UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge
Bakersfield Federal Courthouse
510 19th Street, Second Floor
Bakersfield, California

WEDNESDAY

SEPTEMBER 17, 2014

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 matters. 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, if reflected in the order or judgment, 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. 14-11811-A-13 JOSE VARGAS SIERRA AND ANITA VARGAS
MHM-2
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS
7-22-14 [32]

IVAN LOPEZ VENTURA/Atty. for dbt.

No tentative ruling.

2. 14-10314-A-13 DANIEL/LINDA MONTES
RSW-4
DANIEL MONTES/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO CONFIRM PLAN
8-12-14 [75]

Tentative Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Pending
Order: Pending

The motion requests confirmation of the Chapter 13 plan in this case. *See* 11 U.S.C. §§ 1322, 1323, 1325; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(1)-(2). The Chapter 13 trustee opposes the motion, objecting to confirmation. But the moving party has not filed a reply to the opposition.

Without the benefit of a reply, the court cannot determine whether the grounds for the trustee's opposition are disputed or undisputed. As a result, the court does not consider the matter to be ripe for a decision in advance of the hearing.

If such grounds are undisputed, the moving party may appear at the hearing and affirm that they are undisputed. The moving party may opt not to appear at the hearing, and such nonappearance will be deemed by the court as a concession that the trustee's grounds for opposition are undisputed and meritorious.

If such grounds are disputed, the moving party shall appear at the hearing. The court may either (1) rule on the merits and resolve any disputed issues appropriate for resolution at the initial hearing, or (2) treat the initial hearing as a status conference and schedule an evidentiary hearing to resolve disputed, material factual issues or schedule a further hearing after additional briefing on any disputed legal issues.

3. 14-12223-A-13 ANDRES ALVAREZ AND ELVIRA DE CAMPOS
LKW-3
BANK OF AMERICA, N.A./MV
LEONARD WELSH/Atty. for dbt.
JONATHAN CAHILL/Atty. for mv.
RESPONSIVE PLEADING

MOTION TO CONFIRM PLAN
7-16-14 [57]

Final Ruling

The plan withdrawn, the matter is dropped as moot. A Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on September 17, 2014. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's declaration without further notice or hearing. *See* 11 U.S.C. § 1307(c)(1). The court will enter a civil minute order.

4. 14-12932-A-13 ALICIA MARTINEZ
MHM-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
7-23-14 [18]

ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Objection: Trustee's Objection to Confirmation of Plan
Notice: LBR 3015-1(c)(4), 9014-1(f)(2); no written opposition required
Disposition: Pending
Order: Civil minute order

The court will overrule the objection as moot at the hearing if the debtor's motion to value collateral, docket control RSW-1, is granted at the hearing. If the motion to value collateral is not granted at the hearing, then the objection will be continued to October 22, 2014, at 9:00 a.m.

5. 14-12932-A-13 ALICIA MARTINEZ
RSW-1
ALICIA MARTINEZ/MV
ROBERT WILLIAMS/Atty. for dbt.

CONTINUED MOTION TO VALUE COLLATERAL OF BENEFICIAL/HFC
8-5-14 [21]

Tentative Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Pending
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). 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).

SERVICE OF PROCESS

The court will raise concerns regarding the sufficiency of service of the motion. The respondent named in the motion is "Beneficial/HFC." The entity actually served was "Household Finance Corporation of California." Any difference between the name of the entity against whom relief is sought and the name of the entity served suggests that service was insufficient and made on a party other than the respondent named in the motion. Further, if Household Finance Corporation of California is the correct respondent, then the motion appears that it is not directed at such respondent.

However, the debtor's counsel bears the burden of determining the correct respondent. The court will allow counsel, after reviewing the court's comments, to decide whether counsel is satisfied with both (i) the respondent identified in the motion, and (ii) the entity served on the proof of service. If counsel believes that "Beneficial/HFC" and the entity appearing on the proof of service are the same, or is satisfied that service on the entity named in the proof satisfies the due process standards required for an order to be effective as against the respondent named in the motion, then counsel may opt to have the motion granted on the merits. Or counsel may opt to re-file the motion and serve the re-filed motion, or to file a supplemental service.

[*If counsel decides that service is satisfactory, then the court will adopt the remainder of this tentative ruling as the ruling and remove this discussion on service of process from the minutes.*]

VALUATION OF COLLATERAL

Chapter 13 debtors may strip off a wholly unsecured junior lien encumbering the debtor's principal residence. 11 U.S.C. §§ 506(a), 1322(b)(2); *In re Lam,* 211 B.R. 36, 40–42 (B.A.P. 9th Cir. 1997); *In re Zimmer,* 313 F.3d 1220, 1222–25 (9th Cir. 2002) (holding that the trial court erred in deciding that a wholly unsecured lien was within the scope of the antimodification clause of § 1322(b)(2) of the Bankruptcy Code). 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); LBR 3015-1(j). 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. 11 U.S.C. § 506(a); *Lam*, 211 B.R. at 40–42; *Zimmer*, 313 F.3d at 1222–25. "In the absence of contrary evidence, an owner's opinion of property value may be conclusive." *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The debtor requests that the court value real property collateral. The collateral is the debtor's principal residence located at 909 Oswell St., Bakersfield, California.

The court values the collateral at $75,000.00. The responding party holds the second deed of trust against the collateral. The debt secured by liens senior to the respondent's lien exceeds the value of the collateral. Because the amount owed to senior lienholders exceeds the collateral's value, 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).

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The debtor's motion to value real property collateral has been presented to the court. Having considered the well-pleaded facts of the motion, and having entered the default of respondent for failure to appear, timely oppose or otherwise defend in the matter,

IT IS ORDERED that the motion is granted. The real property collateral located at 909 Oswell St., Bakersfield, California has a value of $75,000.00. The collateral is encumbered by senior liens securing claims that exceed its value. The responding party, who holds the second deed of trust, has a secured claim in the amount of $0.00 and a general unsecured claim for the balance of the claim.

6. 14-10134-A-13 LEAH JONES — MOTION TO MODIFY PLAN
RSW-1 — 7-25-14 [32]
LEAH JONES/MV
ROBERT WILLIAMS/Atty. for dbt.

Final Ruling

Motion: Confirm Modified Chapter 13 Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

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 3015-1(d)(2), 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).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). The court finds that the debtor has sustained that burden, and the court will approve modification of the plan.

7. 13-13640-A-7 DAVID/MARGARET SANCHEZ
MHM-2
MICHAEL MEYER/MV
PHILLIP GILLET/Atty. for dbt.
CONVERTED 7/30/14

MOTION TO DETERMINE DISPOSITION OF TRUST ASSETS
8-11-14 [85]

Final Ruling

Motion: Determine Disposition of Trust Assets
Notice: LBR 9014(f)(1); written opposition required
Disposition: Granted
Order: Civil minute order if appropriate

The chapter 13 trustee has moved to determine the proper party entitled to receive the undistributed funds held by the trustee after the conversion of this case from chapter 13 to chapter 7. The trustee argues that the debtors should receive the funds absent a finding of bad faith under § 342(f)(2).

In cases converted from chapter 13 to a different chapter, the conversion terminates the former chapter 13 estate, and § 348(f) prescribes what property from the former chapter 13 estate becomes property of the estate in the converted case. 11 U.S.C. § 348(f)(1)(A); *see also In re Michael*, 699 F.3d 305, 313 (3d Cir. 2012). Section 348(f) provides that "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." *Id.* § 348(f)(1)(A). An exception to this rule is made when the debtor's conversion is in bad faith, in which case the estate in the converted case will include property of the estate as of the date of conversion. *Id.* § 348(f)(2).

Section 348(a) clarifies that the petition date remains unchanged when a case is converted to a different chapter. With some exceptions set forth in § 348(b), the conversion of a case to a different chapter under Title 11 "constitutes an order for relief under the chapter to which the case is converted, but . . . does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." *Id.* § 348(a).

Read together with § 348(a), § 348(f) means that property of the estate in a case converted from chapter 13 to a different chapter comprises (i) property of the estate under the chapter to which the case is converted but as of the petition date in the former chapter 13 case, unless the debtor converted the case in bad faith, and (ii) that is under the debtor's possession or control on the date of conversion.

Whether a chapter 7 estate in a converted case includes funds held by the chapter 13 trustee depends on whether such property is defined as property of the chapter 7 estate as of the petition date in the former chapter 13 case and whether such property remains in the debtor's possession of control on the conversion date. *Id.* §§ 348(a), (f), 541(a)(5), (6). Although property of a chapter 13 estate includes earnings from services performed postpetition by the debtor and property acquired postpetition by the debtor, *id.* § 1306(a), property of a chapter 7 estate, by contrast, excludes earnings from services performed postpetition by a debtor, *see id.* § 541(a)(6). Property of a chapter 7 estate also includes some, but not all, property acquired postpetition by the debtor, *see id.* § 541(a)(5).

Here, the trustee holds $356.29 of undistributed plan payments. It is likely that such plan payments are earnings from services performed by the debtor, or from unemployment compensation. Schedules I and J filed on April 14, 2014, show earnings and unemployment compensation income as the probable source of funds for plan payments. The court will grant the motion and determine that the funds should be returned to the debtor.

8. 09-18544-A-13 JUAN/ANN PRIETO
DMG-6
JUAN PRIETO/MV

MOTION FOR COMPENSATION BY THE LAW OFFICE OF YOUNG WOOLDRIDGE, LLP FOR D. MAX GARDNER, DEBTOR'S ATTORNEY(S).
8-27-14 [183]

D. GARDNER/Atty. for dbt.

Final Ruling

Application: Additional Compensation Under LBR 2016-1(c)(3)
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Continued to October 22, 2014, at 9:00 a.m.
Order: None

This matter is continued to October 22, 2014, at 9:00 a.m. Not later than October 1, 2014, the applicant shall file and serve on all person entitled to notice under Federal Rule of Bankruptcy Procedure 2002(a)(6): (1) statement of client consent, or opposition, to the application, United States Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330, Guideline (b)(1)(v); and (2) an authenticated billing statement that complies with Federal Rule of Evidence 803(6).

9. 14-13352-A-13 SHARON REX
MHM-1

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
8-18-14 [16]

ROBERT WILLIAMS/Atty. for dbt.
WITHDRAWN

Final Ruling

The objection withdrawn, the matter is dropped as moot.

10. 14-13352-A-13 SHARON REX
MHM-2
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.
WITHDRAWN

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
8-18-14 [19]

Final Ruling

The objection withdrawn, the matter is dropped as moot.

11. 14-13352-A-13 SHARON REX
RSW-1
SHARON REX/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF GREEN TREE
8-25-14 [24]

Tentative Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). 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).

VALUATION OF COLLATERAL

Chapter 13 debtors may strip off a wholly unsecured junior lien encumbering the debtor's principal residence. 11 U.S.C. §§ 506(a), 1322(b)(2); *In re Lam,* 211 B.R. 36, 40–42 (B.A.P. 9th Cir. 1997); *In re Zimmer,* 313 F.3d 1220, 1222–25 (9th Cir. 2002) (holding that the trial court erred in deciding that a wholly unsecured lien was within the scope of the antimodification clause of § 1322(b)(2) of the Bankruptcy Code). 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); LBR 3015-1(j). 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. 11 U.S.C. § 506(a); *Lam*, 211 B.R. at 40–42; *Zimmer*, 313 F.3d at 1222–25. "In the absence of contrary evidence, an owner's opinion of property value may be conclusive." *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The debtor requests that the court value real property collateral. The collateral is the debtor's principal residence located at 800 Circle Dr., Lebec, California.

