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

OCTOBER 22, 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 — MOTION TO VALUE COLLATERAL OF CHASE BANK USA, N.A. 9-11-14 [37]

JOSE VARGAS SIERRA/MV
IVAN LOPEZ VENTURA/Atty. for dbt.
DISMISSED

Final Ruling

The case dismissed, the motion is denied as moot.

2. 14-11811-A-13 JOSE VARGAS SIERRA AND ANITA VARGAS — MOTION TO CONFIRM PLAN 9-16-14 [40]

JOSE VARGAS SIERRA/MV
IVAN LOPEZ VENTURA/Atty. for dbt.
DISMISSED

Final Ruling

The case dismissed, the motion is denied as moot.

3. 14-11811-A-13 JOSE VARGAS SIERRA AND ANITA VARGAS — ORDER TO SHOW CAUSE FOR DISGORGEMENT 9-19-14 [43]

IVAN LOPEZ VENTURA/Atty. for dbt.
DISMISSED, RESPONSIVE PLEADING

Final Ruling

Application: Order to Show Cause (Disgorgement of Fees)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Order to Show Cause discharged
Order: Civil minute order

Respondent Ivan Lopez Ventura has voluntarily returned the retainer received, $2,800.00, the Order to Show Cause is discharged as moot. No appearance is necessary.

4. 14-10314-A-13 DANIEL/LINDA MONTES
MHM-3
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
9-22-14 [88]

ROBERT WILLIAMS/Atty. for dbt.

Final Ruling

Motion: Dismiss Chapter 13 Case
Notice: LBR 9014-1(f)(1); 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). 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).

DISCUSSION

A Chapter 13 case may dismissed upon a showing of cause, including unreasonable delay prejudicial to creditors. 11 U.S.C. § 1307(c)(1),(3). This Chapter 13 case was filed January 25, 2014. No plan has ever been confirmed. On July 23, 2014, this court imposed a 75 day deadline to confirm a plan. See, Civil Minutes, July 23, 2014, ECF #70. That deadline has expired. Because no plan has been confirmed, unsecured creditors have not been paid. Unreasonable delay prejudicial to creditors exists and the case is dismissed.

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 motion to dismiss filed by Michael H. Meyer, Chapter 13 trustee, 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 the case is dismissed.

5. 14-13928-A-13 ADDISON CRAFTS

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
9-9-14 [22]

Final Ruling

The case being dismissed on Trustee’s motion to dismiss, the order to show cause is discharged.

6. 14-13928-A-13 ADDISON CRAFTS
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
9-10-14 [24]

Final Ruling

Motion: Dismiss Chapter 13 Case
Notice: LBR 9014-1(f)(1); 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). 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).

DISCUSSION

A Chapter 13 case may dismissed upon a showing of cause, including unreasonable delay prejudicial to creditors. 11 U.S.C. § 1307(c)(1). This Chapter 13 case was filed August 5, 2014. Here, the debtor has: (1) failed to appear the meeting of creditors; (2) failed to provide the Chapter 13 trustee with documentation necessary to fulfill his statutory duties; (3) failed to file his plan with the petition and subsequent thereto to set a hearing on confirmation of the plan filed; and (4) failed to file a plan that was completed in all necessary respects. As a result of these omissions, no plan has been confirmed and creditors cannot be paid. Unreasonable delay prejudicial to creditors exists and the case is dismissed.

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 motion to dismiss filed by Michael H. Meyer, Chapter 13 trustee, 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 the case is dismissed.

7. 14-11231-A-13 ERIC/CHRISTI LAFORTUNE
MHM-3
MICHAEL MEYER/MV
PATRICK KAVANAGH/Atty. for dbt.
RESPONSIVE PLEADING

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
9-9-14 [87]

Tentative Ruling

Objection: Debtors' Claim of Exemption
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Sustained
Order: Civil minute order

Michael H. Meyer, Chapter 13 trustee, objects to the debtors' claim of exemption as to two IRAs: (1) wife's IRA in the amount of $194,363.22; and (2) husband's IRA in the amount of $97,979.02. Debtor's resist the objection.

DISCUSSION

The debtors's claim of exemption arises from Amended Schedule C, filed August 14,, 2014, ECF #80. Therein the debtors claim an exemption each IRA exempt under California Code of Civil Procedure 704.115(a)(1),(2),(b). Section 704.115(a)(1) is not applicable to IRAs. *Liberman v. Hawkins (In re Lieberman)*, 245 F.3d 1090,1093 (9th Cir. 2001); *Simpson v. Burkart (In re Simpson)*, 366 B.R. 64, 74 (B.A.P. 9th Cir. 2007). Section 704.115(a)(2) is also not applicable to IRAs. *Simpson*, 366 B.R. 75; *In re Barnes*, 275 B.R. 889, 897 (Bankr. E.D. Cal. 2002). Under Section 704.115 IRAs may be exempted, if at all, only under subdivision (a)(3). *In re Mooney*, 248 B.R. 391, 393 (Bankr. C.D. Cal. 2000). But for reasons not clear, not claim of exemption has been made under § 704.115(a)(3). As a result, the arguments regarding § 704.115(a)(3) and *Clark v. Rameker*, 134 S.Ct. 2242 (2014), are moot and will not be considered.

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 objection to claim of exemptions filed by Michael H. Meyer, Chapter 13 trustee, 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 objection is sustained.

8. 14-11231-A-13 ERIC/CHRISTI LAFORTUNE — MOTION TO CONFIRM PLAN
PK-4 — 8-14-14 [72]
ERIC LAFORTUNE/MV
PATRICK KAVANAGH/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Denied as to confirmation, denied as to 75 day bar
Order: Civil minute order

Chapter 13 debtors Eric Lafortune and Christi Lafortune move to confirm their Chapter 13 plan. Chapter 13 trustee Michael H. Meyer opposes confirmation. The trustee has the better side of the argument.

DISCUSSION

Chapter 13 Plan Confirmation

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 debtors have not sustained that burden.

The plan proposes to pay unsecured creditors 3.43% or $10,015.85. But the plan is posited on the exempt status of two IRAs, one in the amount of $194,363.22 and the other in the amount of $97,979.02. Since the court intends to sustain the Chapter 13 trustee's objection to each exemption, the debtors cannot demonstrate that their plan satisfies the liquidation test. 11 U.S.C. § 1325(a)(4).

75 Day Bar

Chapter 13 trustee Meyer asks for a 75 day bar date. Because the issues pertaining to the exemption of IRAs are sufficiently novel, notwithstanding *Clark v. Rameker*, 134 S.Ct. 2242 (2014), the request is denied.

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 motion to confirm the First Modified Chapter 13 Plan filed by the debtors 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: (1) confirmation of the First Modified Chapter 13 Plan is denied; and (2) the Chapter 13 trustee's counter-motion for a 75 day bar date to achieve confirmation is also denied.

9. 09-18544-A-13 JUAN/ANN PRIETO
DMG-6
JUAN PRIETO/MV

CONTINUED 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 for Debtors' Counsel Under LBR 2016-1(c)(3)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: Young Wooldridge, LLP
Compensation approved: $6,844.00
Costs approved: $118.95
Aggregate fees and costs approved in this application: $6,962.95
Retainer held: $0.00
Amount to be paid as administrative expense: $6,962.95

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).

DISCUSSION

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a debtor's attorney in a Chapter 13 case and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3). In the Eastern District of California § 330(a) has been implemented through an opt in and an opt out fee scheme allowing debtors' attorney to accept a flat fee (opting in) or billing by the hour, subject to court approval (opting out). For those who opt in, additional fees will only be allowed upon a showing of substantial and unanticipated post-confirmation work.

The court finds that the compensation and expenses sought are substantial, unanticipated and 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.

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 motion for additional compensation filed by Young Wooldridge, LLP,

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) the application is approved; (2) in addition to the flat fee received the applicant's request for compensation of $6,844.00 compensation is approved on an interim basis; (3) additional costs of $118.95 are approved on an interim basis; (4) the applicant is not holding any retainer; (5) those amounts shall be paid as an administrative expense by the Chapter 13 trustee in a manner consistent with the terms of the confirmed plan; and (6) said amounts shall be finalized prior to the conclusion of the case.

10. 14-12747-A-13 CHRYSTAL ABBOTT
NES-3
CHRYSTAL ABBOTT/MV
NEIL SCHWARTZ/Atty. for dbt.
DISMISSED

MOTION TO VACATE DISMISSAL OF CASE
9-2-14 [45]

Final Ruling

Motion: Vacate Dismissal of Chapter 13 Case
Notice: LBR 9014-1(f)(1); 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). 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).

DISCUSSION

Federal Rule of Civil Procedure 60(b), incorporated by Fed. R. Bankr. P. 9024, allows the court to vacate an order based on mistake or excusable neglect. Here, the debtor properly executed a wage withholding order instructing her employer to make payments on her behalf to the Chapter 13 trustee. Unbeknownst to her, the debtor's employer failed to remit payments to the Chapter 13 trustee and the case was dismissed without further notice to her. *See*, Order, filed June 26, 2014, ECF #27. The court finds mistake and vacates its order dismissing the case. Order Dismissing Chapter 13 Case, filed August 19, 2014, ECF #36.

Reinstatement of the case also reinstates the stay. *In re Sewell*, 345 B.R. 174, 179 (B.A.P. 9th Cir. 2006). Because the debtor had one prior case, No. 14-10690, the stay existed for only 30 days and then by order of this court, subject to conditions. Order Granting Motion to Extend Stay, filed June 26, 2014, ECF #27. The stay, subject to the same conditions and limitations as described in the Order Granting Motion to Extend Stay, is restated. Reinstatement is effective upon entry of the order vacating the stay on the docket. *In re Sewell*, 345 B.R. 174 (B.A.P. 9th Cir. 2006). No other relief is granted.

