UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

October 30, 2014 at 10:30 a.m.

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1. 11-91405-E-7 GILBERT ANAYA
CGA-2 Richard G. Hyppa

MOTION FOR CONTEMPT AND/OR MOTION FOR SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION
8-22-14 [55]

Tentative Ruling: The Motion for Contempt and Motion for Sanctions for Violation of Discharge Injunction has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice **Not** Provided. No Proof of Service has been filed in connection with the Motion and the court cannot determine if proper notice was given.

The Motion for Contempt and Motion for Sanctions for Violation of the Discharge Injunction has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Contempt and Motion for Sanctions for Violation of the Discharge Injunction is denied without prejudice.

Gilbert Anaya ("Debtor") filed the instant Motion for Contempt and Motion for Sanctions for Violation of the Discharge Injunction on August 22, 2014. Dckt. 55. However, the Debtor failed to provide a Proof of Service for the court to determine whether or not proper notice was given to necessary

parties.

Upon a brief review of the Motion, the Debtor states that a Points and Authorities, declarations and attachments will be forthcoming.

Fed. R. Bank. P. 9013 Minimum Pleading Requirements

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that: (1) Debtor received a discharge; (2) Caramba, Garcia, Goldstein, and Guerra received notice of discharge; (3) Caramba, Garcia, Goldstein, and Guerra have continued collection activities against the Debtor personally despite the discharge and notices, including obtaining a bench warrant for the Debtor's arrest; and (4) Caramba, Garcia, Goldstein, and Guerra continued collection efforts have caused and continued to cause Debtor to suffer harm and incur damages. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in

this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that

evidentiary support exists for such “postulations.”

Failure to Provide Evidence

In addition to the fundamental pleading defect, no evidence has been provided in support of the Motion. This court cannot, and will not, grant relief demanded by a party without regard to evidence. Local Bankruptcy Rule 9014-1(d) clearly requires that the motion, points and authorities, each declaration, and the exhibits (which may be one collective exhibit document) be filed as separate documents. See also, Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents. Local Bankruptcy Rule 9014-1(d)(4) clearly requires that evidence be filed with the motion, not submitted at some later date.

The court is very concerned about the alleged conduct of the named parties in the Motion in light of the alleged collection efforts including obtaining or allowing the issuance of a bench warrant for the arrest of the Debtor in the post-discharge attempted collection of a discharged debt. However, based merely on that tidbit the court cannot launch off issuing orders and bringing the full sanction power of this court on persons who are alleged to be in violation of the discharge injunction.

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 and Motion for Sanctions for Violation of the Discharge Injunction filed by Gilbert Anaya (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, proper service on the named parties not having been documented, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied, without prejudice.

2. 13-91016-E-7 MIGUEL/JOANN VALENCIA
THA-4 Peter Koulouris

MOTION TO SELL FREE AND CLEAR OF LIENS
10-8-14 [128]

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

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on October 8, 2014. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Chapter 7 Trustee ("Trustee") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

A. 2709 Torrey Pines Way, Modesto, California (APN No. 077-043-049)

Since the June 26, 2014 hearing where the court ordered the turnover of the Property to the Trustee (Dckt. 108), Miguel Calencia and Joann Valencia ("Debtors") attempted to obtain financing to pay the estate and retain the Property. Debtors were able to get assistance from family members and have provided the Trustee with $100,000.00 to purchase the non-exempt equity in the Property. Debtors and the Trustee engaged in discussions to draft an appropriate purchase price for the non-exempt asset. The following chart describes the results of those discussions:

Sale Price	**$360,000.00**
Cost of Sale (7%)	($25,000.00)
Consensual First Lien	($140,000.00)
Debtors' Claimed Exemption	($93,271.28)
Net Proceeds	**$101,528.72**

The Trustee states that based upon the estimated net proceeds after deduction of Debtors' claimed exemption, being cognizant of the IRS tax lien and "carve-out" Stipulation approved by the court (Dckt. 125), and considering Debtors' ability to amend their claimed homestead exemption and avoid the judicial liens pursuant to 11 U.S.C. § 522(f)(1), the Trustee exercised his best judgment and accepted Debtors' offer to purchase the non-exempt equity for $100,000.00.

The proposed purchaser of the Property are the Debtors and the terms of the sale are:

1. Sale Price for the non-exempt equity in the Property is $100,000.00.

2. Payment of $46,514.44 from the sale at $100,000.00 will go to the Internal Revenue Service pursuant to the "carve-out" agreement.

The Motion seeks to sell Property free and clear of the liens of Internal Revenue Service. Movant alleges that such a free and clear sale is proper based on the following:

A. The Trustee and the Internal Revenue Service have stipulated to a carve out agreement by which the Internal Revenue Service has agreed to accept a sum certain for its secured claim and allow the estate to recover a sum certain.

B. The court has approved the carve out agreement with the Internal Revenue Service.

C. That Thomas Rohall, counsel for the Internal Revenue Service, consents to the sale.

D. The consent is grounds to sell free and clear of the Internal Revenue Service liens pursuant to 11 U.S.C. § 363(f)(2).

The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

> "(f) The trustee [debtor in possession or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f).

For this Motion, the Trustee has established that, after the court granted the "carve-out" agreement, the Internal Revenue Service would be paid $46,517.44 from the sale and the remaining Internal Revenue Service claim of $30,715.87 will drop down to the general unsecured class, pursuant to the carve-out agreement.

With respect to a sale of the Property free and clear of the lien of the Internal Revenue Service, the Carve-Out Agreement (Exhibit A, Dckt. 115; Order approving, Dckt. 127) provides,

> A. The Unites States of America and its agency, the Internal Revenue Service, stipulate to a carve-out.
>
> B. The Internal Revenue Service "[***w]ill*** consent to the sale of the non-exempt equity in the Property" to the Debtors free and clear of its interests pursuant to 11 U.S.C. § 363(f)(2), and ***upon entry of such Order [approving the sale] the IRS will release its lien, if necessary, as to the Debtors' Property.***"

No other terms are provided in the Stipulation portion of the Agreement approved by the court. The Stipulation does not state the dollar amounts of the carve out, the secured claim, and the unsecured claim of the Internal Revenue Service in this case.

While the Trustee argues that the Internal Revenue Service has agreed to specific amounts for the carve out, secured claim, and the balance to be provided for as an unsecured claim, that has not been reduced to writing by the Internal Revenue Service. Further, the Stipulation states that the Internal Revenue Service "will release" ["will," indicating some future act required, not a completed act] its lien if the court approves the sale. Further that the Internal Revenue Service "will consent" to a future sale free and clear order

(for some unstated amount), not that the Internal Revenue Service "does consent" to a sale free and clear order for a specific amount. FN.1.

FN.1. This future release by the Internal Revenue Service is consistent with what the Trustee argued at the hearing on the motion to approve the stipulation.

> "As to this possible Motion to Sell, Trustee states that after conversation with Mr. Rohall on behalf of the IRS and the United States, the IRS is amenable to having a sale of the non-exempt equity to the Debtors free and clear of its interest pursuant to 11 U.S.C. § 363(f)(2), if necessary. Trustee argues that if the court approves the sale of the non-exempt equity in the Property to the Debtors, then the IRS will release its lien, if necessary, in exchange for a sum as stated in the Sale Motion."

Civil Minutes, Dckt. 125.

At the time of the hearing the court announced the proposed sale an requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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 Sell Property filed by Michael D. McGranahan, the Trustee, 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 Michael D. McGranahan, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Miguel Calencia and Joann Valencia or nominee ("Buyer"), the Property commonly known as 2709 Torrey Pines Way, Modesto, California (APN No. 077-043-049) ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $100,000.00, on the terms and conditions set forth in the Motion, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

3. The Internal Revenue Service shall release its lien pursuant to the terms of the Stipulation for Carve Out, (Exhibit A, Dckt. 115; Order approving, Dckt. 127), to allow the Trustee to complete the sale free and clear of the Internal Revenue Service liens, obtain the carve out from the Internal Revenue Service sales proceeds, and payment of the secured portion of the Internal Revenue Service secured claim as provided in said Stipulation.

4. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

3. 13-90323-E-12 FRANCISCO/ORIANA SILVA
JPJ-1 Peter L. Fear

AMENDED OBJECTION TO CLAIM OF CREDITORS ADJUSTMENT BUREAU, CLAIM NUMBER 24
9-3-14 [106]

Final Ruling: No appearance at the October 30, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed..

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on September 3, 2014. By the court's calculation, 57 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim number 24 of Creditors Adjustment Bureau is sustained.

Jan P. Johnson, the Trustee ("Objector") requests that the court disallow the claim of Creditors Adjustment Bureau ("Creditor"), Proof of Claim No. 24 ("Claim"), Official Registry of Claims in this case. FN.1. The Claim is asserted to be unsecured in the amount of $22,286.59. Objector asserts that the Claim has not been timely not timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is June 25, 2013. Notice of Bankruptcy Filing and Deadlines, Dckt. 6.

FN.1. After review of the Claim, the court notes that the Claim lists the Cargill Animal Nutrition, as the "creditor" and Creditors Adjustment Bureau, Inc. as assignee (which the court interprets to be "assignee for collection" – a collection agency). The totality of the Proof of Claim indicates that it is the collection agency, Creditors Adjustment Bureau, who is assignee for collection who holds the legal rights to be adjudicated in this Objection. The court proceeds as such, leaving it to the Trustee to determine if an order thereon is sufficient.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The deadline for filing a Proof of Claim in this matter was June 25, 2013. The Creditor's Proof of Claim was filed November 12, 2013. No order granting relief for an untimely filed proof of claim for Creditor has been issued by the court.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety as untimely. The Objection to the Proof of Claim is sustained.

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 Creditors Adjustment Bureau, Creditor, filed in this case by Jan P. Johnson, Trustee, 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 objection to Proof of Claim Number 24 of Creditors Adjustment Bureau is sustained and the claim is disallowed in its entirety.

4. 11-94224-E-11 EDWARD/ROSIE ESMAILI — MOTION TO DISMISS CASE
JWC-5 David C. Johnston — 9-22-14 [518]

Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on September 22, 2014. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion of Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss the Chapter 11 Bankruptcy Case is granted.

This Motion to Dismiss the Chapter 11 bankruptcy case of Edward Esmaili and Rosie Lopes Esmaili ("Debtors") has been filed by BBCN Bank ("Movant"). Movant asserts that the case should be dismissed based on the following grounds.

A. Debtors' plan confirmation was denied. Dckt. 472.

B. Debtors' failure to submit a new amended plan of reorganization and a new amended disclosure statement. Dckt. 473.

C. Debtors' inability to confirm a plan over the objection of Movant because Movant "controls" the general unsecured class with its unsecured portion of its claim and, if Movant makes a § 1111(b) election, any plan will not be feasible.

D. Debtors have repeatedly admitted to spending $130,000.00 in pre-petition accounts receivable without seeking this court's approval for the use of Movant's case collateral.

E. 11 U.S.C. § 1112(b)(2) provides that it is Debtors' burden to demonstrate that "there is a reasonable likelihood that a plan will be confirmed." Debtors have not carried that burden, and cannot do so.

F. Debtors have utilized estate assets and revenue without any budget and without supervision.

DEBTORS' OPPOSITION

Debtors filed opposition to the instant Motion on October 21, 2014. Dckt. 530. The Debtors argue that the instant Motion should be denied on the following grounds:

1. The Motion fails to comply with Local Rule 9014-1(d)(5) which requires that a motion shall be accompanied by evidence establishing the factual allegation and demonstrating that the movant is entitled to the relief requested.

2. The only "evidence" filed in support of the Motion appears to be a Request for Judicial Notice (Dckt. 520) which the Debtors object to on the grounds that it requests the court to take notice of Movant's Motion for Allowance and Payment of Administrative Claims. Debtors claim that this motion was denied.

3. Under Federal Rule of Evidence 201, the Debtors argue that the court's findings in a prior motion may be judicially noticed, but there were no findings in connection with the instant Motion and the earlier motion was denied.

4. Fed. R. Evid. 201(b) requires that "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to source whose accuracy cannot be questions." Neither requirement of Rule 201(b) is met in this case.

5. Fed. R. Evid. 201(c) provides that "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." The Debtors request such an opportunity.

MOVANT'S REPLY

Movant filed a reply to Debtors' opposition on October 23, 2014. Dckt. 532. In the reply, the Movant highlights that the only opposition given by the Debtors concerns Movant's reference to court records and pleadings in the case. The exact documents being referenced are the court's Minute Order, Debtors' Status Report, and Movant's Motion for Administrative Expenses and supportive documents (Dckt. 262-267). The Movant argues that the latter is attached because it contains deposition testimony of Debtor Edward Esmaili conceding that he spent $130,000.00 of Movant's pre-petition collateral, post-petition. The Movant argues that merely because the motion was denied without prejudice does not mean that the court cannot consider sword testimony of the Debtor previously filed. The Movant then reiterate a contention in its initial Motion:

> The matter has been pending without any progress. After the Court denied the Debtors' proposed Chapter 11 Plan on May 27, 2014 (Civil Minute Order, Docket No. 472), Debtors failed to submit a new amended plan or disclosure statement, and no other action whatsoever (other than bare monthly operating statements) to administer the case in reorganization. The Debtors have completely and utterly failed to confirm a plan.

Dckt. 518, pg. 2, lines 6-10.

