UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 1, 2021 at 10:30 a.m.

1.	**20-23267-E-7** **PGM-3**	**SHON/JILL TREANOR** **Pro Per**	**SCHEDULING CONFERENCE RE: OBJECTION TO CLAIM OF STEVEN C. SANDERS, SANDERS & ASSOCIATES, CLAIM NUMBER 9 AND/OR MOTION FOR EVIDENTIARY HEARING** **4-11-21 [185]**

THE COURT POSTS THIS AS A TENTATIVE RULING IN LIGHT OF DEBTORS PROCEEDING IN PRO SE AND TO AFFORD ALL PARTIES IN INTEREST AN OPPORTUNITY TO ADDRESS THIS IF NECESSARY

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 11, 2021. By the court's calculation, 46 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 9-1 of Steven C. Sanders, Sanders & Associates is moot; the court having granted the Chapter 7 Trustee's Motion to Approve Settlement with Steven C. Sanders, Sanders & Associates**.**

Shon Jason and Jill Diana Treanor, the Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of Steven C. Sanders, Sanders & Associates ("Creditor"), Proof of Claim No. 9-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $1,001,372.60. Objector asserts the following as the basis for this objection:

1. The judgment on which Creditor bases their claim is not final.

2. Creditor's claim is based on an unconscionable contract that is void.

3. The fees requested under that contract are also void as excessive.

4. Making three personal loans to Debtor was a conflict on interest so that Creditor violated the Model Rules of Professional Conduct and the amounts of these loans should not be paid through the proof of claim.

5. The claim exceeds $1 Million and is thus unconscionable especially when the Debtor would receive less than $500,000; thus, the claim should be determined based on a reasonable fee and not on an unconscionable fee.

6. The claim, for damages to be awarded a wrongfully discharged attorney, should be determined by the court based upon a "reasonable fee" which requires further hearings and is a disputed material fact.

7. The value of the claim is a disputed material fact because it may not be based upon the "net recovery" as required by the agreement where no evidence, such as "Net Sheet" upon which the contingency would have been triggered, has been produced.

8. Creditor may be not entitled to recovery of fees where it is a disputed fact that Creditor's conduct was neither willful nor egregious so as to warrant denial of compensation.

9. Whether the fees requested are reasonable is a disputed fact requiring an evidentiary hearing.

Debtors filed this Objection to Claim on April 11, 2021. At that time, Objector were represented by counsel. Objector substituted in as *pro se* on April 16, 2021. Dckt. 207. The Order on Substitution of Attorney was entered on April 29, 2021. Dckt. 227.

Trustee filed a Response on May 6, 2021 opposing the objection on the ground that the

underlying claim is subject of a motion to approve compromise that is set for hearing on June 17, 2021. Dckt. 230. Trustee requests that the objection be stayed pending resolution of the motion to compromise; or in the alternative, that the hearing and deadline to file a written response to this objection be extended to a date after June 17, 2021.

DISCUSSION

Here, there is a Motion for Approval of Compromise pending before this court settling all disputes with Creditor. Dckt. 85. Trustee seeks authorization to settle Creditor's claim for the sum of $245,005 plus 30% of the Post-Petition Recovery. Creditor's claim is for the amount of $1,001,372.60. If the court were to make a decision now regarding Creditor's claim, this would negatively impact Trustee's compromise. Trustee has negotiated a significant reduction in this claim that would benefit the estate, creditors, and Debtor in the long run.

The settlement payment is also accompanied by a dismissal of the state court cases and adversary proceedings in the instant bankruptcy case. This would also benefit creditors, the estate, and Debtor.

Moreover, Debtors has been afforded the opportunity to oppose the compromise. The hearing on the Motion was continued so as to –

> insure that Debtor is able to state the opposition that Debtor believes should be asserted and not feel that now former counsel did not full state such opposition.

Civil Minutes, Dckt. 217.

The Debtors have rained down on the court many, many documents in which they desire the bankruptcy court to undertake/order investigations to be done by the Federal Bureau of Investigation and the Attorney General of alleged conspiracies and fraud committed against non-debtor parties (such as the Bandy Estate and Gortemiller Estate). The allegations include misconduct by multiple state and county officials, including judges in the State courts.

The court has discussed with Debtors, who are now prosecuting this case in *pro se*, that to the extent they were "advised" by an FBI agent in Boston to file bankruptcy because the judge would undertake and order investigations of all the alleged wrongs over more than the past decade, such was clearly erroneous "advice" by a federal agent. The Federal Courts are not investigatory or prosecutorial agencies, such as is the FBI, or the U.S. Attorney, or the State Attorney General.

Debtors, having elected to file bankruptcy, have placed all of their various rights and interests in the bankruptcy estate in this case. All of those rights and interests are under the control of the Chapter 7 Trustee who is responsible for administering such assets. 11 U.S.C. §§ 541(a), 704.

The Trustee is seeking to settle and resolve the disputes Creditor. In the Objection, Debtors recount numerous state court proceedings and a June 8, 2020 judgment in favor of Creditor for $1,001,372.60. Objection, ¶ 66; Dckt. 185.

Debtors assert that the June 8, 2020 Judgment is merely a "Decision," and Debtor make seek to vacate the Decision within 60 days after they are entered. Those 60 days would have expired on or about August 8, 2020.

However, Debtors argue that the June 20, 2020 filing of the bankruptcy case imposes the automatic stay that prohibits actions taken against the Debtors after the bankruptcy case was filed. Debtors then infer that since the bankruptcy case was filed and the automatic stay arose, then the time for them to seek to vacate the "Decision" is opened ended and has not expired.

Debtors then explain that they would seek to vacate the "Decision" based upon Federal Rule of Civil Procedure 60(b) in the State Court action. Debtors do not explain how a Federal Rule of Civil Procedure will be applied in a California State Court action.

The provisions of 11 U.S.C. § 108(b) provide for extensions of a time period under nonbankruptcy law for a debtor, creditor, the trustee, or debtors to act within a time period specified by non-bankruptcy law:

> b) Except as provided in subsection (a) of this section, **if applicable nonbankruptcy law**, an order entered in a nonbankruptcy proceeding, or an agreement **fixes a period within which the debtor** or an individual protected under section 1201 or 1301 of this title [co-debtor stay] **may file any pleading**, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, **and such period has not expired before the date of the filing of the petition**, the **trustee may only file**, cure, or perform, as the case may be, **before the later of**—
>
> > (1) the **end of such period**, including any suspension of such period occurring on or after the commencement of the case; or
> >
> > (2) **60 days after the order for relief**.

However, the State Court Decision/Judge is in an action brought against the Debtor for which the automatic stay applies and appears not to be subject to the above.

The court is presented with a conflict – the Chapter 7 Trustee exercising his business judgment and acting with the advice from his legal counsel seeks to administer the assets of the bankruptcy estate in a certain way; and the Debtors seeks to administer them differently and launch a multi-front litigation against many persons.

At the hearing, Counsel for the Trustee requested that this hearing be continued until after the hearing on the proposed settlement that would, if approved, moot this Objection.

Motion to Approve Settlement

On June 17, 2021, the court approved Trustee's Motion to Approve Settlement with Steven C. Sanders and Associates. Dckt. 307. The order was entered on June 21, 2021. Dckt. 316.

The court having approved Trustee's settlement with Creditor regarding this claim, the Objection is moot.

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 Objection to Claim of Steven C. Sanders, Sanders & Associates ("Creditor"), filed in this case by Shon Jason Treanor and Jill Diana Treanor, the Chapter 7 Debtor, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 9-1 of Creditor is moot, the court having approved the Chapter 7 Trustee's Motion to Approve Settlement with Creditor.

2. **21-21424-E-7** **ROBERT MOHR** **MOTION TO ABANDON**
DEF-3 **David Foyil** **6-4-21 [34]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 4, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Motion to Compel Abandonment is granted.

After notice and a hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or is 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 Robert B. Mohr ("Debtor") requests the court to order Kimberly J. Husted ("the Chapter 7 Trustee") to abandon the following:

1. personal property commonly known as Brendan Mohr Insurance Agency, Debtor's business operated as a sole proprietorship and

2. real property commonly known as 4141 Sottile Lane, Shingle Springs, California.

("Property"). The Declaration of Robert B. Mohr has been filed in support of the Motion. Dckt. 36. Debtor asserts that there is no non-exempt value or assets derived from the business. *Id.*, ¶ 7. As to the

real property, Debtor testifies that the value of this asset is $565,000, encumbered by Wells Fargo Home Mortgage in the amount of$385,088.83 and the equity for this asset is fully exempted. *Id.*, ¶ 11.

Trustee has no opposition to the relief requested. Trustee's June 24, 2021 Docket Entry Statement.