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 motion for order vacating dismissal filed by Chrystal Michelle Abbott 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: (1) the motion is granted; (2) the Order Dismissing Chapter 13 Case, filed August 19, 2014, ECF #36, is vacated; (3) effective upon entry of this Civil Minute Order on the docket the case is reinstated; (4) effective upon the entry of this Civil Minute Order on the docket the stay is reinstated, subject to the terms and conditions included in Order Granting Motion to Extend Stay, filed June 26, 2014, ECF #27; and (5) except as may exist by operation of law or other order of this court, no stay existed between dismissal of the case, Order Dismissing Chapter 13 Case, filed August 19, 2014, ECF #36, and the reinstatement of the stay as described in subpart (4) hereof and any action taken by a creditor during that time will not be deemed a violation of 11 U.S.C. § 362.

11. 14-13851-A-13 DAVID/MONICA GARZA
MHM-1

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
9-10-14 [14]

PHILLIP GILLET/Atty. for dbt.

No tentative ruling.

12. 14-13053-A-13 JEFFREY HINOJOS
MHM-2
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS , AND/OR MOTION TO DISMISS CASE
9-12-14 [46]

PATRICK KAVANAGH/Atty. for dbt.
DISMISSED

Final Ruling

The case dismissed, the motion is denied as moot.

13. 09-62859-A-13 NEIL/JENNIFER WEITING — MOTION TO SELL
RSW-4 — 10-2-14 [99]
NEIL WEITING/MV
ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Motion: Sell Property
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party and approved as to form and content by the Chapter 13 trustee

Property: 6708 Noah Avenue, Bakersfield, CA
Buyer: Casey and Jocelyn Hively
Sale Price: $290,000.00
Sale Type: Private sale subject to overbid opportunity

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

Confirmation of a Chapter 13 plan revests property of the estate in the debtor unless the plan or order confirming the plan provides otherwise. 11 U.S.C. § 1327(b); *see also In re Tome*, 113 B.R. 626, 632 (Bankr. C.D. Cal. 1990). Here, the subject property is property of the estate because the debtor's confirmed plan provides that property of the estate will not revest in debtors upon confirmation.

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. § 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). A Chapter 13 debtor has the rights and powers given to a trustee under § 363(b). 11 U.S.C. § 1303. Based on the motion and supporting papers, the court finds a proper reorganization purpose for this sale. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

14. 13-13660-A-13 MICHAEL/VERONICA WHITE — MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTOR'S ATTORNEY(S).
LKW-5 — 9-16-14 [85]

LEONARD WELSH/Atty. for dbt.

Final Ruling

Application: Third 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: $1,552.50
Costs approved: $17.10
Aggregate fees and costs approved in this application: $1,569.60
Retainer held: $0.00
Amount to be paid as administrative expense: $1,569.60

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).

DISCUSSION

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

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

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 Third Interim Motion for Compensation filed by Leonard K. Welsh 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: (1) defaults of the respondents are entered; (2) compensation of $1,552.50 is approved on an interim basis; (3) costs of $17.10 are approved on an interim basis; and (4) said compensation and costs shall be paid by the Chapter 13 trustee as an administrative expense in a manner consistent with the terms of the then confirmed Chapter 13 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]

No tentative ruling

[The hearing on this matter will follow the hearing on the debtors' motion to value the collateral of U.S. Department of HUD in this case

having docket control no. RSW-4.]

16. 14-11760-A-13 JUSTIN/DESIREE LAY — MOTION TO VALUE COLLATERAL OF UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
RSW-4
JUSTIN LAY/MV
10-8-14 [82]

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: 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 respondent 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 respondent'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 court was unable to tell from the motion whether the collateral was the principal residence of the debtor. The plan attached to the motion does not, moreover, show the respondent's claim in Class 2. However, the plan filed at ECF No. 39 does show respondent's claim placed in Class 2 and secured by 13626 Foyers Falls Dr., Bakersfield, CA 93314 and described as a residence. That the collateral is the principal residence of the debtor should be stated in any future *Lam* motion filed by counsel for the debtor.

The collateral is the debtor's principal residence located at 13626 Foyers Falls Dr., Bakersfield, CA.

The court values the collateral at $235,000. 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 respondent'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 13626 Foyers Falls Dr., Bakersfield, CA, has a value of $235,000. The collateral is encumbered by senior liens securing debt that exceeds the collateral's value. The respondent has a secured claim in the amount of $0.00 and a general unsecured claim for the balance of the claim.

17. 14-13761-A-13 SHERRY SIMPSON — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
9-23-14 [52]

Final Ruling

The case being dismissed on Trustee's motion to dismiss, the order to show cause is discharged.

18. 14-13761-A-13 SHERRY SIMPSON
MHM-1
MICHAEL MEYER/MV — MOTION TO DISMISS CASE FOR FAILURE TO FILE DOCUMENTS, AND/OR MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS, MOTION TO DISMISS CASE FOR FAILURE TO PROVIDE TAX DOCUMENTS, MOTION TO DISMISS CASE
9-10-14 [40]

Final Ruling

Motion: Dismiss Chapter 13 Case
Notice: LBR 9014-1(f)(1); 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). 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).

DISCUSSION

A Chapter 13 case may dismissed upon a showing of cause, including unreasonable delay prejudicial to creditors. 11 U.S.C. § 1307(c)(1). This Chapter 13 case was filed July 28, 2014. Here, the debtor has: (1) failed to provide the Chapter 13 trustee with documentation necessary to fulfill his statutory duties; (2) failed to obtain and file a credit counseling certificate prior to filing the petition; (3) failed to file his plan with the petition and subsequent thereto to set a hearing on confirmation of the plan filed; and (4) failed to file a plan that was completed in all necessary respects. As a result of these omissions, no plan has been confirmed and creditors cannot be paid. Unreasonable delay prejudicial to creditors exists and the case is dismissed.

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 motion to dismiss filed by Michael H. Meyer, Chapter 13 trustee, 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 the case is dismissed.

19. 14-13761-A-13 SHERRY SIMPSON
PPR-1
DRRF II SPE, LLC/MV
ASYA LANDA/Atty. for mv.

OBJECTION TO CONFIRMATION OF PLAN BY DRRF II SPE, LLC
9-9-14 [36]

Final Ruling

The case dismissed, the objection is overruled as moot.

20. 10-10369-A-13 REESE/RACHEL TIMONEN
PK-4
REESE TIMONEN/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION TO MODIFY PLAN
9-11-14 [62]

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.

21. 14-13669-A-13 TIMOTHY DAVIS AND CAITLYN KENEFSKY
BHT-1
OCWEN LOAN SERVICING, LLC/MV

OBJECTION TO CONFIRMATION OF PLAN BY OCWEN LOAN SERVICING, LLC
9-8-14 [25]

ROBERT WILLIAMS/Atty. for dbt.
BRIAN TRAN/Atty. for mv.

Tentative Ruling

Objection: Creditor's Objection to Confirmation of Plan
Notice: LBR 3015-1(c)(4), 9014-1(f)(2); no written opposition required
Disposition: Overruled as moot in part, sustained in part
Order: Civil minute order

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

SECURED CREDITOR'S ARREARAGE CLAIM AMOUNT

Secured creditor Ocwen Loan Servicing, LLC, objects to confirmation because it claims that the plan fails to provide for its prepetition arrears that debtors' owe. Secured creditor contends that it is owed prepetition arrears of 9289.00. It states that it intends to file a proof of claim prior to the deadline for such claims.

As to the amount of the arrearages owed to the secured creditor, the

secured creditor's proof of claim controls over the amounts shown in the plan. Ch. 13 Plan § 2.04, ECF No. 10. The secured creditor appears to have in fact filed its proof of claim on September 11, 2014 for $172,462.82. The proof of claim states that it is secured by real property located at 3312 Deming Court, Bakersfield, CA, and this is the same real property that the objection to confirmation lists as security on page 2 of the objection.

Accordingly, because the proof of claim controls, the secured creditor's objection is moot. The secured creditor's arrearage claim is exactly the amount stated in the creditor's proof of claim absent a claim objection or motion to value collateral.

CLASSIFICATION OF SECURED CREDITOR'S CLAIM

A review of the plan reveals that secured creditor's claim has been placed in Class 4. Class 4 claims include all secured claims that mature after the plan's completion, and they are paid directly by the debtor to the creditor. But such claims must not be in default.

The secured creditor claims that it is owed arrearages that are not provided for in the plan. Its proof of claim shows the arrearage of $9289, which is the amount of the arrearage described in the objection. *See* Claim No. 13, Sept. 11, 2014; Objection at 2, ECF No. 25. Because the debtors have not objected to the secured creditor's claim, and the amount of arrearages in the claim, the court must treat the claim as an allowed claim. *See* 11 U.S.C. § 502(a) (a claim is deemed allowed absent an objection). This means that the secured creditor's claim includes an arrearage claim and therefore is a secured claim that is in default.

Even though the secured creditor did not raise the ground of incorrect classification, it did raise the debtors' failure to provide for the secured creditor's arrearage claim. That the plan fails to provide the correct amount of arrearages is moot given that the creditor's proof of claim controls.

However, the failure to provide for arrears in this case, even if the proof of claim's arrearage amount controls, cannot be remedied given the improper classification. Thus, the court will treat the secured creditor's objection as encompassing the secured creditor's treatment and its classification under the plan. To receive appropriate treatment, the secured creditor's claim must be placed in Class 1 given that the claim is in default.

Because its claim is in default, it may not be placed in Class 4 of the plan. Accordingly, the court will sustain the creditor's objection and deny confirmation on that ground. The court will not address feasibility as that issue should be properly addressed in a modified plan that correctly classifies the secured creditor's claim.

75-DAY ORDER

The court finds it appropriate to impose a 75-day order. The case was filed on July 22, 2014, and a plan has not yet been confirmed.

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 objection to confirmation of Ocwen Loan Servicing, LLC ("Ocwen") has been presented to the court. Having considered the objection, oppositions, responses and replies, and having heard oral argument presented at the hearing,

IT IS ORDERED that the objection is overruled in part as to the amount of the arrearage claim shown in the plan, as the proof of claim filed by Ocwen controls, and the objection is sustained in part as to the treatment of the secured creditor's claim in that it is improperly classified.