RULING

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson),* 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

Fed. R. Evid. 201(b) allows the court to "judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known wihtin the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

A bankruptcy court may consider evidence presented by the parties at prior hearings. *In re Acequia*, Inc., 787 F.2d 1352, 1359 (9th Cir. 1986); *see e.g. In re Graco, Inc.*, 364 F.2d 257, 260 (2d Cir. 1966). The Ninth Circuit stated in *In re Acequia*:

> To require a bankruptcy court to ignore prior evidence would impose a harsh and unnecessary administrative burden. We find nothing in either the language or logic of the Code requiring the court or parties to "grind the same corn a second time'". . . and we will not read into the Code the requirement of redundancy.

In re Acequia, Inc., 787 F.2d 1352, 1359 (9th Cir. 1986)(citing *Aloe Creme Labs, Inc. v. Francine Co.*, 425 F.2d 1295, 1296)(5th Cir. 1970).

The court begins its analysis concerning the "judicial notice" contention between the parties. The court finds that the issue is not whether the court can or cannot judicially notice prior evidence and rulings when determining a ruling on a motion. As stated by the Ninth Circuit it is well within the court's authority to consider evidence presented by the parties at prior hearings. In *In re Acequia, Inc.*, the bankruptcy court stated that it "would consider the prior testimony in ruling on confirmation, and 'give it whatever weight I think it is worth.'" *In re Acequia, Inc*., 787 F.2d 1352, 1359 (9th Cir. 1986). As the Ninth Circuit found, this type of consideration is not an issue of judicial notice and is within the court's authority to review prior evidence in the case when determining the outcome of a motion currently in front of the court.

Therefore, because the issue is not one of judicial notice and the court may review prior rulings and testimony without the need of judicially noticing them, the court overrules the Debtors objections.

As to the question of dismissal, cause does exist to dismiss the case. The case was filed on December 12, 2011, nearly three years ago. To date, there has not been a plan confirmed. Under 11 U.S.C. § 1112(b)(4)(J), "cause" includes "failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court." The Debtors have not been able to file a confirmed plan. As stated by the Movant, 11 U.S.C. § 1112(b)(2) provides defenses the Debtors may use to prevent the court from converting or dismissing the case if:

> the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that
>
> (A) there is a reasonable likelihood that a plan will be confirmed within the time frames established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and
>
> (B) the ground for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)
>
> (I) for which there exists a reasonable justification for the act or omission; and
> (ii) that will be cured within a reasonable

period of time fixed by the court.

Here, the Debtors did not attempt to provide any justification on why there has not been a confirmable plan or indicating to the court that a confirmable plan is pending. Instead, the Debtors mistakenly base their abjections on judicial notice, which, as explained *supra*, is not an issue.

The failure to confirm a plan nearly three years into the case is cause for dismissal. The Debtors have not pleaded any unusual circumstances establishing that dismissing the case is not in the best interests of the creditors nor provides the court with any information that would lead the court to conclude that there is a reasonable likelihood that a plan will be shortly confirmed.

This bankruptcy case was filed on December 12, 2011. The Debtors in Possession, in breach of their fiduciary duties to the estate, have used cast collateral without authorization. In reviewing the Monthly Operating Report for September 2014, it shows that $11,195,838 of monies have been received by the estate, ($11,059,777) in disbursements have been made, and the estate has a positive operating cash flow of $136,061. While that number may appear significant, it is 1.2% of the gross revenues for a period of almost three years – which averages 0.4% per year positive cash flow.

The Debtors in Possession appear to fail to accept that they have to make peace with BBCN if they want to confirm a plan. They have not been able to overcome the no vote of BBCN in the confirmation process. Though Debtors in Possession may believe that it is unfair that BBCN is allowed to vote its claim and assert the rights Congress granted it under the Bankruptcy Code – BBCN may enforce those rights. See Civil Minutes, Dckt. 470, denial of Debtors in Possession Motion to Confirm Chapter 11 Plan.

BBCN seeks to have the Chapter 11 case dismissed, not converted to one under Chapter 7. Movant asserts that a Chapter 7 liquidation would be of less benefit to creditors than a sale of the estate's business as a going concern. How dismissal would allow that to occur is not explained. (Though the court can envision several methods by which creditors could achieve such a result, both inside and outside of a bankruptcy case.)

The court determines whether dismissal is appropriate based upon the "best interest of creditors and the estate." *In re Staff Inv. Co.*, 146 B.R. 256 (Bankr. E.D. Cal. 1992). Here, the court denied confirmation of an amended Plan on May 22, 2014. Since then, the Debtors have not provided any further amended plans for confirmation. It does not appear that there are assets which a Chapter 7 Trustee could readily liquidate. If someone were to take over running this business, a fiduciary other than a Chapter 7 Trustee would appear to be better suited for that obligation.

Cause has been shown for relief pursuant to 11 U.S.C. § 1112(b). The motion is granted and the case is dismissed.

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 the Chapter 11 case filed by BBCN Bank, creditor, 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 granted and the case is dismissed.

5. 11-94427-E-7 DFH-4 | **BIEN BANH AND UT QUACH** | **Drew Henwood** | **MOTION TO AVOID LIEN OF TD AUTO FINANCE, LLC** | **9-15-14 [44]**

Tentative Ruling: The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 15, 2014. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of TD Auto Finance, LLC, as successor-in-interest to Mercedes Benz Financial and/or DaimlerChrysler Financial Services America LLC against property of Bien Banh and Ut Quach ("Debtor") commonly known as 3013 Poppypatch Drive, Modesto, California (the "Property").

A judgment was entered against Debtor in favor of DaimlerChrysler Financial Services America LLC in the amount of $24,721.50. An abstract of judgment was recorded with the Stanislaus County on November 13, 2008, under DOC-2008-0121288-00, which encumbers the Property. It was also recorded with the Alameda County Recorder's Office on January 7, 2009, under 2009003168.

However, the court is unable to determine who, in fact, TD Auto Finance, LLC, as successor-in-interest to Mercedes Benz Financial and/or DaimlerChrysler Financial Services America LLC is and whether it actually is the new holder of the judicial lien. With no Proof of Claim filed, the court looks at the petition and the motion to determine the actual holder of the lien. The Debtor does not provide a copy of any transfer of interest to TD Auto Finance, LLC from DaimlerChrysler Financial Services America LLC. In fact, the Debtor in their Motion state TD Auto Finance, LLC, as successor-in-interest to Mercedes Benz Financial and/or DaimlerChrysler Financial Services America LLC," appearing to ask the court to guess which entity was the original holder of the lien and take the Debtors word that TD Auto Finance, LLC now holds the judicial lien. The court will not purport to alter the rights of a party in interest when it is not clearly shown that such named person is the holder of the interests to be altered.

The court will not begin issuing orders when the actual creditor is not readily identifiable. While Debtor names TD Auto Finance, LLC, the court cannot identify how and if the judgment has been assigned to that entity.

Though the Motion alleges that TD Auto Finance, LLC is the successor to the "and/or" entities named in the Motion, no evidence is provided that TD Auto Finance, LLC is the current judgment creditor. Exhibit 8, Dckt. 54, is a copy of the Abstract of Judgment which is the lien to be avoided. That Abstract of Judgment identifies the judgment creditor to be DaimlerChrysler Financial Services Americas, LLC. If the judgment has been assigned, California law provides for an assignment of the judgment to be filed in the state court and served on the judgment debtor. Cal. C.C.P. § 673, Assignee of Record; California Debt Collection and Enforcement of Judgments, Matthew Bender, § 9.08; Enforcing Judgments and Debts, The Rutter Group, ¶¶ 6:1539 et seq.

Additionally, the evidence of value of the property upon which the motion is based is provided in the Debtor's declaration. While an owner of property may provide his or her opinion as to value, it must be that owner's opinion. *See* Fed. R. Evid. 701; see also *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). But such testimony must be that of the owner, based on his or her personal knowledge. Fed. R. Evid. 601, 602, and 701. Here, Debtor provides not his opinion of value, but merely states that a website listed a statement of value, and that the out of court statement from the internet is the "evidence" of value. An owner's opinion of value is not merely parroting the statement of another to wash hearsay statements into "personal knowledge testimony." Fed. R. Evid. 801, 802. When filing a new motion, Debtor may provide his or her personal knowledge testimony, rather than merely pushing a printout from the internet in front of the court. FN.1.

FN.1. The Debtor may wonder what difference it makes whether he states his opinion of value, personally, which may be based on his knowledge of the neighborhood and internet research, and his merely providing the court with a

copy of what a third party thinks the property is worth, an opinion upon which the Debtor relies for providing his testimony under penalty of perjury. As Debtor's counsel knows, that is the difference from providing actual personal knowledge testimony, whatever the basis (which goes to credibility_), and hearsay which the declarant may, or may not, know to be true. When the Debtor gives his personal testimony, then he is responsible if it is falsely given. (Such as the Debtor saying the property is worth $100 but has in hand an offer to purchase for $100,000.) The declarant cannot ask the court to rely on some statement of value, which nobody makes under penalty of perjury, as credible evidence of value.

In light of the evidence identifying another person as the judgment creditor and the lack of personal knowledge testimony as to value, the Motion is denied without prejudice.

An order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

6. 14-90931-E-7 JEFFREY TRUESDAIL
BSH-1 Brian S. Haddix

CONTINUED MOTION TO COMPEL ABANDONMENT
8-28-14 [17]

Final Ruling: No appearance at the October 30, 2014 hearing is required.

Jeff Truesdail ("Debtor") filed the instant Motion to Compel Abandonment on August 28, 2014. At the October 2, 2014 hearing, the court granted the motion as to all items identified in the motion except for the potential tax refunds for the 2012 and 2013 tax years. As to the mineral rights in Van Buren Count, Arkansas and Cleburn County, Arkansas properties, the court continued the hearing to 10:30 a.m. on October 30, 2014.

On October 16, 2014, the Chapter 7 Trustee and Debtor's counsel filed a stipulation stating that the trustee represented he has investigated the mineral rights and marketed them for sale. The Trustee represents that he received an offer to purchase the mineral rights for $40,000.00 on October 15, 2014. The Trustee has not entered into a purchase and sale agreement yet and continues to explore additional marketing of the mineral rights to try and obtain a higher price or counteroffer.

The Chapter 7 Trustee and Debtor's counsel having filed a stipulation for the Withdrawal of the Motion to Compel Abandonment, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041 the Motion to Compel Abandonment was dismissed without prejudice, and **the matter is removed from the calendar.**

7. 13-91336-E-7 THOMAS/TONYA OLSON
HCS-2 Scott D. Mitchell

MOTION FOR COMPENSATION FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY
9-29-14 [48]

Final Ruling: No appearance at the October 30, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 29, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is continued to 10:30 a.m. on November 20, 2014.

Herum\Crabtree\Suntag, the Attorney ("Applicant") for Eric Nims, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

On October 13, 2014, Applicant filed a request for continuance on the instant Motion. Dckt. 53. On October 14, 2014, the court issued an order granting the request and continued the hearing on the Motion to 10:30 a.m. on November 20, 2014. Dckt. 54.

8. 11-92149-E-7 SHERRI MUNSON
SSA-3 David Foyil

MOTION FOR COMPENSATION FOR STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY
9-16-14 [39]

Final Ruling: No appearance at the October 30, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on September 16, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Steven Altman, the Attorney ("Applicant") for Irma Edmonds the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 3, 2012 through October 30, 2014. The order of the court approving employment of Applicant was entered on May 15, 2012, Dckt. 23.

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

General Case Administration: Applicant spent 0.7 hours in this category.

1. Applicant assisted Client with reviewing the case file.

2. Revising the supplemental information letter to Debtor's Counsel concerning transfers to Worldwide Patent Assistance

3. Reviewed agent for service or process for Worldwide Patent Assistance in California

Efforts to Assess and Recover Property of the Estate: Applicant spent 1.8 hours in this category.

1. Reviewed file and Trustee's email concerning possible complaints.

2. Reviewed 341 hearing tape and researched into statutory claims and related memo to file.

3. Applicant attended conferred with the Trustee relative to 341 notes and claims in favor of the estate.

Adversary Proceedings: Applicant spent 12.1 hours in this category.

1. Applicant assisted the Trustee in successful resolution of Edmonds v. Foster, Adv. No. 12-09016.

2. Applicant assisted the Trustee in adversary litigation of Edmonds v. Foster, Adv. No. 12-09017, by preparing Status Conference hearing statements and attending same.

Significant Motions and Other Contested Matters: Applicant spent 4.6 hours in this category.

1. Applicant prepared initial application appointing firm as general bankruptcy counsel to bankruptcy estate.

2. Applicant prepared initial application appointing firm as general bankruptcy counsel to Trustee

Applicant requests fees and reimbursement of expenses in the amount of $1,000.00 which will be reduced fees and costs inclusive and a discount from total fees and costs of $5,211.23.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or
(ii) services that were not--
(I) reasonably likely to benefit the debtor's estate;
(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including two litigations resulting in the sum of $8,959.65. The estate has $3,246.34 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

The fees request are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Steven Altman (39 years)	19.2	$250.00	$4,800.00
Total Fees For Period of Application			$4,800.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $1,000.00 pursuant to 11 U.S.C. § 331, subject to final review pursuant to 11 U.S.C. § 330, and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $411.23 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying	$0.10	$60.90
Court Fee	$293.00	$293.00
Postage		$57.33
Total Costs Requested in Application		$411.23

The Applicant requests a discounted amount for the First and Final Costs in the amount of $1,000.00 subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees and Expenses $ 1,000.00

pursuant to this Application of $1,000.00 as final fees pursuant to 11 U.S.C. § 330 in this case.

