UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

August 2, 2018, at 10:30 a.m.

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1. **18-90029-E-11** **JEFFERY ARAMBEL**
MF-29 **Matthew Olson**

MOTION TO APPROVE STIPULATION FOR AUTHORITY TO USE CASH COLLATERAL
7-10-18 [497]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on July 10, 2018. By the court's calculation, 23 days' notice was provided. 14 days' notice is required. FED. R. BANKR. P. 4001(b)(2) (requiring fourteen days' notice).

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

The Motion for Authority to Use Cash Collateral is granted.

Jeffery Arambel ("Debtor in Possession") moves for an order approving a stipulation with Metropolitan Life Insurance Company ("Creditor") to the use of cash collateral.

Debtor in Possession presents that escrow for a sale of property closed on December 15, 2017, which included a check in the amount of $75,000.00 payable to Berliner Cohen LLP and held pending a potential settlement in Stanislaus County Superior Court case *El Che Corporation v. Arambel*, No. 2021033. When settlement was not reached, the check was issued to counsel as a matter of convenience, but Debtor in Possession argues that it has not been cashed and has become stale, remaining on deposit with Old Republic Title Company.

Debtor in Possession argues that Creditor has agreed that the $75,000 be used as cash collateral for:

A. Ordinary and reasonable living expenses,

B. Farming and maintaining agricultural land,

C. Federal or state income taxes or real property taxes,

D. Premiums for real property insurance,

E. Payment to estate professionals upon court approval,

F. Funds proposed in a budget (identified as located at DCN: MF-22), and

G. For other purposes approved by Creditor's advanced written consent.

Debtor in Possession has not attached a copy of the proposed budget, but the court's review of the motion relating to DCN: MF-22 shows the following budget:

Category	Monthly Expense
Irrigation, including water, power, labor, fuel, and parts	$10,000.00
Contract labor for Debtor in Possession's office	$1,120.00
Insurance, including health insurance, homeowner's insurance, general liability insurance, and automobile insurance, together with a one-time payment of $31,338 for past-due post-petition insurance premium payments	$7,091.00
Pharmacy expenses	$300.00
Home maintenance and homeowner's association assessments	$400.00
Adequate protection payments to Wells Fargo Bank	$6,100.00

Utilities	$1,167.00
Food, clothing, and household expenses	$1,000.00
Transportation, including gasoline	$400.00
Office supplies	$100.00
Miscellaneous	$150.00
Total	**$27,828.00**

At the June 21, 2018 hearing, the court approved the budget for the period June 2018 through September 2018, and the court continued the hearing on approval of the use of cash collateral according to the budget to September 20, 2018. Dckt. 451.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> > (A) such sale or such lease is consistent with such policy; or
> >
> > (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
> >
> > > (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
> > >
> > > (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

> (b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

Debtor in Possession has shown that the proposed use of cash collateral is in the best interest of the Estate. The proposed use provides for living expenses for this individual debtor, as well as maintaining business expenses to generate income. The Motion is granted, and Debtor in Possession is authorized to use the cash collateral identified as $75,000 held by Old Republic Title Company, including required adequate protection payments. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by Debtor in Possession. All surplus cash collateral is to be held in a cash collateral account and accounted for separately by Debtor in Possession.

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

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

The Motion for Authority to Use Cash Collateral filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, pursuant to this order, for the cash collateral of $75,000.00 held by Old Republic Title Company to be used for:

A. Ordinary and reasonable living expenses,

B. Farming and maintaining agricultural land,

C. Federal or state income taxes or real property taxes,

D. Premiums for real property insurance,

E. Payment to estate professionals upon court approval,

F. Funds proposed in a budget (approved at the June 21, 2018 hearing), and

G. For other purposes approved with Metropolitan Life Insurance Company's advanced written consent.

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

IT IS FURTHER ORDERED that Debtor in Possession shall make monthly adequate protection payments of $6,100.00 to Wells Fargo Bank, as noted in the approved cash collateral budget.

2. 17-90432-E-12 CARLOS/BERNADETTE ESTACIO — ORDER RE: STATUS CONFERENCE ON FEES
Peter Fear
7-11-18 [191]

Final Ruling: No appearance at the August 2, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Order Setting Status Conference was served on Debtor, Debtor's Attorney, Chapter 12 Trustee, and Office of the United States Trustee on July 14, 2018. By the court's calculation, 19 days' notice was provided. The court set the Status Conference for August 2, 2018. Dckt. 191.

The Status Conference was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 12 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

The Status Conference is concluded and removed from calendar.

On June 5, 2017, this court entered its order authorizing Carlos Estacio, III and Bernadette Estacio, as Debtor in Possession, to employ pursuant to 11 U.S.C. § 327, Peter Fear, Esq. and his law firm Fear Waldel, P.C. ("Counsel") as counsel for the Chapter 12 Debtor in Possession. Order, Dckt. 17. Consistent with the provisions of 11 U.S.C. §§ 327, 328, 330, and 331, the Order provides that no compensation shall be allowed Counsel except as permitted by order of the court pursuant to 11 U.S.C. § 330.

On June 2, 2017, Counsel filed his Disclosure of Compensation. Dckt. 12 at 64. For the required disclosures he states that he was provided a retainer of $15,000.00 pre-petition. Of that, $5,149.00 was used to pay counsel for his attorneys fees, costs, and the Chapter 12 filing fee prior to the case. The remaining balance of $9,851.00 was held by Counsel to be used to pay his fees for representing Debtor in Possession

(for such fees as allowed by the court pursuant to 11 U.S.C. § 330, this parenthetical added by the court). *Id.*

Notwithstanding the efforts by Counsel in working with Debtor in Possession, the bankruptcy case was dismissed on April 29, 2018. Order, Dckt. 186. Candidly, the court was not complementary of the conduct of Debtor in Possession and how they approached their fiduciary duties as debtors in possession.[1] Such comments do not relate to Counsel's conduct, as the conduct of Debtor in Possession relates to how they fulfilled their duties, the financial decisions they made, and the "business plans" they developed for counsel to try to float in a Chapter 12 Plan.

ORDER FOR STATUS CONFERENCE

On July 11, 2018, the court issued an order setting a status conference because a review of the file reflected that Counsel had not sought the allowance of any attorneys' fees and costs for representing Debtor in Possession. No fees have been allowed or authorized to be paid Counsel for his services.

Weeks after dismissal of this case, Debtor filed a second Chapter 12 case, this time utilizing the services of another experienced bankruptcy attorney, David Jenkins, Esq. Bankr. E.D. Cal. 18-90376. The court set a hearing on the Motion to Approve the Employment of Mr. Jenkins in the second Chapter 12 case. 18-90376; Order, Dckt. 16. The court set a hearing on the Motion because Mr. Jenkins filed a motion seeking to be employed by Debtor individually, who was noted to also be serving as debtor in possession.