IT IS FURTHER ORDERED that a Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on the date of this hearing. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's motion. *See* 11 U.S.C. § 1307(c)(1).

22. 12-13772-A-13 ANTA ODDIE — MOTION FOR RELIEF FROM AUTOMATIC STAY
NLG-1 — 9-22-14 [74]
THE BANK OF NEW YORK MELLON/MV
STEVEN ALPERT/Atty. for dbt.
NICHOLE GLOWIN/Atty. for mv.

Tentative Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied as moot
Order: Civil minute order

Notwithstanding the stipulation filed by the parties to resolve this matter, the court must adopt the following as the ruling. The parties may stipulate to whatever terms they desire, but the court need not consider the merits of this motion, or any future motion, involving this Class 4 claim.

Federal courts have no authority to decide moot questions. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67–68, 72 (1997). "Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* at 68 n.22 (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)) (internal quotation marks omitted).

The confirmed chapter 13 plan in this case provides for the moving party's claim in Class 4. Even though the moving party is named as the Bank of New York Mellon as a trustee for certain certificate holders, and the Class 4 claimant is "Bank of America Home Loans," the court finds that the moving party has been placed in class 4. In the stay relief summary sheet, the moving party alleges it holds the first deed of trust on the property located at 4409 Rock Lake Drive, Bakersfield, CA. This property is listed as the address for the debtor in the petition, so the court will assume it is the debtor's personal residence. The only classes in the plan that could contain a

first deed of trust holder against a personal residence is Class 4 or Class 1. Class 1 has no claims and Class 4 contains the claim of Bank of America. The payment amount shown for the Class 4 claim is $1,822.58, the same amount as the payment shown on the stay relief summary sheet. Finally, the movant admits in the motion that the debtor agreed in the plan to make payments directly to movant. Class 4 claims are claims paid directly to the claimholder. Thus, the court will treat the movant as the Class 4 claimant.

Class 4 secured claims are long-term claims that are not modified by the plan and that were not in default prior to the filing of the petition. They are paid directly by the debtor or a third party. Section 2.11 of the plan provides that "[u]pon confirmation of the plan, all bankruptcy stays are modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract."

Because the plan has been confirmed, the automatic stay has already been modified to allow the moving party to exercise its rights against its collateral. No effective relief can be awarded. The movant's personal interest in obtaining relief from the stay no longer exists because the stay no longer affects its collateral. The motion will be denied as moot.

23. 09-10374-A-13 BERNICE MCCOY
MHM-1
MICHAEL MEYER/MV
STEVEN STANLEY/Atty. for dbt.

CONTINUED OBJECTION TO DISCHARGE BY MICHAEL H. MEYER
5-22-14 [56]

Tentative Ruling

The matter will be continued to December 3, 2014, at 9:00 a.m. in Bakersfield

24. 09-10374-A-13 BERNICE MCCOY
SMS-1
BERNICE MCCOY/MV

STEVEN STANLEY/Atty. for dbt.

CONTINUED MOTION WAIVING DEBTOR'S SECTION 1328 CERTIFICATION REQUIREMENT
6-5-14 [59]

Tentative Ruling

Motion: Waiver of Requirement to File § 1328 Certifications
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Continued to December 3, 2014 at 9:00 a.m.; a supplemental declaration shall be filed no later than November 19, 2014, indicating compliance with this ruling
Order: Prepared by moving party pursuant to instructions in civil minutes dated August 20, 2014, at ECF No. 87

The court continued the hearing to ensure procedural requirements of Rule 9037 have been met. A supplemental declaration has been filed as of August 29, 2014 describing the actions taken to comply with Rule 9037. From the supplemental declaration, it appears appropriate ex parte applications were filed to seal or restrict access to certain

documents on the docket. It also appears that the court entered orders granting the application and restricting access to those documents.

However, since the last hearing, redacted copies of two documents were filed on August 26, 2014. Both redacted copies do not sufficiently redact protected and sensitive information required by Rule 9037 to be protected. Both documents contain a blue strike-out of the sensitive information, but the court could view the sensitive information on its docket through and despite the blue strike-out. Redaction is insufficient if it leaves the redacted information visible.

No later than November 19, 2014, counsel for the debtor shall file another supplemental declaration that describes what actions were taken to comply with Rule 9037 as to all papers filed with insufficient redaction. Counsel shall also ensure no other papers have been filed on the docket with insufficient redaction of sensitive information.

As stated in the civil minutes dated August 20, 2014, ECF No. 87, if counsel has fully complied with Rule 9037 as to the insufficiently redacted papers filed with this court, the court will grant the motion.

25. 14-12585-A-13 ANTONIO GARCIA AND CHRISTINA MUNOZ-GARCIA — CONTINUED MOTION TO VALUE COLLATERAL OF CHASE AUTO
WDO-1 ANTONIO GARCIA/MV
8-1-14 [28]

WILLIAM OLCOTT/Atty. for dbt.

Final Ruling

Motion: Value Collateral [Personal Property; Vehicle]
Notice: LBR 9014-1(f)(1); 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). 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 respondent 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 THE MOTION

As initiating a contested matter, a motion to value must be served pursuant to Rule 7004. The court previously raised questions about the sufficiency of service, but also noted that service might be sufficient for one of the addresses shown on the proof of service. The court continued the hearing to allow supplemental service or an amended motion to be filed given dissimilarity between the name of the respondent in the motion and the name of the respondent served.

The court permitted supplemental papers or an amended motion no later than October 8, 2014. Nothing has been filed.

The court again reviewed the proof of service in preparation for the continued hearing. The motion names "Chase Auto aka JP Morgan Chase Bank" as the respondent in the title of the motion (the body of the motion and prayer for relief names only Chase Auto). Service on the New York address shows "Auto Division JP Morgan Chase" as the respondent." A supporting declaration states that Ms. Duckett is the CEO of the "Auto Finance Department of JP Morgan Chase." Gonzalez Decl. ¶ 4.

Questions may be raised about whether service is sufficient given the lack of precision in naming the respondent and the dissimilarity between the respondent's name in the motion and on the proof of service. But "Auto Division JP Morgan Chase" and "Chase Auto aka JP Morgan Chase Bank" might be sufficiently similar to each other to give the respondent, whichever one it is, adequate notice know that it has been named and apprised of the relief sought against it.

But the court will not rule on whether service is sufficient. The court treats the lack of any supplemental filing as the debtors' decision that service is sufficient despite the issues raised by the court.

VALUATION OF COLLATERAL

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 described as a 2009 Toyota Camry. The debt secured by the vehicle was not incurred within the 910-day period preceding the date of the petition. The court values the vehicle at $10,023.

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 collateral consisting of a motor vehicle 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 personal property collateral described as a 2009 Toyota Camry has a value of $10,023. No senior liens on the collateral have been identified. The respondent has a secured claim in the amount of $10,023 equal to the value of the collateral that is unencumbered by senior liens. The respondent has a general unsecured claim for the balance of the claim.

26. 14-12585-A-13 ANTONIO GARCIA AND CHRISTINA MUNOZ-GARCIA
WDO-2 ANTONIO GARCIA/MV

CONTINUED MOTION TO CONFIRM PLAN

8-1-14 [35]

WILLIAM OLCOTT/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.

27. 10-12090-A-13 CLARENCE/LINDA HORN
RSW-5
CLARENCE HORN/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO MODIFY PLAN
9-17-14 [113]

Tentative Ruling

Motion: Modify Chapter 13 Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition filed by the trustee
Disposition: Denied without prejudice
Order: Civil minute order

The motion requests modification of the Chapter 13 plan in this case. *See* 11 U.S.C. §§ 1322, 1325, 1329; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(2). The Chapter 13 trustee opposes the motion, objecting to the modification.

The court will disapprove the modification. The debtor filed a Notice of Error in Third Modified Plan. The notice reduces the dividend to be paid under the proposed modified plan from 11% to 8% because of an error in preparation of the plan. But the notice was filed October 8, 2014. The hearing is October 22, 2014, so the notice was filed only 14 days before the hearing. Creditors, therefore, have not received the requisite notice of a material term affecting how much their dividend will be. Creditors were not given at least 21 days' notice of the time fixed for filing objections to a no less than an 8% dividend. Fed. R. Bankr. P. 3015(g).

And creditors did not receive 35 days' notice of the 8% dividend rate, as they originally had notice of an 11% rate, and then only 14 days before the hearing were given notice of an 8% rate. LBR 3015-1(d)(2).

In addition, the proper notice procedure has not been used. The notice states that opposition may be presented at the hearing. But the local rules require written opposition 14 days in advance. LBR 3015-1(d)(2).

28. 11-10994-A-13 HAL/ABBY FRIEDMAN
MHM-1
MICHAEL MEYER/MV

OBJECTION TO DISCHARGE OF DEBTOR, HAL DENNIS FRIEDMAN BY MICHAEL H. MEYER
8-22-14 [93]

ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Objection: Objection to Discharge
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Sustained
Order: Civil minute order

The trustee has objected to the discharge of joint debtor Hal Dennis Friedman. The certificate at docket no. 87 is an admission by Mr. Friedman that he has not paid all domestic support obligations. The court will sustain the objection and rule that joint debtor Hal Dennis Friedman is not entitled to a discharge at this time. A condition

precedent to the court's granting of a discharge under § 1328(a) is that the debtor certify that the debtor has paid all domestic support obligations required by law and due on or before the date of the certification. 11 U.S.C. § 1328(a).

29. 11-10599-A-13 KRAIG/MELANIE GRADOWITZ — OBJECTION TO CLAIM OF FIA CARD SERVICES, N.A., CLAIM NUMBER 13
MHM-2 — 8-7-14 [65]
MICHAEL MEYER/MV
LEONARD WELSH/Atty. for dbt.

Final Ruling

An Amended Notice has been filed, rescheduling this hearing for December 3, 2014, at 9:00 a.m.

