

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

Honorable Fredrick E. Clement  
Bankruptcy Judge  
2500 Tulare Street, Fifth Floor  
Department A, Courtroom 11  
Fresno, California

**WEDNESDAY**

**JULY 31, 2013**

**PRE-HEARING DISPOSITIONS**

**GENERAL DESIGNATIONS**

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matter; matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

**MATTERS RESOLVED BEFORE HEARING**

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

**ERRORS IN FINAL RULINGS**

If a party believes that a final ruling contains an error that would warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

9:00 a.m.

1. [11-15407](#)-A-7 CALIFORNIA HOME CARE AND OBJECTION TO CLAIM OF U.S.  
RH-7 HOSPICE, INC. DEPARTMENT OF HEALTH & HUMAN  
JAMES SALVEN/MV SERVICES, CLAIM NUMBER 36  
6-5-13 [[63](#)]
- DENNISE HENDERSON/Atty. for dbt.  
ROBERT HAWKINS/Atty. for mv.

### Final Ruling

**Objection:** Objection to Claim

**Notice:** LBR 9014-1(f)(1) / LBR 3007-1(b)(1); written opposition required

**Disposition:** Sustained

**Order:** Prepared by objecting party

Unopposed objections are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c); LBR 9001-1(d), (n) (contested matters include objections). Written opposition to the sustaining of this objection was required not less than 14 days before the hearing on this motion. None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

### BACKGROUND

In this case, the claimant has filed a proof of claim indicating that the claim is a secured claim. The claim asserts that it is unliquidated. The claimant checked the box "Other" to provide information on the nature of the property or right of setoff. The claimant wrote "See attached declaration" on the proof of claim form in the space provided for a description of the nature of property or right of setoff.

The attached declaration does not contain any documents indicating that the claimant holds a lien or security interest. However, it does provide, "The United States also asserts that this claim is subject to its right of recoupment and/or set-off [sic]." The declaration then cites to § 553 of the Bankruptcy Code.

An Exhibit A attached to the claim indicates a balance owed to the claimant of \$57,221.79. The Exhibit does not, however, show any amount owed by the claimant to the debtor.

### LEGAL STANDARDS

A proof of claim is "deemed allowed, unless a party in interest objects." 11 U.S.C. § 502(a). Federal Rule of Bankruptcy Procedure 3001(f) creates an evidentiary presumption of validity for "[a] proof of claim filed and executed in accordance with [the Federal Rules of Bankruptcy Procedure]. This presumption is rebuttable. See *Litton Loan Servicing, LP v. Garvida (In re Garvida)*, 347 B.R. 697, 706-07 (B.A.P. 9th Cir. 2006).

A proof of claim that is facially irregular, however, is not considered compliant with the Rules, and is not given the evidentiary

presumption of validity. *Id.* at 707 n.7. Rule 3001(c) requires that a claim based on a writing be filed with the claim, and Rule 3001(d) provides that a proof of claim shall be accompanied by evidence of perfection of any security interest claimed in property of the debtor. Fed. R. Bankr. P. 3001(c), (d).

#### **ANALYSIS**

The trustee objects on grounds that the claim asserts no basis upon which it is a secured claim. The attached declaration supporting the claim generally asserts a right of setoff and recoupment under § 553 of the Bankruptcy Code and 42 U.S.C. § 1396m.

Setoff can be a valid basis for a claim to be a secured claim. "The Bankruptcy Code treats a right of setoff protected by §553 as a security interest." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 17:172, at 17-18 (rev. 2009) (citing 11 U.S.C. § 506(a) and cases). Section 506 is the basis for such treatment. 11 U.S.C. § 506(a)(1).

Here, the claim does not provide any basis for finding that the claimant owes a prepetition debt to the debtor that may be the basis for setoff against the claimant's claim against the debtor. No factual basis for a setoff or recoupment right appears in the supporting documents. The claimant has only stated generally asserted right of recoupment or setoff included as boilerplate language for the purpose of protecting rights in the event a basis for setoff could become applicable in the future.

As a result, the claim is facially irregular and will not be accorded secured status. The trustee also requests that the claim be liquidated and allowed as a general unsecured claim. The court liquidates the claim at \$57,221.79, and the claim will be allowed as a general unsecured claim.

2. [13-12113](#)-A-7 JANICE PARTEN MOTION TO AVOID LIEN OF DAYS  
WW-1 INN WORLDWIDE, INC.  
JANICE PARTEN/MV 6-12-13 [[13](#)]  
RILEY WALTER/Atty. for dbt.  
STIPULATION AND ORDER

#### **Final Ruling**

The parties have resolved the matter by stipulation. The matter will be dropped from calendar as moot.

3. [13-12713](#)-A-7 NANCY VILLARRUEL CONTINUED OPPOSITION TO  
TRUSTEE'S REPORT OF NO  
DISTRIBUTION BY LOURDES CAMACHO  
6-14-13 [[15](#)]  
JANINE ESQUIVEL/Atty. for dbt.  
RESPONSIVE PLEADING

**No tentative ruling.**

4. [13-14214](#)-A-7 MARTIN/SANDRA MANNING MOTION TO COMPEL ABANDONMENT  
BDB-1 7-17-13 [[16](#)]  
MARTIN MANNING/MV  
BENNY BARCO/Atty. for dbt.

**Tentative Ruling**

**Motion:** Compel Abandonment of Property of the Estate

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted only as to the business and such business assets described in the motion

**Order:** Prepared by moving party

**Business Description:** antique and gift shop

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted. The order will compel abandonment of the business and the assets of such business only to the extent described in the motion.

5. [12-18516](#)-A-7 JACKLYN FRONK CONTINUED STATUS CONFERENCE RE:  
[13-1004](#) AMENDED COMPLAINT  
FRONK ET AL V. FRONK 4-5-13 [[24](#)]  
MYRON SMITH/Atty. for pl.  
RESPONSIVE PLEADING

[This matter will be called at 9:15 a.m. with the Status Conference calendar.]

**No tentative ruling.**

6. [13-12717](#)-A-7 JESSE/LORENA AVILA  
UST-1  
AUGUST LANDIS/MV  
OVIDIO OVIEDO/Atty. for dbt.  
GREGORY POWELL/Atty. for mv.  
RESPONSIVE PLEADING

MOTION TO DISMISS CASE PURSUANT  
TO 11 U.S.C. SECTION 707(B)  
6-27-13 [[17](#)]

**Tentative Ruling**

**Motion:** Dismiss Case Pursuant to § 707(b)

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Continued to August 15, 2013, at 9:00 a.m.

**Order:** Civil minute order

Debtors have filed a motion to convert the case to Chapter 13. The court will continue the hearing on this matter to coincide with the hearing on the debtor's motion to convert the case.

7. [13-14420](#)-A-7 MANUEL LOPEZ  
SAC-1  
MANUEL LOPEZ/MV

MOTION TO COMPEL ABANDONMENT  
7-12-13 [[13](#)]

SCOTT COBEN/Atty. for dbt.

**Tentative Ruling**

**Motion:** Compel Abandonment of Property of the Estate

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Business Description:** J and M Gonzalez Trucking Inc.

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The court finds that the business may be abandoned because the business has no equity that would benefit the estate. Only one page of the motion appears on the docket. In addition, only one page each (the first page) of the notice of hearing and declaration appears on the docket. In the future, the debtor should ensure that all pages of the motion and supporting papers are filed, and that any business and

business assets that sought to be abandoned are clearly identified in the motion itself.

8. [13-11827](#)-A-7      EFRAIN/ANDREA MACIAS      CONTINUED MOTION TO AVOID LIEN  
TCS-4      OF ACCLAIM CREDIT TECHNOLOGIES  
EFRAIN MACIAS/MV      6-4-13 [[23](#)]  
TIMOTHY SPRINGER/Atty. for dbt.

### **Final Ruling**

**Motion:** Avoid Lien that Impairs Exemption

**Notice:** LBR 9014-1(f)(1) / continued date of the hearing; written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

The responding party's judicial lien, all other liens, and the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, the responding party's judicial lien will be avoided entirely.

9. [13-13028](#)-A-7 MARSHALL KYLE  
CGF-1  
MARSHALL KYLE/MV  
CHRISTOPHER FISHER/Atty. for dbt.

MOTION TO AVOID LIEN OF SAN  
FRANCISCO FEDERAL CREDIT UNION  
6-28-13 [[19](#)]

**Final Ruling**

**Motion:** Avoid Lien that Impairs Exemption

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

The responding party's judicial lien, all other liens, and the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, the responding party's judicial lien will be avoided entirely.

10. [13-14530](#)-A-7 KATHRYN JONES

ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES  
7-11-13 [[22](#)]

PAID \$30.00  
PAID \$40.00.

**Final Ruling**

All past due filing fees have been paid. The order to show cause is discharged, and the case will remain pending. The court will issue a minute order.

11. [13-14640](#)-A-7 EDUARDO/CECILIA GARCIA

MOTION FOR WAIVER OF THE  
CHAPTER 7 FILING FEE OR OTHER  
FEE  
7-2-13 [5]

EDUARDO GARCIA/MV

RESPONSIVE PLEADING

### **Tentative Ruling**

**Application:** Waiver of Chapter 7 Filing Fee

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Denied without prejudice, Clerk authorized to establish payment of installments

**Order:** Civil minute order

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

The Bankruptcy Court may waive the filing fee in a case under Chapter 7 of 11 U.S.C. for an individual if that individual "has income of less than 150% of income official poverty line...applicable to a family of the size involved and is unable to pay the fee in installments." 28 U.S.C. § 1930(f)(1). The debtor bears the burden of proof.

