UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

October 30, 2013 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled "Amended Civil Minute Order."

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

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1. 13-25000-D-7 JAMES/DIANA MURRAY — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 9-27-13 [17]
SANTANDER CONSUMER USA, INC.
VS.

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtors received their discharge on July 24, 2013 and, as a result, the stay is no longer in effect as to the debtors (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtors as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

2. 13-25003-D-7 MBS-2 — BETTY WILLIAMS — MOTION TO AVOID LIEN OF FIA CARD SERVICES, N.A. 8-29-13 [27]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

3. 13-28020-D-7 HSM-2 — ROGER/BONNIE TURNER — MOTION TO EXTEND TIME 9-23-13 [19]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to extend time is supported by the record. As such the court will grant the motion to extend time. Moving party is to submit an appropriate order. No appearance is necessary.

4. 13-27324-D-7 CLR-2 — LOYD/SHARON BIRD — MOTION TO AVOID LIEN OF CALIFORNIA SERVICE BUREAU INCORPORATED AND OF GRANT AND WEBER 9-10-13 [21]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

5. 13-27725-D-7 WAC-2 — KRISTIAN HARTMAN — MOTION TO DISMISS CASE 10-1-13 [93]

6. 13-30525-D-7 CHARLES SPECK — MOTION FOR RELIEF FROM AUTOMATIC STAY
MRG-1 — 10-3-13 [10]
CAPITAL ONE, N.A. VS.

Final ruling:

The matter is resolved without oral argument. This motion was noticed under LBR 9014-1(f)(2). However, the debtor's Statement of Intentions indicates he intends to surrender the collateral and the trustee has filed a Report of No Assets. Accordingly, the court finds a hearing is not necessary and will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

7. 13-29230-D-7 VI LUONG — MOTION TO AVOID LIEN OF DONAHUE SCHRIBER REALTY GROUP, LP
FF-3 — 9-23-13 [30]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

8. 13-31631-D-7 IVAN LATINKIC — MOTION TO COMPEL ABANDONMENT
FF-1 — 9-24-13 [11]

Final ruling:

This is the debtor's motion to compel the trustee to abandon certain real property. The motion will be denied because the notice of hearing does not comply with applicable local rules. The notice of hearing purports to be a notice pursuant to LBR 9014-1(f)(2) (no written opposition required); however, it also states that (1) if a party mails a response to the court for filing, he or she must mail it early enough so the court will receive it before the date of the hearing, and (2) if a party does not take these steps, the court may grant the motion, in some circumstances without even conducting an actual hearing. Both of these phrases contradict the very plain provision of the local rule that the notice of hearing state whether or not written opposition must be filed (see LBR 9014-1(d)(3)); both of these phrases may tend to inhibit parties-in-interest from appearing at the hearing.

As a result of this notice defect, the motion will be denied by minute order. No appearance is necessary.

9. 12-29442-D-7 MICHELE FISCHER — MOTION FOR COMPENSATION FOR ATHERTON AND ASSOCIATES, LLP, ACCOUNTANT(S), FEES: $4,853.00, EXPENSES: $0.00
ADJ-7 — 10-2-13 [113]

10. 13-30546-D-7 AJJ-1 — MOREY LLOYD AND CYNTHIA STUART-LLOYD — MOTION TO AVOID LIEN OF DISCOVER BANK 9-13-13 [17]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

11. 13-31846-D-7 — JULIO ZAMORA ESCOTO AND ANGELINA GONZALEZ OCAMPO — MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE 9-9-13 [5]

12. 13-31748-D-7 MRG-1 — FAUSTINO GUTIERREZ — MOTION FOR RELIEF FROM AUTOMATIC STAY 9-30-13 [12]
ONEWEST BANK, FSB VS.

Final ruling:

This matter is resolved without oral argument. This is Onewest Bank, FSB's motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

13. 13-28667-D-7 MOH-1 — CHRISTOPHER/MARI JACQUET — MOTION TO AVOID LIEN OF LVNV FUNDING, LLC 9-23-13 [18]

Final ruling:

This is the debtors' motion to avoid an alleged judicial lien held by LVNV Funding LLC ("LVNV"). No party-in-interest has filed opposition. However, that does not necessarily entitle the moving parties to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the

default was due to excusable neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Having examined the moving papers, the court will deny the motion.

"There are four basic elements of an avoidable lien under § 522(f)(1)(A): First, there must be an exemption to which the debtor would have been entitled under subsection (b) of this section. 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be . . . a judicial lien. 11 U.S.C. § 522(f)(1)." In re Goswami, 304 B.R. 386, 390-91 (9th Cir. BAP 2003), citing In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added).

Since there must be a judicial lien for the court to avoid under § 522(f)(1)(A), the moving parties must demonstrate that one actually exists. The motion states that LVNV is the holder of a judicial lien against the debtors' property described in the motion, and that a copy of LVNV's abstract of judgment is filed as an exhibit. However, the copy filed as an exhibit is an unrecorded copy; thus, the debtors' assertion that LVNV is the holder of a judicial lien is hearsay, and the debtors have not met the requirements for avoiding a judicial lien under 11 U.S.C. § 522(f)(1)(A). See LBR 9014-1(d)(6), requiring every motion to be accompanied by evidence establishing its factual allegations and demonstrating that the moving party is entitled to the relief requested.

