UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

July 7, 2016 at 10:30 a.m.

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1. 16-90002-E-11 1263 INVESTORS LLC — **MOTION TO SELL FREE AND CLEAR OF LIENS**
RLC-3 — **6-8-16 [34]**

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

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

Below is the court's tentative ruling.

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

Sufficient Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on June 10, 2016. By the court's calculation, 27 days' notice was provided. 28 days' notice is normally required, bu the court issued an order shortening time to 27 days. Dckt. 47.

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

The Motion to Sell Property is denied without prejudice.

The Bankruptcy Code permits the Debtor in Possession ("Movant") FN.1. to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here Movant proposes to sell the property commonly known as 7318 Crane Road, Oakdale California (the "Property").

FN.1. While the Motion lists in the upper left-handed corner that counsel represents the "Debtor in Possession" and the motion identifies 1263 Investors, LLC as the "Chapter 11 Debtor in Possession," the Motion then creates a special definition for this Contested Matter to refer to the "Debtor in Possession" and the "Debtor." This is incorrect, and improper." The term "Debtor" is already defined by the Bankruptcy Code, which does not include the "debtor in possession." 11 U.S.C. 101(13). The "debtor in possession" is a fiduciary created in Chapter 11 cases by Congress as provided in 11 U.S.C. § 1101. The debtor in possession owes a fiduciary duty to the bankruptcy estate, exercising the powers, and having the duties, of a Chapter 11 trustee. 11 U.S.C. § 1107. The debtor in a Chapter 11 case does not owe such duties.

Misusing the term "debtor" as a shorthand for the "debtor in possession" leads only to confusion not only as to what person, the individual or fiduciary, is acting, but also for a debtor in possession, who may be misled into forgetting his/her/its fiduciary duties, and subsequently being on the wrong end of breach of fiduciary duty to recover damages (including punitive damages), in addition to losing their discharge.

In reviewing the Motion, there is an internally inconsistent allegation that the debtor in possession (using the specially defined term "Debtor" for this Motion) commenced the bankruptcy case on January 5, 2016. Motion ¶ 2, Dckt. 34. Such was a legal impossibility, as the "debtor in possession" could not exist until after the case was filed. This demonstrates that in this Motion the Debtor in Possession inconsistently uses the specially Motion unique definition "Debtor." For this Motion, the court will do its best to interpret the term "Debtor" to mean the Debtor when appropriate and then interpret the term "Debtor" to mean the Debtor in Possession when appropriate. Such misidentification by counsel in the future may lead to the motion or application be summarily denied without prejudice and without hearing, and what ever consequences which flow therefrom be for the debtor in possession in this or other case, and the debtor in possession's professionals to deal with.

While there is no doubt that in this case, by this counsel, the misuse of the term "Debtor" was merely inadvertence, there are a small group of attorneys who would engage in such conduct intending to mislead the court and creditors. Later, they would feign confusion on behalf of their client who looted the bankruptcy estate as part of a scheme to defraud the court and creditors. As this court has stated many times, the rules are equally applied to all, with the court properly exercising judicial discretion, such as in the present case, to provide relief for innocent mistakes as appropriate.

The Motion states with particularity both the following grounds and relief requested (Fed. R. Bank. P. 9014) as follows:

Grounds:

A. Movant seeks to sell the Property.

B. The terms of the sale are set forth in multiple documents, the Purchase and Sale Agreement, Amended Seller Counter Offer No. 1, Buyer's Counteroffer No.1, Acceptance, Amended Acceptance;

all of which are subject to modification at the time of the hearing.

C. The Purchase Price is $435,000.00.

D. Movant is aware of two liens which encumber the Property:

1. First priority lien securing the claim of Nationstar Mortgage in the approximate amount of $597,221.12. This lien was originally recorded on September 24, 2004 in the amount of $480,000.

2. Second priority lien securing the claim of Bank of New York Mellon in the approximate amount of $120,000. This lien was originally recorded on October 13, 2004. Debtor is informed and believes that this loan is currently serviced by Di Tech.

Relief Requested (prayer, Motion p. 5:1-20.5):

E. Authorize the conclusion of the proposed sale.

F. Authorize the Debtor in Possession to execute any and all instruments, documents, and agreement to consummate the sale.

G. The court retain jurisdiction over all matters relating to the sale.

H. Approve commissions and costs of sale.

I. For any and all other relief.

Motion, Dckt. 34.

At the end of the Mothorities (a two page points and authorities concerning the application of 11 U.S.C. § 362(f) to sales) inserted in the Motion, the following one sentence paragraph states,

> "As a consequence, the motion of the Debtor under Section 363(f) is proper and the motion should be granted in its entirety."

Motion, Points and Authorities insert, p. 4:26-27.

DISCUSSION

Improper Structure of Pleadings

The pleading title motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments - an improper pleading style described as a "Mothorities" by this court. In a Mothorities, the court, trustee, U.S. Trustee, and parties in interest are put to the challenge of de-constructing the Mothorities, divining what are the

actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

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

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

The court, notwithstanding, this simple pleading requirement being violated, will consider the merits of proposed sale given the circumstances in this case. However, the Debtor-in-Possession and counsel should be aware that the court will not cavalierly waive the rules and create the mis-impression that this Debtor in Possession and attorney have a "special relationship" with the court and are allowed to write their own local bankruptcy rules, rules of bankruptcy procedure, rules of civil procedure, bankruptcy code, self-sovereign law, and personal constitution which are enforced in this court.

Grounds in Mothorities

As stated above the "grounds" are quite sparse. The Property is identified, a sales price is identified, two lien holders, no buyer is identified, and no sales terms are stated (which could be a "dollar down, a dollar a day, just because I can get the court to order it"). Instead, the court and parties in interest are told to "read the exhibit and figure it out." (Court's paraphrasing, not the polite, professional language used by counsel in the Motion.) These documents for the court and parties to digest to understand the "simple" sale terms run thirty-one pages in length. These are standard real estate documents which are in small font, multiple check-boxes, and consists of counter-offers and amended acceptances. The Movant fails to own up to the basic terms of the sale.

Sale Free and Clear of Liens

The Motion does not clearly request the sale free and clear of liens, and in fact, the prayer at the end of the Motion excludes any such request. A reasonable person reading the clear, plain language portion of the Motion, rather than the Points and Authorities, would clearly understand that, for whatever reason, Movant does not seek an order selling the Property free and clear of any liens.

Buried in the Points and Authorities portion of the Mothorities, Movant states, "[Debtor in Possession] anticipates obtaining the consent of both secured parties prior to the hearing on the proposed sale." Dckt. 34. In addition, the Movant states relief under § 363(f) is proper because "the failure of any lien-holder or other interest holder to object to the proposed sale after receiving proper notice should be deemed to constitute their consent to the same as that creditor."

Congress authorizes federal judges to order the sale of property free and clear of liens and interests of non-debtor parties only under the following specified grounds:

> "(f) The trustee [debtor in possession or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f)(1).

Movant appears to assert that "consent" exists because no opposition is filed to the Motion. Interestingly, Movant provides no persuasive authorities for the proposition that 11 U.S.C. § 363(f) creates a negative presumption that the failure to show grounds for not selling free and clear of liens, a debtor in possession has the power to destroy property rights merely because he/she/it tells the court to issue such an order.

The first authority cited, *Hargrave v. Thownship of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855 (Bankr. N.J. 1994), expressly states that the sale may be free and clear of a lien if any one of the conditions specified under 11 U.S.C. § 3634(f) are met. *Id.* at 858. In addition to "implying" consent, the court determined that grounds pursuant to 11 U.S.C. § 363(f)(2), a sale in excess of the amount of the liens, was satisfied.

The second case, *In re Shary*, 152 B.R. 724 (Bankr. N.D. Ohio 1993), though the court approved the sale, the State of Ohio attempted to collaterally attack the sale order after it had been entered. The court concluded that the failure to object was an "implied consent," such that the order was proper. The Third Circuit authority cited in *Shary* actually addresses the issue as equitable estoppel, precluding the creditor from collaterally attacking a final order when it failed to oppose the motion upon which the final order had been entered. (The cases do not also address the issue of judicial estoppel, by

which the non-opposition could be recognized as a representation made to the court, upon which the court (rightly or wrongly relied) and the inability to collaterally attack the court's order by making a different assertion at a later date).

The third case cited is *Citcorp Homeowners Services, Inc. v. Elliot et al.*, 94 B.R. 343, 345-346 (E.D. Pa. 1988). This appeal taken from a motion for judgment on the pleadings in an adversary proceeding. Citcorp sought to set aside the sale of property of the bankruptcy estate free and clear of its lien. In this collateral attack on the prior final order, Citcorp contended that notice was not proper and the trustee had sold the property for significantly less than its actual value. Citcorp also contended that the bankruptcy court did not have the authority to order the sale free and clear of its lien. The district court, on appeal, in addition to finding the procedural and value grounds insufficient, also ruled that "implied consent" was sufficient. Interestingly, the district court ruling contains no discussion of what is required for consent or when consent may be implied in federal judicial proceedings. Rather, it relies upon one prior bankruptcy court decision.

The district court expressly addressed that Citcorp failed to show grounds by which the bankruptcy court final order could, or should, be vacated. *Id.* In rejecting the contention that the bankruptcy court's order should be vacated, the district court states:

> "Third, Citicorp contends that the Bankruptcy Court abused its discretion by refusing to invoke its equitable powers to set aside the sale. 'The law is clear that a confirmed sale is not to be set aside except under the limited circumstances where fraud, mistake or a similar infirmity is present.' *In re Furst*, 57 B.R. 1013, 1015 (Bankr. E.D. Pa. 1986), appeal dismissed, 800 F.2d 1133 (3d Cir. 1986). The public policy against setting aside the sale of property in a case such as this is strong. 'If parties are to be encouraged to bid at judicial sales, there must be stability in such sales and a time must come when a fair bid is accepted and the proceedings are ended.' *In re Webcor, Inc.*, 392 F.2d 893, 899 (7th Cir. 1968), *cert. denied*, 393 U.S. 837, 89 S. Ct. 113, 21 L. Ed. 2d 107 (1968). 'The policy of finality protects confirmed sales unless 'compelling equities' outweigh the interests of finality.' *In re Chung King, Inc.*, 753 F.2d 547, 550 (7th Cir. 1985).
>
> In this case, the equities against setting aside the sale are compelling. Citicorp admits that it received notice of the sale and did not file any timely objection or appeal. During the hearing on the motion to set aside the sale three months after confirmation, Judge Twardowski noted that improvements had already been made on the property.
>
> In this case, Citicorp does not argue that the public auction was conducted fraudulently. Absent such a showing, I am not convinced that the Bankruptcy Court abused its discretion in refusing to set aside the sale.
>
> Finally, Citicorp contends that the Bankruptcy Court

> abused its discretion by failing to invoke the Court's power under Fed. R. Civ. P. 60(b). This rule is made applicable to bankruptcy cases under Bankr. Rule 9024. Defendant-appellees argue that an adversarial proceeding may not be treated as a Rule 60(b) motion. See *Dooley v. Weil (In re Garfinkle)*, 672 F.2d 1340, 1348 (11th Cir. 1982). The Bankruptcy Court held that the facts of this case did not merit invoking that Court's powers under Rule 60(b). I do not believe that the Bankruptcy Court abused its discretion in that decision."

Id., 346.

This "implied consent" to treatment other than as specified by Congress is at the heart of the Supreme Court's ruling in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010). Though a judge may issue an order outside the scope of what is permitted under the law, if a legal error is made when no opposition is presented, a contention of such error is not in and of itself sufficient for granting relief pursuant to Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 7024. Final orders are final orders, and parties are not allowed to engage in passive aggressive litigation tactics that make a federal judge's final order only "quasi-final."

Following the direction of the Supreme Court in Espinosa that bankruptcy judges are not to ignore the plain language of the Bankruptcy Code merely because a party so requests, merely because a party does not respond, this court will issue orders pursuant to 11 U.S.C. § 363(f), as well as any other laws, based on the plain language therein.

In a recognized treatise, "The consent required is consent to a sale free of liens or interests, not merely consent to the sale of assets." 3 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 363.06[3], 363–51 (16th ed., 2010). To highlight the difference between consent versus non-response is outlined in *In re Roberts*:

> The Court suspects that the confusion as to what constitutes consent for purposes of Section 363(f)(2) is in part due to the requirement that all sales of estate property outside the ordinary course, including sales free and clear of liens, must be authorized by the court after notice and a hearing. 11 U.S.C. § 363(b). It is tempting to conclude that Section 363(b) imposes upon the lienholder the same obligation that any other party-in-interest has to come forward and object if it disagrees with a proposed sale. However, Sections 363(b) and 363(f) address entirely different issues. Sections 363(b) and (c) both dictate the circumstances under which the trustee is generally authorized to use or dispose of the estate's property. In contrast, Section 363(f) sets forth the circumstances under which the trustee may have the additional authority to sell the property free and clear to the purchaser.
>
> Although a sale of estate property free and clear of liens may be desirable, it is not necessary. Nothing within Section 363(b) prevents the trustee from selling encumbered estate

> property outside the ordinary course subject to those encumbrances, provided that proper notice is given and no party-in-interest (including any lienholder) makes a timely request for a hearing. However, if the trustee wishes to sell the property free and clear of those encumbrances, then the trustee must not only secure court authority under Section 363(b), but also must secure the affected lienholder's consent or meet one of the requirements of Section 363(f).

In re Roberts, 249 B.R. 152, 156 (Bankr. W.D. Mich. 2000)

While most authorities for implied consent date back to the mid-1980's, in a recent decision the bankruptcy court for the Western District of New York concluded:

> A failure to oppose, however, differs fundamentally from an affirmation of acquiescence. This is not to say that silence can never indicate consent. For example, in a case where the affected interest was a license to use intellectual property, the Seventh Circuit ruled that circumstances warranted a conclusion that "lack of objection (provided of course there is notice) counts as consent." *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285 (2002). But the present instance involves a sale of real property, and real property is different. Buffalo Realty Corp. is a mortgagee of record, and the Worker's Compensation Board holds a duly recorded judgment. Both creditors took the necessary steps to perfect their liens. Having perfected their liens, both could understandably expect that their interests would survive any subsequent transfer of title. Under these circumstances, the more reasonable inference is that silence would here imply the absence of consent. Moreover, the debtor has presented no other special fact that would indicate creditor approval. Without proof of expressed consent, the debtors here fail to satisfy the requirements of 11 U.S.C. § 363(f)(2) for a sale free and clear of any interest in the property.
>
> The language of 11 U.S.C. §363(f)(2) is unambiguous: unless justified under a different subdivision of section 363(f), a sale free and clear of an interest in property will require the consent of the interest holder. Here, neither Buffalo Realty Corp. nor the Worker's Compensation Board have expressed such consent. We recognize that courts have divided on the issue of whether silence constitutes an implied consent to a sale free and clear of interests. *In re Silver*, 338 B.R. 277 (Bankr. E.D. Va. 2004). However, in the view of this judge, the more reasoned analysis is that adopted in *In re Roberts*, 249 B.R. 152 (Bankr. W.D. Mich. 2000) and in *In re Decelis*, 349 B.R. 465 (Bankr. E.D. Va. 2006). Accord, *In re W.R.M.J. Johnson Fruit Farm, Inc.*, 107 B.R. 18, 19 (Bankr. W.D.N.Y. 1989). Consent and failure to object are not synonymous. *In re Roberts*, 249 B.R. at 155. As a general rule applicable in the present instance, section 363(f)(2) requires a consent that is expressed and not merely implied.”

In re Arch Hospitality, Inc., 5309 B.R. 588, 594 (Bankr. W.D. N.Y. 2015).

Additionally, stating in the Mothorities that the Debtor "will" receive consent of the secured creditors is recognition that actual consent, not merely implying consent being sufficient, for the court to grant relief under 11 U.S.C. § 363(f). As discussed *supra*, there is a fundamental difference between "consent" and "does not object." While in the context of a Motion to Sell just under 11 U.S.C. § 363(b), the non-response of a party in interest may be considered consent as to the sale, 11 U.S.C. § 363(f)(2) requires "consent."

RULING

In considering the Motion, including the Mothorities, in their totality, the court does not grant the Motion. The court is concerned that hidden in the thirty-one pages of small print sale documents could well be improper hidden terms. If the Debtor in Possession, the Movant, cannot (or is unwilling) to clearly state the sales terms but leave it for the court and parties in interest to divine, the court will not take up and speak for the Debtor in Possession.