The court shall issue an 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 Allowance of Fees and Expenses filed by Steven Altman, ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Steven Altman is allowed the following fees and expenses as a professional of the Estate:
>
> Steven Altman, Professional Employed by Trustee
>
> Fees and expenses in the amount of $ 1,000.00,
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

9. 11-92055-E-7 RACHEL EVERETT
TOG-5 Thomas O. Gillis

MOTION TO AVOID LIEN OF CHASE BANK USA, N.A.
9-20-14 [36]

Tentative Ruling: The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, JPMorgan Chase Bank, N.A., Chase Bank USA, N.A., and Office of the United States Trustee on September 22, 2014. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Chase Bank USA, N.A. ("Creditor") against property of Rachel Everett ("Debtor") commonly known as 1105 Pipit Drive, Patterson, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $18,868.63. An abstract of judgment was recorded with Stanislaus County on May 10, 2011, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $140,000.00 as of the date of the petition. The unavoidable consensual liens total $160,643.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $24,485.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Chase Bank USA, N.A., California Superior Court for Stanislaus County Recorder County Case No. 648106, recorded on May 10, 2011, Document No. 2011-0039810-00 with the Stanislaus County Recorder, against the real property commonly known as 1105 Pipit Drive, Patterson, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

10. 14-91057-E-7 JENNIFER SIMAS
SDM-1 Scott D. Mitchell

MOTION TO AVOID LIEN OF CAP ONE BANK (USA), N.A.
9-12-14 [12]

Tentative Ruling: The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Capital One Bank (USA), N.A., and Office of the United States Trustee on September 12, 2014. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Capital One Bank (USA), N.A. ("Creditor") against property of Jennifer Simas ("Debtor"). Currently and as of the date Debtor filed her petition, Debtor owns no real property interests. Debtor seeks to avoid this lien because although she has no real property interests in Stanislaus County currently, the operation of California Code of Civil Procedure § 693.340(b) will allow this lien, if not avoided, to attach to property Debtor acquires in the future after a discharge has been granted in this case.

A judgment was entered against Debtor in favor of Creditor in the amount of $2,790.39. An abstract of judgment was recorded with Stanislaus County on March 28, 2013, which encumbers the any future acquired property.

The Debtor argues that, while under 11 U.S.C. § 522(f)(1) the Debtor could not have avoided the Creditor's judicial lien because there were no real property interests to which the judgment lien could have attached, the court should allow for the avoidance under 11 U.S.C. § 105(a).

At this point, the court is compelled to note that the "hail mary" play of 11 U.S.C. § 105(a) all but mandates that the Motion be denied. 11 U.S.C. § 522(f) specifies the grounds by which a lien may be avoid. The United States Supreme Court recently made it clear that 11 U.S.C. § 105(a) is not a basis for a bankruptcy judge ordering whatever would be appropriate if Congress had drafted statutes differently. Law v. Segal, ___ U.S. ___, 132 S. Ct. 1188, 188 L. Ed. 2d 146, 2014 U.S. LEXIS 1784 (2014). This is consistent with the well established law in the Ninth Circuit that the powers exercised under 11 U.S.C. § 105(a) are to carry out the Bankruptcy Code, not write additional provisions to the Bankruptcy Code.

The Bankruptcy Appellate Panel of the Ninth Circuit in *In re Pederson* found that the statutory language of California Code of Civil Procedure § 693.340(b) provides "that the lien attaches to after-acquired property 'at the time it is acquired' can only mean that the lien attaches simultaneously with the debtor's acquisition of the property." 230 B.R. 158, 163 (B.A.P. 9th Cir. 1999). This approach has been termed the "temporal approach." In *In re Pederson*, the court found that because the debtor did not have property for which the lien to attach to, the debtor never held an interest and, therefore, never had a right to claim an exemption before the lien attached. Id. The B.A.P. concluded by explaining "the purpose of § 522(f) is to protect a debtor's exemptions" and since there were no exemptions for the debtor to claim on any property in which the lien attached to, the lien was not avoidable. Id. (citing *Cowan v. Cowan* (*In re Scott*), 12 B.R. 613, 615 (Bankr.W.D. Okla. 1981)).

Further, the discharge obtained by a Debtor,

A. Voids any judgment obtained, to the extent that it is with respect to any debt discharged. 11 U.S.C. § 524(a)(1);

B. Is an injunction against the employment of any process, or an act to collect or enforce any discharged debt as a personal liability of the debtor. 11 U.S.C. § 524(a)(2); and

C. Is an injunction against any enforcement of a discharge debt against property of the debtor acquired after the commencement of the bankruptcy case. 11 U.S.C. § 524(a)(3).

A plain reading of the Bankruptcy Code establishes as a matter of federal law (the supreme law of the land) that a judgment lien for a discharged judgment cannot attach to any post-petition acquired property.

Here, the facts of *In re Pederson* are nearly identical to that in the instant case. The court is not willing to circumvent the requirements of § 522(f) through § 105(a) and allow the Debtor to avoid the lien. The language of § 522(f) is clear that "the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent such a lien impairs an exemption..." 11 U.S.C. § 522(f)(1). Here, the Debtor has no interest in property and no exemptions that the lien impairs.

The case cited by the Debtor, *In re Thomas*, 102 B.R. 199 (Bankr. E.D. Cal. 1989), actually proves Debtor's theory is wrong. The court in *Thomas* correctly applied the law and concluded that no judgment lien could attach to the post-petition acquire property of the debtors in that case. That is exactly what this court determines in connection with the present motion. The Debtor seeks to have a judgment lien, which cannot be enforced against post-petition acquired property, declared void in the abstract.

This motion causes the court concern that, in light of the plain language of the Bankruptcy Code and case law, there may actually be property in which the Debtor has a pre-petition interest to which the lien has attached. Debtor does not list any interests in real property on Schedule A. Dckt. 1. If such property exists, then Debtor's statement under penalty of perjury on Schedule A is false.

Therefore, because the Debtor has no property in which the lien is attached to nor impairing Debtor's exemptions, the court denies the Motion.

An order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

11. 14-91157-E-7 DAVID GLASS **MOTION TO AVOID LIEN OF CAVALRY SPV I, LLC**
MTM-1 Michael T. McEnroe **9-24-14 [16]**

Final Ruling: No appearance at the October 30, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Cavalry SPV I, LLC, Cavalry Portfolio Services, LLC, parties requesting special notice, and Office of the United States Trustee on September 23, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Cavalry SPV I, LLC ("Creditor") against property of David Glass ("Debtor") commonly known as 1764 Stanislaus Drive, Arnold, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $12,516.39. An abstract of judgment was recorded with Calaveras County on August 27, 2013, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $159,000.00 as of the date of the petition. The unavoidable consensual liens total $94,000.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.703(a)(1) in the amount of $65,000.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real

property and its fixing is avoided in its entirety subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Cavalry SPV I, LLC, California Superior Court for Calaveras County Case No. 12CF10492, recorded on August 27, 2013, Document No. 2013 12211 with the Calaveras County Recorder, against the real property commonly known as 1764 Stanislaus Drive, Arnold, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

12. 14-91157-E-7 DAVID GLASS **MOTION TO COMPEL ABANDONMENT**
MTM-2 Michael T. McEnroe **10-15-14 [23]**

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

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by David Palmer Glass ("Debtor") requests the court to order the Trustee to abandon property commonly known as 1764 Stanislaus Drive, Arnold, California (the "Property"). This Property is encumbered by the liens of Wells Fargo Home Loans, securing claims of $98,000.00. Cavalry SPVI, LLC has a judgment lien against the Property in the amount of $12,516.39 which was recorded on April 12, 2013. However, the Debtor filed a Motion to Avoid the Lien which was granted on October 30, 2014. The Declaration of David P. Glass has been filed in support of the motion and values the Property to be $159,000.00.

No opposition has been filed in connection with this Motion.

The court finds that the debt secured by the Property exceeds the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by David Palmer Glass ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. 1764 Stanislaus Drive, Arnold, California
>
> and listed on Schedule A by Debtor is abandoned to David Palmer Glass by this order, with no further act of the Trustee required.

13. 13-91459-E-11 LIMA BROTHERS DAIRY
KDG-12 Hagop T. Bedoyan

MOTION TO APPROVE STIPULATION TO VALUE COLLATERAL OF STANISLAUS FARM SUPPLY CO. INC.
10-2-14 [351]

Final Ruling: No appearance at the October 30, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the 20 largest unsecured claims and parties requesting special notice, on October 2, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Approve Stipulation to Value has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Approve Stipulation to Value Collateral of Stanislaus Farm Supply Co. Inc. Under 11 U.S.C. § 522(a)(1) is granted.

The Motion to Approve Stipulation to Value Collateral of Stanislaus Farm Supply Co. Inc. Under 11 U.S.C. § 522(a)(1) filed by Lima Brothers Dairy ("Debtor-in-Possession") on October 2, 2014. Debtor-in-Possession seeks the court to approve a stipulation to value the secured claim of Stanislaus Farm Supply Co. Inc. ("Creditor").

MOTION

In support, the Debtor-in-Possession states that Creditor provided goods and services to Debtor-in-Possession prior to the petition date. Creditor filed a security interest that is secured by crops, milk and milk products, and base and quota under U.C.C. Article 1 on August 21, 2012 ("Creditor's Lien")

Creditor's Lien is junior to American AgCredit PCA lien, which is held against the livestock, farm products, equipment, crops, and milk proceeds owned

by Debtor-in-Possession dated April 29, 1997 with continuations dated December 27, 2001, November 8, 2006, and November 3, 2011. The American AgCredit PCA lien is valued as $2,561,128.14 and filed as Proof of Claim No. 5. Debtor-in-Possession estimates that as of the effective date of the Plan, the claim will be $1,534,745.00.

Creditor's lien is also junior to a Dairy Supply Lien that Cargill, Inc. Holds for $823,221.45. This is filed as Proof of Claim No. 12.

Creditor filed Proof of Claim No. 3 in the amount of $263,951.87 on August 29, 2013. Debtor-in-Possession states that Creditor did not provide goods during the 20 days before the petition date so it is not entitled to administrative priority under 11 U.S.C. §§ 503(b)(9) and 507(a)(2).

Debtor-in-Possession argues that the market value of its growing and harvested crops is $350,000.00, which secured liens held by American AgCredit PCA lien and Creditor. The Debtor-in-Possession provides the following table to represent the amount available to secure repayment to Creditor after subtracting American AgCredit PCA senior lien:

Market Value of Growing and Harvested Crops	$350,000.00
American AgCredit PCA lien	($1,534,745.00)
Total Available to secured repayment to Creditor	($1,184,745.00)

Debtor-in-Possession also alleges that the market value of the account receivable and milk is about $459,395.00. The Debtor-in-Possession provides the following table to represent the amount available to secure repayment to Creditor after subtracting American AgCredit PCA senior lien and Cargil, Inc.'s senior lien:

Market Value of Account Receivable and Milk	$459,395.00
Milk Quota	$0.00
American AgCredit PCA lien (net of crops)	($1,184,745.00)
Cargil, Inc.'s Lien	($823,221.45)
Total Available to secured repayment to Creditor	($1,548,571.45)

Based on these figures, Debtor-in-Possession asserts that the value of Creditor's collateral is $0.00 in light of the two senior secured liens.

Debtor-in-Possession and Creditor have stipulated that Proof of Claim No. 3 held by Creditor shall be changed to secured to unsecured.

STIPULATION

The Stipulation, attached as Exhibit E, states the following terms as being stipulated and agreed:

1. Debtor-in-Possession and Creditor agree that the value of Creditor's interest in the Collateral, defined as crops, milk and milk products, base and quota, is $0.00;

2. Creditor shall be allowed a secured claim in the amount of $0.00;

3. Creditor shall be allowed a general unsecured claim in the amount of $263,951.87;

4. Creditor shall retain its security interest with the same priority and enforceability that existed at the time of the filing of Debtor-in-Possession's chapter 11 case until such time as the court enters an order confirming a Plan of Reorganization in Debtor-in-Possession's case;

5. The parties request that the court enter an Order adopting this Stipulation.

Dckt. 355, Exhibit E.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North* (*In re Walsh Construction*), 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). The Trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate. *In re Walsh Construction*, 669 F.2d at 1328. The reasonableness of a compromise is determined by the particular circumstances of each case. *Id.*

Here, grounds exist to approve the Stipulation as it appears necessary to maximize the estate's interest by providing the Creditor with a general unsecured claim in the amount of $263,951.87 and valuing the Collateral at $0.00.

The court finds the terms agreed to by the parties reasonable and that the business judgment in determining that the Secured Claim of Stanislaus Farm Supply Co., Inc. has a value of $0.00, with the balance to be provided for as a general unsecured claim in any plan of reorganization in this case.

However, the Stipulation purports to go further and adjudicate a series of other factual issues and findings which have not been presented to the court. While these are facts that the Debtor in Possession and this Creditor may have used in coming to the conclusions that the secured claim has a value of $0.00, they go beyond the valuation of the secured claim. The stipulation

purports to have the court make factual determination as to liens and values which may well effect third-parties who are not parties to the Stipulation

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve a Stipulation For Valuation of Secured Claim 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 granted and the Secured Claim of Stanislaus Farm Supply Co., Inc. (“Creditor”) in this case, as set forth in Proof of Claim No. 3 has a value of $0.00, with the balance of the claim to be provided for as a general unsecured claim in the bankruptcy plan in this case. The value of the collateral securing the claim is encumbered by senior liens which exhaust the value of the collateral.