The court values the collateral at $143,000. The debt secured by liens senior to the respondent's lien exceeds the value of the collateral. Because the amount owed to senior lienholders exceeds the collateral's value, 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).

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The debtor's motion to value real property collateral has been presented to the court. Having considered the well-pleaded facts of the motion, and having entered the default of respondent for failure to appear, timely oppose or otherwise defend in the matter,

IT IS ORDERED that the motion is granted. The real property collateral located at 800 Circle Dr., Lebec, California has a value of $143,000. The collateral is encumbered by senior liens securing claims that exceed its value. The responding party has a secured claim in the amount of $0.00 and a general unsecured claim for the balance of the claim.

12. 14-13053-A-13 JEFFREY HINOJOS — MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
MHM-1 — 8-28-14 [40]
MICHAEL MEYER/MV
PATRICK KAVANAGH/Atty. for dbt.

No tentative ruling.

13. 14-12354-A-13 CHAIRRALYN WASHINGTON — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-8-14 [42]

RANDY RISNER/Atty. for dbt.
PAID IN FULL

Final Ruling

The fees paid in full, the order to show cause is discharged.

14. 14-12354-A-13 CHAIRRALYN WASHINGTON — MOTION TO CONFIRM PLAN
RJR-1 — 7-31-14 [35]
CHAIRRALYN WASHINGTON/MV
RANDY RISNER/Atty. for dbt.
RESPONSIVE PLEADING

Final Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

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 3015-1(d)(1), 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).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1325 and by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). The court finds that the debtor has sustained that burden, and the court will approve confirmation of the plan.

15. 14-11760-A-13 JUSTIN/DESIREE LAY — CONTINUED MOTION TO CONFIRM PLAN
RSW-1
JUSTIN LAY/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING
6-20-14 [35]

[The hearing on this matter will follow the hearing on the debtors' motion to value collateral in this case having docket control no. RSW-2.]

Tentative Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

The motion requests confirmation of the Chapter 13 plan in this case. *See* 11 U.S.C. §§ 1322, 1323, 1325; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(1)-(2). The Chapter 13 trustee opposes the motion, objecting to confirmation because the plan reduces two Class 2 claims based on the value of the collateral securing such claims.

As indicated in the civil minutes from the August 20, 2014, hearing, the Class 2 claim of Chase has been resolved. But the resolution of the Class 2 claim of the US Department of HUD c/o Deval LLC remains pending. Because the motion to value this Class 2 claim is being denied without prejudice at this time, the court will deny confirmation without prejudice.

16. 14-11760-A-13 JUSTIN/DESIREE LAY
RSW-2
JUSTIN LAY/MV

CONTINUED MOTION TO VALUE COLLATERAL OF DEPARTMENT OF HUD C/O DEVAL LLC
7-7-14 [49]

ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

At the prior hearing, the court addressed certain issues concerning service of the motion. *See* Civ. Mins., Aug. 20, 2014, ECF No. 68. No response or supplemental proof of service has been filed by the deadline set by the court.

In the prior minutes, the court noted that the court would leave to the expertise of counsel which respondent to serve. The hearing was continued to allow supplemental service of the motion.
In continuing the motion, the court set a deadline of 14 days prior to the continued hearing for the filing of a supplemental proof of service. None has been filed by this deadline set by the civil minute order. The motion will be denied without prejudice for noncompliance with the court's deadline.

17. 14-12360-A-13 SERGIO BUENO
MHM-2

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
8-18-14 [37]

ROBERT WILLIAMS/Atty. for dbt.

No tentative ruling.

18. 14-13761-A-13 SHERRY SIMPSON

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-11-14 [20]

Final Ruling

An installment order having issued, the order to show cause is discharged.

19. 14-11162-A-13 DENNIS/LASHANE WILLIAMS
MHM-3
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
8-14-14 [46]

ROBERT WILLIAMS/Atty. for dbt.
DISMISSED

Final Ruling

The case dismissed, the motion is denied as moot.

20. 14-12585-A-13 ANTONIO GARCIA AND CHRISTINA MUNOZ-GARCIA
WDO-1
ANTONIO GARCIA/MV
WILLIAM OLCOTT/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF CHASE AUTO
8-1-14 [28]

Tentative Ruling

Motion: Value Collateral [Personal Property; Motor Vehicle]
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Continued to allow supplemental service or granted at the moving party's option
Order: Prepared by the moving party consistent with this ruling's instructions

SERVICE OF PROCESS

The motion names "Chase Auto aka JP Morgan Chase Bank" as the respondent. A declaration filed by Valerie Gonzalez indicates that the respondent is "FDIC insured." As a result, Rule 7004(h) applies.

Four different addresses for the respondent appear on the proof of service. Three of the addresses are plainly insufficient: these three do not indicate that the motion was mailed to the attention of an officer of the respondent, so mailing pursuant to those three addresses does not comply with Rule 7004(h). Two of these three addresses also do not show mailing by certified mail, so the mailing to those two addresses does not constitute proper service for this alternative reason.

But one service address might constitute sufficient service. The address shows that the mailing was made to the attention of Thasunda Brown Duckett, CEO, by certified mail. Underneath this party's name is "Auto Division JP Morgan Chase" listed as the party to whom the motion was mailed. The address is somewhat confusing about exactly which entity is receiving service of the motion: the entity intended could be JP Morgan Chase at its Auto Division or it could be a completely different entity called "Auto Division JP Morgan Chase." In short, the respondent named in the motion might not be able to decipher that the mailing was intended for such respondent or whether it was intended for a related but different entity.

Because the name of the respondent appears to vary to some extent from the name specified for the respondent in the motion, further questions might be raised about whether the mailing has been in accordance with Rule 7004(h).

Lastly, the exact name of the respondent might be the one shown in proof of claim no. 8 filed by "JPMorgan Chase Bank, N.A." This name differs somewhat from the respondent named in the motion and proof of service.

The court will allow these questions to be resolved by the expertise of counsel. If the debtors' request a continuance, the motion will be continued to October 22, 2014,at 9:00 a.m., and all supplemental papers (including an amended motion if that is desired) shall be filed no later than October 8, 2014.

But if counsel for the debtors is satisfied with service of the motion, the court will grant the motion as follows:

VALUATION OF COLLATERAL

Collateral Value: $10,023.00

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).

Chapter 13 debtors may value collateral by noticed motion. Fed. R. Bankr. P. 3012. Section 506(a) of the Bankruptcy Code provides, "An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property" and is unsecured as to the remainder. 11 U.S.C. § 506(a). For personal property, value is defined as "replacement value" on the date of the petition. *Id.* § 506(a)(2). For "property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." *Id.* The costs of sale or marketing may not be deducted. *Id.*

A debtor's ability to value collateral consisting of a motor vehicle is limited by the terms of the hanging paragraph of § 1325(a). *See* 11 U.S.C. § 1325(a) (hanging paragraph). Under this statute, a lien secured by a motor vehicle cannot be stripped down to the collateral's value if: (i) the lien securing the claim is a purchase money security interest, (ii) the debt was incurred within the 910-day period preceding the date of the petition, and (iii) the motor vehicle was acquired for the debtor's personal use. 11 U.S.C. § 1325(a) (hanging paragraph).

In this case, the debtor seeks to value collateral consisting of a motor vehicle. The debt secured by the vehicle was not incurred within the 910-day period preceding the date of the petition. In the absence of any opposition to the motion, the court finds that the replacement value of the vehicle is the amount set forth above.

The order shall state only that the court (i) grants the motion, (ii) values the property at the amount shown above, and (iii) determines that the responding party has a secured claim in an amount equal to the value of the collateral shown above and a general unsecured claim

for the balance of the claim. The order shall not include any other additional findings or information.

21. 14-12585-A-13 WDO-2 ANTONIO GARCIA/MV WILLIAM OLCOTT/Atty. for dbt. RESPONSIVE PLEADING

ANTONIO GARCIA AND CHRISTINA MUNOZ-GARCIA

MOTION TO CONFIRM PLAN 8-1-14 [35]

Tentative Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Pending
Order: Pending

The motion requests confirmation of the Chapter 13 plan in this case. *See* 11 U.S.C. §§ 1322, 1323, 1325; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(1)-(2). The Chapter 13 trustee opposes the motion, objecting to confirmation because the debtors have not concluded the hearings on motions to value collateral of Class 2 claimants whose collateral has been reduced in the proposed plan.

At the hearing, if the court grants both motions to value collateral filed by the debtors in this case, the court will grant the motion to confirm the plan. If the court does not grant both motions to value collateral, then the court will continue this motion to October 22, 2014, at 9:00 a.m.

22. 14-12585-A-13 WDO-3 ANTONIO GARCIA/MV WILLIAM OLCOTT/Atty. for dbt.

ANTONIO GARCIA AND CHRISTINA MUNOZ-GARCIA

MOTION TO VALUE COLLATERAL OF GECRB/GE CAPITAL BANK 9-2-14 [46]

Tentative Ruling

Motion: Value Collateral [Personal Property; Non-vehicular]
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Conditionally granted; the condition is that a supplemental declaration must be filed no later than 9/18/14 confirming that the debt secured by the vehicle was not incurred during the 1-year period preceding the petition date
Order: Prepared by the moving party consistent with this ruling's instructions

Collateral Value: $800.00

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). 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).

Chapter 13 debtors may value collateral by noticed motion. Fed. R. Bankr. P. 3012. Section 506(a) of the Bankruptcy Code provides, "An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property" and is unsecured as to the remainder. 11 U.S.C. § 506(a). For personal property, value is defined as "replacement value" on the date of the petition. *Id.* § 506(a)(2). For "property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." *Id.* The costs of sale or marketing may not be deducted. *Id.*

The right to value non-vehicular collateral in which the creditor has a purchase money security interest is limited to collateral securing a debt that was incurred more than one year before the date of the petition. 11 U.S.C. §1325(a) (hanging paragraph).

In this case, the debtor seeks to value collateral consisting of non-vehicular personal property. The motion does not address the specific date on which the debt secured by such property was incurred. The declaration in support indicates that the debt was incurred on May 2013. But the case was filed May 16, 2014, so the date provided is unhelpful in determining whether the debt securing the respondent's claim was incurred during the 1-year period preceding the petition.

The exhibit in support of the motion appears to show that the debt was incurred on May 5, 2013, which is more than 1 year before the petition date. But the court will require a declaration stating this fact.

Conditioned on the filing of such a declaration before an order is submitted, the court will find that the replacement value of the collateral is the amount set forth above. The order shall state only that the court (i) grants the motion, (ii) values the property at the amount shown above, and (iii) determines that the responding party has a secured claim in an amount equal to the value of the collateral shown above and a general unsecured claim for the balance of the claim. The order shall not include any other additional findings or information.

23. 12-16987-A-13 LAWRENCE/TAMARA HUBBARD
MHM-2
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.