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[1] The findings of the court as stated in the Civil Minutes for the April 26, 2018 hearing on the Motion to Dismiss, Dckt. 184 at 9, include the following:

> Debtor in Possession has been provided more than reasonable time to prosecute this case in good faith. Debtor in Possession has taken several attempts at a plan, failing to obtain confirmation. As this court has addressed previously, Debtor in Possession first chose to take a "financially impractical" (charitably stated) approach of having Debtor in Possession's elderly parents "lease" the farm property. Then, when Debtor in Possession "decided" to proceed with liquidating some of the properties, Carlos Estacio, III, as debtor in possession, did not engage the services of a real estate professional to market and facilitate the sale of the property to achieve the fair market value for the estate, but instead took it upon himself to "list" and "market" the property.
>
> There has now been unreasonable delay caused in this Chapter 12 case. Debtor in Possession has not been able to confirm a plan. Debtor in Possession has not presented facially colorable attempts at moving forward with a confirmable plan. Debtor in Possession, as the fiduciary of the bankruptcy estate, has not managed the property of the estate in a manner consistent with that position. Rather, the management of this case appears to have been done for Debtor's personal benefit in delaying any action to address creditors' claims.

In the order for the hearing, the court cited Mr. Jenkins to 11 U.S.C. § 1203, which provides that the Chapter 12 debtor in possession shall exercise the powers of a trustee, with certain exceptions. As with a Chapter 11 debtor in possession, the Chapter 12 debtor in possession may employ professionals pursuant to 11 U.S.C. § 327, including counsel. 11 U.S.C. § 327 does not provide for the individual debtor to employ counsel.

The counsel employed pursuant to 11 U.S.C. § 327 may be compensated for his or her services as allowed by the court pursuant to 11 U.S.C. § 330.

At the hearing on the Motion to Employ Counsel in the second case, counsel acknowledged that the employment authorized pursuant to 11 U.S.C. § 327 was only as counsel for Debtor in Possession and that the fees for providing such services must be approved by the court pursuant to 11 U.S.C. § 330 just as they would be for counsel for a trustee or a Chapter 11 debtor in possession.

At the hearing, Mr. Jenkins made reference to there being some belief in the Fresno Division of this court that in a Chapter 12 case there really was not a "debtor in possession," it being more akin to being counsel for a Chapter 13 debtor. (As the court noted, even in a Chapter 13 case, a Chapter 13 debtor has fiduciary duties to the bankruptcy estate, and counsel for such Chapter 13 debtor has to act accordingly). Counsel further indicated that there was some belief in the Fresno Division that counsel for the Chapter 12 debtor in possession did not "really" need to get his or her fees approved if a bankruptcy case was dismissed.

The court noted that in the absence of the court approving Counsel's fees in the first case, it appeared that the fiduciary Debtor in Possession in the second case and their attorney would have to pursue fee retainers floating around out there for which no fees had been approved for Counsel in this case.

Mr. Jenkins assured the court that he would review this with Counsel and that the matter would be addressed.

COUNSEL'S STATUS REPORT

Counsel filed a Status Report on July 25, 2018. Dckt. 195. Counsel reports that from May 23, 2017, to July 25, 2018, no additional retainer moneys have been received from Debtor or any other party. Counsel states that after the case was dismissed, Counsel applied the remaining amount of the pre-petition retainer ($9,851.00) to fees incurred during the case.

Counsel also states that a compensation application will be filed and set for hearing for August 23, 2018.

STATUS CONFERENCE

A review of the docket shows that Counsel filed an application for compensation on July 26, 2018, and did indeed set it for hearing at 10:30 a.m. on August 23, 2018. Dckt. 197, 198.

With the application having been filed, it appears that Counsel is taking action to resolve the court's concern that no fees had been applied for, despite there being a pre-petition retainer and legal work

done in the case. The court will address the reasonableness and allowance of fees at the August 23, 2018 hearing. The Status Conference is removed from calendar.

3.	**18-90440-E-7**	**LYNNE MATHENY** **Brian Haddix**	**ORDER TO SHOW CAUSE - FAILURE TO PAY FEES** **6-27-18 [14]**

Final Ruling: No appearance at the August 2, 2018 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on June 29, 2018. The court computes that 34 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on June 13, 2018.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

4. **12-93049-E-11** **MARK/ANGELA GARCIA** **ORDER TO SHOW CAUSE**
RHS-1 **Mark Hannon** **6-29-18 [992]**

APPEARANCE OF MARK GARCIA, ANGELA GARCIA, AND MARK HANNON REQUIRED AT THE HEARING

NO TELEPHONIC APPEARANCE PERMITTED

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Plan Administrator, and Office of the United States Trustee on July 4, 2018. By the court's calculation, 29 days' notice was provided. The court set the hearing for August 2, 2018. Dckt. 992.

The Order to Show Cause was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Plan Administrator, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing **----------**.

The Order to Show Cause is xxxxxxxxxxx.

August 2, 2018 Hearing on Order to Show Cause

At the hearing on the Order to Show Cause **xxxxxxxxxxxxxxxxx**

REVIEW OF ORDER TO SHOW CAUSE

This Chapter 11 Case is one operating under a confirmed Plan. The road to confirmation was not smooth, with Debtor in Possession's conduct causing the court to appoint a Chapter 11 Trustee. The court's findings in determining that the appointment of a trustee was necessary include the following:

> The court in independently reviewing the Monthly Operating Reports is struck by inconsistencies between the reported income, reported expenses, and bank account balances.
>
> First, bank accounts appear and then disappear. Second, substantial amounts of monies each month are not tracked through the bank accounts of the estate. Examples include,
> . . .
>
> Cause has been shown warranting relief under 11 U.S.C. § 1112. The financial reporting and **handling of estate assets by the Debtors in Possession demonstrate a continuing loss** to the estate, **gross mismanagement** of the estate, **and failure to fill clear and accurate monthly operating reports**. . . .

Civil Minutes, Dckt. 254.

Fortunately, with the intervention of a trustee and several creditors, a Chapter 11 Plan was confirmed in this case. As discussed by the court in the Civil Minutes from the Confirmation hearing, the confirmation was not a "text book" picture of good faith prosecution. Again, Debtor and their allies muddied the waters and engaged in questionable (what some would say was bad faith) conduct. Civil Minutes, Dckt. 777. However, the court confirmed the Plan, with the two debtors taking on the fiduciary roles of Plan Administrators under the Confirmed Plan.

