UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

December 1, 2016, at 10:30 a.m.

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1. **16-90103-E-7** **JOSE MERCADO** **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH NELSON GOMEZ**
SSA-2 **Nelson Gomez** **10-31-16 [81]**

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.

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, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 31, 2016. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion for Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Approval of Compromise is granted.

Michael McGranahan, the Chapter 7 Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with Movant and Nelson Gomez, counsel for Debtor ("Settlor"). The claims and disputes to be resolved by the proposed settlement assert that Settlor will refund the bankruptcy estate the sum of $2,500.00 as disgorgement of partial fees received in this case.

Movant and Settlor have 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 are set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 85):

A. Settlor shall pay the sum of $2,500.00 to the bankruptcy estate, and said sum shall be due and payable within ten days following court approval of the settlement agreement.

B. Each party shall bear its own fees and costs.

C. Should Settlor fail to tender the sum of $2,500.00 when due, the Trustee will be awarded all reasonable fees and costs proven at further hearing, adversary proceeding, motion, or trial to enforce the terms and conditions of the settlement agreement.

D. Venue and subject matter jurisdiction shall reside with the Modesto division of the bankruptcy court to interpret the agreement and enforce it.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met. The proposed settlement permits the Movant to immediately receive $2,500.00 as disgorgement of partial fees.

Probability of Success

Movant asserts that the result achieved by this settlement agreement is equal to or greater than would be obtained if the matter were litigated. Litigation fees and costs are saved and would have likely consumed the entire settlement amount.

Difficulties in Collection

Without this settlement, the Trustee and his counsel would otherwise have to bring a motion for turnover of funds or an adversary proceeding to obtain the funds. That is costly and would likely have consumed the entire settlement amount. Trustee's counsel bills his time at the rate of $300.00 per hour, and the amount of work is estimated to have taken about ten to twelve hours.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that litigation here is not overly complex and would have been largely factual, but settling now for funds avoids litigation.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors because the compromise provides prompt payment to creditors that could be consumed by the additional costs and administrative expenses created by further litigation. The $2,500.00 balance of funds is being remitted over to the Trustee for administration. This confers a benefit to the Estate and the creditors.

Consideration of Additional Offers

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

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 for Approval of Compromise filed by Michael McGranahan, the Chapter 7Trustee ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Debtor's Counsel, Nelson Gomez ("Settlor"), is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the Motion (Dckt. 85).

2.	**12-91506-E-7** **SCB-2**	**ABDUL/MBOYO OKITUKUNDA** **Christian Younger, James Pitner**	**MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH ABDUL R. OKITUKUNDA AND MBOYO N. OKITUKUNDA** **11-2-16 [56]**

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

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, and Office of the United States Trustee on November 1, 2016. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion for Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Approval of Compromise is xxxxx.

Gary Farrar, the Chapter 7 Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with Abdul Okitukunda and Mboyo Okitukunda, the Debtor ("Settlor"). The claims and disputes to be resolved by the proposed settlement are regarding a two-carat diamond ring that Settlor failed to disclose on the original schedules and before the case closed on October 12, 2016. Movant learned about the asset when a claims adjuster with Farmers Insurance informed Movant that Settlor had filed a claim for a lost diamond ring.

Movant and Settlor have 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 are set forth in the Settlement Agreement filed as Exhibit D in support of the Motion, Dckt. 61):

A. Settlor shall be allowed an exemption in the ring and other jewelry of $5,000.00 under Section 703.140(b)(5) and shall not claim the ring or other jewelry exempt under any other section. The bankruptcy estate shall retain the remainder of the claim proceeds.

B. Movant will collect $15,245.18 for the bankruptcy estate.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met. The proposed settlement permits the Movant to immediately recover the remainder of the claim proceeds.

Probability of Success

Movant is unable to assess the probability of success. While Settlor failed to disclose the ring, they contend that their failure to disclose was not a result of bad faith. Movant anticipates that Settlor will cite to *Law v. Siegel* for support of the position that a trustee no longer has a basis to deny exemptions due to bad faith; however, any denial of exemptions must arise under state law. 134 S. Ct. 1188, 1196–97 (2014). Some circumstances of misconduct warrant the denial of an exemption, though. *Id.*

Movant is convinced that exempting the ring is improper and barred by equitable estoppel, but he asserts that there is no certainty of prevailing in litigation.

Difficulties in Collection

There are no anticipated difficulties in collection on an objection to the exemption of the ring, but this will likely cost additional administrative fees and costs associated with litigating the dispute. The estimated cost would likely be equal to the agreed exemption of $5,000.00.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that litigation would result in significant costs, estimated at approximately $5,000.00, which are projected based on the unsettled nature of the claim. Movant estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors because the compromise provides prompt payment to creditors that could be consumed by the additional costs and administrative expenses created by further litigation. Movant will collect $15,245.18 for the Estate without dealing with litigation. That results in significant savings of time and administrative expenses.

Consideration of Additional Offers

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

DISCUSSION OF HIDDEN ASSETS

This compromise presents the court with an interesting dilemma. This bankruptcy case was filed on May 24, 2012. Debtor claimed all exemptions they believed they were legally entitled to on Schedule C. Dckt. 1 at 17–18. Debtor also stated under penalty of perjury all of Debtor's personal property on Schedule B. *Id.* at 13–16. Only $800.00 of "[m]iscellianeous jewelry" is listed on Schedule B.

Debtor was represented by knowledgeable, experienced bankruptcy counsel throughout this case. There is nothing to indicate that Debtor did not understand the legal duties to disclose all property on the schedules and that the schedules are executed under penalty of perjury.

In reliance on the Schedules and information provided by Debtor under penalty of perjury, the Chapter 7 Trustee, other parties in interest, the U.S. Trustee did not object to, and most significantly the court entered, each of the two debtors their Chapter 7 discharges on September 11, 2012. Dckt. 26.

Four years later, the U.S. Trustee requested the court reopen this case so that a Chapter 7 trustee could be reappointed and that trustee recover such assets, consisting of a ring Debtor was attempting to recover $30,000.00 for an insurance claim. Motion and Declaration, Dckts. 38, 39. The court's order reopening the case was filed on August 19, 2016. Dckt. 41.

Shortly after the bankruptcy case was reopened, on September 8, 2016, Debtor filed what was stated to be an Amended Schedule B that listed a "2-carat diamond ring and other miscellaneous jewelry." Dckt. 52 at 4. Debtor also filed an Amended Schedule C in which Debtor now claims the following exemptions in this jewelry:

A. C.C.P. § 703.140(b)(4).....$1,425.00

B. C.C.P. § 703.140(b)(5).....$9,622.00

Id. at 8.

A debtor is allowed to claim exemptions "from property of the [bankruptcy estate]." 11 U.S.C. § 522(a). Federal Rule of Bankruptcy Procedure 1009 provides that a debtor may amend various documents, including schedules, at "any time before the case is closed." Fed. R. Bankr. P. 1009(a). Here, the bankruptcy case was closed in 2012, without Debtor making any amendments to Schedule C.

The court may reopen a case to: (1) administer assets, (2) accord relief to the debtor, or (3) for other cause. Here, the U.S. Trustee sought to reopen the case to allow a Chapter 7 trustee to administer assets of the bankruptcy estate. Undisclosed assets continue to remain in the bankruptcy estate, protected by the automatic stay, notwithstanding the closing of a bankruptcy case. 11 U.S.C. § 554(c) and (d).

The ability of a debtor to amend schedules to obtain a benefit when it relates to improper conduct, such as concealing an asset is discussed in Collier on Bankruptcy.

> "As a general rule, courts have denied a debtor the opportunity to amend the schedules, or may have stricken an amendment, if a debtor intentionally concealed an interest in property that is property of the estate from creditors by omitting it from the schedules. Under those circumstances courts have inferred fraudulent intent. In contrast, if a debtor seeks to amend promptly to disclose and exempt an asset he or she was not previously aware of, there should be no finding of bad faith. Thus, for example, the Court of Appeals for the Eighth Circuit, in *Kaelin v. Bassett (In re Kaelin)*, allowed a debtor to amend his schedule of exemptions to claim as exempt a cause of action soon after he learned that the cause of action existed. Because the debtor acted promptly to exempt the cause of action and because the debtor had not intentionally concealed the property, the court found that no bad faith existed."

COLLIER ON BANKRUPTCY, 16TH EDITION, ¶ 1009.02

Here, Debtor failed to disclose the existence of $30,000.00 (by Debtor's later account when trying to make an insurance claim) ring. When caught four years later, Debtor attempts to "routinely" try to claim it as exempt when the deception was discovered. When Debtor "discovered" this undisclosed asset, Debtor did not seek to reopen the case, properly disclose the asset, and then claim an exemption. The Debtor kept the asset and potential exemption under wraps until the existence of this asset was outed by the Trustee.

In the Motion, it is asserted that the failure to not list a $30,000.00 asset was caused by Debtor merely "overlooking" the absence of such $30,000.00 asset. The court finds such a contention that a $30,000.00 asset was overlooked to be a bit fanciful. This is very questionable in light of Debtor remembering this $30,000.00 piece of jewelry when seeking to recover $30,000.00 on an insurance claim.

No declaration is provided by Debtor explaining the good faith failure to properly disclose this asset. No testimony is provided by Debtor concerning when it was discovered that Debtor had this asset, or why when Debtor decided to pursue the insurance claim the asset was not disclosed.

While the Debtor's are to get "only" $5,000.00 of the undisclosed asset under this settlement, the court questions whether so allowing the Debtor such a reward is consistent with the Bankruptcy Code and the fundamental underpinnings of a debtor's duties—honesty, accuracy, and full disclose in the schedules. While the Trustee's quick calculation is that creditors may net more that if an adversary proceeding was commenced, the court is required to determine whether an exemption could properly be claimed after the case was reopened.

Upon weighing the factors outlined in *A & C Props*. and *Woodson*, the court determines that the compromise ~~is/is not~~ in the best interest of the creditors and the Estate because Movant will recover ~~only~~ $15,245.18 while avoiding what he perceives to be as uncertainty in litigation, which could lead to costs that outweigh the settlement amount, and trades that for allowing Debtor to receive $5,000.00 from the undisclosed asset. The Motion is 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 for Approval of Compromise filed by Gary Farrar, the Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Abdul Okitukunda and Mboyo Okitukunda, the Debtor ("Settlor"), is xxxxxxxxxxxxx.

3. **16-90309-E-7** **MARK/JULIANNA RUNYON** **MOTION FOR ENTRY OF DEFAULT JUDGMENT**
16-9010
WC-1 **10-21-16 [16]**
MARCHANT V. RUNYON

Final Ruling: No appearance at the December 1, 2016 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 Defendant and Defendant's Attorney on October 21, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 for Entry of Default Judgment is granted.