30. 11-17099-A-13 JAMES/AMBER SIRATT — MOTION TO INCUR DEBT
RSW-4 — 10-8-14 [54]
JAMES SIRATT/MV
ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Motion: Approve Debtor's Incurring New Debt [Vehicle Loan]
Notice: LBR 9014-1(f)(2); no 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). 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 debtor seeks to incur new debt to finance the purchase of a vehicle. Amended Schedules I and J need not be consulted given that all plan payments have been made. The plan is not only current but also completed. The court will grant the motion, and the trustee will approve the order as to form and content.

31. 14-14826-B-13 SOO LEE — MOTION TO EXTEND AUTOMATIC STAY
PK-1 — 10-15-14 [17]
SOO LEE/MV
PATRICK KAVANAGH/Atty. for dbt.

Tentative Ruling

Motion: Extend the Automatic Stay
Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Granted except as to any creditor without proper notice of this motion
Order: Prepared by moving party pursuant to the instructions below

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).

Upon request of a party in interest, the court may extend the automatic stay where the debtor has had one previous bankruptcy case that was pending within the 1-year period prior to the filing of the current bankruptcy case but was dismissed. *See* 11 U.S.C. § 362(c)(3)(B). Procedurally, the automatic stay may be extended only "after notice and a hearing *completed* before the expiration of the 30-day period" after the filing of the petition in the later case. *Id.* (emphasis added). To extend the stay, the court must find that the filing of the *later case* is in good faith as to the creditors to be stayed, and the extension of the stay may be made subject to conditions or limitations the court may impose. *Id.*

For the reasons stated in the motion and supporting papers, the court finds that the filing of the current case is in good faith as to the creditors to be stayed. The motion will be granted except as to any creditor without proper notice of this motion.

9:30 a.m.

1. 09-18544-A-13 JUAN/ANN PRIETO — STATUS CONFERENCE RE: COMPLAINT
14-1088 — 8-19-14 [1]
PRIETO ET AL V. NATIONSTAR MORTGAGE, LLC
D. GARDNER/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.

10:00 a.m.

1. 14-12654-A-12 ROGELIO RIOS — MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE FROM CHAPTER 12 TO CHAPTER 7
SRF-2 — 9-23-14 [16]
ELIAS AND CAROLINA VALADEZ/MV

PHILLIP GILLET/Atty. for dbt.
STEVEN FOX/Atty. for mv.

Tentative Ruling

Motion: Dismiss or Convert
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part, denied in part
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). 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).

SUMMARY

Valdezes move for dismissal of Rios' Chapter 12 petition, arguing: (1) the Rioses are not eligible for Chapter 12; (2) Rioses previously filed a Chapter 12 petition; (3) absence of changed circumstances; (4) lack of good faith in filing the plan; (5) this Chapter 12 impermissibly seeks to modify the debtors' substantially consummated plan in the previous case; (6) the Chapter 12 plan filed by the debtors lacks good faith; (7) the Chapter 12 plan is not confirmable; (8) the Chapter 12 plan is not feasible; (9) the proposed plan uses inappropriately low interest rates; and (10) the debtor has been using cash collateral. Rioses have not opposed the motion. Finding a lack of eligibility, the motion will be granted. Other grounds are not considered.

DISCUSSION

Are Elias and Carolina Valdez Entitled to Relief

A Chapter 12 case may be dismissed for cause. 11 U.S.C. § 1208(c). Lack of eligibility is cause. Only family farmers may file a Chapter 12 petition. 11 U.S.C. § 109(f). "Family farmer" is a defined term. It means, ""...individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $4,031,575 and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for--(i) the taxable year preceding; or (ii) each of the 2d and 3d taxable years preceding; the taxable year in which the case concerning such individual or such individual and spouse was filed..." (emphasis added). The debtor bears the burden of proof of eligibility. *In re Sohrakoff*, 85 B.R. 848 (E.D. Cal. 1988). Absent bad faith, eligibility is to be ascertained from the petition, schedules and statements. *In re Scovis*, 249 F.3d 975 (9th Cir. 2001)(Chapter 13); *In re Quintana*, 107 B.R. 234, 239 nt. 6 (B.A.P. 9th Cir. 1989), *aff'd*, 915 F.2d 513 (9th Cir. 1990) (court assumed Chapter 12 eligibility should be determined on the date of the petition).

Neither the taxable year preceding filing, nor the 2nd and 3rd taxable years preceding the filing, support eligibility. In 2013, the debtors' non-farm income was $53,501.00; their farm income was $34,323.00. Statement of Financial Affairs No. 1-2, filed May 21, 2014, ECF #1. Income for 2011 was not scheduled. But 2012 income also does not support a finding of eligibility. Non-farm income was $35,483.00; farm income was $30,986.00. *id.* As a result, the income requirements have not been satisfied and relief will be granted.

Dismissal or Conversion, That is the Question

As a general proposition, dismissal–not conversion–is the proper remedy for a finding of cause. 11 U.S.C. § 1208(c)(the court may dismiss). *But see*, 11 U.S.C. § 1208(d) (authorizing a dismissal or conversion if fraud present). Dismissal of the case will be ordered.

Two Year Filing Bar

The creditors have prayed a 2 year in rem filing bar. The request will be denied. First, the creditors have failed to brief the issue of entitlement, from which abandonment of the issue is inferred.

Second, the moving party has not made the showing required by 11 U.S.C. § 109(g). Moreover, 11 U.S.C. § 349(a) specifically contemplates further filings. "Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title." No such order was made here.

Third, and finally, the moving parties made an insufficient showing of bad faith to invoke the court's inherent authority to enjoin filings. *In re Casse*, 198 F.3d 327, 339 (2nd Cir. 1999). As a result, the request for in rem relief is denied.

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 motion to dismiss or convert filed by Elias Valdez and Carolina Valedez 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: (1)granted in part and the case dismissed; and (2) denied in part and no filing bar is imposed.

10:30 a.m.

1. 14-13955-A-7 MICHAEL/ARACELLY WALDEN — PRO SE REAFFIRMATION AGREEMENT WITH WELLS FARGO DEALER SERVICES
9-25-14 [11]

BARRY BOROWITZ/Atty. for dbt.

No tentative ruling.

2. 14-13957-A-7 JORGE BALDERAS GONZALEZ — PRO SE REAFFIRMATION AGREEMENT WITH ALLY FINANCIAL
9-16-14 [10]

BARRY BOROWITZ/Atty. for dbt.

No tentative ruling.

3. 14-13265-A-7 ELIAS/SARA OLIVERA — PRO SE REAFFIRMATION AGREEMENT WITH CAPITAL ONE AUTO FINANCE
9-11-14 [14]

WILLIAM OLCOTT/Atty. for dbt.

No tentative ruling.

1:00 p.m.

1.	12-18004-A-7 KDG-4	LA BONITA, INC., A CALIFORNIA CORPORATION	MOTION FOR COMPENSATION BY THE LAW OFFICE OF KLEIN, DENATALE, GOLDNER, COOPER, ROSENLIEB AND KIMBALL, LLP FOR LISA HOLDER, TRUSTEE'S ATTORNEY(S). 9-16-14 [181]

D. GARDNER/Atty. for dbt.

Final Ruling

Application: First and Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Applicant: Klein DeNatale
Compensation approved: $7,941.00
Costs approved: $201.02
Aggregate fees and costs approved in this application: $8,142.00

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).

DISCUSSION

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.

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 First and Final Application for Compensation filed by Klein DeNatale 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: (1) defaults of the respondents are entered; (2) compensation of $7,941.00 is approved on a final basis; and (3) costs of $201.02 are approved on a final basis.

2. 12-11008-A-7 RAFAEL ALONSO
PWG-6
MARKO ZUBCIC/MV

MOTION FOR CONTEMPT
9-19-14 [105]

NICHOLAS ANIOTZBEHERE/Atty. for dbt.
PHILLIP GILLET/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

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

Creditor Marko Zubcic moves for a contempt citation against debtor Rafael Alonso for failure to comply with this court's February 26, 2014. That order issued in response to the Chapter 7 trustee's motion to shutdown the debtor's sole proprietorship businesses. Debtor Alonso opposes the motion and, in response, prays sanctions for bringing the motion.

DISCUSSION

Contempt

The motion will be denied for two reasons. First, the movant lacks prudential standing. A gatekeeper question in all federal litigation is standing. *Savage & Assoc., P.C. v. Mandel (In re Teligent, Inc.)*, 417 B.R. 197 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09 CIV 09674(PKC), 2010 WL 2034509 (S.D.N.Y. May 13, 2010), *aff'd*, 640 F.3d 53 (2nd Cir. 2011). Standing has two components: Article III standing and prudential standing. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Without considering the question of Article III standing, the court turns to prudential standing. "Prudential standing refers to the requirement that even '[w]hen the [movant] has alleged injury sufficient to meet the case or controversy requirement, ... the [movant] generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' *Id.* (quoting *Warth*, 422 U.S. at 499, 95 S.Ct. 2197) (alteration and omission in original)." *In re Sofer*, 507 B.R. 444, 449 (Bankr. E.D.N.Y. 2014).

The problem is that creditor Marko Zubcic lacks prudential standing. Both the order to which the motion refers, Order Granting Shut Down, February 26, 2014, ECF #17, is a species of turnover order. 11 U.S.C. §542(a). Following that order the Chapter 7 trustee has filed a further motion for turnover of these assets and other assets. Motion to Compel Turnover, filed June 13, 2014, ECF #34. That matter remains pending and will be set for evidentiary hearing at the pretrial conference on February 18, 2015.

Individual creditors do not have standing to assert turnover rights in the first instance. *Matter of Perkins*, 902 F.2d 1254, 1258-1259 (7th Cir. 1990); *Matter of Sinder*, 102 B.R. 978, (Bankr. S.D. Ohio 1989); *In re Yancey*, 46 B.R. 621 (Bankr. E.D. Pa. 1985). Since the right to seek turnover belongs exclusively to the Chapter 7 trustee the right to enforce it also belongs exclusively to the trustee. *id*. As a result, creditor Marko Zubcic lacks standing to enforce the February 26, 2014, order.