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 caused by retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

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 to Compel Abandonment filed by Robert B. Mohr ("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 granted, and the Property identified as
>
> 1. personal property commonly known as Brendan Mohr Insurance Agency, Debtor's business operated as a sole proprietorship, and
>
> 2. real property commonly known as 4141 Sottile Lane, Shingle Springs, California.
>
> and listed on Schedule A / B by Debtor is abandoned by the Chapter 7 Trustee, Kimberly J. Husted ("Trustee") to Robert B. Mohr by this order, with no further act of the Trustee required.

3. **20-24123-E-11** **RUSSELL LESTER** **AMENDED MOTION TO EMPLOY**
FWP-27 **Tom Willoughby** **CHARTER REALTY AS BROKER(S)**
3 thru 5 **6-11-21 [681]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on June 11, 2021. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Employ is xxxxx.

Russell Wayne Lester ("Debtor in Possession") seeks to employ Charter Realty ("Broker") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Broker to list the MacQuiddy Ranch and list additional properties without the need for additional orders approving employment. Dckt. 662.

Moreover, Debtor in Possession seeks the following related relief:

1. An order which provides that (a) all proposed sales of properties owned by the Debtor in Possession are subject to Bankruptcy Court approval with over bidding, and (b) all fee commissions from approved sales sought by the Broker shall be subject to Bankruptcy Court approval pursuant to section 328 of the Bankruptcy Code;

2. To deem the Listing Agreement modified to incorporate all the provisions of the Employment Order.

Id., at 1-2.

Debtor in Possession argues that Broker's appointment and retention is necessary to assist Debtor in Possession to market, list, and sell the MacQuiddy Ranch and certain other real estate properties. Debtor in Possession has selected Broker in part based on their reputation in the farm community.

Under the terms of the Listing Agreement, Charter Realty will provide real estate brokerage services, including advisement regarding the marketing, listing, and sale of the MacQuiddy Ranch and other Estate Real Property to the extent the Court approves such expansion of the Listing Agreement and the Debtor in Possession elects to list such properties during the pendency of the bankruptcy case. Dckt. 665.

Ward Charter, a Broker Associate of Charter Realty, testifies that he/Charter Realty will provide real estate brokerage services, including advisement regarding the marketing, listing, and sale of the MacQuiddy Ranch and other Estate Real Property to the extent the Court approves such expansion of the Listing Agreement and the Debtor in Possession elects to list such properties during the pendency of the bankruptcy case. Ward Charter testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Amendment to the Motion to Employ

Debtor in Possession filed an Amendment to the Motion to Employ on June 11, 2021. Dckt. 681. The Amendment requests the following:

1. That upon the Effective Date of the Plan, the Listing Agreement shall be automatically assigned to the SPE as more fully described in the Plan and the Amendment to Motion, filed concurrently herewith;

2. That upon the assignment of the Listing Agreement to the SPE, the employment of the Broker by the Debtor in Possession shall be terminated, and shall be automatically deemed to be fully assumed by the SPE;

3. That creditors and parties in interest who oppose the Motion as amended, be authorized to appear, and comment on or oppose the Motion at the hearing;

4. To provide such other relief as is just and appropriate in the circumstances of this case.

First Northern Bank Opposition

Creditor FNB filed an opposition on June 17, 2021. Dckt. 689. FNB opposes the motion on the following grounds:

A. Seeing that as of July 1, 2021, the SPE will be formed and the Independent SPE Manager (now Hank Spacone) will be appointed and will embark upon fulfilling his duties under the Plan, there is no reason for Debtor in Possession to employ the Broker at this time.

B. The Listing Agreement was signed by signed by Mr. and Mrs. Lester as Owners instead of Mr. Lester as Debtor in Possession for the Estate and there is no mention that the Lester bankruptcy Estate is the owner of the MacQuiddy property.

C. It is not possible for the Debtor in Possession to close a sale prior to July 1, 2021 where there is no indication that Debtor in Possession has entered into a Purchase and Sale Agreement for the Property. No Motion to Sell has been filed with the court for the sale of such property.

D. Creditor questions Debtor in Possession attempting to rush the employment when the SPE Manager will be taking over soon.

E. The Amended Plan, which was the result of extensive negotiations, including the assistance of this court, now controls the duties and obligations of the parties and the SPE Manager soon to take over control is better suited to move ahead with the process of the sale of the properties and once they are sold distribute the proceeds according to that stated in the Amended Plan.

F. Approval of this employment may complicate and interfere with the Amended Plan and frustrate the work to be done by SPE Manager.

G. Debtor in Possession presents no legal or business justification for this Motion to be granted.

DISCUSSION

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being

anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Charter Realty as Broker for the Subchapter V Estate on the terms and conditions set forth in the Listing Agreement filed as Exhibit 1, Dckt. 665. Approval of the 4% commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

In their Reply, Debtor in Possession explains that the Motion has been filed in order to support the SPE Manager given that the Broker currently has in hand three offers for the MacQuiddy Ranch and as such approving employment now will be allow the SPE Manager to step into "an advantageous position regarding the liquidation of the MacQuiddy Ranch." Reply, ¶ 2, Dckt. 707. Debtor in Possession notes that due to the high voltage powerlines that traverse the property the offers received are a good value and any further marketing is not likely to result in better offers. *Id.*, ¶ ¶ 2-3. Debtor in Possession points the court to the amendments submitted in order to address FNB's concerns which state that if no sale if no sale is executed prior to the Effective Date, the listing agreement will be terminated and assigned to Hank Spacone. *Id.*, ¶ ¶ 5-6. According to Debtor in Possession, Mr. Spacone will be attending the hearing and intends to retain Broker whether through an assignment of the listing agreement or through a new listing agreement. *Id.*, ¶ 6.

The court understands Creditor FNB's concerns. At this juncture, Mr. Spacone starts his role as SPE Manager on July 1, 2021, the same date as the hearing on this Motion. The court is also concerned that allowing for Debtor in Possession to hire people when the SPA Manager is about to take on his role, may create the appearance that Mr. Spacone is just a "cardboard" cut out with Mr. Lester actually being the one running the show. The court is sure this is not the case here. But the bankruptcy court and the bankruptcy code require transparency.

However, there being three offers on the table already obtained by Broker and Debtor in Possession indicating that Mr. Spacone will be retaining Broker, Debtor in Possession has shown there is good cause to allow for this employment.

DECISION

On the one hand, by the time of the July 1, 2021 hearing, the Debtor in Possession will not have any ability to sell the property, contract with someone to sell the property, or contract with a broker to market the property. The person with those rights and powers will be Mr. Spacone, the SPE Manager. The SPE was sent up specifically to get the Debtor out of management and control.

In the Reply, the Debtor in Possession states that he has engaged the services of the Broker and the Broker has been working to try and sell the property before the effective date at which point the property goes into the SPE and Mr. Spacone has all the rights and powers to sell. Debtor in Possession did not obtain authorization to hire such a professional, with the Listing Agreement dating back to May 25, 2021, so the requested relief is to grant thirty-seven day retroactive authorization.

In the Reply, based on information and belief, it is asserted that:

> Based on information and belief, Mr. Spacone will be present at the July 1, 2021, hearing and it is believed that Mr. Spacone will inform the Court that he intends to retain Ward Charter whether through an assignment of the listing agreement or through a new listing agreement.

Reply, p. 2:23-26; Dckt. 707. That may be true, but no such consent or concurrence has been filed by Mr. Spacone. Additionally, in saying that Mr. Spacone intends to retain the Realtor either through an assignment of the contract or a new one, granting of this Motion would appear to force Mr. Spacone to take the Debtor in Possession's agreement or face a breach of contract claim if Mr. Spacone determines that he does not want to employ the Realtor.

Most likely, the court anticipates that Mr. Spacone will be in court (in person or telephonically) for the July 1, 2021 hearing and support the employment of the Realtor as the professional for Mr. Spacone, the SPE Manager.

At the hearing, **xxxxxxx**

~~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 to Employ filed by Russell Wayne Lester (" 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 Employ is xxxxx.~~

~~**IT IS FURTHER ORDERED** that Debtor in Possession is authorized to employ Charter Realty as Broker for Debtor in Possession on the terms and conditions as set forth in the Listing Agreement filed as Exhibit 1, Dckt. 665.~~

~~**IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.~~

~~**IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.~~

~~**IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by broker in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.~~

4. **20-24123-E-11 FWP-30** **RUSSELL LESTER** **MOTION TO MODIFY CHAPTER 11 PLAN**
6-21-21 [696]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, Receiver, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on June 21, 2021. By the court's calculation, 10 days' notice was provided. The court set the hearing for June 21, 2021. Dckt. 650.

The Motion to Modify the Amended Chapter 11 Plan is granted.

11 U.S.C. § 1127(e) permits a debtor to modify a plan after confirmation. The Chapter 11 debtor, Russell Wayne Lester ("Debtor in Possession"), an order authorizing him to modify certain portions of the Debtor in Possession's Amended Plan (Dated May 18, 2021) [Dckt. 605] (the "Amended Plan").