Debtors are a family of three persons. Schedule I, July 2, 2013, ECF No. 1. The HHS Poverty Guidelines for 2013, show that 150% of the official poverty line for a family of three in the contiguous 48 states is \$2,441.25 per month. This court uses Line 16 of Schedule I (net income) for such a calculation. Since Line 16 shows \$1,634.86, the debtor seems to qualify. But three deductions on Schedule I suggest that the debtor's net income is understated. First, the debtor has a savings plan, to which Mr. Garcia contributes \$498.33 per month. This money should be considered in calculating disposable net income. Second, the debtor has a retirement plan (whether voluntary or involuntary the court cannot tell) of \$34.78 per month. Third, taxes and Social Security constitute 46% of the debtor's gross income. Given the modest level of the debtors' gross income (\$4,154.00 per month), the court does not find this amount credible. Considering only the first two deductions mentioned, net disposable income is \$2,167.97, which is only \$273.28. Given probably over withholding of taxes the court finds that the debtors have not sustained their burden. The application will be denied without prejudice and the Clerk of the Court is authorized to establish payment of the fee in installments.

12. [08-15141](#)-A-7 LINDA PINSON  
TGM-4  
JAMES SALVEN/MV  
THOMAS GILLIS/Atty. for dbt.  
TRUDI MANFREDO/Atty. for mv.

CONTINUED MOTION TO SURCHARGE  
DEBTOR'S EXEMPTION  
3-13-13 [[140](#)]

### **Tentative Ruling**

**Motion:** Surcharge Debtor's Homestead Exemption of \$50,000.00

**Notice:** LBR 9014-1(f)(2)/opposed

**Disposition:** To Be Determined

**Order:** To Be Determined

In light of the court's ruling on the Chapter 7 trustee's Motion to Compel Discovery, the court intends to inquire: (1) whether the matter is ripe for resolution and if so, to set a date for the evidentiary hearing described in the Civil Minutes, May 14, 2013, ECF No. 190; and (2) set discovery cut offs and Rule 26(a)(1),(2) disclosures and continue this matter to a date after discovery has closed.

13. [08-15141](#)-A-7 LINDA PINSON  
TGM-5  
JAMES SALVEN/MV

MOTION TO COMPEL AND/OR MOTION  
TO HAVE REQUESTS FOR ADMISSIONS  
DEEMED ADMITTED, MOTION FOR  
SANCTIONS  
7-2-13 [[196](#)]

THOMAS GILLIS/Atty. for dbt.  
TRUDI MANFREDO/Atty. for mv.

### **Final Ruling**

**Motion:** Compel Discovery, Have Requests for Admissions Deemed Admitted, and Sanctions

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

### **BACKGROUND**

The trustee served the debtor with requests for production, requests for admission, and requests for special interrogatories. The discovery requests were served on the debtor's counsel, Thomas Gillis, on May 17, 2013. The proof of service for these requests is Exhibit 1 supporting the motion.

Approximately 30 days after the discovery was propounded, Gillis sent a letter to the trustee's attorney that does not respond specifically to any discovery request (e.g., no discovery request to which the letter is responsive is identified). The letter from Gillis states, "I found the auction tally you requested. It was in my file." Attached to Gillis's letter is a letter from the debtor in which reasons are given for the auction and a statement that the auction proceeds were paid to the debtor's husband. Attached to the letter from the debtor is an auction settlement statement.

On June 30, 2013, the trustee received a second letter from Gillis advising that he could not find the discovery requests. Gillis in that letter requested a two week extension to respond to the discovery requests.

#### **COMPEL DISCOVERY**

Rule 33(b)(3) requires that each interrogatory, to the extent it is not objected to, be answered separately and fully in writing under oath. Fed. R. Civ. P. 33(b)(3), *incorporated by* Fed. R. Bankr. P. 7033. Rule 34(b)(2)(B) contemplates a response "[f]or each item or category" included in the discovery requests. Fed. R. Civ. P. 34(b)(2)(B), *incorporated by* Fed. R. Bankr. P. 7034.

The first letter sent by Gillis and the attachments do not identify any interrogatory or request for production to which the letter and attachments are responsive. To the extent that Gillis's first letter and the attached letter from the debtor may be responsive to the requests for production of documents, they are only *partially* responsive. For example, one request for production, request No. 8, requests evidence of accounting of disbursement of the proceeds from the sale, and no documents responsive to this request appear to be included in Gillis's letter or the attachments.

The court finds that the debtor has not responded sufficiently to the trustee's discovery requests. Further, to the extent Gillis's first letter and its attachments are responsive, they are incomplete. The interrogatories have not been responded to at all in the manner required by the Rules. The Rules provide that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37(a)(4), *incorporated by* 7037.

Based on the facts provided in the motion and supporting papers, the court will order that discovery be compelled. The order will require interrogatories and requests for production not later than 14 days after the date of service of the order. See Fed. R. Civ. P. 37(a)(3)(B).

#### **DEEM ADMISSIONS ADMITTED**

The debtor has not timely responded to the trustee's requests for admissions. Gillis's first letter has a letter from the debtor attached made to the attention of "To Whom It May Concern." This letter could be construed as a response to request for admission no. 2 and possibly no. 3. But the debtor's letter does not address any of the admissions or identify them by number. Further, "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37(a)(4), *incorporated by* Fed. R. Bankr. P. 7037.

The automatic admission from a failure to respond is a sufficient remedy for the party who made the request." 8B Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice & Procedure* § 2265 (3d. ed. 2010). The debtor will be deemed to have admitted the matters which were included in the requests for admission.

#### **SANCTIONS**

Rule 37(a)(5)(A) mandates that the court require the party whose conduct necessitated the motion, or the attorney advising such conduct, or both, to pay the moving party's reasonable expenses incurred in making the motion, including attorney's fees. Fed. R. Civ. P. 37(a)(5)(A), *incorporated by* Fed. R. Bankr. P. 7037. The moving party must attempt in good faith to obtain the disclosure or discovery without court action. The trustee sent a letter dated June 24, 2013, which satisfies this requirement.

The court will award the trustee his costs and expenses in bringing the motion to compel. The court will award sanctions of \$617.50.

14. [13-14045](#)-A-7 PAM NUNTHATEE MOTION TO COMPEL ABANDONMENT  
GH-1 7-20-13 [[19](#)]  
PAM NUNTHATEE/MV  
GARY HUSS/Atty. for dbt.  
OST

#### **Tentative Ruling**

**Motion:** Compel Abandonment of Property of the Estate

**Notice:** LBR 9014-1(f)(3) and order shortening time; no written opposition required

**Disposition:** Denied

**Order:** Prepared by moving party

**Business Description:** Unnamed farming operation

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The debtor contends that the property has no value to the estate and is worth only \$5,000. The chapter 7 trustee opposes the motion, citing the existence of a 2005 Kabota tractor and/or a John Deere tractor. The values of these items may be as much as \$46,000 collectively. Large amounts of cash have not yet been accounted for. As a result, the court intends to deny the motion.

15. [13-14045](#)-A-7 PAM NUNTHATEE  
JES-1  
JAMES SALVEN/MV

CONTINUED MOTION FOR ORDER  
REQUIRING DEBTOR TO SHUT DOWN  
BUSINESS  
7-12-13 [[11](#)]

GARY HUSS/Atty. for dbt.  
RESPONSIVE PLEADING

*[If the court grants the debtor's Motion to Compel the Chapter 7 trustee to Abandon Property of the Estate, Item No. 14, the court will drop the matter as moot. Otherwise, the court will rule as follows.]*

#### **Tentative Ruling**

**Motion:** Requiring Debtor to Shut Down Business

**Notice:** LBR 9014-1(f)(3); no written opposition required

**Disposition:** Granted

**Order:** Prepared by Chapter 7 trustee

**Business Description:** Unnamed farming operation

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

The commencement of a Chapter 7 case creates an estate. 11 U.S.C. § 541(a). Except as provided otherwise, the estate is comprised of all legal or equitable interests of the debtor as of the commencement of the case. *Id.* When a Chapter 7 case is commenced a trustee is appointed; the trustee is the representative of the estate. 11 U.S.C. §§ 701(a), 323(a). The Chapter 7 trustee must collect and reduce to money property of the estate and account for property received. 11 U.S.C. § 704(a)(1),(2). It is the Chapter 7 trustee, not the debtor, who has authority to use property of the estate. 11 U.S.C. § 363(b). The Chapter 7 trustee, and only the trustee, can operate the debtor's sole proprietorship business post-petition. 11 U.S.C. §§ 363(c)(1), 721; *In re Gracey*, 80 B.R. 675 (Bankr. E.D. Pa. 1987), *aff'd*, 849 F.2d 601 (3rd Cir.), cert. denied 488 U.S. 880 (1988); *see also*, *In re Lah*, 91 B.R. 441 (Bankr. N.D. Ohio 1988). From this it follows that a Chapter 7 trustee assigned to a case in which the debtor has a going business concern must: (1) obtain permission to operate the business, 11 U.S.C. § 721; (2) sell the business, 11 U.S.C. 363(b)(1); (3) abandon it, 11 U.S.C. § 554; or (4) force the closure of the business until such time as the property is no longer property of the estate.

In this case, the debtor has an interest in a sole proprietorship. The Chapter 7 trustee has not received permission to operate the business, sold it or abandoned it. As a result, the court will grant the motion.

16. [13-10150](#)-A-7 DEBRA DAVIS  
JES-2  
JAMES SALVEN/MV  
WILLIAM COLLIER/Atty. for dbt.

MOTION TO SELL  
7-2-13 [[61](#)]

**Tentative Ruling**

**Motion:** Sell Property

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Property:** vehicles and farm implements

**Buyer:** Debtor

**Sale Price:**

2003 GMC Truck - \$20,000.00 (\$5,000.00 cash plus \$15,000.00 exemption credit)

1996 Turnbow horse trailer - \$5,000.00 (\$1,500.00 cash plus \$3,500.00 exemption credit)

1995 New Holland tractor and various farm implements and equipment - \$6,200.00 (\$3,500.00 cash plus \$2,700.00 exemption credit)

**Sale Type:** Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

17. [13-12650](#)-A-7 STEPHANIE PLUMB  
SAS-1

OPPOSITION RE: TRUSTEE'S MOTION  
TO DISMISS FOR FAILURE TO  
APPEAR AT SEC. 341(A) MEETING  
OF CREDITORS  
7-1-13 [[43](#)]

TIMOTHY MCCANDLESS/Atty. for dbt.