The motion will be denied for the additional independent reason that the moving parties failed to serve LVNV in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving parties failed to serve LVNV at all; instead, they served Resurgent Capital Services, L.P. ("Resurgent") (1) through its registered agent in Delaware; (2) at a street address in Greenville, South Carolina, with no attention line; (3) through the registered agent for service of process in California for CSC-Lawyers Incorporating Service, itself a corporate agent for service of process; and (4) through the attorneys who obtained the abstract of judgment. The first method was insufficient because the creditor whose lien the debtors seek to avoid is LVNV, not Resurgent. According to a website page submitted by the moving parties as an exhibit in support of their proof of service, the management of LVNV's purchased assets is outsourced to Resurgent, a third party specializing in the management of these types of assets. In other words, Resurgent is a separate entity from LVNV, and there is no evidence Resurgent is authorized to receive service of process on behalf of LVNV in bankruptcy adversary proceedings and contested matters pursuant to Fed. R. Bankr. P. 7004(b)(3).

The second and third methods were insufficient because there is no evidence that either Resurgent or CSC-Lawyers Incorporating Service or its registered agent is authorized to receive service of process on behalf of LVNV. The fourth method was a good idea, see All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. at 94 (Klein, J., dissenting), but by itself, it was not sufficient. Id. at 92, citing Beneficial Cal., Inc. v. Villar (In re Villar), 317 B.R. 88, 92-94 (9th Cir. BAP 2004).

Finally, the motion will be denied for the additional independent reason that the proof of service evidences service of the motion, but not the notice of hearing or the exhibits.

As a result of these service and evidentiary defects, the motion will be denied by minute order. No appearance is necessary.

14. 13-31269-D-7 DAVID/FELOMENA ABREU
VVF-1
AMERICAN HONDA FINANCE
CORPORATION VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
9-23-13 [15]

Final ruling:

This matter is resolved without oral argument. This is American Honda Finance Corporation's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtors are not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. Accordingly, the court will grant relief from stay by minute order. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). There will be no further relief afforded. No appearance is necessary.

15. 12-20883-D-7 MCCANN PLASTERING, INC., A CALIFORNIA CORPORATION
DRG-3

MOTION FOR COMPENSATION FOR
GABRIELSON & COMPANY,
ACCOUNTANT(S), FEES: $4,452.50,
EXPENSES: $184.06
9-18-13 [40]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

16. 11-22685-D-7 BLUE RIBBON STAIRS, INC.
SES-1
KB HOME COASTAL, INC. VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-1-13 [995]

Final ruling:

This matter is resolved without oral argument. This is KB Home Coastal, Inc.'s motion seeking relief from automatic stay to pursue available insurance proceeds. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is cause for granting limited relief from stay to allow the moving party to proceed with litigation, as is necessary, to collect against available insurance proceeds. Accordingly, the court will grant limited relief from stay to allow the moving party to proceed to judgment against the debtor for the limited purpose of pursuing any available insurance proceeds. There will be no further relief afforded. Moving party is to submit an appropriate order. No appearance is necessary.

17. 13-32187-D-7 DEVINDER SINGH
MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
9-17-13 [5]

18. 12-40590-D-7 ANIL/RANJANI PRASAD
ASF-3
MOTION FOR COMPENSATION FOR GABRIELSON & COMPANY, ACCOUNTANT(S), FEES: $3,185.00, EXPENSES: $117.50
9-17-13 [71]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

19. 13-21595-D-7 PATRICIA CUNNINGHAM
PA-6
OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
9-27-13 [120]

Final ruling:

The hearing on this objection is continued to December 11, 2013 at 10:00 a.m. per the stipulated order entered October 23, 2013. No appearance is necessary.

20. 13-30496-D-7 EDWARD/LORRAINE KURATA
TRM-46
HILTON RESORTS CORPORATION
VS.
MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
9-20-13 [26]

Final ruling:

This matter is resolved without oral argument. This is Hilton Resorts Corporation's motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

21. 13-28697-D-7 ASHOT SHIBOYAN MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY
9-30-13 [28]

Final ruling:

This is the motion of Nationstar Mortgage, L.L.C. ("Nationstar"), for an order confirming that the automatic stay has terminated by reason of the trustee's abandonment of Nationstar's collateral. The debtor has filed opposition. For the following reasons, the motion will be denied.

First, the moving papers do not include a docket control number, as required by LBR 9014-1(c). Second, the proof of service is not signed under oath, as required by 28 U.S.C. § 1746. Third, the motion is premature. The motion seeks an order, pursuant to § 362(j), confirming that the automatic stay has terminated with respect to certain real property Nationstar contends is collateral for its claim (the "property"). For its premise that the automatic stay has terminated, Nationstar relies on (1) § 362(c)(1), which provides that the stay of an act against property of the estate continues until such property is no longer property of the estate; and (2) the trustee's report of no distribution, filed September 5, 2013, which, according to Nationstar, reflects the trustee's intention to abandon the property. The problem is that an intention to abandon property and actual abandonment are two different things. At this point in the case, the property has not been abandoned, and there is nothing preventing the trustee from changing her mind and deciding to administer the property. Unless earlier formally abandoned after notice and a hearing, pursuant to § 554(a) or (b), the property will not be abandoned until the case is closed. See § 554(c).