Rachel Marchant ("Plaintiff") seeks an entry of default judgment against Mark Runyon ("Defendant"). Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

This adversary proceeding was commenced July 1, 2016. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on July 1, 2016. Dckt. 3. The complaint and summons were properly served on Defendant on July 5, 2016. Dckt. 7.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055(a) by the Clerk of the United States Bankruptcy Court on September 7, 2016. Dckt. 12. Plaintiff was ordered to file a Motion for Entry of Default Judgment within thirty days of the Entry of Default and Order Re: Default Judgment Procedures. Plaintiff filed the Motion on October 21, 2016, and has not provided an explanation for failing to file within thirty days. Fortunately for Plaintiff, Defendant has not filed any pleading in this adversary proceeding.

COMPLAINT

The Complaint requests that this court determine that the liability resulting from a superior court judgment and from a prior bankruptcy judgment is not dischargeable in this bankruptcy case. The Complaint also seeks a determination that $185,339.44 and accrued interest, as determined by the superior court and bankruptcy court, be determined due from Defendant to Plaintiff and not dischargeable in this bankruptcy case.

The Complaint presents the court with the issue of whether a second judgment determining that a debt determined nondischargeable due to fraud based on a prior judgment issued by another bankruptcy court, which prior was based on a judgment for fraud entered by the California Superior Court, is required for the determined nondischargeable debt not to be discharged in the second Chapter 7 bankruptcy case.

CLAIM FOR RELIEF STATED IN COMPLAINT

The stated claim showing that Plaintiff is entitled to the relief and the relief itself stated in the Complaint (Fed. R. Civ. P. 8 and Fed. R. Bankr. P. 7008) is summarized as follows:

A. The complaint states one claim for relief, based on 11 United States Code § 523(a)2(A), for a determination that the debt owed to Plaintiff by Mark John Runyon, Defendant/Debtor, is not dischargeable because it is based on actual fraud, as previously determined by a prior bankruptcy court and state superior court. This is a core proceeding . . . .

B. On April 1, 2008, a judgment was entered against Defendant in favor of Plaintiff in the Superior Court Case for breach of contract and for fraud in the total amount of $185,339.44 ("Superior Court Judgment").

C. On August 20, 2008, Defendant filed a voluntary Chapter 7 petition in the U.S. Bankruptcy Court for the Central District of California, Case No. 9:08-bk-12015-RR ("Prior Bankruptcy Case").

D. On November 26, 2008, Plaintiff filed a complaint in the Prior Bankruptcy Case against Defendant/Debtor for a determination that the obligation owed on the Superior Court Judgment was non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) based on fraud.

E. On September 29, 2009, judgment ("Prior Bankruptcy Judgment") was entered in the Prior Bankruptcy Case determining that the obligation owed on the State Court Judgment was non-dischargeable pursuant to Bankruptcy Code § 523(a)(2)(A). FN.1.

FN.1 The Complaint recites that the court in the Prior Bankruptcy Case afforded Defendant-Debtor the extended opportunities to respond to the Complaint, notwithstanding the entry of a default, including the untimely filing of an answer, before entering the Prior Bankruptcy Judgment.

F. Defendant/Debtor filed a second bankruptcy case in this court on April 4, 2016. Bankr. E.D. Cal. 16-90309 ("Second Bankruptcy Case"). Plaintiff was not scheduled as a creditor in the Second Bankruptcy Case.

G. Plaintiff timely filed the current Complaint.

H. The Complaint alleges various underlying grounds, in addition to that there is already the final State Court Judgment and final Prior Bankruptcy Judgment already determining those issues.

I. The Complaint requests that this court enter a judgment that the State Court Judgment, determined to be nondischarge by the Prior Bankruptcy Judgment, is nondischargeable in the Second Bankruptcy Case.

EVIDENCE IN SUPPORT OF MOTION FOR ENTRY OF DEFAULT JUDGMENT

Plaintiff's Counsel in this Adversary Proceeding ("Plaintiff's Counsel") provides his declaration in support of the Motion for Entry of Default Judgment. Dckt. 18. Counsel testifies under penalty of perjury that he has personal knowledge and testifies to the following:

A. On April 1, 2009, the State Court Judgment for breach of contract and fraud was entered.

B. A true and accurate copy of the State Court Judgment is filed as Exhibit A.

C. On September 29, 2009, the Prior Bankruptcy Judgment entered.

D. A true and accurate copy of the Prior Bankruptcy Judgment is filed as Exhibit B.

E. The amount due and payable from the State Court Judgment is $185,339.44, as of April 1, 2008, based on reading the State Court Judgment.

Declaration, Dckt. 18.

A review of Exhibit B discloses that Plaintiff's Counsel was the attorney for Plaintiff in the Prior Bankruptcy Case. This indicates that he has personal knowledge of the judgment in the Prior Bankruptcy Case and can so testify under penalty of perjury. However, Plaintiff's Counsel is not listed as the attorney for Plaintiff for the Superior Court Judgment, and there is no evidence presented how Plaintiff's Counsel has any personal knowledge of that fact. Fed. R. Evid. 601, 602.

Plaintiff's Counsel also testifies as to the amount of the judgment stated in the State Court Judgment. No testimony of Plaintiff's Counsel has any personal knowledge of that amount, other than reading what is written on the unauthenticated Exhibit A, the State Court Judgment. (The State Court

Judgment is not a certified copy and is not a self-authenticating document. Fed. R. Evid. 901, 902.) A declarant merely reading an unauthenticated exhibit does not create personal knowledge testimony.

Plaintiff's Counsel's Declaration does provide credible, proper testimony of the Prior Bankruptcy Judgment and the determinations made therein. From the Prior Bankruptcy Judgment, the court is provided with the following:

A. Judgment has been entered against Mark John Runyon.

B. The obligation owed on a prior judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) [fraud].

C. The prior judgment was entered by the California Superior Court for the County of Stanislaus, Case No. 611670. FN.2.

FN.2. The court notes that Exhibit A, though not authenticated, states it is a judgment entered in California Superior Court, County of Stanislaus, Case No. 611670, awarding judgment for Plaintiff against several persons, including Defendant/Debtor. Exhibit A, in addition to stating the judgment, includes specific findings of fact, which indicate that Plaintiff's Counsel may well have personal knowledge relating to the underlying facts relating to that judgment. However, there is not an authenticated Exhibit A presented. The court believes that this may well be one of those situations where the attorney so well knows the background that some of the evidentiary requirements get short-cut. Though an apparent short-cut, it is not fatal to the Motion.

D. The Prior Bankruptcy Judgment grants relief stated to be interest at the rate of 18% per annum shall be $10,433.57. This is part of the "costs" award and is in addition to the the obligation on the State Court Judgment being nondischargeable.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process that requires: (1) entry of the defendant's default and (2) entry of a default judgment. *Id*. at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds., 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,

(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55–24 to 55–26 (Daniel R. Coquillette & Gregory P. Joseph eds., 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment, the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

POINTS AND AUTHORITIES

No Points and Authorities is provided by Plaintiff. Plaintiff does not provide the court with a legal basis for entering a second judgment determining that debt is nondischargeable for fraud. Plaintiff does not state whether the doctrine of Collateral Estoppel is being asserted, or Plaintiff believes that sufficient evidence of the alleged fraud must be presented in support of the present Motion. Plaintiff does not provide in the Motion whether Plaintiff now seeks a new judgment to replace the prior State Court Judgment.

DISCUSSION

There being the Prior Bankruptcy Judgment, the court first considers whether a second judgment is required from this court. Plaintiff does not allege in the Complaint that Defendant/Debtor was granted a discharge in the Prior Bankruptcy Case. This court has reviewed the Central District Court of California files using the on-line PACER system and it is reported by that court that Defendant/Debtor was granted a discharge on December 22, 2008. Bankr. C.D. Cal. 9:08-bk-12015, Dckt. 13.

Next, discharge having been entered and the bankruptcy court in the Prior Bankruptcy Case determining that the State Court Judgment obligation was not discharged, is Plaintiff put to the task of filing another adversary proceeding when Defendant/Debtor filed his second Chapter 7 case? The answer to this question is not quite as clear as one might expect. 11 U.S.C. § 523(a)(10) provides:

> "(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act; . . . ."

However, Debtor was granted a discharge in the prior case. Debtor did not "waive" the discharge in the Prior Bankruptcy Case.

In 11 U.S.C. § 523(b), Congress created a special exception for a debt that was determined to be nondischargeable in a prior case to allow them to be discharged in a subsequent bankruptcy case.

> "(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1) [tax or customs duty], (a)(3) [not listed or scheduled], or (a)(8) [educational benefit or loan] of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title."

11 U.S.C. § 523(b).

The Bankruptcy Appellate Panel for the Ninth Circuit has determined that the determination of nondischargeability in a prior Chapter 7 bankruptcy case for grounds other than as specified in 11 U.S.C. § 523(b) renders that debt nondischargeable in all subsequent Chapter 7 bankruptcy cases—whether or not a complaint is filed to have the debt (re)determined as nondischargeable in the subsequent Chapter 7 bankruptcy cases. *Moncur v. Agricredit Acceptance Company (In re Moncur*), 328 B.R. 183 (B.A.P. 9th Cir. 2005). Rather than restating the ruling of the Bankruptcy Appellate Panel, the court provides the following direct quotes from that decision:

> "The debtors appeal the renewal of a money judgment that was excepted from discharge under 11 U.S.C. §§ 523(a)(2) and (6) in the first of their two bankruptcy cases. They argue that the debt lost its nondischargeable status when the judgment creditor did not file another nondischargeability action in their second bankruptcy case. We agree with the bankruptcy court that the doctrines of claim and issue preclusion obviated the need for repetitive nondischargeability actions and that the chapter 7 discharge order could not provide otherwise. AFFIRMED.
> . . .
> Section 523(b) indirectly acknowledges that, except for the several exceptions stated therein, the general rule is that if a particular debt is determined to be nondischargeable in a valid and final judgment by a court with jurisdiction and from which there was an opportunity to appeal, then the debt is always nondischargeable on the basis determined in the judgment. *Paine*, 283 B.R. at 37–38. In other words: once nondischargeable, always nondischargeable.
> . . .
> It is axiomatic that §§ 523(b) and (c)(1) must be construed so as to be in harmony. The gravamen of § 523(b) is premised on the general rule once a debt is nondischargeable under any theory not enumerated as an exception in § 523(b), it is always nondischargeable.
> . . .

> Section 523(c)(1) does not, however, necessarily mean that a separate determination must be made each time the debtor is the subject of a bankruptcy case in which a discharge is permitted. Nothing in § 523(c)(1) purports to trump or vary the terms of the general issue and claim preclusion provisions of § 523(b).
> . . .
> Viewing the §§ 523(a)(2) and (6) nondischargeability issues through the prism of issue preclusion involves similar analysis and yields a similar conclusion. The two issues are issues that previously were actually litigated and decided and, being part of the essence of the judgment, were essential to the decision. Hence, they are eligible for issue preclusion. RESTATEMENT (SECOND) § 27. Ordinarily, an exception based on jurisdictional constraints defeats issue preclusion on a bankruptcy dischargeability issue. RESTATEMENT (SECOND) § 28(3). Here, however, the prior bankruptcy court had jurisdiction over the issues, which were justiciable at the time that it actually and necessarily decided them. Thus, this is one of those unusual instances in which the garden-variety application of issue preclusion is operative.
> . . .
> The consequence is that the judgment creditor is entitled to assert claim and issue preclusion in the judgment renewal proceeding to preclude the judgment debtors from contending that their debt was discharged in the second bankruptcy case."