According to Debtor in Possession, in collaborating on finalizing the documents necessary to implement the Amended Plan, the Debtor in Possession, First Northern Bank of Dixon, and Prudential Insurance Company of America have identified several provisions of the Amended Plan that require modification. The parties have also identified typos and grammatical errors that require correction.

Debtor in Possession has filed with the court a redline of the portions of the Amended Plan sought to be modified. Exhibit 1, Dckt. 698. Debtor asserts the following:

A. The proposed modifications to the Amended Plan are the product of extensive negotiations between the interested parties and will not adversely affect interested parties.

B. The proposed modifications to the Amended Plan sought for approval are necessary to implement the Amended Plan and are consistent with the intent of the Amended Plan.

C. The proposed modification in front of the court at this time are not final as additional issues remain. A final modification or revision will be filed prior to the hearing.

D. One specific document that has not been finalized is the SPE Farming Lease. The parties are working to resolve the "rent" issue on that lease, which is a crucial plan feasibility issue.

E. The Debtor in Possession intends to file a Modified Amended Plan of Reorganization that incorporates therein all proposed modifications to the Amended Plan and the final Plan Supplement Documents.

F. If this Motion is granted, the Debtor in Possession will request that the Order approving the Motion attach the Modified Amended Plan of Reorganization so that there is a single, integrated document reflecting all operative provisions.

Motion, ¶ ¶ 9-13.

No opposition to the Motion has been filed and the amendments seek to clarify terms within the Amended Plan which the relevant parties collaborated in identifying and addressing. The proposed modifications to the Amended Plan comply with 11 U.S.C. §§ 1122, 1123, and 1125 and Debtor in Possession is authorized to modify the Amended Plan as provided by the final modification or revision filed on Xxxxxx xx, 2021 (Dckt. xx).

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 to Modify the Amended Chapter 11 Plan filed by the debtor in possession, Russell Wayne Lester, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the Second Amended Plan of Reorganization, a copy of which is attached hereto as Addendum A, is the current confirmed Chapter 11 Plan in this case as of July 1, 2021.

5. **20-24123-E-11 FWP-28** **RUSSELL LESTER Tom Willoughby** **MOTION TO APPROVE TOLLING AGREEMENT 6-3-21 [668]**

Final Ruling: No appearance at the July 1, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on June 3, 2021. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Approval of Tolling Agreement is granted.

Russell Wayne Lester, Debtor in Possession, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with George Lester dba Sequoia Farms and George Lester, individually ("Settlor"). The agreement addresses the tolling of any action related to disclosed pre-petition transfers from Debtor in Possession to Settlor, who are insiders.

The Amended Plan provides that any avoidance to recover transfer from the Debtor in Possession to insiders was assigned to the Lester Family Trust, with the trustee having the sole and exclusive responsibility to investigate and bring such actions. Dckt. 605.

Movant and Settlor have agreed, subject to approval by the court, to the following terms and conditions as summarized in the Motion (the full terms of the agreement are set forth in the Tolling Agreement filed as Exhibit 1 in support of the Motion, Dckt. 670):

A. During the term of the Tolling Agreement, all applicable statutes of limitations and other defenses based upon the passage of time, as they existed on May 27, 2021, shall be tolled with respect to any cause of action, claim, counter-claim, or cross-claim, however asserted, hereafter brought by any of the parties to the Tolling Agreement against any of the other parties in connection with, relating to, or arising from any preferential payment and/or fraudulent conveyance claim.

B. On termination of the Tolling Agreement, all applicable statutes of limitations and other defenses based on the passage of time otherwise tolled by the Tolling Agreement shall again commence running; provided, however, that in computing any period of time under such statute of limitations or other defenses, the tolling period specified by the terms of the Tolling Agreement shall be excluded.

C. The tolling period agreed to shall commence on July 1, 2021 and shall continue through and including December 31, 2026. This tolling period may be extended by agreement of the parties.

DISCUSSION

Debtor in Possession points the court to Bankruptcy Code § 105(a) for their contention that this court has the power to approve this agreement. 11 U.S.C. § 105(a) provides that:

> § 105. Power of court
>
> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Debtor in Possession argues that the Agreement is the product of the Debtor in Possession's reasonable exercise of his business judgment and consistent with the intent of the Amended Plan. First, the Amended Plan allows for the tolling of any action regarding the Potential Avoidable Transfers. Moreover, Debtor in Possession argues that an avoidance action to avoid the Potential Avoidable Transfers is entirely unnecessary under the Amended Plan, where a successful reorganization will provide for the full payment of all creditors; and if not, the sale of estate real property as provided for in the Amended Plan will result in sufficient proceeds to pay the general unsecured creditors in full.

Debtor in Possession has established the need for an order approving this agreement with Settlor to toll the date for when an action related to the avoidance of transfers may be filed.

Based on the evidence before the court, the court determines that the Tolling Agreement is reasonable and necessary. The Motion is granted.

No other relief is granted.

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 to Approve the Tolling Agreement between Russell Wayne Lester, the Debtor in Possession, and George Lester, dba Sequoia Farms and

George Lester, individually having been presented to the court, the terms of the confirmed Chapter 11 Plan authorizing the Debtor in Possession, as the successor in interest, to certain rights and claims, to enter into tolling agreements, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and the Debtor in Possession is authorized to enter into the Tolling Agreement filed as E Exhibit 1 in support of the Motion (Dckt. 670).

6. **20-20175-E-11 HLG-2** **HERBERT MILLER** **Judson Henry** **MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY** **6-3-21 [227]**

DEBTOR DISMISSED: 11/16/2020

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on June 3, 2021. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Confirm Absence of the Automatic Stay is xxxxx.

Creditors FourWs, LLC, Dan Walcott, Deryk Walcott, Julie Walcott, and Thomas Wilson ("Movant") moves the court for an order confirming that the automatic stay is not in effect in this case pursuant to 11 U.S.C. § 362(j). Specifically, Movant requests that the court determine that the automatic stay terminated as to Movant on February 12, 2020, i.e., the 30th day after this case was filed on January 13, 2020.

Movant argues that they were not bound by the stay because Debtor failed to serve any of the Movant with the Motion To Extend the Stay filed by Debtor on January 16, 2020. Further adding that a Motion to Extend the Stay is governed by Federal Rule of Bankruptcy Procedure 9014 which expressly states that service is required as provided by Federal Rule of Bankruptcy Procedure 7004. Given Debtor's failure to serve Movant, the court did not have personal jurisdiction over Movant and this failure deprived Movant of due process (notice and opportunity to be heard) with respect to the court's extension of the automatic stay. Thus, the automatic stay as to Movant terminated on February 12, 2021.

DISCUSSION

Section 362 of the Bankruptcy Code provides in part:

> (a)Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
>
> > (1)the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S. Code § 362. The stay takes effect upon filing, without the need for further action. As this court previously addressed in *Sillman v. Walker,*

> The automatic stay is just that, automatic, with no obligation on a debtor to affirmatively enforce the stay. **When a creditor has notice of a bankruptcy case, it is the creditor's burden to determine the extent of the automatic stay and seek such relief as is appropriate.** Collier On Bankruptcy, Sixteenth Edition, ¶ 362.U2; *Carter v. Buskirk (In re Carter)*, 691 F.2d 390 (8th Cir. 1982); *Hillis Motors v. Hawaii Automobile Dealers' Association (In re Hillis Motors)*, 997 F.2d 581, 586 (9th Cir. 1993) ("Where through an action an individual or entity would exercise control over property of the estate, that party must obtain advance relief from the automatic stay from the bankruptcy court. *Carroll v. Tri-Growth Centre City Ltd. (In re Carroll)*, 903 F.2d 1266, 1270-71 (9th Cir. 1990).")

Sillman v. Walker (In re Sillman), Nos. 09-22188-E-13, 12-2023, 2014 Bankr. LEXIS 292, at *22-23 (Bankr. E.D. Cal. Jan. 21, 2014) (emphasis added).

The automatic stay sweeps broadly, enjoining the commencement or continuation of any judicial, administrative, or other proceedings against the debtor, enforcement of prior judgments, perfection of liens, and "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6). "The automatic stay created upon the filing of a bankruptcy petition … does not require **actual notice** to be effective and, for the most part, prevents a creditor from taking any action to collect a pre-petition debt regardless of notice." *Vargason*, 260 B.R. 488, 492 (Bankr. D.N.D. 2001)(emphasis added).

This court has also discussed the concept of notice of the bankruptcy and the obligations of parties, stating:

> The Ninth Circuit revisited this issue in *40235 Washington Street Corporation v. Lusardi (In re Lusardi)*, 329 F.3d 1076 (9th Cir. 2003), addressing a county tax sale of real property which occurred after a bankruptcy case was filed, **with neither the county nor the purchaser having any knowledge of the bankruptcy case.** The Ninth Circuit concluded that because the tax sale occurred

> while the bankruptcy case was pending, the sale was void, and that the debtor, not the purchaser, was the owner of the real property. This ruling finding that the sale was void was issued more than 12 years after the sale had occurred and notwithstanding the county not having refunded the purchase money paid by the buyer at the tax sale.

