UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

June 26, 2014 at 10:30 a.m.

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1. 10-94411-E-7 CAROLE CAMERON
14-9006 SKV-1
FERLMANN V. GARRETT

AMENDED MOTION TO DISMISS ADVERSARY PROCEEDING
5-30-14 [27]

Final Ruling: No appearance at the June 26, 2014 hearing is required.

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 Plaintiff and Plaintiff's Attorney on March 17, 2014. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 court's decision is to continue the hearing on the Motion to Dismiss Adversary Proceeding to 10:30 a.m. on August 21, 2014.

Defendant Karen J. Garrett moves for dismissal of this case pursuant to Federal Rule of Civil Procedure 12(b)(6) failure to state a claim. Defendant asserts the following grounds for dismissal:

A. The Complaint places an undue hardship on the Defendant due to health issues.

B. The Adversary Proceeding was filed (on January 30, 2014) more than two years after the commencement of the bankruptcy case (November 8, 2010). It is asserted that the "two year statute of limitations period has expired, citing to 11 U.S.C. § 108. (Which addresses an extension of time for periods for the Debtor to act under applicable nonbankruptcy law, order in a nonbankruptcy proceeding, or agreement.)

C. The Trustee cannot "wait for years for real property to appreciate in value and then seek to recover."

D. The Defendant addresses medical and physical burdens created by a sale of the property.

However, the pleading titled "motion" is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

Further, Defendant filed the motion and exhibits and declaration and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

TIMELINESS OF MOTION TO DISMISS

Defendant filed the answer to the complaint and this motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on the same day. Dckts. 8 & 12. Pursuant to Rule 12(b), a motion to dismiss for failure to state a claim upon which relief can be granted **must** be made before pleading if a further pleading is permitted. Fed. R. Civ. P. 12(b) (emphasis added). A motion to dismiss is timely only if filed before the answer. *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470, 1474 (9th Cir. 1988); *see also Hargrove & Costanzo v. United States*, 2007 U.S. Dist. LEXIS 65593 (E.D. Cal. 2007) (Defendants' motion to dismiss for failure to state claim filed under Fed. R. Civ. P. 12(b)(6) was considered as motion for judgment on pleadings under Fed. R. Civ. P. 12(c) because motion was filed

simultaneously with answer and thus was not considered as timely).

When a Rule 12(b)6) motion to dismiss for failure to state a claim upon which relief can be granted is filed after an answer is filed, a court may deny the motion to dismiss as untimely, or the court may consider the Rule 12(b)(6) motion to dismiss as a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). Federal Rule of Civil Procedure 12(h)(2) states that a motion to dismiss for failure to state a claim may be made in a motion for judgment on the pleadings pursuant to Rule 12(c). In *Aldabe*, the Ninth Circuit reasoned,

> Rule 12(h)(2) specifically authorizes use of the latter motion to raise the defense of failure to state a claim. Because it is only after the pleadings are closed that the motion for judgment on the pleadings is authorized Rule 12(c)Rule 12(h)(2) should be read as allowing a motion for judgment on the pleadings, raising the defense of failure to state a claim, even after an answer has been filed. Under that interpretation, Rules 12(c) and 12(h)(2) together constitute a qualification of Rule 12(b)(6).

Id. at 1093.

As the Defendant filed an answer simultaneously with the Motion to Dismiss, the court must consider the motion to dismiss as a motion for judgement on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).

STIPULATION

The parties filed a stipulation to continue the hearing on the Motion to Dismiss Complaint to June 26, 2014. Dckt. 17.

JUNE 10 2014 STIPULATION

On June 10 2014, the parties filed a stipulation agreeing to continue the hearing on the Motion to Dismiss to August 21, 2014, as they have reached a compromise in Adversary Proceeding No. 14-09006 subject to court approval, and the continuance of this hearing will provide Plaintiff and Defendant with the opportunity to consummate the compromise.

The parties having reached a compromise and agreeing to continue the hearing on the Motion to Dismiss, the court continues 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 to Dismiss Complaint filed by Defendant having been presented to the court, and upon review of the

pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Dismiss is continued to 10:30 a.m. on August 21, 2014.

2.	**13-90514-E-7**	**ESTHER MARIN**	**OBJECTION TO DEBTOR'S CLAIM OF**
	SSA-5	**Pro Se**	**EXEMPTIONS**
			5-13-14 [51]

DISCHARGED 7-13-13

Final Ruling: No appearance at the June 26, 2014 hearing is required.

Local Rule 9014-1(f)(1) Objection to Debtor's Claim of Exemptions - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 13, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Objection to Debtor's Claim of Exemptions 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). 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 respondent 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 Debtor's Claim of Exemptions is sustained.

Chapter 7 Trustee, Irma Edmonds, opposes Debtor's Amended Claim of Exemptions described as Property Real Description RMC under C.C.P. § 703.140(b)(1) for $29,129 and Property Personal Description CO under C.C.P. § 703.140(b)(11)(D) for $73,500 filed with this Court on April 23, 2014. Dckt. 45.

Trustee testifies that when Debtor's Chapter 7 case was initially filed on March 20, 2013, Debtor listed no claims for personal injuries or malpractice and made no attempt to exempt any monies. Trustee states that it was not until the First Meeting of Creditors held in this matter on April 29, 2013 that the Trustee, through her questioning, learned that Debtor had

a pending medical malpractice claim against Stanislaus Surgical Hospital and other third parties, which had been pending in Stanislaus Superior Court, styled as case number 667873. Debtor on September 2, 2010 had executed a Contingency Fee Retainer Agreement with the Cochran Firm in Southern California.

As a result, the Trustee moved to employ general bankruptcy counsel to assist in the overall litigation matters attendant in this case and subsequently moved to appoint Debtor's malpractice counsel, Randy McMurray formerly of the Cochran firm, as special counsel in this case to prosecute the underlying medical malpractice action. Trustee states she has spent considerable time and effort in monitoring Debtor's personal injury action and assisting with its prosecution and ultimate settlement. Trustee states she has moved to secure the approval of the compromise of the medical malpractice settlement in bankruptcy court together with payment of special counsel's fees in Court.

However, on April 23, 2014, Debtor amended her Schedule B, Personal Property list, item 35, for the first time to list the personal injury settlement of $73,500 (although the settlement was for $72,500). In addition, on Schedule C, she purported to exempt the entire settlement pursuant to C.C.P. 703.140(b)(1l)(D) for $73,500. Trustee argues that Debtor's purported amendments at this stage of the proceedings are in bad faith and are also prejudicial to the estate including but not limited to the professionals and creditors herein. In addition, the Trustee contends the section used by Debtor to purportedly exempt the entire settlement proceeds, C.C.P. § 703.140(b)(11)(D) for $73,500, is also inappropriate.

DISCUSSION

Section 522(l) of the Bankruptcy Code and Rule 4003(b) of the Federal Rules of Bankruptcy Procedure permit a party in interest to object to a debtor's claim of exemption. The Supreme Court has recognized the "broad authority granted to bankruptcy judges," pursuant to § 105(a) of the Bankruptcy Code, "to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 374-75 (2007); *see also Latman v. Burdette*, 366 F.3d 774, 784-86 (9th Cir. 2004)(recognizing inherent powers of bankruptcy courts to equitably surcharge a debtor's exemption to protect integrity of the bankruptcy process and to ensure debtor does not exempt amount greater than allowed under Bankruptcy Code despite lack of express Code provision for equitable surcharge of exemptions).

A party objecting to a debtor's claim of exemption must prove bad faith by a preponderance of the evidence and not by clear and convincing evidence. *Tyner v. Nicholson (In re Nicholson)*, 435 B.R. 622 (B.A.P. 9th Cir. 2010). Bad faith in claiming exemptions is determined by an examination of the "totality of the circumstances." *In re Rolland*, 317 B.R. 402, 414 (Bankr. C.D. Cal. 2004). Concealment of assets is the usual ground for a finding of "bad faith." *Id.* at 415. However, "a debtor's intentional and deliberate delay in amending an exemption for the purpose of gaining an economic or tactical advantage at the expense of creditors and the estate [also] constitutes 'bad faith.'" *Id.* at 416.

Intentional concealment can be inferred from the facts and circumstances of a case, including non-disclosure resulting from a debtor's reckless disregard for the truth of information furnished in the schedules and statements. *See Jordan v. Bren (In re Bren)*, 303 B.R. 610, 614 (8th Cir. BAP 2003) (stating that "multiple inaccuracies or falsehoods may rise to the level of reckless indifference to the truth, which is the functional equivalent of intent to deceive").

Furthermore, schedules and statements are signed under penalty of perjury. Fed. R. Bankr. P. 1008. Debtors are presumed to have read the schedules and statements before signing the documents, and are responsible for their contents. Debtors bear an independent responsibility for the accuracy of the information contained in their schedules and statements. *AT&T Universal Card Servs. Corp. v. Duplante (In re Duplante)*, 215 B.R. 444, 447 n.8 (9th Cir. BAP 1997) (noting that "schedules and statements of financial affairs are sworn statements, signed by debtors under penalty of perjury" and warning that "adopting a cavalier attitude toward the accuracy of the schedules and expecting the court and creditors to ferret out the truth is not acceptable conduct by debtors or their counsel").

Here, Debtor failed to initially disclose the personal injury claim on her bankruptcy schedules which were filed with the Court on March 20, 2013. Debtor had in fact engaged previous local counsel, the Cochran firm, through a general retainer as early as September 2, 2010. Trustee did not discover the claim until Debtor was questioned at the First Meeting of Creditors. Debtor elected to file the amendments listing the medical malpractice claim to her bankruptcy schedules until April 23, 2014, more than one year following the commencement of the Chapter 7 case.

The Trustee has filed Motions to Employ, Motions to Approve Compromise and Motions for Professional Fees. Trustee provides that Special Counsel's fees and costs total $37,687.23, Trustee Counsel's fees are currently in excess of $6,000 with projected fees of $3,500.00 and Trustee's fees in the amount of $6,875.00 plus costs. Trustee has exerted significant effort, time and expense in the prosecution of this underlying medical malpractice claim.

Furthermore, it appears that Debtor’s amendments exceeded the maximum exemption under the statute. Pursuant to the statute in effect under C.C.P. § 703.140(b)(11)(D) when Debtor filed her Chapter 7 bankruptcy proceedings on March 20, 2013, the allowed maximum value to exempt a personal injury award under the statute at the time was $22,075. The maximum exemption for which Debtor could claim would be $22,075, if allowed and not surrogated to the claims of administrative claimants and unsecured creditors.

Under the totality of the circumstances, the court finds that Debtor acted in bad faith in amending her exemptions in an intentional an deliberate delay to gain an economic advantage at the expense of the creditors and the estate. Debtor concealed the medical malpractice action, waited until the Trustee and her counsel negotiated the compromise, and then amended her schedules to exempt the asset.

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 Exemptions filed by 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 Objection is sustained and the Debtor's Amended Claim of Exemptions described as "Property Real Description RMC" under C.C.P. § 703.140(b)(1) for $29,129 and "Property Personal Description CO" under C.C.P. § 703.140(b)(11)(D) for $73,500 filed with this Court on April 23, 2014, Dckt. 45, are disallowed in their entirety.

3. 13-91016-E-7 MIGUEL/JOANN VALENCIA — MOTION FOR RELIEF FROM AUTOMATIC STAY
IRS-1 Peter Koulouris — 5-28-14 [90]

INTERNAL REVENUE SERVICE VS.

DISCHARGED 9-10-13

Tentative Ruling: The Motion for Relief From the Automatic Stay 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 - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Trustee's Attorney, and Office of the United States Trustee on May 28, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay 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 non-responding parties are entered.

The Motion for Relief From the Automatic Stay is granted.

Internal Revenue Service ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2709 Torrey Pines Way, Modesto, California (the "Property") to file a "Lien Revocation" under 26 U.S.C. § 6325(f)(2) as to the bankruptcy estate only.

MOTHORITIES

The pleading title motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

Furthermore, Movant requests relief to file a "Lien Revocation" under 26 U.S.C. § 6325(f)(2), which initially appears to be a voluntary revocation of a lien. However, after de-constructing the "Mothorities" and reading the referenced section which reads:

> (f) Effect of certificate.
> ...
> (2) Revocation of certificate of release or nonattachment. If the Secretary determines that a certificate of release or nonattachment of a lien imposed by section 6321 was issued erroneously or improvidently, or if a certificate of release of such lien was issued pursuant to a collateral agreement entered into in connection with a compromise under section 7122 which has been breached, and if the period of limitation on collection after assessment has not expired, the Secretary may revoke such certificate and reinstate the lien--
> (A) by mailing notice of such revocation to the person against whom the tax was assessed at his last known address, and
> (B) by filing notice of such revocation in the same office in which the notice of lien to which it relates was filed (if such notice of lien had been filed).
> Such reinstated lien (i) shall be effective on the date notice of revocation is mailed to the taxpayer in accordance with the provisions of subparagraph (A), but not earlier than the date on which any required filing of notice of revocation is filed in accordance with the provisions of subparagraph (B), and (ii) shall have the same force and

> effect (as if such date), until the expiration of the period of limitation on collection after assessment, as a lien imposed by section 6321(relating to lien for taxes).

It appears Movant does not seek authority to release its lien, but rather file a Revocation of Certificate of Release, as they erroneously issued a certificate of release for their lien on Debtor's property.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

DEBTOR'S OPPOSITION

Debtor's oppose the motion, stating that *In re Green*, 310 B.R. 772 (Bankr. M.D. Fl 2004) is analogous to this case, in which the court ruled that the IRS could no rely on its secured status as of the petition date to resurrect its lien and the lien was no longer secured because the IRS extinguished the lien post-petition by recording a Release.

TRUSTEE'S NON-OPPOSITION

Chapter 7 Trustee Michael D. McGranahan, does not oppose the United States of America's and Internal Revenue Service's Motion for Relief form the Automatic Stay as he understands the inadvertent error.

DISCUSSION

The court first notes that the Debtor was granted a discharge in this case on September 10, 2013. Granting of a discharge to an individual in a Chapter 7 case terminates the automatic stay as to that debtor by operation of law, replacing it with the discharge injunction. *See* 11 U.S.C. § 362(c)(2)(C). There being no automatic stay, the motion is moot as to Debtor.