To the extent, if any, Nationstar intended this motion to operate as a motion to compel the trustee to abandon the property, the motion will be denied because that intention is not clear from the moving papers and also because the moving party failed to serve the motion in accordance with Fed. R. Bankr. P. 6007.

Fed. R. Bankr. P. 6007(a) requires the trustee or debtor in possession to "give notice of a proposed abandonment or disposition of property to the United States trustee [and] all creditors . . . ." On the other hand, Fed. R. Bankr. P. 6007(b) provides that "[a] party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate." Ostensibly, the latter subparagraph does not require that notice be given to all creditors, even though the former does. A motion under subparagraph (b), however, should generally be served on the same parties who would receive notice under subparagraph (a) of the rule. See In re Jandous Elec. Constr. Corp., 96 B.R. 462, 465 (Bankr. S.D.N.Y. 1989) (citing Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 709-10 (9th Cir. 1986)). Nationstar served the debtor, the debtor's attorney, the chapter 7 trustee, and the United States Trustee, and failed to serve creditors.

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

22. 13-31597-D-11 FREDRICK HODGSON — MOTION TO EMPLOY TORY M. PANKOPF AS ATTORNEY(S)
TMP-1 — 9-23-13 [34]

Tentative ruling:

This is the motion of the debtor-in-possession to employ the Law Offices of Tory M. Pankopf ("Counsel") as his counsel in this case. East Bay Investors, LLC ("East Bay"), has filed opposition to the motion. For the following reasons, the court intends to deny the motion.

First, the moving party failed to serve the Internal Revenue Service, which has filed a proof of claim in this case, at all. Second, the proof of service is not signed under oath, as required by 28 U.S.C. § 1746, and does not adequately state the manner of service. Third, the moving party served the United States Trustee at an inaccurate address (the address of the Clerk's office).

More important, as East Bay points out, Counsel has made contradictory statements with regard to his compensation and his pre-petition retainer in documents filed in this case. The debtor's preliminary status report, signed by Counsel, states with regard to "anticipated professional fees" the following: "Debtor will file an application to employ Tory M. Pankopf, Law Office of Tory M. Pankopf for Debtor in Possession, total of $30,000.00, with $10,000.00 plus filing fees paid pre-petition." Preliminary Status Report, filed September 23, 2013 (DN 38), at 4:3-5. By contrast, the debtor's statement of financial affairs, filed September 17, 2013, states that the debtor paid Counsel $10,000 in August 2013, and paid the filing fee directly to the court. Further, the present application, signed by Counsel, states: "Debtor has not compensated Law Offices of Tory M. Pankopf with an initial pre-petition sum and agrees to pay on an hourly basis throughout the course of the representation." Application to Employ Attorney for Debtor in Possession, filed September 23, 2013, at 3:7-8. Thus, the application directly contradicts both the preliminary status report and the statement of financial affairs with regard to the pre-petition retainer, and contradicts the preliminary status report with regard to the matter of the total fees, $30,000, as stated in the status report but not mentioned in the application.

Of additional concern, Counsel signed a Rule 2016(b) statement, DN 27, p. 33, in which he stated that the agreed fee for his services in the case was $0; the amount received pre-petition was $0; and the balance due was $0. It appears, Counsel has not taken seriously his responsibility and his duty as an officer of the court to accurately report his transactions with the debtor.

East Bay notes that the debtor failed to list either of his two prior bankruptcy cases where required to do so on his petition in this case, and that Counsel acknowledged at an earlier hearing he was aware of the debtor's two prior cases at the time he filed the petition in this case. Counsel indicated it was through an oversight that the two prior cases were omitted from the petition in this case; an amended petition has been filed. The court notes also that an amended statement of social security number has been filed, in which the debtor's social security number was changed dramatically, although both the original and the amended versions purport to have been signed by the debtor under oath. Whether the failure to file an accurate petition and statement of social security number was intentional or inadvertent, the court finds that there has been a significant and troubling pattern of filing inaccurate documents in this case, although it has been pending

only a relatively short period of time (under two months), which, compounded by the discrepancies among the various documents concerning Counsel's compensation for this case and his pre-petition retainer, makes the court question whether Counsel is qualified to represent the debtor as debtor-in-possession in this case. For these reasons, as well as because of the procedural defects noted above, the motion will be denied.

The court will hear the matter.

23. 12-33698-D-11 2 ANTIOCH, LLC
12-2705
2 ANTIOCH, LLC V. ANTIOCH LOAN, LLC ET AL 9-27-13 [38]

MOTION FOR SUMMARY JUDGMENT, MOTION FOR PARTIAL SUMMARY JUDGMENT

Tentative ruling:

This is the motion of defendant Antioch Loan, LLC ("Antioch Loan") for summary judgment, or in the alternative, for partial summary judgment. (As the plaintiff's complaint names other defendants, a ruling in Antioch Loan's favor would resolve only part of the adversary proceeding; namely, the first and second causes of action as they pertain to Antioch Loan.) The plaintiff has filed no opposition. For the following reasons, the motion will be granted.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), cert. granted, 2013 WL 3155257 (June 24, 2013), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. In this adversary proceeding, the plaintiff, which is the debtor in the underlying chapter 11 case in which this proceeding is pending, seeks a determination of the validity, extent, and priority of liens against real property alleged to be property of the plaintiff's bankruptcy estate, to quiet title to that property, and a judgment for damages for alleged misrepresentation by two of Antioch Loan's co-defendants. Neither party has cited any authority for the proposition that the jurisdictional concerns raised by Bellingham extend to the causes of action pled in this proceeding. However, for the sake of completeness, the court will address the matter as if Bellingham governed. The Bellingham court held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the plaintiff consented to this court's jurisdiction by filing its adversary complaint in this court. Antioch Loan has affirmatively consented by its filing of the present motion to the exercise of this court's jurisdiction. Accordingly, the court has authority to enter a final judgment on the claims asserted by the plaintiff against Antioch Loan.