Moncur v. Agricredit Acceptance Company, 328 B.R. at 185, 186, 189, 190, and 191.

Though this court concurs in the ruling of the Bankruptcy Appellate Panel and that decision has been cited by a number of other courts, there is no clear Ninth Circuit or Supreme Court ruling directly on point. Discretion being the better part of valor, Plaintiff and Plaintiff's Counsel filed this Adversary Proceeding to preempt any contention to the contrary.

JUDGMENT FOR NONDISCHARGEABILITY

The United States Bankruptcy Court has previously entered a final judgment determining that the obligation owed by Defendant/Debtor on the State Court Judgment is nondischargeable based on fraud, 11 U.S.C. § 523(a)(2)(A). Applying the normal rules of Collateral Estoppel, that would be sufficient for this court to enter a judgment so determining that the State Court Judgment is nondischargeable. The court in issuing the Prior Bankruptcy Judgment necessarily made all of the findings and conclusions for this debt to be nondischargeable based on fraud. FN.3.

FN.3. In *Cal-Micro, Inc. v. Cantrell*, 329 F.3d 1119, 1123 (9th Cir. 2003), the Ninth Circuit Court of Appeals states the five elements for application of Collateral Estoppel in California, all of which are satisfied by the Prior Bankruptcy Judgment.

Additionally, by operation of 11 U.S.C. § 523(b), the State Court Judgment having been determined nondischargeable in the Prior Bankruptcy Case pursuant to 11 U.S.C. § 523(a)(2)(A), it continues to be nondischargeable in the subsequent bankruptcy cases filed by Debtor.

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 Entry of Default Judgment filed by Rachel Marchant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted.
>
> **IT IS FURTHER ORDERED** that the obligations owing on, and the judgment itself, entered by the California Superior Court for the County of Stanislaus, *Marchant v. Mark Runyon, et. al.*, Case No. 611670, ("State Court Judgment") are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).
>
> **IT IS FURTHER ORDERED** that the obligations owing on the State Court Judgment are not dischargeable by operation of law pursuant to 11 U.S.C. § 523(b) and the entry of a prior bankruptcy court judgment determining such obligations nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) in *Marchant v. Hammon*, Bankr. C.D. Cal. Adv. 08-01150.
>
> Plaintiff shall, on or before December 15, 2016, prepare and lodge with the court a judgment consistent with this order, which order states that any costs, fees, and expenses allowed by the court shall be enforced as part of the judgment. A motion for attorney's fees and costs, if sought, shall be filed and served on or before December 30, 2017.

4. **15-90811-E-7** **ASSN., GOLD STRIKE** **MOTION FOR SUMMARY JUDGMENT,**
15-9061 **HEIGHTS HOMEOWNERS** **MOTION FOR PARTIAL SUMMARY**
INDIAN VILLAGE ESTATES, LLC V. **JUDGMENT**
GOLD STRIKE HEIGHTS **11-3-16 [68]**

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.

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 Plaintiff's Attorney, Defendant's Attorney, and Chapter 7 Trustee on November 3, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Summary Judgment is denied, with the court determining that specified matters are not subject to material dispute and a determination is made thereon pursuant to Fed. R. Civ. P. 54(g) and Fed. R. Bankr. P. 7054.

Plaintiff Indian Village Estates, LLC filed a complaint against Defendants Gold Strike Heights Association, Gold Strike Heights Homeowners Association, and Community Assessment Recovery Services on March 20, 2015, which was removed to this court on November 11, 2015. Dckt. 1.

On November 3, 2016, Defendant Community Assessment Recovery Services ("Defendant CARS") filed the instant Motion for Summary Judgment. FN.1. The Motion does not comply with Federal Rule of Civil Procedure 7(b), Federal Rule of Bankruptcy Procedure 7007, Local Bankruptcy Rule 9004-1(a), and the Revised Guidelines for the Preparation of Documents.

FN.1. Movant is reminded that Local Bankruptcy Rule 9004-1(c)(1) requires that a Docket Control Number be placed "by all parties immediately below the case number on all pleadings and other documents, including proofs of service, filed in support of or opposition to motions." No Docket Control Number was assigned to the Motion.

PROCEDURAL ISSUES TO BE ADDRESSED

The court first reviews the "Notice of Motion" filed for this matter now before the court. The Notice of Motion is combined with the Motion itself, filed as one document. Dckt. 68. This is contrary to Local Bankruptcy Rule 9004-1, 9014-1, and the Revised Guidelines for Preparation of Documents that require the notice of motion to be a separate pleading from the motion itself. FN.2. While this court has allowed such combined documents to be used when the notice and motion are clearly differentiated, this notice suffers from several other shortcomings.

FN.2. The Revised Guidelines for Preparation of Documents, Sec. III, ¶ A, provides:

> "SECTION III. ORGANIZATION OF DOCUMENTS
>
> A. Filing of Separate Documents. Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents."

The Notice portion states that a hearing will be conducted on the Motion at 10:30 a.m. on December 1, 2016. Dckt. 68. Nothing else is stated with respect to the "notice of hearing." Local Bankruptcy Rule 9014-1 addressing law and motion practice in both the bankruptcy case itself and adversary proceedings, provides that the notice shall be:

> "(3) Separate Notice. Every motion shall be accompanied by a separate notice of hearing stating the Docket Control Number, the date and time of the hearing, the location of the courthouse, the name of the judge hearing the motion, and the courtroom in which the hearing will be held.
>
> (4) Contents of Notice. The notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition. If written opposition is required, the notice of hearing shall advise potential respondents that the failure to file timely written opposition may result in the motion being resolved without oral argument and the striking of untimely written opposition."

L.B.R. 9014-1(d)(3), (4).

The notice portion of the Notice and Motion filed merely states that on December 1st Movant will move the court for summary judgment. No information of whether written opposition is required is provided. Local Bankruptcy Rule 9014-1(f) provides that in Adversary Proceedings at least twenty-eight days' notice of the hearing must be given (excluding adversary proceedings from the fourteen-day notice provisions, L.B.R. 9014(f)(2)(A)).

In light of the extension opposition filed, the court waives, for this Motion only, compliance with the proper notices procedures in this District. Future motions that do not comply may be denied, or as appropriate may include monetary corrective sanctions. As discussed in the section below addressing substantive pleadings issues, the court equally and fairly applies rules to all parties and all attorneys—irrespective of whether an attorney is a "better writer," and the failure to comply with the rules does not create a significant actual "problem" for the court or other parties. The court will not be placed in the position of making a different application of the rules between "good attorneys" and the "not so good attorneys."

REVIEW OF MOTION FOR MINIMUM PLEADING REQUIREMENTS

Federal Rule of Civil Procedure 7(b), which is incorporated in its entirety by Federal Rule of Bankruptcy Procedure 7007, states,

> "(b) Motions and Other Papers
>
> (1) In General. A request for a court order must be made by motion. The motion must:
>
> (A) be in writing unless made during a hearing or trial;
>
> (B) **state with particularity the grounds for seeking the order**; and
>
> (C) state the relief sought."

Fed. R. Civ. P. 7(b) (emphasis added). The same "state with particularity" requirement is included in Federal Rule of Bankruptcy Procedure 9013 for all motions in the bankruptcy case itself.

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 (which contains the same "state with particularity" requirement). 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 678–79. 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 of Civil Procedure and of 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 plan 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, 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 649–50; *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 that 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, 819–20 (7th Cir. 1977).

Not stating 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 Federal Rule of Civil Procedure 7(b) and Federal Rules of Bankruptcy Procedure 7007 and 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try to 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."

Grounds Stated in "Motion"

Here, no separate motion has even been filed. Defendant has combined the Notice of Hearing with the Motion in violation of Section (III)(A) of the Revised Guidelines for the Preparation of Documents. Defendant has not provided any grounds, merely unsupported conclusions of law. The insufficient statements made Defendant are:

A. "Plaintiff cannot establish, as a matter of law, any disputed fact, and Plaintiff cannot establish all of the necessary elements of its claims against CARS, and/or

B. CARS has established the affirmative defenses of immunity and privilege, and it is entitled to judgment in its favor as a matter of law."

Dckt. 68.

These "grounds" are merely two conclusions of law by Movant. Presumably, Movant believed that the court would make these conclusions, but the "grounds" cannot merely state the anticipated conclusions.

Defendant is reminded that "[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." L.B.R. 1001-1(g) (emphasis added).

The Motion goes further to state that the grounds are found in:

A. The Notice of Motion;
B. Memorandum of Points and Authorities;
C. Statement of Undisputed Facts;
D. Declaration of Movant's Counsel;
E. Declaration of Witness;
F. And whatever else Movant costs to present prior to or at the hearing.

The court generally declines the opportunity to do associate attorney work and assemble motions for the parties. It may be that Defendant believes that the Points and Authorities is "really" the motion and should be substituted by the court for the motion. That belief fails for multiple reasons. One is that under Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents, the motion and points and authorities are separate documents. The court has not waived that Local Rule for Movant.

Second, while Movant may feel this is a "simple motion," the court does not allow a different application of the rules between attorneys or from "simple" to "complex" motions. The Rules are equally and fairly applied, without attorneys having to guess when they "really" have to follow the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Evidence, and the Local Bankruptcy Rules. The simpler the motion, the easier it is for the moving party and counsel to state the grounds with particularity in the motion. The points and authorities are left for just that, the legal authorities, statutes, cases, and argument thereon.

Third, it must be remembered that in bankruptcy court, 95+% of all substantive matters are presented to the court on the law and motion calendar (motions and contested matters). There are few adversary proceedings (the multi-year complaint, answer, and trial process). Bankruptcy judges are expected to review, consider the well-stated grounds, consider the separate legal authorities and arguments, weigh the evidence, and rule in a fourteen-to-twenty-one-day window. As opposed to appellate courts that may have five or six law clerks and months to review dense appellate briefs, a bankruptcy judge has one law clerk to assist in the rapid ruling on these matters.

Fourth, no basis is shown for Movant having the right or ability to present whatever other evidence it chooses to prior to or at the hearing. To the extent that the "Notice" or the "Motion" so states, it is inaccurate.

REVIEW OF MOTHORITIES

The court has coined the phrase "Mothorities" to describe the combined one document containing the extensive citations, quotations, legal arguments, conjecture, and speculation in support of the motion. In presenting a Mothorities, and telling the court to harvest other grounds from the declarations, exhibits, and other evidence, the court is being directed to find whatever are the best grounds the court thinks could exist, state those for movant, advocate those for movant, and then rule on the grounds stated and advocated for movant. Such party "advocacy" is inappropriate.