Under the terms of the Plan, Debtor's residence was to be sold and a portion of the sales proceeds paid into the Plan for disbursement to creditors holding general unsecured claims. The fiduciary Plan Administrator Debtor lined up a sale of the property, but then joined with their attorney in a scheme to have a sale approved that diverted the monies otherwise required to be paid to the creditors holding general unsecured claims to Debtor's attorney. In addition, as part of this scheme to divert the monies, Debtor Mark Garcia, in a declaration prepared by Mark J. Hannon, Esq., attorney for fiduciary Plan Administrator Debtor, made false statements under oath. This misconduct is addressed by the court in the Civil Minutes for the Hearing on the Motion to Sell Property, which include:

> Debtor **Mark Garcia** provides his declaration under penalty of perjury in support of the Motion. Dckt. 851. He too fails (or is unwilling) to disclose the identity of the buyer, though he **does state under penalty of perjury that neither of the two Plan Administrators/Debtors have any interest in the Buyer**. Additionally, no information is provided for the marketing of this property. It is disclosed that there is no broker's commission, **so it appears that no attempt has been made to expose this property to the market and achieve the fair market**

value. Mr. Garcia's gratuitous comments that the "offer seems to be the fair market value" does not suffice as proper marketing of the property and fulfilling the fiduciary duties of a Plan Administrator under a confirmed Chapter 11 Plan.

When the court posted the tentative ruling to deny the Motion without prejudice it stated that for all the court knows, Mark Garcia or Angela Garcia, the Debtors and fiduciary Plan Administrators, may be shareholders, partners, members, or other interest holders in Interface Investment Capital and have failed to disclose that information to the court. From the Secretary of State public records, all the court can identify is that Interface Investment Capital filed its papers with the Secretary of State on May 17, 2016, and that its agent for service of process is "LEGALZOOM.COM." http://kepler.sos.ca.gov/.

The U.S. Trustee has now provided information that a **"Mark Garcia**," the same name as one of the Plan Administrators/Debtors **is one of the two members of Interface Investment Capital, LLC, the Buyer**. The U.S. Trustee's attorney reports that this information has been obtained directly from the California Secretary of State, as well as from third-party information sources.

. . .

Additionally, that the **fiduciary Plan Administrators and their attorney** come in and **in the guise of a motion to sell attempt to** get an order of the court **giv**ing a **super-super preference to Plan Administrator's/Debtor's counsel that violates the plan** (which even if it can be read to have the 20% be used to pay administrative expenses and then general unsecured claims) allows Plan Administrator's/Debtor's counsel's administrative expense to be paid in priority to other equal-in-priority administrative expenses.

This is compounded by the fiduciary Plan Administrators/Debtors quickly abandoning not only the payment to their counsel, but any rights of the Plan estate to claim the 20% carve out and give it to the creditor who signed the Stipulation that the money go to the administrative expense of their attorney only. No reason was shown that creditor would not agree to the 20% carve out to be paid and disbursed as provided in the confirmed Chapter 11 Plan.

The conduct of the Plan Administrators/Debtors creates the appearance that they are engaging in self dealing and attempting to divert moneys and properties to their personal benefit in violation of the Chapter 11 Plan. Such may merely be an appearance and the court does not make any findings that the Plan Administrators/Debtor have engaged in such conduct. But the court does not make any findings that have not engaged in such improper conduct.

Civil Minutes, Dckt. 868 (emphasis added).

This led to the U.S. Trustee bringing a Motion to Dismiss, which was centered on the false testimony given by Mark Garcia:

Movant asserts that the case should be dismissed or converted based on the following grounds.

> A. Debtor Plan Administrator Mark Garcia falsely testified under penalty of perjury in this bankruptcy case that the sale of property proposed by the Debtor Plan Administrators was to an entity that the Plan Administrators did not have any interest.
>
> B. The statement under penalty of perjury was false in light of the records of the California Secretary of State showing that Debtor Plan Administrator was a member/owner of the proposed purchaser.
>
> C. The conduct of Debtor Plan Administrator constitutes cause to convert this case to one under Chapter 7.
>
> D. Conversion, rather than dismissal, is in the best interests of the bankruptcy estate and creditors because the estate has a right to a $25,000.00 carve out from the sale of property that the Debtor Plan Administrators (the fiduciaries) obtained authorization to sell in November 2016.

Motion, Dckt. 907.

Civil Minutes, Dckt. 937.

Rather than converting a Chapter 11 case in which there was a plan that could fully fund the Plan and pay for the costs of an actual fiduciary to serve as a Plan Administrator, the court elected to appoint a replacement plan administrator. *Id.*

Plan Administrator Fees—Source of Payment

The court ultimately authorized the sale of Debtor's residence as required by the confirmed Chapter 11 Plan. Order, Dckt. 894. From the sale proceeds, $25,000.00 was carved out free and clear of all liens and encumbrances. The Order expressly provides:

> **IT IS FURTHER ORDERED** that the $25,000.00 disbursed to the Clerk of the Bankruptcy Court is free and clear of any liens, encumbrances, and other interests. Further, **the $25,000.00 is property to be disbursed as provided in the Chapter 11 Plan to creditors holding general unsecured claims** (Confirmed Chapter 11 Plan, Class 3 "carve-out," p. 6:7-10; Dckt. 781) or as otherwise ordered by this court. **If this case is converted to one under Chapter 7** of the Bankruptcy Code, **the $25,000.00 is property of the bankruptcy estate in the Chapter 7 case**, the Plan Administrators/Debtors and creditors in attendance at the November 16, 2016 hearing so stipulating.

Id. (emphasis added). Because the court was appointing a replacement plan administrator due to Debtor Mark Garcia's false testimony under penalty of perjury and Debtor's breaches of duty in acting as the fiduciary plan administrators, the court created a safety net for the replacement plan administrator for his/her fees if Debtor failed to properly fund the Plan and if it was converted to a case under Chapter 7. The Order authorizing the sale further provides:

> **IT IS FURTHER ORDERED** that the court imposes a lien on the $25,000.00 in monies disbursed to the Clerk of the Court to secure the payment of any fees allowed by this court to any successor plan administrator(s) or receiver(s) appointed by the court to the current Plan Administrators/Debtors.

Id. In the Civil Minutes for the hearing on the Motion to sell the Debtor's residence, the court reviews, in detail, the misconduct of the fiduciary Plan Administrator Debtor in their attempts, assisted by their counsel, to improperly divert the carve-out from the sales proceeds that must be paid to creditors holding general unsecured claims under the terms of the confirmed Chapter 11 Plan to Debtor's counsel. This was to pay the personal obligations of Debtor to their counsel with monies due creditors under their confirmed Chapter 11 Plan.

Replacement Plan Administrator's Fees

On June 3, 2018, the court approved interim Replacement Plan Administrator fees of $14,160.00. In light of the substantial work required of the Replacement Plan Administrator fulfilling his fiduciary duties in light of the defaults of the Debtors (who continue to run the main business - a bail bond agency), such amount was determined to be very reasonable. The Replacement Plan Administrator has carefully tailored his duties so as not to "run up the bill."