The facts alleged in the plaintiff's complaint are that in 2006, a single loan was made to the owner of 50 acres of undeveloped land in Antioch, California, for $11,000,000; that the loan was, in essence, artificially split into two loans of $5,500,000 each, for purposes of complying with California Department of Real Estate regulations, which resulted in the recording of two different deeds of trust, one immediately after the other; that the parties intended the "two" loans to be on equal footing with each other, despite the fact that one deed of trust was recorded

after the other; and thus, that the plaintiff, as successor-in-interest to the holder of the deed of trust recorded second, is on equal footing, in terms of the priority of its interest in the land, with Antioch Loan, which is the successor-in-interest to the holder of the deed of trust recorded first.

Antioch Loan cites, on the other hand, (1) the two loan agreements prepared by the original beneficiary of both deeds of trust, CMR Mortgage Fund II, LLC ("CMR II"), and signed by the original borrower on both loans, which state that the loans will be secured by a "FIRST" and a "SECOND" deed of trust, respectively, and (2) the deed of trust recorded second, which states that it is "junior in priority to a deed of trust of even date herewith, which secures an obligation" of $5,500,000. Antioch Loan also contends there is no documentary evidence to support the plaintiff's claim that the two deeds of trust were to be of equal priority, and that in addition to the original loan agreements and deeds of trust, there is a standstill agreement that provides additional evidence that the two loans were not intended to be of equal priority.

The standstill agreement was entered into between (1) the original beneficiary of the two deeds of trust, CMR II, and related entities, including CMR Mortgage Fund III, LLC ("CMR III"), which is the sole member and 100% owner of the plaintiff, on the one hand, and (2) certain investors who were successors-in-interest to CMR II on the loan secured by the first recorded deed of trust, which investors are Antioch Loan's predecessors-in-interest, on the other hand. The standstill agreement recited that the investors' loan was secured by a first mortgage lien, that CMR II also had a mortgage lien that was junior in priority to the investors' deed of trust, and that CMR II was in bankruptcy and was "financially incapable of reinstating or paying off the Loan[] held by the Investors, and if the Investors were to foreclose on their Deed[] of Trust . . ., the lien[] securing the junior mortgage loan[] held by [CMR II] would be extinguished." Antioch Loan's Ex. 15, ex. p. 284. The standstill agreement was signed on behalf of CMR II and CMR III by David Choo, as president of their corporate manager. CMR II filed a motion for court approval of the standstill agreement in CMR II's chapter 11 case in the bankruptcy court for the Northern District of California, and the motion was granted. Graham Seel, as senior vice-president of the corporate manager of CMR II, signed a declaration in support of the motion to approve the standstill agreement, in which he testified that the two deeds of trust were a first and a second, respectively.

Antioch Loan cites certain testimony that has been offered in support of the plaintiff's position that the loans were to be on equal footing; namely, a declaration of Mr. Seel filed in the plaintiff's parent chapter 11 case in this court and the deposition testimony of Mr. Choo taken in this adversary proceeding. Mr. Seel's declaration contradicts the facts stated by him in his declaration in support of CMR II's motion to approve the standstill agreement; Mr. Choo's deposition testimony contradicts the facts as stated in the standstill agreement, which he signed on behalf of CMR II and CMR III. Antioch Loan also contends Mr. Choo's deposition testimony was internally inconsistent and evasive; the court certainly finds it unconvincing. When asked to cite evidence of the plaintiff's position that the two loans were intended to stand on equal footing, he referred only to an internal policy of CMR II and California Mortgage and Realty, Inc. ("CMR Inc."), which was the trustee under both deeds of trust, that CMR Inc. would not foreclose under the first and wipe out the second. Mr. Choo went so far as to claim that CMR Inc., as trustee, could decide whether or not to foreclose, regardless of the wishes of the investors. He suggested there were servicing agreements to that effect between CMR Inc. and CMR II that were also signed by the individual investors

in the loans; however, apparently, neither Mr. Choo nor the plaintiff has ever produced copies.

Antioch Loan posits that (1) the deed of trust recorded first was, as a matter of law, senior to the one recorded second, based on the language of the latter deed of trust and of the two loan agreements, as interpreted under applicable contract law; (2) the plaintiff's claim that the two deeds of trust were intended to stand on equal footing is barred by the statute of frauds; (3) the plaintiff is judicially estopped from claiming the two deeds of trust were intended to be on equal footing by the position CMR II, CMR III, Mr. Seel, and Mr. Choo took in the standstill agreement and the motion to approve it;[1] (4) the plaintiff is equitably estopped from making the same claim by the position taken in the standstill agreement and the motion to approve it; and (5) the plaintiff, by way of the standstill agreement, waived the right to claim the two deeds of trust were or are on equal footing. The court agrees with Antioch Loan across the board and adopts the legal analysis and argument in Antioch Loan's moving papers.