Movant's Mothorities is twenty-four pages in length. It appears that the first three pages contain the alleged grounds. The following seventeen pages appear to be the legal authorities, citations, quotations, arguments, speculation, and conjecture. Given the extensive opposition filed and effort expended, the court will do the best it can to state the grounds set forth in the first part of the Mothorities. Movant will have to "live with" the best the court has been able to do in stating what is set forth in the Mothorities as grounds.

Grounds upon Which Relief Is Based

The court may grant summary judgment or determine the facts that are not in material dispute as provided in Federal Rule of Civil Procedure 54 (a) and (g) and Federal Rule of Bankruptcy Procedure

7054. From the court's review of the Mothorities, pages one through three, the grounds stated by Movant are:

A. Defendant CARS acted as the trustee for the foreclosure of thirty-one lots located in Calaveras County, California.

B. California Civil Code § 2924(b) "completely immunizes CARS from liability in the context of its actions as a foreclosure trustee for 'any good faith error resulting from reliance on information provided in good faith by the beneficiary.'"

C. Plaintiff I'VE has judicially admitted CARS's purported wrongful actions took place while it was acting in its capacity as foreclosure trustee.

D. Plaintiff I'VE alleges Defendant CARS sent out improper notices during the foreclosure process by using the name of what Plaintiff I'VE characterizes as the "wrong" entity - Gold Strike Homeowners Association ("GSHA"). Plaintiff I'VE asserts that the notices should have been given in the name of, and on behalf of, Gold Strike Heights Homeowners Association ("GSHHA"). Defendant I'VE asserts the entity on whose behalf Defendant CARS ostensibly undertook to foreclose, GSHA no longer possessed the capacity to foreclose.

E. Defendant CARS asserts that GSHA had been merged into GSHHA, and that GSHHA could act (presumably in the name GSHA).

F. Title to the thirty-one lots was taken in the name of GSHHA.

G. Plaintiff I'VE was not misled by the use of the GSHA and GSHHA names.

H. California Civil Code § 2924(d) provides an absolute privilege for all communications and related conduct of a trustee, even if "wrongful."

I. The First Cause of Action for Summary Judgment fails to state a claim for declaratory relief—that a current controversy exists. The Complaint seeks to state claims for a completed foreclosure and to correct past wrongs.

J. Summary Judgment on the Second Cause of Action (to set aside the trustee's sales), Third Cause of Action (to cancel the trustee's sales), and the Fourth Cause of Action (wrongful foreclosure) are subject to summary judgment because Plaintiff I'VE failed to make the required pre-suit tender of the indebtedness upon which the trustee's sales were based (citing *Loan v. Citibank*, 202 Cal. App.4th 89, 104 (2011)).

K. The Complaint is defective as an action to quiet title because it is not verified (citing Cal. C.C.P. § 761.020).

L. For the Slander of Title Cause of Action, Plaintiff I'VE must plead and prove that Defendant CARS's publication was not privileged or justified (citing *La Jolla Group, et al v. Bruce*, 211 Cal. App. 4th 461, 472 (2012)).

OPPOSITION STATED BY PLAINTIFF I'VE

The court has reviewed the Opposition stated by Plaintiff I'VE to the above grounds. Dckt. 78. The court summarizes the opposition to those grounds as follows:

A. On November 9, 2004, GSHA's powers, rights, and privileges were suspended by the California Secretary of State.

B. GSHHA was formed in 2007, which was to replace GSHA and enforce the Covenants, Conditions, and Restrictions in the place of GSHA.

C. GSHHA was intended as a new entity, not merely a continuation of GSHA.

D. GSHA entered into an agreement for Defendant CARS to process the foreclosures on lots.

E. When Defendant CARS issued the Notice of Delinquent Assessments for the thirty-one lots at issue, it was done as the trustee for "GSHA."

F. On March 13, 2013, Defendant CARS was notified by Mark Weiner, on behalf of Plaintiff I'VE that Defendant CARS was conducting the trustee's sales for the "wrong entity," whose corporate powers had been suspended.

G. On September 30, 2014, Defendant CARS conducted the foreclosure sales on the 31 lots as the purported Trustee for GSHA (the suspended corporation).

H. Defendant CARS recorded Certificates of Foreclosure Sale Subject to Redemption identifying GSHA as the owner of the 31 lots.

I. On January 15, 2015, Defendant CARS recorded deeds for each of the thirty-one lots that identified GSHHA as the purchaser at the September 30, 2014 foreclosure sale.

J. Defendant CARS had actual knowledge that GSHA is a separate entity from GSHHA.

K. The purported foreclosures by GSHA are void. Defendant CARS was not the agent of, and could not conduct foreclosure sales for, GSHA, a suspended corporation.

L. Defendant CARS prepared the foreclosure deeds knowingly misstating the person who was the purported purchaser at the actual foreclosure sale.

M. The alleged immunities do not apply because Defendant CARS had actual knowledge that GSHA was a suspended corporation and that it could not act for GSHA.

N. There is no tender requirement when challenging a void foreclosure sale (citing *Yvanova v. New Century Mortgage Corp.*, 62 Cal.4th 930, FN.4 (2016); *Dimock v. Emerald Properties, LLC*, 81 Cal. App.4th 868, 878 (2000)).

O. GSHA and GSHHA were not merged, as alleged by Defendant CARS. Declarations of Mark Weiner and Don Lee.

CONSIDERATION OF SPECIFIC CLAIMS AND CAUSES OF ACTION

Declaratory Relief

Unaddressed in the Opposition is the contention that the First Cause of Action must fail because it is framed as one for declaratory relief, when all acts have been completed and the dispute relates to the respective rights and interests in the thirty-one lots post-foreclosure. Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. *See* Declaratory Relief Act, 28 U.S.C. § 2201. FN.3. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.3. 28 U.S.C. § 2201,

> § 2201. Creation of remedy
>
> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

Here, the bell has rung, with the parties fighting over the effect of the foreclosure sales—not merely whether the right to conduct such sales sometime in the future exists.

The court previously addressed this issue in ruling on the Defendant Chapter 7 Trustee's motion for summary judgment. Memorandum Opinion and Decision, p.9:22–28, 10, and 11:1–5. Here, as there, the resolution of who owns the thirty-one lots is the subject of the quiet title claim, not the proper subject of a request for a declaration of rights so the parties can avoid taking action in violation of existing agreements and obligations.

The court grants Defendant CARS's motion that no relief is granted pursuant to the First Cause of Action.

Requirement That Complaint to Quiet Title Must Be Verified

Defendant CARS cites to California Code of Civil Procedure § 761.020, asserting that the Cause of Action to Quiet Title must fail, in this Complaint, because the Complaint is not a verified complaint. This code section states,

> "§ 761.020. Contents of complaint
>
> The **complaint shall be verified** and shall include all of the following:
>
> (a) A description of the property that is the subject of the action. In the case of tangible personal property, the description shall include its usual location. In the case of real property, the description shall include both its legal description and its street address or common designation, if any.
>
> (b) The title of the plaintiff as to which a determination under this chapter is sought and the basis of the title. If the title is based upon adverse possession, the complaint shall allege the specific facts constituting the adverse possession.
>
> (c) The adverse claims to the title of the plaintiff against which a determination is sought.
>
> (d) The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint shall include a statement of the reasons why a determination as of that date is sought.
>
> (e) A prayer for the determination of the title of the plaintiff against the adverse claims.

Cal. C.C.P. § 760.020 (emphasis added).

There is a corresponding requirement that the answer to a Complaint asserting a quiet title claim for relief must be verified. Cal. C.C.P. § 761.030.

The Complaint was filed in state court on March 20, 2015. Complaint, Exhibit A; Dckt. 5. The Amended Answer of Defendant CARS was filed on September 8, 2015. Exhibit P, Dckt. 11. The Amended Answer is not verified. It consists of a general denial (which is permitted in state court) and eleven affirmative defenses. As with every general denial, the court cannot determine what allegations in the complaint are really denied, and which Defendant CARS knows is true and will not actually contest.

The court has conducted a Status Conference, has set discovery schedules, and is prepared to conduct a trial setting conference in January 2017. As opposed to state court, for which trials may be set years out and repeatedly delayed due to no judge being available, or even the District Court due to its extreme case load, Congress has done litigants a great favor by giving them a judge whose whole purpose is to conduct trials and contested matters so that bankruptcy cases and related proceedings are promptly adjudicated. Here, the parties to this Adversary Proceeding can be in trial by March 2017 if they can move in diligent prosecution.

To derail the determination of whether the estate owns the property or whether it sits with Plaintiff I'VE and to start all over when everyone appears to have waived anyone filing verified pleadings would be contrary to the Bankruptcy Code and the enactment of a uniform bankruptcy law pursuant to Article 1, Section 8, Clause 4 of the U.S. Constitution. The Chapter 7 Trustee must be able to reasonably act to assemble and liquidate property of the estate—which in this bankruptcy case is dependent on the judgment in this Adversary Proceeding.

The failure of Defendant CARS not to raise this issue until the eve of trial setting sounds in part like a waiver. Failing to state in an answer or demurrer (motion to strike in federal court) causes the possible defense to be waived.

> "The waiver rule is not so literally applied as to preclude any possibility of an amendment to the answer to state a plea in abatement. But the courts take a strict attitude toward these amendments and require a strong showing of excuse for the failure to set up the plea at the earlier time."

WITKIN CAL. PROC., 5th Edition, Pleading § 1131 (citing *Tingley v. Times Mirror Co.* (1907) 151 C. 1, 13, 89 P. 1097; *Bernheim Distilling Co. v. Elmore* (1909) 12 C.A. 85, 86, 106 P. 720; *Reed & Co. v. Harshall* (1910) 12 C.A. 697, 703, 108 P. 719; *Stewart v. San Fernando Refining Co.* (1937) 22 C.A.2d 661, 663, 71 P.2d 1118).

It appears that the requirement that both the complaint and answer be verified under California procedure statutes is that it is contemplated that a plaintiff diligently prosecuting will record a lis pendens. The requirement for a lis pendens is not "jurisdictional," but part of the pleading requirement, which may be amended.

To the extent that Defendant CARS believes that obtaining a verification on the eve of trial setting is necessary, the court grants leave for Plaintiff I'VE to do so.

IMMUNITY AND GOOD FAITH

Defendant CARS asserts that it is guaranteed victory due to statutory grants of immunity, citing the court to the following two statutes. First, California Civil Code § 2924(b), which states:

> "(b) In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from **reliance on information provided in good faith** by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage. In performing the acts required by this article, a trustee shall not be subject to Title 1.6c (commencing with Section 1788) of Part 4."