In re Sillman, at *20 (emphasis added). Thus, creditors who wish to take action against a debtor or property which is subject to the automatic stay "[h]ave the burden of obtaining relief from the automatic stay." *Id.*, at 19-20. This is discussed in 3 Collier on Bankruptcy ¶ 362.02 (16th 2021) as follows (emphasis added):

> ¶ 362.02 Effective Time of Stay and Notice
>
> **The stay is effective automatically and immediately** upon the filing of a bankruptcy petition, whether voluntary, joint or involuntary. **Formal service of process is not required**, and **no particular notice need be given in order to subject a party to the stay**. In certain limited situations involving repeat bankruptcy filings, the stay does not arise automatically. At least one court has held that, in unusual cases involving abuse of the bankruptcy court's jurisdiction, the stay might not apply. But a creditor acting in reliance on such an exception does so at its peril.
>
> **In general, actions taken in violation of the stay will be void** [which is established Ninth Circuit Court of Appeals decisional law], or at least voidable, even where there was no actual notice of the existence of the stay. Violation of the stay is punishable as contempt of court. Particularly if the violation is willful, the court may punish the violator for contempt and take other appropriate steps to negate the impact of the improper action. In addition, if the debtor is an individual who has been injured by a willful violation of the stay, a court may award damages under section 362(k). **A party that has received notice of the bankruptcy case**, even if only oral notice, **can be sanctioned for violation of the stay**. If there are doubts about the veracity of the notice, it is incumbent upon the party receiving notice to determine for itself, before acting, whether a case has been filed.

See Schwartz v. United States (In re Schwartz), 954 F.2d 569, 574-575 (9th Cir. 1991).

This principle that the automatic stay is effective as to the world, with or without notice, and acts taken in violation of the stay are void was recently discussed by the Ninth Circuit Court of Appeals in *CitiMortgage, Inc. v. Corte Madera Homeowners Ass'n*, 962 F.3d 1103, 1110 (9th Cir. 2020), which states:

> On appeal, Citi reiterates the complaint's allegation that the notices themselves violated the automatic stay, that the notices must be deemed void as a result, and that the subsequent foreclosure sale must be set aside for lack of adequate notice. *See Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992) ("[V]iolations of the automatic stay are void, not voidable.").

> The filing of a bankruptcy petition automatically stays "actions by all entities to collect or recover on claims" against the debtor and the property of the estate. *Burton v. Infinity Capital Mgmt*., 862 F.3d 740, 746 (9th Cir. 2017). The stay is "effective against the world, regardless of notice." *Morris v. Peralta (In re Peralta)*, 317 B.R. 381, 389 (B.A.P. 9th Cir. 2004). . . .

Movant argue that the automatic stay did not apply to them after 30 days from the filing of the bankruptcy petition because Debtor did not provide them with notice of the Motion to extend the automatic beyond those 30 days. Movant alleging that this lack of notice was a violation of their due process to be heard. Movant's arguments are disingenuous. As explained above, "the automatic stay is just that, automatic, with no obligation on a debtor to affirmatively enforce the stay." In this case, Debtor requested the stay within the prescribed time and such extension was granted. But other than that, the assumption is that the stay is in place and is enforceable.

The court finds that as of no later than April 2020 and continuing thereafter, Movant had knowledge of the January 2020 bankruptcy filing, the automatic stay going into effect in January 2020 with the filing of the bankruptcy case. In his Declaration, Debtor states that Movant attended the Meeting of Creditors in April 2020 and perhaps even the May 2020 continued Meeting of Creditors. When Movant participated in the bankruptcy as stated by Debtor, which Movant has not denied, Movant was on notice.

Notwithstanding notice of the petition and thus existence of the stay, Movant chose to file a lawsuit in Placer County in June 2020 and served Debtor in August 2020. Both of the acts occurring while Debtor was under the protection of the stay. Debtor's case was dismissed in November 2020.

Movant now comes and seeks to assert that the stay did not apply to them a year and two months after having notice of the bankruptcy, a year after filing the lawsuit in violation of the stay and seven months after Debtor's case was dismissed Movant files this Motion. The court is having a difficult time in seeing any good faith from Movant in waiting such a long time to seek "clarification" as to the stay.

As addressed above, the automatic stay goes into effect automatically upon the commencement of the bankruptcy case and applies irrespective of whether a creditor or other person has knowledge of the bankruptcy case. Congress provides in 11 U.S.C. § 363(c)(3) that under a specified circumstance that the automatic stay, which goes into effect without notice to creditors or other persons, will terminate as to the Debtor thirty days after a case is filed unless extended by order of the court 11 U.S.C. § (c)(3)(a).

Congress also empowers the bankruptcy judge to extend the automatic stay, that is in effect without notice to creditors or other persons, as it applies to the Debtor in 11 U.S.C. § 362(c)(3)(B). Such stay may be extended on motion, "upon notice and a hearing." 11 U.S.C. § 362(c)(3)(B). Congress further defines the terms "'after notice and a hearing', or similar phrase as:

> In this title—
>
> (1) "after notice and a hearing", or a similar phrase—
>
> (A) means after such notice as is appropriate in the particular circumstances, and

such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if—

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;
. . . .

11 U.S.C. § 102(1).

Such authority does not, and Congress cannot, vitiate the Due Process rights under the United States Constitution, but it signals that Movant's contention that any extension of the existing statutory automatic stay, which existing statutory automatic stay is effective without notice or hearing, must be void unless such extension was granted only after a noticed hearing.

Here, the automatic stay went into effect on January 13, 2020. Petition, Dckt. 1. The Motion to Extend the Stay as to the Debtor was filed on January 13, 2020, three days later. Movants are not listed on the Certificate of Service or on the Verification of Master Address List filed by Debtor. Dckts. 14, 3. Debtor provides testimony why he did not list Movants as a creditor, stating that he did not believe he had any personal liability for a loan made to a limited liability company. Dckt. 236.

On February 11, 2020 the order extending the existing statutory automatic stay that went into effect on January 13, 2020, was entered. Dckt. 31.

It was not until April 17, 2020, three months after the bankruptcy case was filed and two months after the order extending the existing statutory automatic stay was entered that movant FourWs, LLC filed Proof of Claim 8-1. The Claim stated is for $245,000 and is based on a "promissory note." POC 8-1. This Proof of Claim is signed by Daniel E. Walcott, identified as the manager of FourW's LLC.

Attachment 1 to Proof of Claim 8-1 is a Loan Agreement and Promissory Note between Schmook Ranch, LLC ("Borrower") and FourW's LLC ("Lender"). Paragraph 3 of the note states:

3. Non-Recourse. This Loan shall be without recourse to any person or entity except the Property and proceeds from sale or other disposition of the Property.

The Note is signed for Schmook Ranch, LLC by "Herb Miller, Manager."

On its face, Proof of Claim 8-1 supports Debtor's statement that he had no knowledge that Movant was a possible creditor to be included on the Schedules or Master Mailing List.

Though having actual knowledge of the bankruptcy case sometime before April 17, 2020,

FourW's LLC and Daniel Walcott had actual notice of this bankruptcy case, as well as constructive notice of the statutory automatic stay imposed by Congress. The court notes that FourWs, LLC does appear on the Certificate of Service for the Notice of Continued Meeting of Creditors that was served on March 2, 2020. Dckt. 36.

In extending the statutory automatic stay the court did not impose the stay, the court did not enjoin Movant, the court did not adjudicate rights and interests of Movant. Rather, the court "merely" extended the statutory automatic stay, imposed by Congress as a matter of federal law, which already existed, as to the world - whether such bankruptcy case was known or unknown.

Though the stay is automatic, statutory, and imposed without notice, Congress has not left persons acting innocently in violation of the stay bereft of relief, but has provided a statutory basis for annulling the automatic stay - allowing the stay that did exist to be retroactively annulled so that no violation of the stay occurred. 11 U.S.C. § 362(d), and see 3 Collier on Bankruptcy ¶ 362.07[1] (16th 2021).

While citing to Due Process and the basic standard that for relief granted to be effective against a person the must be afforded their "day in court," Movant does not address that the statutory stay effective against the world that is imposed Congress without notice or a right to dispute, is not effective against the world by order of the court. The statutory stay applies to everyone and if extended, applies to everyone whether or not they had notice of the statutory stay. The world is put on constructive notice that the statutory automatic stay comes into existence upon the filing of a bankruptcy case.

Here, the Docket shows that FourW's, LLC and Daniel Walcott had actual notice of the bankruptcy case some time prior to the March 2, 2020 mailing of the Notice of Continuance of First Meeting of Creditors. As such, they and their counsel could easily review the Docket, see that the automatic stay was extended as to the world, and then seek relief from the stay if appropriate.

FourW's LLC and Daniel Walcott, and their counsel, appear to chosen not to seek such relief.