On June 22, 2018, the Replacement Plan Administrator filed his updated Status Report. Dckt. 990. With respect to the payment of his fees, he advises the court:

> The Court approved the Plan Administrators fee application on May 31, 2018. The Order Approving was docketed June 3, 2018. At the point of agreeing to be considered for the Plan Administrator position, it was my understanding that my fee payment would be derived from the $25,000 designated sale proceeds from property escrow.
>
> I submitted the order to Linda Payne of the Clerk's Office requesting payment. I received a call from the law clerk indicating I should address this issue at the Status Conference. I have confirmed my understanding of compensation source with Mr. Hannon and Mr. Blumberg.
>
> The Plan filed does not have a provision otherwise for payment of the Plan Administrator fees. Mr . Blumberg directed me to Docket item "894" ORDER FOR AUTHORITY TO SELL REAL PROPERTY.

> The order seems to state that the $25,000 is available to pay the Plan Administrator's fees. I again request the Court authorize the disbursement of funds held per the Order approving fees June 3, 2018.

Id. The Replacement Plan Administrator interprets the $25,000.00 of monies which are to be paid creditors on their general unsecured claim is to be first used, and then lost to the creditors, to pay the Replacement Plan Administrator's fees. That is incorrect.

As the court made clear to the Debtors and their counsel when the misconduct of Debtor Mark Garcia, including the false statements in the declarations prepared by Mark Hannon, Esq., counsel for the then Plan Administrator Debtors, the cost of the Replacement Plan Administrator would not be borne by the creditors. To do so would be merely to let the Debtors accomplish what they tried to do earlier with the false testimony under penalty of perjury – divert the monies required to be paid to creditors to an administrative expense Debtors had to otherwise fund.

The order approving the sale expressly states that the $25,000.00 shall be paid to creditors holding general claims – except a lien is created on the monies to protect the Replacement Plan Administrator. If the Debtors defaulted under the Plan (such as failing to pay the Replacement Plan Administrator's fees) and the case was converted to one under Chapter 7, the Replacement Plan Administrator was protected as against the trustee and Chapter 7 administrative expenses.

DEBTOR'S RESPONSE

Debtor filed a Response on July 17, 2018. Dckt. 995. Debtor argues that there was no bad faith at plan confirmation, that confirmation took so long (and by a creditor-proposed plan) because there were two objecting creditors that Debtor could not agree with on plan terms.

Debtor does not admit whether a default has happened, instead arguing that the Estate has paid almost $100,000 in fees to the Plan Administrator and his accountant. Also instead of admitting whether or not a default has occurred, Debtor stresses that no creditor has filed anything with the court complaining about non-payment or how plan administration is proceeding.

DISCUSSION

Terms of Confirmed Chapter 11 Plan and Sham Creditor Plan Proponent

In the Chapter 11 Plan confirmation process and then the request for fees by the purported creditor plan proponent, YP Advertising & Publishing, LLC ("YP"), the court concluded that it was actually the Debtors and Debtors' counsel who were "running the show," using the name of YP as a canard for the Debtors to prosecute this case. The court determined that the purported counsel for YP was not being paid by YP, but only if and when the Debtors could get a plan confirmed, and then only to the extent counsel could be directly paid (rather than an actual creditor reimbursed) for an administrative expense.

Terms of Confirmed Chapter 11 Plan

As Debtors advocated with the Replacement Plan Administrator, they argue that the court's order imposing a lien on the $25,000 in proceeds from the sale to secure the Replacement Plan Administrator or Chapter 7 fees constitutes a statement that the $25,000 in proceeds is the first source of payment. However, such interpretation of the creation of a lien as creating a first source of payment is inconsistent with the express terms of the confirmed Chapter 11 Plan which Debtors state they wrote and confirmed.

Additionally, in addressing the treatment of the Secured Claim of United States Fire Insurance Company ("USFI"), the confirmed Chapter 11 Plan provides (and requires):

> Class 3: Secured claim of United States Fire Insurance Company (Second Deed of Trust).
>
> Debtors will pay the non-dischargeable sum of $400,000.00 to USFI, with monthly payments of $3,000.00 for four years, with a balloon payment, if necessary, at the end of the four years. Interest shall be charged at 6%. The monthly payments due to USFI by the Debtors shall commence upon the 1st day of the month after the Effective Date of the Plan.
>
> **If the Debtors' residence is sold through this Court**, the claim of the first mortgage holder, Deutsche Bank, will be paid in full. The remaining sum, after authorized expenditures, is to be paid to USFI. In that event, USFI has agreed to a **'carve-out'** procedure, **where 20% of the proceeds payable to USFI are to be paid to unsecured creditors.**
>
> . . .
>
> In the event that the Trustee has not completed a sale of the Oakdale Property and the escrow for such sale has not closed within six (6) months of the Order approving this Stipulation, then USFI's consent to such sale shall be deemed withdrawn. In the event that the Debtors have defaulted on the monthly payments due to USFI, USFI may petition the Court for relief from automatic stay and/or default under the confirmed plan to obtain its remedies with respect to the Oakdale Property by judicial or non-judicial foreclosure.

Id., at 6:1–10, 7:15–20 (emphasis added). This 20% of the proceeds, which is the $25,000.00 on which the court has imposed a lien to secure payment of the fees due the Replacement Plan Administrator or Chapter 7 Trustee, is not stated to be part of the 50% dividend to be paid quarterly, but appears to be an additional amount to be disbursed to creditors holding general unsecured claims via USFI's lien.

Even if not an additional amount to be paid the creditors holding general unsecured claims, the $25,000 has to be paid to creditors holding unsecured claims for Debtor to perform and complete the confirmed Chapter 11 Plan and cannot be diverted to pay expenses of administration.

Prior Attempts of Debtor to Divert the 20% Carve Out Proceeds

As noted, the final paragraph of the above treatment addresses a situation where the Plan Administrator Debtors, not withstanding the diligent exercise of their fiduciary duties under the confirmed Chapter 11 Plan, cannot get the property sold within six months, then USFI's consent will be deemed withdrawn.

The Plan was confirmed on May 6, 2016. On September 16, 2016, a mere four months after the Plan was confirmed, the then Plan Administrator Debtors filed their Motion to sell the property securing the USFI claim. The sale was to a limited liability company for which Plan Administrator Debtor Mark Garcia was a member. However, Plan Administrator Debtors submitted false testimony that the Debtors (who were serving as the fiduciary Plan Administrator Debtors) had no interest in the purchaser.

Further, the fiduciary Plan Administrator Debtors asserted that the 20% carve out of the proceeds could be diverted to the attorney they owed as Debtors to their counsel. The fiduciary Plan Administrator Debtors asserted that this diversion of the 20% carve out could be obtained by them because the six-month sale deadline under the Plan should not be computed from the confirmation of the Plan, but from the date of the Order approving the Stipulation, July 6, 2015 - which was ten (10) months before the confirmation of the Plan. Taken on its face, the fiduciary Plan Administrator Debtors were asserting that the sale deadline had already expired when they (in the name of Creditor YP) obtained confirmation of a plan in which the creditors were told that they would receive a 20% carve out from Creditor USFI's lien.