OBJECTION TO CLAIM OF HERBERT P. SEARS CO., CLAIM NUMBER 11
8-4-14 [47]

Final Ruling

Objection: Objection to Claim as Duplicate Claim
Notice: 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 objection. 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 objection asserts that the claim is a duplicate claim. The claim asserts the same obligation in the same amount as another claim that the claimant has filed against the same debtor. The court will sustain the objection and disallow the duplicate claim. The duplicate claim will be disallowed and expunged in its entirety. The claimant shall retain only one claim, Claim No. 10-1, incorporating the entire obligation owed to the claimant.

24. 14-12891-A-13 ARLETHIA WAFFORD JONES
MHM-1
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE FOR FAILURE TO PROVIDE TAX DOCUMENTS , MOTION TO DISMISS CASE
7-23-14 [19]

PHILLIP GILLET/Atty. for dbt.
WITHDRAWN

Final Ruling

The motion withdrawn, the matter is denied as moot.

9:30 a.m.

1. 14-13277-A-13 NOVELLA MCGLEW
14-1067
U.S. TRUSTEE V. MCGLEW
ROBIN TUBESING/Atty. for pl.

STATUS CONFERENCE RE: COMPLAINT
7-14-14 [1]

Final Ruling

This matter is continued to November 5, 2014, at 9:15 a.m. to allow the plaintiff to enter a default judgment.

2. 14-13277-A-13 NOVELLA MCGLEW
14-1067 UST-1
U.S. TRUSTEE V. MCGLEW
ROBIN TUBESING/Atty. for mv.

MOTION FOR ENTRY OF DEFAULT JUDGMENT
8-25-14 [11]

Tentative Ruling

Motion: Entry of Default Judgment
Notice: LBR 9014-1(f)(2); written opposition required
Disposition: Granted in part (injunction against future filings for a two-year period); denied in part as moot (dismissal with prejudice)
Order: Prepared by moving party

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed R. Bankr. P. 7055. The plaintiff has moved for default judgment.

Under Federal Rule of Civil Procedure 8(b)(6), the allegations of the complaint are admitted except for allegations relating to the amount of damages. Fed. R. Civ. P. 8(b)(6), *incorporated by* Fed. R. Bankr. P. 7008(a). Having accepted the well-pleaded facts in the complaint as true, and for the reasons stated in the motion and supporting papers, the court finds that default judgment should be entered against the defendant. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed. R. Bankr. P. 7055.

The court has the authority to preclude serial, abusive bankruptcy filings. A number of remedies exist to redress such abuses: (1) dismissal with prejudice that bars the subsequent discharge of existing, dischargeable debt in the case to be dismissed, 11 U.S.C. § 349(a); (2) dismissal with prejudice that bars future petitions from being filed or an injunction against future filings, 11 U.S.C. §§ 105(a), 349(a); *see also Kistler v. Johnson*, No. 07-2257, 2008 WL 483605 (Bankr. E.D. Cal. Feb. 15, 2008) (McManus, J.) (unpublished decision). These provisions and remedies complement each other and are cumulative. *See In re Casse*, 198 F.3d. 327, 337–41 (2d Cir. 1999).

In cases where cause is found under § 349(a), a filing bar may exceed the 180-day limit described in § 109(g). *See, e.g., id.* at 341; *In re Tomlin*, 105 F.3d 933 (4th Cir. 1997). *But see In re Frieouf*, 938 F.2d 1099, 1103–04 (10th Cir. 1991). In *Leavitt*, the Ninth Circuit B.A.P. noted that § 349 was intended to authorize courts to control abusive filings, notwithstanding the limits of § 109(g). *See In re Leavitt*, 209 B.R. 935, 942 (B.A.P. 9th Cir. 1997).

Section 349(a) invokes a “cause” standard. In *Leavitt*, the panel held that “egregious” conduct must be present to find “cause” under § 349, but “a finding of bad faith constitutes such egregiousness.” *Id.* at 939 (upholding the bankruptcy court’s decision that debtors’ inequitable proposal of Chapter 13 plan merely to avoid an adverse state court judgment was an unfair manipulation of the Code). In this circuit, a finding of bad faith is sufficient “cause” for barring future filings pursuant to § 349(a). *Id.* at 939. The overall test used to determine bad faith is to consider the totality of the circumstances. *See, e.g., In re Leavitt*, 209 B.R. at 939; *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). In determining whether bad faith exists, “[a] bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the

Bankruptcy Code, or otherwise proposed [a plan] in an inequitable manner." *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982).

The court concludes that a filing bar may be ordered pursuant to § 349 if the appropriate objective factors are found. The court may find cause to bar a debtor from re-filing if the debtor: (1) acted inequitably in filing a case or proposing a plan, (2) misrepresented the facts, (3) unfairly manipulated the Code, or (4) proposed a plan in an inequitable manner. These factors are disjunctive.

Based on the undisputed facts, the court finds cause to impose a filing bar exceeding the 180-day limit in § 109(g). The facts show debtor has unfairly manipulated the Code without genuine intent to prosecute the debtor's cases to reorganization.

The case has already been dismissed for failure to timely file documents. Order Dismissing Case, July 15, 2014, ECF No. 12, *In re Novella McGlew*, No. 14-13277. The motion for default judgment will be denied in part to the extent it seeks to dismiss the case with prejudice.

The court will grant the motion to the extent it requests an injunction. The debtor will be enjoined from filing another bankruptcy petition in the Eastern District of California without leave of court for a two-year period commencing on the entry of the order dismissing the debtor's bankruptcy case. During such time, leave of court will not be granted to file a petition unless the following conditions have been met: (1) the request for leave of court to file a petition is accompanied by a cashier's check made payable to the Clerk of Court for the full amount of the filing fee and documents that include the completed schedules and statements prepared and ready to be filed, (2) reasonable assurances are provided that debtor will appear at the § 341 meeting, and (3) the debtor shows a material change in circumstances that warrant the filing of a subsequent petition.

10:30 a.m.

1. 14-12622-A-7 CURTIS/CAROL BINGHAM — PRO SE REAFFIRMATION AGREEMENT WITH SPRINGLEAF FINANCIAL SERVICES
8-22-14 [14]

No tentative ruling.

2. 14-12437-A-7 MICHAEL/RASEL CORPUZ — REAFFIRMATION AGREEMENT WITH WELLS FARGO DEALER SERVICES
8-18-14 [19]

PATRICK KAVANAGH/Atty. for dbt.

No tentative ruling.

1:00 p.m.

1. 12-11008-A-7 RAFAEL ALONSO — MOTION FOR PROTECTIVE ORDER
HTK-1 — 8-25-14 [95]
RAFAEL ALONSO/MV
NICHOLAS ANIOTZBEHERE/Atty. for dbt.

No tentative ruling.

2. 12-16817-A-7 GREGORY STURGES — MOTION FOR CONTEMPT AND/OR MOTION FOR CONTEMPT , MOTION FOR PUNITIVE DAMAGES AND FOR ATTORNEY FEES
PK-4 — 8-27-14 [224]
GREGORY STURGES/MV

PATRICK KAVANAGH/Atty. for dbt.

No tentative ruling.

3. 14-13017-A-7 MICHAEL NICHOLSON-CURTIS — MOTION TO AVOID LIEN OF INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB
8-21-14 [26]
MICHAEL NICHOLSON-CURTIS/MV

GINGER MARCOS/Atty. for dbt.

Tentative Ruling

Motion: Avoid Lien that Impairs Exemption
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

PROCEDURAL DEFICIENCIES

The motion has been noticed under the procedure of LBR 9014-1(f)(1), but the motion was served on August 21, 2014, which is less than 28 days before the hearing date. In addition, papers filed as a "notice and a motion" are a form used in the Central District of California, and incorrectly advise the respondent that the debtor brings the motion to avoid a lien "without a hearing." In any event, the court will treat the motion as having been noticed under LBR 9014-1(f)(2) and permit opposition to be raised at the hearing. The motion also does not comply with other local rules. *See* LBR 9014-1(e)(3), LBR 9014-1(c). In the future, counsel shall ensure motions comply with the local rules of this court.

MERITS

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). 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 motion has been brought to avoid a lien on a savings account. The Notice of Motion and Motion to Avoid Lien under 11 U.S.C. § 522(f) (Personal Property) states that the amount claimed exempt is $4050.00. But the attached schedules show only $4000 has been claimed exempt as to the savings account. The court presumes based on the attached schedule that the total value of this account is only $4000 in any event.

The responding party's judicial lien ($10,846.86), all other liens ($0.00), and the exemption amount ($4000) together exceed the property's value ($4000) 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.

4. 13-11027-A-7 GARY TURNER
RNR-4
GARY TURNER/MV

MOTION TO AVOID LIEN OF DIAZ & ASSOCIATES, INC. AND/OR MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.
8-6-14 [24]

ROSETTA REED/Atty. for dbt.

Tentative Ruling

Motion: Avoid Lien that Impairs Exemption
Disposition: Denied without prejudice
Order: Civil minute order

The court will deny the motion without prejudice on grounds of insufficient service of process on the responding party. A motion to avoid a lien is a contested matter requiring service of the motion in the manner provided by Federal Rule of Bankruptcy Procedure 7004. Fed. R. Bankr. P. 4003(d), 9014(b); *see also In re Villar*, 317 B.R. 88, 92 n.6 (B.A.P. 9th Cir. 2004). Under Rule 7004, service on FDIC-insured institutions must "be made by certified mail addressed to an officer of the institution" unless one of the exceptions applies. Fed. R. Bankr. P. 7004(h).

Service of the motion was insufficient on both respondents. Service of the motion on Capital One Bank (USA), N.A. was not made by certified mail or was not addressed to an officer of the responding

party. No showing has been made that the exceptions in Rule 7004(h) are applicable. *See* Fed. R. Bankr. P. 7004(h)(1)–(3). Instead, service was made on an attorney who represented the respondent in obtaining the judgment lien. "An implied agency to receive service is not established by representing a client in an earlier action. We cannot presume from [the attorney's] handling the litigation that resulted in the judicial lien that he is also authorized to accept service for a motion to avoid the judicial lien." *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 93–94 (B.A.P. 9th Cir. 2004) (citations omitted).

Service on Diaz & Associates, Inc. was also insufficient. Service was made on Thomas E. Stepp, Jr., whose name appears as the creditor's attorney of record on the recorded abstract of judgment. This attorney's authorization to accept service on behalf of respondent in this proceeding cannot be presumed from the attorney's prior representation of the respondent in the litigation that resulted in the lien. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 93–94 (B.A.P. 9th Cir. 2004) (citations omitted). No evidence has been presented in the proof of service that the attorney or law firm served has been authorized to accept service of process on the responding party in this bankruptcy case.

Service on both respondents, moreover, should clearly indicate that service is being made to a named person whose status on behalf of the respondent is expressly shown on the proof of service.

5.	12-18333-A-7 MKK-2 M. KLEIN/MV	CASA MOORE AUDIO VIDEO, INC.	MOTION FOR COMPENSATION FOR M. KATHLEEN KLEIN, ACCOUNTANT(S), FEE: $1233.50, EXPENSES: $135.35. 3-4-14 [39]

LEONARD WELSH/Atty. for dbt.

Final Ruling

Application: Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: M. Kathleen Klein
Compensation approved: $1,233.50
Costs approved: $185.71
Aggregate fees and costs approved in this application: $1,419.21

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 trustee, examiner or professional person employed under § 327 or § 1103 and

"reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). 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 a final basis as to the amounts requested.