The Court of Appeals for the Ninth Circuit held that 26 U.S.C. § 6325(a)(1) does not require the IRS to release valid, secured, tax liens when the underlying tax debt is discharged in bankruptcy because the lien is still enforceable against a debtor's property in rem. *In re Isom*, 901 F.2d 744, 745 (9th Cir. 1990). Rather, allowing such "liens to remain alive does not defeat the purpose of § 6325 because Congress intended for valid tax liens to survive bankruptcy." *Isom*, 901 F.2d at 745-46; *see also In re*

Dillard, 118 B.R. 89 (Bankr. N.D. Ill. 1990); *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991) ("[A] bankruptcy discharge extinguishes only one mode of enforcing a claim--namely, an action against the debtor *in personam*--while leaving intact another--namely, an action against the debtor *in rem*"); *In re Dinatale*, 235 B.R. 569 (Bankr. D. Md. 1999) ("Valid federal tax liens . . . pass through bankruptcy unscathed as to a debtor's prepetition property or rights to property.") (*citing Dewsnup v. Timm*, 502 U.S. 410, 417, 112 S. Ct. 773, 116 L.Ed. 2d 903 (1992)). Therefore, under ordinary circumstances, a valid secured tax lien would remain enforceable against a debtor's property even after a debtor receives a discharge.

A review of the case law associated with 26 U.S.C. § 3625(f)(2) revealed the following rulings which, while not binding upon this court, provide an analysis consistent with the United States exercising its rights to correct the error.

In *United States v. Rogers*, 558 F. Supp. 2d 774, 790 (N.D. Ohio 2008), the court states that the language in 26 U.S.C. § 3625(f)(2) "simply means that a reinstated lien under § 6325(f)(2) will have the same force and scope as the erroneously released lien which arose under § 6321. The underlying personal liability is not being reinstated, simply the *in rem* liability on the property interests. The statute provides that the lien is reinstated, which is different from the creation of a new lien that would arise only after assessment, demand, and refusal to pay."

In *United States v. Peterson*, 1993 U.S. Dist. LEXIS 2045 (W.D. Wash. 1993), the court stated that after Debtors received their Chapter 7 discharge, the IRS erroneously released its liens on the Debtors' home on the basis of the bankruptcy discharge. However, the IRS was informed by the Department of Justice that the liens had been erroneously released and to correct its error, the IRS revoked the releases and reinstated the liens in accordance with § 6325(f)(2) of the Internal Revenue Code. The court concluded that the liens were thus still in effect.

In *Enax v. United States*, 2006 U.S. Dist. LEXIS 46023 (M.D. Fla. 2006), the tax court concluded that when a limitations period is in effect and the taxpayer files for bankruptcy, during pendency, the IRS is **statutorily authorized** to revoke a Notice's self-release date. 26 U.S.C. § 6325(f)(2).

In *In re Green*, 310 B.R. 772 (Bankr. M.D. Fla. 2004), the court held that the IRS claim was no longer secured because it extinguished its lien post-petition by recording the Release. However, the *In re Green* court did not discuss 26 U.S.C. § 6325(f)(2) and the Revocation of the Certificate of Release.

In addition, the provisions of 26 U.S.C. § 6325(f)(3) state,

> (3) Certificates void under certain conditions. Notwithstanding any other provision of this subtitle, any lien imposed by this chapter shall attach to any property with respect to which a certificate of discharge has been issued if the person liable for the tax reacquires such

property after such certificate has been issued.

There are no cases the court can locate discussing 26 U.S.C. § 6325(f)(3).

Here, the IRS argues that while it voluntarily extinguished its lien against the real property, and thereby relinquishing its preferred status as the holder of a secured tax lien, it was done so in error and that it should be able to file a Revocation of the Certificate of Release pursuant to 26 U.S.C. § 6325(f). The parties have failed to address is if 26 U.S.C. § 6325(f)(3) applies in this instance. It appears if the property is required by the Debtors (such as in the confirmation of a plan) the certificate releasing the lien is void pursuant to 26 U.S.C. § 6325(f)(3).

Given the plain language of the statute, the Debtors having received their discharge, evidence of error, the Internal Revenue Service having statutory authority pursuant to 26 U.S.C. § 6325(f)(2) to file a Certificate of Revocation of the Certificate of Release, the Chapter 7 Trustee having no opposition, and the Debtors providing for the secured portion of the IRS claim (treating it as a lien) in their proposed Chapter 13 plan, the court grants the Motion for Relief.

The court shall issue an order modifying the automatic stay to allow Movant, and its agents, representatives and successors, having lien rights against the real property commonly known as 2709 Torrey Pines Way, Modesto, California (the "Property") to file a Revocation of the Certificate of Release under 26 U.S.C. § 6325(f)(2) as to the bankruptcy estate only.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Internal Revenue Service 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 automatic stay provisions of 11 U.S.C. § 362(a) are modified to allow Internal Revenue Service, its agents, representatives and successors, having lien rights against the real property commonly known as 2709 Torrey Pines Way, Modesto, California (the "Property") to file a Revocation of the Certificate of Release under 26 U.S.C. § 6325(f)(2) as to the bankruptcy estate only.
>
> **IT IS FURTHER ORDERED** that to the extent the Motion seeks relief from the automatic stay as to Miguel Angel Valencia and JoAnn Gutierrez Valencia ("Debtor"), the discharge having been entered in case, the Motion is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(C).
>
> No other or additional relief is granted.

4. 13-91016-E-7 MIGUEL/JOANN VALENCIA — FINAL HEARING RE: MOTION TO CONVERT CASE TO CHAPTER 13
PK-3 Peter Koulouris — 4-9-14 [68]

DISCHARGED 9-10-13

CONT. FROM 5-1-14

Tentative Ruling: The Motion to Convert Case to Chapter 13 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 the opposition and 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 Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 9, 2014. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion to Convert Case to Chapter 13 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.

The court's decision is to deny the Motion to Convert Case to Chapter 13.

JUNE 26 HEARING

At the hearing, ----------

DEBTOR'S SUPPLEMENTAL PLEADINGS

Debtor filed supplemental pleadings in support of their motion to convert. Debtors begin stating that due to the format changes of the revised Schedule J, the court believed that there were expenses which

disappeared without explanation. Debtor states that most of the expenses appear on Exhibit A, but have been combined with other expenses. Debtor states home maintenance was listed as $150 on original Schedule J, but now Exhibit A lists $300, which includes a $150 pool maintenance expense. Debtor states the original Schedule J listed $600 for food and Exhibit A lists $830, which includes $180 for school lunches and $50 in pet supplies. Debtor states that there has been no overall increase in the Debtors' expenses, rather their expenses have decreased since the filing of the original schedules in that their insurance premiums for auto insurance have decreased and their monthly payment to the IRS is no longer listed on their Schedule J.

Debtor also argues that the IRS lien has been released. However, Debtors propose a Chapter 13 plan that treats the IRS claim as contemplated in the good faith deal negotiated by Mr. Rohall and Mr. Armstrong as a Class 2A claim in the amount of $46,517.44 with interest in the amount of 4.5% per annum and with a monthly dividend in the amount of $740.00.

Debtors argue that they qualify for relief under Chapter 13 as they meet the qualifications under 11 U.S.C. § 109(e) and that they are not seeking conversion in bad faith or improper purpose. Debtors state that notwithstanding the fact that the pre-petition penalties and interest are dischargeable in Chapter 13, Debtors chose to honor the agreement made by the IRS and Chapter 7 Trustee by treating the IRS claim as a Class 2A claim in the amount of $46,517.44.

IRS Motion for Relief

The court notes that the IRS's Motion for Relief to file a Revocation of the Certificate of Release has been granted. Debtor's Chapter 13 Plan must then provide for payment in full of the IRS' secured tax liens in the amount of $77,233.31 with interest, or such lower amount as the Service may agree. Debtors treat the IRS claim as a Class 2A claim in the amount of $46,517.44.

Updated Chapter 7 Liquidation Analysis

Based on the foregoing, the liquidation of the estate appears to have changed as follows:

Gross Sale of Real Property	$335,000.00
Less: Costs of Sale (8%)	-$26,800.00
Less: First Mortgage	-$140,167.00
Less: Homestead Exemption	-$100.000.00
Net Proceeds of Sale of Residence	$68,033.00
Plus: Sale of autos back to Debtors	$6,000.00
Net Deposits into Estate	$74,033.00
Less: Trustee's Commission	-$16,474.00
Less: Trustee's Expense	-$0.00
Less: Trustee's Attorney (if allowed)	-$8,000.00
Less: Internal Revenue Service Priority Claim	-$77,233.31
Less: Franchise Tax Board Priority Claim	-$632.56
NET Unsecured Disbursement	**-$28,306.87**

However, the Chapter 7 Trustee has negotiated a "carve-out" with the Internal Revenue Service to generate $30,715.87 for the estate. The Debtors' analysis ignores this recovery in the Chapter 7 case. Thus, there is not a $77,233.31 deduction from those monies recovered. Just using the Debtor's figures, there would be $38,000.00 of monies to pay expenses and for disbursement to creditors. Also, the Debtors incorrectly burden the Chapter 7 estate with the maximum percentage fees which may be allowed. (The court is not prejudging whether that amount would be awarded either in the Chapter 7 case or if the case were converted to one under Chapter 13 – however, the court notes that it is now only due to the efforts of the Chapter 7 Trustee are the Debtors making rumblings that they want to take the case away to try and prosecute a plan incorrectly premised upon there being $0.00 recovery for creditors with unsecured claims in the Chapter 7 case).

Proposed Plan

Debtor propose plan payments of $996.00 for 60 months. The IRS tax lien is provided in the amount of $46,517.44 at a 4.5% interest rate at a monthly dividend of $740.00. Debtor's mortgage is provided for in Class 4 at $1,034.00 per month. Debtor provides in Class 5 for IRS and FTB claims at $1,685.95 and $632.56 respectively, in addition to $2,500.00 for Chapter 7 Trustee fees and $8,000.00 for Trustee's Counsel fees. Debtor proposes a 2% dividend to unsecured claims. Dckt. 97, Exhibit B. FN.1.

FN.1. The general unsecured claims filed in the Chapter 7 case total $54,792. The Debtors propose that after they pay the Internal Revenue Service in the Chapter 13 case, they will make a 2% dividend for creditors holding general unsecured claims. That would be $1,095.84. That is significantly less than the $10,000 to $15,000.00 that is projected to be available to be disbursed to creditors holding general unsecured claims in the Chapter 7 case after payment of the Internal Revenue Service from the sale of the collateral and payment of administrative expenses.

The court notes that Debtor's plan relies on $7,500 payments within 6 months of confirmation from family contributions. Debtors have not provided any evidence, such as declarations from family members, of where this $7,500 family contribution is coming from or if the family members are capable of contributing.

Debtors question why the Chapter 7 Trustee is adamant about insisting the Debtors submit a plan that pays the entire IRS claim amount of $77,233.31. The court agrees with the Chapter 7 Trustee in this instance, as the Debtors have not shown that they are capable of making payments and that the court has granted the IRS motion for relief. Under the proposed plan, the Debtor has not provided for the entire IRS claim amount of $77,233.31.

Bad Faith

The rights of a debtor to convert or dismiss a Chapter 13 case are almost absolute. However, the overriding factor goes to the core of bankruptcy proceedings. With the ability to get great benefits from

bankruptcy, debtors must proceed in good faith, providing candid, honest information. The court has not been persuaded that the Debtors have acted in good faith or provided honest information.

Through out this bankruptcy case the Debtors have not clearly and accurately stated their debts and expenses. Debtors have submitted various drafts of Schedule "I" and "J" in their Joint Declaration with varying discrepancies. This was noted in the prior Motion to Convert, and in the prior hearing on this matter. On the hearing of the first Motion to Convert the Trustee noted that the discrepancies included the statement that their house payment does not include taxes or insurance but they do not include those expenses in Schedule J; deletion of their automobile payment but propose a payment to Ally Financial in their proposed Chapter 13 plan; deletion of their automobile insurance and decreased their transportation/gas expense from $375.00 to $120.00. In the supplemental pleadings filed by Debtors for this hearing, the court notes that several changes were made, but no explanations were provided until the further hearing.

It also appears that the Debtors significantly undervalued their Property in their initial schedules. It was only through the Chapter 7 Trustee's efforts with Mr. Brazeal, the estate's broker, that the Trustee determined the value of the Property to be between $330,000.00 and $335,000.00. Now that the Chapter 7 Trustee wants to sell the Debtors' Property, (after attempting to strike a compromise with the Debtors for the purchase of non-exempt equity from them based upon erroneous values in Debtors' schedules), Debtors employ new counsel and seek an order from this Court allowing them to convert this case to Chapter 13. It appears that the Debtors are attempting to unfairly manipulate the Bankruptcy Code and system as it was only when Debtors realized that the Trustee knew their Property was more valuable than they initially disclosed, did Debtors seek new counsel and move to convert their case from Chapter 7 to Chapter 13 to save their Property.

Additionally, the Trustee’s negotiated a "carve-out" agreement with the IRS appears to benefit the estate and creditors more than under the proposed Debtors' Chapter 13 Plan, as Debtors would have to provide for the full secured claim of the IRS, $77,233.31.

PRIOR HEARING

The Debtors seek to convert this case from Chapter 7 to Chapter 13. Debtors contend that their financial situation has unexpectedly changed and they now desire to convert to a Chapter 13. This motion appears almost identical to the prior Motion to Convert Case filed on November 30, 2013, which the court held an opposed hearing on January 16, 2014.

The Motion states with particularity (Fed. R. Bankr. 9013) the following grounds upon which the requested relief is based:

A. Debtors commenced this Chapter 7 case on May 28, 2013.

B. The Debtors’ “financial and/or legal situation has unexpectedly changed.” Therefore, the Debtors now want to

convert the case to one under Chapter 13.

C. The Internal Revenue Service has released tax liens for tax years 2005, 2006, and 2007 for tax debts totaling $54,588.45. This renders the tax claims unsecured.

D. The Debtors qualify as debtors for a Chapter 13 case.

Motion, Dckt. 68. The court accepts these well pleaded grounds as the basis for the requested conversion to a case under Chapter 13.

The Debtors have provided their joint declaration in support of the Motion. In the Declaration the Debtors testify,

A. The Debtors' financial situation has changed, specifically,

1. They no longer have a $158 expenditure for their daughter's braces

2. A $258.00 "auto payment" is no longer being made, the debt having been paid in full;

3. The Debtors will now pay the claim of the Internal Revenue Service through a Chapter 13 Plan;

4. The Internal Revenue Service has released liens for tax debts totaling $54,257.13 for tax years 2005, 2006, 2007;

5. The Chapter 13 Plan will pay creditors more than they will receive through the Chapter 7 liquidation of the estate by the Trustee;

6. Property taxes and insurance (for an unidentified property) are included in the monthly mortgage payment.

7. The Debtors failure to identify these payments on Schedule J filed in this case was a mistake.

8. The Debtors' auto insurance has been reduced to $96.59 per month from the prior stated $120.00 a month.

9. The Debtors' monthly income $4,840.15 [stated to be $4,740.98 on Schedule I, Dckt. 1 at 36] and monthly expenses are ($3,843.59) [stated to be $4,740.98 on Schedule J, *Id.* at 38], yielding a net monthly income of $999.59 [($42.02) on Schedule J, *Id.*] which can be the projected disposable income to fund a Chapter 13 Plan.

Declaration, Dckt. 70.