If the arguments of Plan Administrator Debtors and the Counsel were given effect, then they would have participated in the confirmation of a plan that contained an illusory (fraudulent) term. Given that the Plan Administrator Debtors and the Counsel were clearly driving the plan confirmation process, with the creditor "proposing" the Plan clearly just along for the ride, such illusory (fraudulent) plan provision would have rested with Plan Administrator Debtors and their Counsel if the court gave such strained effect to the provision.

With respect to the nominal participation of YP as the creditor plan proponent, the court discusses this in the Memorandum Opinion and Decision on said Creditor's request for attorneys' fees. Dckt. 899. The court's findings include the following:

> In addition to Creditor YP and YP Counsel, **the main players in the prosecution of this case relevant to the current Motion are Mark Garcia and Angela Garcia, the two debtors ("Debtor"); Mark Hannon, Esq.**, who served as counsel for the two debtors when they served as the debtor in possession prior to the appointment of the Chapter 11 Trustee ("Debtor's Counsel"); John Bell, the Chapter 11 Trustee ("Chapter 11 Trustee"); Zayante P. Merrill, the first attorney for the Chapter 11 Trustee; and Estella Pino, the second attorney for the Chapter 11 Trustee (collectively "Trustee Counsel").

Id. at 2:2–8.

In considering this Motion and the underlying facts, the court is convinced that YP Counsel, given her good nature and lack of bankruptcy law experience (though not inexperienced as a lawyer), **was actively taken advantage of by Debtor and Debtor's Counsel**, and at least passively by the Chapter 11 Trustee and Trustee Counsel. Recently, the court was presented with a declaration under penalty of perjury signed by debtor Mark Garcia, the Plan Administrator under the confirmed Chapter 11 Plan. Mr. Garcia was testifying under penalty of perjury as to facts in support of a motion to sell property under the plan to an "unrelated" third-party. **The declaration that was prepared by Debtor's Counsel, who is now serving as the attorney for the Debtor serving in the capacity of Plan Administrator, contained false information (inaccurately stating that Debtor had no interest in the "unrelated" third-party purchaser limited liability company, an entity for which debtor Mark Garcia is actually a managing member).** The court did not find persuasive debtor Mark Garcia's and Debtor's Counsel's arguments that Mr. Garcia just did not read the declaration before signing it and the court should overlook the false statement. Civil Minutes, Dckt. 896. **This misstatement exemplifies the conduct of Debtor in this case, all the while represented by the same Debtor's Counsel.**

Id. at 2:11–16, 3:1–9.

Additional Information Provided by YP Counsel at the October 20, 2016 Hearing

At the hearing, YP Counsel engaged in a frank, honest discussion with the court. While the court acknowledges YP Counsel's candor and professional interaction with the court and other counsel at the hearing, the information provided amplifies the court's above conclusions and concerns regarding YP Counsel's conduct, as well as the conduct of Debtor's Counsel and Trustee Counsel. At the hearing, the attorney from **YP Counsel stated** that she was not experienced in bankruptcy and out of her depth. She also stated that **she relied on information from Debtor's Counsel** and Trustee **Counsel as what could and could not be done under the Bankruptcy Code** in this case, in addition to her own research.

At the hearing, YP Counsel further reaffirmed that she agreed to discount her fees because Debtor's Counsel and Trustee Counsel demanded payment of 100% of their fees. In addition to further demonstrating YP Counsel's bankruptcy legal naivete, it also **demonstrates the lack of professionalism and good faith conduct by Debtor and Debtor's Counsel**, and the lack of a moderating influence and demonstrating professionalism in federal court by the Trustee and Trustee Counsel.[3] . . . YP Counsel, **unadvisedly relying on the direction from Debtor's Counsel** and the apparent acquiescence of the Trustee and Trustee Counsel, **was led down a path of non-productive, non-compensable legal work**.

Id., at 6:17.5–28, 7:1–10.

Appendix A to the Memorandum Opinion and Decision is the court's review of the "Dysfunctional Conduct of the Parties" in this bankruptcy case. *Id.*, pp. 35-37. The court discusses the failure of the Debtors to fulfill their obligations as the fiduciary Debtors in Possession, which led to the appointment of a bankruptcy trustee. The Decision recounts prior findings of the court that while creditor YP was facially the plan proponent, the Debtors purported to speak for YP and Debtor's Counsel asserted that YP's counsel knew little if anything about the information put in the disclosure statement (purportedly prepared by YP's counsel). The court's findings in the Civil Minutes of the Motion to Compel production of discovery by YP include:

> D. "Finally, Debtors, on behalf of [Creditor YP], request that the court deny the Motion**. Debtors provide no basis for having standing to defend [Creditor YP]** from Mr. Macdonald's attempts to conduct discovery of the plan proponent. The Response and seeking to defend [Creditor YP] appears to **be pregnant with the implication that the Debtors are controlling, or having [Creditor YP] act merely as the Debtors agent or proxy**, in proposing the Chapter 11 plan now before the court."
>
> The court notes that as shown by the pleadings and rulings in this case, at many times it appears that Debtor's Counsel was the one actually doing the work for Creditor YP, with Creditor YP merely providing the cover of its name and YP Counsel named as the "sham party."

Id., at 36:2–8; Citing to the Civil Minutes, Dckt. 452.

One of the grossly improper terms being advanced in the Debtors/AP plan was to have Debtors' counsel paid as an administrative expense. *Id.* at 14:20–28, 15:1–4.

> This is similar to the attempt to have the 20% carve out to be paid to creditors holding general unsecured claims diverted to Debtor's counsel through the original motion to sell the residence. **This is yet another demonstration, as discussed in greater detail below, that Creditor YP, while nominally the plan proponent, was dancing to the tune of Debtor and Debtor's Counsel**. Creditor YP did not even respond to an objection to confirmation of "its" plan, but abdicated to allow Debtor's Counsel to call the shots.
> . . .
> This yet again **demonstrates that Creditor YP, as a creditor, appears to be disconnected with the Plan, allowing Debtor and Debtor's Counsel to run this bankruptcy case and the plan**. No credible explanation was provided as to how YP Counsel, as the attorney for Creditor YP, would ever propose a plan that allowed Debtor to live in their home without ever having to pay the creditors with claims secured by the property.

. . .

> Because the Debtor does not get to vote for confirmation of a plan, there appears to be little, if any, bona fide, good faith reason for a creditor's plan to provide for a "never have to pay a claim" provision. Rather, it appears that **Debtor has prepared and proposed a Plan that "bought off" Creditor YP by providing for its claim (dropping the objection to the objection to the claim), with Creditor YP then standing as the sham plan proponent**.