**Tentative Ruling**

**Motion:** Dismiss Case and Extend Deadlines

**Notice:** LBR 9014-1(f)(1); written opposition required or case dismissed without hearing

**Disposition:** Granted in part, conditionally denied in part

**Order:** Prepared by chapter 7 trustee

The Chapter 7 trustee has filed a Motion to Dismiss for Failure to Appear at § 341(a) Meeting of Creditors and Motion to Extend Deadlines for Filing Objections to Discharge. The debtor opposes the motion. The court will deny the motion to dismiss subject to the condition that debtor attend the continued meeting of creditors.

Certain deadlines will be extended so that they run from the continued date of the § 341(a) meeting of creditors rather than the first date set for the meeting of creditors. The continued date of the meeting of creditors is August 6, 2013, at 8:30 a.m. The deadline for objecting to discharge under § 727 is extended to 60 days after this continued date. See Fed. R. Bankr. P. 4004(a). The deadline for bringing a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, is extended to 60 days after such date. See Fed. R. Bankr. P. 1017(e).

The motion will be granted in part and conditionally denied in part. The motion will be granted to the extent it requests extension of certain deadlines so that they run from the continued date of the meeting of creditors. The motion will be conditionally denied in part to the extent it requests dismissal of the case. The court will deny the motion to dismiss subject to the condition that the debtor appear at the continued meeting of creditors, but if the debtor does not appear at the continued meeting of creditors, the case will be dismissed on the trustee's ex parte declaration.

18. [10-11551](#)-A-7 LARRY/DANETTE SAILER MOTION FOR COMPENSATION BY THE  
DAI-1 LAW OFFICE OF DOWLING AARON  
CHRISTOPHER SEYMOUR/MV INC. FOR CHRISTOPHER E.  
SEYMOUR, TRUSTEE'S ATTORNEY(S),  
FEE: \$44951.77, EXPENSES:  
\$5048.23.  
6-21-13 [[66](#)]

PETER BUNTING/Atty. for dbt.

### **Tentative Ruling**

**Motion:** First and Final Application for Compensation and Expenses

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Continued to September 4, 2013, at 9:00 a.m.

**Order:** Prepared by applicant

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

In this case, the court is unable to locate either a motion approving the compromise with David R. Smith and other described in the First and Final Application for Payment, Narrative for Fee Application ¶ 5, June 21, 2013, ECF No. 66, or an order thereon. Fed. R. Bankr. P. 9012; *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1982). If

such a motion was prosecuted the court invites the applicant to direct it to that portion of the record. If not, the court will continue the matter to allow such a motion to be noticed.

19. [12-19851](#)-A-7 ROBERT OWENS MOTION TO SELL  
JES-3 7-2-13 [[31](#)]  
JAMES SALVEN/MV  
THOMAS ARMSTRONG/Atty. for dbt.

### **Tentative Ruling**

**Motion:** Sell Property

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Property:** Vehicles

**Buyer:** Debtor

**Sale Price:**

2000 GMC Yukon - \$5,894.00 (\$3,169.00 cash plus \$2,725.00 exemption credit)

1997 Chevrolet Astro van - \$1650.00 (cash and no exemption credit)

**Sale Type:** Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

20. [11-12264](#)-A-7 GENEAL CHIMA  
WW-1  
GENEAL CHIMA/MV

MOTION FOR SANCTIONS FOR  
VIOLATION OF THE AUTOMATIC STAY  
AND/OR MOTION FOR SANCTIONS FOR  
VIOLATION OF THE DISCHARGE  
INJUNCTION  
7-11-13 [[122](#)]

JEFF REICH/Atty. for dbt.

[This matter will be called at 11:00 a.m.]

**No tentative ruling.**

21. [10-61970](#)-A-7 BRIAN ENNIS  
THA-4  
THOMAS ARMSTRONG/MV

MOTION FOR COMPENSATION FOR  
THOMAS H. ARMSTRONG, SPECIAL  
COUNSEL(S), FEE: \$8167.25,  
EXPENSES: \$428.29.  
7-2-13 [[207](#)]

RILEY WALTER/Atty. for dbt.

**Final Ruling**

**Motion:** Application for Compensation and Expenses

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Approved

**Order:** Prepared by applicant

**Applicant:** Thomas A. Armstrong

**Compensation approved:** \$8,167.25

**Costs approved:** \$428.29

**Aggregate fees and costs approved:** \$8,595.54

**Retainer held:** \$0.00

**Amount to be paid as administrative expense:** \$8,595.54

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a debtor's attorney in a Chapter 13 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. See *Id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed

prior to case closure. The moving party is authorized to draw on any retainer held.

Future fee applications by counsel for the Chapter 7 trustee shall include a representation by the Chapter 7 trustee that the estate is administratively solvent.

22. [13-11275](#)-A-7 GUADALUPE PUENTES MOTION TO COMPEL ABANDONMENT  
GH-1 6-20-13 [[18](#)]  
GUADALUPE PUENTES/MV  
GARY HUSS/Atty. for dbt.

### **Tentative Ruling**

**Motion:** Compel Abandonment of Property of the Estate

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Denied

**Order:** Prepared by moving party

**Asset Description:** 2006 Jeep Commander

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

### **BACKGROUND**

The debtor has filed a motion to compel abandonment of the subject vehicle, but the trustee has filed a motion to compel turnover of the vehicle set for hearing on this calendar. The court will treat the motion to compel turnover as an opposition to this motion, as the two matters involve substantially interrelated concepts. The motion to compel abandonment and the motion for turnover both depend on the question of whether the property is burdensome or of inconsequential value and benefit to the estate. Thus, if the court compels abandonment of the vehicle, the motion to compel turnover of the vehicle would be moot, and if the property is turned over, the motion to compel abandonment would be.

### **LEGAL STANDARDS**

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

### **ANALYSIS**

The court will deny the motion to abandon the property. The debtor's own testimony at the creditors' meeting shows that the vehicle may have equity. The debtor testified at the meeting of creditors that she took the vehicle to Baird Auction for a valuation. Strain Reply

at ¶ 3, ECF No. 24. The debtor also testified at this meeting that the damage to the vehicle occurred before the petition date. See *id.* By inference, then, the auctioneer had an opportunity to consider the damage to the vehicle at the time of the auctioneer's valuation.

The auctioneer gave Strain an auction value of \$9,000.00 taking into account the needed repairs. At a \$9,000.00 value, there is equity in the vehicle taking into account the debtor's \$2,725.00 exemption and even assuming the cost of repairs will be as stated by the debtor (\$4,523.79). Accordingly, the court does not find that the property is of inconsequential value and benefit to the estate.

In any event, the trustee has stated that if she is wrong about whether the vehicle has equity, then the vehicle will not sell at auction and she will return the vehicle to the debtor. The court believes that the best method for determining the value of the vehicle is to place the vehicle on the market to obtain the price a willing buyer would pay.

### CONCLUSION

The motion will be denied. The debtor has admitted that she took the vehicle to the auctioneer for valuation. The auctioneer valued the vehicle at \$9,000.00. After subtracting the debtor's exemption and costs of sale, there may be some equity in the vehicle for unsecured creditors.

23. [13-11275](#)-A-7 GUADALUPE PUENTES  
SAS-1  
SHERYL STRAIN/MV  
GARY HUSS/Atty. for dbt.  
RESPONSIVE PLEADING

CONTINUED MOTION TO COMPEL  
6-12-13 [[13](#)]

*[The hearing on this matter will be concurrent with the hearing on the debtor's motion for abandonment of the subject vehicle (docket control no. GH-1), which vehicle is also the property subject of this turnover matter.]*

### Tentative Ruling

**Motion:** Compel Debtor's Turnover of Property of the Estate

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

## LEGAL STANDARDS

Section 542 of the Bankruptcy Code requires the debtor and third parties to turn over to the chapter 7 trustee property that the trustee may use or sell. See 11 U.S.C. § 542(a). Property that is of inconsequential value or benefit to the estate is not required to be turned over to the trustee. See *id.* Other narrow exceptions and defenses are described in § 542. See *id.* § 542(b)-(d).

The trustees may compel the debtor to turn over property to the trustee by motion rather than by adversary proceeding. Fed. R. Bankr. P. 7001(1). The trustee bears the burden of proof, and must demonstrate that the property sought is property of the estate.

## ANALYSIS

In this case, the trustee has made the requisite showing of the estate's interest in the property sought by turnover. For the reasons stated in the court's ruling on the debtor's motion for abandonment in this case, having docket control no. GH-1, the property has equity. The property is therefore not of inconsequential value or benefit to the estate.

In any event, the trustee has stated that if she is wrong about whether the vehicle has equity, then the vehicle will not sell at auction and she will return the vehicle to the debtor. The court believes that the best method for determining the value of the vehicle is to place the vehicle on the market and see what price a willing buyer will pay.

## CONCLUSION

The motion will be granted. The property shall be turned over to the trustee at once and no later than 7 days from the date of service of the order on this motion.

24. [11-63576](#)-A-7 GARY/FOSTINE STERN  
PDP-45  
GARY STERN/MV

MOTION TO AVOID LIEN OF  
CONSOLIDATED ELECTRICAL  
DISTRIBUTORS, INC.  
6-29-13 [[283](#)]

PERRY POPOVICH/Atty. for dbt.  
RESPONSIVE PLEADING

## Tentative Ruling

**Motion:** Avoid Lien that Impairs Exemption

**Notice:** LBR 9014-1(f)(1); written opposition filed

**Disposition:** Continued for an evidentiary hearing on a date to be determined at the hearing

**Order:** Civil minute order

## BACKGROUND

This case began by the debtors' filing a voluntary petition under Chapter 13 of the Bankruptcy Code. On June 12, 2012, the court converted the case to a case under Chapter 11. Almost one year later, the court sua sponte converted the case to a case under Chapter 7.