The court concludes, based on the evidence summarized above, that Antioch Loan has met its burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. See Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Thus, the plaintiff, as the non-moving party, was required to present affirmative evidence showing the existence of genuine issues of fact for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). Instead, the plaintiff has submitted no opposition to the motion at all. For the reasons stated, the court will grant the motion.[2]

The court will hear the matter.

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1 Again, CMR III is the sole member and 100% owner of the plaintiff, according to the plaintiff's statement of financial affairs and list of equity security holders filed in the plaintiff's underlying chapter 11 case.

2 The court recognizes that the plaintiff's counsel of record has withdrawn as its counsel in this adversary proceeding (and in the plaintiff's underlying chapter 11 case). However, counsel's motion to withdraw was filed over a month before this summary judgment motion was filed; the summary judgment motion, notice of hearing, and all supporting documents were served on the plaintiff, as well as on its then counsel of record. In these circumstances, the court finds no reason not to rule on the motion at this time. The court notes that the plaintiff has not requested additional time to respond.

24.	12-39999-D-11 WFH-14	PHILLIPS DELIVERY	MOTION FOR COMPENSATION FOR FRANK A. BODIE, OTHER PROFESSIONAL(S), FEES: $46,800.00, EXPENSES: $593.45 10-2-13 [181]

25.	12-39999-D-11 WFH-15	PHILLIPS DELIVERY	MOTION FOR COMPENSATION BY THE LAW OFFICE OF WILKE, FLEURY, HOFFELT, GOULD & BIRNEY, LLP FOR STEVEN J. WILLIAMSON, DEBTOR'S ATTORNEY(S), FEES: $189,642.50, EXPENSES: $5,921.78 10-2-13 [171]
26.	12-39999-D-11 WFH-16	PHILLIPS DELIVERY	DEBTOR'S MOTION TO AMEND ORDER APPROVING EMPLOYMENT 10-2-13 [176]
27.	13-21199-D-7 JEM-1	JAMES SCOTT	MOTION BY JEANETTE E. MCPHERSON TO WITHDRAW AS ATTORNEY 9-26-13 [195]

Final ruling:

This is the motion of the Schwartzer & McPherson Law Firm to withdraw as counsel for Michael Zucaro in this bankruptcy case. The court is not prepared to grant the motion at this time because there is no evidence it was served. The proof of service, DN 198, states that (1) service will be made by the Court through its e-filing program; and (2) service was made by mail to the parties listed on the attached matrix. However, first, the applicable rules do not permit service by reliance on the court's e-filing services. See Fed. R. Civ. P. 5(b)(3), authorizing service via the court's transmission facilities only where authorized by local rule; LBR 7005-1(d), not authorizing service by such means. Second, the "attached matrix" referred to in the proof of service was not attached. Thus, the court has no basis on which to determine that service was made in accordance with LBR 2017-1(e).

The court will continue the hearing to November 13, 2013, at 10:00 a.m., the moving party to file and serve a notice of continued hearing (which shall be a notice pursuant to LBR 9014-1(f)(2) – no written opposition required) no later than October 30, 2013, and to file a proof of service no later than November 1, 2013. The hearing will be continued by minute order. No appearance is necessary on October 30, 2013.

28. 13-30301-D-7 CROSSROADS FAMILY FINAL CARE, INC.
ORDER TO SHOW CAUSE - FAILURE TO TENDER FEE FOR FILING TRANSFER OF CLAIM
10-8-13 [20]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

29. 12-28704-D-7 BERNIE/JULIETA GALVE
TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
9-17-13 [127]

30. 13-29928-D-7 ARMANDO SANCHEZ
TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
10-3-13 [15]

31. 13-31631-D-7 IVAN LATINKIC
NMB-1
KINECTA FEDERAL CREDIT UNION
VS.
MOTION FOR RELIEF FROM AUTOMATIC STAY
10-15-13 [18]

32. 12-39434-D-7 BLC-5 — ANTHONY/PAMELA BOSSERMAN — CONTINUED MOTION TO AVOID LIEN OF KARIANNE MORGAN AND MATTHEW MORGAN
10-2-13 [99]

33. 12-35735-D-11 PD-1 — DAVID CAROTHERS — CONTINUED MOTION FOR ORDER APPROVING THE STIPULATION RE: TREATMENT OF CLAIM UNDER DEBTORS PROPOSED CHAPTER 11 PLAN OF REORGANIZATION AND TERMINATING THE AUTOMATIC STAY
9-11-13 [257]

Final ruling:

This matter has been resolved by stipulation. Matter removed from calendar. No appearance is necessary.

34. 13-23439-D-7 SJJ-1 — JUST/VICKIE WILLIS — CONTINUED MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13
8-23-13 [23]

Final ruling:

The court finds that a further hearing will not be helpful and is not necessary. This is the debtors' motion to convert this case from chapter 7 to chapter 13. The chapter 7 trustee opposes the motion. The hearing has been continued for both parties to submit supplemental evidence, which the court has considered. For the following reasons, the motion will be denied.