6. 14-13242-A-7 JACOB HAUGHTON
RP-1

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
7-24-14 [17]

Tentative Ruling

Motion: Dismiss Case and Extend Deadlines
Notice: LBR 9014-1(f)(1); written opposition required or case dismissed without hearing
Disposition: Conditionally denied in part, granted in part
Order: Prepared by chapter 7 trustee

The Chapter 7 trustee has filed a Motion to Dismiss for Failure to Appear at the § 341(a) Meeting of Creditors and Motion to Extend Deadlines for Filing Objections to Discharge. The debtor opposes the motion on grounds that the debtor is incarcerated and therefore unable to attend the creditors' meeting.

Section 343 provides that "[t]he debtor *shall* appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title." 11 U.S.C. § 343 (emphasis added). But the court does not have statutory authority to waive this statutory requirement to appear at the § 341 creditors' meeting. The court will not construct an exception not provided by the statute that only debtors who are not incarcerated are subject to the requirement of an appearance at the § 341 meeting. The U.S. Trustee Program's Handbook for Chapter 7 Trustees provides, however, for rare circumstances, including a debtor's incarceration, as a basis for allowing a debtor's telephonic appearance at the meeting of creditors. *See* U.S. Trustee Program, U.S. Dep't of Justice, Handbook for Ch. 7 Panel Trustees 3-9 (Oct. 1, 2012).

The court will conditionally deny the motion 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 attend—telephonically or in person—the continued meeting of creditors. But if the debtor does not appear at a continued meeting of creditors on or before October 15, 2014, the case will be dismissed on the trustee's ex parte declaration.

The court will grant the motion in part to the extent it requests extension of certain deadlines. Such 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 September 23, 2014 and on such other date as the trustee shall set on or before October 15, 2014. The deadline for objecting to discharge under § 727 is extended to 60 days after the continued date of the creditor's meeting

at which the debtor first appears. *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).

7. 14-12846-A-7 IGNACIO VEGA — MOTION TO AVOID LIEN OF DISCOVER BANK
PK-1
IGNACIO VEGA/MV
8-13-14 [18]
PATRICK KAVANAGH/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).

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.

1:15 p.m.

1. 14-12906-A-7 GAIL RUMBO — STATUS CONFERENCE RE: COMPLAINT
14-1071 — 7-17-14 [1]
U.S. TRUSTEE V. RUMBO
ROBIN TUBESING/Atty. for pl.

Final Ruling

This matter is continued to November 5, 2014, at 9:15 a.m. to allow the plaintiff to enter a default judgment.

2. 14-12906-A-7 GAIL RUMBO — MOTION FOR ENTRY OF DEFAULT JUDGMENT
14-1071 UST-1 — 8-25-14 [11]
U.S. TRUSTEE V. RUMBO
ROBIN TUBESING/Atty. for mv.

Tentative Ruling

Motion: Entry of Default Judgment
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

The U.S. Trustee has moved for entry of default judgment on its claims for dismissal of debtor Gail Rumbo's bankruptcy case with prejudice and for injunctive relief to bar future filings. The complaint and the motion do not address a critical element of the first claim for relief. The complaint seeks to dismiss the case under § 707(b)(3)(A). But the complaint contains no factual allegations that Rumbo's debts are primarily consumer debts. *See* 11 U.S.C. § 707(b)(1), (3). The well-pleaded facts thus do not warrant entry of a default judgment for a dismissal under § 707(b)(1) and (3). In addition, the motion addresses dismissal under an incorrect statute, § 1307(c).

The court prefers to enter only one judgment on both claims at this time, so the motion for entry of default on the injunctive claim will also be denied at this time. *See* Fed. R. Civ. P. 54(b), *incorporated by* Fed. R. Bankr. P. 7054 (giving the court discretion to enter judgment on one claim when there are multiple claims).

3. 11-62509-A-7 SHAVER LAKEWOODS — CONTINUED STATUS CONFERENCE RE: COMPLAINT
14-1003 DEVELOPMENT INC. — 1-6-14 [1]
PARKER V. RODRIGUEZ
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.

4. 11-62509-A-7 SHAVER LAKEWOODS CONTINUED MOTION TO STRIKE
14-1003 DEVELOPMENT INC. KDG-4 7-10-14 [69]
PARKER V. RODRIGUEZ
LISA HOLDER/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Strike Second Amended Counterclaim
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Plaintiff and Counter-Defendant Randall Parker, Chapter 7 trustee, moves under Federal Rule of Civil Procedure 12(f) to strike Counter-Claimant Angela Rodriguez's Second Amended Counterclaim. Parker contends the relief requested by Rodriguez's counterclaims mirrors the relief sought by his complaint. Rodriguez opposes the motion denying that the parties' are bringing the same claims. Rodriguez has the better side of the argument.

LEGAL STANDARDS

Rule 12(f) authorizes the court to strike redundant pleadings. "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter..." Fed. R. Civ. P. 12(f), *incorporated by* Fed. R. Bankr. P. 7012(b). A counterclaim that mirrors the complaint is redundant within the meaning of Rule 12(f) and may be stricken. *Apple, Inc. v. Samsung Electronics*, 2011 WL 4948567 (N.D. Cal. October 18, 2011).

A complaint may be plead one or more claims. Each claim must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2), *incorporated by* Fed. R. Bankr. P. 7008(a). A claim is the "aggregate of operative facts which give rise to a right enforceable in the courts." *Bautista v. Los Angeles County*, 216 F3d 837, 840 (9th Cir. 2000). The complaint must give the adverse party fair notice of the nature of the claim. *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995).

DISCUSSION

Here, the first claim of Parker's complaint and the first claim of Rodriguez's Second Amended Counterclaim plead two different claims. Though styled as an adversary to determine the nature, extent and validity of Rodriguez's lien and objection to claim, Parker's first claim sounds under the strong arm powers of 11 U.S.C. § 544(a)(3), arguing that Rodriguez never perfected her rights under the promissory note and security agreement. *See* Compl. ¶¶ 6-13, Jan. 6, 2014, ECF #1. As pled, Parker's § 544(a)(3) claim arises from operative facts that occurred, if at all, not later than the date Shaver Lakewoods Development, Inc. filed its petition under Chapter 7 of Title 11. Parker's second claim objects to the amount of Rodriguez's filed claim and interest accrued on the claim.

By contrast, the first claim of Rodriguez's Second Amended Counterclaim prays specific performance arising from a settlement agreement with the Chapter 7 trustee, the meaning of which is disputed. Second Am. Counterclaim ¶¶ 16-18, 27-32, filed June 20, 2014, ECF #61. As pled, the majority (though perhaps not all) of the operative facts of the counterclaim occurred post-petition.

Similarly, the second claim of Rodriguez's Second Amended Counterclaim, the claim for declaratory relief, involves alleged, operative facts that occurred post-petition. The claim requests a declaration of the rights of the parties under the settlement agreement and an interpretation of the settlement agreement and how such interpretation would apply to the resolution of the dispute.

Moreover, it is of no consequence that Rodriguez's fifth affirmative defense to the complaint raised the settlement agreement with the trustee. Answer, Fifth Affirmative Defense, Feb. 13, 2014, ECF #7. Such a pleading would not give rise to the right to affirmative relief. Affirmative defenses raise new facts and theories that defeat a plaintiff's claim, even if all of the allegations in the complaint are ultimately found to be true. *Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 449 (1st Cir. 1995). But a request for affirmative relief must be raised as a counterclaim. Fed. R. Civ. P. 13, *incorporated by* Fed. R. Bankr. P. 7013; *see also* Schwarzer, *Federal Civil Procedure Before Trial*, Pleadings §§ 8:1005-8:1006 (Rutter Group 2014). If Rodriguez wishes to contend that she gained rights for affirmative relief she is obligated to raise that issue by counterclaim, as she has done.

As a result, Rodriguez's claims are not identical to Parker's claims. Because Rodriguez's claims are not redundant of Parker's claims, they will not be stricken.

ORDER

The court will issue a minute order substantially in the following form:

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

The Motion to Strike the Second Amended Counterclaim, filed July 10, 2014, ECF #69, having been presented to the court, and upon review of the pleadings, arguments of counsel, and good cause appearing,

It is hereby ordered that the Motion to Strike is denied. Counter-defendant Randall Parker shall serve a response to the Second Amended Counterclaim not later than 14 days after service of this Civil Minute Order. No other or additional relief is granted.

5. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC. KDG-5
14-1003 PARKER V. RODRIGUEZ

CONTINUED MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION
7-23-14 [74]

LISA HOLDER/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Summary Judgment/Partial Summary Judgment
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part, denied in part
Order: Civil minute order

Plaintiff Randell Parker, Chapter 7 trustee, moves for summary judgment or, in the alternative, partial summary judgment with respect to the issues raised in his complaint against Defendant Angela Rodriguez. In dispute is whether trustee Parker may avoid Rodriguez's lien against sale proceeds of the real property identified in paragraphs 9 and 12 of Parker's complaint. The parties also dispute the amount of Rodriguez's filed claim.

HISTORY

In 2005, debtor Shaver Lakewoods Development, Inc. ("Shaver Lakewoods") executed a promissory note in favor of Rodriguez in the amount of $419,276.05. By Security Agreement executed the same date, Shaver Lakewoods secured the debt to Rodriguez granting Rodriguez a security interest in five parcels of real property it owned in Fresno County. In 2009, Shaver Lakewood Development transferred the five parcels to Rodriguez and others. Later, Shaver Lakewoods filed a Chapter 7 bankruptcy and Randell Parker was named the Chapter 7 trustee. Parker on the one hand, and Rodriguez and the other transferees on the other hand, entered into a settlement agreement, approved by court under Rule 9019, whereby Rodriguez and other transferees transferred the real property back to Parker in exchange for reinstatement of their rights as of the 2009 transfer. Later, Parker sold the property under § 363(f) with Rodriguez's lien attaching the to the sale proceeds with the same validity and effect, if any, that such lien had on the real property prior to the sale.

MOTION FOR SUMMARY JUDGMENT

Parker now moves for summary judgment. Parker's motion defines the scope of the relief that may be awarded. Fed. R. Bankr. P. 9013 ("The motion. . .shall set forth the relief or order sought."). In this case, the motion is directed only to the claims raised in Parker's complaint. "Randell Parker, Chapter 7 Trustee, moves the Court for summary judgment, or in the alternative summary adjudication on the claims brought by the Trustee in his Complaint against Angela R. Rodriguez." Mot. Summ. J. at 1:23-25, July 23, 2014, ECF #74. As pled, the trustee's claims for relief are: (1) a claim for a determination of the nature, extent and validity of Rodriguez's lien in light of the exercise of Parker's strong arm powers under 11 U.S.C. § 544(a)(3); and (2) an objection to Rodriguez's Claim No. 4 (incorrectly designated in the complaint as Claim No. 3).

Not raised by that complaint, and therefore excluded from consideration in this motion, are the rights, if any, that Rodriguez may have by virtue of the post-petition settlement with Parker on or about April 26, 2012. *See* Second Am. Counterclaim, filed June 20,

2014, ECF #61. As a result, the only questions for consideration in this motion are the rights of Parker vis-a-vis Rodriguez's lien *as of the petition date* and the amount of Rodriguez's claim against the estate.