The debtors have brought a motion to avoid the lien of the responding party, Consolidated Electrical Distributors, Inc. ("CED") on real property located at 114 Yosemite Way, Los Gatos, California ("Los Gatos property"). Another motion by debtors to avoid a lien on real property located at 41741 Lilly Mountain Drive, Coarsegold, California ("Coarsegold property") is on the court's hearing calendar.

CED opposes the motion. First, CED argues that the debtors claim the exemption in the Los Gatos property pursuant to § 703.140(b)(5) while claiming an inconsistent exemption pursuant to § 704.730 in the Coarsegold property. Second, CED disputes the value of the property contending that the debtors have understated such value.

## LEGAL STANDARDS

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

Property must be listed on the schedules and claimed as exempt as a requirement for lien avoidance under § 522(f). See *Goswami*, 304 B.R. at 390-91 (deciding the unrelated issue of whether a debtor loses the ability to amend exemptions claimed upon case closure, and relying on the premise that property must be claimed exempt on the schedules for purposes of lien avoidance). "If the debtor does not proffer the verified schedules and list of property claimed as exempt, the court nevertheless has discretion to take judicial notice of them for the purpose of establishing whether the property is listed and claimed as exempt . . . ." *In re Mohring*, 142 B.R. 389, 393 (Bankr. E.D. Cal. 1992), *aff'd*, 153 B.R. 601 (B.A.P. 9th Cir. 1993), *aff'd*, 24 F.3d 247 (9th Cir. 1994) (unpublished mem. decision). It follows that a debtor who has not claimed an exemption in property encumbered by a judicial lien or a nonpossessory, nonpurchase-money security interest may not use the protections of that section. See *Goswami*, 304 B.R. at 390-91 (quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)).

## **ANALYSIS**

### Whether Exemption Properly Claimed

CED asserts that debtors have claimed exemptions inconsistently from two separate statutory schemes. Debtors may elect state law exemptions available only to debtors in bankruptcy under section 703.140(b) ("special bankruptcy exemptions") or they may elect the exemptions under Chapter 4 of Part 2, Title 9, Division 2 of the California Code of Civil Procedure excluding the exemptions under section 703.140(b) ("regular non-bankruptcy exemptions"), but they may not elect both. See Cal. Civ. Proc. Code § 703.140(a)(1)-(3).

Amended Schedule C shows that both exemptions were properly claimed under § 703.140(b)(1) and (5). The Coarsegold property is not claimed exempt under § 704.730 but under § 703.140(b)(1).

But the debtors' motion to avoid the lien on the Coarsegold property asserts that the exemption is \$100,000.00. This amount is inconsistent with amount claimed exempt and the statutory basis for the Coarsegold exemption on the debtors' amended Schedule C.

The court, however, will not treat the debtors' motion to avoid the lien on the Coarsegold property as electing an inconsistent exemption under § 704.730. Schedule C contains a properly claimed exemption as to the Coarsegold property. Based on the exemption claimed on amended Schedule C and § 703.140(b), the lien may be avoided on the Coarsegold property. Thus, the analysis for avoiding a lien on the subject Los Gatos property is unaffected by the inconsistency between the debtors' amended Schedule C and the debtors' motion to avoid the lien on the Coarsegold property.

### Disputed Issue of the Property's Value

However, CED disputes the value of the property. At the hearing, the court will hold a scheduling conference and set an evidentiary hearing under Federal Rule of Bankruptcy Procedure 9014(d). An evidentiary hearing is required because the disputed, material factual issue of the property's valuation must be resolved before the court can rule on the relief requested.

Before the hearing, the parties shall attempt to meet and confer to determine: (i) whether the court has fully and fairly described the evidentiary issues requiring resolution; (ii) whether any party wishes to engage in discovery prior to the evidentiary hearing and the time necessary to complete discovery; (iii) the deadlines for any dispositive motions or evidentiary motions; (iv) the dates for the evidentiary hearing and the trial time that will be required; (v) whether the parties wish to use or waive the provisions of Local Bankruptcy Rule 9017-1; and (vi) any other such matters as may be necessary or expedient to the resolution of these issues.

25. [11-63576](#)-A-7 GARY/FOSTINE STERN  
PDP-46  
GARY STERN/MV

MOTION TO AVOID LIEN OF  
CONSOLIDATED ELECTRICAL  
DISTRIBUTORS, INC.  
6-29-13 [[286](#)]

PERRY POPOVICH/Atty. for dbt.

### **Final Ruling**

**Motion:** Avoid Lien that Impairs Exemption

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

In the motion, the debtor asserts that the exemption amount is \$100,000.00. The debtors' amended schedules show, however, that the exemption claimed is actually only \$8,000.00 and claimed under § 703.140(b) consistent with other exemptions claimed in the schedules. Even if the \$8,000.00 figure is used, a prima facie case for lien avoidance exists.

The responding party's judicial lien, all other liens, and the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, the responding party's judicial lien will be avoided entirely.

26. [12-14779](#)-A-7 STEVEN/CARRIE WOOD  
PFT-1  
PETER FEAR/MV  
  
THOMAS ARMSTRONG/Atty. for dbt.  
PETER FEAR/Atty. for mv.  
WITHDRAWN
- OBJECTION TO CLAIM OF QUALITY  
DOCK AND DOOR, INC., CLAIM  
NUMBER 1  
6-13-13 [[26](#)]

**Final Ruling**

Having been withdrawn, the matter is dropped from calendar as moot.

27. [09-18191](#)-A-7 CON DEV SERVICES, INC.  
GEG-1  
ERICKSON EQUIPMENT, INC./MV  
GLEN GATES/Atty. for mv.  
RESPONSIVE PLEADING
- CONTINUED MOTION FOR  
ADMINISTRATIVE EXPENSES  
6-7-13 [[403](#)]

**No tentative ruling.**

28. [13-12713](#)-A-7 NANCY VILLARRUEL
- OPPOSITION TO TRUSTEE'S REPORT  
OF NO DISTRIBUTION BY ALFREDO  
CAMACHO  
7-19-13 [[24](#)]
- JANINE ESQUIVEL/Atty. for dbt.  
RESPONSIVE PLEADING

*[This matter will be called simultaneously with Item No. 28,  
Opposition to Trustee's Report of No Distribution by Lourdes  
Camacho.]*

**Tentative Ruling**

The court intends to adopt the tentative ruling in Item No. 3,  
Villarruel, No. 13-12713 (Bankr. E.D. Cal. 2013), Continued Opposition  
to Trustee's Report of No Distribution by Lourdes Camacho, as its  
ruling in this case.

29. [13-14514](#)-A-7 CHARLES ROSS AND MARIAMA MOTION FOR ORDER REQUIRING  
JES-1 HEBERT DEBTOR TO SHUT DOWN BUSINESS  
JAMES SALVEN/MV 7-12-13 [[13](#)]  
GARY HUSS/Atty. for dbt.  
RESPONSIVE PLEADING

### **Tentative Ruling**

**Motion:** Requiring Debtor to Shut Down Business

**Notice:** LBR 9014-1(f)(3); no written opposition required

**Disposition:** Granted or continued to August 15, 2013, at 9:00 a.m.

**Order:** Prepared by Chapter 7 trustee

**Business Description:** Styles by Mari

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

The commencement of a Chapter 7 case creates an estate. 11 U.S.C. § 541(a). Except as provided otherwise, the estate is comprised of all legal or equitable interests of the debtor as of the commencement of the case. *Id.* When a Chapter 7 case is commenced a trustee is appointed; the trustee is the representative of the estate. 11 U.S.C. §§ 701(a), 323(a). The Chapter 7 trustee must collect and reduce to money property of the estate and account for property received. 11 U.S.C. § 704(a)(1),(2). It is the Chapter 7 trustee, not the debtor, who has authority to use property of the estate. 11 U.S.C. § 363(b). The Chapter 7 trustee, and only the trustee, can operate the debtor's sole proprietorship business post-petition. 11 U.S.C. §§ 363(c)(1), 721; *In re Gracey*, 80 B.R. 675 (Bankr. E.D. Pa. 1987), *aff'd*, 849 F.2d 601 (3rd Cir.), cert. denied 488 U.S. 880 (1988); *see also*, *In re Lah*, 91 B.R. 441 (Bankr. N.D. Ohio 1988). From this it follows that a Chapter 7 trustee assigned to a case in which the debtor has a going business concern must: (1) obtain permission to operate the business, 11 U.S.C. § 721; (2) sell the business, 11 U.S.C. 363(b)(1); (3) abandon it, 11 U.S.C. § 554; or (4) force the closure of the business until such time as the property is no longer property of the estate.

In this case, the debtor has an interest in a sole proprietorship. The Chapter 7 trustee has not received permission to operate the business, sold it or abandoned it. As a result, the court will grant the motion.

In the alternative, at the debtor's option, the court will continue the matter to August 15, 2013, at 9:00 a.m. to allow the debtor to make a motion to compel the Chapter 7 trustee to abandon the business.

30. [13-13744](#)-A-7 JESUS PONCE  
PBB-1  
JESUS PONCE/MV  
PETER BUNTING/Atty. for dbt.

MOTION TO SELL  
7-24-13 [[12](#)]

**Tentative Ruling**

**Motion:** Sell Property

**Notice:** LBR 9014-1(f)(3) and order shortening time; no written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Property:** Sole Proprietorship Business Assets

**Buyer:** Debtor

**Sale Price:** \$7,080.00 (\$3,000.00 cash plus \$4,080.00 exemption credit in certain business assets)

**Sale Type:** Private sale subject to overbid opportunity

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(3). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); see also *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. See 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.





10:00 a.m.

1. [11-16829](#)-A-7 GILBERT/ADA GALVAN MOTION FOR RELIEF FROM  
KKY-153 AUTOMATIC STAY  
OPERATING ENGINEERS LOCAL 7-3-13 [[82](#)]  
UNION &#035;3 FEDERAL CREDIT  
GARY HUSS/Atty. for dbt.  
KAIPO YOUNG/Atty. for mv.