Therefore, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by 1263 Investors, LLC the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

2. 16-90002-E-11 1263 INVESTORS LLC **MOTION TO VALUE COLLATERAL OF**
RLC-4 **BANK OF NEW YORK MELLON**
6-9-16 [38]

Final Ruling: No appearance at the July 7, 2016 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, Official Committee of Creditors Holding General Unsecured Claims\creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on June 9, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Value has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Value secured claim of Bank of New York Mellon ("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by 1263 Investors, LLC ("Debtor in Possession") to value the secured claim of Bank of New York Mellon ("Creditor") is accompanied by Debtor in Possession's declaration. The bankruptcy estate is the owner of the subject real property commonly known as 7318 Crane Road, Oakdale, California ("Property"). Debtor in Possession seeks to value the Property at a fair market value of $486,500.00 as of the petition filing date. As the owner, Debtor in Possession's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The valuation of property which secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) [emphasis added]. For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2; case or controversy requirement for the parties seeking relief from a federal court.

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Proof of Claim No. 2 filed by Bank of New York Mellon is the claim which may be the subject of the present Motion.

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $597,221.12. Creditor's second deed of trust secures a claim with a balance of approximately $120,000.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

Relief to Predetermine Plan Terms Denied

In the Motion, Movant goes further and requests that he court predetermine a Chapter 11 Plan term and order that "no payments shall be made on the secured claim under the terms of any confirmed Chapter 11 Plan." Motion, p. 4:15.5-16.5. No basis is given for the court to piecemeal order approval of, or mandate, plan terms. What plan terms are proper will be determine if, and when, the Debtor in Possession or creditors have a proposed plan before this court for confirmation.

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

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

The Motion for Valuation of Collateral filed by 1263 Investors, LLC (“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 pursuant to 11 U.S.C. § 506(a) is granted and the claim of Bank of New York Mellon secured by a second in priority deed of trust recorded against the real property commonly known as 7318 Crane Road, Oakdale, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $486,500.00 and is encumbered by senior liens securing claims in the amount of $597,221.12, which exceed the value of the Property which is subject to Creditor’s lien.

3. 11-94410-E-7 SAWTANTRA/ARUNA CHOPRA
FW-14

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR PETER L. FEAR, DEBTORS' ATTORNEY(S)
6-8-16 [1459]

Final Ruling: No appearance at the July 7, 2016 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Fear Waddell, P.C., formerly the Law Offices of Peter L. Fear ("Applicant"), Attorney for the former Debtor in Possession ("Client"), makes a Final Request for the Allowance of Fees and Expenses in this case. FN.1.

FN.1. In the Motion Applicant clearly states that the fees relate to representation of the former Debtor in Possession. However, Applicant then attempts to create a Motion specific definition by referring to the former Debtor in Possession as the "Debtor." This is incorrect, and improper." The term "Debtor" is already defined by the Bankruptcy Code, which does not include the "debtor in possession." 11 U.S.C. 101(13). The "debtor in possession" is a fiduciary created in Chapter 11 cases by Congress as provided in 11 U.S.C. § 1101. The debtor in possession owes a fiduciary duty to the bankruptcy estate, exercising the powers, and having the duties, of a Chapter 11 trustee. 11 U.S.C. § 1107. The debtor in a Chapter 11 case does not owe such duties.

Misusing the term "debtor" as a shorthand for the "debtor in possession" leads only to confusion not only as to what person, the individual or fiduciary, is acting, but also for a debtor in possession, who may be misled

into forgetting his/her/its fiduciary duties, and subsequently being on the wrong end of breach of fiduciary duty to recover damages (including punitive damages), in addition to losing their discharge.

While there is no doubt that in this case, by this counsel, the misuse of the term "Debtor" was merely inadvertence, there are a small group of attorneys who would engage in such conduct intending to mislead the court and creditors. Later, they would feign confusion on behalf of their client who looted the bankruptcy estate as part of a scheme to defraud the court and creditors. As this court has stated many times, the rules are equally applied to all, with the court properly exercising judicial discretion, such as in the present case, to provide relief for innocent mistakes as appropriate.

Prior Interim Fees Authorized

The court previously approved Applicant's interim fees of $55,931.00 and costs of $1,334.95, with $37,000.00 of fees authorized to be paid. October 3, 2012 Order, Dckt. 340. Applicant requests final authorization pursuant to 11 U.S.C. § 330 of the interim fees previously awarded to Applicant as well as authorization for distribution of the remaining $18,431.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including case administration, opposing multiple Relief from Stay motions, prepared financing and cash collateral proposals, discussed and proposed plan and Disclosure Statement, and drafted the complaint for avoidance. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	$55,931.00	$37,500.00
	$0.00	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$55,931.00	

Costs and Expenses

Pursuant to prior interim applications, the court has allowed costs of $1,334.95.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Prior Interim Fees in the amount of $55,931.00 are approved pursuant to 11 U.S.C. § 330 and the remaining $18,431.00 is authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs and Expenses

The prior Interim Costs in the amount of $1,334.95 are approved pursuant to 11 U.S.C. § 330.

The court is authorizing that Trustee pay the remaining $18,431.00 of the fees and costs allowed by the court.

Applicant is allowed the prior interim fees of $55,931.00 and interim costs of $1,334.95 as final fees pursuant to 11 U.S.C. § 330 in this case. The remaining $18,431.00 is authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Fear Waddell, P.C., formerly the Law Offices of Peter L. Fear (“Applicant”), Attorney for the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Fear Waddell, P.C., formerly the Law Offices of Peter L. Fear is allowed the following fees and expenses as a professional of the Estate:

Fear Waddell, P.C., formerly the Law Offices of Peter L. Fear, Professional Employed by Debtor

The Fees in the amount of $55,931.00 and costs of $1,334.95 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the remaining $18,431.00 fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

4. 13-91315-E-7 APPLEGATE JOHNSTON, INC. MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH I.C. ELECTRONICS, INC.
WFH-33 6-16-16 [641]

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, parties requesting special notice, creditors, and Office of the United States Trustee on June 16, 2016. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

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

The Motion For Approval of Compromise is granted.

Michael D. McGranahan, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with I.C. Electronics, Inc. ("Settlor"). The claims and disputes to be resolved by the proposed settlement are those arising from Adversary Proceeding No. 15-9042 which seeks to avoid and recover pre-petition transfers of the Debtor to Settlor in the amount of $45,180.68 pursuant to 11 U.S.C. §§ 547 and 550. However, the Movant asserts that of this only $16,670.89 are within the ninety

day preference period.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 644):

A. Trustee and Settlor agree to resolve the litigation and all disputes between them, except the excluded items, for the sum of $7,000.00.

B. Within ten days of the execution of this agreement, Settlor will cause to be delivered to the Trustee a check in the amount of $7,000.00 in full and complete settlement of the claim in the litigation.

C. Trustee agrees to dismiss the Adversary Proceeding.

D. The Settlor shall have the right to file an amended proof of claim asserting an additional claim pursuant to § 502(h) in the amount of the settlement amount.

E. Upon receipt of the settlement payment, the Trustee will promptly file a motion with the court for approval of the compromise.

F. The parties jointly and severally release from any and all claims, demands, express or implied contract rights, actions, causes of action, charges, debts, demands, damages, costs, attorneys' fees and/or expenses of any kind, nature and character, at law or in equity, accrued or inchoate, arising under any federal, state, or any other law, whether known and/or unknown, filed or otherwise, sounding in tort, contract, or otherwise, including, but not limited to foreseen or unforeseen, disclosed or undisclosed, anticipated or unanticipated, and expected or unexpected claims, damages, losses, costs, expenses and liabilities and the consequences thereof which either party now has or may hereafter acquire for any reason whatsoever, arising out, connected with or incidental to, or in any way related to the litigation up to and including the effective date of this agreement.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Under the Settlement Movant shall recover $7,000.00 in satisfaction of the estate's claim for recovery of the property, with an asserted value of $45,810.68, from Settlor. Movant asserts that the property can be recovered for the estate as a preference. This proposed settlement allows Movant to recover for the estate $7,000.00 without further cost or expense and is 42% of the maximum amount of the claim, which is within the ninety day preference period, identified by Movant.

Probability of Success

The Trustee asserts the, because of the nature of the joint check which is at issue in the instant Adversary, the Trustee is limited to attempting to recover the remaining payment in the amount of $16,670.89 due to the payment being outside the 90-day window.

The Settlor is asserting the ordinary course of business defense of 11 U.S.C. § 547. The Trustee argues that while the Settlor has the burden of proof, the Trustee notes that there is a risk inherent in any litigation. In analyzing the risk, the Trustee argues that the recovery of $7,000.00 of the amount demanded without the need for further litigation makes the factor weigh in favor of the settlement.

Difficulties in Collection

The Trustee does not believe there are any impediments to collection of any judgment obtained against the Settlor.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that litigation would result in significant costs, projected based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. Formal discovery would be required, with depositions of the Settlor and document production requests will be required. The Movant estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Movant projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation.

Paramount Interest of Creditors

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

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The proposed settlement allows for the Trustee and the estate to recover $7,000.00 without the need of litigation. In light of the possible defense of the Settlor, the nature of the claim, and the terms of the settlement, the settlement and recovery of the estate is in the best interest of all parties. The motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Michael D. McGranahan, the Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve Compromise between Movant and I.C. Electronics, Inc. ("Settlor") is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion(Docket Number 644).

5. 13-91315-E-7 APPLEGATE JOHNSTON, INC. MOTION FOR SUMMARY JUDGMENT
15-9021 WFH-1 6-9-16 [22]
MCGRANAHAN V. BAY CITY MECHANICAL, INCORPORATED

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant's Attorney on June 8, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Partial Summary Judgment is granted as to the elements of 11 U.S.C. § 547(b). Plaintiff's Motion for Partial Summary Judgment as to the Defendants Fourth and Sixth Affirmative Defenses are denied without prejudice.

INTRODUCTION

Michael D. McGranahan, the Chapter 7 Trustee ("Plaintiff") initiated this adversary proceeding against Bay City Mechanical Incorporated, A California Corporation ("Defendant") by filing a complaint on June 30, 2015 (the "Complaint"). In its Complaint, Plaintiff requests a judgment for avoidance of transfers set forth in Plaintiff's Exhibit "A" of the Complaint under 11 U.S.C. § 547 and for judgment recovering the amount of $254,819.00 pursuant to 11 U.S.C. § 550.

On June 9, 2016, Plaintiff filed the instant Motion for Partial Summary

Judgment (the "Motion"). The Motion seeks partial summary judgment holding that Plaintiff has established all the elements of Plaintiff's cause of action under 11 U.S.C. § 547(b)and that Defendant has failed to establish a triable issue of fact as to its Fourth and Sixth Affirmative Defenses.

FACTS

The parties have proffered the following information as to disputed and undisputed facts. For purposes of the instant section, the parties have used the terms:

"Payment A" means Check No. 76312, in the amount of $211,373.73

"Payment B" means Check No. 76313, in the amount of $43,444.57

"Challenged Payments" means Payment A and Payment B

MOVING PARTY'S UNDISPUTED FACT	**MOVING PARTY'S SUPPORTING AUTHORITY**	**OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE**
Each of the Challenged Payments constituted a transfer of an interest of the debtor in property within the meaning of Section 547(b)	Responses to Requests for Admission, Set #2 at 3:10-26, 5:17-6:5. Ex . 4 pg. 11, 13)	Undisputed

Each of the Challenged Payments were to or for the benefit of a creditor.	See, Id. 4:1-8, 6:6-13. (Ex. 4, pg. 12, 14)	Disputed, to the extent that Plaintiff has not established that the payment was to or for the benefit of Defendant. Defendant's Admissions as cited by Plaintiff are only that the Challenged Payments were to or for the benefit of a creditor, but are not admissions that they were to or for the benefit of Defendant. The checks referenced in these Requests for Admissions are two party checks written by Debtor to Plaintiff and Plaintiff's Suppliers. Plaintiff never received any of the funds in these checks. Declaration of Bobbie Amos, pg. 2, ¶ 7, lines 19-25
Each of the Challenged Payments was for or on account of an antecedent debt owed by the debtor before the transfer was made.	Id., 4:9-16, 6:14-21. (Ex. 4, ph. 12, 14)	Undisputed

Each of the Challenged Payments were made by check honored by Debtor's bank within 90 days of the bankruptcy filing date.	Exhibit 3 at p.6. Exhibit 10 at p. 88 (Authenticated of Bank Statements)	Objection: The offered evidence lacks foundation. Disputed as to whether or not this fact establishes Debtor's insolvency. The presumption of insolvency during the 90-day period is rebuttable. Evidence exists that Debtor was solvent during the 90 Day Period. Debtor's summary of schedules filed on July 30, 2013 as Dckt. 37 in Case No. 2013-91315, attached as "Exhibit A" to Bay City Mechanical, Inc.'s request for Judicial Notice in Support of Opposition to Plaintiff's Motion for Pretrial Summary Judgment.
Each Challenged Payment was made on account of a what would have been an unsecured claim had the payment not been made.	Response to Request for Admission 5:6-10, 7:10-14, (Ex. 4 at p. 13, 15)	Undisputed
The distribution to unsecured creditors in this case will be less than 100%. The estate currently has $409,947.85 in assets (Ex. 6 (Trustee's Form 2)), and claims asserted in excess of $17 million	Ex. 6 (Trustee's Form 2), Ex 7 (Claim Register)	Disputed. Trustee's Form 2 and the Claims register shows only the current value of the estate and does not establish the value of the estate will be at the time of distribution.

(Dckts. 25 and 37)

Defendant also submitted the following statements of additional material facts that raise a triable issue (Dckt. 37):

Additional Undisputed Material Facts	Evidence in Support

The checks referenced in these requests for admissions are two party checks written by Debtor to Plaintiff and Plaintiff's Suppliers. Plaintiff never received any of the funds in these checks	Declaration of Bobbie Amos, pg. 2, ¶ 7, lines 19-25.
Debtor's bankruptcy schedules, prepared under penalty of perjury lists assets in excess of liabilities by $2,211,347.90 and Debtor's Statement of Financial Affairs show a gross income of $18,275,492.00 earned between October 1, 2012 and May 31, 2013	Debtor's summary of schedules. Case No. 13-91326, Dckt. 37.
Defendant Bay City Mechanical, Inc. Continued to provide labor, service and equipment after the Challenged Payments cleared the bank and both before and after Debtor filed bankruptcy	Declaration of Bobbie Amos, pg. 2, ¶ 6, lines 14-18

OTHER DEFENDANT'S OPPOSITION

C&T Welding Inc., Skyline Steel Erectors Inc., Cal West Steel Detailing LLC, and Ace Automatic Garage Doors Inc. ("Other Defendants") filed an Opposition to Plaintiff's Motion for Partial Summary Judgment on June 22, 2016. Dckt. 29. The Other Defendants assert that there is a material question of fact that the Debtor was solvent during the 90 days before filing bankruptcy.

The Other Defendants state that the presumption of insolvency on or during the 90 days immediately preceding the date of the filing of the petition requires the party against whom the presumption exists, to come forward with some evidence to rebut the presumption, although the burden of proof remains on the party in whose favor the presumption exists. See 11 U.S.C. §547(f) advisory committee's note. The Other Defendants have come forward with evidence that the balance sheet test shows that the Debtor was solvent during the 90 day time period at issue in the case. The Other Defendants references the Debtor's bankruptcy schedules, prepared under penalty of perjury, which list assets in excess of liabilities by $2,211,347.90. The Summary of Assets and Liabilities states Debtors personal property assets are valued at $9,236,805.90 while Debtor's total liabilities only amount to $7,025,458.00. See Exhibit E. Furthermore, the Other Defendants state that the Debtor's Statement of Financial Affairs shows a gross income of $18,275,492.00 earned between October 1, 2012 and May 31, 2013. See Exhibit E.

The Defendant filed Points and Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment on June 22, 2016. Dckt 33. The Defendants responds with the following additional arguments:

A. The creditor's ability to make a claim on a payment bond or file a mechanics lien prevents the debtor's payment from being avoided by

the trustee as a preference because the availability of these alternative forms of recovery negates the Debtor's ability to prove that the creditor recovered more than it would have received in a Chapter 7 liquidation.

B. The Plaintiff fails to demonstrate what insurance claims are outstanding and may contribute to the bankruptcy estate and fails to mention or take into account the preference avoidance claims that the Trustee has asserted in each of the 31 separate adversary actions that have been filed.

C. Just as the funds are not part of the debtor's estate when they are in the middle of the two party check transaction, the funds never became the property of Defendant. Bay City had the right to question the invoice, but had no right to the funds. A triable issue of fact exists as to this element of Plaintiff's case.

D. The Defendant has filed invoices dates 4/31/13, 5/31/13 and 6/2/13 which establish that Bay City continued to provide services to the project and debtor after the challenged payments were received and before the debtor filed for bankruptcy. According the Defendant, the creditor need not return transfers received within 90 days of the filing date of the petition if it proves that after the payment was received and before the petition was filed, it supplied goods or services having a value equal to or greater than the value of the transfer. The invoices for services after the challenged payments total $254,819.00. Defendant claims that Bay City's discovery responses provide information in support of the new value it provided which included both the release of its stop notice rights via the Unconditional Waiver and Release on Progress Payment and the continued labor and services it provided after the challenged payments were received and before the bankruptcy petition was filed. There are triable issues of fact relating to Bay City's Affirmative defenses for new value.