14. 13-91459-E-11 LIMA BROTHERS DAIRY
KDG-4 Hagop T. Bedoyan

CONTINUED MOTION TO USE CASH COLLATERAL
1-17-14 [119]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 17, 2014. By the court's calculation, 13 days' notice was provided.

Tentative Ruling: The Motion to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

The court's decision is to grant the Motion to Use Cash Collateral and to set a date for further hearing on a supplemental motion, if any, for further used of cash collateral.

Lima Brothers Dairy, the Debtor-in-Possession, seeks an order authorizing the use of cash collateral, in the form of cash on hand, money on deposit, milk and cull proceeds, and the feed, derived from its business operations to fund its ongoing operations on an emergency basis. Debtor-in-Possession believes the use of these funds is necessary to preserve its operations as a going concern and to insure the 2,200 animals, including milk cows, dry cows, heifers, calves and bulls, are fed.

Debtor-in-Possession seeks the use of cash collateral through July 14, 2014. This court previously authorized the use of cash collateral through and including April 14, 2014. Civil Minutes, Dckt. No. 154.

Based on the loan and security documents, Debtor-in-Possession believes that AgCredit has first priority liens against the Cash Collateral. Based on loan statements and the representations of AgCredit, Debtor believes that the debt owed to AgCredit is about $1.8 million on its Cow Loan and $0.00 on its Feed Loan. On the petition date, AgCredit was owed about $2.5 million on the two loans combined, but Debtor-in-Possession sold some livestock and pool quota and paid AgCredit pursuant to stay-relief orders entered on October 16, 2013, and November 5, 2013, in addition to continuous monthly payments throughout the case.

Debtor-in-Possession states the following creditors hold security interests junior to AgCredit's interest against the Cash Collateral: (1) Stanislaus Farm Supply (UCC-1 filed August 29, 2012), and (2) Cargill, Inc. (UCC-1 filed October 15, 2012).

Debtor-in-Possession had previously stated that it has been using cash collateral pursuant to two very narrow cash collateral stipulations dated September 11, 2013, and December 2, 2013. Debtor seeks broader use of cash collateral under the motion as well as additional protections to AgCredit. Debtor has requested that AgCredit continue to consent to the use of cash collateral under a further stipulation. Debtor is hopeful that such a stipulation will be presented to the Court in conjunction with this motion.

The court notes that on March 4, 2014, Debtor-in-Possession and AGCredit filed a Fourth Stipulation to continue the hearing on the Motion for Relief from the Automatic Stay filed by American AgCredit. Dckt. No. 163. The Stipulation provides that the hearing on the Motion for Relief from the Automatic Stay, WJS-1, shall be continued to April 10, 2014, at 10:00 am. The parties stated in the Stipulation that the continuance of the hearing will allow Debtor-in-Possession and AgCredit time to analyze Debtor-in-Possession's long-term budget, and make necessary adjustments and continue negotiations regarding the terms of repayment in a plan of reorganization. Dckt. No. 163 at 2.

In its Motion to Use Cash Collateral, Debtor-in-Possession states it will provide AgCredit with adequate protection, including:

> a. caring for and maintaining the secured parities' collateral,
>
> b. granting AgCredit a replacement lien on Debtor's post-petition property of the same type and nature as against Debtor's pre-petition property to the extent the use of cash collateral results in a decrease in value of AgCredit's interest in its collateral,
>
> c. making bi-weekly adequate-protection payments to AgCredit in the amount of about $35,000.00 (increasing to $55,000.00 in February 2014 and thereafter) as provided in the Budget;
>
> d. providing monthly financial reports to AgCredit, and allowing reasonable inspection of its operations; and
>
> f. harvesting crops in the field and converting it into usable silage, thereby substantially increasing the feed collateral value.

Debtor-in-Possession states it will provide junior secured creditors Stanislaus Farm Supply and Cargill, Inc. with adequate protection by granting replacement liens on milk proceeds and milk products generated by Debtor-in-Possession post-petition of the same type and nature as existed when Debtor filed its case to the extent the use of cash collateral results in a decrease in value of their interest in their collateral.

Conditional Objection by Creditor

Creditor Cargill, Incorporated, Cargill Animal Nutrition ("Cargill) filed a "conditional opposition" to the Motion (Dckt. No. 142), stating that no provision had made for payments to Cargill in the Motion. Cargill argued that the dairy budget attached to the Motion to Use Cash Collateral did not

include the payment currently made to Cargill pursuant to an Irrevocable Milk Proceeds Assignment, which was executed in favor of Cargill by Debtor-in-Possession. The assignment, according to Cargill, provided for two payments per month, totaling a note payment of $5,609.63. ¶ 4, Opposition of Cargill, Dckt. No. 142.

The court was informed, that Cargill has since been paid through its milk assignment, thus resolving Cargill's conditional opposition. Civil Minutes, Dckt. No. 154.

Debtor-in-Possession's budget for the authorization of use of cash collateral until July, 2014, as included below, explicitly states that "[l]oan payments include Cow loan & two mortgages to ACC totaling $61,186, and Cargill at $5,600 per month." Dckt. No. 186.

PREVIOUS PLEADINGS FILED BY DEBTOR IN POSSESSION

Debtor-in-Possession filed the original Motion to Use Cash Collateral on January 17, 2014. The court granted interim and continued use of Cash Collateral through April 13, 2014, pursuant to Civil Minute Orders entered on February 5, 2014, and February 20, 2014. The court continued the hearing on the Motion to March 27, 2014 at 10:30 am. The court directed Debtor-in-Possession to file a supplement to the Motion on or before March 10, 2014. Civil Minutes, Dckt. No. 154.

Debtor-in-Possession states that the Supplement to the Motion (Dckt. No. 183) requests authorization for continued use of Cash Collateral from April 14, 2014, though July 13, 2014, as provided in the budget included in the Supplemental Exhibits to M0tion to Use Cash Collateral and Grant Adequate Protection as Exhibit "D" ("the Budget") under the same terms as provided in the Civil Minute Orders previously issued by the court.

Debtor-in-Possession states that the following budget represents the best estimate and income and expenses of Debtor-in-Possession from April 14, 2014 through July 13, 2014. Debtor-in-Possession requests authorization to use about $1,416.558.00 from April 14, 2014, through July 13, 2014, as described in the budget below.

FURTHER JUNE 2, 2014 SUPPLEMENT TO USE CASH COLLATERAL

Debtor-in-Possession supplements the Motion to Use Cash Collateral and Grant Adequate Protection filed by Debtor-in-Possession on January 17, 2014, Dckt. No 19, Docket Control Number KDG-4 by filing a further supplement to the Motion. Dckt. No. 238.

The court had previously granted interim and continued use of Cash Collateral through July 13, 2014, pursuant to Civil Minute Orders entered on April 1, 2014. The court directed the Debtor-in-Possession to file a supplement to the Motion on or before June 2, 2014. This Supplement to the Motion requests authorization for the continued use of Cash Collateral from July 13, 2014 through October 31, 2014, as provided in the budget included in the Supplemental Exhibits Motion to Use Cash Collateral under the same terms provided in the previous Civil Minute Orders.

The Debtor-in-Possession prepared the budget with the help of its financial advisors and attorneys. Debtor-in-Possession believes that the Budget included in the Civil Minute Order on the Motion to Use Cash Collateral, Dckt. No. 202, represents the best estimate of the income and expenses of Debtor-in-Possession from July 14, 2014 through October 31, 2014.

Debtor-in-Possession requests authorization to use about $2,617,690.00 from July 13, 2014, through October 31, 2014, as described in the below budget.

Expense Budget July 14, 2014 - October 31, 2014					
Operating Disbursements:					
Grain/Hay/Ration/Minerals	234,696	339,237	330,928	343,305	1,248,166
Seed and Farming	14,180	14,180	15,800	40,800	84,960
Payroll, Taxes & Benefits/Draws	41,000	41,000	41,000	41,000	164,000
Contract Labor/Machinery Hired	7,100	7,100	7,100	7,100	28,400
Hauling	2,000	2,000	2,000	2,000	8,000
Fuel & Oil/Propane	8,600	13,100	13,100	13,100	47,900
Herd Replacement	43,350	64,600	64,600	64,600	237,150
Rent/Lease	860	860	860	860	3,440
Bank fees	220	220	220	220	880
Office Supplies	800	800	800	800	3,200
Repairs & Maint	12,500	14,500	14,500	14,500	56,000
Supplies/Meds/Semen	13,500	21,500	28,500	28,500	92,000
Utilities	10,500	10,500	9,500	8,500	39,000
Vet & Breeding	-	1,500	1,500	1,500	4,500
Insurance	3,300	6,000	6,000	6,000	21,300
Capital Expenditures	50,000				50,000
Owners' Draw	12,000	18,000	18,000	18,000	66,000
Misc	1,600	2,600	2,600	2,600	9,400
TOTAL OPER. DISBURSEMENTS	456,206	557,697	557,008	593,385	2,164,296
Non-Operating Disbursements:					
Accounting	4,000	3,500	3,500	4,000	15,000
Property Taxes					-
Administrative Claims [2]	60,000		95,000		155,000
US Trustee Fees	6,500			9,750	16,250
TOTAL NON-OPER. DISBURS.	70,500	3,500	98,500	13,750	186,250
Loan Payments					
Loan Payments	66,786	66,786	66,786	66,786	267,144
TOTAL LOAN PAYMENTS	66,786	66,786	66,786	66,786	267,144
TOTAL CASH DISBURSEMENTS	**593,492**	**627,983**	**722,294**	**673,921**	**2,617,690**

SECOND FURTHER SUPPLEMENT TO USE CASH COLLATERAL

Debtor-in-Possession supplements the Motion to Use Cash Collateral and Grant Adequate Protection filed by Debtor-in-Possession on January 17, 2014, Dckt. No 19, Docket Control Number KDG-4 by filing a further supplement to the Motion. Dckt. No. 345.

The court had previously granted interim and continued use of Cash Collateral through July 13, 2014, pursuant to Civil Minute Orders entered on April 1, 2014. The court directed the Debtor-in-Possession to file a supplement to the Motion on or before June 2, 2014. This Supplement to the Motion requests authorization for the continued use of Cash Collateral from July 13, 2014 through October 31, 2014, as provided in the budget included in the Supplemental Exhibits Motion to Use Cash Collateral under the same terms provided in the previous Civil Minute Orders.

The court then granted a second interim and continued use of Cash Collateral from July 14, 2014 through October 31, 2014, pursuant to Civil Minute Orders entered on June 26, 2014. The court directed the Debtor-in-Possession to file a supplement to the Motion on or before October 9, 2014. This Supplement to the Motion requests authorization for the continued use of Cash Collateral from November 1, 2014 through January 31, 2015, as provided in the budget included in the Supplemental Exhibits Motion to Use Cash Collateral under the same terms provided in the previous Civil Minute Orders.

The Debtor-in-Possession prepared the budget with the help of its financial advisors and attorneys. Debtor-in-Possession believes that the Budget included in the Exhibits to Motion to Use Cash Collateral and Grant Adequate Protection, Dckt. 348, Exhibit F, represents the best estimate of the income and expenses of Debtor-in-Possession from November 1, 2014 through January 31, 2015

Debtor-in-Possession requests authorization to use about $1,797,727.00 from November 1, 2014, through January 31, 2015, as described in the below budget.

Expense Budget November 1, 2014 - January 31, 2015				
Operating Disbursements:				
Grain/Hay/Ration/Minerals	332,241	343,305	343,305	1,018,851
Seed and Farming	7,500	2,500	2,500	12,500
Payroll, Taxes & Benefits/Draws	41,000	41,000	41,000	123,00
Contract Labor/Machinery Hired	7,100	7,100	7,100	21,300
Hauling	2,000	2,000	2,000	6,000
Fuel & Oil/Propane	13,100	13,100	13,100	39,300
Herd Replacement	--	--	--	--
Rent/Lease	860	860	860	2,580
Bank fees	220	220	220	660
Office Supplies	800	800	800	2,400
Repairs & Maint	14,500	14,500	14,500	43,500
Supplies/Meds/Semen	21,500	21,500	21,500	64,500
Utilities	7,000	6,500	6,500	20,000
Vet & Breeding	1,500	1,500	1,500	4,500
Insurance	3,300	6,000	6,000	18,000

	Capital Expenditures			22,500	22,500
	Owners' Draw	18,000	18,000	18,000	54,000
	Misc	2,600	2,600	10,160	15,360
TOTAL OPER. DISBURSEMENTS		457,921	481,485	551,545	1,468,951
					0
Non-Operating Disbursements:					
Accounting		3,500	3,500	4,000	11,000
Property Taxes			24,500		24,500
Administrative Claims [2]			71,250		71,250
US Trustee Fees				6,500	6,500
TOTAL NON-OPER. DISBURS.		3,500	99,250	10,500	113,250
Loan Payments					
Loan Payments		71,842	7,1842	71,842	215,526
TOTAL LOAN PAYMENTS		66,786	66,786	66,786	66,786
TOTAL CASH DISBURSEMENTS		**551,263**	**652,577**	**593,887**	**1,797,727**

DISCUSSION

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtor-in-Possession has the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. *See In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

No objection has been raised to the use and the payments are reasonable and necessary to maintain Debtor's operations. The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). Here, the existence of a substantial equity cushion and the adequate protection payment protect the creditors interests, with the court granting creditors with liens on the cash collateral replacement liens in the same types of collateral described in their security agreements and other lien documents, to the extent that the use of cash collateral reduces the pre-petition amount of collateral which secured their respective claims.