The Debtors have provided a new expense statements in support of this Motion. Exhibit A attached to the Declaration. [Local Bankruptcy Rule 9004 and the Revised Guidelines for Preparation of Pleadings in this District requires that the motion, points and authorities, each

declarations, and the exhibits (which may be combined into one exhibit document) be filed as separate pleadings. The court waives this failure to comply with the Local Rules and filing requirements, for this motion only.]

The court constructs the following comparison of the Debtors' original statements of income and expenses made under penalty of perjury and the current statements of income and expenses made under penalty of perjury.

INCOME CHART

Income	Schedule I, Dckt. 1
Debtor	
Wages	$5,288.80
Debtor Taxes and Social Security	($888.10)
Debtor 401(k)	($370.22)
Medical Pretax UFCW	($297.26)
Delta Dental Pre-Tax	($25.44)
Garnishment - Tax Levy	($100.00)
Co-Debtor	
Co-Debtor Wages	$728.23
Taxes and Social Security	($74.20)
Unemployment Benefits	$479.17
Average Monthly Income	$4,740.98

EXPENSE CHART

Expense	Schedule I, Dckt. 1	Declaration and Exhibit A, Dckt. 70	(Less Than)/ Greater Than Original
Mortgage	($1,034.00)	($1,034.00)	$0.00
Electricity/Heating	($250.00)	($250.00)	$0.00
Water and Sewer	($100.00)	($100.00)	$0.00

Telephone, Cell Phone, Internet, Cable	$0.00	($413.00)	$413.00
Cellular Phone	($215.00)		($215.00)
Internet-Cable-Land Line	($198.00)		($198.00)
Other	$0.00		$0.00
Home Maintenance	($150.00)	($300.00)	$150.00
Food	($600.00)	($830.00)	$230.00
Clothing	($100.00)	($150.00)	$50.00
Laundry and Dry Cleaning	($50.00)	Included in Clothing	($50.00)
Medical and Dental Expenses	($50.00)	($50.00)	$0.00
Transportation	($350.00)	($350.00)	$0.00
Recreation	($75.00)	($95.00)	$20.00
Homeowner's Ins	$0.00	Included in Mortgage	$0.00
Property Taxes	$0.00	Included in Mortgage	$0.00
Automobile Payment	($259.00)		($259.00)
Automobile Insurance	($120.00)	($96.59)	($23.41)
Dental Payment - Braces	($158.00)		($158.00)
Internal Revenue Service - Back Taxes	($500.00)		($500.00)
Pet Care	($50.00)		($50.00)
Gym Membership	($20.00)		($20.00)
School Lunches	($180.00)		($180.00)
Pool Upkeep and Supplies	($150.00)		($150.00)
Supplemental Taxes	($100.00)	($100.00)	$0.00
Personal Care Items	($75.00)	($75.00)	$0.00
	----------	----------	----------
Total Expenses	($4,784.00)	($3,843.59)	($940.41)

For some of the above expenses the change is described in the Declaration,

A. Auto Insurance reduced.....($ 23.41)
B. Car Payment Completed.....($259.00)

C. IRS Tax Payment.....($500.00)

However, there are some expenses which have increased, decreased, or just "disappeared" without explanation. Because Schedule J was filed under penalty of perjury, the court gives significance to the statements made therein by the Debtors. Unexplained changes in expenses are,

	Schedule J	**Declaration and Exhibit A**	**Greater/(Lesser) Expense**
Home Maintenance	($150.00)	($300.00)	$150.00
Food	($600.00)	($830.00)	$230.00
Recreation	($75.00)	($95.00)	$20.00
Gym Membership	($20.00)		($20.00)
School Lunches	($180.00)		($180.00)
Pet Care	($50.00)		($50.00)

The disappearing expenses and the increase in expenses are not explained by the Debtors.

At the May 1, 2014 hearing counsel for the Debtors state that the differences are in amounts appear because some expenses have been consolidated.

Debtors' Liquidation Analysis

A liquidation analysis is provided by Kenneth Sanders, a former Chapter 7 Trustee in this District. The pleading is entitled "Liquidation Analysis" and it is signed by Mr. Sanders stating that he has read the analysis and certifies under penalty of perjury that "the contents thereof are true and correct." Dckt. 71. However, the document is not a declaration and the court cannot clearly identify whether this is testimony by Mr. Sanders or merely argument by counsel which Mr. Sanders "certifies." FN.1.

FN.1. In the Liquidation Analysis it states that if Mr. Sanders were called to testify he would certify to facts which are set forth in the Liquidation Analysis. This raises further questions as to whether the Liquidation Analysis is "testimony" or merely a statement what possible testimony could be if, at some later date, Mr. Sanders was called to testify.

The Liquidation Analysis first addressed the Debtors having previously paid the Estate $6,000.00 to purchase two vehicles from the Trustee.

The Liquidation Analysis then addresses the Torrey Pines Way Property which the Trustee has asserted has a value of $325,000.00. It is asserted that after the Debtors deduct a $100,000.00 homestead exemption

from the sales proceeds there would be $68,039.00 in net sales proceeds (assuming an 8% cost of sale). When the $6,000.00 from the vehicles is added to the real property sales proceeds, the bankruptcy estate would have $74,033.00 to pay expenses and distribute for claims.

The Liquidation Analysis deducts the following amounts for administrative expenses and priority claims:

A. Chapter 7 Trustee Fees.....($15,000.00)
B. Trustee Attorneys' Fees.....($ 6,127.00)
C. Internal Revenue Service Priority Claim.....($ 1,685.95)
D. Franchise Tax Board Priority Claim.....($ 632.56)

After deducting these amounts, the Liquidation Analysis concludes that there would be $50,287.49 for disbursement for unsecured claims.

The Liquidation Analysis projects the Debtors' proposed Chapter 13 Plan not distributing less than $50,326.35. The Plan which is the subject of the Liquidation Analysis provides for a $996.00 monthly plan payment and a "nominal" $1,500.00 contribution from family members.

The Liquidation Analysis provides an analysis of a Chapter 13 plan for the Debtors. The Analysis first provides a legal conclusion that while the Chapter 13 Trustee's fees are set at 9.5%, the Chapter 7 Trustee fees to be paid through a Chapter 13 plan are set by statute to be $25.00 per month. In a footnote, the legal authority for this proposition is stated to be 11 U.S.C. § 1326(b)(3)(B). FN.2.

FN.2. That the Liquidation Analysis contains such legal arguments indicates that it is something prepared by counsel for the Debtors as "argument," and not factual testimony by a witness.

The court is not persuaded by this citation that a Chapter 7 Trustee is disallowed his or her fees for all amounts in excess of $25.00 a month based on 11 U.S.C. § 1326(b)(3). The language of that paragraph states in pertinent part,

> "(3) if a chapter 7 trustee has been allowed compensation **due to the conversion or dismissal of the debtor's prior case pursuant to section 707(b)**, and some portion of that compensation remains unpaid in a case converted to this chapter [11 U.S.C. §§ 1301 et seq.] **or in the case dismissed under section 707(b)** [11 U.S.C. § 707(b)] and refiled under this chapter [11 U.S.C. §§ 1301 et seq.], the amount of any such unpaid compensation, which shall be paid monthly--
>
> (A) by prorating such amount over the remaining duration of the plan; and
>
> (B) by monthly payments **not to exceed the greater of**-

(I) $ 25; or

(ii) the **amount payable to unsecured nonpriority creditors, as provided by the plan, multiplied by 5 percent**, and the result divided by the number of months in the plan.

11 U.S.C. § 1326(b)(3) [emphasis added].

The first requirement is that the case was either converted to one under Chapter 7 pursuant to 11 U.S.C. § 707(b) or had been dismissed pursuant to 11 U.S.C. § 707(b) and a new Chapter 13 case filed. The court has not ordered this case to be converted to Chapter 13 pursuant to 11 U.S.C. § 707(b). Instead, the Debtors are attempting to convert the case to one under Chapter 13 and remove the Chapter 7 Trustee from control over the estate.

The Bankruptcy Code expressly provides that conversion of a bankruptcy case from one chapter to another does not constitute a "new" bankruptcy case.

"§ 348. Effect of conversion

(a) Conversion of a case from a case under one chapter of this title [11 U.S.C. §§ 101 et seq.] to a case under another chapter of this title [11 U.S.C. §§ 101 et seq.] constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." [11 U.S.C. § 348(b) providing that upon conversion to Chapter 13, the "order for relief under Chapter 13" as used in 11 U.S.C. §§ 1301 (stay against co-debtor) and 1305 (post-petition claims) means the date of conversion.]

11 U.S.C. § 348(a).

For the trustee fee limits to be met all of the requirements of 11 U.S.C. § 1326(b)(3) must be met. COLLIER ON BANKRUPTCY SIXTEENTH EDITION, ¶ 1326.03[4]. As further stated in COLLIER,

[4] Compensation to Chapter 7 Trustee in Prior Case; § 1326(b)(3) & (d)

Section 1326(b)(3) provides for limited payments by the chapter 13 trustee to a person who was **a chapter trustee in a prior case** under certain circumstances. In order to qualify for such payments all of the following conditions must be met:

-- The debtor filed a prior case under chapter 7. The **references to a prior case makes clear that a trustee in a case that is converted to chapter 13 does not qualify**

> **under this provision because that case is the same case and not a prior case....**

Id.

The provisions of 11 U.S.C. § 1326(b)(3)(B) do not apply in the current bankruptcy case. (This does not mean that a Chapter 7 trustee is entitled to be paid the maximum fees which could be computed under 11 U.S.C. § 326(a), as such is the maximum amount which the court may allow as a "commission" for the trustee.")

Even if 11 U.S.C. § 1326(b) applied, the conclusion in the Liquidation Analysis that there would only be $25 a month in Chapter 7 Trustee fees for a period of 60 months – total Chapter 7 Trustee fees of $1,500.00. The provisions of 11 U.S.C. § 1326(b)(3)(B) provide that the payments shall not exceed **the greater of** the $25.00 a month or 5% of the distribution to be made to creditors holding general unsecured claims. Since the Liquidation Analysis projects no less than $50,326.35. If the case were once converted pursuant to 11 U.S.C. § 707(b) and the Trustee fee limit applied, then there would have been a $2,516.30 maximum in fees. Spread over 60 months, that would be $41.94 a month. Almost double the maximum presumed in the Liquidation Analysis.

Additionally, the Liquidation Analysis assumes that an attorney representing a Chapter 7 Trustee would be denied his or her reasonable legal fees for the services provided. No provision is made in the Liquidation Analysis for the payment of the Chapter 7 administrative expenses for counsel.

Review of Draft Chapter 13 Plan

No exhibit has been filed for the Chapter 13 plan referenced in the Liquidation Analysis. The court will not presume that it is the same as the prior draft Chapter 13 Plan (Exhibit D, Dckt. 42) which required $919.01 monthly payment from the Debtors, the $6,000.00 paid to the estate for the vehicles, and an $11,516.98 gift from unidentified family members.

TRUSTEE'S OBJECTION

The present Motion was filed pursuant to Local Bankruptcy Rule 9014-1(f)(2), for which opposition may be stated orally at the hearing. In reviewing this Motion the court reviewed the Civil Minutes of the court in connection with the prior motion. Civil Minutes, Dckt. 54. Mr. Robert Brazeal of PMZ Real Estate in Modesto, stated his opinion that the Debtors' real property residence has a current market value of $330,000 to $335,000 as opposed to Debtors' stated value of $257,600 in their Amended Schedule "A" filed on October 23, 2013 (Dckt. 33). Mr. Brazeal was employed by the Trustee to appraise the real Torrey Pines Way Property. Mr. Brazeal testified that due to the low inventory in the Modesto market, that it would take perhaps 30 days for an offer to be made and accepted, and 45 days for a customary time in which to close escrow.

The Trustee and his counsel testified have worked with the Internal Revenue Service ("IRS") and has spoken with Thomas Rohall, Esq., District

Counsel for the IRS and agreed to a "carve out" from the IRS lien for payment of administrative expenses, priority claims, and general unsecured claims that significantly exceeds Debtors' proposed plan distribution to unsecured creditors. The "carve out" for the estate is stated to be approximately $30,715.87. The Trustee also challenged the good faith of the Debtors and the significantly understated value (in the opinion of Robert Brazeal) for the real property. The court denied the prior motion to convert without prejudice to allow the Debtors the opportunity to regroup and, if proper, to seek to convert the case to Chapter 13 and properly provide for creditors and administrative expenses.

RESPONSE OF THE UNITED STATES OF AMERICA
(Internal Revenue Service Claim)

On April 25, 2014, the United States filed a Response to the Motion in the form of a declaration of Aixia Kassim, a bankruptcy specialist employed by the Internal Revenue Service. In it she states that the total Internal Revenue Service Claim is $78,919.26. This consists of a $77,233.31 secured claim (2005, 2006, and 2007 tax years) and an $1,685.95 priority claim for 2012.

For the Internal Revenue Service, Kassim states that she concluded that the Torrey Pines Way Property had $93,000.00 in equity. In her Declaration, Kassim recounts having been contacted by counsel for the Chapter 7 Trustee and presented with the proposal to "carve out" a portion of the proceeds subject to the Internal Revenue Service lien from the sale of the Property for creditors holding general unsecured claims. Since the proposal for a "carve out" was new to Kassim, she communicated with her counsel. She states that an agreement was reached with the Trustee for a "carve out." Though the Internal Revenue Service records were noted that the lien was not to be released, a release of lien was processed and recorded due to "inadvertent error." The parties have not addressed the effect of this asserted inadvertent release of the, the legal principles which may apply, and if the release is effective and cannot be reversed, to whose benefit the "error" accrues – the Debtors or the Bankruptcy Estate. FN.3.

FN.3. In her declaration Kassim states that there was, by her analysis, $93,000.00 of "equity" in the Property. She further states that "In a typical chapter 7 case where there are no assets to collect from after the debtor receives a discharge, the Service would file a Release of Federal Tax Lien after discharge is entered." What the court does not understand is if there was $93,000.00 in "equity" and the Internal Revenue Service had a lien for a $77,233.31 secured claim, why the tax lien would be released. The parties have not addressed the issue of whether a debtor's claim of homestead exemption comes ahead of an Internal Revenue Service tax lien. If so, then why would that not apply in the bankruptcy case? If not, then why or how was this a "typical no asset case" in which the tax lien would be released for dischargeable debts to prevent the appearance that the lien attached to post-bankruptcy discharge properties?