Defendant also filed the Declaration of Bobbie Amos, the Chief Financial Officer of Defendant Bay City Mechanical, Inc. Dckt. 35. Mr. Amos states that once each check was received by Bay City it was endorsed and passed on to the supplier named on the check. Mr. Amos claims that each of the checks the Trustee has referred to as Payments A and B are joint checks written to both Bay City and each of its respective suppliers; Norman S. Wright Mechanical Equipment Co. and Therma Corporation. The Declaration asserts that Bay City never had use or Possession of these funds. Mr. Amos also states in his declaration that in exchange for these two payments Bay City executed lien releases which in recognition of receipt of payment reduced Bay Cities rights to a Stop Notice for the amounts of those payments.

Plaintiff's Reply

Plaintiff filed a Reply in Support of Motion for Partial Summary Judgment on July 28, 2016. Dckt. 39. The Plaintiff states that evidence has been submitted showing that, after a court supervised liquidation, there is less than $500,000.00 in the estate and over $17 million in liabilities. The Plaintiff claims that Defendant's opposition is based on a misreading of Debtor's schedules of assets and liabilities.

According to the Plaintiff, the Debtor's Schedule of Assets and Liabilities do not purport to provide the type of information necessary to calculate solvency, because, among other things, they do not purport to value contingent claims. The Plaintiff states that the Schedules of Assets and Liabilities does not list the amount of every liability. The Debtor did not specify the amounts for many contingent, unliquidated, or disputed claims and instead identified them as "unknown," thus not including those claims in the total debts. The Plaintiff further supports this contention with the claim that four of the creditors listed as "unknown" filed proof of claims totaling over $13 million. FN. 1. The Plaintiff cites *In re Sierra Steel, Inc.* to explain that even disputed or contingent claims are included in the solvency analysis. In re Sierra Steel, Inc., 96 B.R. 275,279 (B.A.P. 9th Cir. 1989). Following this analysis, the Plaintiff claims that the Schedule of Assets and Liabilities does not provide a conclusion as to whether Debtor was solvent or insolvent during the 90 days before the filing of the petition.

FN.1. Claim No. 63-2 filed by Liberty Mutual Insurance Company is asserted in the amount of $6,910,960.00. Claim No. 90-1 filed by the City of San Jose is asserted in the amount of $4,400,916. Claim No. 58-2 filed by Fidelity & Deposit is asserted in the amount of $783,262.00. Claim No. 84-1 filed by The Guarantee Company is asserted in the amount of $947,710.00.

The Plaintiff contends that partial summary judgment is appropriate under the "greater amount" test pursuant to Section 547(b)(5). Under this test, the Plaintiff need only show that Defendant was an unsecured creditor of the Debtor, and that unsecured creditors will receive a less than 100% dividend from the bankruptcy estate. The Plaintiff claims that the Defendant admits that the Challenged Payments were made on account of what would have been an unsecured claim had the payments not been made. Furthermore, the Plaintiff claims that it is clear that the distribution to unsecured creditors will be far less than 100% in this case.

The Plaintiff alleges that the Defendant admitted that the transfers were to or for the benefit of the creditor in its responses to Requests for Admission. According to the Plaintiff, the Challenged Payments were made by check from Debtor's account jointly to Defendant and a supplier. Defendant's Chief Financial Officer admits that "each check once received by Bay City was endorsed and passed on to the supplier named on the check." (Declaration of Bobbie Amos, 2:24-26.) According to the Plaintiff, it is clear that Defendant received the joint check from Debtor, and then endorsed the check over to its supplier.

The Plaintiff asserts that the Defendant has failed to carry its burden of proof as to the fourth affirmative defense based on section 547(c)(1). The Plaintiff claims that the Defendant has provided no evidence to support its claim that the bonding company's contingent claim for indemnity was fully secured or secured at all at the time of transfer. The Plaintiff also claims that the invoices filed by Defendant as Exhibits B-D provide no support for the subsequent new value defense. Dckt. 34. Furthermore, the Plaintiff argues that the declaration of Bobbie Amos is problematic because the declarant lacks personal knowledge of the key allegation that the goods or services were provided after the challenged transfers. Overall, the Plaintiff contends that

the Defendants have not produced evidence sufficient to establish an issue of fact with respect to its fourth and sixth affirmative defenses.

SUMMARY JUDGMENT STANDARD

In an adversary proceeding, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); 11 James Wm. Moore et al., Moore's Federal Practice § 56.11[1][b] (3d ed. 2000) ("Moore").

"[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza*), 545 F.3d 702, 707 (9th Cir. 2008) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), *incorporated by* Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707 (*citing Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002)). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (*citing Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (*citing Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

First Cause of Action: 11 U.S.C. § 547(b)

Plaintiff's First Claim for Relief requests a holding that Plaintiff has established all elements of his cause of action under 11 U.S.C. 547(b). 11 U.S.C. § 547(b) sets for the avoidance powers of a bankruptcy trustee as they relate to a preferential transfer of a debtor's interest in property. The Trustee has the burden of proving that payments made by the debtor to a creditor during the 90 days immediately preceding the bankruptcy are preferential, and therefore, avoidable. 11 U.S.C. § 547(g).

11 U.S.C. § 547(b) provides that the trustee may avoid any transfer of an interest of the debtor in property-

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made-
>
> > (A) on or within 90 days before the date of the filing of the petition;
>
> (5) that enables such creditor to receive more than such creditor would receive if-
>
> > (A) the case were a case under chapter 7 of this title;
> >
> > (B) the transfer had not been made; and
> >
> > (C) such creditor received payment of such debt to the extent provided by the provisions of this title[.]

In this case, Defendant has admitted that it is an unsecured creditor and that Debtor made payments to Defendant on account of an antecedent debt owed by Debtor to Defendant before the transfer was made. Additionally, the transfers were made on April 18, 2013 and April 19, 2013. Any transfers made on or after April 17, 2013 fall within the 90 day preference period.

Defendant contests that there remains a triable issue of fact as to whether the transfer was "to or for the benefit of a creditor, Debtor's solvency during the 90 day period prior to the filing of Debtor's bankruptcy petition, and whether Defendant received more than it would have been entitled to had the transfers not been made.

The Transfer

Defendant does not dispute that each of the Challenged Payments constituted a transfer of an interest of the debtor in property within the meaning of Section 547(b). Dckt.37. There is no genuine issue for trial on this element of the claim.

To or for the Benefit of a Creditor

Defendant disputes that each of the Challenged Payments were to or for

the benefit of a creditor. Defendant argues that while the Challenged Payments were to or for the benefit of a creditor, they were not to or for the benefit of Defendant. The Challenged Payments were two party checks written by Debtor to Plaintiff and Plaintiff's Suppliers. Thus, Plaintiff never received any of the funds in the checks.

Defendant admits in Plaintiff's Requests for Admission Nos. 4 and 14 that the Contested Payments "constitute a transfer to or for the benefit of a creditor within the meaning of Bankruptcy Code section §547(b)(1)." (internal quotations omitted) Dckt. No. 26, Ex. 4, p. 12, 14.

Despite this, Defendant states that because the Challenged Payments were two party checks written to both Defendant and its Suppliers, this "joint-payee status does not render the transfer in a joint check situation one of a transfer of Debtor's property as required under 11 U.S.C. § 547(b)." Defendant offers the declaration of Bobbie Amos in support of its claim. Dckt. 35. The Bobbie Amos declaration states that each of the Challenged Payments were two party checks written to Defendant and Defendant's respective supplier. Defendant did not cash the checks or receive the funds. Each check that Defendant received was endorsed and passed on to the named supplier with Defendant never having use or possession of the funds.

Defendant also cites authorities relating to situations where the debtor subcontractor receives a joint check made payable to both the debtor subcontractor and its sub-subcontractor. In such situations, the funds never become property of the debtor subcontractor and therefore do not become part of the bankruptcy estate. Defendant argues that the same analysis should apply here. Similar to the funds not becoming property of the debtors estate when defendant subcontractor is a joint-payee on a two party check; when Defendant endorsed the checks and sent them on to the suppliers, they were never in possession of the funds and the transfer was not to or for Defendant's benefit.

The central issue in these cases however, is whether the funds became property of the estate. Such an issue is not present in this case, as the funds came from the debtor within the 90 day preference period.

11 U.S.C. § 101(10) broadly defines a "creditor" to mean:

> (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
>
> (B) entity that has a claim against the estate of a kind specified in sections 348(d), 502(f), 502(g), 502(h), or 502(I) of this title;
>
> (C) entity that has a community claim[.]

11 U.S.C. § 101(5) defines a "claim" as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such

> breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[.]

"[A] transfer of the debtor's property to or for the benefit of virtually every kind of creditor may be avoided if the other requirements of section 547(b) are met." 16 Collier on Bankruptcy ¶ 547.03[3].

Any transfer that reduces the contingent liability of an endorser is a transfer for the benefit of that creditor, even if the transfer is made to another party. *In re Robinson Bros Drilling, Inc.*, 6 F.3d 701, (10th Cir. 1993); *In re Ausman Jewelers, Inc.*, 177 B.R. 282 (Bankr. W.D. Wis. 1995). Therefore, a transfer that benefits such a party meets the requirements of "to or for the benefit of a creditor", notwithstanding whether it could be avoided with regard to the primary entity to whom the transfer was actually made. *In re Performance Communications, Inc.*, 126 B.R. 473 (W.D. Pa. 1991).

Here, whether the money was retained by Defendant or used by Defendant to pay its creditors (the suppliers), the transfer of the property of the estate was for the benefit of Defendant by reducing Defendant's liability to a third-party. This is admitted in the Declaration of Bobbie Amos, Chief Financial Officer of Defendant, stating,

> "10. Each of the checks the Trustee has referred to as Payments A and B are joint checks. The check referred to by the Trustee as Payment A is a two party check written to both Bay City and Bay City'S supplier Norman S. Wright Mechanical Equipment Co. The check referred to as Payment B is a two party check written to both Bay City and Bay City's supplier Therma Corporation. Bay City did not cash these checks and did not receive these funds. Each check once received by Bay City was endorsed and passed on to the supplier named on the check. Bay City never had the use or possession of these funds."

Declaration, p. 2:20-26; Dckt. 35. The payments received from Debtor were used for the benefit of Defendant to pay obligations owed by Defendant to its suppliers.

For or on Account of an Antecedent Debt Owed by the Debtor Before Such Transaction Was Made

Defendant admits that each of the Challenged Payments was for or on account of an antecedent debt owed by the debtor before the transfer was made. Dckt.37 There is no genuine issue for trial on this element of the claim.

Made While the Debtor Was Insolvent

Defendant asserts that Debtor was solvent during the 90 day time period at issue, relying on Debtor's bankruptcy schedules which list assets valued at $9,236,805.90 and liabilities at $7,025,458.00. This valuation by Debtor (not a party to this Adversary Proceeding) leaves assets in excess of liabilities by $2,211,347.90. 11 U.S.C. §32(A) provides that "insolvent" means:

> financial condition such that the sum of such entity's debts is greater than all of such entities property, at a fair valuation,

exclusive of-

> (I) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
>
> (ii) property that may be exempted from property of the estate under section 522 of this title[.]

Using Defendant's valuation, Debtor was solvent.

Plaintiff has filed a reply in support of his Motion for Partial Summary Judgment in which he rebuts Defendants valuation. Plaintiff asserts that Debtor's schedules did not list the amount of all of its liabilities, instead listing some contingent, unliquidated, or disputed claims as of an "unknown" amount. In reviewing Debtors Schedules, there are at least 58 claims listed as "unknown." Dckt. 37.

Eleven of these "unknown" claims have had proofs of claims filed in the claims registry for Debtor's bankruptcy case in the aggregate amount of about $14,013,009.39. While these claims were disputed, unliquidated, or contingent, such claims must still be included in determining total indebtedness for purposes of determining insolvency. *See In re Sierra Steel, Inc.*, 96 B.R. 275,279 (B.A.P. 9th Cir. 1989). A court may look to future events to determine how to treat a debt. *Diamond v. Osborne*, 102 F. App'x 544, 549 (9th Cir. 2004). Taking these new claims into account and using Defendant's balance sheet test, there are now assets valued at $9,236,805.90 and liabilities of $21,038,467.39, leaving liabilities in excess of assets by $11,801,661.49.

Further, there is a presumption of insolvency with respect to any transfers within ninety days of the commencement of the filing of the bankruptcy case. It is the creditor's burden of presenting evidence to overcome this presumption. Here, all Defendant offers are the Debtor's schedules filed in this case listing assets and liabilities. Defendant offers no legal arguments why the Debtor may provide the court with credible testimony as to the value of assets in the ninety days leading up to the filing of the bankruptcy case. Debtor is not a party to this Adversary Proceeding.

While stating that the "balance sheet test applies," no evidence of the assets and liabilities of the Debtor during any period of the ninety day period prior to the commencement of the bankruptcy case was filed has been provided. At best, is an unsupported statement by a representative of the Debtor of a dollar amount of assets and a dollar amount for liabilities.

Further, as noted by the Trustee, Debtor's "knowledge" of its finances are limited and incomplete, having to list a fifty-eight creditors as having "unknown claims." These include not "knowing" what is owed to American Honda Finance Corporation, County Bank, Ford Motor Credit, and GMAC for vehicle loans. Looking at Schedule E (Dckt. 37) Debtor states that the obligation owing to the Internal Revenue Service is $0.00. However, in Amended Proof of Claim No. 2 the Internal Revenue Service asserts a $95,560.34 priority claim.

On Schedule F Debtor lists AFCO as having a claim for $18,512.00. However, AFCO Acceptance Corporation has filed Proof of Claim No. 79 asserting a secured claim in the amount of $129,585.54. Another "unknown" unsecured claim is stated for Bogard Construction, Inc. on Schedule E. However, Bogard

Construction, Inc. has filed Proof of Claim No. 67 asserting a $395,458.00 general unsecured claim.

Merely citing to the Schedules prepared and filed by the non-party Debtor does not provide the court with "some evidence" to overcome the presumption. The burden falls on Defendant to provide the court with evidence to meet the "preponderance of the evidence standard."

> "[3] Amount and Type of Evidence Required to Create or Rebut Presumption Varies
>
> [c] Presumed Fact Must Be Rebutted by Enough Evidence to Convince Jury of Fact's Non-Existence
>
> Rule 301 says nothing about how much evidence is needed to rebut a presumption, 26 although the evidence necessary to rebut will be less than the burden of persuasion in the case.
>
> The opponent of the presumed fact, in order to rebut, generally has the burden of presenting enough evidence so that a reasonable jury could be convinced of the non-existence of the presumed fact. 27 This evidentiary requirement has been variously described as the need to come forward with "only some evidence" 28 or the amount of evidence "that would be sufficient to overcome a directed verdict."

WEINSTEIN'S FEDERAL EVIDENCE, § 301.02.

As addressed by the Eighth Circuit Court of Appeals, this is a "flexible" standard, with some courts requiring "some evidence" and others "substantial evidence." *Clay v. Traders Bank of Kansas City*, 708 F.2d 1347, 1351 (8th Cir. 1983).

At best, the "some evidence" presented by Defendant is that the list of assets and liabilities is incomplete - much of the debts owned by Debtor are "unknown." Debtor, in listing the debts as "unknown" admits that Debtor cannot state whether it was, or was not, insolvent as of the commencement of the filing of the bankruptcy case. Further, 11 U.S.C. § 547(b)(3) provides that the insolvency will exist as of the time of the transfer. Defendant offers only the incomplete, unknowing statement of assets and liabilities as of the commencement of the bankruptcy case being filed. This "some evidence" is no evidence of the total liabilities and total assets, nor that Debtor was not insolvent when the bankruptcy case was filed.

Defendant also argues that on the Statement of Financial Affairs Debtor states that during the period October 1, 2012 and May 31, 2013, Debtor has gross income of $18,275,492.00. Based on gross income, Defendant draws the conclusion, "Therefore, Plaintiff was in fact solvent." However, Defendant fails to show how a statement of gross income by a non-party equates to solvency (assets exceeding liabilities). Again, this is "no evidence" to rebut the presumption of insolvency.

Second, Defendant offers no basis as to how it is submitting this evidence to the court. The information on the Schedules is not testimony in this Adversary Proceeding. Defendant treats this litigation with the Trustee

as if it is litigating with the Debtor and the Debtor is now attempting to recant on prior statements made under penalty of perjury.

Made on or Within 90 Days Before the Date of the Filing of the Petition

Defendant objects to this assertion on grounds that the offered evidence lacks foundation. Dckt. 37.

However, the Plaintiff has provided Debtor's bank statement as evidence that Payment A cleared Debtor's bank on April 18, 2013 and Payment B cleared the Debtor's bank on April 19, 2013. These two dates are within 90 days before the date of the filing of this petition pursuant to 11. U.S.C. §547(b)(4).