Second, even if standing were present, the court would exercise its discretion to deny relief at this time. Contempt is a discretionary remedy. *Cox v. Zale Del.*, Inc., 239 F.3d 910, 915-16 (7th Cir. 2001). In this case, the trustee's right to turnover, as described in the Motion to Compel Turnover, filed June 13, 2014, ECF #34, remains unresolved and will be set for evidentiary hearing. Since both of the trustee's motions are related, any ruling on contempt for violation of the first order would be premature.

Counter-Motion for Sanctions

Debtor Rafael Alonso seeks "punitive damages against Zubcic and Alonso." The request is denied without prejudice. First, joinder of claims is not authorized in this instance. Fed. Bankr. P. 9014(c) (omitting incorporation of Fed. R. Bankr. P. 7018 and Fed. R. Civ. P. 18). Second, and more importantly such a request for sanctions would need to be brought in compliance with Federal Rule of Bankruptcy Procedure 9011. It was not. Fed. R. Bankr. P. 9011(c). The request is denied without prejudice.

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 motion for contempt filed by creditor Marko Zubcic 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: (1)creditor Marko Zubcic's the motion for contempt is denied; and (2) debtor Rafael Alonso's counter-request for sanctions is denied without prejudice.

3. 12-14508-A-7 LAWRENCE/SHANNON MORRIS — MOTION TO AVOID LIEN OF MIDLAND FUNDING LLC
PK-2
LAWRENCE MORRIS/MV
PATRICK KAVANAGH/Atty. for dbt.
STEPHEN RUDIN/Atty. for mv.
10-3-14 [38]

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

Liens Plus Exemption: $187,004.28
Property Value: $112,000.00
Judicial Lien Avoided: $16,492.28

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 THE MOTION

CSC Corporation Service Company's status as an agent for the respondent does not appear beside the name of this entity and its address. The attached papers reveal that respondent's corporate agent for service of process is Corporation Service Company which Will Do Business in California as CSC – Lawyers Incorporating Service. Because the attached papers show that the respondent is the agent, the court finds that service is sufficient. The court prefers that service made to an agent clearly indicate its status as an agent of respondent.

MERITS OF THE MOTION

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.

4. 12-14508-A-7 LAWRENCE/SHANNON MORRIS — MOTION TO AVOID LIEN OF RIVERWALK HOLDINGS, LTD
PK-3 — 10-3-14 [48]
LAWRENCE MORRIS/MV
PATRICK KAVANAGH/Atty. for dbt.
STEPHEN RUDIN/Atty. for mv.

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 corporations and other business entities must be made "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Fed. R. Bankr. P. 7004(b)(3).

Service of the motion was insufficient. The address shown for the corporate agent in the attachments to the proof show a zip code that is different by one digit from the zip code shown on the proof. If in fact the proof of service was mailed to the correct address and the proof contains an error, counsel shall inform the court of this fact and request a continuance of the hearing to allow an amended proof to be filed to conform with the actual mailing sent to the respondent.

5. 11-62509-A-7 HDN-4 GORDON LOO/MV

SHAVER LAKEWOODS DEVELOPMENT INC.

OBJECTION TO CLAIM OF SIERRA PINES AT SHAVER LAKE HOMEOWNERS ASSOCIATION, CLAIM NUMBER 10
8-25-14 [164]

HENRY NUNEZ/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Objection: Objection to Claim
Notice: LBR 3007-1(b)(1); written opposition required
Disposition: Continued for an evidentiary hearing
Order: Civil minute order

The court will hold a scheduling conference for the purpose of setting an evidentiary hearing under Federal Rule of Bankruptcy Procedure 9014(d). An evidentiary hearing is required because disputed, material factual issues must be resolved before the court can rule on the relief requested.

Preliminarily, the court identifies the following disputed, material factual issues:
(i) whether Claim No. 10-1 is enforceable by the claimant in its entirety against the debtor or property of the debtor under agreement or applicable law or whether it is overstated by nearly two-thirds;
(ii) if the claim is not enforceable in its entirety, the amount of the claim that is enforceable against the debtor under agreement or applicable law;
(ii) whether the claimant has standing under state law to enforce all portions of Claim No. 10-1 as liabilities for which claimant has a right to litigate and enforce;
(iii) whether the construction defects forming the basis of the claim constitute (a) damage to a common area, damage to a separate interest that the association is obligated to maintain or repair, or damage to a separate interest that arises out of, or is integrally related to, damage to the common area or a separate interest that the association is obligated to maintain or repair, or (b) constitute damage to an area that the unit owners have exclusive responsibility to maintain and repair for purposes of enforcing a claim for such defects against the debtor.

All parties shall appear at the hearing for the purpose of determining the nature and scope of the matter, identifying the disputed and undisputed issues, and establishing the relevant scheduling dates and

deadlines. Alternatively, the court may continue the matter to allow the parties to file a joint status report that states:

(1) all relief sought and the grounds for such relief;
(2) the disputed factual or legal issues;
(3) the undisputed factual or legal issues;
(4) whether discovery is necessary or waived;
(5) the deadline for Rule 26(a)(1)(A) initial disclosures;
(6) the deadline for Rule 26(a)(2) expert disclosures (including written reports);
(7) the deadline for the close of discovery;
(8) whether the alternate-direct testimony procedure will be used;
(9) the deadlines for any dispositive motions or evidentiary motions;
(10) the dates for the evidentiary hearing and the trial time that will be required;
(11) any other such matters as may be necessary or expedient to the resolution of these issues.

Unless the parties request more time, such a joint status report shall be filed 14 days in advance of the continued hearing date. The parties may jointly address such issues orally at the continued hearing in lieu of a written joint status report.

6. 13-10814-A-7 FL.INVEST.USA INC. — MOTION FOR COMPENSATION BY THE LAW OFFICE OF KLEIN, DENATALE, GOLDNER, COOPER, ROSENLIEB AND KIMBALL, LLP FOR LISA HOLDER, TRUSTEE'S ATTORNEY(S). 9-24-14 [315]
KDG-6

RYAN ERNST/Atty. for dbt.

Final Ruling

Application: First and Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Applicant: Klein DeNatale
Compensation approved: $47,928.50
Costs approved: $487.72
Aggregate fees and costs approved in this application: $48,416.22

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).

DISCUSSION

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.

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 First and Final Application for Compensation filed by Klein DeNatale 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: (1) defaults of the respondents are entered; (2) compensation of $47,928.50 is approved on a final basis; and (3) costs of $487.72 are approved on a final basis.

7. 13-10814-A-7 FL.INVEST.USA INC.
MKK-1
VINCENT GORSKI/MV
RYAN ERNST/Atty. for dbt.
LISA HOLDER/Atty. for mv.

MOTION TO EMPLOY M. KATHLEEN KLEIN AS ACCOUNTANT(S)
9-23-14 [305]

Tentative Ruling

Application: Approval of Employment
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Continued to November 5, for supplemental declarations to be filed no later than October 29, 2014
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).

The court may approve employment of professional persons who "do not hold or represent an interest adverse to the estate, and that are disinterested persons." 11 U.S.C. § 327(a); *see also id.* § 101(14) (defining "disinterested person").

This year, the court issued a decision defining the standards for retroactive employment of an attorney. *See In re Grant*, Case No. 12-

19109 at 4-5 (Bankr. E.D. Cal. Mar. 10, 2014) (available on the court's website). Those standards are applicable here to a request for retroactive approval of the unauthorized services of an accountant for the estate.

In short, the standard for retroactive employment and approval of unauthorized services requires that the professional to be employed not have an impermissible conflict of interest throughout the period of representation, *see* § 328(c), and that the applicant show exceptional circumstances justifying retroactive approval, *see Atkins v. Wain, Samuel & Co. (In re Atkins),* 69 F.3d 970, 974 (9th Cir. 1995). "To establish the presence of exceptional circumstances, professionals seeking retroactive approval must . . . (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankrupt estate in a significant manner." *Id.* at 975-76.

The evidence provided in support of the motion satisfactorily addresses only part of the standard for retroactive employment—the declaration of M. Kathleen Klein at docket no. 307, paragraph 5, shows that no impermissible conflict or connection exists.

But the court finds insufficient evidence showing exceptional circumstances, but will extend the time for filing declarations to the date indicated above to allow an opportunity to make the proper showing. In particular, the court has the following questions about the facts relating to exceptional circumstances: (i) on what date was the accountant first contacted by the trustee; (ii) on what date was the employment application prepared and was it ready for filing on such date or a later date; (iii) which party made the decision to "hold off" filing the application for employment—the trustee, the accountant or another party; (iv) why was there doubt about seeing the direction the case was to go; (v) how was the decision to hold off filing the application communicated to the accountant, if it was made by someone other than the accountant, and what was the date of such communication; (vi) was the accountant actually instructed by the trustee not to file the application for employment or was it merely discussed but left to the accountant's judgment; and lastly, (vii) what mechanism was used to alert the accountant to the need for an employment application to see that it was not neglected and, if a mechanism was used, why didn't such mechanism operate successfully.

8. 13-10814-A-7 FL.INVEST.USA INC.
MKK-2
M. KLEIN/MV
RYAN ERNST/Atty. for dbt.

MOTION FOR COMPENSATION FOR M. KATHLEEN KLEIN, ACCOUNTANT(S).
9-23-14 [309]

Final Ruling

This matter is continued to November 5, 2014, at 1:00 p.m.15.

9. 14-12420-A-7 GLORIOSO/LUDIMA LOMBOY — OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
JMV-1 — 8-4-14 [11]

ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

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

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.

DISMISSAL

Chapter 7 debtors shall attend the § 341(a) meeting of creditors. 11 U.S.C. § 343. A continuing failure to attend this meeting is cause for dismissal of the case. *See* 11 U.S.C. §§ 105(a), 343, 707(a); *see also In re Nordblad*, No. 2:13-bk-14562-RK, 2013 WL 3049227, at *2 (Bankr. C.D. Cal. June 17, 2013).

The court finds that the debtor has failed to appear at the first date set for the meeting of creditors. Because the debtor's failure to attend the required § 341 creditors' meeting has occurred only once, the court will not dismiss the case provided the debtor appears at the continued meeting of creditors.