The basis for the motion, as originally presented, was that "[t]he Debtors' financial and/or legal situation has unexpectedly changed and the Debtors now desire to convert to Chapter 13." Motion to Convert Case, filed Aug. 23, 2013, at 1:19-20. Neither the motion nor the debtors' supporting declaration gave any hint of what those unexpected changes were. The debtors did, however, file amended schedules that disclosed certain alleged changes in their income and expenses, together with a proposed chapter 13 plan. Upon its initial review of those schedules and plan, the court concluded that the debtors had forfeited their right to have the case converted to chapter 13. See Marrama v. Citizens Bank, 549 U.S. 365, 375 n.11 (2007). Thus, the court issued a tentative ruling on the motion, which included the following findings and conclusions.

The debtors filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on March 14, 2013. The meeting of creditors was held in three sessions, and was ultimately concluded on May 21, 2013, after which the trustee issued a notice to creditors to file proofs of claim due to the possible recovery of assets. The trustee also filed an application to employ a real estate broker to market the debtors' real property at 939 Eden Valley Road, Colfax, California, which at the time, was the residence of debtor Just Willis. (Debtor Vickie Willis had a different address.) The debtors had listed the value of the property at $224,000 in their schedules, with liens against it totaling $209,767; they claimed the difference, $14,233, as exempt.

The trustee, however, based on his broker's opinion, believed the property was worth approximately $400,000, which if accurate, would mean approximately $176,000 in equity for the estate, a sum that would easily pay the commission, costs of sale, trustee compensation, and unsecured claims, scheduled by the debtors at a total of $62,469, in full. It was apparently on account of the trustee's decision to market the property that the debtors filed this motion.

On their original Schedule I, filed with their petition on March 14, 2013, the debtors indicated they were separated. They listed debtor Just Willis' employment as "manufacturer's representative / self employed - Preservation Packaging," with gross and net income of $2,309 per month. They listed debtor Vickie Willis' pension income at $1,724 per month, for total combined income of $4,033. Where required on Schedule I to disclose any increase or decrease in income reasonably anticipated to occur in the next year, the debtors listed nothing. The debtors filed two Schedules J – one for each of them, with combined household expenses totaling $6,877. Thus, their original schedules showed monthly net income of <$2,843> per month. As with their Schedule I, the debtors' Schedule J required them to disclose any increase or decrease in expenses anticipated to occur in the next year; again, the debtors disclosed no anticipated changes.

On August 23, 2013 – three months after the meeting of creditors was concluded and ten weeks after the trustee employed a real estate broker, the debtors filed this motion, accompanied by amended Schedules I and J and a proposed chapter 13 plan. On the amended Schedule I, they described Just Willis' employment exactly as before, and the amount of his income from employment, together with Vickie Willis' pension income, exactly as before, but in Just Willis' column, they added "anticipated business income" of $1,500 per month, bringing his total income to $3,809 and their combined income to $5,533. They provided no indication of the source of this additional income. The court noted in its original tentative ruling that to the extent the debtors meant to suggest Just Willis would simply be able to earn more in his capacity as a manufacturer's representative for Preservation Packaging, that conclusion was not supported by the record. At $3,809 per month, Just Willis would earn $45,708 per year, whereas the debtors' statement of financial affairs disclosed he earned gross income of just $37,036 in 2011, $29,959 in 2012, and $1,375 year-to-date in 2013 (in two and one-half months).

The debtors' amended Schedule I showed their marital status as married, not separated as before, and listed fewer dependents than the original schedule. The debtors filed a single amended Schedule J showing household expenses at $5,038 (down from the combined $6,877 shown on their original Schedules J). With the additional anticipated business income of $1,500 and the reduced expenses resulting from the debtors apparently combining their households (and with the debtors no longer providing for two of the dependents they had originally listed), their amended

Schedule J showed monthly net income of $495.

Under the chapter 13 plan they filed August 23, 2013, the debtors proposed to pay $495 per month for 36 months, for a total of $17,820. The plan incorrectly did not list the debtors' car loan or two mortgages at all, but it was clear from the debtors' amended Schedule J that those would be paid directly to the creditors rather than through the plan. From the $17,820, however, would be deducted the chapter 13 trustee's compensation (which the court estimates at 10%, or $1,782), compensation to the chapter 7 trustee, $2,000, and the debtors' attorney's fees, $5,350 in addition to the $1,150 their attorney has already been paid, leaving $8,688 for unsecured creditors. The debtors' estimate of general unsecured claims, as listed in their plan, incorrectly included the amounts of both mortgages and the car loan, along with the debtors' unsecured debt, for a total of $291,409. Thus, the plan proposed a 1% dividend on those claims.

If the secured claims were backed out of that total, there would be general unsecured claims totaling only $62,469, but the proposed plan payments, less the administrative expenses described above, would be sufficient to pay a dividend of only 14% on those claims, as contrasted with the 100% that would be paid if the case remained in chapter 7 and the trustee were able to sell the property for even a portion of his estimate of its value. By the court's calculations, given the trustee's broker's agreement to take a 5% commission, and with additional costs of sale of 1%, the trustee would need to sell the property for only $330,000 in order to pay both liens against the property, the debtors' exemption claim, the real estate commission and costs of sale, the trustee's compensation, and all unsecured claims in full.