That Enables Such Creditor to Receive More than if the Transfer Had Not Been Made and the Creditor's Claim is Paid as Provided Through Chapter 7

Defendant contests Plaintiff's assertion that Defendant received more than it would have received under the Chapter 7 distribution provisions of the code if the transfer had not been made. Defendant argues that had it perfected its Stop Notice, it would have been entitled to full payment under the Stop notice or alternatively through the payment bond and therefore would likely have received more in this case had the payments not been made.

However, based on the evidence presented by Defendant, it had not exercised its stop payment rights, if any, was not paid by virtue of its stop payment rights if any, and was paid like any other creditor holding an unsecured claim of the Debtor in the ninety days prior to the commencement of this case. With respect to the contention of stop payment rights, it is argued that "if Bay City had perfected its Stop Notice, it would have been entitled to full payment under the Stop Notice or alternatively through the payment bond." Memorandum in Opposition, p. 5:7-8; Dckt. 33.

For evidence of having such stop payment rights, in the Declaration, Bobbie Amos states,

> "3. As this was a public works project, Bay City has the right under California law to serve a Stop Notice to secure payment for any funds not received. In exchange for payment, Bay City executed lien releases which in recognition of receipt of payment reduced Bay Cities rights to a Stop Notice for the amounts of those payments. Without payment no lien releases were issues [sic]."

Declaration, p. 2:4-8. Bobbie Amos does not testify as to what facts existed upon which the stop notice rights would arise in connection with the claims in this Adversary Proceeding, what action was taken to enforce such stop notice rights, and that such rights were properly enforced. Bobbie Amos goes further to state that while asserting Defendant has some stop notice rights, Defendant was issuing "lien releases." The court is directed to Exhibit A, Dckt. 34, as being a copy of the "lien release." This Exhibit is a combined release of whatever lien, stop payment, or payment bond rights which may exist. However, it does not provide evidence of there being any such stop payment, lien rights, or payment bond rights.

Further, the Release is stated to be for the period through January 31,

2013. It states that Defendant has received $430,817.40 in release payments. The date written by the signature block is April 15, 2013. The two checks at issue are dated April 9, 2013 (Exhibits A and B, Dckt. 26) and are asserted to have cleared the Debtor's bank on April 18 and 19, 2013.

The court does not have evidence before it showing that Defendant was entitled to jump the cue and take monies ahead of other creditors having general unsecured claims.

"To determine whether a payment improved a creditor's position, the trustee must demonstrate that there were other unsecured creditors ... and that these unsecured creditors would receive less than one-hundred percent of their claims." *Biggs v. Capital Factors (In re Herb Goetz & Marlen Horn Assocs.),* No. 96-55944, 1997 U.S. App. LEXIS 19191, at 3 (9th Cir. July 24, 1997). Whether the requirements of section 547(b)(5) have been met also depends in part on the status of the creditor who received the transfer. Generally, pre-petition payments to a fully secured creditor will not be considered preferential. *See Committee of Creditors Holding Unsecured Claims v. Koch Oil Co. (In re Powerline Oil Co.)*, 59 F.3d 969, 971 (9th Cir. 1995).

Defendant admits in its Response that at all times herein, Defendant was an unsecured creditor of Debtor and does not dispute the fact that each Challenged Payment was made on account of what would have been an unsecured claim had the payment not been made. Dckt. 2, 37.

Defendant also contends that Plaintiff's assertion that the distribution will be less than 100% is incorrect because the Plaintiff failed to address any of the defenses the Trustee may have to any of the currently asserted claims, any objections to those claims the trustee may assert, what insurance claims are outstanding that may contribute to the bankruptcy estate, or the preference claims that the Trustee has asserted in each of the separate adversary actions filed. Debtor believes that significant assets may be added to the bankruptcy estate and some claims may be settled or avoided for less than currently stated, potentially leading to a 100 percent distribution.

Thus, there is no genuine dispute as to these facts and Plaintiff has established the elements of his cause of action under 11 U.S.C. § 547(b). The Motion for Summary Judgment as to the First Cause of Action is granted.

FOURTH AFFIRMATIVE DEFENSE
Contemporaneous Exchange (Fourth Affirmative Defense)

Plaintiff also requests that the court enter summary judgment in favor of the Plaintiff as to the Defendant's Fourth and Sixth Affirmative Defenses under 11 U.S.C. §§ 547(c)(1) and (4) because they are not supported by any facts. 11 U.S.C. § 547(c) limits the trustees avoidance powers.

The purpose of the contemporaneous exchange exception, like that of the other section 547(c) exceptions, is to encourage creditors to continue to deal with troubled debtors without fear that they will have to disgorge payments received for value given. Campbell v. Hanover Ins. Co. (In re ESA Envtl. Specialists, Inc.), 709 F.3d 388 (4th Circ. 2013). If creditors continue to deal with a troubled debtor, it is possible that bankruptcy will be avoided all together. Id.

11 U.S.C. §547(c)(1) provides:

> (C)The trustee may not avoid under this section a transfer--
>
> (1) to the extent such transfer was---
>
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange

11 U.S.C. §547(a)(2) defines "new value" as money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation. It is not clear whether the transfer was made to be a contemporaneous exchange for new value. The Defendant has failed to specify exactly what work was done or what materials were supplied.

The Defendant has filed three invoices (Exhibits 4-6) as evidence that work was being done contemporaneously to Payments A and B and this contemporaneous exchange was for new value. However, the invoices do not specify whether the requested payment was for an antecedent debt or the contemporaneous "new value" as the Defendant argues. Exhibits 4-6. Dckt 34. The invoices appear to provide evidence the alleged contemporaneous exchange was for a combination of new work completed and stored, an increase to the change order, and an increase in retainage.

While, these invoices are evidence that the parties intended for an exchange to be substantially contemporaneous, it is not completely clear what services or materials were specifically exchanged. The Defendants intention for the new value and reciprocal transfer by the debtor to be contemporaneous is supported by the release of its stop notice rights via the Unconditional Waiver and Release on Progress Payment. Furthermore, the continuation of labor and/or services provided after the challenged payments were received and before the bankruptcy petition was filed are evidence of the intention of the transfer to be contemporaneous. However, the Defendant has failed to provide any evidence that these payments were exchanges that were in fact contemporaneous.

Under 11 U.S.C. § 547(a)(2), release of a valid materialman's lien constitutes a transfer of new value, even when the property on which the lien formerly existed ultimately proves valueless to the estate's New Value Defense. However, the Defendant merely mentioned a materialman's lien in their Points and Authorities and did not provide any concrete evidence of such. The Defendant did not provide any evidence of what materials were supplied and what specific work was done. Therefore, there is not enough support for the argument that the preference defendant extended new value to the debtor. Again, all the Defendant filed with the court are invoices that request payment for a combination of new work completed and stored, an increase to the change order, and an increase in retainage. This is not sufficient evidence to prove that the there was in fact a contemporaneous exchange.

See also *Energy Coop., Inc. V. SOCAP Int'l, Ltd. (In re Energy Coop., Inc.)*, 832 F.2d 997,1003,17 C.B.C.2d 1215,1222 (7th Circ. 1987)(a release from contractual obligations and "continued credibility and goodwill" is not new value and the court agreed with trustee "that release and goodwill do not fall within §547(a)'s definition of new value. To hold otherwise would be inconsistent with the contemporaneous exchange exceptions purpose:

> "If a release (and possible "goodwill") resulting from settling a claim was new value bringing the settlement payment within the contemporaneous exchange exception, creditors would rush to settle for cash at the first hint of the debtor's financial trouble rather than wait and pursue a claim in bankruptcy. Those creditors who successfully settle will likely receive more than they otherwise would have, leaving less for the creditors who do not successfully settle. This would be inconsistent with Congress' intent to deter creditors from dismembering the debtor during his slide into bankruptcy and to promote equity among creditors. See House Report at 178-79, 1978 U.S. Code Cong. & Ad. News at 6138. Congress certainly did not intend the contemporaneous exchange exception to achieve such a result.)"

The Defendant mentioned a materialman's lien but has failed to provide evidence that there was a perfected or enforceable materialman's lien in connection with the events that are the subject of the this case. The Defendant has only a provided evidence of a release resulting from settling claim. A release does not fall within section 547(a)'s definition of new value.

Although the Defendant has not yet proved that this was a contemporaneous exchange, the Defendant has set forth specific facts showing that there is a genuine dispute for trial as to whether this was a contemporaneous exchange. *Barboza*, 545 F.3d at 707 (citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002)). Furthermore, the Plaintiff has failed to meet his burden of showing the absence of a genuine dispute of material fact with respect to this affirmative defense. Therefore, the Motion for Partial Summary Judgment for the Fourth Affirmative Defense is denied without prejudice.

SIXTH AFFIRMATIVE DEFENSE
New Value Under 11 U.S.C. §§ 547(c)(4)

New value is defined in Title 11 to mean money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation. 11 U.S.C. § 547(a)(2). As evidence of new value, Defendant has submitted the declaration of Bobbie Amos along with invoices for work completed provided to Debtor for the months of April, May, and June. The Bobbie Amos declaration and invoices show that the total amount billed for Defendant's work during that period was $219,836.25.

Defendants Sixth Affirmative Defense asserts that any recovery under the complaint is barred because the transfers made by Debtor as claimed in the complaint were offset by new value given by the defendant to or for the benefit

of the Debtor as specified in 11 U.S.C. § 547(c)(4). In order to establish the new value defense under § 547(c)(4) in the Ninth Circuit, Defendant must show that it advanced new value to the debtor after the preferential transfer; that the advance of new value was unsecured; and that the advance of new value remains unpaid or, if paid, the payment must also be avoidable. *Mosier v. Ever-Fresh Food Co. (In Re IRFM, Inc.)*, 52 F.3d 288, 230 (9th Cir. 1995).

Defendant asserts that it provided new value to Debtor through the continued labor services provided after the challenged payments were received and before Debtor filed its bankruptcy petition. Defendant has provided the declaration of Bobbie Amos as well as its invoices for the months of April, May, and June in support of its claim that the goods or services were provided after the Challenged Payments. The declaration and invoices are provided to support the assertion that Defendant performed work for the Debtor during the 90 day period at issue valued at $219,836.25. Any work performed after the Challenged Payments were received is asserted to be the "new value." However, Defendant has not indicated what work, labor, or materials these invoices represent nor what portion of the April invoice occurred after the Challenged Payments were received.

The advance of the new value must also be unsecured. The Defendant admitted in its Answer that it was an unsecured creditor of the Debtor. Therefore, the new value provided to Debtor after the Challenged Payments appears to be unsecured.

Finally, the advance of the new value must remain unpaid. There has not been sufficient evidence produced in order to determine whether there has been any payment on the advance of new value from the time that it was advanced.

Additionally, the Plaintiff argues that the declaration is insufficient because the declarant does not sufficiently explain how he has personal knowledge of the statement asserting that certain work was performed after the Debtor made the Challenged Payments and before the Debtor filed its bankruptcy petition. Plaintiff also argues Defendant failed to show that the goods or services referenced were provided after otherwise avoidable transfers. However, Defendant has offered the declaration of Bobbie Amos, along with the invoices for the work completed provided to the Debtor for the months of April, May, and June. The Bobbie Amos declaration and invoices show that the total amount billed for the Defendant's work during that period was $219,836.25. There remains a dispute as to whether any materials, labor, or services were provided during this period. Plaintiff has failed to establish that there are no facts to support Defendant's Sixth Affirmative Defense, thus there is still a genuine dispute for trial.

Therefore, the Motion for Partial Summary Judgment for the Fourth Affirmative Defense is denied without prejudice

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Summary Judgment filed by Plaintiff having been presented to the court, and upon review of the

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

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment as to the elements of 11 U.S.C. §§ 547(b) is granted and it is determined that Bay City Mechanical, Incorporated received payments totaling $254,820.00 which are avoidable preferences, subject to adjudication of the affirmative defenses asserted by Bay City Mechanical, Incorporated in this Adversary Proceeding.

IT IS FURTHER ORDERED that Plaintiff's Motion for partial Summary Judgment as to Bay City Mechanical's Fourth and Sixth Affirmative Defenses is denied without prejudice.

6. 13-91315-E-7 APPLEGATE JOHNSTON, INC. CONTINUED MOTION FOR SUMMARY
15-9047 NHA-1 JUDGMENT
MCGRANAHAN V. INTEGRATED 5-16-16 [16]
COMMUNICATIONS SYSTEMS

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney on May 16, 2016. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion for Summary Judgment is denied, and the court grants partial summary judgment determining the undisputed facts in this Adversary Proceeding.

Integrated Communications Systems, ("Defendant") filed the instant "Notice of Motion and Motion by Defendant ICS Integrated Communication Systems for Summary Judgment" on May 16, 2016. Dckt. 16. As the court noted in connection with the original hearing date, Defendant's Motion failed to comply with the basic pleading requirements of Federal Rule of Civil Procedure 7(b), Federal Rule of Bankruptcy Procedure 7007, and Local Bankruptcy Rule 9004-1, and the Revised Guidelines for Preparation of Documents. Notwithstanding this deficiency, the court has reviewed the combined documents and pieced together,

the best it could, what grounds stated with particularity the Defendant asserts the basis for the relief requested.

Grounds Stated in Mothorities

The Defendant narrows the question at issue in the instant Adversary Proceeding to:

> "The question here is whether making a debtor subcontractor a joint payee on such payments can make the payment a preferential transfer of the subcontractor's property, subject to clawback after the subcontractor filed under Chapter 7."

Dckt. 18.

The Defendant argues that the general contractor Bogard Construction had at least two independent obligations to pay Defendant if Debtor failed to. First, Bogard undertook that obligation in entering into the Construction Labor and Material Payment Bond. Bogard therein bound itself "to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract" where its subcontractors did not make such payments. The Defendant argue that it had a contract with a subscontractor (Debtor) of the Contractor (Bogard) and so Defendant is an entity to whom the obligation extended.

The Defendant further argues that if Defendant failed to, when Defendant expressed concerns over Debtor's viability. In exchange Defendant stayed on the project and agreed not to file liens on the property. Bogard then made the payments at issue here against specific invoices from Defendant in the exact same amounts. Bogard's making those payments by checks made jointly to Defendant and Defendant were accordingly not transfers of Debtor's property at all, so they cannot be deemed preferential transfers of Debtor's property.

The Defendant asserts that since Debtor did not deposit the checks but instead endorsed the checks over to Defendant supports the conclusion that the funds were never the Debtor's property. Additionally, the Defendant argues that even if Debtor did deposit the funds into its own account, and then paid to Defendant, so long as it was clear that those funds had been earmarked for Defendant all along.

The Defendant concludes by arguing that the checks made jointly payable to the Debtor and Defendant, just as clearly earmarked payment against specific creditor invoices in the exact same amounts. The funds here never passed through Debtor's account.

PLAINTIFF-TRUSTEE'S OPPOSITION

The Plaintiff-Trustee filed an opposition to the instant Motion on June 1, 2016. Dckt. 22.

The Plaintiff-Trustee argues that the two challenged payments constitute a "transfer of an interest of the debtor in property," and therefor the Motion must be denied.

First, the Plaintiff-Trustee argues that a payment by a joint check

constitutes a transfer of property of the debtor if the Defendant does not have contractual privity with the maker of the joint check. The Plaintiff-Trustee argues that because Defendant never had a separate independent obligation with Bogard nor is there a joint check agreement.

The Plaintiff-Trustee argues that a joint check is a transfer of the Debtor's property. Specifically, the Plaintiff-Trustee argues that payment of an antecedent debt by joint check from a general contractor is, under proper circumstances, a transfer of an interest in a debtor.

The Plaintiff-Trustee then asserts that the Defendants argument is missing the necessary independent obligation from Bogart in order to avoid the claw back. Specifically, the Plaintiff-Trustee argues that the Defendant does not assert or provide evidence of any independent statutory right to pursue Bogard for the payments received by joint check.

The Plaintiff-Trustee then asserts that the Defendant was not a third party beneficiary of the payment bond contract between the general contractor and the surety. The Defendant appars to be arguing that the bond agreement imposed an obligation on Bogard to ensure payment of sub-subcontractors, and that Defendant, as a third party beneficiary of the Bond Agreement, could independently enforce these obligations. The Plaintiff-Trustee argues that there is at least a material issue of fact as to whether or not Defendant was an intended third party benefit of the Bond Agreement. First, the Plaintiff-Trustee asserts that there is no authority holding that a subcontractor is a third party beneficiary under the cited language of a payment bond agreement. As such, the Plaintiff-Trustee argues that the Defendant cannot establish that there is no issue of material fact regarding its status as a third party beneficiary.

The Plaintiff-Trustee asserts that the earmarking doctrine is inapplicable because there is no evidence that Bogard guaranteed the payment to Defendant. The Plaintiff-Trustee restates that the Defendant has failed to show that Bogard had guaranteed, or was independently liable to, Defendant, and the earmarking doctrine is inapplicable. The payment diminished the bankruptcy estate by reducing the amount of Bogard Construction's liability to Debtor's estate.