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 the continued meeting of creditors. But if the debtor does not appear at the continued meeting of creditors, the case will be dismissed on trustee's declaration without further notice or hearing.

EXTENSION OF DEADLINES

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 next continued date of the § 341(a) meeting of creditors rather than the first date set for the meeting of creditors. The following deadlines are extended to 60 days after the next continued date of the creditors' meeting: (1) the deadline for objecting to discharge under § 727, *see* Fed. R. Bankr. P. 4004(a); and (2) the deadline for bringing a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, *see* Fed. R. Bankr. P. 1017(e).

CIVIL MINUTE ORDER

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

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

The Motion to Dismiss for Failure to Appear at § 341(a) Meeting of Creditors and Motion to Extend the Deadlines for Filing Objections to Discharge and Motions to Dismiss having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is denied on the condition that the debtor attend the continued § 341(a) meeting of creditors scheduled for November 7, 2014, at 9:00 a.m. But if the debtor does not appear at this continued meeting, the case will be dismissed on trustee's declaration without further notice or hearing.

IT IS ALSO ORDERED that following deadlines shall be extended to 60 days after the continued date of the creditors' meeting: (1) the deadline for objecting to discharge under § 727, *see* Fed. R. Bankr. P. 4004(a); and (2) the deadline for bringing a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, *see* Fed. R. Bankr. P. 1017(e).

10. 14-12821-A-7 DANIEL/JUDEE SWAINSTON — MOTION TO COMPEL ABANDONMENT
LKW-3 — 9-25-14 [44]
DANIEL SWAINSTON/MV
LEONARD WELSH/Atty. for dbt.

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Real Property Description: 7613 Angoras Court, Bakersfield, CA

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).

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

The real property described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment is warranted. The order shall state that any exemptions claimed in the real property abandoned may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

11. 14-12921-A-7 DMG-1 THOMAS HOLLENBECK/MV D. GARDNER/Atty. for dbt.

THOMAS/JENNIFER HOLLENBECK

MOTION TO AVOID LIEN OF DISCOVER BANK
10-6-14 [19]

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

Liens Plus Exemption: $371,112.53
Property Value: $310,000.00
Judicial Lien Avoided: $6982.53

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 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.

12. 13-11027-A-7 GARY TURNER
RNR-5
GARY TURNER/MV

MOTION TO AVOID LIEN OF DIAZ & ASSOCIATES, INC. AND/OR MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.
9-18-14 [33]

ROSETTA REED/Atty. for dbt.

Final Ruling

Motion: Avoid Lien that Impairs Exemption
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

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

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

In cases in which there are multiple liens to be avoided, the liens must be avoided in the reverse order of their priority. *See In re Meyer*, 373 B.R. 84, 87–88 (B.A.P. 9th Cir. 2007). "[L]iens already avoided are excluded from the exemption-impairment calculation with respect to other liens." *Id.*; 11 U.S.C § 522(f)(2)(B).

The court finds it unnecessary to apply the reverse-priority analysis individually to each of the responding parties' liens. *See In re Meyer*, 373 B.R. at 88 ("[O]ne must approach lien avoidance from the back of the line, or at least some point far enough back in line that there is no nonexempt equity in sight."). The sum of the debt secured by the consensual liens ($87,175.41) plus the debtor's exemption amount ($7824.59) equals the fair market value of the real property ($95,000), so all judicial liens on the debtor's property are avoidable under § 522(f) including the highest priority judicial lien of Capitol One Bank (USA), N.A. recorded November 16, 2010.

13. 14-12827-A-7 LATANYA LABLUE
FPS-1
LATANYA LABLUE/MV

MOTION TO AVOID LIEN OF STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT
9-22-14 [21]

FRANK SAMPLES/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).

Service of the motion was insufficient. First, service has not been made at the address shown on the Roster of Governmental Agencies for adversary proceedings. While this is technically not an adversary proceeding, Rule 7004 applies here under Rule 9014 and is a rule generally applicable in adversary proceedings. Thus, the court believes service in contested matters should be at the address shown on the Roster for adversary proceedings, and may be at additional addresses that counsel believes appropriate for service.

Second, service upon a state or local governmental agency or entity must be made pursuant to Rule 7004(b)(6) or Federal Rule of Civil Procedure 4(j). Fed. R. Bankr. P. 7004(b)(6); Fed. R. Civ. P. 4(j), *incorporated by* Fed. R. Bankr. P. 7004(a). Rule 7004(b)(6) permits service upon such an entity to be made by first class mail addressed "to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof." Fed. R. Bankr. P. 7004(b)(6).

Subsection (a) of section 416.50 of the California Code of Civil Procedure provides that "[a] summons may be served on a public entity by delivering a copy of the summons and of the complaint to the clerk, secretary, president, presiding officer, or other head of its governing body." Cal. Civ. Proc. Code § 416.50(a). Subsection (b) of this section defines a "public entity" to include "a county, city, district, public authority, public agency, and any other political subdivision or public corporation in this state." *Id.* § 416.50(b).

Alternatively, service may be made pursuant to Federal Rule of Civil Procedure 4(j)(2). Fed. R. Civ. P. 4(j)(2), *incorporated by* Fed. R. Bankr. P. 7004(a). This rule allows service to be made by delivering a copy of the summons and of the complaint to the public entity's chief executive officer or by following state law requirements for serving process on such a defendant. *Id.*

14. 14-13142-A-7 ROBERTO/CELIA SANDOVAL — OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
VG-1
VINCENT GORSKI/MV
9-8-14 [14]
OSCAR SWINTON/Atty. for dbt.
VINCENT GORSKI/Atty. for mv.

Final Ruling

Objection: Objection to Claim of Exemptions
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Overruled as moot
Order: Prepared by objecting party

Because an amended Schedule C was filed on September 16, 2014, at ECF No. 18, the exemptions to which the objection is directed have been superseded by the amended ones. The objection will be overruled as moot.

15. 13-11347-A-7 CHRISTOPHER BURGONI — CONTINUED TRUSTEE'S FINAL REPORT (TFR)
ORC-1
6-24-14 [45]

LEONARD WELSH/Atty. for dbt.
VINCENT GORSKI/Atty. for mv.
RESPONSIVE PLEADING

No tentative ruling.

16. 13-11347-A-7 CHRISTOPHER BURGONI — OBJECTION TO CLAIM OF BOARD OF TRUSTEES OF THE KERN COUNTY ELECTRICAL PENSION FUND, CLAIM NUMBER 6-2
VG-4
VINCENT GORSKI/MV
8-22-14 [65]

LEONARD WELSH/Atty. for dbt.
VINCENT GORSKI/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Objection: Objection to Claim No. 6-2
Notice: LBR 3007-1(b)(1); written opposition filed
Disposition: Pending an update from the parties at the hearing about potential resolution
Order: Pending

The opposition to the trustee's claim objection does not oppose the grounds for the relief requested. Instead, counsel for the creditors states he has consulted with the chapter 7 trustee and that the trustee will be "satisfied by the Creditors' specific release of the Property." Response and Opp'n to Ch. 7 Tr.'s Obj. at 1.

At the hearing, the court will determine whether the trustee supports the resolution described in the opposition filed by Creditors, and whether the trustee accepts the agreement of the Creditors regarding their liens. If this matter has been resolved, the court will drop

the matter from calendar. If the matter has not been resolved, the court will continue the hearing on this matter to a subsequent date to allow either (i) further steps toward resolution between the parties, or (ii) further briefing and argument.

17. 13-13952-A-7 BRENT/KISH SCHWEBEL
JTW-2
JANTZEN, TAMBERI & WONG/MV

MOTION FOR COMPENSATION FOR JANTZEN, TAMBERI & WONG, ACCOUNTANT(S).
9-18-14 [69]

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: Civil minute order

Applicant: Janzen, Tamberi & Wong, an Accountancy Corporation
Compensation approved: $1248.80
Costs approved: $0.00
Aggregate fees and costs approved in this application: $1248.80

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).

COMPENSATION

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.

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.

Janzen, Tamberi & Wong, an Accountancy Corporation has presented its final application for fees and expenses to the court. Having considered the well-pleaded facts of the application, and having entered the default of respondent for failure to appear, timely oppose or otherwise defend in the matter,

IT IS ORDERED that the application is approved. The court awards Janzen, Tamberi & Wong its fees in the amount of $1248.80 on a final basis.

18. 13-16258-A-7 JAMES/ETHEL ANTHONY
MKK-2
M. KLEIN/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION FOR COMPENSATION FOR M. KATHLEEN KLEIN, ACCOUNTANT(S).
9-17-14 [44]

Final Ruling

Application: First and Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Applicant: M. Kathleen Klein
Compensation approved: $818.50
Costs approved: $97.30
Aggregate fees and costs approved in this application: $915.80

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).

DISCUSSION

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.

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 First and Final Application for Compensation filed by M. Kathleen Klein 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: (1) defaults of the respondents are entered; (2) compensation of $818.50 is approved on a final basis; and

(3) costs of $97.30 are approved on a final basis.

19. 14-12173-A-7 JESUS BARRAGAN
RP-1
RANDELL PARKER/MV

MOTION TO EMPLOY GOULD AUCTION & APPRAISAL COMPANY, LLC AS AUCTIONEER(S) AND/OR MOTION TO CONDUCT PUBLIC AUCTION SALE ON OCTOBER 25, 2014
9-18-14 [17]

D. GARDNER/Atty. for dbt.

Final Ruling

Motion: Sell Property and Employ and Compensate Auctioneer
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Property: 2004 Ford 450
Sale Type: Public auction

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

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

The Chapter 7 trustee may employ an auctioneer that does not hold or represent an interest adverse to the estate and that is disinterested. 11 U.S.C. §§ 101(14), 327(a). The auctioneer satisfies the requirements of § 327(a), and the court will approve the auctioneer's employment.

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

1:15 p.m.

1. 11-62509-A-7 14-1003 — SHAVER LAKEWOODS DEVELOPMENT INC. — PARKER V. RODRIGUEZ — LISA HOLDER/Atty. for pl. — RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-6-14 [1]

No tentative ruling.