The court included the above calculations in its September 18, 2013 tentative ruling, and concluded that the proposed plan, even as adjusted to remove the secured claims from the total of general unsecured claims, would fall far short of meeting the liquidation test of § 1325(a)(4) of the Bankruptcy Code. The court also stated it had no reason to believe debtor Just Willis would be able to increase his income by $1,500 per month; thus, it was likely the proposed plan was not feasible. Finally, given the circumstances – the debtors' decision to seek to convert the case only after the trustee discovered that their schedules apparently seriously undervalued their property, and given the dramatic and speculative changes to their income and expenses, after the debtors had testified under oath they anticipated no such changes, the court stated it would be unable to conclude that the plan had been proposed in good faith. The hearing was continued to allow for further briefing.

On October 8, 2013, the debtors filed a response to the trustee's opposition, along with four declarations and several exhibits. Among the exhibits is a "CMA Report" printed from an Internet website on March 4, 2013, with handwritten notations and calculations and the figure 224,000 circled. The debtors testify this was a broker's price opinion they obtained prior to filing their petition; they add that they relied on that value, $224,000, when preparing their schedules. Despite the fact that the September 18, 2013 tentative ruling indicated the debtors appeared to have seriously undervalued the property in their schedules, they did not in the next three weeks obtain a declaration of the broker who allegedly printed out the CMA Report and added the handwritten notations, including the $224,000 estimate. Instead, the debtors themselves testified they had obtained this broker's price opinion from a "local licensed Real Estate Broker," whom they did not even identify by name.[1]

On October 8, 2013, the debtors filed as an additional exhibit a copy of a

formal appraisal their counsel had obtained showing the value of the property in "as is" condition as $275,000 as of March 14, 2013, the date the debtors filed their petition in this case. The "date of signature and report" is shown on the appraisal as August 8, 2013, two weeks before the debtors filed this motion. The debtors' counsel has testified his office received the appraisal on August 10, 2013. He states the appraisal "solidified our expectation that conversion was necessary to gain emotional relief from the stress that living under the threat of sale was causing the debtors." Declaration of Lucas Garcia, filed Oct. 8, 2013, at 2:6-8. Yet the debtors did not file a copy of the appraisal in support of the motion, did not amend their Schedule A to reflect the increased value determined by the appraisal, and did not mention the appraisal or its value conclusion in their motion.

Instead, on September 30, 2013, seven weeks after they obtained the appraisal and two weeks after the court issued its tentative ruling on the motion, the debtors filed amended Schedules A and C, changing their claim of exemption in the property from $14,233 (under Cal. Code Civ. Proc. § 703.140(b)(5)) to $100,000 (under Cal. Code Civ. Proc. § 704.730)). They did not change the value of the property on those amended schedules; instead, they continued to show the value as $224,000. They did not file anything indicating they had obtained an appraisal showing the value as $51,000 higher than the $224,000 they were reporting. As with the broker's price opinion, the $275,000 appraisal is hearsay; the court references it only as supporting the court's finding that the debtors were less than forthcoming about the likely value of the property when they filed their amended Schedules A and C on September 30, 2013.

The debtors have submitted testimony in their own and their two attorneys' declarations to counter the trustee's testimony that the debtors and/or their attorneys interfered in the trustee's attempts to market the property between May and August, when the debtors finally filed this motion. This boils down to a "he said, she said" contest that the court need not decide. The court does not, however, believe the trustee's realtors invented the difficulties described by the trustee out of whole cloth. In other words, the court is convinced the debtors and/or their attorneys in some fashion interfered with the trustee's efforts to market the property, and filed this motion only after they realized he intended to proceed with the marketing.

The debtors also refer in their response to tax refunds totaling $9,983 they claim to have received on or about August 1, 2013. The debtors delayed for two months filing an amended Schedule B to disclose the refunds, and even then, they listed the value of the refunds at only $2,600, with the notation that "the remaining $7,383 was applied to tax debt." The problem here is that the debtors' Schedule E lists their priority debt, including tax debt, as "None." Thus, the amended Schedule B provides further reason to question the debtors' credibility; the fact that they disposed of a $7,383 portion of a tax refund that was clearly an asset of the bankruptcy estate – an asset they were unable even to claim as exempt – further supports the conclusion that they have not acted in good faith in this case.

To support the increase in income they reported on their amended Schedule I – the unexplained $1,500 per month in "anticipated business income," debtor Just Willis has now testified, "I have been self employed for over 25 years total and feel that I can estimate accurately anticipated income based on current market indicators and can predict when my income will pick up and when it will slow down." Declaration of Just Willis, filed Oct. 8, 2013, at 2:8-10. He refers to his income in 2011 as $37,036 and in 2012 as $3,477, and concludes, "Based on this information,

new marketing and my increase in business between May and August of this year, I believe an increase of $1,500.00 per month of anticipated business income is accurate." Id. at 2:12-14.[2] Mr. Willis did not describe his new marketing strategies, and did not state what his income between May and August has been. His testimony is far too speculative to allow the court to conclude that his new estimate, $3,809 per month, is realistic on a year-round basis, when his income for the first two and one-half months of 2013, according to the debtors' statement of financial affairs, was just $1,375, or $550 per month.