The court authorizes the use of cash collateral, as set forth above, through and including January 31, 2015. To provide for the orderly administration of this case, the court continues the hearing on this Motion to Use Cash Collateral to 10:30 a.m. on XXXXXX. On or before XXXXX the Debtor in Possession shall file a Supplemental Motion for Further Use of Cash Collateral, and Oppositions, if any, to the Supplemental Motion shall be filed and served on or before XXXXX.

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 Authorize Use of Cash Collateral filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the motion to use cash collateral for the payment of the expenses is granted, and the Debtor in Possession is authorized through and including January 31, 2015 to use cash collateral may be used to pay the following expenses:

Expense Budget November 1, 2014 - January 31, 2015				
Operating Disbursements:				
Grain/Hay/Ration/Minerals	332,241	343,305	343,305	1,018,851
Seed and Farming	7,500	2,500	2,500	12,500
Payroll, Taxes & Benefits/Draws	41,000	41,000	41,000	123,00
Contract Labor/Machinery Hired	7,100	7,100	7,100	21,300
Hauling	2,000	2,000	2,000	6,000
Fuel & Oil/Propane	13,100	13,100	13,100	39,300
Herd Replacement	--	--	--	--
Rent/Lease	860	860	860	2,580
Bank fees	220	220	220	660
Office Supplies	800	800	800	2,400
Repairs & Maint	14,500	14,500	14,500	43,500
Supplies/Meds/Semen	21,500	21,500	21,500	64,500
Utilities	7,000	6,500	6,500	20,000
Vet & Breeding	1,500	1,500	1,500	4,500
Insurance	3,300	6,000	6,000	18,000
Capital Expenditures			22,500	22,500
Owners' Draw	18,000	18,000	18,000	54,000
Misc	2,600	2,600	10,160	15,360
TOTAL OPER. DISBURSEMENTS	457,921	481,485	551,545	1,468,951
				0
Non-Operating Disbursements:				
Accounting	3,500	3,500	4,000	11,000
Property Taxes		24,500		24,500
Administrative Claims [2]		71,250		71,250
US Trustee Fees			6,500	6,500
TOTAL NON-OPER. DISBURS.	3,500	99,250	10,500	113,250
Loan Payments				
Loan Payments	71,842	7,1842	71,842	215,526
TOTAL LOAN PAYMENTS	66,786	66,786	66,786	66,786
TOTAL CASH DISBURSEMENTS	**551,263**	**652,577**	**593,887**	**1,797,727**

The amount authorized for each category may be increased by no more than 10% each month, but the total cash collateral used in a month cannot exceed the monthly total set forth in the budget above.

IT IS FURTHER ORDERED that the hearing on this Motion to Use Cash Collateral to 10:30 a.m. on XXXXX. On or before XXXXX the Debtor in Possession shall file a Supplemental Motion for Further Use of Cash Collateral, and Oppositions, if any, to the Supplemental Motion shall be filed and served on or before XXXX.

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

No attorneys' fees or other professional fees are approved by this order or inclusion of such expense item in the budget. Such professional fees may be paid only as allowed and authorized to be paid by separate order of the court.

15. 14-91363-E-7 CHRISTINA SOUTHIDA MOTION TO COMPEL ABANDONMENT
TPH-1 Thomas P. Hogan 10-6-14 [5]

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

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and Office of the United States Trustee on October 6, 2014. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Christina Southida ("Debtor") requests the court to order the Trustee to abandon the estate's interest in the Debtor's sole proprietorship business, Teriyaki 1 Express (the "Property"), which includes:

PROPERTY	**VALUE**
Commercial Building commonly known as 330 N. Golden State Blvd., Turlock, California	Debtor's Interest = $12,500.00 ($50,000.00 full value, less community property interest of Debtor's non-filing spouse and half interest held by co-owner Wayside Terrace LLC)
2 Deep Fryers	$1,200.00
1-3 Door Freezer	$1,500.00
1-4 Door Refrigerator	$1,200.00
Wok Stove	$300.00
Hood Over Stove	$1,600.00
Grill	$500.00
Icemaker	$600.00
Cash Register	$100.00
Tables and Chairs	$400.00
Business Checking and Savings Account with Wells Fargo	$3,100.00
TOTAL	**$10,500.00**

There are no existing liens held against the commercial building, land or against the fixtures and equipment. The Declaration of Christina Southida has been filed in support of the motion and but does not value the Property outside of what the Motion states. The values are set forth in Schedules A and B, which values are stated under penalty of perjury by the Debtor. Dckt. 1.

Debtor, under Schedule C, has fully exempted all of the Property. Dckt. 1, pgs. 14-15.

No parties have filed opposition to the instant Motion.

The court finds that the exemptions taken by the Debtor on the Property exceeds the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Christina R. Southida ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the Property identified as:

1. Commercial Building commonly known as 330 N. Golden State Blvd., Turlock, California

2. 2 Deep Fryers

3. 1-3 Door Freezer

4. 1-4 Door Refrigerator

5. Wok Stove

6. Hood Over Stove

7. Grill

8. Icemaker

9. Cash Register

10. Tables and Chairs

11. Business Checking and Savings Account with Wells Fargo

and listed on Schedule A and B by Debtor is abandoned to Christina R. Southida by this order, with no further act of the Trustee required.

16. 00-90665-E-7 JAY/MARGARET HARP MOTION TO SUBSTITUTE PARTIES
GMW-3 Pro Se 10-6-14 [29]

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

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditor, and Office of the United States Trustee on October 6, 2014. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

The Motion to Substitute Parties was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Substitute Parties is granted.

Steven Harp, Jay Edward Harp, and Ronnie Harp ("Movants"), the successors in interest of Jay and Margaret Harp ("Debtors"), filed the instant Motion to Substitute Parties on October 6, 2014. Dckt. 29. Debtor Jay Harp passed away on August 10, 2002 and Debtor Margaret Harp passed away on October 29, 2004. The Movants succeeded to the Debtors' interest in the real property commonly known as 312 Adrienne Street, Stockton, California (the "Property")by virtue of an order issued by the San Joaquin County Superior Court and recorded in the San Joaquin County Official Records on August 7, 2014 (Document No. 2014-078095).

On October 6, 2014, the Movants caused a Statement Noting a Party's Death to be filed with respect to both Debtors. Dckts. 33 and 34. FN.1.

FN.1. The Movants also have filed a Motion to Avoid Lien which has been granted.

No opposition has been filed in connection with this Motion.

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the case pending under chapter 11, chapter 12, or chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in chapter 13 dies. *Id*.

Federal Rule of Bankruptcy Procedure 7025 provides "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representation. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to

> enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

See also, *Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 7 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Here, the Movants have abided by the Fed. R. Bankr. P. 1016 and 7025 and Fed. R. Civ. P. 25. The Movants have filed the Statements Noticing a Party's Death for both Debtors and have filed the instant motion within 90 days of the filing of the Notices. Upon review of the motion, pleadings, and docket, the Movants appear to be the appropriate real parties in interest to be substituted into the case following the passing of the Debtors, particularly due to the order issued by the San Joaquin County Superior Court and recorded in the San Joaquin County Official Records on August 7, 2014 (Document No. 2014-078095).

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 Substitute Parties filed by Steven Harp, Jay Edward Harp, and Ronnie Harp having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and Steven Harp, Jay Edward Harp, and Ronnie Harp are substituted in for the Debtors as the real parties in interest, in the place of the two deceased joint debtors in this case.

17. 00-90665-E-7 GMW-4 | **JAY/MARGARET HARP** | **Pro Se** | **MOTION TO AVOID LIEN OF CBSJ FINANCIAL CORP.** **10-6-14 [36]**

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

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Arcadia Recovery Bureau, LLC (formerly CBSJ Financial Corp.), parties requesting special notice, and Office of the United States Trustee on October 6, 2014. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of CBSJ Financial Corp. ("Creditor"). against property of Jay and Margaret Harp ("Debtors") commonly known as 312 Adrienne Street, Stockton, California (the

"Property"). Debtors have since passed away, Mr. Harp in 2002 and Mrs. Harp in 2004. Steven Harp, Jay Edward Harp, and Ronnie Harp ("Debtors' Successors") succeeded Debtors' interest in the Property through an order from the San Joaquin County Superior Court recorded on August 7, 2014. The court granted the Motion of Substitution of Parties on October 30, 2014.

A judgment was entered against Debtor in favor of Creditor in the amount of $13,071.84. An abstract of judgment was recorded with San Joaquin County on February 2, 2000, which encumbers the Property. Creditor applied to renew the judgment in 2009 and an abstract of judgment was recorded with San Joaquin County on September 2, 2009. The total renewed judgment amount is $25,793.99.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $35,000.00 as of the date of the petition. The unavoidable consensual liens total $2,000.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $75,000.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

IDENTITY OF REAL PARTY IN INTEREST

The Motion clearly states that relief is sought only against CBSJ Financial Corp. No relief is sought against any other person. In his declaration counsel for Debtors states that his research indicates that CBSJ Financial Corp. no longer exists, having been merge out into Golden State Collections, Ltd. However, the corporation number for that entity is related to James Cruz Incorporated. He also discovered that the website for Arcadia Recovery Bureau states that its business was formerly known as CBSJ Financial Corp. He contacted that business and was told by a Thomas Pendergrst that Arcadia Recovery Bureau and was told that Arcadia purchased the assets of CBSJ Financial Corp. Further, that Arcadia was the owner of the judgment for which the lien is sought to be avoided. Declaration, Dckt. 38.

It appears that counsel has uncovered a long and winding trail of transfers and mergers, with ultimately Arcadia Recovery Bureau being the real party in interest with whom the Debtors seek to have their claim or controversy adjudicated. U.S. Constitution Article III, Section 2. However, Arcadia Recovery Bureau is not a party to this contested matter, but only CBSJ Financial Corp., an entity with Debtors assert no longer exists.

The Debtors having requested relief against only CBSJ Financial Corp., the court cannot effectively issue and order purporting to adjudicate the asserted claims of the Debtors against the actual owner of the rights. The court appreciates the challenge facing Debtors, and it may well be that they have to file a motion which seeks to have the lien avoided as to as to all and each of the various entities which have appeared in this chain of title. The court could then issue an order against each and every of the named parties avoid the lien, to the extent they have an interest.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 Avoid the judgment lien of CBSJ Financial Corp., California Superior Court for San Joaquin County Case No. SV218908, recorded on February 2, 2000, Document No. 00011269 with the San Joaquin County Recorder, against the real property commonly known as 312 Adrienne Street, Stockton, California, is denied without prejudice.

18. 13-90465-E-7 KIMBERLY VEGA
SSA-3 Thomas O. Gillis

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH KIMBERLY VEGA, VICTOR VEGA AND MARIA RANGEL
O.S.T.
10-13-14 [79]

Tentative Ruling: The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7

Trustee, creditors, and Office of the United States Trustee on October 13, 2014. By the court's calculation, 17 days' notice was provided.

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion For Approval of Compromise is granted.

Michael D. McGranahan, the Trustee, requests that the court approve a compromise and settle competing claims and defenses with Kimberly Vega, Victor Vega, and Maria Rangel ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the sale of Debtor's interest in the real property commonly known as 1441 103rd Street, Oakland, California (the "Property"). The Trustee filed the Adversary Proceeding No. 14-09004 on January 29, 2014 to determine the sale of the Property and the actual interest of the Settlor.

Trustee and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 83):

A. As set forth in the companion Buy/Sell Agreement, the Trustee will allow Debtor/Defendant Kimberly Vega, through the assistance of her co-Defendants, Maria Rangel and Victor Vega, to pay to the bankruptcy estate the sum of $27,000 in full satisfaction of the estate's claims against her, which includes, inter alia, the residual non exempt net equity to be paid the estate from Debtor's and Defendant Kimberly Vega's one-third interest in the subject property referenced above.

B. As set forth in the companion Buy/Sell Agreement, the subject sale is made between Kimberly Vega, with the financial assistance of Maria Rangel and Victor Vega, co-defendants in the above adversary proceedings referenced above. It is made "as is" "where is" and "without any warranty of any kind." The foregoing sale includes, but is not limited to any and all actual, observable, and/or latent defects in the real property structures on the property and any issues dealing with the construction of any buildings, dwelling or appurtenant property structures or zoning issues

C. The foregoing agreement is nonassignable

D. Buyer Kimberly Vega, with the assistance of Maria Rangel and victor Vega, understand and agree that should they be unable to tender funds immediately to pay the settlement proceeds, the Trustee and his counsel will need to secure an order approving the borrowing motion against their (Maria Rangel and Victor Vega's interest) and the interest of Kimberly Vega in the subject property to pay the foregoing sum of $27,000. Any fees and costs which are occasioned by the borrowing motion from any

third party lender and escrow company, shall be the sole and individual responsibility of Kimberly Vega, Maria Rangel and Victor Vega for procuring the sum of $27,000 to pay the chapter 7 Trustee in this matter. The foregoing monies will be used to repay the bankruptcy estate for the Debtor's interest in the property.