**Final Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 2007 Chevrolet Tahoe vehicle

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

2. [11-16829](#)-A-7 GILBERT/ADA GALVAN MOTION FOR RELIEF FROM  
KKY-154 AUTOMATIC STAY  
OPERATING ENGINEERS LOCAL 7-3-13 [[91](#)]  
UNION &#035;3 FEDERAL CREDIT  
GARY HUSS/Atty. for dbt.  
KAIPO YOUNG/Atty. for mv.

**Final Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 2003 Chevrolet Trailblazer

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been

filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

3. [13-12931](#)-A-7 JUDITH BOMBARDIERI MOTION FOR RELIEF FROM  
JCW-1 AUTOMATIC STAY  
U.S. BANK NATIONAL 6-26-13 [[17](#)]  
ASSOCIATION/MV  
GEOFFREY ADALIAN/Atty. for dbt.  
JENNIFER WONG/Atty. for mv.

**Final Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 1929 East Andrea Court, Visalia, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

4. [13-12650](#)-A-7 STEPHANIE PLUMB  
CMS-2  
U.S. BANK NATIONAL  
ASSOCIATION/MV  
TIMOTHY MCCANDLESS/Atty. for dbt.  
PATRICIA LYON/Atty. for mv.

MOTION TO CONFIRM TERMINATION  
OR ABSENCE OF STAY  
7-11-13 [[51](#)]

**Tentative Ruling**

**Motion:** Confirm Absence of Stay

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 17703 Road 24, Madera, California

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Section 362(j) allows the court to issue orders confirming the termination of the automatic stay. It provides, "On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated." 11 U.S.C. § 362(j).

Debtors that have more than one case pending within a year receive the benefit of the stay for 30 days, unless extended by the court. 11 U.S.C. § 362(c)(3). Debtor Stephanie Plumb has had two cases in pending in the last 12 months: No. 12-12739 and 13-12650. The stay has not been extended. No stay applies to either the debtor or the estate. *In re Reswick*, 446 B.R. 362, 366-369, 373 (B.A.P. 9th Cir. 2011).

5. [13-12650](#)-A-7 STEPHANIE PLUMB  
MRG-1  
THE BANK OF NEW YORK MELLON/MV  
TIMOTHY MCCANDLESS/Atty. for dbt.  
MICHAEL GONZALES/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
6-26-13 [[36](#)]

**Tentative Ruling**

**Motion:** Confirm Absence of Stay

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 16884 Avellar Drive, Madera, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(j) allows the court to issue orders confirming the termination of the automatic stay. It provides, "On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated." 11 U.S.C. § 362(j).

Debtors that have more than one case pending within a year receive the benefit of the stay for 30 days, unless extended by the court. 11 U.S.C. § 362(c)(3). Debtor Stephanie Plumb has had two cases in pending in the last 12 months: No. 12-12739 and 13-12650. The stay has not been extended. No stay applies to either the debtor or the estate. *In re Reswick*, 446 B.R. 362, 366-369, 373 (BAP 9th Cir. 2011).

6. [13-13965](#)-A-7 ROBERT SCHWEITZER  
SC-1  
GRANITE RANCH OPPORTUNITIES,  
LLC/MV  
SAM CHANDRA/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
7-3-13 [[20](#)]

#### **Final Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 1437 South Michael Court, Visalia, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

#### **SECTION 362(1) RELIEF**

Section 362(d)(1) authorizes stay relief for cause shown. Cause includes the debtor's pre-petition loss of real property by way of foreclosure. In this case, the debtor's interest in the property was extinguished prior to the petition date by a foreclosure sale. The motion will be granted. The moving party may take such actions as are authorized by applicable non-bankruptcy law, including prosecution of an unlawful detainer action (except for monetary damages), to obtain

possession of the subject property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived.

**SECTION 362(d)(4) RELIEF**

Section 362(d)(4) authorizes in rem relief as real property for up to two years if the court finds that the debtor's petition was part of a "a scheme to delay, hinder or defraud creditors" that involved either: (1) transfer of all or part ownership of the real property without the secured creditors consent or court approval; or (2) multiple bankruptcy filings affecting such real property. The court must affirmatively find each of these elements before granting in rem relief. *In re First Yorkshire Holdings, Inc.*, 470 B.R. 864, 870-71 (B.A.P. 9th Cir. 2012).

In this case, this is the debtor's third bankruptcy in two years. The other two bankruptcies are Nos. 12-12642 and 12-15147. The first was a Chapter 7 filed March 26, 2012, pro se and dismissed on April 6, 2012, for failure to timely file documents. The second was Chapter 7 filed on June 6, 2012, pro se and dismissed on June 18, 2012, for failure to timely file documents. This case is also a Chapter 7 filed June 5, 2013, pro se. Schedules and statements have been filed. But the debtor has not provided pay advices and tax returns to the Chapter 7 trustee. And the Chapter 7 trustee has noticed a motion to dismiss the case. Trustee's Motion to Dismiss, July 17, 2013, ECF No. 30. The court finds a scheme to delay, hinder or defraud creditors

No other relief will be awarded.

7. [13-14369](#)-A-7 VINCENT D'AMORE MOTION FOR RELIEF FROM  
SRH-1 AUTOMATIC STAY  
JASCO CONSULTING, INC./MV 7-17-13 [[15](#)]  
STEVEN HRDLICKA/Atty. for mv.

**Tentative Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 14879 Avenue 313, Visalia, California

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Section 362(d)(1) authorizes stay relief for cause shown. Cause includes the debtor's pre-petition loss of real property by way of foreclosure. In this case, the debtor's interest in the property was extinguished prior to the petition date by a foreclosure sale. The motion will be granted. The movant may take such actions as are authorized by applicable non-bankruptcy law, including prosecution of an unlawful detainer action (except for monetary damages) to obtain possession of the subject property. The motion will be granted, and

Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

8. [13-14382](#)-A-7 ROBERTO/LAURA JUAREZ MOTION FOR RELIEF FROM  
CJO-1 AUTOMATIC STAY  
GREENTREE SERVICING LLC/MV 7-12-13 [[16](#)]  
PATRICIA CARRILLO/Atty. for dbt.  
CHRISTINA O/Atty. for mv.

**Tentative Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 531 East Valley Street, Coalinga, California

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

9. [13-14388](#)-A-7 CHAU LUU MOTION FOR RELIEF FROM  
MET-1 AUTOMATIC STAY  
HEDLUND TRUST #10612/MV 7-3-13 [[16](#)]  
MARY TANG/Atty. for mv.  
CASE DISMISSED

**Final Ruling**

The case dismissed the matter is dropped as moot.

10. [13-14393](#)-A-7 MARINA MONGE MOTION FOR RELIEF FROM  
MRG-1 AUTOMATIC STAY  
CAPITAL ONE, N.A./MV 7-15-13 [[9](#)]  
JANINE ESQUIVEL/Atty. for dbt.  
MICHELLE GHIDOTTI-GONSALVES/Atty. for mv.

**Tentative Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 14301 West C Street, Kerman, California

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

11. [13-13494](#)-A-7 ANDREA SMITH MOTION FOR RELIEF FROM  
TJS-1 AUTOMATIC STAY  
JPMORGAN CHASE BANK, N.A./MV 6-26-13 [[11](#)]  
LAYNE HAYDEN/Atty. for dbt.  
TIMOTHY SILVERMAN/Atty. for mv.

**Final Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 2004 BMW 3-Series

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court

considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

10:30 a.m.

1. [13-14028](#)-A-7 ROSEMARY WILLIAMS PRO SE REAFFIRMATION AGREEMENT WITH CAPITAL ONE AUTO FINANCE 6-29-13 [[23](#)]

**No tentative ruling.**

2. [13-13234](#)-A-7 GRIFFIN/RHONDA BAILEY REAFFIRMATION AGREEMENT WITH JPMORGAN CHASE BANK, N.A. 7-10-13 [[21](#)]

GARY HUSS/Atty. for dbt.

**No tentative ruling.**

3. [13-13440](#)-A-7 KAYE SAILOR REAFFIRMATION AGREEMENT WITH TOYOTA MOTOR CREDIT CORPORATION 6-29-13 [[11](#)]

GEORGE LOGAN/Atty. for dbt.

**No tentative ruling.**

1:30 p.m.

1. [10-12709](#)-A-11 ENNIS COMMERCIAL MOTION FOR COMPENSATION BY THE  
RK-6 PROPERTIES, LLC LAW OFFICE OF THE LAW OFFICE OF  
ALLAN BAILEY/MV ROBERT KRASE FOR ALLAN M.  
BAILEY, DEBTOR'S ATTORNEY(S),  
FEE: \$5130.00, EXPENSES:  
\$59.59.  
7-1-13 [[964](#)]

PETER FEAR/Atty. for dbt.

**Final Ruling**

**Motion:** Final Application for Compensation and Expenses

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Approved

**Order:** Prepared by applicant

**Applicant:** Law Offices of Robert Krase

**Additional compensation approved:** \$5,130.00

**Additional costs approved:** \$59.59

**Aggregate additional fees and costs approved:** \$5,189.59

**Retainer held:** \$3,950.00

**Additional amount to be paid as administrative expense:** \$1,239.59

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a debtor's attorney in a Chapter 13 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. See *Id.* § 330(a)(3).

The applicant's prior interim fee applications on April 6, 2011, July 27, 2011, December 7, 2011, December 18, 2012, and December 5, 2012, are approved on a final basis.

The court finds that the additional compensation and expenses sought are reasonable, and the court will approve the application on a final basis. The moving party is authorized to draw on any retainer held.

2. [12-17310](#)-A-11 JOHN/GRACE VISSER CONTINUED CHAPTER 11 STATUS  
CONFERENCE  
9-18-12 [[121](#)]

RONALD CLIFFORD/Atty. for dbt.