Id., at 16:3–6, 11–15, 19–23 (emphasis added).

> From the evidence presented, YP Counsel has served as the "second chair" to Debtor's Counsel, acting at his direction and on his commands. The plans filed clearly were drafted, or at least the terms dictated, by Debtor's Counsel, as demonstrated by the "Debtor never has to pay on the claim secured by Debtor's home until Debtor chooses in the future" provision. As discussed above, when the "Creditor YP's Plan" was attacked, YP Counsel did not respond, but left that to Debtor's Counsel (the "first chair attorney" directing the show). This even included objecting to the deposition of YP Counsel, something that Creditor YP did not act on. Again, this demonstrated that YP Counsel was the "associate counsel" working on this matter at the direction of Debtor's Counsel.

Id., at 26:24–28, 27:1–4.

At the end of the day, the Debtors first attempted to run this case as fiduciary debtors in possession, breached their duties, and got replaced. The Debtors then tried to run the case on the sly, using the name of YP to shield their actions. After much turmoil got a plan confirmed. Once confirmed, Debtors tried to improperly divert monies from creditors to their attorney, purporting to allow him an administrative expense that was not allowed under the Bankruptcy Code. Then the Debtors, breaching their fiduciary duties as Plan Administrators Debtors, tried to improperly divert monies (the 20% proceeds of sale) from creditors holding general unsecured claims to their attorney.

Now, Debtors are failing to properly fund their Plan to pay the costs of administration of the Replacement Plan Administrator who had to be appointed due to Debtors breach of their fiduciary duties as Plan Administrators by trying to divert the 20% in proceeds that have to be distributed to the creditors with unsecured claims under the Plan to their attorney. Debtors now seek to divert the 20% from creditors to pay the costs of the Replacement Plan Administrator rather than fund it themselves.

Debtors have demonstrated that they cannot fulfill even their duties as Debtors to operate the business of the estate and pay the required monies to fund the confirmed Chapter 11 Plan, making another end around attempt to avoid paying monies they personally owe under the Plan.

The Replacement Plan Administrator's Status Report states that the Plan has not been funded to pay his fees as allowed by the court. With that nonpayment, the Replacement Plan Administrator is having to resort to the monies that otherwise must be paid to the creditors with unsecured claims. This

demonstrates that the Plan is materially in default, unable to pay even this modest necessary expense of administration which arises due to the Debtors' breach of their fiduciary duties as prior plan administrators and Mark Garcia's false statements under penalty of perjury in the declaration prepared by his attorney.

~~There being such material default, cause exists pursuant to 11 U.S.C. § 1112(b) to convert this case to one under Chapter 7.~~

~~The Chapter 11 Plan being in material default and the Debtors having demonstrated their inability (whether financially or ethically) or unwillingness (whether financially or ethically) to fund the Chapter 11 Plan, and further making a third effort to improperly divert the 20% proceeds from distribution to creditors with unsecured claims under the Plan to pay expenses which the Debtors must personally pay, and good cause appearing, the case is converted to Chapter 7.~~

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

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

~~The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Order to Show Cause is sustained, and case No. 12-93049 of Mark Garcia and Angela Garcia is converted to one under Chapter 7.~~

5. **12-93049-E-11** **MARK/ANGELA GARCIA** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION**
Mark Hannon **11-30-12 [1]**

Debtor's Atty: Mark J. Hannon

Notes:
Continued from 1/11/18

Quarterly Operating Reports filed: 6/22/18 [ending Dec 2017], 6/22/18 [ending Mar 2018]

[GRF-2] First Interim Application for Compensation of Gary R. Farrar, Plan Administrator filed 4/25/18 [Dckt 973]; Order granting filed 6/3/18 [Dckt 984]

[RHS-1] Order to Show Cause Why Case Should Not be Converted to One Under Chapter 7 and Order Requiring the Personal Attendance of (No Telephonic Appearances Permitted For): Mark Anthony Garcia, Angela Marie Garcia, Mark Hannon, Esq. filed 6/29/18 [Dckt 992], set for hearing 8/2/18 at 10:30 a.m.

AUGUST 2, 2018 STATUS CONFERENCE

The court issued an Order to Show Cause why this case should not be converted to one under Chapter 7. The hearing on that is set for 10:30 a.m. on August 2, 2018. Dckt. 992.

On June 22, 2018 (prior to the issuance of the Order to Show Cause), the Replacement Plan Administrator filed a Status Report. Dckt. 990. Debtor filed a Response on July 17, 2018. Dckt. 995.

At the August 2, 2018 Status Conference, **xxxxxxxxxx**.

6. **18-90258-E-7** **ANDREAS ABRAMSON** **MOTION TO AVOID LIEN OF HELEN MCABEE, INVESTMENT RETRIEVERS, INC., AMERICAN EXPRESS COMPANY, ET AL.**
MF-1 **Iain MacDonald** **7-11-18 [74]**

Final Ruling: No appearance at the August 2, 2018 hearing is required.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on July 20, 2018. By the court's calculation, 13 days' notice was provided. 14 days' notice is required.

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

The hearing on the Motion to Avoid [nine different] Judicial Lien has been reset for hearing at 10:30 a.m. on August 23, 2018 (to correctly set it for a hearing in the Modesto Courthouse)**.**

This Omnibus Motion requests an order avoiding the judicial liens of:

- Helen McAbee;
- Investment Retrievers, Inc.;
- American Express Company;
- Guy Martin dba Martin Appraisals;
- Portfolio Recovery Associates, LLC;
- Pentech Funding, LLC;
- Peninsula Estates;

- Capital One Bank (USA); and
- Persolve, LLC (collectively "Creditors")

against property of Andreas Abramson ("Debtor") commonly known as 83 Sanguinetti Court, Copperopolis, California ("Property").

Deficiency of Notice

Movant provided thirteen days' notice of this Motion. Local Bankruptcy Rule 9014-1(f)(2) requires a minimum fourteen days to set a matter for hearing. Movant has provided one fewer day than the minimum.

Improper Combination of Parties and Claims in One Motion

Debtor has sought to have this court adjudicate the lien rights of nine different creditors in one motion. The common thread is that the judgment liens are all asserted to be on the same property in which Debtor claims her exemption.

The Supreme Court provides in Federal Rule of Bankruptcy Procedure 3007 for there to be an omnibus objection to claims in one contested matter. No such provision is made in Federal Rule of Bankruptcy Procedure 4003(d) relating to avoiding judicial liens. Rule 4003(d) expressly states that such request to avoid the judicial lien shall be made by motion as provided in Federal Rule of Bankruptcy Procedure 9014.