2. 11-62509-A-7 14-1003 — SHAVER LAKEWOODS DEVELOPMENT INC. KDG-5 — PARKER V. RODRIGUEZ — LISA HOLDER/Atty. for mv. — RESPONSIVE PLEADING

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

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 Lakewoods transferred the five parcels to Rodriguez and other transferees. 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

Cal.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.

This result is not changed by the fact that subsequent to the creation of the security interest Shaver Lakewoods Developments conveyed its fee interest to the respondent. Viewed most favorably to Rodriguez, the transaction would extinguish the deed of trust under the doctrine of merger, rendering the question moot. *Sheldon v. La Brea Materials Co.*, 216 Cal. 686, 689 (1932)(merger). But unity of title does not always work a merger, and merger ordinarily is only applied to shield the parties from injustice

and is a question of intent of the parties. *Rumpp v. Gerkens*, 59 Cal. 496, 501-502 (1881); *Strike v. Trans-West Disc. Corp.*, 155 Cal. Rptr. 132, 137-38 (App. Ct. 1979) ("The law is clear that merger is a question of intent of the person in whom the interests are united."). "A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981). The parties have offered no evidence on the issue of merger. Further, Rodriguez, the party arguing merger occurred, has not cited to any evidence in the record to support his intent as to merger at the time of the 2009 transfer.

As a result, merger will not be presumed. More importantly, by agreement of the parties, the settlement between Parker and Rodriguez specifically returned the parties to their respective positions prior receipt of title to the disputed property. Settlement Agreement and Release ¶ 2, Exhibits in Support of Motion Under Rule 9019, filed March 28, 2012, Case No. 11-62509-A-7, ECF #30. A declaration in support of Rodriguez's opposition asserts that "[t]he parties however are in the same position on March 22, 2012 as they were on October 2, 2009 prior to the transfer." Rodriguez Decl. ¶ 4, ECF No. 90. Accordingly, for purposes of deciding the Section 544(a)(3) question post-settlement, the merger issue is of no import.

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.

The Motion for Summary Judgment is denied insofar as it seeks to ascertain the rights and/or duties of the parties with respect to the Settlement and Release between Rodriguez and Parker, Exhibit A to Motion Under Rule 9019, filed March 28, 2012, ECF #30.

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

3.	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.

4. 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 other transferees. 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 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*, 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. 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 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.

This result is not changed by the fact that subsequent to the creation of the security interest Shaver Lakewoods Developments conveyed its fee interest to the respondent. Viewed most favorably to Loo, the transaction would extinguish the deed of trust under the doctrine of merger, rendering the question moot. *Sheldon v. La Brea Materials Co.*, 216 Cal. 686, 689 (1932)(merger). But unity of title does not always work a merger, and merger ordinarily is only applied to shield the parties from injustice and is a question of intent of the parties. *Rumpp v. Gerkens*, 59 Cal. 496, 501-502 (1881); *Strike v. Trans-West Disc. Corp.*, 155 Cal. Rptr. 132, 137-38 (App. Ct. 1979) ("The law is clear that merger is a question of intent of the person in whom the interests are united."). "A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981). The parties have offered no evidence on the issue of merger. Further, Loo, the party arguing merger occurred, has not cited to any evidence in the record to support his intent as to merger at the time of the 2009 transfer.

As a result, merger will not be presumed. More importantly, by agreement of the parties, the settlement between Parker and Loo specifically returned the parties to their respective positions prior receipt of title to the disputed property. Settlement Agreement and Release ¶ 2, Exhibits in Support of Motion Under Rule 9019, filed March 28, 2012, Case No. 11-62509-A-7, ECF #30. A declaration in support of Loo's opposition asserts that "[t]he parties however are in the same position on March 22, 2012 as they were on October 2, 2009 prior to the transfer." Loo Decl. ¶ 5, ECF No. 80. Accordingly, for the purposes of deciding the Section 544(a)(3) question post-settlement, the merger issue is of no import.

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 [sic]." A Proof of Claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a).

Claim No. 3 filed by Gordon Loo asserts 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.

The Motion for Summary Judgment is denied insofar as it seeks to ascertain the rights and/or duties of the parties with respect to the Settlement and Release between Rodriguez and Parker, Exhibit A to Motion Under Rule 9019, filed March 28, 2012, ECF #30.

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

5. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC.
14-1005
PARKER V. NUNEZ
1-6-14 [1]
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: COMPLAINT

No tentative ruling.

6. 13-17909-A-7 WILLIE BAKER
14-1048
PARKER ET AL V. BAKER
NEIL SCHWARTZ/Atty. for dbt.
LISA HOLDER/Atty. for pl.
DISMISSED
CLOSED 8/28/14

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-22-14 [1]

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

7. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC.
14-1076
PARKER V. GAINES
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

STATUS CONFERENCE RE: COMPLAINT
7-28-14 [1]

No tentative ruling.

8. 14-11429-A-7 STEPHEN DAKE
14-1068
GBC INTERNATIONAL BANK V. DAKE
JUSTIN SANTAROSA/Atty. for pl.

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

No tentative ruling.

9. 14-11429-A-7 STEPHEN DAKE
14-1068 TSB-1
GBC INTERNATIONAL BANK V. DAKE

T. BELDEN/Atty. for mv.
RESPONSIVE PLEADING

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

Tentative Ruling

Motion: Dismiss Adversary Proceeding
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted with leave to amend

Stephen M. Dake ("Dake") moves under Rule 12(b)(6) to dismiss a § 727(a)(5) cause of action filed by GBC International Bank ("GBC") against him. In support of this motion Dake offers three arguments: (1) his prior valuation of his ownership of Laguna Exports, LLC is too remote in time (5 years, five months before the bankruptcy) to support a § 727(a)(5) action; (2) reduction in value of Dake's membership interest from Laguna Exports, LLC from $2 million to $0 is insufficient as a matter of law; and (3) having pled that the transfer of real property involved was for "estate planning" purposes, GBC admits the adequacy of the explanation as to the disposition of assets. GBC resists the motion. For the reasons stated below, the motion will be granted with leave to amend.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

DISCUSSION

Bankruptcy Code § 727(a)(5) provides, "The court shall grant the debtor a discharge, unless...the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities." The Ninth Circuit Court of Appeals has determined that such an action has three elements: "Under § 727(a)(5) an objecting party bears the initial burden of proof and must demonstrate: (1) debtor at one time, not too remote from the bankruptcy petition date, owned identifiable assets; (2) on the date the bankruptcy petition was filed or order of relief granted, the debtor no longer owned the assets; and (3) the bankruptcy pleadings or statement of affairs do not reflect an adequate explanation for the disposition of the assets." *In re Retz*, 606 F.3d 1189, 1205 (9th Cir. 2010).

The Representations Are Not Too Remote in Time

Succinctly stated, Dake argues that as a matter of law, valuation of his ownership interest in Laguna Exports, LLC in December 2008, is too removed in time from a bankruptcy filed in March 2014, to satisfy the first element of *Retz*.

Section 727(a)(5) resists a precise definition of proximity in time between asset ownership and filing bankruptcy. *In re Potts*, 501 B.R. 711 (Bankr. D. Colo. 2013). Most courts find assets owned within two years of the bankruptcy to be sufficiently close to support a finding under § 727(a)(5). *See In re Kane*, 470 B.R. 902 (Bankr. S.D. Fla. 2012). Remoteness will depend on the facts of each case. *In re Olbur*, 314 B.R. 732 (Bankr. N.D. Ill. 2002). In some instances, courts have found assets owned well beyond the two-year presumptively proximate deadline to be sufficiently close for § 727(a)(5) purposes. *See e.g.*, *In re Hermanson*, 273 B.R. 538 (Bankr. N.D. Ill. 2002) (six years); *In re Straub*, 192 B.R. 522 (Bankr. D. N.D. 1996) (loss of assets occurred 1985, 1988, and bankruptcy petition filed in 1995).

GBC's complaint alleges the representations were made five years and five months before the bankruptcy petition. Complaint ¶¶ 18, 33, filed July 14, 2014, ECF #1. While that valuation is well beyond the two year rule, it does not follow that this decline in value is insufficiently proximate as a matter of law. GBC alleges that during that period the stock dropped from $2 million to $0. And a trier of fact might find, after consideration of all facts and circumstances, that a $2 million reduction in that period does not run afoul of the remoteness rule. Since the test is fact specific and since the court draws all inferences in favor of the respondent on a motion to dismiss, the court will not at this time find a decline in value was too remote. Moreover, from the record before it the court is unable to conclude when the decline in value occurred.

Stock Ownership and Reduction in Value

Dake's second argument is that GBC admits he still owns his interest in Laguna Exports, LLC, albeit at no value, and, as a consequence, GBC's complaint cannot satisfy the second prong of the *Retz* decision.

The best reading of Retz is that a lack of ownership of the asset on the date of the petition is a necessary element of § 727(a)(5). *Retz*, 606 F.3d at 1205 ("the debtor no longer owned the assets"); *see also*, March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*,

Discharge and Dischargeability, Chapter 7 Discharge 2:990 (Rutter Group 2013); *In re Tran*, 464 B.R. 885 (Bankr. S.D. Cal. 2012) (gambler debtor unable to explain disappearance of cash, personal property and proceeds of property).

Additionally, the majority of courts hold that a debtor, who is the sole or majority shareholder will not be held to answer under § 727(a)(5) for corporate disposition of assets. *N.E. Nebraska Econ. Dev. Dist. v. Wagner (In re Wagner)*, 305 B.R. 472 (8th Cir. 2004)(11 U.S.C. § 727(a)(2)); *In re Goodwin*, 488 B.R. 799, 809 (Bankr. M.D. Ga. 2013); *Stanley v. Paige (In re Paige)*, 335 B.R. 358, 361 (Bankr. N.D. Tex. 2005); *see also In re Scott*, 462 B.R. 735, 741 n.24(Bankr. D. Ak 2011)(applying principle in § 727(a)(2) and collecting cases). An exception to the rule exists where there is basis to pierce the corporate veil. *Lort v. Ferguson Enter., Inc. (In re Lort)*, 347 B.R. 909, 910 (M.D. Fla. 2006) (11 U.S.C. § 727(a)(2)); *Hoffman v. Bethel Native Corporation (In re Hoffman)*, 2007 WL 7540947 * 5(B.A.P. 9th Cir. 2007). From these authorities it follows that a reduction in value of an owner's equity position cannot form the basis of § 727(a)(5) claim in the absence of piercing the corporate veil. The reasons for this is that reduction in value of an equity interest often follows from the loss of corporate assets.