**No tentative ruling.**

3. [12-17310](#)-A-11 JOHN/GRACE VISSER  
RAC-14

HEARING RE: AMENDED DISCLOSURE  
STATEMENT

7-10-13 [[733](#)]

RONALD CLIFFORD/Atty. for dbt.  
RESPONSIVE PLEADING

**No tentative ruling.**

4. [12-17310](#)-A-11 JOHN/GRACE VISSER  
RAC-30  
GLASSRATNER ADVISORY AND  
CAPITAL GROUP, LLC/MV

MOTION FOR COMPENSATION FOR  
GLASSRATNER ADVISORY AND  
CAPITAL GROUP, LLC, FINANCIAL  
ADVISOR(S), FEE: \$4320.00,  
EXPENSES: \$17.50., MOTION FOR  
ALLOWANCE OF PAYMENT OF  
HOLDBACK FUNDS

7-10-13 [[727](#)]

RONALD CLIFFORD/Atty. for dbt.

#### **Final Ruling**

This matter is continued to August 21, 2013, to allow the applicant to file supplemental support documentation. The applicant shall do so no later than August 14, 2013.

There are two issues to be addressed. First, there is no evidence of client approval of the fees. U.S. Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 USC § 330, Guideline (b)(1)(v). The applicant shall obtain such approval or provide a declaration as to its to do so.

Second, the court is not inclined to approve actual payment of the compensation unless and until the applicant make a showing that the estate is administratively solvent or the payment to the applicant is proportionate to the payment to other § 507(a)(2) creditors. This court has ruled that this case appears administratively insolvent and has approved fees but not authorized payment for other professionals seeking interim compensation. Civil Minutes, July 10, 2013, ECF No. 725. Ninth Circuit case law is clear that all § 507(a)(2) claims are of equal dignity and share the same priority. *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1356 & fn. 22 (9th Cir. 1983); *In re Lazar*, 83 F.3d 306, 308-309 (9th Cir. 1996). This court has the authority to control timing of administrative expenses. *In re Verco Indus.*, 20 B.R. 664, 665 (9th Cir. BAP 1982). That includes interim fee applications of professionals. Where there are insufficient funds to pay all administrative claims in full, the § 507(a)(2) creditors share pro-rata. *In re Barron*, 73 B.R. 812, 815 (Bankr. SD Cal. 1987); *In re Lazar*, 83 F.3d 306, 308-309 (9th Cir. 1996).

5. [13-13531](#)-A-11 DANIEL'S MEXICAN GRILL, MOTION TO EMPLOY STEPHEN LABIAK  
SL-1 LLC AS ATTORNEY(S)  
DANIEL'S MEXICAN GRILL, LLC/MV 6-20-13 [[20](#)]  
STEPHEN LABIAK/Atty. for dbt.

**Tentative Ruling**

**Motion:** Employ Stephen Labiak

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Employment applications are governed by 11 U.S.C. § 327(a). 11 U.S.C. § 101(14). Labiak appears to meet the lack of adverse interest and disinterested elements of § 327(a) and, absent objection at the hearing, the court will approve his employment.

6. [13-13531](#)-A-11 DANIEL'S MEXICAN GRILL, CONTINUED MOTION TO EMPLOY MPA  
SL-2 LLC ASSOCIATES AS ACCOUNTANT(S)  
DANIEL'S MEXICAN GRILL, LLC/MV 6-21-13 [[31](#)]  
STEPHEN LABIAK/Atty. for dbt.

**Tentative Ruling**

**Motion:** Employ MPA Associates

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Employment applications are governed by 11 U.S.C. § 327(a). 11 U.S.C. § 101(14). MPA Associates appears to meet the lack of adverse interest and disinterested elements of § 327(a) and, absent objection at the hearing, the court will approve its employment.

7. [12-17336](#)-A-11 VISSER FARMS

CONTINUED CHAPTER 11 STATUS  
CONFERENCE

9-18-12 [[103](#)]

SCOTT BLAKELEY/Atty. for dbt.

**No tentative ruling.**

8. [12-17336](#)-A-11 VISSER FARMS  
RAC-15

HEARING RE: SECOND AMENDED  
DISCLOSURE STATEMENT

7-10-13 [[235](#)]

SCOTT BLAKELEY/Atty. for dbt.  
RESPONSIVE PLEADING

**No tentative ruling.**

9. [13-14037](#)-A-11 GIL/MARIA GILBUENA

ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES

7-15-13 [[83](#)]

J. IRIGOYEN/Atty. for dbt.  
PAID \$303.00

**Final Ruling**

The Order to Show Cause is discharged and the case shall remain pending.

10. [13-14037](#)-A-11 GIL/MARIA GILBUENA  
JMI-1  
GIL GILBUENA/MV

MOTION TO VALUE COLLATERAL OF  
HSBC MORTGAGE SERVICES, INC.

AND/OR MOTION TO VALUE  
COLLATERAL OF KEYBANK

6-18-13 [[17](#)]

J. IRIGOYEN/Atty. for dbt.

**Final Ruling**

**Motion:** Value Collateral [Real Property; Principal Residence]

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been

filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Individual Chapter 11 debtors may strip off a wholly unsecured junior lien encumbering the debtor's principal residence. See 11 U.S.C. §§ 506(a), 1123(b)(5). Courts in this circuit have interpreted § 1322(b)(2), a provision analogous to § 1123(b)(5), and held that the provision is inapplicable to wholly unsecured claims. See *In re Lam*, 211 B.R. 36, 40-42 (B.A.P. 9th Cir. 1997); *In re Zimmer*, 313 F.3d 1220, 1222-26 (9th Cir. 2002).

A motion to value the debtor's principal residence should be granted upon a threefold showing by the moving party. First, the moving party must proceed by noticed motion. Fed. R. Bankr. P. 3012. Second, the motion must be served on the holder of the secured claim. Fed. R. Bankr. P. 3012, 9014(a). Third, the moving party must prove by admissible evidence that the debt secured by liens senior to the responding party's claim exceeds the value of the principal residence. See 11 U.S.C. § 506(a); *Lam*, 211 B.R. at 40-42; *Zimmer*, 313 F.3d at 1222-25.

The motion requests that the court value real property that is the responding party's collateral. The motion does not state whether the property is the debtors' principal residence. The real property is located at 1726 North Edison, Visalia, California, the address that appears as the debtor's street address on the voluntary petition. In the future, a valuation motion should, if applicable, clearly state that real property is the debtors' principal residence.

Because the amount owed to senior lien holders exceeds the value of the collateral, the responding party's claim is wholly unsecured and no portion will be allowed as a secured claim. See 11 U.S.C. § 506(a).

11. [13-14037](#)-A-11 GIL/MARIA GILBUENA MOTION TO VALUE COLLATERAL OF  
JMI-2 FIRST BANK  
GIL GILBUENA/MV 6-19-13 [[33](#)]  
J. IRIGOYEN/Atty. for dbt.  
STIPULATION AND ORDER

### **Final Ruling**

The matter resolved by stipulation, the motion is dropped as moot.

12. [13-14037](#)-A-11 GIL/MARIA GILBUENA  
JMI-3  
GIL GILBUENA/MV  
J. IRIGOYEN/Atty. for dbt.  
RESPONSIVE PLEADING

MOTION TO VALUE COLLATERAL OF  
OCWEN LOAN SERVICING, LLC  
6-18-13 [[21](#)]

### **Tentative Ruling**

**Motion:** Value Collateral [Real Property; Nonresidential]  
**Notice:** Written opposition filed by responding party  
**Disposition:** Continued to September 11, 2013, at 9:00 a.m.  
**Order:** Civil Minute Order

The motion seeks to value nonresidential real property that is the responding party's collateral. The responding party has requested a continuance to obtain a broker's opinion, appraisal or other evidence of the collateral's value. The court will continue the motion to the date indicated. No later than 14 days before the continued date of the hearing, the parties will file a joint status report.

If the parties have not resolved this matter, then the court will hold a scheduling conference on the continued date of the hearing and set an evidentiary hearing under Federal Rule of Bankruptcy Procedure 9014(d). An evidentiary hearing would be required because the disputed, material factual issue of the collateral's valuation must be resolved before the court can rule on the relief requested.

Before the continued date of the hearing, the parties shall meet and confer to determine: (i) whether an evidentiary hearing will be required; (ii) whether the court has fully and fairly described the evidentiary issues requiring resolution; (iii) whether any party wishes to engage in discovery prior to the evidentiary hearing and the time necessary to complete discovery; (iv) the deadlines for any dispositive motions or evidentiary motions; (v) the dates for the evidentiary hearing and the trial time that will be required; (vi) whether the parties wish to use or waive the provisions of Local Bankruptcy Rule 9017-1; and (vii) any other such matters as may be necessary or expedient to the resolution of these issues.

13. [13-14037](#)-A-11 GIL/MARIA GILBUENA  
JMI-4  
GIL GILBUENA/MV  
J. IRIGOYEN/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF  
OCWEN LOAN SERVICING, LLC  
6-18-13 [[25](#)]

### **Final Ruling**

**Motion:** Value Collateral [Real Property; Nonresidential]  
**Notice:** LBR 9014-1(f)(1); written opposition required  
**Disposition:** Granted  
**Order:** Prepared by moving party

**Collateral Value:** \$130,000.00

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The motion requests that the court value nonresidential real property that is the responding party's collateral. The court values the collateral at the amount set forth above. The responding creditor's claim is secured only to the extent of the collateral's value. See 11 U.S.C. § 506(a).

14. [13-14037](#)-A-11 GIL/MARIA GILBUENA MOTION TO VALUE COLLATERAL OF  
JMI-5 AMERICAS SERVICING COMPANY  
GIL GILBUENA/MV 6-18-13 [[29](#)]  
J. IRIGOYEN/Atty. for dbt.

**Final Ruling**

**Motion:** Value Collateral [Real Property; Nonresidential]

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Collateral Value:** \$135,000.00

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The motion requests that the court value nonresidential real property that is the responding party's collateral. The court values the collateral at the amount set forth above. The responding creditor's claim is secured only to the extent of the collateral's value. See 11 U.S.C. § 506(a).