LEGAL STANDARDS

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Painsolvers, Inc. v. State Farm Mut. Auto. Ins. Co.*, 732 F. Supp. 2d 1107, 1110 (D. Haw. 2010).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.* Meeting this initial burden requires the moving party to show only "an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.*

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

DISCUSSION

First Cause of Action: 11 U.S.C. § 544(a)(3)

"The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-- . . . (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists." 11 U.S.C. § 544(a)(3).

State law, not federal law, controls whether the Chapter 7 trustee's rights as a bona fide purchaser trump those held by a party who acquired its interest before the bankruptcy. *In re Deuel*, 594 F.3d 1073, 1078-79 (9th Cir. 2008); *In re Prof'l Inv. Props. of Am.*, 955

F.2d 623, 627 (9th Cir. 1992). California's statutory scheme for determining the priorities of persons holding interests in real property operates through both a general rule and a modification of that rule. The general rule has been aptly described, "California starts with a 'first in time, first in right system of lien priorities,' under which 'a conveyance recorded first generally has priority over any later-recorded conveyance.'" *First Bank v. E. W. Bank*, 199 Cal. App. 4th 1309, 1313 (2011) (quoting *Thaler v. Household Fin. Corp.* 80 Cal. App. 4th 1093, 1099, 95 Cal. Rptr. 2d 779 (2000)) (citing Cal. Civ. Code, § 2897). "Other things being equal, different liens upon the same property have priority according to the time of their creation . . . ." Cal. Civ. Code § 2897.

California's recording statutes modify the first-in-time rule, which are described as "race-notice" rules. Under the race-notice statute, "[e]very conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action." Cal. Civ. Code § 1214.

"Under these race-notice rules, a subsequent purchaser obtains priority for a real property interest by (1) acquiring the interest as a bona fide purchaser for valuable consideration with neither actual knowledge nor *constructive notice* of (2) a *previously-created* interest; and (3) first duly record[ing] the interest, i.e., recording before the previously-created interest is recorded." *First Bank v. E. W. Bank*, 199 Cal. App. 4th 1309, 1313 (2011) (alteration in original) (citations omitted) (internal quotation marks omitted).

Except for the lack of constructive or inquiry notice, § 544(a)(3) establishes as a matter of law each element of California's race-notice exception. *See e.g.*, *In re Gurs*, 27 B.R. 163, 165 (9th Cir. B.A.P. 1983) (confining inquiry solely to constructive notice issue). Constructive notice is a legal fiction. *Lewis v. Super. Ct.*, 30 Cal. App. 4th 1850, 1867 (1994). Constructive notice is conclusively established by perfection, in this case recordation with the County Recorder of the instrument or document for which constructive notice is sought to be imputed. Civ. Code § 1213; *Hochstein v. Romero*, 219 Ca.App.3d 447, 452 (1990). It may also be established by circumstance. *In re Weisman*, 5 F.3d 417 (9th Cir. 1993).

Here, the issue has been narrowed to the respective priority of the party's interests in the real property (and now sale proceeds) as of the date of the petition, so the only question under § 544(a)(3) is that of notice. Neither party argues the applicability of inquiry notice. Parker has not shown by *admissible* evidence that Rodriguez's interest was not recorded. *See* Parker's Separate Statement of Undisputed Facts Supp. Mot. Summ. J., No. 4, July 23, 2014, ECF #78. The evidence offered by the trustee is the preliminary title report and an order approving a § 363(f) sale. The former is inadmissible because it is not properly authenticated and is inadmissible hearsay; the later is admissible but does not stand for the proposition cited, instead holding only that a bona fide dispute exits. *See* Fed. R. Evid. 801-804, 901; Civ. Mins., filed Sept. 26, 2012, ECF # 63 (finding only bona fide dispute under 11 U.S.C. § 363(f)(4)).

Rodriguez does not dispute the lack of recordation as of the date of the petition but argues that Parker had an obligation under the terms of the settlement to record the deed of trust on her behalf post-petition. Def.'s Opp'n to Pl.'s Separate Statement of Undisputed Facts, No. 4, Aug. 6, 2014, ECF #89. Even if that is true, it does not address the only issue raised by the complaint, and by extension this motion: whether as of the date of the petition Rodriguez's interest was perfected by recordation so as to provide trustee Parker with constructive notice of her interest.

But Rodriguez's pleadings not cited by Parker show that Rodriguez admits lack of recordation of her interest as of the petition date. Fed. R. Civ. P. 56(c)(3), *incorporated by* Fed. R. Bankr. P. 7056 (authorizing granting summary judgment on other matters in the record). Admissions in an adverse party's pleadings may form the basis of a motion for summary judgment. Fed. R. Evid. 801(d)(2); *Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980). Parker's complaint alleges that, "Ms. Rodriguez never recorded a copy of the Security Agreement in the official records of Fresno County." Compl. ¶ 8, January 6, 2014, ECF #1. Rodriguez's answer admits this fact. Answer ¶ 8, Feb. 13, 2014, ECF #7. Rodriguez's Second Amended Counterclaim strengths her admission, "On or about October 2005, the debtor [Shaver Lakewoods] executed a note to Counter-Claimant in the present total amount, with accrued interest, of $419,276.05. . . . Concurrently thereto, the debtor granted the Counter-Claimant a security interest in the real property of property [sic] located in the County of Fresno, to secure the debtor's obligation. *The Security Agreement and Release required the debtor to do those 'acts or things* ... necessary to establish, *perfect*, and continue [the defendant's] security interest' in the subject real property. *The debtor failed to perform pursuant to the security agreement.*" Second Am. Counterclaim ¶¶ 10-13, June 20, 2014, ECF #61 (emphases added) (final alteration in original; other alterations added). Rodriguez having admitted the critical fact, § 544(a)(3) is operative and the trustee's rights trump Rodriguez's rights with respect to Rodriguez's security interest.

The court grants the motion for summary judgment in part as to Parker's § 544(a)(3) claim against Rodriguez. Rodriguez's lien against the five parcels of real property described in the complaint was unperfected as of the petition date and is avoided by Parker's exercise of his rights as a bona fide purchaser under § 544(a)(3).

Second Cause of Action: Objection to Claim No. 4

A proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). Proper grounds for objection include the inability to enforce the claim under applicable non-bankruptcy law. 11 U.S.C. § 502(b)(1).

Claim No. 4 filed by Rodriguez assets a secured claim for $464,615.99. *See* Claim No. 4, Apr. 10, 2012. The claim is based on a promissory note, dated October 18, 2005, in the amount of $282,000.00, at 8% interest. The note matured on October 18, 2010. It contains a defaulted interest rate at the lesser of "eighteen percent (18%) per annum or the highest rate permitted by law..." It was secured by real property owned by Shaver Lakewoods. The nature, extent and validity of Rodriguez's security interest is resolved by the First Cause of Action in Parker's Complaint.

Parker also contends that Rodriguez has overstated the amount of Rodriguez's claim, contending that she is only entitled to

$419,276.05. Parker does not explain how he derives that number. Rodriguez's memorandum of points and authorities does not address the issue. No payments have been made on the note.

Trustee Parker does not contend the note is usurious. Fed. R. Civ. P. 8(c); *FDIC v. Ramirez-Rivera*, 869 F.2d 624 (1st Cir. 1989) (usury is an affirmative defense). Under California law the phrase "per annum" refers to simple, not compounded interest. *Fuller v. White*, 33 Cal. 2d 236, 240 (1948); *Ninety Five Ten v. Crain*, 231 Cal. App.3d 36, 39-40 (1991).

As a consequence, summary judgment is granted in part and denied in part on Parker's second claim in the complaint objecting to Rodriguez's filed proof of claim. The court finds that the undisputed factual record establishes that Rodriguez's claim includes principal of $282,000 plus non-default interest from October 18, 2005, through October 18, 2010, and default interest from October 19, 2010, through the petition date, November 17, 2011, *see* 11 U.S.C. § 502(b), and that the amount due Rodriguez on the petition date was $451,045.48 ($282,000 principal + $112,861.81(1,826.00 days x 461.81/day) non-default interest + $56,183.67 (404 days x $139.07/day) default interest).

ORDER

The court will issue a minute order substantially in the following form:

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

The Motion for Summary Judgment is granted as to Chapter 7 trustee Randell Parker's avoidance of the Security Agreement in favor of Rodriguez, dated October 18, 2005, and attached as Exhibit A, pages 8-9 of the Complaint, filed January 6, 2014, ECF #1.

The Motion for Summary Judgment is also granted in part and denied in part as to Parker's objection to Claim No. 4. If not otherwise determined to be secured, the amount of Rodriguez's claim as of the date of the petition is fixed at $451,045.48.

Except as specifically provided otherwise in this order the Motion for Summary Judgment is denied.

6.	11-62509-A-7 14-1004	SHAVER LAKEWOODS DEVELOPMENT INC. PARKER V. LOO LISA HOLDER/Atty. for pl. RESPONSIVE PLEADING	CONTINUED STATUS CONFERENCE RE: COMPLAINT 1-6-14 [1]

No tentative ruling.

7. 11-62509-A-7 SHAVER LAKEWOODS CONTINUED MOTION TO STRIKE
14-1004 DEVELOPMENT INC. KDG-4 7-10-14 [64]
PARKER V. LOO
LISA HOLDER/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Strike Second Amended Counterclaim
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Plaintiff and Counter-Defendant Randell Parker, Chapter 7 trustee, moves under Federal Rule of Civil Procedure 12(f) to strike Counter-Claimant Gordon Loo's Second Amended Counterclaim. Parker contends the relief requested by Loo's counterclaims mirrors the relief sought by his complaint. Loo opposes the motion denying that the parties' are bringing the same claims. Loo has the better side of the argument.

LEGAL STANDARDS

Rule 12(f) authorizes the court to strike redundant pleadings. "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter..." Fed. R. Civ. P. 12(f), *incorporated by* Fed. R. Bankr. P. 7012(b). A counterclaim that mirrors the complaint is redundant within the meaning of Rule 12(f) and may be stricken. *Apple, Inc. v. Samsung Electronics*, 2011 WL 4948567 (N.D. Cal. October 18, 2011).

A complaint may be plead one or more claims. Each claim must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2), *incorporated by* Fed. R. Bankr. P. 7008(a). A claim is the "aggregate of operative facts which give rise to a right enforceable in the courts." *Bautista v. Los Angeles County*, 216 F3d 837, 840 (9th Cir. 2000). The complaint must give the adverse party fair notice of the nature of the claim. *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995).

DISCUSSION

Here, the first claim of Parker's complaint and the first claim of Loo's Second Amended Counterclaim plead two different claims. Though styled as an adversary to determine the nature, extent and validity of Loo's lien and objection to claim, Parker's first claim sounds under the strong arm powers of 11 U.S.C. § 544(a)(3), arguing that Loo never perfected his rights under the promissory note and security agreement. Compl. ¶¶ 8, 16, Jan. 6, 2014, ECF #1. As pled, Parker's § 544(a)(3) claim arises from operative facts that occurred, if at all, not later than the date Shaver Lakewoods Development, Inc. filed its petition under Chapter 7 of Title 11. Parker's second claim objects to the amount of Loo's filed claim and alleges that a large portion of the claim is unenforceable under the statute of limitations and that Loo's claim under only the second note described in the complaint is enforceable.