DISCUSSION

The Bankruptcy Code authorizes a one-time, near absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a). A "bankruptcy judge may override a Chapter 7 debtor's conversion right based on a finding of bad faith." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 379 (2007). The authority to convert is left to the discretion of the bankruptcy court. *Id.* at 377. In determining whether the debtor's conversion involved bad faith, "a bankruptcy judge must review the totality of the circumstances." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). Under the "totality of the circumstances" test, the court examines whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or filed his Chapter 13 petition or plan in an inequitable manner. *Id.* Debtor's history of filings and dismissals is relevant in determination of "bad faith." *Id.*

As addressed by the Supreme Court the rights of a debtor to convert or dismiss a Chapter 13 case are almost absolute. However, the overriding factor goes to the core of bankruptcy proceedings. With the ability to get great benefits from bankruptcy, debtors must proceed in good faith, providing candid, honest information. The Ninth Circuit Court of Appeals most recently review this concept in *Danielson v. Flores (In re Flores)*, 735 F.4th 855, 2013 U.S. App. LEXIS 18413 (9th Cir. 2013), stating,

> "Finally, our interpretation of § 1325(b)(1)(B) is consistent with the policies that underlie the Bankruptcy Code and the BAPCPA amendments. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank*, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991))."

The Collier on Bankruptcy discussion of Marrama notes there being a simple, practical reason for the conversion right to 13 being "almost absolute," if converted it is the bankruptcy judge who will consider whether it should be reconverted to a Chapter 7 due to the debtor's conduct. 6 COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 706.02.

Here, the Debtors' case has not previously been converted, the Trustee has raised some serious issues regarding the conduct of the Debtors. The conduct of Debtors raises significant credibility issues. The court has to question the value of the subject property (the only evidence being the real estate appraiser of the Trustee), how the Debtors going to fund a plan with less income, what are the explanations for the several different changes in expenses, and whether the plan passes the Chapter 7 Liquidation analysis. Possibly bona fide, good faith answers exist to these questions, but the Debtors have mutely failed to provide them.

Civil Minutes, Dckt. 54.

Here, the does not appear to be a change in circumstances form the January 16, 2014 discussion. The Debtors have proceeded on some faulty assumptions. First, the application of 11 U.S.C. § 1326(b)(3)(B) to deny the Chapter 7 Trustee fees except for minimal amount permitted for fees relating to getting a prior bankruptcy case converted or dismissed pursuant

to 11 U.S.C. § 707(b). Secondly, even if it applied, the Debtors ignore the computation of what a proper fee would be and represent to the court that it would be only $25.00, not the greater 5% amount.

Second, the Debtors' Liquidation Analysis ignores other administrative expenses in the case – the Chapter 7 Trustee's counsel. While deducting that amount from the sales proceeds for a Chapter 7 liquidation, the Debtors ignore paying those administrative expenses if the case is converted to one under Chapter 13.

Third, the Debtors provide the court with new expenses under penalty of perjury. These differ from those previously stated under penalty of perjury on Schedule J. While the Debtors provide the explanation for some, such as the braces, car loan payment, and lower auto insurance, other just "disappear." One example is that school lunches for their two children are no longer an expense. Presumably the children still need to eat during the school day. Also, a "pet expense" of $50.00 has disappeared. No testimony is provided that the pet no longer exists. The gym membership expense disappears.

Equally concerning is the Debtors have unexplained increases in expenses. These include increasing their home maintenance expense 100% from ($150.00) a month to ($300.00) a month. Additionally, the Debtors' food expense jumps 38% from ($600) a month to ($830.00) a month. While there may be some bona fide, good faith reasons for such increases, no explanation is given. This causes the court to infer that these increases are "necessary" to depress projected disposable income to the predetermined amount "necessary" to improperly minimize the payments to creditors holding general unsecured claims.

Fourth, the Debtors improperly compute what they would be required to pay under a Chapter 13 Plan (ignoring Chapter 7 trustee fees and attorneys' fees). Taking the Debtors most recent statement of expenses under penalty of perjury as true and correct, they do not have the ability to pay any additional amounts to fund a plan. The Debtors demonstrate that conversion is not in good faith as they cannot fund a plan.

Fifth, the Debtors have not addressed the effect of the purported "release" of a lien post-petition and whether it inures to their benefit or the owner of the Property, the bankruptcy estate.

Sixth, the Chapter 7 Trustee has filed a motion for the Debtors to turn over the Torrey Pines Way Property to the Trustee. DCN: THA-2. That motion was filed pursuant to Local Bankruptcy Rule 9014-1(f)(1), for which a written opposition was required to be filed at least fourteen days prior to the hearing. Local Bankruptcy Rule 8914(f)(1)(B). Here no opposition has been filed. It may well be that after reading the Trustee's motion, reflecting on the statements made in connection with the present Motion to Convert, and additional information that the Debtors and their counsel has obtained concerning the Internal Revenue Service lien, they have chosen to not try and retain the property through a Chapter 13 conversion.

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 Convert Case to Chapter 13 filed by Debtors 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 final hearing on the Motion to Convert Case to Chapter 13 is denied.

5.	**13-91016-E-7**	**MIGUEL/JOANN VALENCIA**	**CONTINUED MOTION FOR TURNOVER OF PROPERTY**
	THA-2	**Peter Koulouris**	**3-24-14 [63]**

DISCHARGED 9-10-13

Tentative Ruling: The Motion for Turnover 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 - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on March 24, 2014. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion for Turnover of Property 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 non-responding parties and other parties in interest are entered.

The Motion for Turnover of Property is granted.

JUNE 26, 2014 HEARING

The court having denied the Debtor's Motion to Convert Case to Chapter 13, the Chapter 7 Trustee actively administering the case, and the possession of the Property necessary to such administration, the court grants the Motion for Turnover of Property.

PRIOR RULING

Michael D. McGranahan, the Chapter 7 Trustee ("Trustee") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 2709 Torrey Pines Way, Modesto, California.

DISCUSSION

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Trustee has initiated this proceeding to compel Debtors deliver property to the Trustee. Federal Rule of Bankruptcy Procedure permits the trustee to obtain turnover from the Debtor without filing an adversary proceeding. This Motion for the injunctive relief, in the form of a court order requiring that Debtors turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *In re Hernandez*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *See also* 11 U.S.C.A. §§ 541(a), 542(a). Section 542(a) requires one in possession of property of the estate to deliver such property to the Trustee. Pursuant to 11 U.S.C. § 542, a Trustee is entitled to turnover of all property of estate from Debtors. Most notably, pursuant to 11 U.S.C. § 521(a)(4), the Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

Here, the Trustee asserts that Debtors filed a voluntary petition for relief under Chapter 7 on May 28, 2013 and received their discharge on September 10, 2013. Trustee asserts that among the assets of the estate is the subject property, which the Debtors scheduled as having a value of

$233,438.04. The Trustee through the estate's broker, Robert Brazeal of PMZ Real Estate, has determined that the Property has a value of $330,000.00 to $335,000.00. Trustee states the Property is encumbered by a consensual first position note secured by a deed of trust in the scheduled amount of approximately $140,000.00 and the Internal Revenue Service ("IRS") holds a perfected statutory tax lien in the amount of $77,233.31. Debtors have claimed an exemption in the Property in the amount of $93,271.28. Trustee argues that while the Debtors may be able to protect their homestead proceeds from other judgment lien creditors, Debtors may not do so as against federal tax liens.

Trustee asserts that he has attempted to work with the Debtors to resolve the non-exempt equity issue relative to the subject property without success. Being unable to resolve the issue with the Debtors, Trustee and his counsel have worked with the IRS regarding its tax lien. The undersigned has spoken with Thomas Rohall, Esq., District Counsel for the IRS, and agreed to a "carve out" from the IRS lien for payment of administrative expenses, priority claims, and general unsecured claims.

Trustee states that by court order entered March 17, 2014 (Docket 62), Robert Brazeal of PMZ Real Estate is now employed to sell the subject property and needs access to the subject property to post "For Sale" signs, place a key lock box so he may show the Property, and perform all ordinary and necessary acts in order to sell the Property in the furtherance of the Trustee's statutory duties as referenced above. He or the Trustee may also need documents, records and/or papers regarding the Property in order to sell the same. The Trustee is not asking at this juncture that the Debtors vacate the Property, but rather that they remain in the Property, maintain house payments, insurance and otherwise protect and maintain the Property.

No opposition has been filed to this motion by the Debtors or other parties in interest.

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 Turnover of Property filed by 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 for Turnover of Property is granted.
>
> **IT IS FURTHER ORDERED** that Miguel Valencia and Joann Gutierrez Valencia, and each of them, (collectively referred to as "Debtors") shall deliver on or before July 31, 2014, possession of the real property commonly known as 2709 Torrey Pines Way, Modesto, California (the "Property"), with all of their personal property, personal property of any other persons which Debtors, and each of them, allowed

access to the Property; and any other person or persons that Debtors, and each of them, allowed access to the Property removed from the Property.

IT IS FURTHER ORDERED that the Michael D. McGranahan, the Chapter 7 Trustee, and the Internal Revenue Service shall file and serve a motion to approve a stipulation providing for the carve out of the estate's interest, free and clear of all liens and interests, with a copy of the executed stipulation attached (which shall be contingent only on court approval) on or before July 15, 2014.

6. 14-90027-E-7 SDM-2 | **MARGARET ELMORE** / **Scott D. Mitchell** | **MOTION TO AVOID LIEN OF STANISLAUS COUNTY O.S.T. 6-3-14 [49]**

DISCHARGED 4-21-14

Tentative Ruling: The Motion to Avoid Lien 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 Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on June 3, 2014. By the court's calculation, 23 days' notice was provided.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 Avoid Judicial Lien is denied.

This Motion requests an order avoiding the judicial lien of Stanislaus County ("Creditor") against property of Margaret Grace Elmore ("Debtor") commonly known as 530 Strathaven Court, Turlock, California (the "Property"). The grounds for the relief requested are stated in the Motion to be pursuant to 11 U.S.C. § 522(f).

A judicial lien is a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101. In some instances, it may be difficult to determine whether a particular lien is a "judicial lien." *See, e.g., In re Nichols*, 265 B.R. 831 (B.A.P. 10th Cir. 2001) (consensual mortgage was not transformed into judicial lien when prepetition foreclosure judgment was entered). However, federal tax liens are not judicial liens. *See, e.g., Rench v. United States Internal Revenue Service (In re Rench)*, 129 B.R. 649 (Bankr. D. Kan. 1991); *In re Driscoll*, 14 C.B.C.2d 146, 57 B.R. 322 (Bankr. W.D. Wis. 1986). Rather, they are statutory liens as defined by the Code, 11 U.S.C. § 101(53), and statutory liens are not subject to avoidance under section 522(f)(1)(A) to the extent that they impair exemptions. See 4 COLLIER ON BANKRUPTCY ¶ 522.11 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Here, the Debtor is trying to avoid a statutory tax lien, not a judicial lien, which cannot be avoided to the extent that it impairs exemptions. Therefore, the motion is denied.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.

7. 14-90027-E-7 MARGARET ELMORE
SDM-3 Scott D. Mitchell

MOTION TO AVOID LIEN OF INTERNAL REVENUE SERVICE O.S.T. 6-3-14 [54]

DISCHARGED 4-21-14

Tentative Ruling: The Motion to Avoid Lien 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 Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on June 3, 2014. By the court's calculation, 23 days' notice was provided.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 Avoid Judicial Lien is denied.

SERVICE

Local Bankruptcy Rule 2002-1 provides that notices in adversary proceedings and contested matters that are served on the Internal Revenue Service shall be mailed to three entities at three different addresses, including the Office of the United States Attorney, unless a different address is specified:

LOCAL RULE 2002-1
Notice Requirements

a) Listing the United States as a Creditor; Notice to the United States. When listing an indebtedness to the United States for other than taxes and when giving notice, as required by FRBP 2002(j)(4), the debtor shall list both the U.S. Attorney and the federal agency through which the debtor became indebted. The address of the notice to the U.S. Attorney shall include, in parenthesis, the name of the federal agency as follows:

For Cases filed in the Sacramento Division:
United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814

(c) Notice to the Internal Revenue Service. In addition to addresses specified on the roster of governmental agencies maintained by the Clerk, notices in adversary proceedings and contested matters relating to the Internal Revenue Service shall be sent to all of the following addresses:

(1) United States Department of Justice
Civil Trial Section, Western Region
Box 683, Ben Franklin Station
Washington, D.C. 20044

(2) United States Attorney as specified in LBR 2002-1(a) above; and,

(3) Internal Revenue Service at the addresses specified on the roster of governmental agencies maintained by the Clerk.

The proof of service lists only the following addresses as those used for service on the Internal Revenue Service:

Internal Revenue Service
PO Box 145585, STOP 842OG
Cincinnati, OH 45250

Internal Revenue Service
PO Box 7346
Philadelphia, PA 19101-7346

A motion is a contested matter. *See* Fed. R. Bankr. P. 9014. The proof of service in this case indicates service was not made on all three addresses, and service was therefore inadequate.

MOTION

This Motion requests an order avoiding the judicial lien of Internal Revenue Service ("Creditor") against property of Margaret Grace Elmore ("Debtor") commonly known as 530 Strathaven Court, Turlock, California (the "Property"). The grounds for the relief requested are stated in the Motion to be pursuant to 11 U.S.C. § 522(f).

A judicial lien is a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C.

§ 101. In some instances, it may be difficult to determine whether a particular lien is a "judicial lien." *See, e.g., In re Nichols*, 265 B.R. 831 (B.A.P. 10th Cir. 2001) (consensual mortgage was not transformed into judicial lien when prepetition foreclosure judgment was entered). However, federal tax liens are not judicial liens. *See, e.g., Rench v. United States Internal Revenue Service (In re Rench)*, 129 B.R. 649 (Bankr. D. Kan. 1991); *In re Driscoll*, 14 C.B.C.2d 146, 57 B.R. 322 (Bankr. W.D. Wis. 1986). Rather, they are statutory liens as defined by the Code, 11 U.S.C. § 101(53), and statutory liens are not subject to avoidance under section 522(f)(1)(A) to the extent that they impair exemptions. See 4 COLLIER ON BANKRUPTCY ¶ 522.11 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Here, in addition to the service issue, the Debtor is trying to avoid a statutory tax lien, not a judicial lien, which cannot be avoided to the extent that it impairs exemptions. Furthermore, the exhibit attached to this motion is for a lien by the State of California Franchise Tax Board, not the IRS lien. Based on the foregoing, the motion is denied.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.

8. 14-90027-E-7 MARGARET ELMORE
SDM-4 Scott D. Mitchell

MOTION TO AVOID LIEN OF FRANCHISE TAX BOARD O.S.T. 6-3-14 [59]

DISCHARGED 4-21-14

Tentative Ruling: The Motion to Avoid Lien 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 Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on June 3, 2014. By the court's calculation, 23 days' notice was provided.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 Avoid Judicial Lien is denied.

This Motion requests an order avoiding the judicial lien of Franchise Tax Board ("Creditor") against property of Margaret Grace Elmore ("Debtor") commonly known as 530 Strathaven Court, Turlock, California (the "Property"). The grounds for the relief requested are stated in the Motion to be pursuant to 11 U.S.C. § 522(f).