15. [12-19661](#)-A-11 JORGE/MARY LOU SANTOS CONTINUED CHAPTER 11 STATUS  
CONFERENCE  
11-28-12 [[29](#)]

RILEY WALTER/Atty. for dbt.

[This matter will be called subsequent to Items No. 16-20.]

### **Tentative Ruling**

**Filed:** November 21, 2012

**Status:** Plan and Disclosure Statement not filed

**Exclusivity:** Expired

**Bar date for plan:** September 13, 2013

**Disposition:** Status Conference will be conducted

**Appearance by counsel and Pro Se Parties:** Required

The court will conduct a Status Conference and, absent reason to do otherwise, will continue the Status Conference for future monitoring.

16. [12-19661](#)-A-11 JORGE/MARY LOU SANTOS MOTION TO SELL  
WW-17 7-3-13 [[207](#)]  
JORGE SANTOS/MV  
RILEY WALTER/Atty. for dbt.

### **Tentative Ruling**

**Motion:** Sell Property

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Property:** Farm equipment

**Buyer:** Dirt Road, LLC

**Sale Price:** \$12,500.00

**Sale Type:** Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). Liquidation of estate assets is an appropriate restructuring purpose in a Chapter 11 reorganization case. *See, e.g.*, 11 U.S.C. § 1123(a)(5) (listing a sale of all or part of property of the estate as a means for implementing a Chapter 11 plan). As a result, the court will grant

the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

17. [12-19661](#)-A-11 JORGE/MARY LOU SANTOS MOTION TO SELL  
WW-18 7-3-13 [[212](#)]  
JORGE SANTOS/MV  
RILEY WALTER/Atty. for dbt.

### **Tentative Ruling**

**Motion:** Sell Real Property and Compensate Real Estate Broker

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted subject to the following condition: the sale is not made to an undisclosed nominee or designee of the buyer, but this condition will not apply if the moving party shows at or before the hearing that the nominee or designee is not an insider or relative of the debtor

**Order:** Prepared by moving party

**Property:** 18104 Everett Avenue, Laton, Kings County, CA ("Dairy #1") and a mobile home (the mobile home was financed by Greentree on which about \$55,000.00 is owed and will be paid through escrow)

**Buyer:** Rosa Farms, LP—but not buyer's undisclosed assignee or nominee

**Sale Price:** \$1.8 million

**Sale Type:** Private sale subject to overbid opportunity

**Real Estate Broker:** Pearson Realty

**Compensation Requested:** 4% commission (2% of the commission is proposed to be paid from a surcharge pursuant to § 506(c) with the consent of Farm Credit West, but the order shall not approve such surcharge)

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

### **SALE UNDER § 363(b)**

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); see also *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). Liquidation of estate assets is an appropriate restructuring purpose in a Chapter 11 reorganization case. See, e.g., 11 U.S.C. § 1123(a)(5) (listing a sale of all or part of property of the estate as a means for implementing a Chapter 11 plan). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

**SALE UNDER § 333(a)**

Section 330(a) of Title 11 authorizes "reasonable compensation for actual, necessary services" rendered by a professional person employed under § 327 and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3). The court finds that the compensation sought is reasonable and will approve the application.

**NO § 363(f) RELIEF GRANTED**

The court makes clear that no relief under § 363(f) is being granted. The order shall not contain language approving the proposed surcharge of Farm Credit West's collateral unless Farm Credit West affirmatively consents on the record.

18. [12-19661](#)-A-11 JORGE/MARY LOU SANTOS MOTION TO SELL  
WW-19 7-3-13 [[199](#)]  
JORGE SANTOS/MV  
RILEY WALTER/Atty. for dbt.  
RESPONSIVE PLEADING

**Tentative Ruling**

**Motion:** Sell Real Property and Compensate Real Estate Broker

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Pending

**Order:** Prepared by moving party

**Property:** 437 W. Mt. Whitney, Riverdale, CA ("Dairy #2")

**Buyer:** Melvin and Kelley Medeiros- but not buyer's undisclosed assignee or nominee

**Sale Price:** \$1.2 million

**Sale Type:** Private sale subject to overbid opportunity

**Real Estate Broker:** Pearson Realty

**Compensation Requested:** 4% commission

**APPLICABLE STANDARDS**

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); see also *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). Liquidation of estate assets is an appropriate restructuring purpose in a Chapter 11 reorganization case. See, e.g., 11 U.S.C. § 1123(a)(5) (listing a sale of all or part of property of the estate as a means for implementing a Chapter 11 plan).

Section 330(a) of Title 11 authorizes "reasonable compensation for actual, necessary services" rendered by a professional person employed

under § 327 and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

#### **FARM CREDIT WEST'S OPPOSITION**

Farm Credit West ("FCW") has stated that it is having discussions with the Debtors and "intends to continue with discussions notwithstanding the filing of [its opposition] in the hope that a satisfactory resolution of FCW's concerns can be reached either before or at the time of the hearing."

FCW states its concerns regarding the sale price, and its potential action of enforcing its rights to credit bid under § 363(k).

At the hearing, the court will determine the status of Farm Credit West's and the debtors' discussions and determine what issues remain to be decided by the court.

19. [12-19661](#)-A-11 JORGE/MARY LOU SANTOS MOTION FOR ADMINISTRATIVE  
WW-20 EXPENSES  
JORGE SANTOS/MV 7-9-13 [[227](#)]  
RILEY WALTER/Atty. for dbt.

#### **Tentative Ruling**

**Motion:** Motion for Payment of Administrative Expenses

**Notice:** FRBP 2002(a)(6); no written opposition required

**Disposition:** To be determined

**Order:** Prepared by the moving party

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

The debtors Jorge and Mary Lou Santos (the "Debtors") have filed a motion to pay certain administrative expenses, totaling \$42,687.84. They include the following:

#### § 503(b)(9) Claims:

JC Landsdowne Inc. - \$3,568.98 (approved as to amount; ECF No. 96)

Richard Souza - \$5,117.55 (approved as to amount; ECF No. 96)

#### Professional Fees:

Martin Garcia (debtor's accountant) - \$14,271.75 (approved as to amount; ECF No. 183)

Walter & Wilhelm (debtor's counsel) - \$19,729.56 (tentatively approved as to amount; matter no. 20)

The Debtors have represented that the secured creditor Farm Credit West has consented to a surcharge under § 506(c), but there is no evidence of an affirmative consent. The surcharge arises from the

sale of two dairies (ECF Nos. 199, 212) (the Debtors have not indicated in their motion to sell personal property whether Farm Credit West consented to a surcharge as well), of which Farm Credit West has liens. The surcharge would be 2% of the purchase prices. The purchase price for the first dairy is \$1,800,000, so the 2% surcharge would be \$36,000. The purchase price for the second dairy is \$1,200,000, so the 2% surcharge would be \$24,000.

The surcharged amount available to pay administrative expenses totals \$60,000. Even though the Debtors have stated that payment to the above administrative expense claimants would be pro rata, the surcharged amount appears sufficient to pay the administrative expenses in full.

Because the court currently has no evidence that Farm Credit West has affirmatively consented to the surcharge, the court will allow Farm Credit West to make such a representation at the hearing.

20. [12-19661](#)-A-11 JORGE/MARY LOU SANTOS MOTION FOR COMPENSATION BY THE  
WW-22 LAW OFFICE OF WALTER AND  
RILEY WALTER/MV WILHELM FOR RILEY C. WALTER,  
DEBTOR'S ATTORNEY(S), FEE:  
\$28433.50, EXPENSES: \$6789.46.  
7-9-13 [[231](#)]

RILEY WALTER/Atty. for dbt.

#### **Tentative Ruling**

**Motion:** Application for Compensation and Expenses

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Approved

**Order:** Prepared by applicant

**Applicant:** Walter Wilhelm

**Compensation approved:** \$28,433.50

**Costs approved:** \$6,789.46

**Aggregate fees and costs approved:** \$35,222.96

**Retainer held:** \$15,493.40

**Amount to be paid as administrative expense:** \$19,729.56

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a debtor's attorney in a Chapter 13 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. See *Id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure. The moving party is authorized to draw on any retainer held.

21. [12-60064](#)-A-11 ANTONIO/MARIA TEIXEIRA CONTINUED MOTION TO SELL  
PLF-14 6-19-13 [[143](#)]  
ANTONIO TEIXEIRA/MV  
PETER FEAR/Atty. for dbt.  
RESPONSIVE PLEADINGS

### **Tentative Ruling**

**Motion:** Motion to Sell Easement Free and Clear

**Notice:** Continued date of hearing

**Disposition:** Denied

**Order:** Civil minute order

The individual debtors Antonio and Maria Teixeira in Case No. 12-60064 and the partnership debtor Tony Teixeira & Son Dairy in Case No. 12-60065 (collectively, the "Debtors") have jointly filed a motion to sell two easements (the "Motion"), in their respective cases. The court continued the matter for the parties to file supplemental briefs on the § 363(f)(5) issue. The Debtors and the creditor AL Gilbert have filed supplemental briefs, while the creditor Farmers and Merchants' Bank has filed a response to the Motion, which is unrelated to the § 363(f)(5) issue.

For the reasons set forth below, the court will deny the motion.

### **SECTION 363(f)(5)**

Under § 365(f)(5), a trustee or debtor in possession may sell property of the estate free and clear of any lien or interest of an entity only if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." The BAP has construed § 365(f)(5) to set forth three basic elements: "(1) a proceeding exists or could be brought, in which (2) the nondebtor could be compelled to accept a money satisfaction of (3) its interest." *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25, 41 (B.A.P. 9th Cir. 2008).

AL Gilbert only argues that the second and third elements have not been met. Specifically, it contends that "money satisfaction" requires full payment of the claim and that "interest," for purposes of only § 363(f)(5), does not apply to liens. However, the BAP has rejected both of these interpretations of the statute. See *id.* at 41-43. AL Gilbert has not addressed the first element, which the court believes to be the dispositive issue.