By contrast, the first claim of Loo's Second Amended Counterclaim prays specific performance and declaratory relief arising from a settlement agreement with the Chapter 7 trustee, the meaning of which is disputed. Second Am. Counterclaim ¶¶ 19-22, 30-39, filed June 20,

2014, ECF #56. As pled, the majority (though perhaps not all) of the facts occurred post-petition.

Similarly, the second claim of Loo's Second Amended Counterclaim, the claim for declaratory relief, involves alleged, operative facts that occurred post-petition. The claim requests a declaration of the rights of the parties under the settlement agreement and an interpretation of the settlement agreement and how such interpretation would apply to the resolution of the dispute.

Moreover, it is of no consequence that Loo's fifth affirmative defense to the complaint raised the settlement agreement with the trustee. Answer, Fifth Affirmative Defense, Feb. 13, 2014, ECF #7. Such a pleading would not give rise to the right to affirmative relief. Affirmative defenses raise new facts and theories that defeat a plaintiff's claim, even if all of the allegations in the complaint are ultimately found to be true. *Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 449 (1st Cir. 1995). But a request for affirmative relief must be raised as a counterclaim. Fed. R. Civ. P. 13, *incorporated by* Fed. R. Bankr. P. 7013; *see also* Schwarzer, *Federal Civil Procedure Before Trial*, Pleadings §§ 8:1005-8:1006 (Rutter Group 2014). If Loo wishes to contend that he gained rights for affirmative relief he is obligated to raise that issue by counterclaim, as he has done.

As a result, Loo's claims are not identical to Parker's claims. Because Rodriguez's claims are not redundant of Parker's claims, they will not be stricken.

ORDER

The court will issue a minute order substantially in the following form:

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

The Motion to Strike the Second Amended Counterclaim, filed July 10, 2014, ECF #64, having been presented to the court, and upon review of the pleadings, arguments of counsel, and good cause appearing,

It is hereby ordered that the Motion to Strike is denied. Counter-defendant Randell Parker shall serve a response to the Second Amended Counterclaim not later than 14 days after service of this Civil Minute Order. No other or additional relief is granted.

8. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC. KDG-5
14-1004 PARKER V. LOO

CONTINUED MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION
7-23-14 [69]

LISA HOLDER/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Summary Judgment/Partial Summary Judgment
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part, denied in part
Order: Civil minute order

Plaintiff Randell Parker, Chapter 7 trustee, moves for summary judgment or, in the alternative, partial summary judgment with respect to the claims raised in his complaint against Gordon Loo. In dispute is whether Parker may avoid Loo's lien against sale proceeds of the real property identified in paragraphs 10 and 13 of Parker's complaint. The parties do not dispute the amount of Loo's filed claim.

HISTORY

In 2002, debtor Shaver Lakewoods Development, Inc. ("Shaver Lakewoods") executed a promissory note in favor of Loo in the amount of $250,000.00. By Security Agreement executed the same date, Shaver Lakewoods secured the debt to Loo by granting Loo a security interest in five parcels of real property it owned in Fresno County. In 2009, Shaver Lakewoods transferred the five parcels to Loo and others. Later, Shaver Lakewoods filed a Chapter 7 bankruptcy, and Randell Parker was named the Chapter 7 trustee. Parker on one the one hand, and Loo and the other transferees on the other hand, entered into a settlement agreement, approved by the court under Rule 9019, whereby Loo and the other transferees deeded the property back to Parker in exchange for reinstatement of their rights as of the 2009 transfer. Later, Parker sold the property under § 363(f) with Loo's lien attaching the to the sale proceeds with the same validity and effect, if any, that such lien had on the real property prior to the sale.

MOTION FOR SUMMARY JUDGMENT

Parker now moves for summary judgment. Parker's motion defines the scope of the relief that may be awarded. Fed. R. Bankr. P. 9013 ("The motion. . .shall set forth the relief or order sought."). In this case, the motion is directed only to the claims raised in Parker's complaint. "Randell Parker, Chapter 7 Trustee, moves the Court for summary judgment, or in the alternative summary adjudication on the claims brought by the Trustee in his Complaint against Gordon K. Loo." Mot. at 1:23-25, July 23, 2014, ECF #69. As pled, the trustee's claims for relief are: (1) a claim for a determination of the nature, extent and validity of Loo's lien in light of the exercise of the Parker's strong arm powers under 11 U.S.C. § 544(a)(3); and (2) an objection to Loo's Claim No. 3 (incorrectly designated as Claim No. 4 in Parker's complaint).

Not raised by that complaint, and therefore excluded from consideration in this motion, are the rights, if any, that Loo may have by virtue of the post-petition settlement with Parker on or about April 26, 2012. *See* Second Am. Counterclaim, June 20, 2014, ECF #56.

As a result, the only questions for consideration in this motion are the rights of Parker vis-a-vis Loo's lien *as of the petition date*, whether Loo's claim is barred by the applicable statute of limitations, and the amount of Loo's claim against the estate.

LEGAL STANDARDS

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Painsolvers, Inc. v. State Farm Mut. Auto. Ins. Co.*, 732 F. Supp. 2d 1107, 1110 (D. Haw. 2010).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.* Meeting this initial burden requires the moving party to show only "an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.*

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

DISCUSSION

<u>First Cause of Action: 11 U.S.C. § 544(a)(3)</u>

"The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-- . . . (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists." 11 U.S.C. § 544(a)(3).

State law, not federal law, controls whether the Chapter 7 trustee's rights as a bona fide purchaser trump those held by a party who acquired its interest before the bankruptcy. *In re Deuel*, 594 F.3d 1073, 1078-79 (9th Cir. 2008); *In re Prof'l Inv. Props. of Am.*, 955

F.2d 623, 627 (9th Cir. 1992). California's statutory scheme for determining the priorities of persons holding interests in real property operates through both a general rule and a modification of that rule. The general rule has been aptly described, "California starts with a 'first in time, first in right system of lien priorities,' under which 'a conveyance recorded first generally has priority over any later-recorded conveyance.'" *First Bank v. E. W. Bank*, 199 Cal. App. 4th 1309, 1313 (2011) (quoting *Thaler v. Household Fin. Corp.* 80 Cal. App. 4th 1093, 1099, 95 Cal. Rptr. 2d 779 (2000)) (citing Cal. Civ. Code, § 2897). "Other things being equal, different liens upon the same property have priority according to the time of their creation . . . ." Cal. Civ. Code § 2897.

California's recording statutes modify the first-in-time rule, which are described as "race-notice" rules. Under the race-notice statute, "[e]very conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action." Cal. Civ. Code § 1214.

"Under these race-notice rules, a subsequent purchaser obtains priority for a real property interest by (1) acquiring the interest as a bona fide purchaser for valuable consideration with neither actual knowledge nor *constructive notice* of (2) a *previously-created* interest; and (3) first duly record[ing] the interest, i.e., recording before the previously-created interest is recorded." *First Bank v. E. W. Bank*, 199 Cal. App. 4th 1309, 1313 (2011) (alteration in original) (citations omitted) (internal quotation marks omitted).

Except for the lack of constructive or inquiry notice, § 544(a)(3) establishes as a matter of law each element of California's race-notice exception. *See e.g.*, *In re Gurs*, 27 B.R. 163, 165 (9th Cir. BAP 1983) (confining inquiry solely to constructive notice issue). Constructive notice is a legal fiction. *Lewis v. Super. Ct.*, 30 Cal. App. 4th 1850, 1867 (1994). Constructive notice is conclusively established by perfection, in this case recordation with the County Recorder of the instrument or document for which constructive notice is sought to be imputed. Civ. Code § 1213; *Hochstein v. Romero*, 219 Ca.App.3d 447, 452 (1990). It may also be established by circumstance. *In re Weisman*, 5 F.3d 417 (9th Cir. 1993).

Here, the issue has been narrowed to the respective priority of the party's interests in the real property (and now sale proceeds) as of the date of the petition, so the only question under § 544(a)(3) is that of notice. Neither party argues the applicability of inquiry notice. Parker has not shown by *admissible* evidence that Loo's interest was not recorded. Parker's Separate Statement of Undisputed Facts Supp. Mot. Summ. J., No. 4, July 23, 2014, ECF #73. Supporting evidence offered by the trustee is the preliminary title report and order approving a § 363(f) sale. The former is inadmissible because it is not properly authenticated and is inadmissible hearsay; the later is admissible but does not stand for the proposition cited, instead holding only that a bona fide dispute exits. *See* Fed. R. Evid. 801-804, 901; Civ. Mins., filed Sept. 26, 2012, ECF # 63 (finding only bona fide dispute under 11 U.S.C. § 363(f)(4)).

Loo does not dispute the lack of recordation as of the date of the petition but argues that Parker had an obligation under the terms of the settlement to record the deed of trust on her behalf post-petition. Def.'s Opp'n to Pl.'s Separate Statement of Undisputed Facts, No. 4, Aug. 6, 2014, ECF #82. Even if that is true, it does not address the only issue raised by Parker's complaint, and by extension this motion: whether as of the date of the petition Loo's interest was perfected by recordation so as to provide Parker with constructive interest.

But Loo admits that critical fact missing from the trustee's proof. His declaration states, "The Security Agreement required Shaver Lake[woods] Development, Inc., to perfect the security interest in my note. . . . Of course, Shaver Lake[woods] Development, Inc., had failed to record the Security Agreement with the County Recorder." Loo Decl. at 3:3-4, 3:9-10, filed Aug. 6, 2014, ECF #80. Moreover, this is entirely consistent with the thrust of the Second Amended Counterclaim wherein Loo alleges that Parker had an obligation to perfect the lien post-petition on his behalf. Second Am. Counterclaim, June 20, 2014, ECF #56. Loo having admitted the critical fact, § 544(a)(3) is operative and the trustee's rights trump Loo's rights.

The court grants the motion for summary judgment as to Parker's § 544(a)(3) claim against Loo. Loo's lien against the five parcels of real property described in the complaint was unperfected as of the petition date and is avoided by Parker's exercise of his rights as a bona fide purchaser under § 544(a)(3).

Second Cause of Action: Objection to Claim No. 3

The second cause of action is entitled "Second Claim for Relief-Objection to Claim No. 4." A Proof of Claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). Grounds for objection include the inability to enforce the claim under applicable non-bankruptcy law. 11 U.S.C. § 502(b)(1).

Claim No. 3 filed by Gordon Loo assets a claim of $577,214.12. Of that amount the Proof of Claim contends $516,682.62 is secured and $60,531.59 is unsecured. Proof of Claim, April 10, 2012. The nature, extent and validity of Loo's security interest is resolved by the First Cause of Action in Parker's Complaint.

The claim is based on a promissory note, dated November 7, 2002, in the amount of $250,000.00, at 8%. The note matured on November 7, 2007. It contains a defaulted interest rate at the lesser of "eighteen percent (18%) per annum or the highest rate permitted by law..." It was secured by real property owned by Shaver Lakewoods Development, Inc.

Parker's motion asserts that Loo is entitled to an unsecured claim of $577,214.21. The motion requests that judgment be entered determining that Loo has a claim against the debtor for this amount. This amount is the exact amount Loo has claimed in his proof of claim. As a result, summary judgment will be granted to the extent Parker's motion requests that Loo's claim will be fixed in the amount of $577,214.21.