The order extending the statutory automatic stay imposed by Congress did not impose any greater relief for Debtor or alter any rights of Movant, other than continuing in effect the statutory automatic stay as it existed as to Debtor against the entire world. The world does not have to be given notice of the statutory automatic stay imposed by Congress to have it apply to them, whether they know of the bankruptcy or not, or whether a debtor knows that a person in the world believes they are a creditor of Debtor. Movant has not provided the court with any basis for the court to neuter the statutory automatic stay imposed by Congress by concluded that an extension of the existing statutory stay imposed by Congress should only apply to that portion of the world that receives notice of the request to extend the existing statutory stay or the portion of the world (which in this case includes Movant) who have actual knowledge of the bankruptcy case.

The court also notes that the Motion does not disclose what conduct of Movant is asserted to not be subject to the extension of the stay as to the Debtor.

As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay terminates as to Debtor, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay never goes into effect in the bankruptcy case when the conditions of that section are met. Congress clearly knows the difference between a

debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor.

This court's analysis of the plain language of 11 U.S.C. § 362(c)(3) in *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 229-230 (5th Cir. 2019), which states:

> Courts are divided on the proper interpretation of § 362(c)(3)(A) and the import of the phrase "with respect to the debtor." The Fifth Circuit has not addressed the issue. The majority view, adopted by three bankruptcy courts in this circuit, interprets the provision to terminate the stay as to actions against the debtor but not as to actions against the bankruptcy estate. According to the majority, the plain meaning of the provision dictates such an interpretation. The minority view, adopted by the First Circuit as a matter of first impression in the courts of appeals, "reads the provision to terminate the whole stay." According to the minority, the provision is ambiguous; therefore, congressional intent is determinative. After reviewing the legislative history surrounding the provision and the BAPCPA, the minority conclude that Congress intended the provision to terminate the stay in its entirety.
>
> We adopt the majority position, which has already been applied in the district where Rose has repeatedly filed for bankruptcy. Specifically, after reviewing the plain language of the provision and the context of the provision within § 362, we conclude that § 362(c)(3)(A) terminates the stay only with respect to the debtor; it does not terminate the stay with respect to the property of the bankruptcy estate.

Even if Movant was correct that the statutory automatic stay effective against the world, whether the world had actual notice or not of the say, could not be extended as to the world unless the entire world had notice of a request to have the statutory stay extended, this court has no idea as to what conduct Movant seeks to have determined not to be effected by the statutory automatic stay. The Motion gives no hint of the conduct at issue. No declaration is provided by any of the Movant parties. The only testimony is Movant's counsel to authenticate pleadings that are in this court's file. It may be the conduct is in violation of the automatic stay as to the bankruptcy estate that is not subject to termination.

The Motion is denied.

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 to Confirm Absence of the Automatic Stay filed by Creditors FourWs, LLC, Dan Walcott, Deryk Walcott, Julie Walcott, and Thomas Wilson ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied. Such denial is without prejudice to Movant seeking an annulment or other relief from the stay as provided in 11 U.S.C. § 362(d).

7. 20-24311-E-13 TBG-1 — JASON DIVEN, Bonnie Baker — CONTINUED MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY — 4-27-21 [84]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on April 27, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Sanctions for Violation of the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion for Sanctions for Violation of the Automatic Stay is xxxxx.

The present Motion for Sanctions for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a) and for damages pursuant to 11 U.S.C. § 362(k) and the inherent power of this court has been filed by Jason Diven ("Movant"). The claims are asserted against Numa Corp. aka Cedarville Rancheria of No. Paiute Indians and its counsel, Jack Duran, Esq. ("Respondent" or "Creditor").

LEGAL STANDARD

A request for an order of contempt by a debtor, United States Trustee, or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. FED. R. BANKR. P.

9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283–85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to willful violations of the stay, and then typically to actual damages, including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (a Congressionally-created injunction) pursuant to its inherent power as a federal court. *Sternberg v. Johnston*, 595 F.3d 937, 946 (9th Cir. 2009). FN.1.

FN.1. Bankruptcy courts have jurisdiction and authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548–49 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see* 11 U.S.C. § 105(a). A bankruptcy judge is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see In re Lehtinen*, 564 F.3d at 1058.

Attorneys' fees may be recovered for work involved in bringing about an end to the stay violation and for pursuing an award of damages. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1101 (9th Cir. 2015). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

The automatic stay imposes an affirmative duty of compliance on the non-debtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151–52 (9th Cir. 1996). A party who acts in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191–92 (9th Cir. 2003).

In addition, Congress provides in 11 U.S.C. § 362(a) & (k) additional relief for violation of the automatic stay, which may be requested by an individual debtor.

REVIEW OF MOTION

In asserting this claim pursuant to 11 U.S.C. § 362(a) & (k), Movant states with particularity (Federal Rule of Bankruptcy Procedure 9013) the following grounds for relief:

A. The request is made pursuant to 11 U.S.C. § 362(k) based on Creditor's actual knowledge of the Chapter 13 petition filed.

B. Respondent has continued legal proceedings in tribal court case no. CEO-CI-2019-002 by requesting a status conference and briefing schedule to determine the scope of the automatic stay in the tribal court.

C. The case has been continued despite Debtor's attempt to meet and confer and the stipulation to file any request for relief in the bankruptcy court.

Debtor requests the following relief:

1. An award actual damages of attorney's fees totaling $9,579;

2. An award for emotional distress damages of $2,657;

3. An award for punitive damages in an amount necessary to punish the willful acts of Creditor and its counsel, and to deter any further action without further order from this Court.

Motion, Dckt. 84.

Review of the Memorandum of Points and Authorities

In the Memorandum of Points and Authorities, Debtor argues that violations of the automatic stay are actionable against not only the client, but the attorney for that client that willfully violates the automatic stay on behalf of that client; pointing the court to *In re LeGrand*, 612 B.R. 604, 612 (Bankr. E.D. Cal. 2020) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396–97 (1993); *Link v. Wabash R. Co.*, 370 U.S. 626, 633–34 (1962); *Smith v. Ayer*, 101 U.S. 320, 325–26 (1879)).

Debtor alleges that both Creditor and counsel violated the automatic stay and are thus subject to damages by continuing litigation in the Tribal Case, despite actual knowledge of the bankruptcy proceedings.

Moreover, Debtor argues that Creditor is not entitled to raise sovereign immunity as a defense where courts have found that Indian Tribes cannot assert sovereign immunity in bankruptcy actions and the filing of a proof of claim constitutes waiver of sovereign immunity with respect to the entity's claim.

Evidence Presented

Movant has provided the Declaration of Jason Diven in support of the Motion. Dckt. 90. In his Declaration, Debtor testifies under penalty of perjury that he has spent $2,657.00 on mental health care due to Respondent's efforts at the Tribal Court; adding that he is "stressed, losing sleep, and ha[s] anxiety as a direct result of [Respondent]'s efforts to continue litigation" against him. *Id.*

Movant has also provided the Declarations of Daniel J. Griffin and Bonnie Baker in support of the Motion. Dckts. 86, 87. In their declarations, Counsels Griffin and Baker testify under penalty of perjury as to the attorney's fees and costs incurred to meet and confer, file pleadings in the tribal court case to preserve Debtor's rights and in connection with the instant motion, and appearances at the trial court.

Continuance and Appearances at May 11, 2021 Initial Hearing

Daniel Griffin, Esq., and Bonnie Baker, Esq., counsel for Debtor, and Jack Duran, Jr., Esq., counsel for Numa Corp., owned and operated by Cedarville Rancheria of Northern Paiute Indians, and the Rancheria (specially appearing) appeared at the May 11, 2021 hearing. The respective counsel

agreed that a threshold issue to address is the question of sovereign immunity for Numa Corporation, the Rancheria, and its counsel, and if such exists, whether it was waived.

For Phase 1 of this Contested Matter, the Parties agreed to the following briefing schedule on the issues of sovereign immunity, waiver, and the effect of Proof of Claim No. 6-1 filed in this case identifying he creditor as "Numa Corp AKA Cedarville Rancheria of No. Paiute Indians" (POC 6-1, Part 1, § 1):

> 1. On or before June 4, 2021, Numa Corporation and the Cedarville Rancheria of Northern Paiute Indians shall file and serve opposition pleadings relating to the issues of sovereign immunity, waiver of sovereign immunity, and the effect of Proof of Claim 6-1 filed in this case.
>
> 2. On or before June 18, 2021, Debtor shall file and serve Reply, if any, pleadings.
>
> 3. The continued hearing on the above issues shall be conducted at 10:30 a.m. on July 1, 2021.

The Parties also agreed on the record that a stipulation to stay the proceeding in the Tribal Court that are the subject of this Contested Matter, with the stipulation to be prepared by counsel for Numa Corporation and the Rancheria. The judge in the Tribal Court has requested that the parties address the issue of that court's jurisdiction in light of the bankruptcy case.