A judicial lien is a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101. In some instances, it may be difficult to determine whether a particular lien is a "judicial lien." *See, e.g., In re Nichols*, 265 B.R. 831 (B.A.P. 10th Cir. 2001) (consensual mortgage was not transformed into

judicial lien when prepetition foreclosure judgment was entered). However, federal tax liens are not judicial liens. *See, e.g., Rench v. United States Internal Revenue Service (In re Rench)*, 129 B.R. 649 (Bankr. D. Kan. 1991); *In re Driscoll*, 14 C.B.C.2d 146, 57 B.R. 322 (Bankr. W.D. Wis. 1986). Rather, they are statutory liens as defined by the Code, 11 U.S.C. § 101(53), and statutory liens are not subject to avoidance under section 522(f)(1)(A) to the extent that they impair exemptions. See 4 COLLIER ON BANKRUPTCY ¶ 522.11 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Here, the Debtor is trying to avoid a statutory tax lien, not a judicial lien, which cannot be avoided to the extent that it impairs exemptions. Furthermore, the exhibit attached to this motion is for a lien by the IRS, not the State of California Franchise Tax Board. Based on the foregoing, the motion is denied.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.

9. 14-90633-E-7 LONALD/MARY MILLER — MOTION TO AVOID LIEN OF BLEIER AND COX, APC
SDM-1 Scott D. Mitchell — 5-19-14 [13]

Tentative Ruling: The Motion to Avoid Judicial Lien 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 the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 19, 2014. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of **Bleier and Cox, APC** ("Creditor") against property of Lonald Dwiete Miller and Mary Miller ("Debtor") commonly known as 1624 Shirley Court, Modesto, California (the "Property").

However, a review of the Abstract of Judgment recorded with Stanislaus County shows the Plaintiff/Creditor to be Capital One Bank (USA), N.A. for the amount of $4,543.87. Exhibit 1, Dckt. 16. The Creditor named and served in the motion, Bleier and Cox, APC appears to be the attorney for the Judgment Creditor, Capital One Bank (USA), N.A. enforcing the judgment obtained by Capital One Bank (USA).

The actual creditor, Capital One Bank (USA), N.A. failing to be named or served in the present Motion to Avoid Judicial Lien, the motion is denied without prejudice.

A minute order substantially in the following form shall be prepared and issued by the court:

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

10. 12-93238-E-7 BRIAN/HEATHER BRITT
HCS-3 Shane Reich

MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM, CRABTREE, AND SUNTAG FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S)
5-21-14 [62]

Final Ruling: No appearance at the June 26, 2014 hearing is required.

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 holding the 20 largest unsecured claims, and Office of the United States Trustee on May 21, 2014. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirements.)

The Motion for Allowance of Professional Fees 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). 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 are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Dana Suntag, the Attorney ("Applicant") for Gary Farrar the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period October 15, 2013 through June 26, 2014. The order of the court approving employment of Applicant was entered on October 24, 2013, for The Suntag Law Firm ("Suntag") and again on March 6, 2014 for HCS (Merger between Herum\Crabtree and Suntag) Dckt. 65. Exhibits B and C.

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

General Case Administration: Applicant spent 12.9 hours in this category. This time included reviewing the Debtor's schedules to determine whether it was appropriate to object to exemptions, preparing three

stipulations and orders extending the Trustee's deadline to object to exemptions, preparing the certified public accountant's employment application and application for compensation, preparing Suntag's employment application (no time was billed for preparing HCS's employment application), and preparing the instant application for compensation.

Review of Motion to Reopen: Applicant spent .50 hours in this category. Applicant reviewed and advised Mr. Farrar on the motion to reopen this case.

Compromise of Controversy: Applicant spent 18.65 hours in this category. In their amended schedules filed October 4, 2013, the Debtors disclosed an interest in a class action settlement as follows: "Class Action Settlement (Rogers v. Les Schwab Tire Centers of California, Inc.) re wages and overtime (awarded post-petition)," (the "Class Action Settlement"). In the Class Action Settlement, the Debtors received a settlement of $18,564.72, plus interest of $6,939.87. In their amended Schedule C filed on October 4, 2013, the Debtors claimed exemptions in the Class Action Settlement in the amount of $7,574.16 under California Code of Civil Procedure§ 703.140(b)(5) and $13,923.54 under 15 U.S.C. § 1673. The Debtors claimed the interest of $6,939.87 exempt under Code of Civil Procedure § 703.140(b)(5).

Mr. Farrar contended that the Bankruptcy Code and applicable state and federal property exemption statutes control, not 15 U.S.C. § 1673 (the "Exemption Dispute"). Eventually, the parties, assisted by counsel, reached a proposed compromise settling the Exemption Dispute (the "Compromise"). Under the terms of the Compromise, the Debtors paid the bankruptcy estate $7000, and Mr. Farrar agreed not to challenge the Debtors' exemption of the Class Action Settlement (the "Agreement"). Applicant prepared a settlement agreement and prepared and filed a motion for court approval of the compromise. The court granted the motion.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity,

importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a professional fees and expenses legal fee tab without considering the maximum probable as opposed to possible recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including negotiating and preparing a settlement agreement to obtain court approval of a compromise. The estate has $6,950.00 of unencumbered monies

to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

The fees request are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Loris L. Bakken (Esq. 2001)	10.95	$295.00	$3,230.25
Wendy A. Locke (Esq. 2012)	11.40	$225.00	$2,565.00
Dana A. Suntag (Esq. 1986)	5.50	$315.00	$1,732.50
Audrey A. Dutra (Paralegal)	4.20	$90.00	$378.00
Total Fees For Period of Application			$7,905.75

Notwithstanding the loadstar computation of fees, Counsel has agreed to reduce the fees allowed to $2,500.00. Though not expressly articulated in the Motion, it appears that this is based on the actual monies which were generated for the estate and to avoid Counsel rendering the Estate administratively insolvent. (When professionals make such reasonable accommodations, it is appropriate to "take credit" for being "professional" in dealings with the Trustee and estate.) The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final fees in the amount of $2,500.00 are allowed and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $191.58 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Postage		$83.98
Copying	$0.10 per page	$107.60
Total Costs Requested in Application		$191.58

The First and Final Costs in the amount of $ 191.58 are allowed and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$2,500.00
Costs and Expenses	$ 191.58

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Dana Suntag ("Applicant"), Attorney for 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 Dana Suntag is allowed the following fees and expenses as a professional of the Estate:
>
> Dana Suntag, Professional Employed by Trustee
>
> Fees in the amount of $ 2,500.00
> Expenses in the amount of $ 191.58,
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $2,500.00 and costs of $191.58 are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

11. 14-90442-E-7 RALPH/LEANNA GENITO **AMENDED MOTION TO COMPEL**
JAD-1 **ABANDONMENT**
5-21-14 [23]

Final Ruling: No appearance at the June 26, 2014 hearing is required.

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 the Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 21, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property 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). 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 are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Ralph John Genito Jr. And Leanne Joy Ganito ("Debtors") request the court to order the Trustee to abandon property commonly known as 13537 Molina Street, La Grange, California (the "Property"). This Property is encumbered by the lien of Wells Fargo Mortgage, securing a claim . The Debtors contend that the fair market value of the Property is $110,000, drawing this value from an appraisal that was completed by Jack E. Paddock on March 3, 2014. Debtors do not, however, provide a sworn declaration attesting to their opinion of value, or provide a copy of the authenticated appraisal conducted by Jack E. Paddock, or a declaration describing Paddock's valuation of the property.

Debtors do, however, provide a Declaration in Support of their Motion to Compel, asserting that the fair market value of the Property is $110,000.00. The Debtors also make this assertion based on their opinion and knowledge of the property values in the area. ¶ 7, Declaration of

Debtors in Support of Motion to Compel, Dckt. No. 16.

The Chapter 7 Trustee filed his No Distribution Report. May 28, 2014 Docket Entry. This manifests that the Trustee has determined that there is no value in this asset fro the Estate.

The court finds that the debt secured by the Property exceeds the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Ralph John Genito Jr. And Leanne Joy Ganito ("Debtors") 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 Compel Abandonment is granted and that the Property identified as:
>
> 13537 Molina Street, La Grange, California
>
> and listed on Schedule A by Debtors is abandoned to Ralph John Genito Jr. And Leanne Joy Ganito by this order, with no further act of the Trustee required.

12. 09-90452-E-7 DELIDDO AND ASSOCIATES, INC.
CWC-9
MOTION TO SELL
5-22-14 [252]

Tentative Ruling: The Motion to Sell 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, all parties requesting special notice, and Office of the United States Trustee on May 22, 2014. By the court's calculation, 35 notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirement.)

The Motion to Sell Property 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). 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 are entered.

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Chapter 7 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 a Judgment entered on February 13, 2012, in Adversary Proceeding No. 11-09017, Complaint to Recover Avoidable Transfers against Jack P. DeLiddo, individually, in the amount of $1,738.045.77.

The Trustee has received an offer from Dennis W. Hough, PLLC, 333 Flint Street, Reno, Nevada, the "Buyer," to purchase the estate's Judgment against Jack P. DeLiddo, individually, for the sum of $5,000.00. The terms of the sale provide for payment of the purchase of $5,000.00 within seven (7) days of entry of the Order approving the sale. The Trustee acknowledges

that the sale is subject to court approval and overbids that may be received at the time of hearing, and overbid requirements that the court may impose.

The deposits of unsuccessful bidders will be fully refundable. In order to qualify to make an overbid at the hearing of this motion, each prospective bidder must be available to appear personally or by telephonic appearance at the hearing on this motion, and provide evidence of verifiable funds for the overbid purchase.

The Trustee states that he has made significant efforts to enforce the Judgment against Jack P. DeLiddo, individually, with no success. In addition, the Trustee has attempted to market and sell the Judgment to third parties with limited success. Trustee states that this sale represents the Trustee's best efforts to sell the Judgment against Jack P. DeLiddo, individually, for the highest possible price. Trustee believes that the proposed sale is in the best interests of the estate.

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: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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 Stephen C. Ferlmann, 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 Stephen C. Ferlmann, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Dennis W. Hough PLLC ("Buyer"), the Property described as the Judgment entered on February 13, 2012 in Adversary Proceeding No. 11-9017, Complaint to Recover Avoidable Transfers against Jack P. De Liddo, individually, in the amount of $1,738,045.77 ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $5,000.00, on the terms and conditions set forth in the email correspondence for the period of March 5, 2015 through March 26, 2014, describing the terms of sale, (Exhibit A, Dckt. No. 255) and as further provided in this Order.

2. The sale proceeds shall first be applied to closing costs and 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.

13. 14-90457-E-7 JOSUE MARTINEZ **MOTION TO COMPEL ABANDONMENT**
JAD-3 **5-21-14 [13]**

Tentative Ruling: The Motion to Abandon 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, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 21, 2014. By the court's calculation, 36' notice was provided. 28 days' notice is required.

The Motion to Abandon Property 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). 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 are entered.

The Motion for Motion to Abandon Property is denied without prejudice.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and

benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here the

The Motion filed by Josue A. Martinez ("Debtor") requests the court to order the Trustee to abandon some real property. The court is not certain, however, of the exact description of real property that Debtors seeks abandoned.

Debtor's Motion requests that the court enter an order requiring the abandonment of property commonly known as 943 Big Creek Lane, Ceres, California (the "Property"). The Motion states that the Property is encumbered by the lien of Wells Fargo Home Mortgage, securing a claim of $126,662.00.

Debtor's Declaration, however, differs in its identification of the subject property. Debtor filed a declaration in support of the motion, stating that the value of the Property is $171,000.00. Dckt. No. 15. Debtor claimed an exemption of $44,338.00 under California Civil Code of Procedure § 703.730, leaving $0.00 in net equity of the property to the estate. Based on the foregoing, Debtor asserts that the value of the estate's interest in 935 Big Creek Lane, Ceres, California is $0.00, and that the real property is of inconsequential value and is burdensome to the estate.

On two different instances in Debtor's Declaration, however, Debtor identifies the property as "935 Big Creek Lane, Ceres, CA," and not 943 Big Creek Lane, Ceres, California, as stated in Debtor's Motion. ¶ ¶ 9 and 12, Declaration of Josue A. Martinez.

The court cannot issue an order compelling the Trustee to abandon some unknown real property. The Debtor asserts that some property is of inconsequential value and burdensome to the estate, but the court cannot determine whether there are negative financial consequences to the estate in retaining some unknown property that may not have been listed on the Debtor's schedules. The Debtor testifies about the value of a property not named in the Motion, thereby making it impossible for the court to ascertain the fair market value of the property named in the Motion and determine that the Property is of inconsequential value and benefit to the Estate. Thus, 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 Abandon Property filed by Josue A. Martinez ("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 to Compel Abandonment is denied without prejudice.

14. 14-90457-E-7 JOSUE MARTINEZ
JAD-4

MOTION TO AVOID LIEN OF CITIBANK, N.A.
5-21-14 [17]

Tentative Ruling: The Motion to Avoid Lien 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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on only Wells Fargo Card Services and Wells Fargo Home Mortgage on May 21, 2014. The respondent creditor and Chapter 7 Trustee were not served. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has not been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The

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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is denied without prejudice.

NO SERVICE OF PROCESS

Because this Motion to Avoid the Lien seeks relief against a specific, identifiable party, the Debtor should take care to serve the affected lienholder in the manner required by the Federal Rules of Bankruptcy Procedure, and in particular Federal Rules of Bankruptcy Procedure 7004(b) and 7004(h) as to certain lenders. Here, the Debtor seeks to avoid the judgment lien of Citibank, N.A., which resulted from a money

judgment issued in favor of Citibank, N.A. and was recorded against Debtor's real property, on the basis that the lien impairs an exemption that Debtor has claimed in his real property.

The Proof of Service filed on May 21, 2014, Dckt. No. 21, however, reflects that the Citibank, N.A., the respondent creditor, was not served with the Motion, the Notice of Hearing, or Debtor's evidence filed in support of the Motion. Furthermore, Chapter 7 Trustee, also a party an interest in this case, was not served with the Motion. Neither Trustee nor Creditor received notice of the hearing of the Motion or the contents of Debtor's pleadings. This defective service of process is sufficient to deny the Motion.

REVIEW OF MOTION

Additionally the Motion to Avoid the Lien on Debtor's Real Property does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based.

This Motion requests an order avoiding the judicial lien of Citibank, N.A. ("Creditor") against property of Josue Martinez ("Debtor"). Debtor indicates that after the application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien and fixing of this judicial lien impairs the Debtor's exemption of the real property. The Property, however, is not identified in the Motion, and Debtor instructs the court to refer to the description of the real property included in Exhibit A.