E. The seller, at his/her sole discretion, may use the services of a reputable title company to assist with this transaction.

F. The Trustee and Kimberly Vega, Victor Vega, and Maria Rengel reference that they will bear any and all expenses associated with refinancing the subject property, including but not limited to related escrow and borrowing loan origination fees and costs and any attorney's fees and costs occasioned by same. The foregoing includes but is not necessarily limited to any motion filed in Bankruptcy Court, review of any documents, including refinancing documents or agreements or any documents depicting loan terms and conditions.

G. In connection wit the waiver and relinquishment of Section 1542 California Code of Civil Procedures, and such similar statutes, etc, the Parties acknowledge that they are aware that they may hereafter discover claims presently unknown or unsuspected, or facts in addition to or different from those which they now know or believe to be true. Nevertheless, it is the intention of the Parties, through this Agreement, fully, finally, and forever to release all such matters, and of such intention, the releases herein given shall be and remain in effect as a full and complete release of such matters notwithstanding the discovery or existence of any such additional or different claims or facts relative thereto.

H. Defendants acknowledge that should there be failure in the performance of the companion Buy/Sell Agreement as timely required, notwithstanding same, judgment will be entered in favor of the Trustee and as against Defendants Kimberly Vega, Victor Vega and Maria Rangel in the underlying adversary proceeding referenced above for the principal sum of $27,000, plus any additional fees and costs the Trustee's counsel incurs arising from said default.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Under the Settlement Trustee shall recover $27,000.00 in satisfaction of the estate's claim in the Property from Settlor. This proposed settlement allows Trustee to recover for the estate $27,000.00 without further cost or expense arising from the underlying Adversary Proceeding.

Probability of Success

The Trustee believes that the result achieved by settlement resolves protracted and costly litigation. Debtor is one-third owner of the Property. An actual trial litigating the equity interest of the Debtor, her brother and her mother in the Property would have entailed an addition twenty-five to thirty house of Trustee's time, billed at $300.00 per hour and resulted in additional attorney's fees of a minimum of between $7,500.00 to $9,000.00.

While the Trustee's investigation and discussion with his broker suggests the Property has gone up since the Adversary Proceeding was filed and could possibly sell for $135,000.00, if this ultimate result was achieved through adjudication, it would not necessarily yield more monies to the estate than the present settlement based upon the following calculations:

Sale Price	$135,000.00
Cost of Sale (8%)	($10,800.00)
Mortgage (approx)	($71,500)
Net	**$52,700/3 = $17,500.00**

Trustee asserts that the actual subjective probability of success in the underlying litigation is difficult to quantify. However, Trustee's counsel estimates it would be in the 70-75% range.

Difficulties in Collection

Trustee states that litigation would require a great deal of testimony concerning the investigation, reliance of Debtor's schedules concerning the ownership of the Property and change of position during the course of litigation. Additional issues of estoppel or judicial estoppel against Debtor for representations made concerning her ownership of the Property in her schedules and motions would be relevant. The Trustee asserts that the costs and fees associated with continuing the litigation would deplete any gain that might be achieved.

However, the Trustee argues that the settlement saves the estate from the costs and fees of litigation and brings $27,000.00 into a totally insolvent estate for distribution.

Complexity of Litigation

Trustee alleges that there are both factual and legal issues that are somewhat complex. These include: (1)Does Debtor have both a legal and equitable interest in the Property?; (2) Does the concept of estoppel or judicial estoppel apply: both to Debtor and co-owners?; (3) The nature and value of the underlying Property; and (4) Are the elements for sale under 11 U.S.C. § 363(h) met for sale?

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Michael D. McGranahan, the Trustee, (“Trustee”) 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 Approve Compromise between Movant and Kimberly Vega, Victor Vega and Maria Rangel (“Trustee”) is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the Motion(Docket Number 83).

19. 13-90465-E-7 KIMBERLY VEGA
SSA-4 Thomas O. Gillis

MOTION FOR SALE AND PERMISSION TO BORROW O.S.T.
10-13-14 [85]

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

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors who filed claims, and Office of the United States Trustee on October 13, 2014. By the court's calculation, 17 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice). Movant's order to shorten time was granted on October 10, 2014. Dckt. 78.

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing **----------**.

The Motion to Sell Property and for Permission to Borrow is granted as to the Motion to Sell and denied as to the Permission to Borrow.

MOTION TO SELL

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

G. 1441 103rd Street, Oakland, California.

The proposed purchaser of the Property is Kimberly Vega ("Debtor"), with assistance of Maria Rangel and Victor Vega (Debtor's mother and brother, respectively) and the terms of the sale are for Debtor to pay $27,000 to fully satisfy the estate's claims against her, including the residual non-exempt net equity from Debtor's one-third interest in the Property. The sum of $27,000.00 will be due 60 days after the execution of the agreement and the sale will be as is and subject to all liens. The terms of the sale include a provision that Debtor will be responsible for any fees or costs that may be incurred if Debtor shall need to refinance the Property in order to obtain the $27,000.00 purchase price.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

MOTION FOR PERMISSION TO BORROW

In the instant Motion, the Trustee seeks, in conjunction with authorization to sell the Property, that Debtor be permitted to either borrow against the Property or secure a new loan to refinance the property in order to pay the purchase price. However, the Trustee has not plead this request with the necessary particularity for the court to rule on it.

The court cannot discern why or to whom the parties would request this relief. The only location of this request is in the prayer for relief. All the parties give to the court is the generalized request to "either borrow against the subject property or secure a new loan for refinancing purposes to pay the estate's claim in full." The court cannot determine whether it is requesting for the Trustee to borrow against the Property to pay the estate in which then the estate would be liable for the lien or whether the Debtor, who is in a Chapter 7, to incur more debt at the expense of other creditors. The court is puzzled over this request. It appears that the parties are request carte blanche authority from this court to maybe borrow against the property without providing any information on who the Trustee or Debtor are borrowing from, for what purpose, the terms of the lien, etc. The court is not in the business of giving Chapter 7 debtors or Trustee's for that matter free reign in incurring more debt without providing specifics.

The Motion for Permission to Borrow does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that the court should allow Debtor to incur debt in order to secure funds for the proposed sale. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the

pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

The court further notes that Trustee's combination of two types of relief in one pleading is procedurally incorrect. While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, however, those rules are not applicable to contested matter in the bankruptcy case, including motions. Trustee has improperly attempted to join two separate requests for relief in one motion.

As with the present Motion, the reason for not incorporating Rule 7018 into contested matters is in part based on the short notice period for motions and the substantive matters addressed by the bankruptcy court in motions. These include sales of property, disallowing claims, avoiding interests in real and personal property, confirming plans, and compromising rights of the estate– proceedings which in state court could consume years. In the bankruptcy court, such matters may well be determined on 28 days notice. The Supreme Court and Rules Committee excluded the provision of Fed. R. Bankr. P. Rule 7018 and Fed. R. Civ. P. Rule 18 from the rapid law and motion practice in the bankruptcy court. Allowing parties to combine claims and create potentially confusing pleadings would not only be a prejudice to the parties, but put an unreasonable burden on the court in the compressed time frame of bankruptcy case law and motion practice. This burden is greater in this case, because the court allowed Trustee to file the instant Motion in an even shorter time frame.

The court cannot read the Motion as requesting authorization for the Trustee to borrow any monies for the estate. No provision is made under the Bankruptcy Code for the court to authorize the Chapter 7 Debtor and non-debtors to borrow monies. No credit agreement or loan terms are presented by the Trustee to have approved, if he is seeking authority to borrow pursuant to 11 U.S.C. § 364.

At the hearing the following additional bids were presented to the court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

The Motion to Approve the Sale is granted.

The Motion to Authorize Borrowing by the Trustee or Debtor is denied.

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 Sell Property filed by Michael McGranahan the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Michael McGranahan, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Kimberly Vega ("Buyer"), a one-third interest in the Property commonly known as 114 103rd Street, Oakland, California ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $27,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit 1, Dckt. 89, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs and other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 4. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> **IT IS FURTHER ORDERED** that the Trustee's request for permission for the Debtor or Trustee to borrow is denied without prejudice.

20. 14-90866-E-7 ELVIA GARIBAY MOTION TO COMPEL ABANDONMENT
CJY-1 Christian J. Younger 9-23-14 [14]

Final Ruling: No appearance at the October 30, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 23, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Elvia Garibay ("Debtor") requests the court to order the Trustee to abandon property commonly known as 1527 Spokane Street, Modesto, California (the "Property"), in which Debtor has a 50% interest. This Property is encumbered by the lien of Round Point Mortgage, securing a claim of $34,008.24. The Declaration of Debtor has been filed in support of the motion and values the Property to be $218,000.00 in full. After the mortgage encumbrance is deducted, the value of Debtor's interest is $91,995.88.

The court finds that between the debt secured by the Property and Debtor's exemption of the property in Schedule C, there is no value to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Elvia Garibay ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the Property identified as:

1. 1527 Spokane Street, Modesto, California

and listed on Schedules A by Debtor is abandoned to Elvia Garibay by this order, with no further act of the Trustee required.

21. 10-94467-E-7 TINA BROWN
12-9003 Michael R. Germain
CCA-1
MCGRANAHAN V. BROWN

MOTION FOR ASSIGNMENT OF RIGHTS, MOTION FOR RESTRAINING ORDER AND/OR MOTION FOR TURNOVER ORDER
9-8-14 [59]

Tentative Ruling: The Motion for Assignment of Rights, Motion for Restraining Order and/or Motion for Turnover Order was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, and Defendant's Attorney on September 8, 2014. By the court's calculation, 52 days' notice was provided. 14 days' notice is required.

The Motion for Assignment of Rights, Motion for Restraining Order and/or Motion for Turnover Order was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion for Assignment of Rights, Motion for Restraining Order and/or Motion for Turnover Order is denied without prejudice.

Michael McGranahan, the Judgment Creditor, filed the instant Motion for Assignment of Rights, Restraining Order and Turnover Order in connection to Adversary Proceeding No. 12-09003 on September 8, 2014. Dckt. 59. This Motion is brought by the Judgment Creditor to enforce the monetary judgment and orders of this court using the California Enforcement of Judgment laws. Fed. R. Civ. P. 69, Fed. R Bankr. P. 7069.

The Motion states with particularity (Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007) the following grounds and relief,

A. Judgment Creditor seeks an order assigning various rights to payment;

1. Which are due the Judgment Debtor, Tim Brown, who is stated to "aka Affordable Moving & Storage, LLC" or "any of Judgment Debtor's partners, assignees, and other persons acting on his behalf.

B. An order restraining the Judgment Debtor from the sale, alienation, mortgage, lien, encumbrance, advancement, cashing or negotiation, or receipt or exploitation of any of the accounts for which the assignment order is issued.

C. An order compelling Judgment Debtor to turn over documentary evidence of any "accounts," and that such shall be delivered to the civil division of the U.S. Marshal's office in Sacramento, California. Cal. C.C.P. § 699.040, turnover in aid of execution to levying officer.

D. Judgment Debtor does business as Affordable Moving & Storage LLC, as stated in *Affordable Moving & Storage LLC v. Transguard Insurance Company of America, Inc.*, E.D. Cal. No 07-00618.

MOTION

The Judgment Creditor argues that the Motion is based on the fact that Judgment Creditor has obtained the Supplemental Order for Election of Monetary Damages under Judgment (Dckt. 41) and Authorizing Enforcement of Monetary Sanction (Case No. 10-94667, DCN CWC-4) and Judgment Through Combined Writ of Execution and Other Judgment Enforcement (the "Authorizing Order"). Dckt. 56. The Authorizing Order is a combination of a money judgment and contempt damages, for a total of $80,499.34. The Judgment Creditor alleges that the Judgment Debtor has continuously failed and refused to pay for the judgment.

The Judgment Creditor moves the court for:

1. An order assigning

a. All of the accounts, accounts receivable, rights to payment of money, general intangibles, customer deposits, customer receivables, and the like, which arise out of moving and storage services, storage rentals, the sale of packing supplies, the rendition of transportation, carriage, drayage, and other services which arise out of the transportation and moving of consumer and commercial goods and household items by a moving service; this would also include any and all revenue arising out of a storage facility; contracting and subcontracting services;

b. All accounts, accounts receivable, rights to payment of money, contingent rights, contract rights, deposits and deposit accounts, claims against third parties, monies due

from third parties, any and all amounts which are due from any merchant bank, credit card processor, third parties or processors who process the merchant bank and/or credit card drafts, any and all rights to payment of money from any online financial services, including but not limited to PayPal, Square, Stripe, WePay, Ally Bank, and other non-brick-and-mortar financial institution

due and in favor of and for the benefit of Judgment Debtor Timothy Brown aka Tim Brown dba Affordable Moving and Storage LLC, or any Judgment Debtor's partners, assignees, and other persons acting on his behalf, pursuant to the provisions of C.C.P. § 708.510. For purposes of clarity, deposit accounts, checking accounts, certificates of deposits, lines of credit, credit balances due under ATM cards, savings accounts, trust accounts, and safety deposit boxes, are specifically subject to the terms and conditions of this order, and constitute a right of payment as assigned herein.

2. For an order restraining Judgment Debtor from the sale, alienation, mortgage, lien, encumbrance, advancement, cashing or negotiation, or receipt or exploitation of any of the accounts under C.C.P. § 708.520(a).