DEFENDANT'S REPLY

The Defendant filed a reply on June 9, 2016. Dckt. 26. The Defendant asserts that the rule it is asserting is that:

> (I) That where an insolvent subcontractor on a construction project, fails to pay the invoices received from its sub-subcontractors or suppliers, and
>
> (II) where the general contractor is separately obligated to and does pay those invoices,
>
> (III) the general's payment by those invoices by check payable jointly to the defaulting subcontractor (debtor) and to the sub-subcontractor creditor, for the debtor's endorsement of the check over to the creditor does not make the payment one of an "interest in property of the debtor," and thereby subject to clawback as a

voidable preference.

Asserting that the Plaintiff-Trustee misstates the binding case law as to the instant case, the Defendant argues that the Debtor was serving as a conduit of funds to a sub-subcontractor. The Plaintiff-Trustee's argument that the Defendant does not assert state law constructive trust does not bar the Defendant from seeking summary judgment.

In sum, the Defendant argues that the cases cited by the Plaintiff-Trustee do not undercut or undermine binding Ninth Circuit law that supports the Defendant's argument that the issuance of the joint check, in light of the Bond, did not make it an interest in property of the Debtor.

While the Defendant notes that the Plaintiff-Trustee argues that the Defendant failed to allege a state law constructive trust, the Defendant argues that the terms of the Bond as well as the Ninth Circuit all support the idea that, under the facts presented, the issuance of the joint check does not create an interest in property of the debtor.

STATEMENT OF UNDISPUTED FACTS AND RESPONSE FROM PLAINTIFF-TRUSTEE; EVIDENCE PROVIDED BY PARTIES

Federal Rule of Bankruptcy Procedure 7056 incorporates the Federal Rule of Civil Procedure 56 summary judgment provisions into adversary proceedings. Local Bankruptcy Rule 7056-1 further requires that the motion for summary judgment be accompanied by a "statement of Undisputed Facts" which shall enumerate discretely each of the specific material facts relied upon and cite the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission or other document relied upon to establish that fact.

Defendant's Statement of Undisputed Facts and the Plaintiff-Trustee's response are as follows:

Evidence Cited by Defendant	**Defendant's Undisputed Fact**	**Plaintiff-Trustee's Response**
Declaration of Aaron Colton ¶ 2.	"1. Defendant, is a construction-contracting firm that installs and supports communications systems in buildings, such those used for fire-and-life safety, security, audio-video, voice-data and IT support."	Not Disputed
Declaration of Aaron Colton ¶ 2; Applegate-ICS subcontract, Exhibit A, at p. 1.	"2. [Defendant] entered into a 5-page written subcontract with [Debtor] effective 7/25/2912 [sic], for work to be done at the Northside Branch Library project. The contract designated [Debtor] to be the 'Contractor' and [Defendant] to be the 'Subcontractor.'"	Not Disputed

Declaration of Aaron Colton ¶ 4; Construction Labor and Material Payment Bond, Exhibit B, at p. 1.	"3. The general contractor on the Northside Branch Library project was another entity, Bogard Construction Inc. [Debtor] was a subcontractor on that project to Bogard Construction Inc., which made [Defendant] a sub-subcontractor."	Not Disputed
Declaration of Aaron Colton ¶¶ 5-6; Construction Labor and Material Payment Bond, Exhibit B, at pp. 2,3.; Bond Terms and Conditions ¶¶ 1-3, 13.	"4. Bogard Construction Inc., as general contractor, executed a Construction Labor and Material Payment Bond for the Northside Branch Library project. In that bond Bogard bound itself 'to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract' where its subcontractors did not make such payments. That obligation extended to 'An individual or entity having a direct contract with Contractor or with a subcontractor of Contractor to furnish labor, materials or equipment for use in the performance of the Contract...'"	Not Disputed
Declaration of Aaron Colton ¶¶ 7,11.	Based on the above stated fact, Defendant asserts as part of Fact 4: "As a result, Bogard Construction Inc. assumed a separate, independent and direct legal duty to any sub-subcontractors or material suppliers under any of the underlying sub-contracts, should the other contracting party fail to make such payments." [This appears to be a conclusion of law - the existence of asserted legal duties.]	Not Disputed
Declaration of Aaron Colton, ¶¶ 7, 11	"5. [Defendant] became suspicious of [Debtor's] viability not long after ICS commenced work under its contract with [Debtor]. [Defendant] expressed these concerns to the general contractor Bogard. Bogard advised [Defendant] that Bogard was reserving sufficient funds to pay [Defendant] directly if need be. Bogard further agreed to make such payments by checks jointly payable to Applegate and [Defendant]. Bogard did so with respect to the two payments at issue in this adversary proceeding."	Evidentiary Objections. Lack of personal knowledge of the communications between Defendant Bogard. Declarant (Defendant's president) fails to state his personal knowledge of any such communications. Hearsay objection to statements attributed to someone at Bogard.

Complaint	"6. In this adversary proceeding Michael D. McGranahan, as Chapter 7 Trustee for [Debtor], seeks to void as preferential transfers and to recover two transfers allegedly made from [Debtor] to defendant [Defendant]: transfer number 898-0001 made May 13,2013 in the amount of $21,059.66 and transfer number 232-0001 made June 26, 2013 in the amount of $50,137.66."	Not Disputed
Coleman Decl. at ¶ 9; Bogard check #89297 dated May 10,2013 for $21,059.60 and Bogard check #89655 dated June 24, 2013 for $50.137.66, attached thereto as Exhibits F and G, respectively.]	"7. The transfers of funds in those amounts were made at those times, but the funds transferred were funds of the general contractor Bogard Construction Co. Inc., and not funds of [Debtor]. The two transfers were made by checks on the account of the general contractor on the project, Bogard Construction Inc., and made payable jointly to [Debtor] and to [Defendant].	Not Disputed
Coleman Decl. at ¶¶ 9-10.	"8. The checks were issued by the general contractor as payments for amounts invoiced [Defendant] to [Debtor] in the exact same amounts [Exhibits D and E], where [Debtor] could not make payment on them."	Not Disputed
Coleman Decl. at ¶ 12.	"9. [Debtor] endorsed the checks over to [Defendant] to evidence its intent that the money should go to [Defendant]. [Defendant] deposited the full amount of those checks in its account, and those funds were accordingly transferred directly from Bogard's bank account to [Defendant's] bank account."	Not Disputed
Coleman Decl. at ¶ 12; Exhibits D, E, F, and G.	"10. [Debtor] never did deposit or otherwise come to possess any of the funds that were thereby transferred by those two checks. [Debtor] could not have deposited those funds into its own account without [Defendant] having endorsed the checks over to [Debtor]."	Not Disputed
Coleman Decl. at ¶ 11.	"11. The checks were made out jointly to enable [Debtor] to approve the amounts being invoiced under the terms of the applicable subcontract, and to document [Debtor's] agreement to and acquiescence in those payments being so made."	Not Disputed

Coleman Decl. at ¶ 13; Conditional Waivers, attached as Exhibits H and I, 5 respectively, to Coleman Decl.	"12. Along with the invoices for the amounts ultimately paid by Bogard in the two transfers at issue here, [Defendant] submitted conditional waivers of its lien rights with respect to the work done for those amounts. Those waivers were conditioned upon receipt by [Defendant] of the amounts in question. Bogard's payment of those amounts activated those waivers of lien rights and made those waivers effective.|	Not Disputed
	No Asserted Fact 13 in Statement of Undisputed Facts.	Not Disputed
Coleman 10 Decl. ¶ 14; Receipts History attached thereto as Exhibit J.	"14. Apart from the two checks issued by Bogard Construction as discussed above [Exhibits G and H], [Defendant] received no other payments or transfers from [Debtor] in the 90 days before [Debtor] filed for bankruptcy.	Not Disputed

Stipulation to Facts

The Defendant and Plaintiff-Trustee filed a Stipulation to Facts on June 1, 2016. Dckt. 23. The stipulated facts are:

A. "Bogard Construction, Inc. ("Bogard") entered into a construction contract to build a project known as the Northside Branch Library, Applegate Johnston, Inc. ("Debtor") was a commercial construction contractor that acted as a subcontractor to Bogard on the Northside Branch 'Library project."

B. "Debtor then entered into a sub-subcontract with Defendant in 2012."

C. "Defendant acknowledges that it had no written contract of its own, directly with Bogard."

D. "Defendant does, however, claim to be an intended, third-party beneficiary of promises made by Bogard in a Construction Labor And Materials Payment Bond dated June 18, 2012 (Defendant's Exhibit B)."

Evidence Submitted

Defendant has filed the Declaration of Aaron Colton (Dckt. 17), five pages, to which are attached thirty-two pages of exhibits identified as:

A. Exhibit A. Applegate Johnston Contraction Subcontract between Applegate Johnston (Debtor) and Integrated Communications Systems (Defendant).

B. Exhibit B. Construction Labor and Material Payment Bond naming Bogard Construction Inc. as "Contractor as Principal" and Liberty Mutual Surety as "Surety."

C. Exhibit C. Complaint in this Adversary Proceeding.

D. Exhibit D. March 14, 2013 Invoice by Defendant to Debtor for

$21,059.60, with due date of April 13, 2013.

E. Exhibit E. May 13, 2013 Invoice by Defendant to Debtor for $50,137.66, with a due date of June 12, 2013, and stating it includes a previously billed amount of $26,353.00.

F. Exhibit F. Check No. 89297 issued by Bogard Construction, Inc., dated May 10, 2013, in the amount of $21,059.60, which is made jointly payable to Debtor and Defendant. (The reverse of the check showing the negotiation thereof is not provided as part of the Exhibit.)

G. Exhibit G. Check No. 89655 issued by Bogard Construction, Inc., dated June 24, 2013, in the amount of $50,137.66, which is made jointly payable to Debtor and Defendant. (The reverse of the check showing the negotiation thereof is not provided as part of the Exhibit.)

H. Exhibit H. Conditional Waiver and Release by Defendant dated March 14, 2013, for lien, stop payment notice, and payment bond rights by Defendant conditioned on payment of $21,059.60 for a check drawn for which the "Maker" is Debtor.

I. Exhibit I. Conditional Waiver and Release by Defendant dated May 13, 2013, for lien, stop payment notice, and payment bond rights by Defendant conditioned on payment of $50,137.66 for a check drawn for which the "Maker" is Debtor. This Conditional Waiver states that Defendant has not received payment of the $21,059.60 to which the April 2013 Conditional Release was given.

J. Exhibit J. A Contracts Receipt History listing payments received from several persons, including Debtor and Bogard.

DISCUSSION

Summary Judgment Standard

In an adversary proceeding, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); 11 James Wm. Moore et al., Moore's Federal Practice § 56.11[1][b] (3d ed. 2000) ("Moore").

"[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza*), 545 F.3d 702, 707 (9th Cir. 2008) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477

U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), *incorporated by* Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707 (*citing Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002)). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (*citing Bhan v. NME Hosps., Inc*., 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (*citing Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

11 U.S.C. § 547, Avoidance of Preferential Transfers

11 U.S.C. § 547(b) sets for the avoidance powers of a bankruptcy trustee as they relate to a preferential transfer of a debtor’s interest in property. The Trustee has the burden of proving that payments made by the debtor to a creditor during the 90 days immediately preceding the bankruptcy are preferential, and therefore, avoidable. 11 U.S.C. § 547(g).

11 U.S.C. § 547(b) provides that the trustee may avoid any transfer of an interest of the debtor in property-

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made-

(A) on or within 90 days before the date of the filing of the petition;

(5) that enables such creditor to receive more than such creditor would receive if-

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title[.]

DISCUSSION

From the combined pleadings filed by Defendant (rather than stated with particularity in the motion), the court has identified the issue before it whether the issuance of a joint check made out to Debtor and Defendant, when Debtor endorsed the check over to Defendant, became an interest in property of the debtor for purposes of 11 U.S.C. § 547 is transferred property of the Debtor?

Further narrowing the issue, the crux of the dispute appears to be focus on whether an independent obligation to pay the Defendant existed for Bogard Construction such that the joint check payment bypassed the Debtor.

The Defendant answers with "Yes," citing the Construction Labor and Material Payment Bond as well as an alleged conversation between the Defendant and Bogart. The Plaintiff-Trustee, on the other hand, answers with a resounding "no," stating that the Defendant fails to show that an independent obligation existed between Bogart and Defendant.

Review of California and Ninth Circuit Authorities

While the issues relating to preferences in general arising under 11 U.S.C. § 547 may be generally viewed as "pedestrian legal issues," the present situation is one in which a more complicated state law-federal law interface is at issue. Defendant's argument is ground in determining that a state law obligation exists for Bogard (the general contractor) to pay Defendant (the sub-subcontractor) with which there is no contract (the contract being between Bogard and Debtor).

Defendant first directs the court to the 1956 decision of the Ninth Circuit in *Keenan Pipe & Supply Co. v. Shields*, 241 F.2d 486 (9th Cir. 1956). (The court is reminded of the law school adage that an older case represents well grounded, established law when it supports an attorney's arguments, but is moldy, out of touch, inapplicable law when it does not support an attorney's position.) The court summarizes *Keenan* as follows.

In *Keenan*, the debtor (principal contractor) endorsed joint checks (debtor and subcontractor) checks received on a public works project over to a subcontractor (Keenan). The principal contractor filed bankruptcy and the bankruptcy trustee sued the subcontractor to recover the payment as a preference under the Bankruptcy Act.

The Ninth Circuit focused on the project being a public works project and the prohibition on contractors and materialmen placing liens on public property. It determined that the California Public Works Bond Act (Cal. Govt. Code §§ 4200-4208, repealed, with current version found in Cal. Civ. § 9550 et seq.) was enacted to serve the public policy of protecting persons who furnish material or labor on a public project. Though the public contract with the prime contractor or contract with the sub-contractor may require payment to

materialmen and other contractors, such a provision does not create a trust. However,

> "But, if the prime contractor or the subcontractor dedicates a specified sum to pay to the laborer or materialman to discharge the obligation placed upon the contractor by law, no one else can assert any claim to the money so paid. This is true irrespective of the fact that the time may not yet have arrived for the materialman to take positive action by filing a Stop Notice or to take similar steps to collect...
>
> The public policy to have the laborer and materialman paid for public works jobs is much stronger than that which underlies legislation to protect such parties on private projects, by which each is given a mechanic's lien which attaches from the time the labor or material goes into the project. But the rationale of all such legislation is the same. Therefore, a payment either by a principal contractor or a subcontractor to a materialman can be held valid either on the ground that the materialman surrendered his right to file a lien or, as here, the Stop Notice, and received the payment as present consideration therefor or, on the other hand, that a valid contract had been made between the parties, the contractor, the **subcontractor and the materialman whereby the materialman gave up his right to file the Stop Notice and the contractor and subcontractor agreed that, as a consideration therefor, the checks should be given to him**."

Id. at 489-490 [emphasis added].

In such a situation, while the debtor was required to endorse the check, it was not money of the debtor, but was the prime contractor which was being paid to the subcontractor.

The Ninth Circuit pulled this "obligation to pay" thread in *Bel Marin Driwall v. Grover*, 470 F.2d 932, 935 (9th Cir. 1972), in concluding that a general contractor paying a sub-subcontractor and then offsetting the payment again any debt owed to the Debtor was not void or voidable.

Defendant directs the court to consider the more recent 1984 ruling of the Bankruptcy Appellate Panel in *Shaw Industries v. Gill (In re Flooring Concepts, Inc.)*, 37 B.R. 957 (B.A.P. 9th Cir. 1984). Following *Keenan*, the Appellate Panel concluded that where there is an independent obligation to pay, a payment by a general contractor to a subcontractor's (the bankruptcy debtor) materialman was not a preference since there was an independent obligation for the general contractor to pay the debt owed to the materialman. The Bankruptcy Appellate Panel rejected the argument that the *Keenan* analysis of what was a transfer of a debtor's property was limited only to a public works project. The Bankruptcy Appellate Panel in *Shaw*, noted the language in *Keenan*, as this court has above, equating the stop notice rights for a public works project to the greater lien rights for non-public works construction.

The Plaintiff-Trustee directs this court to consider the ruling of the Ninth Circuit Court of Appeals in *Food Catering Supply, Inc. v. Chemcarb, Inc. (In re Food Catering & Housing, Inc.)*, 971 F.2d 396 (9th Cir. 1992), for the proposition that a creditor cannot collude with a debtor to immunize an

otherwise avoidable preference. The Plaintiff-Trustee notes that the cases "protecting" the defendant creditor arise in a situation where there is an obligation of the third-party to pay the obligation to the creditor.

In *Food Catering Supply*, the creditor was paid on delinquent invoices within ninety days of the bankruptcy case being filed. Debtor transferred assets to buyer, and as part of the purchase price buyer "assumed" the obligation owed to the creditor, and thereon paid creditor the obligation owed to creditor by debtor. Creditor's contention that since the payment was made by buyer directly to creditor, it was not a "transfer" by the debtor. *Id.* at 397-398. The Bankruptcy Appellate Panel concluded that when debtor transferred it assets to a third-party and obtained the "assumption" of creditor's debt by was a transfer of the debtor's asset for the benefit of creditor.