### Legal or Equitable Proceeding

For the first element, the issue is "whether there is an available type or form of legal or equitable proceeding in which a court could compel [the lienholder] to release its lien for payment of an amount that was less than full value of [the lienholder's] claim." *Id.* at 45-46. Thus far, the BAP has held that deed release provisions are a contractual mechanism under which a lienholder could be compelled to accept money satisfaction. See *Pac. Capital Bancorp, N.A. v. E. Airport Dev., LLC (In re E. Airport Dev., LLC)*, 443 B.R. 823, 830 (B.A.P. 9th Cir. 2011). The BAP has also held that a cram down under § 1129(b) is not an appropriate mechanism applicable under § 363(f)(5). *Clear Channel*, 391 B.R. at 46. The BAP, in dicta, has also noted that a buy-out arrangement among partners, the presence of a liquidated damages clause, and agreed damages in lieu of specific performance may be situations in which a lienholder could be compelled to accept money satisfaction. *Id.* at 43.

Here, the Debtors argue that a foreclosure under California law by a senior lienholder, which would wipe out the liens of junior lienholders, is an applicable legal or equitable proceeding under § 363(f)(5). Some courts have agreed with this general proposition. See, e.g., *In re Jolan, Inc.*, 403 B.R. 866, 870 (Bankr. W.D. Wash. 2009); *In re Boston Generating, LLC*, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010). However, this court does not need to rule on this issue.

Instead, the court believes that the Motion must be denied because the Debtors have not set forth a proceeding that is applicable under the facts of this case. The Debtors argue that since a foreclosure sale transfers full title (i.e., all of the sticks in the bundle), it necessarily incorporates the right to use property (i.e., the basis for the easement). Therefore, a foreclosure sale would be an applicable proceeding in this case. However, in the court's view, there must be some nexus or relation between the hypothetical proceeding and the proposed sale transaction under § 363; that is, they both must seek to achieve the same thing. This interpretation of § 363(f)(5) is consistent with the BAP's general view that this statutory provision should be interpreted narrowly. See *Clear Channel*, 391 B.R. at 43, 44. Thus, if the Debtors wish to sell an easement free and clear, then the hypothetical proceeding must involve the lienholder being compelled to accept a money satisfaction of its interest in the easement specifically. However, in this case, as the Debtors have pointed out, a hypothetical foreclosure would transfer the full title free and clear of AL Gilbert's lien entirely, while the proposed sale would eliminate AL Gilbert's lien on just the easement, with its lien still attached to the other "sticks" in the "bundle" of property interests.

If the court were to follow the Debtors' position, such a rule could unfairly interfere what a lienholder had originally bargained for, since it results in the lienholder still retaining a lien on the other remaining property interests, interests that could have no value when separated from the interest sold free and clear. For example, a junior mortgage secured by collateral in an oil-producing property could be substantially less valuable if the mortgagor was permitted to sell the mineral rights to the property free and clear of liens but the junior mortgagee still held a lien on the rest of the remaining property interests. Even if the value of the mineral rights was significant (i.e., enough to satisfy the senior mortgage), the value of the property interests individually, when aggregated, may nevertheless be less than the value of the property as a whole. Thus, when the junior mortgagee seeks to foreclose on whatever property

interests remained as its collateral, the value could be less than if it had foreclosed on the full title subject to the first mortgage.

#### CONCLUSION

For the reasons set forth above, the court will deny the motion.

22. [12-60064](#)-A-11 ANTONIO/MARIA TEIXEIRA MOTION FOR RELIEF FROM  
TJS-1 AUTOMATIC STAY  
JPMORGAN CHASE BANK, N.A./MV 6-28-13 [[150](#)]  
PETER FEAR/Atty. for dbt.  
TIMOTHY SILVERMAN/Atty. for mv.  
RESPONSIVE PLEADING

#### Tentative Ruling

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

**Subject:** 2004 Dodge Truck

Section 362(d)(1) authorizes stay relief cause, including lack of adequate protection. The value of the 2004 Dodge Truck is \$10,000. The debtors owe \$11,250.61 to the lender, who is secured by the truck. Monthly payments of \$256.85. The debtor's last payment was December 2012. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

23. [12-60065](#)-A-11 TONY TEIXEIRA & SON CONTINUED MOTION TO SELL  
PLF-14 DAIRY 6-19-13 [[200](#)]  
TONY TEIXEIRA & SON DAIRY/MV  
PETER FEAR/Atty. for dbt.  
RESPONSIVE PLEADINGS

**Tentative Ruling**

**Motion:** Motion to Sell Easement Free and Clear

**Notice:** Continued date of hearing

**Disposition:** Denied

**Order:** Civil minute order

The court adopts the tentative ruling from item no. 21.

24. [13-13974](#)-A-11 LAGUNA EXPORTS, LLC MOTION TO EMPLOY T. SCOTT  
TSB-2 BELDEN AS ATTORNEY(S)  
LAGUNA EXPORTS, LLC/MV 6-18-13 [[18](#)]  
T. BELDEN/Atty. for dbt.  
BAKERSFIELD CASE

**No tentative ruling.**

25. [13-11288](#)-A-11 ABEL/STACY LUNA CONTINUED CHAPTER 11 STATUS  
CONFERENCE  
3-5-13 [[7](#)]  
PETER FEAR/Atty. for dbt.

**Tentative Ruling**

**Filed:** February 27, 2013

**Status:** Plan and Disclosure Statement filed

**Expiration of exclusivity (plan confirmation):** August 27, 2013

**Disposition:** Status Conference will be conducted

**Appearance by counsel and Pro Se Parties:** Required

The court will conduct at Status Conference and continue the Status Conference to the date of next hearing on the disclosure statement.

26. [13-11288](#)-A-11 ABEL/STACY LUNA  
PLF-4

HEARING RE: DISCLOSURE  
STATEMENT FILED BY DEBTOR ABEL  
LUNA JR., JOINT DEBTOR STACY  
LYNNE LUNA  
7-16-13 [[44](#)]

PETER FEAR/Atty. for dbt.  
AMENDED NOTICE FOR HRG  
8/21/13 AT 1:30 P.M.

**Final Ruling**

Per amended notice of hearing (ECF No. 48), the hearing on this matter  
will be held on August 21, 2013.

1:45 p.m.

1. [10-12709](#)-A-11 ENNIS COMMERCIAL  
[12-1033](#) PROPERTIES, LLC  
ENNIS COMMERCIAL PROPERTIES,  
LLC V. NICHOLSON ET AL  
PETER FEAR/Atty. for pl.  
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE:  
AMENDED COMPLAINT  
3-5-12 [[6](#)]

**No tentative ruling.**

2. [10-12709](#)-A-11 ENNIS COMMERCIAL  
[12-1050](#) PROPERTIES, LLC  
ENNIS COMMERCIAL PROPERTIES,  
LLC V. HA DEVCO, INC. ET AL  
PETER FEAR/Atty. for pl.  
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
3-16-12 [[1](#)]

**No tentative ruling.**

3. [10-12709](#)-A-11 ENNIS COMMERCIAL  
[12-1209](#) PROPERTIES, LLC  
ENNIS COMMERCIAL PROPERTIES,  
LLC V. ENNIS  
PETER FEAR/Atty. for pl.

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
12-16-12 [[1](#)]

**No tentative ruling.**

4. [12-17310](#)-A-11 JOHN/GRACE VISSER STATUS CONFERENCE RE: COMPLAINT  
[13-1060](#) 5-29-13 [[1](#)]  
PENNY NEWMAN GRAIN CO. V.  
WELLS FARGO BANK, N.A.  
BRADLEY SILVA/Atty. for pl.

**Final Ruling**

This matter is continued to September 4, 2013, at 1:45 p.m.

5. [12-17310](#)-A-11 JOHN/GRACE VISSER MOTION TO DISMISS ADVERSARY  
[13-1060](#) MDM-1 PROCEEDING/NOTICE OF REMOVAL  
PENNY NEWMAN GRAIN CO. V. 6-27-13 [[8](#)]  
WELLS FARGO BANK, N.A.  
M. MINNICK/Atty. for mv.  
RESPONSIVE PLEADING

**Final Ruling**

This matter is continued to September 4, 2013, at 1:45 p.m.

6. [10-61725](#)-A-7 PAMELA ENNIS CONTINUED STATUS CONFERENCE RE:  
[12-1160](#) AMENDED COMPLAINT  
STRAIN V. ENNIS ET AL 10-16-12 [[7](#)]  
THOMAS ARMSTRONG/Atty. for pl.  
RESPONSIVE PLEADING

**No tentative ruling.**

7. [10-61970](#)-A-7 BRIAN ENNIS CONTINUED STATUS CONFERENCE RE:  
[12-1161](#) AMENDED COMPLAINT  
SALVEN V. ENNIS ET AL 10-16-12 [[7](#)]  
THOMAS ARMSTRONG/Atty. for pl.  
RESPONSIVE PLEADING

**No tentative ruling.**

3:30 p.m.

1. [13-10814](#)-A-11 FL.INVEST.USA INC. CONTINUED CHAPTER 11 STATUS  
CONFERENCE  
2-14-13 [[49](#)]  
RYAN ERNST/Atty. for dbt.

**Final Ruling**

The status conference will be re-set as appropriate after the ruling on the Motion to Dismiss, DMG-2, is issued.

2. [13-10814](#)-A-11 FL.INVEST.USA INC. CONTINUED EVIDENTIARY HEARING  
DMG-2 RE: MOTION TO DISMISS CASE (FOR  
ALDO NEMNI/MV FINDINGS OF FACT AND  
CONCLUSIONS OF LAW)  
3-28-13 [[68](#)]  
RYAN ERNST/Atty. for dbt.  
D. GARDNER/Atty. for mv.  
RESPONSIVE PLEADING

**Final Ruling**

A written decision will issue. No appearance is necessary.