Supplemental Pleadings

Creditor NUMA Corp. (Amended Opposition)

Creditor filed an Opposition on June 4, 2021. Dckt. 109. The same day, Creditor filed an Amended Opposition. Dckt. 111. The court summarizes the Amended Opposition under the assumption that it replaces the one filed earlier the same day. Creditor argues that they are not in violation of the stay on the following grounds:

A. The stay does not apply to proceedings before foreign tribunals such as the Tribal Court in this case. Specifically in this case, the automatic stay does not apply because the dispute involves the construction of a building on Tribal land with tribal funds and it is the Tribal Court who has jurisdiction to solve this dispute. Referring the court to *In re Artimm, S.r.l.*, 278 B.R. 832, 841 (Bankr. C.D. Cal. 2002), Movant argues that even if the automatic stay applied, it is up to the Tribal Court to determine whether it is subject to the automatic stay.

B. The Tribal Court system is protected by the Tribe's sovereign immunity because the proceeding is one where the tribe is seeking to resolve an intra-tribal dispute within its own system and the stay cannot preclude the tribe from seeking to administer justice on local disputes through their own systems. Creditor points the court to *In re Nat'l Cattle Cong.*, 247 B.R. 259, 268 (Bankr. N.D. Iowa 2000) arguing that the Tribe did not waive its sovereign immunity when it filed the proof of claim, which

included a waiver disclaimer that for some reason was not docketed within the proof of claim.

C. The Tribe's request for a Status Conference and Briefing Schedule did not violate the automatic stay because these action did not infringe on this Court's authority or violate any rights of Debtor under the Bankruptcy Code. The Tribal Court also stayed the proceeding even though the case had been in litigation for close to a year by the time Debtor filed its bankruptcy petition. Creditor requesting the Tribal Court to examine its own jurisdiction is not a violation of the stay.

D. The Ninth Circuit case, *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1060–61 (9th Cir.2004), cert. denied, 543 U.S. 871 (2004), does not apply in this case because that case involved an inter-tribal matter (matter outside of the tribe's affairs) brought before a non-tribal court (the bankruptcy court). Here, the issue is whether a tribe can be precluded from seeking to resolve an intra-tribal matter in its own tribal court, within the exclusive jurisdiction of the Tribe. Applying *Krystal* to this case would be an egregious encroachment into the internal affairs of Creditor and the Tribe. If this court chooses to impose the stay over the internal affairs of the Tribe, the court would destroy principles of Tribal sovereignty, including the Tribe's ability to administer justice in local, intra-tribal disputes through its own court system. The imposition of the stay over the Creditor/Tribe goes against Supreme Court decisions recognizing Tribal sovereignty and Tribal authority over activities on reservation lands, citing to *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), where the Supreme Court lists several cases decided by that court directly addressing tribal sovereignty.

E. Thus, the court must determine that the automatic stay does not prevent the Tribal Court from assessing its own jurisdiction now does it prevent the Tribe from resolving the dispute with Debtor pending before the Tribal Court.

Debtor's Supplemental Response

Debtor filed a Reply on June 18, 2021 in further support of its Motion and addressing certain points raised by Creditor:

A. Allegations made in the Opposition regarding the merits of the underlying dispute should not be addressed by the court where a claim objection has not yet been filed.

B. Creditor has failed to present evidence that it is entitled to sovereign immunity where Creditor is a corporation formed by a tribe and has failed to present evidence that meets the "subordinate economic entity test." Movant points the court to *In re Whitaker*, 474 B.R. 687 (B.A.P. 8th Cir. 2012), which discusses the six factors test most commonly

applied to determine whether a related organization is sufficiently close to the tribe to assets its sovereign immunity:

> 1) The method of creation of the economic entities;
>
> 2) Their purpose;
>
> 3) Their structure, ownership, and management, including the amount of control the tribe has over the entities;
>
> 4) The tribe's intent with respect to sharing of its sovereign immunity;
>
> 5) The financial relationship between the tribe and the entities;
>
> 6) The policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether these policies are served by granting immunity to the economic entities.

In re Whitaker at 696–97.

C. Creditor fails to meet the factors test because Creditor has not explained the purpose of its formation; additional information is needed regarding Creditor's management, structure, or the Tribe's control over the entity; and no information is provided on the financial relationship between the Tribe and Creditor or how its receipt of non-tribal funds from HUD preserves its status as a purely tribal entity. Thus, Creditor should not be allowed to claim this affirmative defense.

D. Creditor's claim to sovereign immunity was abrogated by Congress through 11 U.S.C. § 106 because it specifically states that "notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in [§ 362]." Citing to *In re Russell*, 293 B.R. 34, 40 (D. Ariz. 2003), a governmental unit for purposes of this section includes Indian Tribes as they are domestic governments. Movant further arguing that when applying the appropriate tools of statutory interpretation Indian governments would be included in the list of government types in § 101(27). Applying the following shows that Indian government bodies and proceedings must be automatically stayed from collection activity by § 362(a): principle of *ejusdem generis*; courts should not create exceptions in addition to those specified by Congress; the purpose rule; and the cannon of constructions that lead to absurd or unreasonably harsh results are disfavored.

E. Ninth Circuit courts have rejected attempts by Indian Tribes to assert sovereign immunity in bankruptcy actions. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1060–61 (9th Cir. 2004); *In re Brown*, 2006 WL 6810938 * (B.A.P. 9th Cir.); *Jamestown S'Klallam Tribe v. McFarland*, 579 B.R. 853, 857–58 (Bankr. E.D. Cal. 2017). Other courts have found that tribal sovereign immunity defense was abrogated by § 106. *In re Platinum Oil Properties*, LLC, 465 B.R. 621, 642–44 (D.N.M. 2011) (finding tribe could not assert sovereign immunity after participating in the bankruptcy case and having its claim determined through a confirmed Chapter 11 plan); *In re Sandmar Corp.*, 12 B.R. 910 (D.N.M. 1981); *see generally In re Russell*, 293 B.R. 34 (Bankr. Ariz. 2003).

F. Creditor waived the defense of sovereign immunity by filing a proof of claim, which Creditor admits did not include the sovereign immunity disclaimer or any language related to it, and by engaging in significant participation in the bankruptcy. Movant points the court to several cases including the Ninth Circuit and the Supreme Court for the argument that filing a proof of claim constitutes waiver of sovereign immunity with respect to the entity's claim. *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998) (citing *Gardner v. New Jersey*, 329 U.S. 565 (1947); *In re Death Row Records, Inc.*, 2012 WL 952292 (B.A.P. 9th Cir. 2012) (citing *Gardner v. State of New Jersey*, 329 U.S. at 573); *In re Barrett Refining Corp.*, 221 B.R. 795, 811 (Bankr. W.D. Ok. 1998).

G. A review of *In re National Cattle Congress*, the case cited by Creditor, shows that the case does not apply to the instant situation. In that case, when a tribal creditor both filed a proof of claim and asserted sovereign immunity, the court stated:

> The posture of this case causes a conundrum for the Court. The Tribe asserts its sovereign immunity as a jurisdictional bar to this Court allowing Debtor to extinguish its lien through its Chapter 11 Plan. By filing the Proof of Claim, however, the Tribe appears to be "participating" in Debtor's reorganization. Having now acknowledged the Tribe's sovereign immunity, the Court concludes that continuing to maintain a Proof of Claim in this case would contradict the Tribe's assertion of immunity.
>
> The Tribe must now make an election between withdrawing its Proof of Claim or asserting an unqualified claim by removing the Waiver Disclaimer from the Proof of Claim as filed. Under Fed.R.Bankr.P. 3006,

> a creditor may withdraw a proof of claim as a matter of right unless an objection has been filed to the claim, the creditor has accepted or rejected a plan, or the creditor has otherwise significantly participated in the case.

In re National Cattle Congress, 247 B.R. 259, 268–69 (N.D. Iowa 2000); *In re Barrett Refining Corp.*, 221 B.R. 795, 810 (Bankr W.D. Ok. 1998).

Creditor in this case has not withdrawn its claim. Instead, Creditor has chosen to participate by filing to dismiss the case; filing a proof of claim; failing to object to the proposed Chapter 13 plans; failing to object to or appeal the confirmation of the plan and will receive payment through the plan. Thus, Creditor should not be rewarded for delay in asserting the sovereign immunity defense. *Stryker International, Inc. v. Resource Technology Corp.*, 2004 WL 609332 *3 (N.D. Ill.).

H. Counsel for Creditor is separately liable in committing willful violations of the stay when it assisted Creditor in continuing litigation despite knowledge of the stay and the court's order confirming the Chapter 13 plan. Attorneys can be held liable when they are responsible for the client's violation of the stay as stated in *In re LeGrand*, 612 B.R. 604, 612 (Bankr. E.D. Cal. 2020) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396–97 (1993); Link v. Wabash R. Co., 370 U.S. 626, 633–34 (1962); *Smith v. Ayer*, 101 U.S. 320, 325–26 (1879)). The court has the power to issue sanction against individuals violating the stay. *Goldberg v. Ellett*, 254 F.3d 1135, 1146–47 (9th Cir. 2001).