Obligation to Pay Defendant

Consistent with *Keenan*, Defendant argues that there was an obligation of Bogard to pay it for the work done as a sub-contractor of Debtor. The obligation is asserted to arise under contract, the Construction and Material Payment Bond. Exhibit B, Dckt. 17. The court has reviewed the bond and analyzes it as follows.

Pertinent parts of the Construction Labor and Material Payment Bond, including Bond Terms and Conditions attachment, (Exhibit B, Dckt. 17) include the following:

A. The parties to the Bond are:

1. Bogard Construction, Inc., ("Contractor") and

2. Liberty Mutual Surety ("Surety"). Bond, p.1 first paragraph.

B. The Bond is issued for the benefit of "Santa Clara City Library Foundation and Friends, a California nonprofit public benefit corporation ("Foundation") in compliance with the terms of the "Construction Contract." *Id.*

C. Contractor and Surety bind themselves and specified successors, to the Foundation and "Claimants" to pay for labor, materials, and equipment furnished for use in performance of the construction contract. Bond Terms and Conditions, ¶ 1.

D. Definitions specified in the Bond Terms and Conditions, ¶ 13, include:

1. Claimant, defined as [emphasis added],

a. "An **individual or entity** having a **direct contract with** Contractor or with a **Subcontractor of Contractor** to furnish labor, materials or equipment for use **in the performance of the Contract**, as further defined in California Civil Code § 3181. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment" that part of water, gas, power, light, heat, oil, gasoline, telephone service or

rental equipment used in the Construction Contract architectural and engineering services required for performance of the Work of Contractor and Contractor's Subcontractors, and all other items for which a stop notice might be asserted. The term Claimant shall also include the Unemployment Development Department as referred to in Civil Code § 3248(b)."

E. Obligations to Claimants become null and void, Bond Terms and Conditions, ¶ 3, as follows.

1. "3. With respect to Claimants, this obligation shall be null and void **if Contractor promptly makes payment, directly or Indirectly through its Subcontractors, for all sums due Claimants.** If Contractor or its Subcontractors, however, fail to pay any of the persons named in Section 3181 of the California Civil Code, [FN.1.] or amounts due under the Unemployment Insurance Code with respect to Work or labor performed under the Contract, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of Contractor or Subcontractors pursuant to Section 13020 of the Unemployment Insurance Code, with respect to such Work and labor, then Surety shall pay for the same, and also, in case suit is brought upon this Bond, a reasonable attorney's fee, to be fixed by the court."

FN.1. California Civil Code § 3181 was repealed by SB 189, Stats 2010 CH 697 § 16, Effective January 1, 2011, operative July 1, 2012. The date of the Bond is June 18, 2012, approximately two weeks prior to the July 1, 2012 operative date.

The provisions of former Cal. Civ. § 3181 related to persons entitled to serve a stop notice upon a public entity for a public work project.

F. **Surety shall have no obligation to Claimant** under the Bond unless Claimant has satisfied all applicable notice requirements. Bond Terms and Conditions, ¶ 4.

California defines "subcontractor" as "a contractor that does not have a direct contractual relationship with an owner. The term includes a contractor that has a contractual relationship with a direct contractor or with another subcontractor..." Cal. Civ. Code § 8046.

The court notes the statutory inclusion of "subcontractor" to include a contractor who has a contractual relationship with another subcontractor.

RIGHT TO PAYMENT FROM BOGARD TO DEFENDANT

While the parties have parried with the issue, the Ninth Circuit Court of Appeals has clearly stated that if a sub-subcontractor has a right to obtain payment directly from the owner or prime contractor and receives such payment, even if by joint check which has to be endorsed by the bankruptcy debtor, such payment is not a transfer of an interest of the debtor in property. The Ninth

Circuit Court of Appeals focused on the two most powerful rights of a subcontractor, the right to issue a stop payment notice and the right to impose a mechanic's lien on the property being improved. Those rights, properly exercised, create an interest in or rights against the construction funds or the property itself.

However, the specific contract relief upon by Defendant contains an escape clause for Bogard - it has no obligation to Defendant so long as it pays the Debtor. Not only does Bogard have no obligation to pay, but any such obligation is stated to be null and void as follows:

> "this obligation [to Claimants] shall be null and void if Contractor promptly makes payment, directly or indirectly through its Subcontractors, for all sums due Claimants."

Exhibit B; Bond Terms and Conditions, ¶ 3, Dckt. 17.

There are two issues which the court concludes have not been resolved. Evidence has not been advanced showing that the ruling in *Shaw* that a "debtor-to-be" cannot collude to create a step transaction by which assets of the debtor are transferred to a buyer, and instead of the buyer paying debtor for the assets, the buyer diverts the proceeds of the sale to one of debtor's preferred creditors is at issue. However, it also has not been shown that Defendant had an interest in the monies it received or that an obligation existed whereby Bogard had to pay Defendant.

For the undisputed facts asserted in support of the summary judgment motion, it is merely stated that the joint check payment was a condition for the release of Defendant's lien rights (if any existed). There is no evidence or an undisputed fact of what lien rights Defendant had and which could have been enforced against the property.

Further, the plain language of the Bond says that any obligation to pay is void upon payment to Debtor. Bond Terms, ¶ 3, *Id.*

Earmarking Doctrine

At the end of its Points and Authorities, Defendant makes reference to the earmarking of specific monies to pay specific obligations. Defendant directs the court to *Zions First National Bank, N.A. v. Christiansen Brothers, Inc. (In re Davidson Lumber Sales, Inc.*), 66 F.3d 1560, 1568 n.10 (10th Cir. 1995). In footnote ten, the Tenth Circuit Court of Appeals make reference to several bankruptcy cases for the proposition that if monies are paid by a third-party through a debtor, but paid on the condition that they be paid to a specific creditor of the debtor, then they have become "earmarked" and are not property of the bankruptcy case. No analysis is provided by the Tenth Circuit as to how a debtor, who is owed an accounts receivable from a third-party, can "collude" with the third-party to have the payment made on the condition that the money go to a third party, and by such "collusion" preclude the application of 11 U.S.C. § 547. Such "earmarking" appears to run afoul of well established Ninth Circuit law - *Food Catering Supply, Inc. v. Chemcarb, Inc. (In re Food Catering & Housing, Inc.)*, 971 F.2d 396 (9th Cir. 1992).

The earmarking case relied upon by the Tenth Circuit is *McCuskey v. National Bank of Waterloo (In re Bohlen Enterprises, Ltd)*, 859 F.2d 561 (8th

Cir. 1989). As opposed to the present situation where the debt owed to Defendant is paid and the account receivable of Debtor exhausted, the earmarking doctrine works to substitute an old creditor of the debtor for a new one, without a reduction in assets or debts, or in a situation where the third-party has an obligation to pay the debt of the debtor (such as a guarantor), again substituting the new creditor, the guarantor, for the old creditor.

> "In every earmarking situation there are three necessary *dramatis personae*. They are the "old creditor", (the pre-existing creditor who is paid off within the 90-day period prior to bankruptcy), the "new creditor" or "new lender" who supplies the funds to pay off the old creditor, and the debtor.
>
> When new funds are provided by the new creditor to or for the benefit of the debtor for the purpose of paying the obligation owed to the old creditor, the funds are said to be 'earmarked' and the payment is held not to be a voidable preference."

Id. at 565. The necessary elements of "earmarking" as a defense to a preference are stated by the Eight Circuit to be:

> "In our view, the transaction should meet the following requirements to qualify for the earmarking doctrine:
>
> (1) the existence of an agreement between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt,
>
> (2) performance of that agreement according to its terms, and
>
> (3) the transaction viewed as a whole (including the transfer in of the new funds and the transfer out to the old creditor) does not result in any diminution of the estate."

Id.

In the present Adversary Proceeding, there was no trading of a old creditor for a new one. Rather, Bogard took monies otherwise it owed to Debtor and paid them to Defendant. The status quo financial was not maintained, and at the end of the day the Debtor's assets (accounts receivable) were reduced and the number of creditors were reduced by one (or the amount due one creditor was substantially reduced).

GRANTING OF PARTIAL SUMMARY JUDGMENT

While Defendant has not provided the court with a basis for granting summary judgment, the court may issue partial summary judgment based upon the undisputed facts which have not been contested. The court grants partial summary judgment for the facts as stated in the Stipulation of Facts, Dckt. 23 and the following facts set forth in the Chart above:

A. Facts 1 through 4;

B. Fact 5, excluding the statements attributed to the entity Bogard Construction, Inc. No personal knowledge basis has been provided by the witness. The alleged statements appear to have been made by

unnamed persons at a corporation. To the extent that they can easily be remedied by more complete testimony, such can be easily provided either in a further summary judgment motion or at trial.

C. Facts 6 through 9.

D. Fact 10. In granting partial summary judgment on this statement, the court also finds that the counter is true, without the endorsement of Debtor on the joint check, Defendant could not have deposited the monies into Debtor's bank account.

E. Facts 11 through 12.

All other matters remain at issue, including what obligation, if any, Bogard owed to Defendant, what rights Defendant had against Bogard and the owner of the property, and whether the payment of the account receivable due Debtor (which upon payment would void any obligation to pay any other Claimant) by Bogard to Defendant was an attempt to improperly circumvent 11 U.S.C. § 547 and prefer Defendant over other creditors of Debtor.

CHAMBERS PREPARED ORDER

The court shall issue an order consistent with the above ruling.

7. 14-91624-E-7 RLF-1 — SALVADOR DA SILVA AND ROSEMARIE SILVA — MOTION TO AVOID LIEN OF VALLEY FIRST CREDIT UNION — 5-27-16 [21]

Final Ruling: No appearance at the June 7, 2016 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and parties requesting special notice, on May 27, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Valley First Credit Union ("Creditor") against property of Salvador Aguenda Da Silva and Rosemarie Silva ("Debtor") commonly known as 1409 Joett Drive, Turlock, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $19,186.92. An abstract of judgment was recorded with **Stanislaus** County on November 5, 2014, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $180,000.00 as of the date of the petition. The unavoidable consensual liens total $157,049.12 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $22,950.88 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Valley First Credit Union, California Superior Court for Stanislaus County Case No. 2007256, recorded on November 5, 2014, Document No. 2014-0073515-00 with the Stanislaus County Recorder, against the real property commonly known as 1409 Joett Drive, Turlock, 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.

8. 14-91633-E-7 SOUZA PROPANE, INC.
FWP-23

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FELDERSTEIN FITZGERALD WILLOUGHBY & PASCUZZI, LLP FOR DONALD W. FITZGERALD, TRUSTEE'S ATTORNEY(S)
5-31-16 [422]

Final Ruling: No appearance at the July 7, 2016 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 31, 2016. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Fees for counsel for the Chapter 11 Trustee is granted.

Felderstein Fitzgerald Willoughby & Pascuzzi LLP, the Attorney ("Applicant") for David D. Flemmer as the former Chapter 11 Trustee ("Client"), makes a Third Interim and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period October 1, 2015 through February 5, 2016. The order of the court approving employment of Applicant was entered on January 31, 2015, Dckt. 95. Applicant requests fees in the amount of $29,875.00 and costs in the amount of $1,341.62 as well as final authorization for two prior interim requests. The first approved $79,245.00 in fees and $1,785.80 in costs pursuant to the First Interim Application and $191,525.00 in fees and $4,590.57 in costs pursuant to the Second Interim Application.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as

opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including work done on administrative expense motions, asset analysis and recovery, asset marketing and sales, attendance at 341 the meeting, business operations, cash collateral/financing issues, claims issues, lease and executory contract issues, fact investigation, general case administration, work on Debtor's petition, schedules, and statement of financial affairs, reporting, and tax work.

Here, the Chapter 11 Trustee and Applicant were face with a complicated Chapter 11 business bankruptcy. While the principals of the Debtor tried to save the business operation, they were "played out" by the time the case was commenced. Their chief financial officer was hired away by a business competitor. Competitors sought to have the business die and their being no value for the estate.

After the Trustee was appointed, he, with the assistance of Applicant, obtained court authorization to use cash collateral. The Trustee was able to operate the business and ultimately sell the business operation and assets for $2,400,000.00. After completing the sale, which required payment of substantial secured claims, the Trustee has been able to net around $340,000.00 for the estate. Once completed, the Trustee and Applicant quickly converted the case to one under Chapter 7, consistent with liquidating the remaining assets of the Estate and providing for proper distribution to the remaining creditors.

The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Administrative Expense Motions: Applicant spent .2 hours in this category. Applicant assisted Client with corresponding with Trustee on status of administrative and priority tax claims.

Asset Analysis and Recover: Applicant spent 6.7 hours in this category. Applicant telephone conferences with the insurance adjuster and counsel regarding an insurance claim for water damage; drafting an authorization to release documents regarding the water damage claim; reviewing and analyzing the documents received regarding water damage; researching the disposition of the Crossroads deposit and drafting correspondence to counsel for Crossroads regarding same.

Asset Disposition: Applicant spent 3.8 hours in this category. Applicant drafted, filed, and served a motion to abandon Financial Pacific Leasing's propane tanks

Asset Marketing and Sales: Applicant spent .2 hours in this category. Applicant reviewed and analyzed the revised closing statement and information on refunds to the seller and buyer.

Business Operations: Applicant spent 1.3 hours in this category. Applicant reviewed and analyzed the asset purchase agreement regarding an unsatisfied customer gas prepayment issue and participating in telephone conferences with the Trustee regarding a proposed resolution of same.

Claims Administration and Analysis: Applicant spent 5.7 hours in this category. Applicant participated in telephone conferences and email exchanges with the U.S. Trustee's Office and the Trustee regarding the payment of priority tax claims and drafted, filed, and served a motion for authority to pay pre-petition priority tax claims.

Claims-Liens and Priority Analysis: Applicant spent 15.7 hours in this category. Applicant corresponded with the California State Board of Equalization regarding its demand for payment, reviewed and analyzed the claim of Financial Pacific Leasing against the net proceeds of the sale; drafted, filed, and served a motion to determine the value of the secured claim of Financial Pacific Leasing in the net proceeds; drafted, filed, and served a motion to disburse net sales proceeds in the blocked account to Financial Pacific Leasing; and exchanged correspondence with the Trustee and counsel for Financial Pacific Leasing regarding the signed orders regarding abandonment of tanks and release of sale proceeds.

Compromise/Settlement Motions: Applicant spent 4.2 hours in this category. Applicant negotiated a compromise with Aasim Propane and Gas Corporation and Ashaf "Mike" Ali regarding a customer prepayment and credit reconciliation dispute arising from the sale of the Debtor's business; drafted a settlement agreement; and drafted, filed, and served a motion to approve the settlement agreement.

Conversion/Dismissal/Trustee: Applicant spent 3.2 hours in this category. Applicant drafted, filed, and served a motion to approve conversion of the case to a Chapter 7; reviewed the court's tentative ruling on the Motion to Convert and drafted correspondence with the Trustee regarding case transition.

Executory Contracts/Leases: Applicant spent .4 hours in this category. Applicant exchanged correspondence with counsel for Lawrence Souza regarding a post-closing lease dispute.

FFWP Fee Applications: Applicant spent 20.9 hours in this category. Applicant filed and served the second interim fee application of FFWP.

General Case Administration: Applicant spent 1.2 hours in this category. Applicant worked with the Trustee on a case action plan including possible conversion of the case to a Chapter 7.

Misc. Motions: Applicant spent 6.2 hours in this category. Applicant drafted, filed, and served a motion to disburse net sale proceeds in the blocked account and a motion to abandon propane tanks; reviewed the court's comprehensive tentative rulings on the motions, traveled to and from Modesto to attend hearing.

Other Professional Fee Applications: Applicant spent 8.6 hours in this category. Applicant drafted, filed, and served the first interim fee application of the Trustee; reviewed and responded to correspondence from the U.S. Trustee's office regarding her concerns regarding the Trustee's fee motion; reviewed the U.S. Trustee's limited opposition; and filed and served a reply.

Reporting: Applicant spent 2.4 hours in this category. Applicant reviewed, filed, and served the Trustee's monthly operating reports and drafted filed and served a Chapter 11 case status report.

Tax Matters: Applicant spent .1 hours in this category. Applicant reviewed the Internal Revenue Service prompt determination letter.