3. For an order compelling Judgment Debtor to turn over any and all documentary evidence of any of the accounts, including but not limited to, any checks, drafts, money orders, deposits, deposit accounts, books, records, papers or files, listing of accounts, accounts receivable ledgers or journals, to and on behalf of the United States Marshal, 501 I Street, Sacramento, California 95814, Attn: Civil Division (Valerie) pursuant to the provisions of C.C.P. § 699.040(a).

The Judgment Creditor argues the Affordable Moving & Storage LLC is a dba for Tim Brown and is nothing more than Judgment Debtor's trade name, justifying the Judgment Creditor seeking an assignment of Judgment Debtor Timothy Brown aka Tim Brown dba Affordable Moving & Storage LLC. The Judgment Creditor argues that under judicial estoppel the Judgment Debtor is estopped from claiming that he is not bound by the Affordable Moving & Storage name. In support of this conclusion, the Judgment Creditor argues that because Judgment Debtor filed a case in Tuolumne County Superior Court that was titled *Tim M. Brown, doing business as Affordable Moving & Storage LLC vs. Transguard Insurance Company of America, Inc., and Does 1-100, inclusive*, Case No. CV52698, that Judgment Debtor is bound by that name. The state action was removed to the District Court of the Easter District of California. Case No. 1:07-cv-00618-AWI-SMS. The Judgment Creditor argues that because Judgment Debtor stipulated to the dismissal of that action under the name "Plaintiff TIM BROWN, doing business as AFFORDABLE MOVING & STORAGE, LLC," the Plaintiff may seek an assignment of rights from Affordable Moving & Storage, LLC because it is merely Judgment Debtor's trade name, and not a separate legal entity.

In Judgment Creditor's Points and Authorities filed in conjunction with the instant Motion, the Judgment Creditor states that the general description of the accounts and accounts receivable is due to the Judgment Debtor's uncooperativeness throughout this case.

Additionally in the Points and Authorities, the Judgment Creditor states that under C.C.P. § 708.510 the Judgment Creditor is entitled to an assignment of rights to payment, accounts, and accounts receivable owed by the Judgment Debtor's customers or clients, even though they are located outside of California. The Judgment Creditor argues that this is because the court has *in personum* jurisdiction over the Judgment Debtor and, thus, the order can reach "offshore obligors" of the Judgment Debtor.

Judgment Debtor has not filed any response or opposition to the instant motion.

APPLICABLE LAW

Cal. Civ. Proc. Code § 680.135

Law and Motion practice in federal court for bankruptcy adversary proceedings is governed by Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 which requires that the motion state with particularity both the grounds upon which the relief is based and the relief itself.

Under Federal Rule of Civil Procedure 69(a), "[t]he procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located." Fed.R.Civ.P. 69(a)(1). Cal. Civ. Proc. Code § 680.135 states:

> "Affidavit of Identity" means an affidavit or declaration executed by a judgment creditor, under penalty of perjury, that is filed with the clerk of the court in which the judgment is entered at the time the judgment creditor files for a writ of execution or an abstract of judgment. The affidavit of identity shall set forth the case name and number, the name of the judgment debtor stated in the judgment, the additional name or names by which the judgment debtor is known, and the facts upon which the judgment creditor has relied in obtaining the judgment debtor's additional name or names. ***The affidavit of identity shall not include the name or names of persons, including any corporations, partnerships, or any legal entities not separately named in the judgment in which the judgment debtor is a partner, shareholder, or member, other than the judgment debtor.***

The judgment creditor must set forth the factual basis for the assertions that the judgment debtor is known by another name. *Century 21 Real Estate LLC v. San Vicente Real Estate Servs., Inc.*, No. 11CV2381WQH WVG, 2012 WL 6161969, at *2 (S.D. Cal. Dec. 11, 2012). The affidavit of identity is not a procedure for adding new debtors to the judgment, but rather to list the alternative names of the judgment debtor. *See, e.g.*, Cal. Prac. Guide Enf. J. & Debt ¶ 6:329.3.

Section 680.135 refer only to names by which the judgment debtor "is known." Cal. Code Civ. Proc. § 680.135. Courts have indicated that a "dba", pseudonym, or alias would all be names by which a judgment debtor is known for purposes of these statutes. *See, e.g., Legal Additions LLC v. Kowalksi*, No. C 08 2754 EMC, 2011 WL 2530912, at *1 (N.D. Cal. June 23, 2011).

Judicial Estoppel

Judicial estoppel, like other equitable doctrines, focus upon *conduct* as compared to claim and issue preclusion which turns merely on the existence of an adjudication. *Alary Corp. v. Sims (In re Associated Vintage Group, Inc.)*, 283 B.R. 549, 565 (B.A.P. 9th Cir. 2002).

Equitable estoppel requires the following elements:

(1) The party to be estopped must know the facts;

(2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

(3) The latter must be ignorant of the true facts; and

(4) He must rely on the former's conduct to his injury.

United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978). Since estoppel is an equitable doctrine, it should be applied "where justice and fair play require it." *Id.*

Judicial estoppel is an equitable doctrine that encompasses a variety of different situations that revolve around the concern for preserving the integrity of the judicial process. *In re Associated Vintage Group, Inc.*, 283 B.R. at 565. The doctrine extends to incompatible statements and positions in different cases. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996).

> Independent of unfair advantage from inconsistent positions, judicial estoppel may be imposed: out of "general consideration of the orderly administration of justice and regard for the dignity of judicial proceedings;" or to "protect against a litigant playing fast and loose with the courts." *Hamilton*, 270 F.3d 778 at 782; *Russell*, 893 F.2d at 1037. Moreover, it may be invoked "to protect the integrity of the bankruptcy process." *Hamilton*, 270 F.3d 778 at 785.

In re Associated Vintage Group, Inc., 283 B.R. at 556. The Ninth Circuit requires that the inconsistent position have been "accepted" by the first court. *Id.*

In addressing judicial estoppel, the Supreme Court has stated,

> Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993). See In re Cassidy, 892 F.2d 637, 641 (7th Cir. 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the

judicial process."); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) (judicial estoppel "protects the essential integrity of the judicial process"); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts'" (quoting Stretch v. Watson, 6 N.J. Super. 456, 469, 69 A.2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (D.C. Cir. 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (citation omitted).

New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001)

The Supreme Court identified several typical factors to be considered:

A. "[A] party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (8th Cir. 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (2d 1997)."

B. "[C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (5th Cir. 1991), and thus poses little threat to judicial integrity. See Hook, 195 F.3d at 306; *Maharaj*, 128 F.3d at 98; *Konstantinidis*, 626 F.2d at 939."

C. "[W]hether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See Davis, 156 U.S. at 689; Philadelphia, W., & B. R. Co. v. Howard, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1852); *Scarano*, 203 F.2d at 513 (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage"); see also 18 Wright § 4477, p. 782."

D. "In enumerating these factors, [the Supreme Court does not] establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts."

Id. at 750-751.

DISCUSSION

Failure to meet the requirements of Cal. Civ. Proc. Code § 680.135 and lack of evidence

Here, Judgment Creditor has not provided a sworn Affidavit of Identity that cites the alternative identities of Judgment Debtor or the factual basis for the determination of the "dba" status. Instead, Judgment Creditor relies solely on a pleading filed in a 2007 action pending in the United States District Court in this District.

The Judgment Creditor, in his three page motion, attempts to move the court for an assignment, a restraining order, and a turnover order against Judgment Debtor as well as Affordable Moving & Storage LLC. However, the Judgment Creditor has failed to abide by the requirements of Cal. Civ. Proc. Code § 680.135 and has not shown whether it is possible to list a registered LLC as a "dba." This prevents this court from issuing a substantial orders against an entity that was not listed in the Authorizing Order nor the complaint itself. The Judgment Creditor attempts to bypass the requirements of Cal. Civ. Proc. Code § 680.135 by arguing that judicial estoppel based on a prior district court stipulation to dismissal where Judgment Debtor listed himself as "dba" for Affordable Moving & Storage precludes the Judgment Debtor from arguing that he is a separate entity, apart from Affordable Moving & Storage LLC. However, Affordable Moving & Storage, LLC is a registered limited liability company that is currently listed as active according to a Business Entity search of the California Secretary of State Debra Bowen's website. Additionally, the entry states that Affordable Moving & Storage, LLC filed on January 1, 2006.

Reviewing Cal. Code Civ. Proc. § 680.135 highlights that separate legal entities cannot be included as alternative identities but must be a separate judgment debtor. Here, the only judgment debtor listed on the Authorizing Order is Judgment Debtor – not any other name, trade name, or company.

Judgment Creditor seems to conclusively state that the prior district court case caption in *Tim M. Brown, doing business as Affordable Moving & Storage LLC vs. Transguard Insurance Company of America, Inc., and Does 1-100, inclusive*, Case No. CV52698 is final in the determination that Judgment Debtor is "dba" Affordable Moving & Storage LLC. Based on this conclusive statement, the Judgment Creditor asks the court to issue orders against the legal entity of Affordable Moving & Storage LLC. Judgment Creditor seems to be asking the court to ignore the numerous questions and concerns that arise from the haphazard classification such as: (1) is the titling in the prior case a mere scrivener's error of Judgment Debtor's name?; (2) how, as a registered limited liability company, there is no need to pierce the corporate veil as to justify encumbering the assets of Affordable Moving and Storage LLC?; (3) is the Judgment Creditor arguing that Affordable Moving & Storage LLC is the alter ego of the Judgment Debtor; or (4) what facts in this case would allow the Judgment Creditor to ignore the requirements of Cal. Code Civ. Proc. § 680.135? The court is not willing to impose such extreme orders on an entity that may or may not be liable for Judgment Debtor's actions.

While not an "Affidavit of Identity," the exhibit attached to the Motion is evidence which the court may consider on the question of whether Judgment Creditor has provided the court with a sufficient basis to determine that the Judgment Creditor and Affordable Moving & Storage, LLC are the same person (not merely an alter-ego claim that two separate legal entities should

be treated as one). The evidence presented is a one document from The District Court Action, the Stipulation for Dismissal and Order Thereon. Exhibit C, Attached to Declaration, Dckt. 61.

The Stipulation is signed by Judgment Debtor's attorney in the District Court Action. The Caption for that Action lists the plaintiff as "Tim M. Brown, doing business as Affordable Moving & Storage, LLC." In the body of the Stipulation it states, "Plaintiff Tim M. Brown (who does business as Affordable Moving & Storage, LLC)..." In going to the District Court file, the court identifies the following additional documents:

a. Complaint attached to the Notice of Removal. Case No. 07- 00618, Dckt. 1. The Complaint states,

    1. Affordable Moving & Storage, LLC is a Limited Liability Company. ¶ 1.

    2. Affordable Moving and Storage, LLC is the plaintiff asserting rights in the Complaint.

    3. The caption lists the plaintiff as, "Tim M. Brown, doing business as Affordable Mong & Storage, LLC."

b. Petition for Removal, 07-00618, Dckt. 1

    1. "Tim Brown dba Affordable Moving & Storage, LLC, was at all time relevant herein, a California limited liability company with a principal place of business in California." ¶ V.

The District Court order closing the file for that Action is the purported "judicial reliance" upon which the judicial estoppel is based. The court order is for the clerk of the court to close the file because the "plaintiff" in that action filed a notice of unilateral dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1). 07-00618, Dckt. 22. This is not an order for or against any of the parties, nor is it an order or judgment determining any rights of any parties. It is an administrative order for the Clerk of the District Court to close a file.

The Judgment Creditor cites to *Pinkerton's, Inc. v. Superior Court*, 49 Cal. App.4th 1342 (1996) as "conclusive precedent" which requires the court to recognize Affordable Moving & Storage, LLC as a "dba." However, the facts in this case are substantially different, namely because the entity here is a registered limited liability company and the *Pinkerton* case involved an actual alternative business name. "This case has been propelled by a fundamental failure to comprehend the distinction, or lack thereof, between the legal corporation and its fictitious business name. The plaintiffs have been steadfast in their insistence that they do not want to sue Pinkerton's, Inc., the Delaware corporation. Rather, they want to sue its "DBA" "Pinkerton's, Inc., DBA Pinkerton Security & Investigation Services." But "Pinkerton Security & Investigation Services" is a fiction." *Id.* at 1348.

Here, we start with a separate legal entity, Affordable Moving & Storage, LLC, not merely an undisputed dba of one legal entity. At best, Judgment Debtor asserted a claim, almost a decade ago, against an insurance

company in which a part of the pleadings state that Affordable Moving & Storage, LLC is a dba of Judgment Debtor, and the other parts affirmatively state that Affordable Moving & Storage, LLC is a limited liability company (and not merely a dba of Judgment Debtor).

The Judgment Creditor has not complied with the Affidavit of Identity procedure by which a judgment is enforced against assets of a judgment debtor which are held in an alias. It cannot be used, and such prohibition cannot be circumvented, by merely claiming that the alias is a "dba." Furthermore, even just looking at the "evidence" provided, the Judgment Creditor has not offered a factual basis that would lead the court to believe that the separate legal entity is actually a "dba" of Judgment Debtor.

Failure to Serve Affordable Moving & Storage, LLC

The certificate of service does not state that Affordable Moving & Storage, LLC was served with the pleadings – only the Judgment Debtor. If the limited liability company had been served, then grounds may have existed for taking its default on the Motion and deemed as admitted such clearly stated grounds that the limited liability company did not do business, but the business, and all of the assets, were a sole proprietorship of the Judgment Debtor.