I. Counsel cannot assert the defense of sovereign immunity, has a separate and affirmative duty not to violate the stay, and cannot continue an action or proceeding without obtaining an order granting relief from the automatic stay.

DISCUSSION

Although Debtor's motion is bare in details encompassing only two pages, Debtor has pleaded with sufficient particularity that Respondent has violated the automatic stay by continuing litigation in a tribal court. Moreover, the declaration properly authenticated the documents filed at the tribal court showing that the litigation continues and that orders have been issued by the Tribal Court while Debtor is under the protection of this bankruptcy court.

In this case, Respondent had the opportunity of seeking relief from the automatic stay and yet they did not do so. A review of the court's docket for this case shows that Respondent filed a Motion to Dismiss requesting an order from this court to grant relief from the automatic stay on the basis of the

court's lack of subject matter jurisdiction over Respondent. See Dckt. 10. However, after the court rejected the proposed order and provided instructions for counsel to follow for filing a new motion, Respondent did not file any new pleadings. See Dckt. 21. Thus, Respondent has not been granted relief so that they may pursue the Tribal Court case.

At the previous hearing the parties agreed to continue the hearing and submit additional supplemental pleadings addressing the issues related to sovereign immunity, and the effect of Proof of Claim 6-1.

Phase 2: Sovereign Immunity,
Waiver of Sovereign Immunity, and the Effect of Proof of Claim 6-1

Here, NUMA Corporation, which as stated in its pleadings is also known as the Cedarville Rancheria of Northern Paiute Indians made the decision to file Proof of Claim 6-1 on November 19, 2021, and subjected the NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians to the jurisdiction of this federal court for such claim. NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians knowingly and intentionally filed Proof of Claim 6-1 to assert and enforce the claim therein in this federal court, thereby waiving Sovereign Immunity with respect to such claim. By coming into this court, NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians sought to have the benefits of the federal court jurisdiction that exists to obtain payment on an alleged obligation.

Beginning with 11 U.S.C. § 106, Congress expressly provides for a waiver of sovereign immunity for specified provisions of the Bankruptcy Code:

> § 106. Waiver of sovereign immunity
>
> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> > (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
> > . . .
>
> (b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

Established law in the Ninth Circuit addresses this issue concerning the statutory waiver of Sovereign Immunity by Native American Tribes, stating:

> Tribal sovereign immunity is not absolute, however. Congress may abrogate it and thereby authorize suit against Indian tribes. *Santa Clara Pueblo*, 436 U.S. at 58 (citing *United States v. Testan*, 424 U.S. 392, 399, 47 L. Ed. 2d 114, 96 S. Ct. 948

(1976)). Such an abrogation must be "unequivocally expressed," id., in "explicit legislation," *Kiowa Tribe*, 523 U.S. at 759. Abrogation of tribal sovereign immunity may not be implied. *Santa Clara Pueblo*, 436 U.S. at 58 (citing *Testan*, 424 U.S. at 399).

Identical language is used by courts in determining whether Congress has abrogated the sovereign immunity of states. *Seminole Tribe of Fla. v. Fla*., 517 U.S. 44, 55, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) ("In order to determine whether Congress has abrogated the States' sovereign immunity, we ask[,] . . . first, whether Congress has 'unequivocally expressed its intent to abrogate the immunity' " (citations omitted)); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000) (same); *see also Osage Tribal Council v. United States Dep't of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999) ("Conceding potential differences between tribal and state sovereign immunity, we note that courts have often used similar language in defining the requirements for waiver of [Eleventh Amendment state sovereign immunity]."); *Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1131 (11th Cir. 1999) (equating the standards applied in determining whether Congress abrogated "federal and state governments' protection from suit" and tribal sovereign immunity). While there are additional constraints on Congress's power to abrogate state sovereign immunity, we may look to state sovereign immunity precedent to help determine how "explicit" an abrogation must be, and do so in deciding the issue before us.
. . .
[S]ection 106(a) explicitly abrogates the sovereign immunity of all "governmental units." The definition of "governmental unit" first lists a sub-set of all governmental bodies, but then adds a catch-all phrase, "or other foreign or domestic governments." 11 U.S.C. § 101(27). Thus, all foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered "governmental units" for the purpose of the Bankruptcy Code, and, under § 106(a), are subject to suit.

Indian tribes are certainly governments, whether considered foreign or domestic (and, logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states). The Supreme Court has recognized that Indian tribes are " 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Potawatomi*, 498 U.S. at 509 (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 5 Pet. 1, 17, 8 L. Ed. 25 (1831)); *see also, Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (comparing Indian tribes to states and foreign sovereigns, and concluding that both states and Indian tribes are "domestic" sovereigns). So the category "Indian tribes" is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate.
. . .
Section 106(a) does not simply "authorize suit in federal court" under the Bankruptcy Code -- it specifically abrogates the sovereign immunity of governmental units, a defined class that is largely made up of parties that could claim sovereign immunity. So to recognize is not, as the Navajo Nation suggests,

> to imply an abrogation that is not explicit in the statute. Instead, reading § 106(a)'s express abrogation as reaching Indian tribes simply interprets the statute's reach in accord with both the common meaning of its language and the use of similar language by the Supreme Court. No implication beyond the words of the statute is necessary to conclude that Congress "unequivocally expressed" its intent to abrogate Indian tribes' immunity.
>
> Finally, we also note that, were Indian tribes not "govern-mental units" for the purpose of § 106(a), a tribe that voluntarily proceeded in federal court under the Code would not be a "governmental unit" under the other sections of the Bankruptcy Code, either. The sections applicable to "governmental units" are myriad, and include § 523 -- Exceptions to discharge -- which states: "A discharge under [certain sections] of this title does not discharge an individual debtor from any debt . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than [certain] tax "penaltiest." 11 U.S.C. § 523. Thus, although Indian tribes' sovereign immunity is abrogated by § 106(a), Congress has also provided certain special treatment to Indian tribes as governmental units within the Bankruptcy Code.

Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056, 1057-58, 1060 (9th Cir. 2004). While several other Circuits disagree with the establish law in the Ninth Circuit, the Ninth Circuit Court of Appeals has not revisited the ruling in *Krystal*.

NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians first question whether the Ninth Circuit Court of Appeals was correct in the *Krystal* Decision. Though NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians question such correctness, it is not the prerogative of a federal trial court to “reverse” the decision of a Circuit Court of Appeals.

While NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians correctly note the respect to be given for intra-tribal matters, the Supreme Court Decision cited, *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), it does not hold that Congress is prevented from abrogating Sovereign Immunity with respect to intra-tribal matters, but recognizes that tribal court jurisdiction may exist, that does not exclude parties from laws enacted by Congress. This is similar to how a state court may have jurisdiction for a matter, while at the same time a federal bankruptcy court has jurisdiction as granted by Congress pursuant to 28 U.S.C. § 1334.

Here, the provisions of 11 U.S.C. § 106(a) do not purport to strip a tribal court of its jurisdiction, but “merely” makes abrogates Sovereign Immunity for specific provisions of the Bankruptcy Code, including 11 U.S.C. § 362 - the Automatic Stay. With respect to Chapter 13 cases, the abrogation of Sovereign Immunity is applicable to sections including 11 U.S.C.:

§ 502 - Allowance of Claims or Interests and Objections to Claims

§ 503 - Allowance of Administrative Expenses

§ 505 - Determination of Tax Liability

§ 506 - Determination of Secured Claim Status

§ 1301 - Co-Debtor Stay

§ 1303 - Rights and Powers of a Chapter 13 Debtor (to exercise specified bankruptcy rights and powers given a trustee)

§ 1305 - Filing and Allowance of Post-Petition Claims

§ 1327 - Effect of Confirmation of a Chapter 13 Plan

Notably, Sovereign Immunity has not been abrogated for some very significant provisions of the Bankruptcy Code. This selective abrogation is described in *Collier on Bankruptcy* as follows:

> [1] Scope of Abrogation
>
> Rather than entirely eliminating the sovereign immunity of governmental units under the Bankruptcy Code, section 106(a)(1) constitutes a selective, though broad, abrogation provision. The selection of the 59 enumerated provisions expressly made applicable to governmental units shows that Congress chose to limit the abrogation of sovereign immunity to bankruptcy causes of action. Thus, it permits suits against governmental units to recover preferences and fraudulent transfers, avoid liens, enforce the automatic stay and discharge injunction, and determine the dischargeability of a debt, among other actions. Congress excluded, however, section 541 from the abrogation list, as a result of which government defendants (absent a waiver) are still permitted to assert sovereign immunity in proceedings brought by the estate to enforce a prepetition cause of action. Congress apparently did not want to allow the happenstance of a debtor's bankruptcy to permit the estate to obtain a recovery against a governmental unit that would not have otherwise been available outside of bankruptcy because of sovereign immunity.
>
> Section 106(a) does include section 542 among the provisions for which sovereign immunity is abrogated. This inclusion prevents a governmental unit from frustrating efforts to consolidate estate property in the bankruptcy court by holding onto it and asserting sovereign immunity as a shield against suit. Section 542, however, also provides that an entity that owes a debt that is property of the estate shall pay the debt to the trustee (or debtor). Because there is an uncertain line between suits under section 541 on a prepetition cause of action and a turnover suit under section 542 for the payment of a prepetition debt, a governmental unit's ability to defend on the ground of sovereign immunity may depend on how the court characterizes the suit.