In Federal Rule of Bankruptcy Procedure 9014, the Supreme Court incorporates specific rules relating to adversary proceedings into the contested matter practice. One of the rules not included is Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018, which allows a plaintiff to join multiple persons and multiple claims for relief into one complaint. Combining multiple claims for relief and multiple parties into one motion is not permitted—unless the bankruptcy judge makes Federal Rule of Bankruptcy Procedure 7018 applicable to that specific contested matter. FED. R. BANKR. P. 9014(c).

No request has been made for the court to make Rule 7018 applicable in this Contested Matter.

While the Motion fails procedurally because it does not provide the minimum service to the parties and it combines multiple claims for relief against multiple parties, it also fails on another ground.

Possible Deficiency of Service

This Contested Matter must be properly served on the creditors whose property rights are to be terminated in the same manner as the service of a summons and complaint. Federal Rule of Bankruptcy Procedure 4003(d) provides that the avoidance of a lien shall be by motion as provided in Federal Rule of Bankruptcy Procedure 9014. The Supreme Court provides in Federal Rule of Bankruptcy Procedure 9014(b) that:

> "(b) Service. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d). Any written response to the motion shall be served within the time determined under Rule 9006(d). Any paper served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P."

The relevant provisions of Federal Rule of Bankruptcy Procedure 7004 provide for the correct service of the present motion on the nine various creditors to be:

> (b) Service by First Class Mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:
>
> > (1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.
> > . . .
> > (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.
>
> . . .
> (h) Service of Process on an Insured Depository Institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—
>
> > (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> >
> > (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
> >
> > (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

For the nine different creditors for whom Debtor seeks to have their property rights terminated as provided in 11 U.S.C. § 522(f), the Certificate of Service filed on July 20, 2018, (Dckt. 90) states the following addresses for service by mail:

- Helen McAbee;

  Helen McAbee
  c o Richard B Gullen Esq
  Rossi Hammerslough Reishl Chuck
  1960 The Alameda Ste 200
  San Jose CA 95126-1451

It is not clear whether Mr. Gullen is the agent for service of process for Ms. McAbee for this Contested Matter litigation.

- Investment Retrievers, Inc.;

  Investment Retrievers Inc
  P O Box 4733
  El Dorado Hills CA 95762-0023

California Secretary of State lists agent for service of process Corporate Service Company Which Will Do Business as CSC-Lawyers Incorporating Service. The business address shown on the Secretary of State Webpage for Investment Retrievers, Inc. is not a post office box.

- American Express Company;

  Amex
  P O Box 3666
  Fort Lauderdale FL 33329-7871

  Amex
  c o Law Office of Steven Booska
  P O Box 194650
  San Francisco, CA 94119-5050

The court cannot identify which "American Express" entity is referred to in the Motion when reviewing the Secretary of State Website.

- Guy Martin dba Martin Appraisals;

  Guy Martin
  dba Martin Appraisals
  945 Morning Star Dr
  Sonora CA 95370-9249

- Portfolio Recovery Associates, LLC;

  Portfolio Recovery Associates

c o Hunt Henriques
151 Bernal Rd Ste 8
San Jose CA 95119-1306

California Secretary of State lists agent for service of process Corporate Service Company Which Will Do Business as CSC-Lawyers Incorporating Service.

- Pentech Funding, LLC;

  Pentech Funding LLC
  Attn Glenda Millerbis
  1620 Bella Cir
  Lincoln CA 95684-7971

Matches California Secretary of Website Information.

- Peninsula Estates;

  Peninsula Estates Association
  c o Associa Northern California
  1225 Alma Rd Ste 100
  Richardson TX 75081-2298

  Peninsula Estates Association
  c o Severaid Glahn PC
  1787 Tribute Rd Ste D
  Sacramento CA 95815-4404

The California Secretary of State Website shows the following person and address as the agent for service of process: Sharon Johnson 601 Commerce Dr. ST 150, Roseville, CA 95678

- Capital One Bank (USA);

  Capital One Bank USA N A
  P O Box 30285
  Salt Lake City UT 84130-0285

The court notes that Capital One Bank USA NA is a federally insured financial institution.

- Persolve, LLC;

  Persolve LLC
  dba Account Resolution Associates
  Attn Shayan Heidarzadeh Esq
  9301 Corbin Ave Ste 1600

Northridge CA 91324-2515

California Secretary of State lists agent for service of process Corporate Service Company Which Will Do Business as CSC-Lawyers Incorporating Service. The above address is the state business address for Persolve, LLC. Shayan Heidarzadeh, Esq. is listed by the California State Bar as an attorney with the Foley & Mansfield, PLLP law firm in Walnut Creek, California.

It appears that the proper and sufficient service on some of the above has not been made by Movant. Some attorneys may argue that it should not be the court's work if a void order is entered, just counsel's and Movant's. The court is concerned and does not enter orders unless it determines that the evidence and law warrants the relief and the court has both subject matter and in personam jurisdiction over the person whose rights are being adjudicated.

Substantive Issues

First, Movant has not provided the court with a recorded copy of any of judicial liens to be avoided. Movant must provide the court with a copy of the actual lien for which he wants an order avoiding.

While Debtor and counsel may be confident that counsel can allege in the motion all of the correct recording information for each of the creditors and each of the liens, such a process only creates the possibility for a simple clerical error into having the court enter an ineffective order, or worse, inadvertently purporting to avoid a judgment lien of a person not before the court.

More significantly, the court is not presented with any evidence to support the alleged recording information. Debtor does not purport to testify to it, and there are no exhibits (adequately authenticated, such as by the runner or counsel who obtained the copies from the county recorder).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Andreas Abramson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion has been reset for hearing at 10:30 a.m. on August 23, 2018.

7. 18-90376-E-12 CARLOS/BERNADETTE ESTACIO MOTION TO DISMISS CASE
DRJ-2 David Jenkins 7-13-18 [20]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, creditors, and Office of the United States Trustee on July 12, 2018. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice).

The Motion for Approval of Compromise with a Stipulation was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 12 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Order Approving Stipulation is xxxxxxxxx.

Carlos Estacio and Bernadette Estacio, Chapter 12 Debtor, ("Movant") request that the court approve a Motion for Order Approving Stipulation with Khatri Brothers, LP, ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the result of negotiations between Settlor and Movant. Movant and Settlor are motivated by a mutual desire to close a sale of real property at Prairie Flower Road and to avoid the bankruptcy reorganization proceedings.

Movant and Settlor have proposed a resolution subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Stipulation Agreement filed as Stipulation for Dismissal of Chapter 12 Case with a Bar to Refiling. Dckt. 23.):

A. Movant's instant Chapter 12 case shall be dismissed with a bar to refiling bankruptcy under any chapter except 7 for a period of 42 months.

B. Upon entry of order approving the stipulation and dismissal of the Chapter 12 case, Movant shall proceed to promptly close th pending sale of the property commonly known as 4413 S. Prairie Flower Rd., Turlock, CA ("The Prairie Flower Road Property").