On September 30, 2013, the debtors amended their Schedule C to claim as exempt $100,000 in value in their Colfax property, leaving non-exempt assets with a total value of $21,587 listed on their amended Schedule B. They do not appear to acknowledge that they would need to pay that amount to unsecured creditors through a chapter 13 plan, and as discussed in the court's earlier tentative ruling and reiterated above, the proposed plan, even based as it is on Mr. Willis' income as increased by $1,500 per month and on the debtors' reduced expenses, would generate only $8,688 for unsecured creditors. Thus, the plan would not meet the liquidation test and could not be confirmed, even if the court concluded it was feasible, which is doubtful.

Further, the debtors have failed to respond at all to the court's comment in its September 18, 2013 tentative ruling that their proposed plan incorrectly included their secured debt in the total of unsecured debt, with the result that the proposed dividend to unsecured creditors, 1%, was artificially low.

To sum up, the court finds that the debtors utilized their original and amended schedules in this case to present a picture that would suit their purpose at the time – initially, to support the conclusion that they had far too little disposable income to fund a chapter 13 plan (in fact, indicating their expenses exceeded their income by almost $3,000 per month) and later, after the trustee discovered that the value of their real property was likely far greater than the debtors' estimate, to present a much rosier picture – that they could combine their households, support two fewer dependents, and earn substantially more money, this time to serve their purpose of retaining the excess equity in the property the trustee had uncovered. At the same time, they obtained a formal appraisal of the property, which, when it returned a value substantially higher than the debtors had estimated, the debtors did not share with the court. They also failed to timely report their previously-undisclosed tax refunds, and disposed of 74% of those funds, which were clearly property of the estate, to their own advantage – allegedly to pay a tax debt they had also failed to disclose.[3]

As a general rule, which applies here, the more a debtor changes the information on his or her bankruptcy schedules after a creditor or trustee has unearthed conflicting information, such as previously undisclosed assets or values different from those asserted by the debtor, the less credibility the debtor will have with the court. The bankruptcy system can only operate properly when creditors, the trustee, and the court can rely on the debtor's sincerity, truthfulness, and completeness in preparing his or her schedules, which, in reality, form the quid pro quo for the fresh start the debtor is seeking. Here, the court has no trouble concluding that the debtors manipulated their schedules as needed to suit their own purposes rather than to fulfill their fundamental duty of "careful, complete, and accurate reporting in [their] schedules." See Hickman v. Hana (In re Hickman), 384 B.R. 832, 841 (9th Cir. BAP 2008), citing Diamond Z Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.), 371 B.R. 412, 417 (9th Cir. BAP 2007).

The Supreme Court's decision in Marrama, which recognized that a debtor does not have an absolute right to convert a chapter 7 case to chapter 13, expressly did not "articulate with precision what conduct qualifies as 'bad faith'" sufficient to permit a judge to deny a motion to convert. 549 U.S. at 375 n.11. However, the Court in that case did conclude that "the courts in this case correctly held that Marrama forfeited his right to proceed under Chapter 13." Id. at 371. The facts in this case are sufficiently similar to those in Marrama (where the debtor made misleading or inaccurate statements in his schedules about the value of his house and about his transfer of the house into a trust, which he later attempted to explain as a "scrivener's error," and failed to disclose his right to an $8,745 tax refund) that the court concludes that by their conduct in connection with their schedules, amended schedules, and chapter 13 plan filed in this case, the debtors have forfeited their right to have the case converted to chapter 13.

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

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1 The debtors' counsel offered, at the October 16, 2013 continued hearing, after the trustee's counsel objected that the broker's price opinion was hearsay, to obtain a declaration of the broker. By that time, however, the debtors had had ample opportunity to present admissible evidence in support of what was, after all, their own motion, and the court had set a briefing schedule at the September 18, 2013 hearing that did not provide for the filing of additional evidence after the deadlines fixed that day.

2 Actually, according to the debtors' 2012 tax return, filed as an exhibit by the trustee (DN 36, p. 21), Mr. Willis' "gross income," as that term is defined in the tax return (gross receipts minus cost of goods sold) was $66,171; the $3,477 figure appears on the tax return as his net profit. The figure he listed as his gross income on the statement of financial affairs filed in this case, $29,959, appears nowhere on the tax return, so far as the court can tell. If his gross income, again as defined in the tax return, was actually $66,171, then the debtors understated it substantially on their statement of financial affairs, which they have never corrected. In addition, the figure the debtors chose to project on their original Schedule I, $2,309 per month, works out to just $27,708 per year, much less than Mr. Willis actually grossed in 2012, according to the tax return.

3 They also amended their Schedule B twice to add other assets that had not been disclosed in the original – first a 1985 Chevrolet Corvette and then a 1990 Achilles 13-ft. inflatable dive boat and 30 hp motor, which the debtors valued at $2,847 and $2,500, respectively.

35.	13-32540-D-7 EJS-1	CARLOS/VANESSA MORALES	MOTION TO COMPEL ABANDONMENT 10-16-13 [9]

36.	12-29442-D-7 ADJ-8	MICHELE FISCHER	MOTION FOR COMPENSATION FOR ANTHONY D. JOHNSTON, TRUSTEE'S ATTORNEY(S), FEE: $14,400.00, EXPENSES: $592.86 10-8-13 [120]