On the face of this language, there must be: (1) a good faith error, (2) based on information provided in good faith, (3) regarding the nature and amount of the default. The basic contention is that the trustee's deeds are void because Defendant CARS purported to conduct a foreclosure sale for an entity that was not entitled to conduct the sales. Defendant CARS asserts that it properly conducted the sale and offers its evidence, while Plaintiff I'VE provides evidence that it was not the proper entity. Further, Plaintiff I'VE presents that Defendant CARS could not have been acting in good faith, proffering testimony that Defendant CARS was provided with information of the deficiencies. Finally, the contention of improper conduct does not go to the nature and amount of the default, but to the person purporting to have the trustee's sales conducted could not so properly act. It is further asserted that the trustee's deeds inconsistent with the foreclosures conducted and the purported purchaser at the sale were executed and recorded by Defendant CARS.

Next, Defendant CARS directs the court to California Civil Code § 2924(d) for the proposition that no claims can be asserted against Defendant CARS, which states:

> "(d) All of the following shall constitute privileged communications pursuant to Section 47:
>
> (1) The mailing, publication, and delivery of notices as required by this section.
>
> (2) Performance of the procedures set forth in this article.
>
> (3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure."

From the Complaint, and conflicting evidence presented, it appears that Plaintiff I'VE contends that Defendant CARS with full knowledge of the asserted deficiency in its actions (GSHA's suspension of power) proceeded to improperly conduct foreclosure sales. Further, after the sales were completed, and with

knowledge that the suspended corporation was the purchaser, Defendant CARS executed the trustee's deed naming another person, GSHHA, as the purported purchaser at the trustee sales.

The court has gone back to double check what Causes of Action are asserted against Defendant CARS and for which the privileges could be asserted:

A. First Cause of Action—Seeks Declaratory Relief between Plaintiff I'VE, GSHA, and GSHHA. Defendant CARS is not stated as a party against whom relief is asserted in the First Cause of Action.

B. Second Cause of Action—Seeks to set aside the thirty-one trustee sales due to GSHA, GSHHA, and Defendant CARS not having the legal authority to conduct the trustee sales. This cause of action seeks a determination that the trustee deeds issued by Defendant CARS are void and did not transfer title from Plaintiff I'VE.

C. Third Cause of Action—Requests that the court "cancel" the thirty-one trustee deeds because such deeds are void. This appears to restate the Second Cause of Action, stating the relief slightly different. This action appears to include Defendant CARS, as it is Defendant CARS's deeds that are sought to be determined void.

D. Fourth Cause of Action Wrongful Foreclosure—seeks relief against GSHHA and Defendant CARS for conducting a foreclosure sale when no such authority existed. This does not arise because of the mailing of notices or performing duties, but because it is asserted that GSHA could not conduct such a sale, Defendant CARS was given notice that the corporate powers were suspended, and Defendant CARS proceeded to act for a suspended corporation, and then after the sale was completed, executed deeds that stated the purchaser to be someone other than the purchaser identified at the time of the trustee sales.

E. Fifth Cause of Action to Quiet Title—This cause of action includes Defendant CARS, asserting that the trustee sales were improperly conducted because GSHA's powers were suspended and no sale could be conducted. However, it is not alleged that Defendant CARS asserted, or now asserts, any interest in the thirty-one lots, but that such title needs to be quieted only as between Plaintiff I'VE and GSHHA (the Chapter 7 Debtor) and the successor Chapter 7 Trustee.

F. Sixth Cause of Action for Slander of Title—This cause of action asserts that GSHHA and Defendant CARS acted with malice, fraud and/or oppression, in noticing the defaults, noticing the trustee sales, conducting the trustee sales, and then recording the trustee deeds, resulting in Plaintiff I'VE's title to the twenty-one lots being slandered. Plaintiff I'VE does not assert that such occurred in error or by mere negligence, but that such conduct was done with the knowledge that the person for whom the sales were being conducted, GSHA, could not act to have such sales conducted.

Defendant CARS argues that Defendant CARS's employee testifies that she bore no ill-will and never intended to do any wrong as to Plaintiff I'VE, but only followed "CARS' stand of practice and the information provided by Mr. Cooper," that conclusively proves that there could be no malice, intent to act improperly, or oppression. This appears to be akin to a defendant's argument that because the defendant does not admit to committing fraud, all other "circumstantial evidence" is insufficient. As Defendant CARS's counsel knows, the absence of such admissions does not bar a judgment against such defendant.

Further, the allegations are not that there was merely a mistake. Testimony is provided that Defendant CARS knew of the defects in what it was doing, and intentionally proceeded thereon. Again, merely because Defendant I'VE and its witnesses say that based on the evidence they present to the court that such intentional, improper conduct occurred, the court has to make that determination. The court has to assess the credibility of each witness, determine what is persuasive testimony, and make the actual findings of fact and conclusions of law.

The court will have to determine if Defendant CARS had knowledge that the person purporting to direct it to conduct the sale was not authorized to do so, why Defendant CARS proceeded with such sales. It may be the court concludes that it was an naive mistake. It may be that the court concludes, after assessing the testimony of all witnesses and making credibility determinations, that Defendant CARS willfully, intentionally, and with malice acted to conduct improper sales.

Requirement of Tender

Defendant CARS asserts that the challenges to the trustee sales must fail because Plaintiff I'VE failed to tender the necessary cure amount, citing to *Lona v. Citibank*, 202 Cal. App.4th 89,104 (2011). Plaintiff I'VE counters with a recent California Supreme Court decision in *Yvanova v. New Century Mortgage Corporation*, 62 Cal. 4th 919 (2016). In it, the Supreme Court makes a number of clear statements concerning California law:

A. "A beneficiary or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the borrower for wrongful foreclosure. (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062; *Munger v. Moore* (1970) 11 Cal. App. 3d 1, 7)." *Yvanva v. New Century Mortgage Corp.*, 62 Cal. 4th at 929.

B. "A foreclosure initiated by one with no authority to do so is wrongful for purposes of such an action. (*Barrionuevo v. Chase Bank, N.A.*, 885 F. Supp. 2d at pp. 973–74; *Ohlendorf v. American Home Mortgage Servicing* (E.D.Cal. 2010) 279 F.R.D. 575, 582–83)." *Id.*

C. In footnote 4, the Supreme Court discusses the tender requirement, stating, "Tender has been excused when, among other circumstances, the plaintiff alleges the foreclosure deed is facially void, as arguably is the case when the entity that initiated the sale lacked authority to do so. (*Ibid*.; *In re Cedano* (Bankr. 9th Cir. 2012) 470 B.R. 522, 529–30; *Lester v. J.P. Morgan Chase Bank* (N.D.Cal. 2013) 926 F. Supp. 2d 1081, 1093; *Barrionuevo v. Chase Bank, N.A.*,885 F. Supp. 2d 964, 969–970)." *Id.* The

Supreme Court did not address the issue of tender under the specific circumstances in *Yvanva*.

D. "A void contract is without legal effect. (Rest.2d Contracts, § 7, com. a, p. 20.) 'It binds no one and is a mere nullity.' (*Little v. CFS Service Corp.* (1987) 188 Cal. App. 3d 1354, 1362). 'Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it ….' (*Colby v. Title Ins. and Trust Co.* (1911) 160 Cal. 632, 644). As we said of a fraudulent real property transfer in *First Nat. Bank of L. A. v. Maxwell* (1899) 123 Cal. 360, 371, 'A void thing is as no thing.'" *Id.*

E. "A voidable transaction, in contrast, 'is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.' (Rest.2d Contracts, § 7, p. 20). It may be declared void but is not void in itself. (*Little v. CFS Service Corp.*, 188 Cal. App. 3d at p. 1358). Despite its defects, a voidable transaction, unlike a void one, is subject to ratification by the parties. (Rest.2d Contracts, § 7; *Aronoff v. Albanese* (N.Y.App.Div. 1982) 85 A.D.2d 3)." *Id.* at 931.

F. "[C]alifornia borrowers whose loans are secured by a deed of trust with a power of sale may suffer foreclosure without judicial process and thus 'would be deprived of a means to assert [their] legal protections' if not permitted to challenge the foreclosing entity's authority through an action for wrongful foreclosure. (*Culhane*, 708 F.3d at p. 290.) A borrower therefore 'has standing to challenge the assignment of a mortgage on her home to the extent that such a challenge is necessary to contest a foreclosing entity's status qua mortgagee' (*id.* at p. 291)—that is, as the current holder of the beneficial interest under the deed of trust. . . ." *Id.*

G. In rejecting that defendant's contention that there really was no prejudice to the property owner on the issue if the correct party conducted a foreclosure sale, since the owner was in default and would lose the property anyway,

> "The logic of defendants' no-prejudice argument implies that anyone, even a stranger to the debt, could declare a default and order a trustee's sale—and the borrower would be left with no recourse because, after all, he or she owed the debt to someone, though not to the foreclosing entity. This would be an "odd result" indeed. (*Reinagel*, 735 F.3d at p. 225.) As a district court observed in rejecting the no-prejudice argument, '[b]anks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust.' (*Miller v. Homecomings Financial, LLC* (S.D.Tex. 2012) 881 F. Supp. 2d 825, 832.)" *Id.* at 938.

The contentions in the Complaint are that the deeds are void, not merely voidable. Tender is not required. Additionally, on the eve of trial setting, it is questionable of whether a demand for tender is of any significance. A motion based on such grounds could have been brought in good faith earlier in the case, not when the court is preparing to adjudicate the respective rights and allow the Chapter 7 Trustee to proceed with prosecuting this case. Most likely, if the parties were not on the eve of having the matter set for trial, tender would be of little concern.

UNDISPUTED FACTS FOR TRIAL

In reviewing the extensive pleadings by Defendant CARS and Plaintiff I'VE, the court has constructed the following chart of Undisputed Facts in this Adversary Proceeding:

1. Plaintiff filed an unverified Complaint entitled Indian Village Estates, LLC. v. Gold Strike Heights Association, et al. against Defendant Community Assessment Recovery Services on March 20,2015.	
2. Plaintiff admits that the purported wrongful actions and communications of CommunityAssessment Recovery Services occurred in the context of its services as a non-judicial foreclosure trustee.	Only objection is that this is stated as a "Legal Conclusion."
3. Defendant Community Assessment Recovery Services ("CARS") filed its amended answer on September 8, 2015 and asserted the affirmative defenses of privilege and immunity.	
4. Plaintiff had alleged that CARS, "...acting as either trustee or the agent of the beneficiary of alleged delinquent assessments, wrongfully and without privilege, caused a Notice of Default to be recorded against the subject property."	
5. In March 2011, litigation involving Indian Village Estates, LLC, GSHHA, Mark Weiner and Don Lee was settled.	
6. Pursuant to a 2011 Settlement Agreement Indian Village Estates, LLC agreed to pay reduced association dues and assessments to GSHHA.	
7. The 2011 Settlement Agreement created a binding contract between Indian Village Estates, LLC and GSHHA.	Only objection is that this is stated as a "Legal Conclusion."
8. Pursuant to the 2011 Settlement Agreement Indian Village Estates, LLC in fact paid reduced association dues and assessments to GSHHA for a period time.	
9. In 2012, Indian Village Estates, LLC unilaterally stopped paying association dues and assessments for reasons unrelated to the 2011 Settlement Agreement.	