C. Movant shall use proceeds from the sale the Prairie Flower Road Property to pay secured claims asserted by the IRS and other taxing authorities with liens against said property.

D. Settlor shall receive remaining proceeds from the sale of the Prairie Flower Road Property, less any reasonable costs of sales.

E. Movant shall make 36 monthly interest only payments as described in Exhibit C, with the remaining debt secured by the real property commonly known as 6855 Faith Home Road, Ceres, California ("Faith Home Road Property") Upon completion of the 36 payments, payment in full for the remaining debt owed by Movant to Settlor shall be due. Dckt. 23.

F. Movant shall enter into an installment agreement with the Stanislaus County tax collector in order to clear the arrearage of property taxes owed on the Faith Home Road Property.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

The proposed settlement permits Movant to immediately list for sale in the real property commonly known as 4413 S. Prairie Flower Rd., Turlock, California ("Property"). Upon completion of the

sale, Movant shall use proceeds to pay reasonably incurred closing costs (subject to court approval if in excess of $27,000.00), real estate commissions (subject to court approval), property taxes and fees, and any and all other tax related claims secured by the property. Movant shall ensure distribution of the remaining proceeds to be paid directly to Settlor as a reduction in the principal of the outstanding loan owed to Settlor by Movant. Under the settlement, Movant shall recover an estimated $844,000.00 in satisfaction of the Estate's claim for recovery of the property, with an asserted value of $1,250,000.00, from Settlor.

Movant has elected to file Motion for Order to Approve Stipulation and set for hearing a noticed motion for two reasons. First, Movant recognizes that parties in interest should receive notice of the detailed terms and conditions set forth in the stipulation. Second, Movant recognizes that the right to dismiss a Chapter 12 case is not without exception, and that Movant may be required to show that requested dismissal is not the result of bad-faith conduct or an abuse of the bankruptcy process. *See Marrama v. Citizens bank of Massachusetts,* 5449 U.S. 365, (2007); *see also, In re Rosson,* 545 F. 3rd 764, (9th Cir. 2008). Dckt. 20.

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

Legal Basis for Court to Approve Contractual Term
Waiving Debtor's Rights to File a Chapter 11, 12, or 13 Case

One of the agreements by Debtor, and a condition required by Settlor is that Debtor waive their right to file a Chapter 11, 12, or 13 bankruptcy case for forty-two months. No legal authority is given for such a provision being enforceable or the propriety of the court in making such a contractually agreed provision part of an order.

As addressed in Collier on Bankruptcy, "As a matter of public policy, courts will not enforce a promise not to file a bankruptcy petition made by a party eligible to file such petition." 2 COLLIER ON BANKRUPTCY ¶ 301.08 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (citing *In re Weitzen,* 3 F. Supp. 698 (S.D.N.Y. 1933)). *See In re Madison*, 184 B.R. 686, 690, Bankr. E.D. Penn. 1995), for more recent discussion of this inability to waive future bankruptcy rights:

> It presents the substantive issue as purely a claim that its "contract" with the Debtor by which she agreed to file no further bankruptcies within 180 days from the filing of her fifth bankruptcy case is capable of strict enforcement and must be enforced by this court. Unfortunately, this argument, though seemingly resounding with thunderous force in light of the large number of cases filed by the Debtor within a brief period, **strikes a lightning rod in the form of the legal principle that an agreement not to file bankruptcy is unenforceable because it violates public policy.** *See Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966) (an advance agreement to waive the benefits of bankruptcy is void). Accord, *In re Weitzen*, 3 F. Supp. 698 (S.D. N.Y. 1933); *In re Peli*, 31 Bankr. 952, 956 (Bankr. E.D. N.Y. 1983); *In re Adana Mortgage Bankers, Inc*., 12 Bankr. 989, 1009 (Bankr. N.D. Ga. 1981), vacated by joint motion of parties, 687 F.2d 344 (11th Cir. 1982); and *In re Kriger*, 2 Bankr. 19, 23 (Bankr. D. Or. 1979).

> Enforcement of even an agreement which only temporarily waives such rights would appear sufficient to us to undermine the Congressionally-expressed public policy underpinning the Bankruptcy Code. While a creditor could potentially attempt to protect its interests through an agreement by having a potential debtor stipulate to facts which would entitle it to relief, stipulations regarding questions of law are not binding on a court or a debtor. *See Marden v. Int'l Assoc. of Machinists & Aerospace Workers*, 576 F.2d 576, 580 (5th Cir. 1980); and *In re Dawson*, 162 Bankr. 329, 333-34 (Bankr. D. Kan. 1993).

This court on several occasions has issued pre-filing review orders to address the problems created by a "challenging debtor" who has filed multiple cases without having the apparent ability (generally *in pro se*) to prosecute a bankruptcy case.

Based upon the Stipulation and evidence presented, the court determines that cause exists to bar Debtor, and each of them, from filing any Chapter 11, Chapter 12, or Chapter 13 case, concluding that proper prefiling review conditions do not improperly impinge on a person's rights to such relief. As discussed in *Logan v. Zimmerman Brush Co.*, the right to seek redress from the court is a protected right of civil litigants. 455 U.S. 422, 429, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). The issuing of a prefiling order is to be made only after a cautious review of the pertinent circumstances.

However, the Ninth Circuit Court of Appeals clearly draws the line that a person's right to present claims and assert rights before a federal court is a not a license to abuse the judicial process and treat the court merely as a tool to abuse others.

> Nevertheless, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long, 912 F.2d at 1148*; *see O'Loughlin v. Doe, 920 F.2d 614, 618 (9th Cir. 1990)*.

Molski v. Evergreen Dynasty Corp, et al, 500 F.3d 1047, 1057 (9th Cir. 2007).

At the hearing, Debtor in Possession explained **xxxxxxxxxxxxxxxxxxxx**.

~~Debtor in Possession addressed the issue of why a plan of liquidation could not be pursued in this case, rather than a dismissal order that includes provisions of future injunctive relief.~~

~~Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of creditors and the Estate because it allows Movant to substantially reduce the remaining debt owed to Settlor. This compromise also allows Movant , as a show of good faith, to address outstanding arrearages owed to tax authorities.~~

The Motion is **xxxxxxxxxxx**.

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

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

The Motion to Approve Compromise filed by Carlos Estacio and Bernadette Estacio, Chapter 12 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Approval of Compromise between Movant and Khatri Brothers, LP ("Settlor") is ~~granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Stipulation for Dismissal of Chapter 12 Case with Bar to Refiling, including Exhibits A, B, and C in support of the Motion (Dckt. 23).~~

~~The court shall issue a separate order dismissing this case and barring Debtor, and each of them, from filing a Chapter 11, Chapter 12, or Chapter 13 case until after December 31, 2021.~~