ORDER

The court will issue a minute order substantially in the following form:

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

The Motion for Summary Judgment is granted as to Chapter 7 trustee Randell Parker's avoidance of the Security Agreement in favor of Loo, dated October 18, 2005, and attached as Exhibit A, pages 8-9 of the Complaint, filed January 6, 2014, ECF #1.

The Motion for Summary Judgment is also granted in as to Chapter 7 trustee Randell Parker' objection to Claim No. 3. If not otherwise determined to be secured, the amount of Loo's claim as of the date of the petition is fixed at $577,214.21.

Except as specifically provided otherwise in this order the Motion for Summary Judgment is denied.

9. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC. — CONTINUED STATUS CONFERENCE RE: COMPLAINT
14-1005
PARKER V. NUNEZ
1-6-14 [1]
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.

10. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC. KDG-4 — CONTINUED MOTION TO STRIKE 7-10-14 [64]
14-1005
PARKER V. NUNEZ
LISA HOLDER/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Strike Second Amended Counterclaim
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Plaintiff and Counter-defendant Randell Parker, Chapter 7 trustee, moves under Federal Rule of Civil Procedure 12(f) to strike Counter-claimant Henry Nunez's Second Amended Counterclaim. Parker contends that the relief requested by this counterclaim mirrors the relief sought by Parker's complaint. Counter-claimant Nunez opposes the motion denying the identity of the pleadings. Nunez has the better side of the argument.

LEGAL STANDARDS

Rule 12(f) Motions

Rule 12(f) authorizes the court to strike redundant pleadings. "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter..." Fed. R. Civ. P. 12(f), *incorporated by* Fed. R. Bankr. P. 7012(b). A counterclaim that mirrors the complaint is redundant within the meaning of Rule 12(f) and may be stricken. *Apple, Inc. v. Samsung Electronics*, 2011 WL 4948567 (N.D. Cal. October 18, 2011).

Unlike the related motions to strike filed in Parker v. Rodriguez, No. 14-1003 (Bankr. E.D. Cal. 2014), and in Parker v. Loo, No. 14-1004 (Bankr. E.D. Cal. 2014), the court believes that two additional principles apply. First, in a doubtful case, Rule 12(f) motions should be denied. Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* ¶ 9:384 (Rutter Group 2014) ("Where there is any doubt as to the relevance of the challenged allegations, courts err on the side of permitting the allegations to stand, particularly where the moving party shows no prejudice therefrom." (citing *Dah Chong Hong, Ltd. v. Silk Greenhouse, Inc.*, 719 F. Supp. 1072, 1073 (M.D. Fla. 1989)).

Second, courts are split on whether the moving party must show prejudice. *Davis v. Ruby Foods, Inc.*, 269 F3d 818, 821 (7th Cir. 2001) (requiring a showing of prejudice); *contra Fantasy, Inc. v. Fogerty*, 984 F2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534–535 (1994); *see also* Schwarzer, Tashima & Wagstaffe, *supra*, ¶¶ 9:407-09.

Identity of Claims

A complaint may plead one or more claims. Each pleading stating a claim must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2), *incorporated by* Fed. R. Bankr. P. 7008(a). A claim is the "aggregate of operative facts which give rise to a right enforceable in the courts." *Bautista v. Los Angeles County*, 216 F3d 837, 840 (9th Cir. 2000). The complaint must give the adverse party fair notice of the nature of the claim. *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995).

DISCUSSION

The motion will be denied for several reasons. First, though much of the complaint and the Second Amended Complaint do overlap there is not a complete identity of facts or theories of relief. The complaint contains two causes of action: (1) a claim to determine the validity, priority and extent of Nunez's lien; and (2) a claim that is an objection to claim no. 5. The focus of the first claim is on Nunez's failure to perfect his lien by recordation and his failure to perform under the terms of his retainer agreement. The trustee's concerns in the second cause of action arise from the contention that Nunez' did not properly allocate legal fees between Shaver Lakewoods Development, Inc. ("Shaver Lakewoods") and other of Nunez's clients. In contrast, Nunez's Second Amended Counterclaim pleads causes of action for: (1) Quiet Title; (2) Specific Performance; and (3) Declaratory Relief. Nunez contends that he performed under his retainer agreement and that the settlement agreement between Rodriguez and Loo on the one hand, and Parker on the other hand, forms the basis of his rights. The

issues of the allocation of fees between Rodgriguez/Loo and other clients as well as the dispute pertaining to the settlement with Parker distinguish Parker's complaint and Nunez's counterclaim from each other.

Second, given the uncertainty as to the continued viability of *Fantasy, Inc., supra*, the court considers the prejudice to each party. Because the issues in the complaint and counterclaim overlap significantly, there is no prejudice to the plaintiff in allowing Nunez to present his counterclaim. It is unlikely that the counterclaim will appreciably increase cost or delay the action. In contrast, there will be demonstrable prejudice by striking Nunez's counterclaim when it contains factual allegations and relief that differ from the factual allegations and relief in Parker's complaint.

Third, this motion presents a case on which reasonable minds could differ. As *Dah Chong Hong, Ltd.*, instructs, the court in close cases should deny Rule 12(f) motions to strike.

As a result, the court holds that there is not identity of claims and denies the motion to strike.

ORDER

The court will issue a minute order substantially in the following form:

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

The Motion to Strike the Second Amended Counterclaim, filed July 10, 2014, ECF #69, having been presented to the court, and upon review of the pleadings, arguments of counsel, and good cause appearing,

It is hereby ordered that the Motion to Strike is denied. Counter-defendant Randell Parker shall serve a response to the Second Amended Counterclaim not later than 14 days after service of this Civil Minute Order. No other or additional relief is granted.

11. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC. KDG-5
14-1005 PARKER V. NUNEZ

CONTINUED MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION
7-23-14 [69]

LISA HOLDER/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Summary Judgment/Partial Summary Judgment
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Plaintiff Randell Parker, Chapter 7 trustee, moves for summary judgment or, in the alternative, partial summary judgment with respect to the claims raised in his complaint against attorney Henry Nunez. In dispute is whether Nunez's charging lien (1) is perfected; and (2) can withstand the Chapter 7 trustee's § 544(a)(3) strong-arm powers

notwithstanding lack of recordation. The court denies the motion because Parker has not sustained his burden of proof.

HISTORY

Under pressure from creditors and in need of representation in Sierra Pines at *Shaver Lake v. Shaver Lakewoods Development, Inc.*, No. 09CECG02005 (Fresno County Superior Court 2009), Shaker Lakewoods Development, Inc. ("Shaver Lakewoods") approached attorney Henry Nunez, who agreed to undertake the representation.

In January 2011, Shaver Lakewoods and Nunez signed an hourly fee agreement. The fee agreement purported to provide Nunez a lien for fees against any recovery and/or the lots that formed the basis of the dispute. The parties agree that Nunez did not record his security interest in the office of the Fresno County Recorder. Compl. ¶ 11, filed Jan. 6, 2014, ECF #1; Answer ¶ 11, Feb. 6, 2014, ECF #7.

Nunez undertook but apparently did not conclude the litigation. Am. Statement of Financial Affairs #4, filed January 6, 2012, ECF #19.

On November 17, 2011, Shaver Lakewoods filed for Chapter 7 bankruptcy protection. *In re Shaver Lakewoods Dev., Inc.*, No. 11-62509 (Bankr. E.D. Cal. 2011). Randell Parker was appointed as the Chapter 7 trustee of this bankruptcy.

On April 20, 2012, Nunez filed a Proof of Claim asserting a secured claim, perfected by the "attorney lien agreement" in the amount of $88,501.18. The Proof of Claim attached the January 2011 "Retainer Agreement" and Nunez's billing records.

Later, Parker filed the instant adversary proceeding against Nunez. The complaint included two causes of action: (1) an action for a determination of the nature, extent and validity of the lien under Federal Rule of Bankruptcy Procedure 7001; and (2) an objection to Nunez's claim. Nunez answered the complaint and filed counterclaims.

MOTION FOR SUMMARY JUDGMENT

Parker now moves for summary judgment. Parker's motion defines the scope of the relief that may be awarded. Fed. R. Bankr. P. 9013 ("The motion . . . shall set forth the relief or order sought."). In this case, motion is directed only to the issues raised in Parker's complaint. "Randell Parker, Chapter 7 Trustee, moves the Court for summary judgment, or in the alternative summary adjudication on the claims brought by the Trustee in his Complaint against Angela R. Rodriguez [sic]." Mot. at 1:23-25, filed July 23, 2014, ECF #69. As pled, those claims for relief are: (1) a claim to determine the nature, extent and validity of Nunez's lien in light of the exercise of the trustee's strong arm powers under 11 U.S.C. § 544(a)(3); and (2) an objection to Nunez's Claim No. 5.

Not raised by that complaint, and therefore excluded from the court's consideration of this motion, are the rights, if any, that Nunez asserts by his counterclaims, including any rights Nunez may have by virtue of the post-petition settlement with trustee Parker on or about April 26, 2012 or any rights he may have relating to his claim for specific performance of the retainer agreement.

As a result, the only questions for consideration in this motion are Parker's rights vis-a-vis Nunez's lien rights *as of the petition date*

and whether the trustee's strong arm powers of § 544(a)(3) trump Nunez's lien. Unlike the summary judgments in the related cases of *Parker v. Rodriguez*, No. 14-1003 (Bankr. E.D.Cal. 2014), and *Parker v. Loo*, No. 14-1004 (Bankr. E.D. Cal. 2014), the motion for summary judgment makes no effort to challenge the amount of Nunez's claim.

LEGAL STANDARDS

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Painsolvers, Inc. v. State Farm Mut. Auto. Ins. Co.*, 732 F. Supp. 2d 1107, 1110 (D. Haw. 2010).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.* Meeting this initial burden requires the moving party to show only "an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.*

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

DISCUSSION

<u>The Strong Arm Powers under § 544(a)(3)</u>

Since the parties admit that Nunez did not record indicia of his security interest in the office of the Fresno County Recorder, the point of contention is whether Nunez was legally required to do so to maintain his lien as against competing interests in the same property.

Parker argues that Nunez was required to perfect by recordation and cites California's race-notice statute. The race-notice statute provides: "Every conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly

recorded prior to the record of notice of action." Cal. Civ. Code § 1214. "Under these 'race-notice' rules, a subsequent purchaser obtains priority for a real property interest by (1) acquiring the interest as a bona fide purchaser for valuable consideration with neither actual knowledge nor *constructive notice* of (2) a *previously-created* interest; and (3) 'first duly record[ing]' the interest, i.e., recording before the previously-created interest is recorded." *First Bank v. E. W. Bank*, 199 Cal. App. 4th 1309, 1313 (2011) (alteration in original) (citations omitted) (internal quotation marks omitted). Since Nunez admits that he did not perfect his lien by recordation, Parker reasons that his strong arm powers as a trustee avoid Nunez's lien.

Nunez disagrees and contends that recording is unnecessary to perfect California's charging liens, which provide attorneys with perfected, secret (unrecorded) lien upon proper execution of an attorney-client fee agreement granting such a lien. *Cetenko v. United Cal. Bank*, 30 Cal. 3d 528, 532-33 (1982); *Isrin v. Super. Ct.*, 63 Cal. 2d 153 (1965). "What is not essential to creation of an attorney's lien is the filing of a *notice of lien.* Unlike a judgment creditor's lien, which is created when the notice of lien is filed (Code Civ. Proc., § 708.410, subd. (b)), an attorney's lien is a 'secret' lien; it is created and the attorney's security interest is protected even without a notice of lien. An attorney may, however, choose to file a notice of lien in the underlying action, and the common practice of doing so has been held permissible and even advisable." *Carroll v. Interstate Brands Corp.*, 99 Cal. App. 4th 1168, 1172-73 (2002) (citations omitted).