As this court has stated on many occasions, the fundamental requirement for any federal court to exercise federal court judicial power is that there must be a case or controversy between the parties for whom relief is sought. U.S. Constitution Article III, Sec. 2. The court must have the real parties in interest before it and have an actions "case or controversy" to adjudicate. U.S. Constitution, Article III, Section 2. Without Affordable Moving & Storage, LLC being served, the court does cannot and will not adjudicate any matter that may effect a party's rights without having the party noticed and served properly.

Judicial Estoppel Does Not Apply

Judgment Creditor has not shown a case for judicial estoppel, based on the evidence presented. In 2007 conflicting statements were made in the action removed to the District Court. The District Court judge did not rely on or issue any orders or judgment based on the representations of the Judgment Debtor in this Adversary Proceeding. That District Court Action was dismissed by the plaintiff in that Action (the Judgment Debtor) without any action of the District Court required.

It may well be that Affordable Moving & Storage, LLC is not an entity which actually does any business. It may be that it has been operated by the Judgment Debtor such that the principals of alter ego may apply. It may be that the Judgment Creditor acts to take control of the limited liability company interests and seek to protect the assets and value of the limited liability company. The Judgment Creditor, who is also the Trustee in the Tina Brown case may well conduct discovery (Rule 2004 exam) relating to property of the estate, which on Schedule B is stated to include a 50% interest in Affordable Moving & Storage, LLC.

However, merely citing the court to inconsistent statements made in a ten year old complaint which was never adjudicated in the District Court does

not provide a basis for the court ignoring the fact that Affordable Moving & Storage, LLC is, on its face, a separate legal entity from the Judgment Debtor.

Reaffirming this conclusion by applying the factors for judicial estoppel as outlined by the Supreme Court, judicial estoppel is inapplicable in this case. The Judgment Creditor has not made a showing that is "clearly inconsistent" with its earlier position. As discussed supra, all that Judgment Creditor has offered is a District Court order closing the file for that Action. The Judgement Creditor is arguing that the classification of Affordable Moving & Storage, LLC as a dba of Judgment Debtor in the caption and the administrative notice of unilateral dismissal of the Action is "clearly inconsistent" with what the position that the Judgement Debtor is taking in the instant action. However, there is no indication that the "dba" classification was in any way relied upon or essential in the Judgment Debtor's prior position in the Action.

As to the second factor, the fact that the prior Action was dismissed voluntarily is evidence that the Judgment Debtor did not persuade the court in the Action of the earlier position of "dba" to the Judgment Debtor's success. Since there was no "success" in the prior Action, there is no risk of inconsistent court determination and little threat to judicial integrity. The court in the prior Action did not make any findings accepting the classification of Affordable Moving & Storage, LLC.

As to the third factor, while the court does understand that in the eyes of the Judgement Creditor there may be a detriment in enforcing the judgment against the Judgment Debtor, the Judgment Debtor has not asserted an inconsistent position. There is no indication and the Judgment Creditor does not argue that there has been an "intentional self contradiction. . . as a means of obtaining unfair advantage." *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953). All Judgment Creditor argues is that Affordable Moving & Storage was listed as a "dba" for Judgement Debtor. Judgment Creditor does not discuss how the listing of "dba" is inconsistent position to his detriment. The court will not fill in the blanks for the Judgment Creditor.

As to the last factor, the Judgment Creditor does not provide any specific factual contexts in the instant case that would justify reading the prior classification of Affordable Moving & Storage, LLC as a dba for Judgment Debtor as preclusive. Again, all the Judgment Creditor offers is the prior Action as evidence for the need of judicial estoppel.

CONCLUSION

After review of the Motion, evidence, and pleadings, the court finds that the Judgment Creditor has not met his burden. The Judgment Creditor has failed to file an Affidavit of Identity with sufficient factual basis to determine that Judgment Debtor is "dba" Affordable Moving & Storage, LLC. The Judgment Creditor has failed to serve the separate legal entity, Affordable Moving & Storage, LLC. The Judgment Creditor has failed to show that judicial estoppel applies to the instant case from the classification of Affordable Storage & Moving LLC as a "dba" for Judgment Debtor in the prior Action which was voluntarily dismissed by the Judgment Debtor. Overally, the Judgment Creditor has not provided sufficient grounds or authority in which the court is justified in ordering attachment, turn-over, and assignment on a legal entity that was not named in the instant action, that was not properly served,

and that was not conclusively found to be a “dba” of the Judgment Debtor. Therefore, for these reasons, the court denies the motion.

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 Assignment of Rights, Motion for Restraining Order and/or Motion for Turnover Order filed by Judgment Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

22. 14-91088-E-7 RONALD/JUANZETTE HUNTER
MLP-1 Martha Lynn Passalaqua
MOTION TO AVOID LIEN OF WELLS FARGO BANK, N.A.
10-9-14 [19]

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

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, Wells Fargo Bank, N.A., parties requesting special notice, and Office of the United States Trustee on October 9, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Wells Fargo Bank, N.A. ("Creditor") against property of Ronald and Juanzetta Hunter ("Debtors") commonly known as 217 Paramatta Drive, Patterson, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $18,297.12. An abstract of judgment was recorded with Stanislaus County on April 5, 2010, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $167,000.00 as of the date of the petition. The unavoidable consensual liens total $102,839.61 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.703 in the amount of $75,000.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided in its entirety subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 judgment lien of Wells Fargo Bank, N.A., California Superior Court for Stanislaus County Case No. 637689, recorded on April 5, 2010, Document No. DOC-2010-0030454-00 with the Stanislaus County Recorder, against the real property commonly known as 217 Paramatta Drive, Patterson, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

23. 14-91290-E-7 EDWIN GODINHO MOTION TO COMPEL ABANDONMENT
MLP-1 Martha Lynn Passalaqua 10-13-14 [11]

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

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2014. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing **----------**.

The Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Edwin Godinho ("Debtor") requests the court to order the Trustee to abandon property commonly known as Debtor's business name, "Ed's Lawn and Yard Care Service," and business assets consisting of:

1. 1999 Ford F150 Reg Cab ($2,716.00)

2. Yard Tools/Lawn Care Equipment ($1,500.00)
3. Accounts Receivable ($2,100.00)
4. Customer List/Business Value ($1,697.00)
5. Business Checking Account ($112.08)

(the "Property"). This Property has been exempted by Debtor in Schedule C in the amount of $8,125.08. The Declaration of Edwin Godinho has been filed in support of the motion and values the Property to be $8,125.08.

The court finds that the total value of the Property has been completely exempted by Debtor. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Edwin Godinho ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. Business name "Ed's Lawn and Yard Care Service"
> 2. 1999 Ford F150 Reg Cab
> 3. Yard Tools/Lawn Care Equipment
> 4. Accounts Receivable
> 5. Customer List/Business Value
> 6. Business Checking Account
>
> and listed on Schedule B by Debtor is abandoned to Edwin Godinho by this order, with no further act of the Trustee required.

24. 08-91491-E-7 ERICA/DAVID BURDG
08-9101 Michael Linn
RHS-1
GONZALES ET AL V. BURDG ET AL

ORDER TO SHOW CAUSE WHY ADVERSARY PROCEEDING SHOULD NOT BE DISMISSED
9-17-14 [56]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on David Burdg and Erica Burdg ("Debtor"), debtor's attorney, Chapter 7 Trustee, and other parties in interest as stated on the Certificate of Service on September 17, 2014. The court computes that 43 day's notice has been provided.

The court's decision is to sustain the Order to Show Cause, and the adversary proceeding is dismissed.

On September 17, 2014, the court issued an Order to Show Cause Why the Adversary Proceeding Should Not Be Dismissed. Dckt. 56. Specifically, the court asked why the court should not dismiss this Adversary Proceeding for failure to prosecute. The court ordered that any response or opposition to the Order to Show Cause shall be in writing and filed with the court in compliance with Local Rule 9014-1, and must be filed at least fourteen (14) days before the date of the hearing set forth in this order.

BACKGROUND

The present Adversary Proceeding was commenced by Carlos Gonzales and Ernestina Valladarez ("Plaintiffs") against Erica Burdg and David Burdg ("Defendant-Debtors") on November 13, 2008. Plaintiffs allege that the judgment debt, and the inchoate, unliquidated debt claimed in the pending state court action No. 617314 are nondischargable under 11 U.S.C. §§ 523(a)(2)(A) & 523(a)(4). Adversary Proceeding No. 08-09101, Dckt. 1.

On May 9, 2014, the court stayed the bankruptcy court proceeding to allow Defendant-Debtor Erica Burdg to defend the state court criminal action and allow the parties to litigate common factual issues in a state court civil action and then allow those findings to be used in this federal court proceeding. Dckt. 40. Discovery had also been stayed in the instant Adversary Proceeding pending resolution of the state court action. *Id.*

On April 9, 2014, Plaintiffs' attorney, Michael Linn, filed a Request for Dismissal with the Clerk of the Superior Court of Stanislaus County. Adversary Proceeding No. 08-09101, Dckt. 55. The request for Dismissal was for a dismissal with prejudice of the entire action of all parties and all causes of actions. *Id.*

On September 8, 2014, Defendant-Debtors filed a certified copy of the Request for Dismissal that was filed with the Superior Court of Stanislaus County on April 9, 2014. *Id.*

At the Status Conference held on September 4, 2014, Plaintiffs' attorney Michael Linn did not appear. Adversary Proceeding No. 08-09101, Dckt. 54.

No parties have filed any responses or oppositions to the instant Order to Show Cause.

DISCUSSION

"In determining whether to dismiss an action for lack of prosecution, the [court] is required to weigh several factors: '(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.'" *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir.1988) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir.1986)). A dismissal for lack of prosecution must be supported by a showing of unreasonable delay. *Nealey v. Transportation Maritima Mexicana, S.A.,* 662 F.2d 1275, 1280 (9th Cir.1980). Unreasonable delay creates a presumption of injury to the defense. *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986).

Here, all the favors weigh in favor of dismissal. Since the underlying civil case has been voluntarily dismissed with prejudice, the public's interest in expeditious resolution of litigation is high because the underlying obligation at issue in this Adversary Proceeding has been dismissed in state court, leaving nothing left to resolve as to the dischargeability of that obligation. As to the second consideration, since the factual basis of the Adversary Proceeding has been dismissed, the court's need to manage the docket to clear out no longer meritorious causes of actions is high in this case. Since the Defendant in this case stipulated to the dismissal of the underlying state court action, there is no threat of prejudice to the Defendant. Since the underlying merits of the case, namely the obligation arising from the state court action, has been dismissed, there is no preference to ruling on the merits. Lastly, because there is no longer an obligation to determine the nondischargeability of, there are no other appropriate lesser sanctions than dismissal.

Additionally, the lack of any response of objections from the parties, indicates to the court that the parties also agree that because the alleged underlying obligation in the Adversary Proceeding has been dismissed in the state court action, that dismissal is proper.

Therefore, after review of the posture of the Adversary Proceeding, the fact that the underlying state court action was dismissed with prejudice, the weighing of the factors for dismissal, and there being no opposition filed, the Order to Show Cause is sustained and the case is dismissed.

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

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

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

IT IS ORDERED that the Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

25. 13-91994-E-7 THERESA FINLEY
HCS-2 Anthony T. Wilson

MOTION TO SELL, MOTION FOR COMPENSATION FOR PMZ REAL ESTATE, REALTOR(S) AND/OR MOTION FOR COMPENSATION FOR RESIDENTPRO, REALTOR(S)
10-9-14 [35]

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

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

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on October 9, 2014. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required

to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

A. 2300 Steinbeck Drive, Modesto, California

The proposed purchaser of the Property is Mark Buckley and the terms of the sale are to purchase for $283,000.00 with a down payment of $56,600.00 in addition to an initial deposit of $3,000.00 which has already been submitted. Trustee's acceptance is subject to Bankruptcy Court approval and possible overbids, with escrow to close within 15 days of approval from the court and sold in "as-is" condition. The buyer's due diligence period is reduced to 10 days and all arbitration/mediation provisions were eliminated from the purchase contract.

The Movant also requests that the court authorize the Trustee to pay PMZ Real Estate and Residentpro 5.5% of the selling price from the sale proceeds at the close of escrow. Specifically, the Trustee requests authorization to pay PMZ Real Estate $8,490.00 of the 5.5% and to pay Residentpro $7,075.00 of the 5.5%.

Additionally, the Trustee requests a waiver Fed. R. Bankr. P. 6004(g) 14-day stay. The Trustee alleges that assuring the prospective buyer of the finality of the sale transaction will equate to hire bids at the hearing. The Trustee argues that it is important to the Trustee and any purchaser that the sale close as soon as possible.

At the time of the hearing the court announced the proposed sale an requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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 Sell Property filed by Eric Nims the Trustee 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 Eric Nims, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Mark Buckley or nominee ("Buyer"), the Property commonly known as

2300 Steinbeck Drive, Modesto, California (“Property”), on the following terms:

1. The Property shall be sold to Buyer for $283,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 40, and as further provided in this Order.

2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

3. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount equal to five and a half percent (5.5%) of the actual purchase price upon consummation of the sale. The five and a half percent (5.5%) commission shall be paid to the Trustee’s agent, Bob Brazeal of PMZ Real Estate.

5. The 14-day stay of enforcement pursuant to Federal Rule of Bankruptcy Procedure 6004(h) is waived.