10. The 2011 Settlement Agreement had not been modified or terminated, no breach had occurred by GSHHA and performance by Indian Village Estates, LLC had not been excused.	Only objection is that this is stated as a "Legal Conclusion."
11. Don Lee told Mark Weiner that the Board of GSHHA were the stupidest group of people he had ever known, and he advised Indian Village Estates, LLC to cease making assessment payments.	
12. GSHHA contracted with CARS on or about July 24,2012, to notice and to conduct non-judicial foreclosures services against I'VE.	
13. CARS was hired by GSHHA to act solely as its non-judicial foreclosure trustee.	
14. Rebecca Jolly, an employee of CARS, acted on behalf of CARS, the foreclosure trustee.	
15. On or about September 5,2012, CARS served Notices of Delinquent Assessment as to the 31 I'VE lots.	
16. On or about October 7, 2013, GSHHA's Board of Directors authorized CARS to begin the foreclosure process on the thirty-one lots owned by I'VE.	
17. On March 17,2013, I'VE sent a letter to CARS requesting an explanation why GSHHA had a right to collect assessments and foreclose on the thirty-one lots.	
18. From March 8, 2013, to January 12, 2015, CARS prepared and filed documents and notices with the Calaveras County Recorder and copies were sent and received by I'VE.	
19. I'VE never disputed the accuracy of the assessment amounts stated in any of the notices.	
20. Mark Weiner had no prior relationship with Rebecca Jolly or CARS prior to CARS's initiation of the foreclosure process.	
21. Before the foreclosure of the thirty-one lots, CARS, through Rebecca Jolly, had no prior dealings or any relationship with I'VE.	
22. Rebecca Jolly possessed no ill-will or any malice towards I'VE, Mark Weiner or Don Lee, before, during, or after the foreclosure process.	
23. Prior to filing the instant lawsuit, I'VE failed to tender to GSHHA the amount of the outstanding assessments on all of the thirty-one lots.	

The court denies the Motion for Summary Judgment. The court determines that no relief is requested under the First Cause of Action (Declaratory Relief), with a determination of the actual, existing, interests of the parties stated in other Causes of Action. Further, the court makes the determinations set forth

above as undisputed pursuant to Federal Rule of Civil Procedure 54(g) and Federal Rule of Bankruptcy Procedure 7054.

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 Summary Judgment filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Summary Judgment is denied, except for the issues and claims expressly determined as stated in this Order.
>
> **IT IS FURTHER ORDERED** that no declaratory relief is requested in the First Cause of Action, and all of the rights and interests identified therein are the subject of the other Causes of Action.
>
> **IT IS FURTHER ORDERED** that the court determines the following matters are not subject to material dispute and are determined for all purposes in this Adversary Proceeding as between Plaintiff Indian Village Estates, LLC and Defendant Community Assessment Recovery Services:
>
> [Insert Chart into Final Order]

5. **15-91013-E-7** **NOEMI BARBOZA** **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH NOEMI BARBOZA**
SCB-7 **Steven Altman** **11-1-16 [80]**

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.

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, and Office of the United States Trustee on November 1, 2016. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion for Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Approval of Compromise is granted.

Gary Farrar, the Chapter 7 Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with Noemi Barboza, the Debtor ("Settlor"). The claims and disputes to be resolved by the proposed settlement are regarding Settlor's proposed exemption of the real property located at 6101 Tennessee Avenue, Riverbank, California ("Property"), and the Estate's nonexempt interest in the Property. Movant asserts that Settlor has delayed the progress of the case. Movant further asserts that Settlor has caused the Estate to incur administrative fees and costs as a result of Settlor's failure to attend five meetings of creditors, Settlor's filing of multiple amended schedules, and Settlor's coercion of the Estate to object to the homestead exemption rather than Settlor utilizing the wildcard exemption initially.

Movant and Settlor have 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 are set forth in the Settlement Agreement filed as Exhibit B in support of the Motion, Dckt. 85):

A. Settlor is allowed an exemption in the Property of $10,000.00 under Section 703.140(b)(5).

B. Settlor shall pay the bankruptcy estate $28,000.00 for the Estate's nonexempt interest in the Property.

C. Settlor shall not claim any portion of the $28,000.00 as exempt.

D. Settlor shall pay this amount by delivering to Movant a cashier's check in the amount of $28,000.00 on or before the close of business on January 9, 2017.

E. The deadline for Movant to file a complaint objecting to Settlor's discharge shall be extended until Movant receives the entire purchase amount.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Probability of Success

Movant asserts that the probability of success is uncertain. Movant anticipates that Settlor will cite to *Law v. Siegel* for support of the position that a trustee no longer has a basis to deny exemptions due to bad faith; however, any denial of exemptions must arise under state law. 134 S. Ct. 1188, 1196–97 (2014). Some circumstances of misconduct warrant the denial of an exemption, though. *Id.*

Movant is convinced that the use of the available wildcard exemption is improper and barred by equitable estoppel, but he states that there is no certainty of prevailing in litigation. Even if Movant prevailed on his objection to the exemption, he would need to file an adversary proceeding to sell the property, which would reduce the amount of net proceeds available for the Estate.

Difficulties in Collection

Movant would have to file an adversary proceeding. If successful, the property would then have to be listed for sale, resulting in significant and possibly complete loss for unsecured creditors.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that litigation would result in significant costs, possibly exceeding the settlement amount. The settlement amount is the estimated amount that the estate would receive if Movant sold the property. The settlement avoids expense, inconvenience, and delay of continued litigation.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors because the compromise provides prompt payment to creditors that could be consumed by the additional costs and administrative expenses created by further litigation. Movant will collect $28,000.00 for the Estate without dealing with litigation. That results in significant savings of time and administrative expenses.

Consideration of Additional Offers

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

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 because the Movant will recover the amount that would have been recovered in a sale of the Property while avoiding the costs and uncertainty of litigation. 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 for Approval of Compromise filed by Gary Farrar, the Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Noemi Barboza ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit B in support of the Motion (Dckt. 85).

6. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **STATUS CONFERENCE RE: COMPLAINT**
15-9038 **7-13-15 [1]**

MCGRANAHAN V. ELECTRICAL DISTRIBUTORS, CO.

Final Ruling: No appearance at the December 1, 2016 Status Conference is required.

Plaintiff's Atty: Anthony Eaton
Defendant's Atty: Gleb Finkelman

Adv. Filed: 7/13/15

Nature of Action:
Recovery of money/property - preference

The Status Conference is continued to 10:30 a.m. on December 15, 2016, to be conducted in conjunction with the hearing on the Motion to Approve the settlement of the claims in this Adversary Proceeding.

Notes: Plaintiff asserts that a settlement has been reached that should bring this adversary proceeding to resolution. Dckt. 87.

The court granted an ex parte motion to convert the December 1, 2016 evidentiary hearing to a status conference regarding all remaining deadlines and the pending settlement. Dckt. 89.

The parties filed a Stipulation on November 15, 2016, in which they agree to a stay on all deadlines, including discovery efforts, while they seek court approval of a settlement. Dckt. 90. The parties also agree that all matters set for hearing on December 1, 2016, will be continued.

7. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **CONTINUED MOTION TO EXTEND DEADLINES AND/OR MOTION TO CONTINUE HEARING**
15-9038
EDC-2
MCGRANAHAN V. ELECTRICAL DISTRIBUTORS, CO.
8-22-16 [41]

Final Ruling: No appearance at the December 1, 2016 hearing is required.

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

The Order Setting Hearing on Ex Parte Motion was served by the Clerk of the Court on Debtor, Debtor's Attorney, Chapter 7 Trustee, Plaintiff's Attorney, Defendant's Attorney, and other parties in interest on August 26, 2016. The court computes that 13 days' notice has been provided.

The Motion to Extend Deadlines and Motion to Continue Pre-Trial Conference 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.

The hearing on the Motion to Extend Deadlines and Motion to Continue Pre-Trial Conference is continued to 10:30 a.m. on December 15, 2016, to be conducted in conjunction with the hearing on the Motion to Approve the settlement of the claims in this Adversary Proceeding.

Chester C. Lehmann, Inc. doing business as Electrical Distributors, Co., Defendant, filed the instant *Ex Parte* Motion to Extend Deadlines and Continue Pre-Trial Conference on August 22, 2016. Dckt. 41. Defendant requests that the court extend all deadlines and the pre-trial conference by five months.

ORDER SETTING HEARING ON *EX PARTE* MOTION

The court issued an Order Setting Hearing on *Ex Parte* Motion on August 24, 2016. Dckt. 49. The court noted that

> [t]he *Ex Parte* Motion, as supplemented by the "grounds" stated in the Points and Authorities, raises some very serious issues concerning the prosecution of the case – issues that a mere extension of discovery deadlines will not solve. With respect to the court *instructing* that relief be sought by *ex parte* motion, the court can envision commenting that if further time was required and the parties in good faith agreed that it was appropriate, such an extension could be sought *ex parte*. However, if there was not a good faith agreement which could be presented to the court, merely

granting additional time on an *ex parte* basis at the request of one party would be inappropriate.

The court mined through Defendant's Memorandum of Points and Authorities and found several grounds that were not stated in the Motion. Those grounds include:

A. "Commencing in late June 2015, Trustee commenced 30 adversary proceedings seeking recovery of alleged preferential transfers under § 547 of the bankruptcy code. The case against Defendant was by far the largest and most complex case of all the adversary actions initiated by Plaintiff in relation to the Debtor."

B. "On April 7, 2016, this Court heard Plaintiff's Motion to Extend Deadlines and Continue Pretrial Conference. During that hearing, Plaintiff sought a three-month extension, while Defendant sought a ten-month extension."

C. "The Court granted a five-month extension with the understanding that more time would be granted if the need arose and the Court instruct Defendant to proceed via ex parte application if further extensions became necessary."

D. "It has now been more than four months after that hearing, virtually no progress has been made in this case as far as Defendant obtaining critical documents from Plaintiff needed by Defendant to adequately prepare its defense."

E. "A further extension is now necessary to avoid immediate prejudice to Defendant. Defendant and Granite Electrical Supply, Inc. ("GES"), which is a defendant in related adversary proceeding #15-09044, are affiliated entities and are represented by the same counsel."

F. "The parties have met and conferred several times regarding the possibilities of narrowing the issues, but have made no progress thus far."

G. "Plaintiff still has not adequately responded to Defendant's request for production of documents from November 2015 and Defendant is not preparing to file a motion to compel."

H. "Instead of producing the requested documents from their electronically stored sources, on or about July 8, 2016 Plaintiff gave Defendant a copy of Debtor's server. The server consisted of over one terabyte of data, which had corrupted files, security protocols that made it difficult to navigate the data, and archived backup files that were not readily navigable even by Defendant's information technology department."