In the Motion, Debtor does not identify the property which secures the lien Debtor seeks to avoid. Debtor merely requests an order providing that the judicial lien recorded against some undisclosed real property, "a copy of which is attached hereto as Exhibit 'A'" be avoided. Exhibit A merely consists of an abstract of judgment recorded by the Stanislaus County Recorder's Office on February 7, 2014, showing that a judgment was entered against the Debtor in favor of Citibank, N.A. FN.1.

FN.1. Minimalist pleading practices often cause the attorney to spend more time and do more work trying to say less than developing a motion form which clearly provides the information in clear, separately numbered paragraphs. Fortunately, the relief requested is not time sensitive and the denial of this motion does not cause the Debtor irreparable (or expensive to repair) harm.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as

being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

The Debtor not having identified the property at issue, the Motion brought pursuant to 11 U.S.C. § 522(f)(1)(A) to avoid the fixing of Creditor's lien is hereby denied.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the 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 to Avoid the Lien is denied.

15. 13-91459-E-11 LIMA BROTHERS DAIRY
KDG-4

CONTINUED MOTION TO USE CASH COLLATERAL
3-10-14 [183]

CONT. FROM 3-27-14

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 17, 2014. By the court's calculation, 13 days' notice was provided.

Tentative Ruling: The Motion to Use Cash Collateral 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.

The court's decision is to grant the Motion to Use Cash Collateral and to set a date for further hearing on a supplemental motion, if any, for further used of cash collateral.

Lima Brothers Dairy, the Debtor-in-Possession seeks an order authorizing the use of cash collateral, in the form of cash on hand, money on deposit, milk and cull proceeds, and the feed, derived from its business operations to fund its ongoing operations on an emergency basis. Debtor-in-Possession believes the use of these funds is necessary to preserve its operations as a going concern and to insure the 2,200 animals, including milk cows, dry cows, heifers, calves and bulls, are fed.

Debtor-in-Possession seeks the use of cash collateral through July 14, 2014. This court previously authorized the use of cash collateral through and including April 14, 2014. Civil Minutes, Dckt. No. 154.

Based on the loan and security documents, Debtor-in-Possession believes that AgCredit has first priority liens against the Cash Collateral. Based on loan statements and the representations of AgCredit, Debtor believes that the debt owed to AgCredit is about $1.8 million on its Cow Loan and $0.00 on its Feed Loan. On the petition date, AgCredit was owed about $2.5 million on the two loans combined, but Debtor-in-Possession sold some livestock and pool quota and paid AgCredit pursuant to stay-relief orders entered on October 16, 2013, and November 5, 2013, in addition to continuous monthly payments throughout the case.

Debtor-in-Possession states the following creditors hold security interests junior to AgCredit's interest against the Cash Collateral: (1) Stanislaus Farm Supply (UCC-1 filed August 29, 2012), and (2) Cargill, Inc. (UCC-1 filed October 15, 2012).

Debtor-in-Possession had previously stated that it has been using cash collateral pursuant to two very narrow cash collateral stipulations

dated September 11, 2013, and December 2, 2013. Debtor seeks broader use of cash collateral under the motion as well as additional protections to AgCredit. Debtor has requested that AgCredit continue to consent to the use of cash collateral under a further stipulation. Debtor is hopeful that such a stipulation will be presented to the Court in conjunction with this motion.

The court notes that on March 4, 2014, Debtor-in-Possession and AGCredit filed a Fourth Stipulation to continue the hearing on the Motion for Relief from the Automatic Stay filed by American AgCredit. Dckt. No. 163. The Stipulation provides that the hearing on the Motion for Relief from the Automatic Stay, WJS-1, shall be continued to April 10, 2014, at 10:00 am. The parties stated in the Stipulation that the continuance of the hearing will allow Debtor-in-Possession and AgCredit time to analyze Debtor-in-Possession's long-term budget, and make necessary adjustments and continue negotiations regarding the terms of repayment in a plan of reorganization. Dckt. No. 163 at 2.

In its Motion to Use Cash Collateral, Debtor-in-Possession states it will provide AgCredit with adequate protection, including:

> a. caring for and maintaining the secured parities' collateral,
>
> b. granting AgCredit a replacement lien on Debtor's post-petition property of the same type and nature as against Debtor's pre-petition property to the extent the use of cash collateral results in a decrease in value of AgCredit's interest in its collateral,
>
> c. making bi-weekly adequate-protection payments to AgCredit in the amount of about $35,000.00 (increasing to $55,000.00 in February 2014 and thereafter) as provided in the Budget;
>
> d. providing monthly financial reports to AgCredit, and allowing reasonable inspection of its operations; and
>
> f. harvesting crops in the field and converting it into usable silage, thereby substantially increasing the feed collateral value.

Debtor-in-Possession states it will provide junior secured creditors Stanislaus Farm Supply and Cargill, Inc. with adequate protection by granting replacement liens on milk proceeds and milk products generated by Debtor-in-Possession post-petition of the same type and nature as existed when Debtor filed its case to the extent the use of cash collateral results in a decrease in value of their interest in their collateral.

Conditional Objection by Creditor

Creditor Cargill, Incorporated, Cargill Animal Nutrition ("Cargil) filed a "conditional opposition" to the Motion (Dckt. No. 142), stating that no provision had made for payments to Cargill in the Motion. Cargill argued that the dairy budget attached to the Motion to Use Cash Collateral did not

include the payment currently made to Cargill pursuant to an Irrevocable Milk Proceeds Assignment, which was executed in favor of Cargill by Debtor-in-Possession. The assignment, according to Cargill, provided for two payments per month, totaling a note payment of $5,609.63. ¶ 4, Opposition of Cargill, Dckt. No. 142.

The court was informed, that Cargill has since been paid through its milk assignment, thus resolving Cargill's conditional opposition. Civil Minutes, Dckt. No. 154.

Debtor-in-Possession's budget for the authorization of use of cash collateral until July, 2014, as included below, explicitly states that "[l]oan payments include Cow loan & two mortgages to ACC totaling $61,186, and Cargill at $5,600 per month." Dckt. No. 186.

PREVIOUS PLEADINGS FILED BY DEBTOR IN POSSESSION

Debtor-in-Possession filed the original Motion to Use Cash Collateral on January 17, 2014. The court granted interim and continued use of Cash Collateral through April 13, 2014, pursuant to Civil Minute Orders entered on February 5, 2014, and February 20, 2014. The court continued the hearing on the Motion to March 27, 2014 at 10:30 am. The court directed Debtor-in-Possession to file a supplement to the Motion on or before March 10, 2014. Civil Minutes, Dckt. No. 154.

Debtor-in-Possession states that the Supplement to the Motion (Dckt. No. 183) requests authorization for continued use of Cash Collateral from April 14, 2014, though July 13, 2014, as provided in the budget included in the Supplemental Exhibits to M0tion to Use Cash Collateral and Grant Adequate Protection as Exhibit "D" ("the Budget") under the same terms as provided in the Civil Minute Orders previously issued by the court.

Debtor-in-Possession states that the following budget represents the best estimate and income and expenses of Debtor-in-Possession from April 14, 2014 through July 13, 2014. Debtor-in-Possession requests authorization to use about $1,416.558.00 from April 14, 2014, through July 13, 2014, as described in the budget below.

FURTHER JUNE 2, 2014 SUPPLEMENT TO USE CASH COLLATERAL

Debtor-in-Possession supplements the Motion to Use Cash Collateral and Grant Adequate Protection filed by Debtor-in-Possession on January 17, 2014, Dckt. No 19, Docket Control Number KDG-4 by filing a further supplement to the Motion. Dckt. No. 238.

The court had previously granted interim and continued use of Cash Collateral through July 13, 2014, pursuant to Civil Minute Orders entered on April 1, 2014. The court directed the Debtor-in-Possession to file a supplement to the Motion on or before June 2, 2014. This Supplement to the Motion requests authorization for the continued use of Cash Collateral from July 13, 2014 through October 31, 2014, as provided in the budget included in the Supplemental Exhibits Motion to Use Cash Collateral under the same terms provided in the previous Civil Minute Orders.

The Debtor-in-Possession prepared the budget with the help of its financial advisors and attorneys. Debtor-in-Possession believes that the Budget included in the Civil Minute Order on the Motion to Use Cash Collateral, Dckt. No. 202, represents the best estimate of the income and expenses of Debtor-in-Possession from July 14, 2014 through October 31, 2014.

Debtor-in-Possession requests authorization to use about $2,617,690.00 from July 13, 2014, through October 31, 2014, as described in the below budget.

	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	
Cash Flow Week	1	2	3	4	5	6	7	8	9	10	11	12	13	
Post-Petition Accounting Week	20	21	22	23	24	25	26	27	28	29	30	31	32	
Week Beginning Monday	1/13/14	1/20/14	1/27/14	2/3/14	2/10/14	2/17/14	2/24/14	3/3/14	3/10/14	3/17/14	3/24/14	3/31/14	4/7/14	TOTAL
BEGINNING CASH BALANCE	**$58,574**	**$124,674**	**$57,574**	**$179,174**	**$56,147**	**$157,474**	**$86,374**	**$33,974**	**$143,674**	**$198,824**	**$126,724**	**$73,924**	**$139,974**	
ADD: Cash Receipts:														
Net Milk Check	$207,000		$233,000		$207,000		$43,500	$184,500	$175,050		$38,900	$175,050		$1,264,000
Bull Calf Income	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$9,100
Cow Sales		$10,000		$10,000		$10,000		$10,000		$10,000			$10,000	$60,000
TOTAL CASH RECEIPTS	**$207,700**	**$10,700**	**$233,700**	**$10,700**	**$207,700**	**$10,700**	**$44,200**	**$195,200**	**$175,750**	**$10,700**	**$39,600**	**$175,750**	**$10,700**	**$1,333,100**
LESS: Operating Disbursements														
Hay	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$136,500
Grain/Silage	$35,000	$55,000		$60,000		$60,000		$60,000		$60,000		$60,000		$390,000
Seed and Farming														$0
Payroll, Taxes & Benefits	$19,200		$19,200		$19,200		$19,200		$19,200			$19,200		$115,200
Contract Labor		$2,000		$2,000		$2,000		$2,000		$2,000		$2,000		$12,000
Hauling	$1,500				$1,500				$1,500				$1,500	$6,000
Fuel & Oil	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$28,000
Herd Replacement									$14,000		$21,000		$14,000	$49,000
Repairs & Maint.		$2,000		$2,500		$2,000		$2,500		$2,000		$2,500		$13,500
Supplies	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$52,000
Utilities	$8,000	$300			$8,000	$300			$8,000	$300			$8,000	$32,900
Vet & Breeding	$1,500				$1,500				$1,500				$1,500	$6,000
Insurance	$400		$400	$2,500	$400		$400	$2,500	$400		$400	$2,500	$400	$10,300
Owner's Draw	$5,000		$5,000		$5,000		$5,000		$5,000			$5,000		$30,000
Misc	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$6,500
TOTAL OPERATING DISBURS.	**$86,600**	**$77,800**	**$40,600**	**$85,500**	**$51,600**	**$82,800**	**$40,600**	**$85,500**	**$65,600**	**$82,800**	**$37,400**	**$109,700**	**$41,400**	**$887,900**
Less: Non-Operating Disburs.														
Legal and Professional Fees													$25,000	$25,000
Property Taxes	$20,000												$18,000	$38,000
2013 Payroll Tax Liability			$30,000											$30,000
US Trustee Fees			$6,500											$6,500
TOTAL NON-OPER. DISBURS.	**$20,000**		**$36,500**										**$43,000**	**$99,500**
Less Loan Payments														
Loan Payments	$35,000		$35,000	$48,000	$55,000		$55,000		$55,000		$55,000		$55,000	$345,000
TOTAL LOAN PAYMENTS	**$35,000**		**$35,000**	**$48,000**	**$55,000**		**$55,000**		**$55,000**		**$55,000**		**$55,000**	**$345,000**
TOTAL CASH DISBURSEMENTS	**$141,600**	**$77,800**	**$112,100**	**$129,500**	**$106,600**	**$82,800**	**$95,600**	**$85,500**	**$120,600**	**$82,800**	**$92,400**	**$109,700**	**$139,400**	**$1,332**
ENDING CASH BALANCE	**$124,674**	**$57,574**	**$179,174**	**$104,374**	**$205,474**	**$133,374**	**$81,974**	**$191,674**	**$$246,824**	**$174,724**	**$121,924**	**$187,974**	**$59,274**	**$59,274**

DISCUSSION

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtor-in-Possession has the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. *See In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

No objection has been raised to the use and the payments are reasonable and necessary to maintain Debtor's operations. The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). Here, the existence of a substantial equity cushion and the adequate protection payment protect the creditors interests, with the court granting creditors with liens on the cash collateral replacement liens in the same types of collateral described in their security agreements and other lien documents, to the extent that the use of cash collateral reduces the pre-petition amount of collateral which secured their respective claims.

The court authorizes the use of cash collateral, as set forth above, through and including XXXXX XX, 2014. To provide for the orderly administration of this case, the court continues the hearing on this Motion to Use Cash Collateral to 10:30 a.m. on XXXX XX, 2014. On or before XXXXX XX, 2014 the Debtor in Possession shall file a Supplemental Motion for Further Use of Cash Collateral, and Oppositions, if any, to the Supplemental Motion shall be filed and served on or before XXXXX XX, 2014.