GBC's sole argument is that the value of Dake's interest has reduced from $2 million to $0 during the more than five years between the date it received his financial statement and the petition date. Complaint ¶¶ 18, 33-35, filed July 14, 2014, ECF #1. This is insufficient factual support for the claim, and GBC has not alleged that Laguna Exports, LLC and Dake are alter egos of each other. For that reason, the motion will be granted. But since GBC might allege Laguna Exports and Dake are alter egos, leave to amend the complaint will be granted.

Adequacy of Explanation

Dake's final argument is that since the complaint alleges that the transfer of Dake's real estate interest was estate planning that he has adequately explained the loss.

The court disagrees. First, the claim under § 727(a)(5) is only applicable to Dake's interest in Laguna Exports, not his real estate interest, though the complaint could be clearer on this point. *See* Plaintiff's Opposition, p. 6, filed September 4, 2014, ECF #21. The explanation does not pertain to the asset that forms the basis of this action. Second, and more importantly, the sufficiency of the explanation is always a question of fact, not law. *In re Retz*, 606 F.3d 1189, 1205 (9th Cir. 2010). As a result, the court declines to find any such explanation satisfactory as a matter of law.

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 motion to dismiss filed by defendant Stephen M. Dake 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: (1) defendant Stephen M. Dake's motion is granted, and the complaint is dismissed with leave to amend; (2) plaintiff GBC may file its First Amended Complaint not later than 21 days from service of this Civil Minute Order; (3) defendant Stephen M. Dake shall file a responsive pleading to the First Amended Complaint 21 days from service of that pleading or, if none is filed, to the remaining portion of the original complaint not later than the date specified in the Order Extending Deadline for Defendant to File Responsive Pleading, filed September 22,2014, ECF #38; and (4) no enlargement of time to file a responsive pleading shall be made without leave of court.

1:30 p.m.

1. 14-12603-A-7 HUMBERTO/LAURA MORENO — MOTION FOR RELIEF FROM AUTOMATIC STAY
VVF-1 — 9-22-14 [17]
AMERICAN HONDA FINANCE CORPORATION/MV
ROBERT WILLIAMS/Atty. for dbt.
VINCENT FROUNJIAN/Atty. for mv.

Final Ruling

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

Subject: 2011 Honda CRV

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. 14-13305-A-7 TRICIA JONES
TJP-1
LBS FINANCIAL CREDIT UNION/MV
FRANK SAMPLES/Atty. for dbt.
THOMAS PRENOVOST/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-19-14 [13]

Tentative Ruling

Motion: Relief from Stay
Disposition: Continued to December 3, 2014; a continued notice of hearing must be filed and served on the respondents no later than November 5, 2014, and use the notice procedure of LBR 9014-1(f)(1)
Order: Civil minute order

The original notice of hearing indicated that the hearing was on September 24, 2014, in the court's Bakersfield, California, location. The amended notice of hearing on the motion indicated the hearing was on October 22, 2014, at 1:30 p.m. The amended notice of hearing was not served or transmitted to any respondent against whom relief is sought (the debtor or trustee). Without the amended notice, respondents have insufficient notice to apprise them of the hearing and to give them a chance to present their objections or protect whatever interests they have at stake.

3. 14-13505-A-7 JOSE GONZALEZ
TJS-1
JPMORGAN CHASE BANK, N.A./MV
ROBERT WILLIAMS/Atty. for dbt.
TIMOTHY SILVERMAN/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-24-14 [11]

Final Ruling

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

Subject: 2014 Mazda Mazda6 Sdn

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).

Subsection (d)(1) of § 362 of Title 11 provides for relief from stay for "cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d)(1). Adequate protection may consist of a lump sum cash payment or periodic cash payments to the entity entitled to adequate protection "to the extent that the stay . . . results in a decrease in the value of such entity's interest in property." 11 U.S.C. § 361(1).

"Where the property is declining in value or accruing interest and taxes eat up the equity cushion to the point where the cushion no

longer provides adequate protection, the court may either grant the motion to lift the stay or order the debtor to provide some other form of adequate protection." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 8:1096 (rev. 2011). Adequate protection is also required where the property is declining in value, but "[a]n undersecured creditor is entitled to adequate protection only for the decline in the [collateral's] value *after* the bankruptcy filing." *See id.* ¶ 8:1065.1 (rev. 2012) (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370-73 (1988)).

The debtor has missed 2 post-petition payments due on the debt secured by the moving party's lien. This constitutes cause for stay relief. The court does not address grounds for relief under § 362(d)(2) as relief is warranted under § 362(d)(1). The motion will be granted, and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

4. 14-11427-A-7 JON/KATHLEEN MARSHALL — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1
SANTANDER CONSUMER USA INC./MV
9-12-14 [33]
ROBERT WILLIAMS/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.

Final Ruling

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

Subject: 2013 Dodge Ram

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.

5. 14-12438-A-7 ROCKY/MELISSA SCHIEFELBEIN
RMD-1
PACIFIC UNION FINANCIAL, LLC/MV
PATRICK KAVANAGH/Atty. for dbt.
RYAN DAVIES/Atty. for mv.
DISCHARGED

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-28-14 [16]

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted as to estate, denied as to debtor
Order: Prepared by moving party

Subject: 19925 Luana Drive, Tehachapi, 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).

AS TO THE DEBTOR

The motion is denied as moot. The stay that protects the debtor terminates at the entry of discharge. 11 U.S.C. § 362(c)(2). In this case, discharge has been entered. As a result, the motion is moot as to the debtor.

AS TO THE ESTATE

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.

6. 13-13640-A-7 DAVID/MARGARET SANCHEZ
JLH-2
KERN FEDERAL CREDIT UNION/MV
ROBERT WILLIAMS/Atty. for dbt.
JOSEPH HORSWILL/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-1-14 [109]

Tentative Ruling

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

Subject: 2003 Honda Accord

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.

7. 14-13872-A-7 VICTORIA MARTINEZ — MOTION FOR RELIEF FROM AUTOMATIC STAY
SMK-1
DEUTSCHE BANK NATIONAL TRUST COMPANY/MV
8-26-14 [16]
VINCENT GORSKI/Atty. for dbt.
SHERI KANESAKA/Atty. for mv.

Final Ruling

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

Subject: 601 Boa Del Rio Drive, Bakersfield, 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.

8. 14-14376-A-7 JOE PEREZ
KDG-1
MONICA TRIANO/MV
ASHTON DUNN/Atty. for dbt.
VINCENT GORSKI/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-8-14 [19]

No tentative ruling.

9. 14-12580-A-7 SANDRA FLEISCHER
PPR-1
BANK OF AMERICA, N.A./MV
STEVEN STANLEY/Atty. for dbt.
MELISSA VERMILLION/Atty. for mv.
DISCHARGED

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-22-14 [13]

Final Ruling

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

Subject: 2010 Winnebago 31C Outlook

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).

Subsection (d)(1) of § 362 of Title 11 provides for relief from stay for "cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d)(1). Adequate protection may consist of a lump sum cash payment or periodic cash payments to the entity entitled to adequate protection "to the extent that the stay . . . results in a decrease in the value of such entity's interest in property." 11 U.S.C. § 361(1).

"Where the property is declining in value or accruing interest and taxes eat up the equity cushion to the point where the cushion no longer provides adequate protection, the court may either grant the motion to lift the stay or order the debtor to provide some other form of adequate protection." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 8:1096 (rev. 2011). Adequate protection is also required where the property is declining in value, but "[a]n undersecured creditor is entitled to adequate protection only for the decline in the [collateral's] value *after* the bankruptcy filing." *See id.* ¶ 8:1065.1 (rev. 2012) (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370-73 (1988)).

The debtor has missed 4 post-petition payments due on the debt secured by the moving party's lien. This constitutes cause for stay relief. The court does not address grounds for relief under § 362(d)(2) as relief is warranted under § 362(d)(1). The motion will be granted,

and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

10. 14-13884-A-7 SONIA RUIZ
EAT-1
WELLS FARGO BANK, NA/MV
MARISOL NAGATA/Atty. for mv.
DISMISSED

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-25-14 [21]

Final Ruling

The case dismissed, the motion is denied as moot.

1:45 p.m.

1. 14-12637-A-11 TOURE/ROLANDA TYLER
PK-1
INOCENCIO MADERA/MV
LEONARD WELSH/Atty. for dbt.
PATRICK KAVANAGH/Atty. for mv.
RESPONSIVE PLEADING

MOTION TO VACATE
9-13-14 [93]

No tentative ruling.

2. 14-14241-A-11 ARTHUR FONTAINE

CHAPTER 11 STATUS CONFERENCE RE: VOLUNTARY PETITION
8-25-14 [1]

D. GARDNER/Atty. for dbt.

No tentative ruling.

3. 13-12358-A-11 CENTRAL VALLEY SHORING, INC.
LKW-16

MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTOR'S ATTORNEY(S).
9-12-14 [279]

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: Leonard K. Welsh
Compensation approved this Application: $2,400.00
Costs approved this Application: $40.02

Aggregate fees and costs approved in this application: $2,440.02
Retainer held: $0.00
Amount to be paid as administrative expense: $2,440.02

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).

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 in this application in the respective amounts of $2,400.00 and $40.02 are reasonable. The court also finds the prior awards of compensation and expenses in the respective amounts of $53,702.50 and $6,092.50 are reasonable. All such awards are approved on a final basis.

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 Fifth and Final Application for Compensation filed by Leonard K. Welsh 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 fees of $56,102.50 and costs of $6,132.52 are approved on a final basis.