2 Collier on Bankruptcy P 106.04 (16th 2021).

At issue in this matter now before the court is "only" the application of the automatic stay for which Congress has expressly, and without limitation, abrogated Sovereign Immunity. It may well be that the tribal court is the proper forum of choice to litigate the issues concerning the alleged liability.

Bankruptcy courts are often presented with such request and will defer to such determinations being made in the courts of other sovereigns, such as state court or tribal courts.

Waiver of Sovereign Immunity By
NUMA Corporation and the
Cedarville Rancheria of Northern Paiute Indians

On November 19, 2020, NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians chose to join these federal court proceedings by filing Proof of Claim 6-1. As discussed above, Congress has abrogated Sovereign Immunity with respect to claims and objections thereto (11 U.S.C. § 502. NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians "put its hand out" and said, we are in this case and pay us under the applicable federal bankruptcy laws.

The Ninth Circuit Court of Appeals has discussed waivers of Sovereign Immunity, noting that such waivers are not something that happen nonchalantly, "Waivers of tribal sovereign immunity must be explicit and unequivocal. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007)." *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087 (9th Cir. 2013).

In discussing the waiver of Sovereign Immunity by a state by voluntarily participating in litigation, 17A Moore's Federal Practice - Civil § 123.41 (2021) provides the following (emphasis added):

> [2] Participating in Litigation
>
> [a] Voluntary Invocation or Acceptance of Federal Court Jurisdiction
>
> **A state may waive its immunity by actively participating in litigation and not asserting** Eleventh Amendment **immunity**. However, a state **does not waive its immunity by appearing in federal court to protest federal jurisdiction**. Stated differently, a state **waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts or by conduct during the litigation that clearly manifests acceptance of the federal court's jurisdiction** or is otherwise incompatible with an assertion of Eleventh Amendment immunity. When the state **voluntarily invokes federal jurisdiction, the waiver extends not only to the cause of action, but also to any relevant defenses or counterclaims**. It also extends to the federal rules and procedures that govern litigation in federal court. Whether a particular set of state laws, rules, or activities amounts to a waiver is a question of federal law.
>
> The focus of the **inquiry is whether the state's action in litigation clearly invokes the jurisdiction of the federal court and not on the state's intention to waive immunity**. For example, a state waives its immunity by insisting that the state's position is identical to that of a non-state entity co-defendant, or by engaging in extensive discovery and inviting the district court to enter judgment on the merits without ever asserting the Eleventh Amendment. On the other hand, the Tenth Circuit held that a state that engaged in some discovery in the early stages of litigation but continued to assert its Eleventh Amendment immunity did

> not waive that immunity. The First Circuit held that the Commonwealth of Puerto Rico did not waive its Eleventh Amendment immunity by participating in years of litigation over Medicaid payments to health centers, because throughout the litigation, the Commonwealth's Secretary of Health repeatedly asserted the Commonwealth's Eleventh Amendment rights to litigate certain matters in its own courts or otherwise to protect its coffers from imposition of liability.

In this case, NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians invoked the jurisdiction of this federal court by filing Proof of Claim 6-1, which then results in that asserted obligation to be deemed allowed and to be paid, unless the debtor or trustee objects thereto. 11 U.S.C. § 502(a).

This act of filing the proof of claim is consistent with the Congressional waiver of Sovereign Immunity in 11 U.S.C. § 502, which is waived for filing a proof of claim (whether by the creditor or debtor) and adjudicating an objection to claim. Electing to waive sovereign immunity, to the extent it was not abrogated by Congress in 11 U.S.C. § 106, by filing a proof of claim is limited to expressly waiving for the claim and adjudication of the claim issues. Such is not a general waiver of Sovereign Immunity for all purposes. As stated by the Ninth Circuit Court of Appeals, "Waivers of tribal sovereign immunity must be explicit and unequivocal." *Maxwell v. County of San Diego*, 708 at 1087.

Scope of Alleged Violation of Stay

This Contested Matter presents an interesting dispute. The alleged conduct violating the automatic stay is "[r]equesting a status conference and briefing schedule to determine the scope of the automatic stay in the tribal court. . . ." Motion, p. 2:1-2; Dckt. 84. On the one hand this demonstrates that NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians were aware of the issue and were seeking a determination of federal Bankruptcy Law by a judicial tribunal. On the other hand, NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians were seeking the relief from the wrong tribunal, with Congress placing questions of bankruptcy core and non-core matters in the federal bankruptcy court, unless the federal judge determines that abstention is proper to have an issue determined in another forum. 28 U.S.C. § 1334(b), (c), (d), which provides (emphasis added):

> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, **the district courts** [the bankruptcy judges being a unit of the district court, 28 U.S.C. § 157(a), with referred to them as provided in 28 U.S.C. § 157(a)] **shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11**.
>
> (c)
>
> > (1) Except with respect to a case under chapter 15 of title 11, **nothing in this section prevents a district court** [to which the bankruptcy judges are a unit**] in the interest of justice,** or in the interest of comity with State courts or respect for State law, from abstaining **from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11**.

> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.
>
> (d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians may seek to have this court abstain and seek to have the automatic stay modified "in the interests of justice." In this case NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians specially appeared and filed an *Ex Parte* Motion to Dismiss this bankruptcy case. Dckt. 10. The Court's Order thereon addressed several deficiencies in the Motion and that multiple types of relief were requested. Dckt. 21. The court rejected the proposed order on the *Ex Parte* Motion, and rather than "denying" the *Ex Parte* Motion, the court extended the opportunity for NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians to file an amended motion. *Id*. This order was entered on September 30, 2020. No amended motion or new motion(s) seeking relief from the court have been filed by NUMA Corporation and the Cedarville Rancheria of Northern Paiute Indians.

> At the hearing, **XXXXXXX**

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 Sanctions for Violation of the Automatic Stay by Jason Diven, Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is **XXXXXXX**

FINAL RULINGS

8.	**21-21569-E-7** **JCK-1** **8 thru 9**	**REYMONDO LUCERO** **Greg Smith**	**MOTION TO AVOID LIEN OF FORD MOTOR CREDIT COMPANY, LLC** **5-19-21 [10]**

Final Ruling: No appearance at the July 1, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, , Chapter 7 Trustee, Creditor, and Office of the United States Trustee on May 19, 2021. By the court's calculation, 43 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Ford Motor Creditor Company, LLC ("Creditor") against property of the debtor, Reymondo N. Lucero ("Debtor") commonly known as 816 San Lucas Ave., Stockton, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $7,616.90. Exhibit A, Dckt. 13. An abstract of judgment was recorded with San Joaquin County on January 1, 2016, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $325,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $193,336.00 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $300,000.00 on Schedule C. Dckt. 1.

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 the judicial lien impairs 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 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 Reymondo N. Lucero, the Chapter 7 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 judgment lien of Ford Motor Creditor Company, LLC, California Superior Court for San Mateo County Case No. CLJ465557, recorded on January 21, 2016, Document No. 2016-007827, with the San Joaquin County Recorder, against the real property commonly known as 816 San Lucas Ave., Stockton, 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.

9. **21-21569-E-7 JCK-2** **REYMONDO LUCERO** **Greg Smith** **MOTION TO AVOID LIEN OF FORD MOTOR CREDIT COMPANY, LLC** **5-19-21 [15]**

Final Ruling: No appearance at the July 1, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on May 19, 2021. By the court's calculation, 43 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Ford Motor Creditor Company, LLC ("Creditor") against property of the debtor, Reymondo N. Lucero ("Debtor") commonly known as 816 San Lucas Ave., Stockton, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $14,443.32. Exhibit A, Dckt. 18. An abstract of judgment was recorded with San Joaquin County on December 12, 2008, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $325,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $193,336.00 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $300,000.00 on Schedule C. Dckt. 1.

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 the judicial lien impairs 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 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 Reymondo N. Lucero, the Chapter 7 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 judgment lien of Ford Motor Creditor Company, LLC, California Superior Court for San Mateo County Case No. CLJ469564, recorded on December 12, 2008, Document No. 2008-191666, with the San Joaquin County Recorder, against the real property commonly known as 816 San Lucas Ave., Stockton, 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.