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 Authorize Use of Cash Collateral filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the motion to use cash collateral for the payment of the expenses is granted, and the Debtor in Possession is authorized through and including XXXXX XX, 2014., to use cash collateral may be used to pay the following expenses:

	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	
Cash Flow Week	1	2	3	4	5	6	7	8	9	10	11	12	13	
Post-Petition Accounting Week	20	21	22	23	24	25	26	27	28	29	30	31	32	
Week Beginning Monday	1/13/14	1/20/14	1/27/14	2/3/14	2/10/14	2/17/14	2/24/14	3/3/14	3/10/14	3/17/14	3/24/14	3/31/14	4/7/14	TOTAL
BEGINNING CASH BALANCE	**$58,574**	**$124,674**	**$57,574**	**$179,174**	**$56,147**	**$157,474**	**$86,374**	**$33,974**	**$143,674**	**$198,824**	**$126,724**	**$73,924**	**$139,974**	
ADD: Cash Receipts:														
Net Milk Check	$207,000		$233,000		$207,000		$43,500	$184,500	$175,050		$38,900	$175,050		$1,264,000
Bull Calf Income	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$9,100
Cow Sales		$10,000		$10,000		$10,000		$10,000		$10,000			$10,000	$60,000
TOTAL CASH RECEIPTS	**$207,700**	**$10,700**	**$233,700**	**$10,700**	**$207,700**	**$10,700**	**$44,200**	**$195,200**	**$175,750**	**$10,700**	**$39,600**	**$175,750**	**$10,700**	**$1,333,100**
LESS: Operating Disbursements														
Hay	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$136,500
Grain/Silage	$35,000	$55,000		$60,000		$60,000		$60,000		$60,000		$60,000		$390,000
Seed and Farming														$0
Payroll, Taxes & Benefits	$19,200		$19,200		$19,200		$19,200		$19,200			$19,200		$115,200
Contract Labor		$2,000		$2,000		$2,000		$2,000		$2,000		$2,000		$12,000
Hauling	$1,500				$1,500				$1,500				$1,500	$6,000
Fuel & Oil	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$28,000
Herd Replacement									$14,000		$21,000		$14,000	$49,000
Repairs & Maint.		$2,000		$2,500		$2,000		$2,500		$2,000		$2,500		$13,500
Supplies	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$52,000
Utilities	$8,000	$300			$8,000	$300			$8,000	$300			$8,000	$32,900
Vet & Breeding	$1,500				$1,500				$1,500				$1,500	$6,000
Insurance	$400		$400	$2,500	$400		$400	$2,500	$400		$400	$2,500	$400	$10,300
Owner's Draw	$5,000		$5,000		$5,000		$5,000		$5,000			$5,000		$30,000
Misc	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$6,500
TOTAL OPERATING DISBURS.	**$86,600**	**$77,800**	**$40,600**	**$85,500**	**$51,600**	**$82,800**	**$40,600**	**$85,500**	**$65,600**	**$82,800**	**$37,400**	**$109,700**	**$41,400**	**$887,900**
Less: Non-Operating Disburs.														
Legal and Professional Fees													$25,000	$25,000
Property Taxes	$20,000												$18,000	$38,000
2013 Payroll Tax Liability			$30,000											$30,000
US Trustee Fees			$6,500											$6,500
TOTAL NON-OPER. DISBURS.	**$20,000**		**$36,500**										**$43,000**	**$99,500**
Less Loan Payments														
Loan Payments	$35,000		$35,000	$48,000	$55,000		$55,000		$55,000		$55,000		$55,000	$345,000
TOTAL LOAN PAYMENTS	**$35,000**		**$35,000**	**$48,000**	**$55,000**		**$55,000**		**$55,000**		**$55,000**		**$55,000**	**$345,000**
TOTAL CASH DISBURSEMENTS	**$141,600**	**$77,800**	**$112,100**	**$129,500**	**$106,600**	**$82,800**	**$95,600**	**$85,500**	**$120,600**	**$82,800**	**$92,400**	**$109,700**	**$139,400**	**$1,332**
ENDING CASH BALANCE	**$124,674**	**$57,574**	**$179,174**	**$104,374**	**$205,474**	**$133,374**	**$81,974**	**$191,674**	**$$246,824**	**$174,724**	**$121,924**	**$187,974**	**$59,274**	$59,274

The amount authorized for each category may be increased by no more than 10% each month, but the total cash collateral used in a month cannot exceed the monthly total set forth in the budget above.

IT IS FURTHER ORDERED that the hearing on this Motion to Use Cash Collateral to XX:XX a.m. on XXXXX XX, 2014. On or before June 2, 2014 the Debtor in Possession shall file a Supplemental Motion for Further Use of Cash Collateral, and Oppositions, if any, to the Supplemental Motion shall be filed and served on or before XXXXX XX, 2014.

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.

No attorneys' fees or other professional fees are approved by this order or inclusion of such expense item in the budget. Such professional fees may be paid only as allowed and authorized to be paid by separate order of the court.

16. 13-90465-E-7 KIMBERLY VEGA — MOTION TO SET ASIDE DEFAULT
14-9004 MR-2 — 6-11-14 [65]
MCGRANAHAN V. VEGA ET AL

Tentative Ruling: The Motion to Dismiss Complaint has been properly set for hearing on the notice required by the Local Bankruptcy Rules. Consequently, the 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.

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.

Motion Not Set for Hearing Under Local Bankruptcy Rules.

Correct Notice Not Provided. No Certificate of Service was filed on the docket pursuant to Local Bankruptcy Rule 9014-1(e)(2), which requires that a proof of service, in the form of a certificate of service, shall be filed with the Clerk concurrently with the pleadings or documents served, or not more than three (3) days after they are filed. This requirement was not

met. The court cannot determine whether the Motion was properly set on notice under the requirements of Local Bankruptcy Rule 9014-1(f)(2).

The Motion to Set Aside the Clerk's Entry of Default for Defendant Maria Rangel was not properly set for hearing. Consequently, the 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.

The court's decision is to grant the Motion to Set Aside the Clerk's Entry of Default.

DEFECTIVE NOTICE AND SERVICE

Local Bankruptcy Rule 9014-1(e)(2) requires that a proof of service, in the form of a certificate of service, be filed with the court clerk concurrently with the pleadings or documents served, or not more than three (3) days after they are filed. The proof of service must be filed as a separate document and shall bear its own Docket Control Number.

Here, no Certificate of Service was filed with the Motion to Set Aside. The court cannot determine whether the Chapter 7 Trustee and other parties in interest were served.

Additionally, it appears that Movant is attempting to set the hearing on this Motion on less than 28 days' notice, as made permissible by Local Bankruptcy Rule 9014-1(f)(2). Given that the Motion has been filed in the course of an adversary proceeding, however, time cannot be shortened based on Local Bankruptcy Rule 9014-1(f)(2)(A).

The defects in service of process, in addition to impermissible Movant's attempt to set the notice on shortened time, are sufficient to deny the Motion.

However, the court considers the "service" in light of the totality of the circumstances. This Defendant has determined that she must proceed in *pro se*. She has prepared an answer which states her defense to the Complaint. She is ready to proceed, diligently prosecute the case, and allow the federal court to determine the rights and interests in the Property as property of the bankruptcy estate.

The court waives the defect in service, treating the motion as an *ex parte* motion. FN.1.

FN.1. This defendant and the other defendant and their counsel, should not be misled into thinking that the Federal Rule of Civil Procedure, Federal Rule of Bankruptcy Procedure, and Federal Rules of Evidence do not apply to them and the prosecution of this case. The waiving of this defect in service has only the effect of giving this defendant the opportunity to properly prosecute the case.

ADVERSARY PROCEEDING

This Adversary Proceeding was commenced On January 29, 2014, by the Chapter 7 Trustee naming Kimberly Vega (the Chapter 7 Debtor in case no. 13-90465) ("Debtor"), Victor Vega, and Maria Rangel as defendants. Dckt. 1. It is asserted that Victor Vega, the brother of Debtor, and holds a one-third interest in certain real property which Debtor listed on her Schedules as the Debtor having a one-half interest (which she later changed to list as a one-third interest). It is further asserted that Maria Rangel is the Debtor's mother and also holds a one-third interest in the Property.

The Complaint seeks to sell the Debtor's and the co-owners interests in the Property pursuant to 11 U.S.C. § 363(h).

It is alleged that after the commencement of the bankruptcy case the Debtor, through letters and correspondence through her bankruptcy counsel, asserted that Debtor was a co-owner of the Property. Based on those representation and the statements in the Schedules (made under penalty or perjury by Debtor), the Plaintiff-Trustee proceeded to administer the interest in the Property as an asset of the estate.

Only after the Plaintiff-Trustee began administering the asset did Debtor and her bankruptcy counsel assert that Debtor was not the "owner" of the Property, but merely held legal title, and that her Mother was the "equitable owner." The Debtor then amended Schedule A in the bankruptcy case, stating under penalty of perjury to state that she was only the holder of legal title. 13-90465, Second Amended Schedule A filed December 11, 2013, Dckt. 67. FN.2.

FN.2. Original Schedule A, filed March 15, 2013, listed the Debtor's interest in the Property as "Single Family Home, ½ Owner with Mother, Full House Value $109,993." *Id.* Dckt. 1 at 8. On Jun3 18, 2014, Debtor filed her First Amended Schedule A which states under penalty of perjury her interest in the Property to be: "Single Family Home 1/3 interest Owner with Mother & Brother, Full House Value $109,993." *Id.*, Dckt. 30 at 2. Second Amended Schedule A stating under penalty of perjury that Debtor is "Legal owner only" does not state a fractional interest held by any other persons and was filed on December 11, 2013. Dckt. 67.

The Complaint also seeks to quiet title as to the Estate's interest in the Property. It does not state whether a one-third, one-half, or one-hundred percent interest is claimed by the Estate.

REVIEW OF THE MOTION

The procedural defects of this Motion notwithstanding, the Movant has not made a showing that meets the standard of Federal Rule of Civil Procedure 60(b), as made applicable in the bankruptcy context by Federal Rule of Bankruptcy Procedure 9024, that the default order obtained by the Plaintiff, Chapter 7 Trustee Michael D. McGranahan, should be set aside.

The Defendant in this adversary proceeding, Maria Rangel ("Defendant"), seeks an order from the court, setting aside the entry of

default by the clerk of the court. The Motion is required to state with particularity the grounds upon which the requested relief is based. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007. The Motion states the following grounds as the basis for setting aside Maria Rangel's default:

A. "As set forth in the declaration of the defendant, the failure to act on the part of the defendant is based up [*sic*] the inability after numerous attempts to obtain independent legal counsel."

B. "Additionally, [Maria Rangel] previously sought relief from this Court, but said relief was denied apparently due to the lack of admissible evidence." FN.3.

FN.3. The court's ruling on Maria Rangel's prior motion to vacate the default is set forth in the Civil Minutes for the hearing on that Motion (DCN: MR-1, Dckt. 47). The court denied the motion for several reasons. First, defective service of the Motion. The Motion failed to comply with the "state with particularity" requirements for Adversary Proceedings. (The court miscited to Federal Rule of Bankruptcy Procedure 9013, which is the contested matter equivalent of Federal Rule of Civil Procedure 7(b).) Third, Maria Rangel failed to provide testimony under penalty of perjury in the declaration or other admissible evidence.

Though the court does not permit attorneys to avoid the simple pleading requirements of Federal Rule of Civil Procedure 7(b) and hide allegations in various declarations, exhibits, documents, pleadings, and "the files in this case," because Maria Rangel purports to be appearing in pro se, the court has reviewed the declaration. In it Maria Rangel states under penalty of perjury:

A. "I did not file a timely response for the following reasons."

1. "I was mailed the complaint."

2. "My son and co-defendant Victor Vega have actively and continually sought attorney representation in this matter."

3. "As of the date of this declaration, I have spoken with seven attorneys, none of whom were willing to represent me."

4. "The bankrupt defendant in this case, Kimberly Vega was only a co-signor on my mortgage loan and has no interest in my home."

5. "I have lived at the home and continue to make all of the mortgage payments. I also made the down payment to buy the home."

6. The proposed answer is filed as Exhibit A in support of the Motion.

7. "I intend to appear at trial and participate in pro per without the aid of an attorney. I do not want to lose my home."

8. She expressly her legal opinion that her prior declaration was misfiled by the Clerk of the Court, and that it is her opinion that she would have prevailed on the prior motion (apparently ignoring the fundamental pleading and service defects).

Declaration, Dckt. 67.

The Answer proposed to be filed by Maria Rangel states the following.

A. I deny allegations of paragraphs 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17.

B. She denies this is a "core proceeding and that Modesto is the proper venue.

C. "Defendant is not in bankruptcy and has no control over what my relatives say in Bankruptcy court. I was not informed off what my sister Kimberly was doing in her case."

D. The Bankruptcy court has no jurisdiction to try a quite title action. This is a civil matter.

E. In fact, the house belong to me. I have paid for it.

F. Defendant demands a jury trial.

Exhibit A, Dckt. 68.

As the court stated in its previous ruling, however, Defendant's stated grounds for relief do not meet any of the factors enumerated by Federal Rules of Civil Procedure Rule 60(b). Civil Minute Order, Dckt. No. 47. Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

However, Entry of a default judgment (which would be the next step if the default is not set aside) is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. Id. at 1472. Factors which the court may consider in exercising its discretion in granting a default judgment include:

(1) the possibility of prejudice to the plaintiff,

(2) the merits of plaintiff's substantive claim,

(3) the sufficiency of the complaint,

(4) the sum of money at stake in the action,

(5) the possibility of a dispute concerning material facts,

(6) whether the default was due to excusable neglect, and

(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

While Defendant Maria Rangel has stumbled and no attorney has agreed to take her case, her first motion to vacate the default was filed on April 10, 2014. She now accepts that she will be representing herself and is responsible for properly prosecuting her case in federal court.

The Motion is granted and the default of Maria Rangel is set aside. Additionally, the Answer of Maria Rangel, filed as Exhibit A, Dckt. 68 is

accepted by the court as her answer. The Clerk of the Court shall print a copy of Exhibit A and file it as Maria Rangel's answer in this Adversary Proceeding.

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 Set Aside the Default filed by Defendant Maria Rangel 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 Set Aside the Default is granted, and the default, Dckt. 13, of Maria Rangel is vacated.
>
> **IT IS FURTHER ORDER** that the Clerk of the Court shall print out the Answer filed as Exhibit A by Maria Rangel, Dckt. 68, deleting the "Exhibit A" reference on the bottom of the Answer denied, and then filing it as Maria Rangel's Answer in this Adversary Proceeding.
>
> **IT IS FURTHER ORDERED** that on or before July 30, 2014, Maria Rangel shall file a Motion, if any, for a Jury Trial in this Adversary Proceeding, by which she shall state with particularity the grounds and provide a separate legal points and authorities supporting a claim for a jury trial in this Adversary Proceeding to determine the rights and interests, if any, of the various parties in what has been listed under penalty of perjury by Debtor as property of the bankruptcy estate in her bankruptcy schedules.
>
> **IT IS FURTHER ORDERED** that on or before July 30, 2014, Maria Rangel shall file a motion, if any, asserting any basis for the contention that federal court jurisdiction exists for this Adversary Proceeding and the asserted interests of the bankruptcy estate therein; including; without limitation: (1) 28 U.S.C. § 1334(a) [original and exclusive jurisdiction of all cases under title 11], (2) 28 U.S.C. § 1334(b) [original, but not exclusive jurisdiction of all civil proceedings under title 11, or arising in or related to cases under title 11, (3) 28 U.S.C. § 1334(e) [exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of the case and of property of the estate, (4) 28 U.S.C. § 157(a) [referral of cases under title 11, and any and all proceedings arising under title 11 or arising in or related to case under title 11 to bankruptcy judges]; (5) 28 U.S.C. § 157(b) [grant of authority to bankruptcy judges to hear all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 referred to the judge by

the district court]; and (6) 28 U.S.C. § 157(c) [bankruptcy judge authorized to hear and decided non core proceedings related to a case under title 11 either by issuing final orders and judgments, or by proposed findings of fact and conclusions of law submitted to the district court].

17. 13-90465-E-7 KIMBERLY VEGA — **MOTION FOR SUMMARY JUDGMENT**
14-9004 SSA-1 — **AND/OR MOTION FOR SUMMARY**
MCGRANAHAN V. VEGA ET AL — **ADJUDICATION**
5-15-14 [57]

No Tentative Ruling: The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Defendant having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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.