Nunez is correct that *if* he holds a charging lien executed in compliance with Rule 3-300, recordation was not required to perfect his interests and his lien will withstand a Section 544(a)(3) challenge.

The Chapter 7 trustee bears the initial burden of proving a lack of perfection. *NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 486 (B.A.P. 9th Cir. 2006) (citing *Citizens State Bank of Nev., Mo. v. Davison (In re Davison)*, 738 F.2d 931, 936 (8th Cir. 1984)). "Section 544 of the Bankruptcy Code makes the avoidance powers of the trustee contingent upon state law." *In re Hilde*, 120 F.3d 950, 952 (9th Cir. 1997) (citations omitted).

In considering the lien asserted by Nunez against real property or its proceeds, the court must engage in a four step analysis: (1) was a valid lien created, after obtaining the informed consent of the client, Rule of Prof'l Conduct 3-300, *Fletcher v. Davis*, 33 Cal.4th 61, 71-72 (2004); (2) whether the scope the lien extends to the asset in dispute, *In re Segovia*, 387 B.R. 773, 782-784 (Bankr. N.D. Cal. 2008), *aff'd*, 2008 WL 8462967 (9th Cir. BAP 2008), *aff'd*, 346 Fed. Appx. 156 (9th Cir. 2009); *Broach v. Michell (In re Bouzas)*, 294 B.R. 318, 33-34(Bankr. N.D. Cal. 2003); (3) whether the attorney's lien may be avoided under the strong arm powers of § 544(a)(3); and (4) whether the claim of the attorney, as a debtor's attorney, for services rendered exceeds the reasonable value of those services, 11 U.S.C. § 502(b)(4).

Parker's motion focuses on the third element, priority. A major premise of Parker's assertion of priority is that an unrecorded lien held by an attorney, valid between the parties but not asserted against a recovery or fund generated by the attorney's efforts, is treated as unperfected and void as against a bona fide purchaser

without constructive notice of the lien who is protected by the race-notice statute, Cal. Civ. Code § 1214. The court does not decide on this record whether Nunez's lien has been validly and properly created in compliance with state law and rules. But Parker has cited no controlling authority that recordation is intended to be the exclusive means for perfection of an attorney's lien on real property. While ordinarily used to protect an attorney's interest in the proceeds of recovery in an injury or other action, there is authority for the proposition that attorney's liens may be used to created interests in real property. *See e.g.*, *Broach v. Michell (In re Bouzas)*, 294 B.R. 318, 33-34(Bankr. N.D. Cal. 2003); *In re Segovia*, 387 B.R. 773, 782-784 (Bankr. N.D. Cal. 2008), *aff'd*, 2008 WL 8462967 (B.A.P. 9th Cir. 2008), *aff'd*, 346 Fed. Appx. 156 (9th Cir. 2009).

Further, avoidance of a lien is dependent on the application of state law, *Hilde, supra*, and California recognizes two alternative methods for an attorney to perfect a charging lien: perfection by recordation, *see* Cal. Civ. Code §§ 1213-1214, and by proper creation of a fee agreement containing a charging lien, *Carroll v. Interstate Brands Corp.*, 99 Cal. App. 4th 1168, 1172-73 (2002). Absent clear authority that California law requires perfection by recordation, this court will not assume recordation is required to perfect an attorney's lien on real property created by a fee agreement. *See, e.g.*, *In re Hilde*, 120 F.3d at 953-54 (recognizing perfected lien on personal property created by debtor's examination order unsupported by filed UCC-1).

Further, on this record, the court cannot decide whether Nunez's fee agreement created a valid, and automatically perfected, attorney's lien against the real property. In the case of charging liens, perfection depends on validity, which in turn requires compliance with Rule 3-300. *Fletcher v. Davis*, 33 Cal.4th 61, 71-72 (2004). The trustee bears the burden on perfection. *NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R. 465, 486 (B.A.P. 9th Cir. 2006). No evidence of compliance with Rule 3-300 has been offered.

Nunez' Failure to Create a Fund From Which the Lien May Be Paid

California law is unclear as to whether a charging lien is limited to the fund that the attorney creates on behalf of a client, *Fletcher v. Davis*, 33 Cal.4th 61, 69 (2004) ("An attorney's charging lien is a "*security* interest" in the proceeds of the litigation."), or may create a lien on property unrelated to litigation. *Bluxome Street Assoc. v. Fireman's Fund Ins. Co.*, 206 Cal. App. 3d 1149 (1988).

Even taking the narrow construction, a genuine issue of fact exits to whether attorney Nunez's efforts created or contributed to the creation of a fund. *Compare* Prehearing Disposition Denying Motion to Expunge Lis Pendens dated March 3, 2011, *with* Declaration of Nunez ¶¶ 12, 16, 18, filed August 6, 2014, ECF #80.

Inclusion of Services on Behalf of Other Clients

The trustee argues that Nunez's lien should be denied because his services included work for non-debtor entities. Mem. P. & A. at 3:21-24. Such an argument fails. While overstatement of the bill might form a basis to reduce the amount of the claim, 11 U.S.C. § 502(b)(4), it is not ground to deny it.

Moreover, the amount of the claim cannot be liquidated in this motion. No specifications of particular offending entries has been offered for

consideration. And even if it were so entered, Nunez has raised an issue of fact. Nunez Decl. ¶¶ 14, Aug. 6, 2014, ECF #80.

For each of these reasons, Parker's motion will be denied.

ORDER

The court will issue a minute order substantially in the following form:

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

The Motion for Summary Judgment is granted as to Chapter 7 trustee Randell Parker's avoidance of the lien, if any, in favor of Henry Nunez created by the Retainer Agreement, dated January 14, 2011, is denied.

12. 13-17117-A-7 PAUL BARNETT
14-1020
PENSION INCOME, LLC V. BARNETT
THOMAS FEHER/Atty. for pl.
RESPONSIVE PLEADING

STATUS CONFERENCE RE: AMENDED COMPLAINT
7-31-14 [36]

No tentative ruling.

13. 14-11429-A-7 STEPHEN DAKE
14-1068
GBC INTERNATIONAL BANK V. DAKE
JUSTIN SANTAROSA/Atty. for pl.
RESPONSIVE PLEADING

STATUS CONFERENCE RE: COMPLAINT
7-14-14 [1]

No tentative ruling.

14. 14-11429-A-7 STEPHEN DAKE
14-1068 TSB-1
GBC INTERNATIONAL BANK V. DAKE
T. BELDEN/Atty. for mv.

MOTION TO DISMISS CAUSE(S) OF ACTION FROM COMPLAINT
8-20-14 [12]

No tentative ruling.

15. 14-11429-A-7 STEPHEN DAKE
14-1068 TSB-2
GBC INTERNATIONAL BANK V. DAKE

T. BELDEN/Atty. for mv.

MOTION TO EXTEND TIME TO FILE RESPONSIVE PLEADING AS TO SECOND CLAIM FOR RELIEF SET FORTH IN COMPLAINT
8-20-14 [16]

Final Ruling

The matter is resolved by stipulation of the parties. The parties shall submit an order approving the stipulation, attaching a copy of the stipulation as an exhibit to the order.

16. 13-11347-A-7 CHRISTOPHER BURGONI
13-1099
BOARD OF TRUSTEES OF THE KERN COUNTY ELECTRICAL PE V.
MARK BAGULA/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: COMPLAINT
9-11-13 [1]

No tentative ruling.

17. 13-11347-A-7 CHRISTOPHER BURGONI
13-1099 ORC-1
BOARD OF TRUSTEES OF THE KERN COUNTY ELECTRICAL PE V.
MARK BAGULA/Atty. for mv.
RESPONSIVE PLEADING

MOTION TO MODIFY PRE-TRIAL ORDER
8-8-14 [53]

No tentative ruling.

18. 14-10279-A-7 DONNIE PRICE
14-1044
EXPRESS SERVICES, INC. V. PRICE

ORDER TO SHOW CAUSE TO DISMISS FIRST AMENDED COMPLAINT
8-11-14 [30]

No tentative ruling.

19. 14-10279-A-7 DONNIE PRICE
14-1044
EXPRESS SERVICES, INC. V. PRICE
RICHARD MONAHAN/Atty. for pl.

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-17-14 [1]

No tentative ruling.

20. 14-10279-A-7 DONNIE PRICE
14-1044 RM-1
EXPRESS SERVICES, INC. V.
PRICE
RICHARD MONAHAN/Atty. for mv.
OST 8/26/14

MOTION TO EXTEND TIME
8-26-14 [33]

No tentative ruling.

1:30 p.m.

1. 14-12805-A-7 JUAN ARAIZA
KAZ-1
NATIONSTAR MORTGAGE LLC/MV
STEVEN ALPERT/Atty. for dbt.
KRISTIN ZILBERSTEIN/Atty. for mv.

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
7-23-14 [13]

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 9320 Parrish Lane, Stockton, 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.

2. 14-13865-A-7 DAVID BROWN
SW-1
CALIFORNIA REPUBLIC BANK/MV
ROBERT WILLIAMS/Atty. for dbt.
TORIANA HOLMES/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-28-14 [10]

Tentative Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 2013 Dodge 300

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). 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.

1:45 p.m.

1. 14-12637-A-11 TOURE/ROLANDA TYLER

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 VOLUNTARY PETITION
5-21-14 [1]

LEONARD WELSH/Atty. for dbt.

No tentative ruling.

2. 14-14241-A-11 ARTHUR FONTAINE
DMG-1
ARTHUR FONTAINE/MV
D. GARDNER/Atty. for dbt.

MOTION TO EMPLOY D. MAX GARDNER AS ATTORNEY(S)
8-27-14 [6]

No tentative ruling.

3.	13-12358-A-11 LKW-15	CENTRAL VALLEY SHORING, INC.	MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTOR'S ATTORNEY(S). 8-13-14 [268]

LEONARD WELSH/Atty. for dbt.

Final Ruling

Application: Fourth Interim Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: Leonard K. Welsh
Compensation approved: $6,092.50
Costs approved: $415.90
Aggregate fees and costs approved in this application: $6,508.40
Retainer held: $0.00
Amount to be paid as administrative expense: $6,508.40

DISCUSSION

Section 330(a) of the Bankruptcy Code authorizes “reasonable compensation for actual, necessary services” rendered by counsel for the debtor in possession in a Chapter 11 case and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1). 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.

CIVIL MINUTE ORDER

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 Fourth Interim Fee Application filed by Leonard K. Welsh, attorney at law, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that the motion is granted and that: (1) compensation of $6,092.50 is approved on an interim basis; (2) costs of $415.90 are approved on an interim basis; (3) said amount may be paid from the sale of stock to CER, as authorized by the Order Authorizing the debtor in possession to Pay Administrative Expenses, filed January 28, 2014; and (4) those amounts shall be finalized prior to the conclusion of the case and in a manner consistent with the terms of the confirmed plan.