Turlock Air Park Lease: Applicant spent .2 hours in this category. Applicant exchanged correspondence regarding the examination of Turlock Air Park's principal.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Donald W. Fitzgerald	27.2	$495.00	$13,464.00
Jennifer E. Niemann	29.6	$395.00	$11,692.00
Karen L. Widder	24.2	$195.00	$4,719.00
Total Fees For Period of Application			$29,875.00

Pursuant to prior Interim Fee Applications the court has approved, pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330, prior interim fees of:

Application	Interim Approved Fees	Interim Fees Paid
First Interim	$79,245.50	$72,479.80
Second Interim	$191,525.00	$167,000.00
	$0.00	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$270,770.50	

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $1,341.62 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of $1,158.85 and $4,590.57.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Court filing fee for Motion to Convert Case - Actual out-of pocket expense		$15.00
Document Retrieval (Pacer) - Actual out-of-pocket expenses		$7.50
Photocopies	$0.10 per page	$928.40
Postage		$390.72
Total Costs Requested in Application		$1,341.62

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Third Interim Fees in the amount of $29,875.00 and prior Interim Fees in the amount of $79,245.50 and $191,525.00 are approved pursuant to 11 U.S.C. § 330 and

authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs and Expenses

The Third Costs in the amount of $1,341.62 and prior Interim Costs in the amount of $1,158.85 and $4,590.57 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court is authorizing that Trustee pay 100% of the fees and costs allowed by the court.

Applicant is allowed, and the Trustee is authorized to pay, the following additional amounts as compensation pursuant to this Third and Final Application to this professional in this case:

Fees	$29,875.00
Costs and Expenses	$1,341.62

and pursuant to this Application and prior interim fees of $79,245.50 and $191,525.00 and interim costs of $1,158.85 and $4,590.57, the court gives final approval to all fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Felderstein Fitzgerald Willoughby & Pascuzzi LLP ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Felderstein Fitzgerald Willoughby & Pascuzzi LLP is allowed the following additional fees and expenses as a professional of the Estate:
>
> Felderstein Fitzgerald Willoughby & Pascuzzi LLP, Professional Employed by Trustee
>
> Fees in the amount of $29,875.00
> Expenses in the amount of $1,341.62,
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $191,525.00 and $79,425.50 and costs of $1,158.85 and $4,590.57 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order as well as the remaining $63,666.17 from interim orders from the available funds of the

Estate in a manner consistent with the order of distribution in a Chapter 7 case.

9. 14-91633-E-7 SOUZA PROPANE, INC.
FWP-24

MOTION FOR COMPENSATION FOR DAVID D. FLEMMER, CHAPTER 7 TRUSTEE
5-31-16 [429]

Final Ruling: No appearance at the July 7, 2016 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on May 31, 2016. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Chapter 11 Trustee Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Chapter 11 Trustee Fees is granted.

David Flemmer, the Trustee ("Applicant") for Debtor, Souza Propane, Inc. ("Client"), makes a Request for the Allowance of Chapter 11 Trustee Fees and Expenses in this case. The period for which the fees are requested is for the period October 1, 2015 through February 5, 2016.

The Applicant was previously awarded $125,585.12 in fees and expenses of $2,641.66. The court authorized payment of $90,00.00 in fees and $2,591.55 in expenses, holding back of $35,943.57.

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

General Case Administration: Applicant spent 42.41 hours in this category. Applicant assisted Client with participating in communications with the California State Board of Equalization regarding sales tax clearance and release; preparing the Debtor's Monthly Operating Report; negotiated gas purchases and managed day to day cash flow; prepared amended property taxes; participated in communications regarding collection of accounts receivable.

Trustee requests the following fees:

25% of the first $5,000.00	$1,250.00
10% of the next $45,000.00	$4,500.00
5% of the next $950,000.00	$47,500.00
3% of the balance of $2,441,757.00	$73,252.71
Calculated Total Compensation	**$126,502.71**
Plus Adjustment	$0.00
Total Maximum Allowable Compensation	$126,502.71
Less Previously Paid	$90,000.00
Total First Interim Fees Unpaid	$36,502.71

The Fees are computed on the total sales generated $3,441,757.00 of net monies (exclusive of these requested fees and costs) was recovery for Client.

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $238.40 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of $2,591.55.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Computer Processing for corporate tax returns		$125.00
Mileage to/from Turlock		$113.40
Total Costs Requested in Application		$238.40

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by a trustee are "actual," meaning that the fee application reflects time entries properly charged for services, the a trustee must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A trustee must exercise good billing judgment with regard to the services provided as the court's authorization to employ a trustee to work in a bankruptcy case does not give that a trustee "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as

opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preforming necessary estate tasks, including monthly operating reports, negotiated tax claims, and participated in negotiations concerning receivables and prepaid customer claims. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable. The court has already paid more than $90,000 of the fees as previously authorized by the court, leaving only a modest amount to be paid from the

FEES AND COSTS ALLOWED

The court finds that the requested fees and costs reasonable pursuant to 11 U.S.C. § 326(a) and that Applicant effectively used appropriate rates for the services provided. Second Interim and Final Fees in the amount of $559.14 and costs in the amount of $238.40 and prior Interim Fees in the amount of $125,943.57 and costs in the amount of $2,641.55 are approved pursuant to 11 U.S.C. § 330 are authorized to be paid by the Trustee from the available funds of the Estate Funds in a manner consistent with the order of distribution in a Chapter 7 case.

In this case the Chapter 7 Trustee currently has $274,919.52 of unencumbered monies to be administered. Applicant’s efforts have resulted in a realized gross of $3,441,757.00 recovered for the estate. Dckt.

This case required significant work by the Trustee, with full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowable as a commission to the Chapter 7 Trustee.

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

Fees	$559.14
Costs and Expenses	$238.40

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

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

The Motion for Allowance of Chapter 11 Trustee Fees and Expenses filed by David Flemmer ("Applicant"), Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that David Flemmer is allowed the following additional Chapter 11 Trustee fees and expenses:

David Flemmer, Chapter 11 Trustee, fees and costs in additional to those previously allowed"

Fees in the amount of $559.14
Expenses in the amount of $238.40,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of $125,943.57 and costs of $2,641.55 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee, as Chapter 11 Trustee, is authorized to pay the fees allowed by this Order as well as the remaining $35,943.57, for a total of $36,741.11 from the available funds of the Estate in a Chapter 7 case. The allowance to the Chapter 11 Trustee's fees is not an order for separate Chapter 11 and Chapter 7 trustee fees in excess of the maximum statutory fees permitted pursuant to 11 U.S.C. § 326.

10. 15-90439-E-7 THOMAS/CINDY BISSON MOTION TO COMPEL ABANDONMENT
MLP-2 6-23-16 [52]

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 23, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Abandon Property is granted.

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

The Motion filed by Thomas and Cindy Bisson ("Debtor") requests the court to order the Trustee to abandon property commonly known as 827 Walnut Way, Modesto, California (the "Property"). This Property is encumbered by the

liens of Quorum Federal Credit Union and farmers & Merchants Bank, securing claims of $170,360.09 and $60,345.63, respectively. The Declaration of Debtor Thomas Bisson has been filed in support of the motion and values the Property to be $348,272.00.

The Debtor claimed an exemption on Property pursuant to California Code of Civil Procedure § 704.730 in the amount of $119,878.16.

The Debtor received a discharge on August 25, 2015. Dckt. 33.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by Thomas and Cindy Bisson ("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 that the Property identified as:
>
> 1. 827 Walnut Way, Modesto, California
>
> and listed on Schedule A by Debtor is abandoned to Thomas and Cindy Bisson by this order, with no further act of the Trustee required.

11. 11-27845-E-11 IVAN/MARETTA LEE
15-2194
LEE ET AL V. CITY OF SACRAMENTO COMMUNITY

MOTION FOR JUDGMENT ON THE PLEADINGS
6-17-16 [113]

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

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

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

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

Sufficient Notice NOT Provided. The Defendant failed to file a Proof of Service.

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

The Motion for Judgment on the Pleadings is continued to XXXXXX, 2016, for the parties to file supplemental briefs on only the issue of the proper rules of construction used by the court in interpreting the language used in the Chapter 11 Plan.

Bank of America, N.A. ("Defendant") filed the a combined Notice of Motion and Motion for Judgment on the Pleadings on June 17, 2016. Dckt. 113. The Motion states the following grounds with particularity pursuant to Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, upon which the request for relief is based:

> PLEASE TAKE NOTICE that on July 7, 2016, at 10:30 A.m., in the Modesto Courtroom of the United States District Court for the

Eastern District of California located at 1200 I street, Suite 4 Modesto CA 95354 or as soon thereafter as this matter may be heard, before the Honorable Ronald H. Sargis.

Defendant BANK OF AMERICA, N.A. ("BANA" or "Defendant") will move the Court pursuant to Fed. R. Civ. P. 12(c) and the Court's Order of May 20, 2016 for a judgment as to the meaning of the terms "surrender" and "surrender and abandon" as used in the debtors' Chapter 11 Plan as follows . [sic]

1) The terms "surrender [sic] and "surrender and abandon" have the same meaning.

2) The terms "surrender [sic] and "surrender and abandon" mean that the debtors relinquish their rights to the subject properties and will make them available to the mortgage lenders and/or their servicers by not contesting foreclosure. These terms do not mean that the lenders/servicers are obligated to foreclose or to foreclose in any particular time frame or otherwise assume title to or possession of the properties. Further these terms do not constrain the lenders/servicers from transferring their interest in the mortgages secured by the properties or the rights to service those mortgages to third parties.

The motion is based on the decisions of other Bankruptcy courts which have rejected the notion that a debtor's surrender of property imposes any affirmative duties on a creditor. E.g., e.g., *In re Rose*, 512 B.R. 790, 793 (Bankr. W.D.N.C. 2014) ("Although 'surrender' envisions a debtor relinquishing his or her rights in the collateral, there is no corresponding requirements that the lender. . . do anything with the property.")

The Motion will also be based on the this Notice of Motion, the supporting Memorandum of Points and Authorities attached hereto, as well as the pleadings, records and files in this action, and upon such further oral or documentary evidence and argument as may be presented at or before the hearing and any other matter the Court may deem appropriate.

Dckt. 113.

FAILURE TO COMPLY WITH FEDERAL RULE OF BANKRUPTCY PROCEDURE 7007

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 7007 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states the general conclusion sought and then instructions for the court to mine through the other documents in the instant Adversary Proceeding as well as the underlying bankruptcy case.. This is not sufficient.

Federal Rule of Bankruptcy Procedure 7007 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b). Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy

Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

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

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

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

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

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

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

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

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

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

FAILURE TO PROPERLY NOTICE AND SERVE THE MOTION

Additionally, the Defendant failed to properly notice and serve the Motion. This is a facial failure to comply with Local Bankr. R. 9014-1.

First, the Defendant failed to file a Notice the complies with Local Bankr. R. 9014-1(d)(4) which requires:

> "(4) Contents of Notice. The notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition. If written opposition is required, the notice of hearing shall advise potential respondents that the failure to file timely written opposition may result in the motion being resolved without oral argument and the striking of untimely written opposition."

The Defendant's Notice does not contain any of the necessary information as to whether written opposition is required and to whom such opposition must be sent.

Furthermore, the Defendant fails to file a Proof of Service, as required by Local Bankr. R. 9014-1(e). The court has no way of knowing whether the instant Motion and pleadings have been properly served on all necessary parties.

Additionally, twenty-eight days notice of the hearing on a motion in an adversary proceeding is required. L.B.R. 9014-1(f)(1), (f)(2)(A) ("This alternative (14-day notice) shall not be used for a motion filed in connection with an adversary proceeding.).

This Motion was filed on June 17, 2016. If served when filed, that allows for 13 days notice in June and an additional 7 days in July, which allows for only twenty days notice - eight days short of the required notice.

However, Plaintiff has filed an Opposition, which does not include inadequate notice. Therefore, this defect in the Motion notice procedure is waived.

OPPOSITION

Ivan and Maretta Lee, the Plan Administrator Plaintiff, ("Plaintiff") filed an Opposition to the Motion. Dckt. 115. The court summarizes the Opposition [emphasis added' as follows:

A. "Plaintiffs' Plan of Reorganization (the "Plan") was confirmed pursuant to an order of the above-entitled Court filed on May 4, 2012. Pursuant to the Confirmed Plan, with regards to the real property located at 272 Christine Drive, Sacramento, CA this property was to be surrendered on the effective date of the Plan. The confirmation order will constitute an order for relief from stay." Opposition, ¶ 2.

B. The Confirmed Chapter 11 Plan provides for the "surrender and abandon" of 2323/2331 Grove Ave., Sacramento, California property ("Grove Property") to The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate holders of the CWMBS, Inc., CHL Mortgage Pass-Through Trust 2006-OA5, Mortgage Pass Through Certificates, Series 2006-OA5, its assignees and/or successors in interest. Opposition, *Id.* ¶ 3.

C. "The confirmation order will constitute an order for relief from stay. The 14-day stay provided by Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived." *Id.*

D. "Pursuant to the confirmed Plan as of the effective date of the Plan 272 Christine Drive, Sacramento, CA was surrendered and 2323-2331 Grove Avenue, Sacramento, CA was surrendered and abandoned." *Id.* ¶ 4.

E. "[D]efendant Bank of America, N.A., did not transfer the property, 272 Christine Drive, Sacramento, CA from Plaintiffs to Bank of America, N.A., by non-judicial foreclosure by a trustee. Defendant Bank of America, N.A., **improperly claims that it was not compelled to pursue foreclosure.**" *Id.* ¶ 5.

F. "After the issuance of the confirmed Plan and the abandonment and surrender of the property with the full satisfaction of the secured claim, **Defendant Bank of America, N.A., did not transfer the property, 2323-2331 Grove Avenue, Sacramento, CA from Plaintiffs to Bank of America, N.A., by non-judicial foreclosure by a trustee. Defendant Bank of America, N.A., improperly claims that it was not compelled to pursue foreclosure.** *Id.* ¶ 6.

G. "Defendant Bank of America, N.A., has not complied with the terms and provisions of the confirmed Plan regarding the surrender and abandonment of 272 Christine Drive, Sacramento, CA and 2323-2331 Grove Avenue, Sacramento, CA. After the issuance of the confirmed Plan, Defendant Bank of America, N.A., assigned the loan for 272 Christine Drive, Sacramento, CA to Defendant IndyMac. After the issuance of the confirmed Plan, Defendant Bank of America, N.A., assigned the loan for 2323-2331 Grove Avenue, Sacramento, CA to be serviced by Defendant Shellpoint. *Id.* ¶ 7.

H. "Contrary to the allegations of Bank of America, N.A., in its motion, since it was the creditor of the two properties that were surrendered and abandoned at the time Bank of America, N.A., was the creditor, **Bank of America, N.A., violated the bankruptcy court confirmation of the Chapter 11 Plan surrendering and abandoning the two properties by assigning the loans to IndyMac and Shellpoint after the properties were surrendered and abandoned and not proceeding with the foreclosure, improperly claiming that it was not compelled to proceed with foreclosure.**"

RULING

On a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false. *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1548 (9th Cir. 1989). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Id.* Dismissal is proper only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief. *New.Net, Inc. V. Lavasoft*, 356 F.Supp.2d 1090, 1115 (C.D. Cal. 2004). While the court must construe the complaint and resolve all doubts in the light most favorable to the plaintiff, the court does not need to accept as true conclusory allegations or legal characterizations. *Id*. (*citing General Conference corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congretional Church,* 887 F.2d 228,230 (9th Cir. 1989); McGlinchy v. Shell Chemical Co., 856 F.2d 802, 810 (9th Cir. 1988)).

A motion for judgment on the pleadings based on Federal Rule of Civil Procedure 12(c) is a functional equivalent of a motion to dismiss under Federal Rule of Civil Procedure 12(b), requiring the same underlying analysis. *Dworkin v. Hustler Magazine, Inc.,* 867 F.2d 1188, 1192 (9th Cir. 1989). Thus, for a complaint to withstand a Rule 12(c) motion for judgement on the pleadings, it must contain more detail than "bare assertions" that are "nothing more than a formulaic recitation of the elements" required for the claim. *Ashcroft v. Iqbal,* 556 U.S. 662, 681 (2009). Courts must draw upon their "experience and common sense" when evaluating the specific context of the complaint and whether it contains the necessary detail to state a plausible claim for relief. *Id.* at 679. The factual content on the face of the complaint – not conclusory statements in the pleading – and reasonable inferences drawn from those facts must plausibly suggest that the plaintiff could be entitled to relief for the pleading to survive a Rule 12(c) motion. See *id.* at 677. Although Rule 12(c) does not mention leave to amend, courts have the discretion in appropriate cases to grant a Rule 12(c) motion with leave to amend, or to simply grant dismissal of the action instead of entry of judgment. *Cagle v. C & S Wholesale Grocers Inc.,* 505 B.R. 534, 538 (E.D. Cal. 2014).

As the Parties have previously addressed for the court in connection with other Motions and at Status Conferences, the fundamental issue is to determine the effect of the language used in the plan "surrender" and "surrender and abandoned" which has been confirmed by the court. Plaintiff's

interpretation has varied, from meaning that the title to the property was transferred by the Plan, that Bank of America, N.A. was to sign a deed transferring title, to now asserting that Bank of America, N.A. was ordered by confirmation of the plan to conduct non-judicial foreclosure sales.