18. 13-90465-E-7 KIMBERLY VEGA — **MOTION TO SET ASIDE DEFAULT**
14-9004 VV-2 — **6-11-14 [69]**
MCGRANAHAN V. VEGA ET AL

Tentative Ruling: The Motion to Dismiss Complaint has been properly set for hearing on the notice required by the Local Bankruptcy Rules. Consequently, the 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.

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.

Motion Not Set for Hearing Under Local Bankruptcy Rules.

Correct Notice Not Provided. No Certificate of Service was filed on the docket pursuant to Local Bankruptcy Rule 9014-1(e)(2), which requires that a proof of service, in the form of a certificate of service, shall be filed with the Clerk concurrently with the pleadings or documents served, or not more than three (3) days after they are filed. This requirement was not met. The court cannot determine whether the Motion was properly set on notice under the requirements of Local Bankruptcy Rule 9014-1(f)(2).

The Motion to Set Aside the Clerk's Entry of Default for Defendant Victor Vega was not properly set for hearing. Consequently, the 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.

The court's decision is to grant the Motion to Set Aside the Clerk's Entry of Default.

DEFECTIVE NOTICE AND SERVICE

Local Bankruptcy Rule 9014-1(e)(2) requires that a proof of service, in the form of a certificate of service, be filed with the court clerk concurrently with the pleadings or documents served, or not more than three (3) days after they are filed. The proof of service must be filed as a separate document and shall bear its own Docket Control Number.

Here, no Certificate of Service was filed with the Motion to Set Aside. The court cannot determine whether the Chapter 7 Trustee and other parties in interest were served.

Additionally, it appears that Movant is attempting to set the hearing on this Motion on less than 28 days' notice, as made permissible by Local Bankruptcy Rule 9014-1(f)(2). Given that the Motion has been filed in the course of an adversary proceeding, however, time cannot be shortened based on Local Bankruptcy Rule 9014-1(f)(2)(A).

The defects in service of process, in addition to impermissible Movant's attempt to set the notice on shortened time, are sufficient to deny the Motion.

However, the court considers the "service" in light of the totality of the circumstances. This Defendant has determined that she must proceed in *pro se*. She has prepared an answer which states her defense to the Complaint. She is ready to proceed, diligently prosecute the case, and allow the federal court to determine the rights and interests in the Property as property of the bankruptcy estate.

The court waives the defect in service, treating the motion as an *ex parte* motion. FN.1.

FN.1. This defendant and the other defendant and their counsel, should not be misled into thinking that the Federal Rule of Civil Procedure, Federal Rule of Bankruptcy Procedure, and Federal Rules of Evidence do not apply to them and the

prosecution of this case. The waiving of this defect in service has only the effect of giving this defendant the opportunity to properly prosecute the case.

ADVERSARY PROCEEDING

This Adversary Proceeding was commenced On January 29, 2014, by the Chapter 7 Trustee naming Kimberly Vega (the Chapter 7 Debtor in case no. 13-90465) ("Debtor"), Victor Vega, and Maria Rangel as defendants. Dckt. 1. It is asserted that Victor Vega, the brother of Debtor, and holds a one-third interest in certain real property which Debtor listed on her Schedules as the Debtor having a one-half interest (which she later changed to list as a one-third interest). It is further asserted that Maria Rangel is the Debtor's mother and also holds a one-third interest in the Property.

The Complaint seeks to sell the Debtor's and the co-owners interests in the Property pursuant to 11 U.S.C. § 363(h).

It is alleged that after the commencement of the bankruptcy case the Debtor, through letters and correspondence through her bankruptcy counsel, asserted that Debtor was a co-owner of the Property. Based on those representation and the statements in the Schedules (made under penalty or perjury by Debtor), the Plaintiff-Trustee proceeded to administer the interest in the Property as an asset of the estate.

Only after the Plaintiff-Trustee began administering the asset did Debtor and her bankruptcy counsel assert that Debtor was not the "owner" of the Property, but merely held legal title, and that her Mother was the "equitable owner." The Debtor then amended Schedule A in the bankruptcy case, stating under penalty of perjury to state that she was only the holder of legal title. 13-90465, Second Amended Schedule A filed December 11, 2013, Dckt. 67. FN.2.

FN.2. Original Schedule A, filed March 15, 2013, listed the Debtor's interest in the Property as "Single Family Home, ½ Owner with Mother, Full House Value $109,993." *Id.* Dckt. 1 at 8. On Jun3 18, 2014, Debtor filed her First Amended Schedule A which states under penalty of perjury her interest in the Property to be: "Single Family Home 1/3 interest Owner with Mother & Brother, Full House Value $109,993." *Id.*, Dckt. 30 at 2. Second Amended Schedule A stating under penalty of perjury that Debtor is "Legal owner only" does not state a fractional interest held by any other persons and was filed on December 11, 2013. Dckt. 67.

The Complaint also seeks to quiet title as to the Estate's interest in the Property. It does not state whether a one-third, one-half, or one-hundred percent interest is claimed by the Estate.

REVIEW OF THE MOTION

The procedural defects of this Motion notwithstanding, the Movant has not made a showing that meets the standard of Federal Rule of Civil Procedure 60(b), as made applicable in the bankruptcy context by Federal Rule of Bankruptcy Procedure 9024, that the default order obtained by the Plaintiff, Chapter 7 Trustee Michael D. McGranahan, should be set aside.

The Defendant in this adversary proceeding, Victor Vega ("Defendant"), seeks an order from the court, setting aside the entry of default by the clerk of the court. The Motion is required to state with particularity the grounds upon which the requested relief is based. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. Victor Vega's default:

A. "As set forth in the declaration of the defendant, the failure to act on the part of the defendant is based up [*sic*] the inability after numerous attempts to obtain independent legal counsel."

B. "Additionally, [Victor Vega] previously sought relief from this Court, but said relief was denied apparently due to the lack of admissible evidence." FN.3.

FN.3. The court's ruling on Victor Vega's prior motion to vacate the default is set forth in the Civil Minutes for the hearing on that Motion (DCN: VV-1, Dckt. 49). The court denied the motion for several reasons. First, defective service of the Motion. The Motion failed to comply with the "state with particularity" requirements for Adversary Proceedings. (The court miscited to Federal Rule of Bankruptcy Procedure 9013, which is the contested matter equivalent of Federal Rule of Civil Procedure 7(b).) Third, Victor Vega failed to provide testimony under penalty of perjury in the declaration or other admissible evidence.

Though the court does not permit attorneys to avoid the simple pleading requirements of Federal Rule of Civil Procedure 7(b) and hide allegations in various declarations, exhibits, documents, pleadings, and "the files in this case," because Victor Vega purports to be appearing in pro se, the court has reviewed the declaration. In it Victor Vega states under penalty of perjury:

A. "I did not file a timely response for the following reasons."

1. "I was mailed the complaint."

2. "A co-defendant Maria Rangel and I have actively and continually sought attorney representation in this matter."

3. "As of the date of this declaration, I have spoken with seven attorneys, none of whom were willing to represent me."

4. "The bankrupt defendant in this case, Kimberly Vega was only a co-signor on my mortgage loan and has no interest in my home."

5. "While I reside at the home, my mother and co-defendant Maria Rangel continues to make all the mortgage payments."

6. "I have lived at the home and continue to make all of the mortgage payments. I also made the down payment to buy the home."

7. The proposed answer is filed as Exhibit A in support of the Motion.

8. "I intend to appear at trial and participate in pro per without the aid of an attorney. I do not want my mother to lose my home."

9. He expresses his legal opinion that her prior declaration was misfiled by the Clerk of the Court, and that it is her opinion that she would have prevailed on the prior motion (apparently ignoring the fundamental pleading and service defects).

Declaration, Dckt. 71. FN.4.

FN.4. Interestingly the motion, and more importantly the declaration, appear to be all but carbon copies of those filed by or for Maria Rangel. While they may be sufficient for this purpose, such duplication does not create an air of credibility for either of the two defendants.

The Answer proposed to be filed by Victor Vega states the following.

A. I deny allegations of paragraphs 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17.

B. She denies this is a "core proceeding and that Modesto is the proper venue.

C. "Defendant is not in bankruptcy and has no control over what my relatives say in Bankruptcy court. I was not informed off what my sister Kimberly was doing in her case."

D. The Bankruptcy court has no jurisdiction to try a quite title action. This is a civil matter.

E. In fact, the house belong to me. I have paid for it.

F. Defendant demands a jury trial.

Exhibit A, Dckt. 72.

As the court stated in its previous ruling, however, Defendant's stated grounds for relief do not meet any of the factors enumerated by Federal Rules of Civil Procedure Rule 60(b). Civil Minute Order, Dckt. No. 49. Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

However, Entry of a default judgment (which would be the next step if the default is not set aside) is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. Id. at 1472. Factors which the court may consider in exercising its discretion in granting a default judgment include:

(1) the possibility of prejudice to the plaintiff,

(2) the merits of plaintiff's substantive claim,

(3) the sufficiency of the complaint,

(4) the sum of money at stake in the action,

(5) the possibility of a dispute concerning material facts,

(6) whether the default was due to excusable neglect, and

(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

While Defendant Victor Vega has stumbled and no attorney has agreed to take her case, her first motion to vacate the default was filed on April 10, 2014. He now accepts that he will be representing himself and is responsible for properly prosecuting his case in federal court.

The Motion is granted and the default of Victor Vega is set aside. Additionally, the Answer of Victor Vega, filed as Exhibit A, Dckt. 72 is accepted by the court as her answer. The Clerk of the Court shall print a copy of Exhibit A and file it as Victor Vega's answer in this Adversary Proceeding.

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 Set Aside the Default filed by Defendant Victor Vega 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 Set Aside the Default is granted, and the default, Dckt. 14, of Victor Vega is vacated.
>
> **IT IS FURTHER ORDER** that the Clerk of the Court shall print out the Answer filed as Exhibit A by Victor Vega, Dckt. 72, deleting the "Ex A" reference on the bottom of the Answer denied, and then filing it as Victor Vega's Answer in this Adversary Proceeding.
>
> **IT IS FURTHER ORDERED** that on or before July 30, 2014, Victor Vega shall file a Motion, if any, for a Jury Trial in this Adversary Proceeding, by which she shall state with particularity the grounds and provide a separate legal points and authorities supporting a claim for a jury trial in this Adversary Proceeding to determine the rights and interests, if any, of the various parties in what has been listed under penalty of perjury by Debtor as property of the bankruptcy estate in her bankruptcy schedules.
>
> **IT IS FURTHER ORDERED** that on or before July 30, 2014, Victor Vega shall file a motion, if any, asserting any basis for the contention that federal court jurisdiction exists for this Adversary Proceeding and the asserted interests of the bankruptcy estate therein; including; without limitation: (1) 28 U.S.C. § 1334(a) [original and exclusive jurisdiction of all cases under title 11], (2) 28 U.S.C. § 1334(b) [original, but not exclusive jurisdiction of all civil proceedings under title 11, or arising in or related to cases under title 11, (3) 28 U.S.C. § 1334(e) [exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of the case and of property of the estate, (4) 28 U.S.C. § 157(a) [referral of cases under title 11, and any and all proceedings arising under title 11 or arising in or related to case under title 11 to bankruptcy judges]; (5) 28 U.S.C. § 157(b) [grant of authority to bankruptcy judges to hear all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 referred to the judge by the district court]; and (6) 28 U.S.C. § 157(c) [bankruptcy judge authorized to hear and decided non core proceedings related to a case under title 11 either by issuing final orders and judgments, or by proposed findings of fact and conclusions of law submitted to the district court].

19. 12-90675-E-7 HUMBERTO SALCEDO — **MOTION TO AVOID LIEN OF NATIONAL CREDIT ADJUSTERS, LLC**
JAD-2 — **6-2-14 [28]**

CASE CLOSED 6/22/12

APPEARANCE OF JESSICA DORN, COUNSEL FOR DEBTOR REQUIRED FOR JUNE 26, 2014 HEARING

Telephonic Appearance Permitted

Tentative Ruling: The Motion to Avoid Judicial Lien 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 the opposition and 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, Chapter 7 Trustee, and Office of the United States Trustee on June 2, 2014. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of National Credit Adjusters, LLC ("Creditor") against property of Humberto Salcedo ("Debtor").

A judgment was entered against Debtor in favor of Creditor in the amount of $9,533.13. An abstract of judgment was recorded with Stanislaus County on February 21, 2012, which encumbers the Property.

The Motion to Avoid the Lien on Debtor's Real Property does not, however, comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. In the Motion, Debtor does not identify the property which secures the lien Debtor seeks to avoid. Debtor merely requests an order providing that the judicial lien recorded against some undisclosed real property, "a copy of which is attached hereto as Exhibit 'A'" be avoided. Exhibit A merely consists of an abstract of judgment recorded by the Stanislaus County Recorder's Office, showing that a judgment was entered against the Debtor in favor of Credit Adjusters, LLC.

The court can canvas Debtor's bankruptcy petition and paperwork to fish out the facts of Debtor's case, and identify property commonly known as 1813 Rose Avenue, Modesto, California to be real property owned by Debtor. Pursuant to the Debtor's Schedule A, the real property has an approximate value of $120,000 as of the date of the petition. The unavoidable consensual liens total $298,269 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $5,000 on Schedule C.

The court can assume that this is the subject property of Debtor's Motion, and determine that after the application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien and fixing of this judicial lien impairs the Debtor's exemption of the real property. However, the court will not postulate as to the property at issue, and issue orders that will affect the rights of the respondent creditor and other parties in interest, that identify the wrong asset at issue. The Motion does not achieve the simple task of identifying the subject property.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also

incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties

the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

The Debtor not having identified the property at issue, the Motion brought pursuant to 11 U.S.C. § 522(f)(1)(A) to avoid the fixing of Creditor's lien is denied.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the 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 to Avoid the Lien on Debtor's Real Property is denied.

20. 13-92082-E-7 ELIZABETH CLEMINS **AMENDED MOTION TO AVOID LIEN OF**
AAM-2 **LVNV FUNDING, LLC**
5-16-14 [28]

Final Ruling: No appearance at the June 26, 2014 hearing is required.

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 Chapter 7 Trustee, Creditor, and Office of the United States Trustee on May 29, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of LVNV Funding, LLC ("Creditor") against the property of Elizabeth Clemins ("Debtor") commonly known as 2724 Rosewood Ave., Ceres, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $4,714.27 on May 17, 2013. An abstract of judgment was recorded with Stanislaus County on June 10, 2013 which encumbers the Property.

The Motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $98,000 as of the date of the petition. The unavoidable consensual liens total $108,655.24 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $100 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 judgment lien of LVNV Funding, LLC, California Superior Court for Stanislaus County Case No. 681754, recorded on June 10, 2013, Document No. DOC-2013-0049690-00 with the Stanislaus County Recorder, against the real property commonly known as 2724 Rosewood Ave., Ceres, California is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.