The present Motion and Opposition reaffirm this contention by Plaintiff, asserting that the plain language of the plan means that Bank of American, N.A. is ordered (compelled) by the Plan to foreclose. The Opposition goes further to assert that the plain language of the Plan prohibits Bank of America, N.A. from transferring the underlying notes and the person acquiring the notes conducting the foreclosure sale. In substance, Plaintiff asserts that confirmation of the Plan overrides the California Commercial Code and renders the notes non-negotiable, non-transferable.

In the Opposition, Plaintiff offers no legal authorities relevant to the court interpreting the terms of the Plan, which Plan becomes the contract between the parties modifying their original agreement.

In the twelve page Points and Authorities (Dckt. 114) Defendant cites the court to other cases in which court's have determined that "surrender" or "abandon" is not a forced transfer of title to a creditor with a secured claim. Defendant has also cited the court to cases in which title was vested, reading those cases as ones in which the plan being confirmed expressly provided for confirmation of the plan to provide for transfer of title. Points and Authorities, p. 10:7-16. These include:

A. *In re Zair*, 535 B.R. 15 (E.D. N.Y. 2015). This decision was reversed and remanded, *HSBC Bank USA, N.A. v. Zair*, 2016 U.S. Dist. Lexis 49032 (E.D. N.Y. 2016), reversing confirmation of the plan in light of Creditor's opposition to attempted vesting by "surrender."

B. In re Williams, 542 B.R. 514, 521 ( ), holding that pursuant to 11 U.S.C. § 1322(b)(9) a Chapter 13 Plan may allow vesting of title in a creditor as part of a plan treatment, 11 U.S.C. § 1325(b)(5) does not permit it over the objection of the creditor. In addressing this issue, the court determined,

1. "Surrender and vesting are not equivalent: "Surrender means making the property available to be taken; vesting means transferring title."38 The parties agree that these distinct meanings are applicable. Section 1322(b)(9) includes vesting as a discretionary term of a plan, but it does not assure confirmation of a plan providing for vesting." *Id.* at 521.

2. Debtor modified the confirmed plan to provide for the "surrender" of debtor's residence. Debtor then sought to interpret the term "surrender" to mean that title was vested in the creditor. The court rejected this interpretation, stating,

a. "But to construe surrender to include vesting would impair the state law rights of

> the secured creditor without providing any corresponding protective limitation in the confirmation standards. The enactment of § 1322(b)(9), providing that a Chapter 13 plan may provide for property of the estate to vest in an entity other than the debtor, is an insufficient basis for the Court to conclude that Congress intended to alter the state law rights of secured creditors in the manner Debtor proposes." *Id.*, 522.

The Bankruptcy Code in 11 U.S.C. § 1322(b)(9) [emphasis added] states that the a Chapter 13 plan may:

> "(9) provide for the **vesting of property of the estate**, on confirmation of the plan or at a later time, in the debtor or in any other entity;...."

ADDITIONAL BRIEFING

Because granting the Motion would bring this Adversary Proceeding to an end, the court wants to insure that both Defendant and Plaintiff have fully addressed all issues for the court. While both Parties have addressed to the extent they deemed appropriate what the Bankruptcy Code allows and does not allow, neither has addressed the rules of construction used by the court in interpreting the terms of the Plan. While Defendant cites the court to cases which say that a plan may include provisions "vesting title" in the creditor and other cases saying that it may not forcibly put "title into a creditor," it has not address how the rules of construction the court uses in interpreting the "surrender" and "surrender and abandon" language used by Plaintiff in the Chapter 11 Plan.

Neither does Plaintiff provide the court with any rules of construction, merely quoting the terms of the Plan.

Therefore, the court continues the hearing for the filing of supplemental briefs of only the issue of the correct rules of construction used by the court in interpreting the language used in a Chapter 11 Plan.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Judgment of the Pleadings filed by Defendant(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion is continued to xxxxxxxxx, 2016, and the Parties shall file supplemental briefs addressing only the issue of the proper rules of construction to be used by the court in interpreting the language of a Chapter 11 Plan. Defendant shall file and

serve its supplemental brief on or before xxxxxxxxx, 2016, and Plaintiff file and serve a supplemental brief on or before xxxxxxxxx, 2016.

12. 15-90555-E-11 SUSAN ALLEN — **MOTION TO CONVERT CASE TO CHAPTER 7 AND/OR MOTION TO DISMISS CASE**
UST-1 — **6-8-16 [132]**

Final Ruling: No appearance at the July 7, 2016 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 and Debtor's Attorney on June 8, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion of Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to dismiss the Chapter 11 Bankruptcy Case is granted.

This Motion to Dismiss the Chapter 11 bankruptcy case of Susan A. Allen, "Debtor" has been filed by Tracy Hope Davis, "Movant," the United States Trustee. Movant asserts that the case should be dismissed or converted based on the following grounds.

A. Debtor has failed to file require monthly operating reports since the March 2016 monthly operating report.

B. Debtor has failed to pay required quarterly fees.

C. Debtor's estate is diminished and there is no reasonable likelihood of rehabilitation.

DISCUSSION

A Chapter 11 case may only be dismissed or converted for cause. 11 U.S.C. § 1112(b)(1). The bankruptcy code provides a list of causes, which are sufficient to support dismissal or conversion. *Id.* At § 1112(b)(4). Generally, such lists are viewed as illustrative rather than exhaustive; the court should "consider other factors as they arise, and use its equitable powers to reach the appropriate result in individual cases." *Pioneer Liquidating Corp. v. U.S. Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) (citation omitted).

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson),* 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1). The term "cause" includes,

> (A) substantial or continuing loss or diminution of the estate and the absence of a reasonable likelihood of rehabilitation ...
>
> (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter ...
>
> (K) failure to pay any fees or charges required under chapter 123 of title 28

11 U.S.C. § 1112(b)(4)(A), (F), & (K)

Cause exists to convert or dismiss this case pursuant to 11 U.S.C. § 1112(b). The Debtor in Possession offers no explanation for the failure to file monthly operating reports required by 11 U.S.C. § 704(a)(8), as incorporated by 11 U.S.C. § 1106 (a)(1) or the failure to pay the required quarterly fees described in 28 U.S.C. § 1930(a)(6). Debtor's failure to pay post-petition debts and allowing creditors to obtain possession of Debtor's interest in the primary residence as a result of a foreclosure sale shows a substantial or continuing loss to or diminution of the estate. Additionally, Debtor had a March 2016 net cash increase of $542 and made no payments on debt secured by the Primary Residence's senior or junior deed of trust holders, demonstrating the absence of a reasonable likelihood of reorganization.

Dismissing Debtor's case would be in the best interest of the creditors and the estate. Debtor lacks equity in any assets that could be liquidated should the case be converted to a case under chapter 7. Further, Debtor received a discharge on September 2, 2008 in a prior chapter 7, case No. 08-90961-D-7. Pursuant to 11 U.S.C. § 727(a)(8), Debtor is ineligible for discharge as she has been granted a discharge under § 727 in a case commenced within 8 years before the date of filing the petition. *Id.*

The motion is granted and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 11 case filed by the United States Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

13. 14-91082-E-7 JUANITA DAWSON **MOTION TO AVOID LIEN OF**
TPH-2 **DISCOVER BANK**
6-17-16 [40]

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 17, 2016. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Discover Bank ("Creditor") against property of Juanita Dawson("Debtor") commonly known as 2028 Milky Way, Ceres, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $12,745.20. An abstract of judgment was recorded with Stanislaus County on May 22, 2013, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $127,000.00 as of the date of the petition. The unavoidable consensual liens total $135,092.00 as of the commencement of this

case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $1.00 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Discover Bank, California Superior Court for Stanislaus County Case No. 681163, recorded on May 22, 2013, Document No. 2013-0044180-00 with the Stanislaus County Recorder, against the real property commonly known as 2028 Milky Way, Ceres, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

14. 14-91082-E-7 JUANITA DAWSON
TPH-3

MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES LLC
6-17-16 [46]

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 17, 2016. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Portfolio Recovery Associates LLC ("Creditor") against property of Juanita Dawson ("Debtor") commonly known as 2028 Milky Way, Ceres, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $1,754.33. An abstract of judgment was recorded with Stanislaus County on November 5, 2013, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $127,000.00 as of the date of the petition. The unavoidable consensual liens total $135,092.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $1.00 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Portfolio Recovery Associates LLC, California Superior Court for Stanislaus County Case No. 682987, recorded on November 5, 2013, Document No. 2013-0092228 with the Stanislaus County Recorder, against the real property commonly known 2028 Milky Way, Ceres, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

15. 15-90284-E-7 ANTONIO/LUCILA AMARAL — CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT
15-9057 ADJ-1
MCGRANAHAN V. SALDANA — 5-24-16 [24]

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Defendant (Pro Se), parties requesting special notice, and Office of the United States Trustee on May 24, 2016. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

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

The Motion for Entry of Default Judgment is granted.

Michael McGranahan, the Chapter 7 Trustee and Plaintiff, filed the instant Motion for Entry of Default Judgment against Rafael Saldana dba Saldana Bros ("Defendant"). Hay on May 24, 2016. Dckt. 24.

The Plaintiff filed the Complaint in the instant Adversary Proceeding on October 21, 201. Defendant was required to file an answer or other responsive pleading on or before April 9, 2016.

The Defendant failed to file an answer. The Clerk of the Court entered an order of entry of default of the Defendant on April 26, 2016. Dckt. 21.

The Plaintiff requests that the Motion be granted and that the court avoid the transfers to the Defendant pursuant to 11 U.S.C. § 547 and recovery of the same pursuant to 11 U.S.C. § 550.

JUNE 16, 2016 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on July 7, 2016, with the Trustee restating the amount of the default judgment being $17,760.00, plus costs.

COMPLAINT

The Complaint was filed on October 21, 2015. The Complaint asserts that between January 1, 2016 and March 2, 2015, Debtors made a series of five payments to the Defendant which altogether amounted to $25,614.00 on account of an antecedent debt.

The Complaint asserts two causes of action:

1. To avoid Preference - 11 U.S.C. § 547

    a. The Plaintiff argues that within the 90 day period prior to the Petition Date, the Debtors transferred to Defendant property, specifically a series of five checks, in the cumulative amount of $25,614.00.

    b. The Plaintiff argues that the transfer was for the benefit of the Defendant.

    c. Plaintiff argues that the said transfer was for or on account of an antecedent debt owed by the Debtors to the Defendant.

    d. Plaintiff argues that the said transfers were made while the Debtors were insolvent.

2. To Recover Transfer - 11 U.S.C. § 550

    a. The Debtor is the initial transferee of the transfers or the entity for whose benefit the transfer was made, or for the immediate or mediate transferee of the initial transferee receiving such transfer.

    b. Under 11 U.S.C. § 551(a) to the extend that a transfer is avoided under 11 U.S.C. § 547, Plaintiff may recover the property transferred or the value of the property transferred from the initial transferee of such transfer or the entity for whose benefit the transfer was made or any immediate or mediate transferee for such initial transfer.

The Plaintiff prays for:

1. For compensator damages in the sum of at least $25,614.00;

2. For a judgment against the Defendant voiding the transfers to Defendant, preserving the same for the benefit of the estate, and for a money judgment against Defendant in an amount equal to the value of the avoided transfers, plus pre- and post-judgment interest at the legal rate.

3. For costs of suit herein incurred.

APPLICABLE LAW

As an initial point, Fed. R. Civ. P. 18 was not incorporated into the bankruptcy law and motion practice. Local Bankr. R. 9014-1(d)(1) provides "[e]xcept as otherwise provided in these rules, every application, motion, contested matter or other request for an order, shall be filed separately from any other request, except that relief in the alternative based on the same statute or rule may be filed in a single motion."

Next, Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

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

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee,* 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

First Cause of Action

Pursuant to 11 U.S.C. § 547(b), the Trustee may avoid any transfer of an interest of the debtor in property made during the ninety days before the date of the filing of the petition.

Defendant is a sole proprietorship. The transfer was made within 90 days prior to March 25, 2015, the date of the commencement of Debtors' bankruptcy case. The transaction has the other hallmarks of preferential transfers as defined by 11 U.S.C. § 547, as Debtors were insolvent, and the transfer enabled Defendant to receive more than he would have received under Chapter 7 of the Bankruptcy Code if the transfer had not been made. The Debtor made five payments during the relevant time:

Date	Check	Amount
January 1, 2015	3987	$7,854.00
January 1, 2015	3800	$5,376.00
February 1, 2015	3869	$4,384.00
February 17, 2015	Cashiers Check	$4,574.00
March 2, 2016	Cashiers check	$3,426.00

Thus, the transfer may be avoided by Plaintiff pursuant to 11 U.S.C. § 547.

Second Cause of Action

Trustee's Second Claim for Relief is brought under 11 U.S.C. § 550, which provides that to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of Title 11, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

Defendant was the initial transferee of the Transfer or entity for whose benefit the transfer was made. The transfer can be avoided, therefore, by the provisions of 11 U.S.C. § 550.

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's bankruptcy case. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding.

The court finds it necessary and proper for the entry of a default judgment against the Defendant.

Therefore, the court grants the default judgment in favor of Plaintiff against Defendant and voids the transfers to Defendant, preserving the same for the benefit of the estate, and for a money judgment against Defendant in an amount equal to the value of the avoided transfers, $17,760.00, plus costs.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by Plaintiff(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted. The court shall enter judgment voiding the transfers to Defendant, preserving the same for the benefit of the estate, and for a money judgment against Defendant in an amount equal to the value of the avoided transfers, $17,760.00, plus costs.
>
> Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgement shall provide that attorneys' fees and costs allow by the court shall be enforced as part of the judgment. A motion for attorneys' fees and costs bill, if any, shall be filed and served on or before July 21, 2016.

16. 16-90392-E-7 JOSE DE LA CRUZ
UST-1

MOTION FOR DENIAL OF DISCHARGE OF DEBTOR UNDER 11 U.S.C. SECTION 727(A)
5-23-16 [16]

DEBTOR DISMISSED: 05/23/2016

Final Ruling: No appearance at the July 7, 2016 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on May 23, 2016. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The Objection to Discharge is dismissed without prejudice.

Edmund Gee, the Attorney for Tracy Hope Davis, United State Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on May 23, 2016. Dckt. 16.

The Objector argues that Jose Luis De La Cruz ("Debtor") is not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 7 bankruptcy case on March 29, 2010. Case No. 10-91154-E-7. The Debtor received a discharge on July 12, 2010. Case No. 10-01154-E-&, Dckt. 21.

This bankruptcy case was dismissed by order of the court on May 23, 2016. Dckt. 15. The case having been dismissed, the motion has been rendered moot and is dismissed without prejudice.

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

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

The Objection to Discharge filed by Edmund Gee, the Attorney for Tracy Hope Davis United States Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed without prejudice as moot, the bankruptcy case having been previously dismissed on May 23, 2016 (Dckt. 15).

17. 14-91197-E-7 TOG-7 | **NICOLAS PEREZ AND MARIA MOSQUEDA DEPEREZ** | **OBJECTION TO CLAIM OF NAVIENT SOLUTIONS, INC., CLAIM NUMBER 3-1**
5-16-16 [257]

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

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

Below is the court's tentative ruling.

Local Rule 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 the Creditor, Debtor (*pro se*), Co-Debtor, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 16, 2016. By the court's calculation, 52 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 3-1 of Navient Solutions, Inc. is overruled without prejudice.

Maria Mosqueda DePerez, the Co-Debtor ("Objector") requests that the court disallow the claim of Navient Solutions, Inc. ("Creditor"), Proof of Claim No. 3-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $15,875.00.

Objector pleads the following in the Objection:

> Co-Debtor hereby objects to the claim of Navient Solutions, Inc. On the following basis:
>
> 1. Claim #3-1 filed by Navient Solutions, Inc. is for a student loan.
>
> 2. Under a government forgiveness program, the loan has been forgiven (See Exh A).
>
> Wherefore Co-Debtor objects to the claim of Navient Solutions, Inc.

Dckt. 257.

The Declaration filed in support states the following:

> I, Maria Mosqueda de Perez, hereby declare:
>
> 1. I am the Co-Debtor in the captioned case.
>
> 2. I object to claim #3-1 filed by Navient
>
> 3. Said claim is for a student loan.
>
> 4. Under the government forgiveness program, the loan has been forgiven (see Exhibit A).
>
> I declare under penalty of perjury that the foregoing is true and correct.

Dckt. 259.

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

Here, the Objection is based on an allegation that the debt has been forgiven. To support this Objection, the court is directed to Exhibit A. Unfortunately, no witness has (or is willing to) testify under penalty of perjury to authenticate this Exhibit. In her Declaration, Objector merely

makes reference to Exhibit A, but does not state that it is a document Objector received.

Based on the lack of authenticated evidence before the court, the Objection to the Proof of Claim is overruled.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Navient Solutions, Inc., Creditor filed in this case by Maria Mosqueda De Perez, Co-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 objection to Proof of Claim Number 3-1 of Navient Solutions, Inc. is overruled without prejudice.