I. "Defendant spent a considerable amount of time reviewing all the subfolders of said server and concluded that the documents that Defendant was seeking (i.e. Defendant's accounting records, financial statements, tax returns, and emails) did not appear to be on the hard drives that were provided."

J. "On August 9, 2016, Plaintiff provided with two more of Debtor's hard drives. (*Id.*, at ¶ 9) Plaintiff reviewed these hard drives and found them to be devoid of any accessible document files. (*Id.*) Plaintiff's production is now approximately eight months late."

Points and Authorities, Dckt. 42.

The court ordered a hearing set for September 8, 2016, at 10:30 a.m.

TRUSTEE'S OPPOSITION

Michael McGranahan, Chapter 7 Trustee, filed an Opposition to *Ex Parte* Application to Extend Deadlines and Continue Pretrial Conference on September 1, 2016. Dckt. 56. The Trustee states that there are twelve adversary proceedings related to preference actions remaining. Trustee asserts that not one of the thirty-four defendants in the various adversary proceedings from the past fourteen months has filed a motion to compel discovery against the Trustee. Trustee says that has not happened because the Trustee has cooperated in discovery in each case, including the present one.

The Trustee provides a lengthy history of the discovery process between the parties. Trustee asserts that it has been an ongoing process since November 30, 2015, involving several requests, meetings, and deadline extensions. Trustee states that he has produced all of the Debtor's hard copy documents in the Trustee's possession and has produced all electronic information available to the Trustee in such a way that Defendant has the same access to all of the information that the Trustee has. Trustee claims that Defendant was not satisfied with the disclosure and requested more, specifically asking for additional forensic services that would cost the estate a minimum of $1,850.00 in setup costs and $18,000.00 per month to host data for Defendant.

The Trustee opposes Defendant's *Ex Parte* Motion on two grounds: (1) that Defendant has not demonstrated that it cannot complete discovery in the two-and-a-half months remaining before the discovery cutoff and (2) that Defendant has not shown diligence.

First, Trustee asserts that Defendant has not identified any issue that will require additional time for discovery. Trustee asserts that Defendant has neglected to depose parties despite issuing subpoenas to seventeen third parties. Trustee states that Defendant's claim for additional time because of an expert witness who requires five months to prepare an opinion as to whether Debtor was insolvent during the preference period is insufficient and unexplained. Defendant has not described what documents are needed for the expert witness or why those documents are believed to be on Debtor's server. Trustee asserts that the information needed to verify Debtor's insolvency has been available to Defendant since before the current adversary proceeding began and is in fact available still.

Second, Trustee asserts that Defendant has not been diligent in complying with the scheduling order even though it did participate in one deposition and issued subpoenas. Trustee states that based upon Defendant expert witness's declaration, over nine months passed before Defendant sought the opinion of the expert witness, and there is no other evidence of Defendant's efforts to conduct a solvency analysis

before or after that time. Additionally, the Trustee notes that Defendant does not seem to have employed an outside consultant to retrieve information from Debtor's server after Defendant's own information technology administrator complained of not being able to navigate Debtor's server so as to identify what files would be helpful for Defendant's case.

REVIEW OF DEFENDANT'S MOTION TO COMPEL

The Defendant has stated that it is "preparing" a motion to compel the production of records. This Adversary Proceeding has been pending since July 13, 2015 and the court has already extended discovery in this Adversary Proceeding. As of the September 8, 2016 hearing, no motion to compel has been filed by Defendant.

SEPTEMBER 8, 2016 HEARING

At the hearing, Defendant asserted that it was the Plaintiff-Trustee's responsibility to provide the requested documents, and not merely provide the books and records of the Debtor. Some dispute appeared to exist as to whether the Trustee's handling of the Debtor's computer system is more difficult to access for the information.

However, Defendant stated that it had not engaged an expert to advise it what it would reasonably take to access the information on the Debtor's file server. Instead, Defendant reported that it had its in-house IT person look at it and opine that it would be difficult and expensive to obtain the information. Further, Defendant's counsel opined as to what information was in the records.

The Trustee argued that his expert states that all someone would need to do is obtain the software to access the data maintained on the server.

The Parties reported that they would be conducting a non-judicial mediation under the District's Bankruptcy Dispute Resolution Program. The BDRP Resolution Advocate to conduct the mediation is an experienced business and bankruptcy attorney, experienced in federal court litigation. Counsel for both parties appeared to be advancing the BDRP mediation in good faith.

To allow the Parties to focus on the Mediation, the court continued the hearing, at which additional testimony would be provided. The court ordered that each party provide its respective experts upon which they have advanced their arguments, provide testimony as to what they have done to investigate this matter to date, what needs to be done, and the projected costs.

The court continued the hearing to 10:30 a.m. on December 1, 2016, to ensure that Defendant was afforded a clear opportunity to demonstrate that it had been diligent in its discovery and that an extension is appropriate, rather than there being a lack of reasonable diligence and good faith prosecution, with an extension of discovery being made only to inappropriately delay the court setting this million dollar litigation for trial.

DEFENDANT'S DIRECT TESTIMONY STATEMENT

Defendant filed a Direct Testimony Statement of its expert Michael Gable on November 3, 2016. Dckt. 79. The expert states that he is a senior system administrator of an information technology department at one of Defendant's subsidiary companies. He states that he was provided with two of Debtor's hard drives on July 11, 2016, and then two more on August 9, 2016. He employed an IT contractor to help extract information from the hard drives (which included a copy of Debtor's server).

Mr. Gable testifies that a common industry practice is to provide hash checksums for data as a way for an examiner to determine the integrity of the data. Mr. Gable states that he was not provided with any such hash checksums for the hard drives. Additionally, he was not provided with the original hard drives or original server hardware, which would have allowed him to run software that reads the drives' databases. Mr. Gable states that he cannot verify the integrity of what was provided to him.

Mr. Gable's opinion is that Plaintiff may not have performed "the production of the Server and Drives in the way they were originally provided to him by the Debtor . . . because [he] found files that were dated after the bankruptcy filing date." According to Mr. Gable, the hard drives, backup media, and data from computers should have been retained per industry standards. Servers require a more difficult process (apparently) to access because viewing the data on them in the same manner in which they were input "would be close to impossible without the availability of compatible or identical hardware and absent the configurations being applied to restore the data correctly."

Mr. Gable asserts that if the hard drives were removed without creating images of the computers they were connected to, then there would have to be at least one hard drive disk for each of the thirty-five allegedly destroyed computers to reconstruct their data. The server utilized software called American Contractor to be accessed. That software is no longer in production, and Mr. Gable does not have a copy of it to access the server. As an alternative, Mr. Gable pulled raw data from the server and uploaded it into forty-seven Microsoft Excel spreadsheets. The spreadsheets showed him and Defendant's attorney that files that would normally be on a server—such as documents and images—were not present. Creating a virtual image of the server would have allowed Mr. Gable to access all of the information stored on it, just like an employee would be able to access.

Californsics provided a proposal to search through the digital information by keyword, but Mr. Gable advised that the price of retention plus his analysis that not all information had been provided dictated that the Californsics service was unnecessary.

Mr. Gable believes that Plaintiff did not provide "the overwhelming majority of electronically stored documents" in Debtor's possession, and the ones that were produced were not produced according to industry standards for data integrity and were not readily accessible. What information Mr. Gable was able to access had little to do with the ninety-day period preceding Debtor filing its bankruptcy case.

PLAINTIFF'S DIRECT TESTIMONY STATEMENT

Plaintiff filed an Alternate Direct Testimony Statement of its expert Erin Bechtold on November 3, 2016. Dckt. 81. The expert states that she is employed by Califorensics as a Computer Forensics Examiner.

She states that Califorensics received a server on May 27, 2016, which contained two drives: one for the operating system and one for data storage. Califorensics created images of both drives. Ms. Bechtold testifies that hash checksums were created.

Between June 22 and June 30, 2016, Califorensics created two copies of each physical drive at the request of Plaintiff's attorney. Ms. Bechtold states that someone who has been provided with the copy "has received the same data and has the same access to the entire contents of each drive as the Trustee." The copied image of the server can be restored, and the data will be produced in its entirety. That data "includes user files, . . . all of the system, program, hidden, and temporary files that are located on the server in its original state." Further, the copied data is viewable exactly as it is on the original server, with nothing altered.

Ms. Bechtold emphasizes that files that require specific software can be accessed if the viewing computer has the necessary programs installed on it. Ms. Bechtold confirmed that files could be opened in their original formats by opening an email file and spreadsheet files.

Ms. Bechtold states that she participated in a July 12, 2016 conference call with Defendant to address concerns over user permissions that Defendant believed were necessary to access some documents. Additionally, on September 16, 2016, Ms. Bechtold's office created a list of software that could be used to view the data on the server.

STIPULATION

On November 15, 2016, the parties filed a Stipulation, in which they agree that all matters set for hearing on December 1, 2016, be continued.

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 Extend Deadline having been presented to the court, the parties having filed a motion to approve s settlement fully resolving this Adversary Proceeding, the hearing on the motion to approve settlement being set for December 15, 2016, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Extend Deadline is continued to 10:30 a.m. on December 15, 2016, for a status and scheduling conference, if necessary.

IT IS FURTHER ORDERED that no witnesses or other parties are required to attend the continued hearing, only their respective counsel. If further proceedings on this Motion are required, the court will reschedule the hearing, taking into account the holiday season and the schedules of all persons involved.

8. 13-91315-E-7 15-9038 ECD-3 MCGRANAHAN V. ELECTRICAL DISTRIBUTORS, CO. — **APPLEGATE JOHNSTON, INC.** — **MOTION FOR PROTECTIVE ORDER 11-2-16 [74]**

Final Ruling: No appearance at the December 1, 2016 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 Plaintiff's Attorney and Office of the United States Trustee on November 2, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Protective Order has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 hearing on the Motion for Protective Order is continued to 10:30 a.m. on December 15, 2016, to be conducted in conjunction with the hearing on the Motion to Approve the settlement of the claims in this Adversary Proceeding.

Defendant's "Motion" for Protective Order is not actually a motion. Defendant filed its Memorandum of Points and Authorities in place of the Motion, which has not been filed at all. Local Bankruptcy Rule 9014-1(d)(2) requires compliance with Rule 9004-1, which in turn requires compliance

with the court's Revised Guidelines for the Preparation of Documents, Form EDC 2-901. *See* L.B.R. 9004-1(a). Section III(A) of the Revised Guidelines requires that motions and memoranda of points and authorities be filed as separate documents. They are not interchangeable. No motion has been filed for this matter, just a memorandum of points and authorities.

STIPULATION

The Parties filed a Stipulation on November 15, 2016, in which the parties agree that all matters set for hearing on December 1, 2016, be continued.

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 Protective Order filed by Defendant having been presented to the court, the parties having filed a motion to approve s settlement fully resolving this Adversary Proceeding, the hearing on the motion to approve settlement being set for December 15, 2016, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion is continued to 10:30 a.m. on December 15, 2016, for a status and scheduling conference, if necessary.

9. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **STATUS CONFERENCE RE: COMPLAINT**
15-9044
MCGRANAHAN V. GRANITE ELECTRICAL SUPPLY, INC.
7-13-15 [1]

Final Ruling: No appearance at the December 1, 2016 Status Conference is required.

Plaintiff's Atty: Daniel Egan
Defendant's Atty: Gleb Finkelman

Adv. Filed: 7/13/15

Nature of Action:
Recovery of money/property - preference

The Status Conference is continued to 10:30 a.m. on December 15, 2016, to be conducted in conjunction with the hearing on the Motion to Approve the settlement of the claims in this Adversary Proceeding.

Notes: Plaintiff asserts that a settlement has been reached that should bring this adversary proceeding to resolution. Dckt. 47.

The court granted an ex parte motion to set a status conference regarding all remaining deadlines and the pending settlement for 10:30 a.m. on December 1, 2016. Dckt. 49.

10. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **MOTION FOR PROTECTIVE ORDER**
15-9044 **11-2-16 [38]**
GES-1
MCGRANAHAN V. GRANITE
ELECTRICAL SUPPLY, INC.

Final Ruling: No appearance at the December 1, 2016 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 Plaintiff's Attorney and Office of the United States Trustee on November 2, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Protective Order has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 hearing on the Motion for Protective Order is continued to 10:30 a.m. on December 15, 2016, to be conducted in conjunction with the hearing on the Motion to Approve the settlement of the claims in this Adversary Proceeding.

Defendant's "Motion" for Protective Order is not actually a motion. Defendant filed its Memorandum of Points and Authorities in place of the Motion, which has not been filed at all. Local Bankruptcy Rule 9014-1(d)(2) requires compliance with Rule 9004-1, which in turn requires compliance with the court's Revised Guidelines for the Preparation of Documents, Form EDC 2-901. *See* L.B.R. 9004-1(a). Section III(A) of the Revised Guidelines requires that motions and memoranda of points and authorities be filed as separate documents. They are not interchangeable. No motion has been filed for this matter, just a memorandum of points and authorities.

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 Protective Order filed by Defendant having been presented to the court, the parties having filed a motion to approve s settlement fully resolving this Adversary Proceeding, the hearing on the motion to approve settlement being set for December 15, 2016, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion is continued to 10:30 a.m. on December 15, 2016, for a status and scheduling conference, if necessary.

11. 16-90718-E-7 TLC-1 | **DANA JONES** **Tamie Cummins** | **MOTION TO CONVERT CASE TO CHAPTER 13** **10-31-16 [10]**

Final Ruling: No appearance at the December 1, 2016 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, creditors, and Office of the United States Trustee on November 2, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion of Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is granted, and the case is converted to one under Chapter 13.

This Motion has been filed by Dana Jones ("Debtor") to convert this case from one under Chapter 7 to one under Chapter 13. The Bankruptcy Code authorizes a one-time, near absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

Debtor asserts that the case should be converted because Debtor has sufficient disposable income (*i.e.*, $528.44) to support a Chapter 13 plan.

Here, the Debtor's case has not previously been converted, and Debtor qualifies for relief under Chapter 13. Notice was provided to the Chapter 7 Trustee, Office of the United States Trustee, and other interested parties. No opposition has been filed.

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 Convert filed by Dana Jones 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 Convert is granted, and the case is converted to a proceeding under Chapter 13 of Title 11, United States Code.

12. 11-92930-E-7 JCK-2 | **ELIAS/DEBORAH GONZALES** **Gregory Smith** | **MOTION TO AVOID LIEN OF AMERICAN EXPRESS BANK 11-14-16 [25]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on November 14, 2016. By the court's calculation, 17 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of American Express Bank, FSB ("Creditor") against property of Elias Gonzales and Deborah Gonzales ("Debtor") commonly known as 1077 Kirksey Drive, Turlock, California ("Property"). FN.1.

FN.1. Debtor filed the Motion and Exhibit A as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Debtor is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents, as required by Local Bankruptcy Rule 9004-1(a).

A judgment was entered against Debtor in favor of Creditor in the amount of $26,838.78. An abstract of judgment was recorded with Stanislaus County on December 9, 2010, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $141,400.00 as of the date of the petition. The unavoidable consensual liens that total $228,182.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $5,000.00 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 the 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 American Express Bank, FSB, California Superior Court for Stanislaus County Case No. 654224, recorded on December 9, 2010, Document No. 2010-0110146-00, with the Stanislaus County Recorder, against the real property commonly known as 1077 Kirksey Drive, Turlock, 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.

13. **11-90137-E-7** **MARGARET BOSEH** **MOTION TO AVOID LIEN OF**
NUU-3 **Chinonye Ugorji** **G.O.N.E., INC.**
11-4-16 [39]

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.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on November 4, 2016. By the court's calculation, 27 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Avoid Judicial Lien is denied without prejudice.

INCORRECT NOTICE PROVIDED

Margaret Boseh ("Debtor") noticed this hearing according to Local Bankruptcy Rule 9014-1(f)(1), which requires twenty-eight days' notice. Debtor provided twenty-seven days' notice. Accordingly, the Motion is denied without prejudice.

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 filed by 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 is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR PROVIDES CORRECT NOTICE

This Motion requests an order avoiding the judicial lien of G.O.N.E., Inc. ("Creditor") against property of Margaret Boseh ("Debtor") commonly known as 3425 Princeville Lane, Modesto, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $39,705.59. An abstract of judgment was recorded with Stanislaus County on October 14, 2009, that encumbers the Property.

Pursuant to the Debtor's Amended Schedule A, the subject real property has an approximate value of $251,000.00 as of the date of the petition. Dckt. 37. The unavoidable consensual liens that total $616,157.00 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 37. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 37.

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 the 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 G.O.N.E., Inc., California Superior Court for Stanislaus County Case No. 635053, recorded on October 14, 2009, Document No. 2009-0099873-00, with the Stanislaus County Recorder, against the real property commonly known as 3425 Princeville Lane, Modesto, 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.

14. 16-90955-E-7 **VERONICA GARCIA** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se **11-10-16 [16]**

Final Ruling: No appearance at the December 1, 2016 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Veronica Garcia ("Debtor") and the Chapter 7 Trustee on November 12, 2016. The court computes that 19 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case ($335.00 due on October 20, 2016).

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

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

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

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

15. 11-92763-E-7 MLP-3 | **STEPHEN/JULIE HOFFMAN** **Martha Passalaqua** | **MOTION TO AVOID LIEN OF AMERICAN EXPRESS BANK, FSB** **11-17-16 [28]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on November 17, 2016. By the court's calculation, 14 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of American Express Bank, FSB ("Creditor") against property of Stephen Hoffman and Julie Hoffman ("Debtor") commonly known as 1484 Waterthrush Way, Turlock, California ("Property").

A judgment was entered against Debtor Stephen Hoffman in favor of Creditor in the amount of $13,616.24. An abstract of judgment was recorded with Stanislaus County on August 31, 2010, that encumbers the Property.

Pursuant to the Debtor's Amended Schedule A, the subject real property has an approximate value of $237,758.00 as of the date of the petition. Dckt. 22. The unavoidable consensual liens that total $268,714.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 22.

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 the 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 American Express Bank, FSB, California Superior Court for Stanislaus County Case No. 644578, recorded on August 31, 2010, Document No. 2010-0077829-00, with the Stanislaus County Recorder, against the real property commonly known as 1484 Waterthrush Way, Turlock, 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.

16. 11-92763-E-7 MLP-4 | **STEPHEN/JULIE HOFFMAN** **Martha Passalaqua** | **MOTION TO AVOID LIEN OF AMERICAN EXPRESS CENTURION BANK** **11-17-16 [33]**

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

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

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

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 November 15, 2016. By the court's calculation, 14 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of American Express Centurion Bank ("Creditor") against property of Stephen Hoffman and Julie Hoffman ("Debtor") commonly known as 1484 Waterthrush Way, Turlock, California ("Property").

A judgment was entered against Debtor Julie Hoffman (AKA Julie Squire) in favor of Creditor in the amount of $16,118.09. An abstract of judgment was recorded with Stanislaus County on September 21, 2010, that encumbers the Property.

Pursuant to the Debtor's Amended Schedule A, the subject real property has an approximate value of $237,758.00 as of the date of the petition. Dckt. 22. The unavoidable consensual liens that total $268,714.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 22.

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 the 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 American Express Centurion Bank, California Superior Court for Stanislaus County Case No. 645288, recorded on September 21, 2010, Document No. 2010-0084397-00, with the Stanislaus County Recorder, against the real property commonly known as 1484 Waterthrush Way, Turlock, 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.

17. 11-92763-E-7 MLP-5 | **STEPHEN/JULIE HOFFMAN** **Martha Passalaqua** | **MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA) N.A.** **11-17-16 [38]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on November 17, 2016. By the court's calculation, 14 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Capital One Bank (USA) N.A. ("Creditor") against property of Stephen Hoffman and Julie Hoffman ("Debtor") commonly known as 1484 Waterthrush Way, Turlock, California ("Property").

A judgment was entered against Debtor Stephen Hoffman (AKA Steve Hoffman) in favor of Creditor in the amount of $8,258.48. An abstract of judgment was recorded with Stanislaus County on July 19, 2011, that encumbers the Property.

Pursuant to the Debtor's Amended Schedule A, the subject real property has an approximate value of $237,758.00 as of the date of the petition. Dckt. 22. The unavoidable consensual liens that total $268,714.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 22.

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 the 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 Capital One Bank (USA) N.A., California Superior Court for Stanislaus County Case No. 653651, recorded on July 19, 2011, Document No. 2011-0059048-00, with the Stanislaus County Recorder, against the real property commonly known as 1484 Waterthrush Way, Turlock, 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.

18. **11-92763-E-7** **STEPHEN/JULIE HOFFMAN** **MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA) N.A.**
MLP-6 **Martha Passalaqua** **11-17-16 [43]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on November 17, 2016. By the court's calculation, 14 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion 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 Stephen Hoffman and Julie Hoffman ("Debtor") commonly known as 1484 Waterthrush Way, Turlock, California ("Property").

Debtor attached an abstract of judgment as Exhibit A that is not the complete document. A portion of the abstract relating to recording of the judgment appears to have gone unscanned. Without the complete abstract, the court cannot evaluate the Motion fully. Accordingly, the Motion is denied without prejudice.

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 filed by 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 is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF THE COMPLETE EXHIBIT A IS SUBMITTED

A judgment was entered against Debtor Stephen Hoffman (AKA Steve Hoffman) in favor of Creditor in the amount of $4,580.69. An abstract of judgment was recorded with xxxx County on August 2, 2011, that encumbers the Property.

Pursuant to the Debtor's Amended Schedule A, the subject real property has an approximate value of $237,758.00 as of the date of the petition. Dckt. 22. The unavoidable consensual liens that total $268,714.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 22.

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 the 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 Capital One Bank (USA), N.A., California Superior Court for Stanislaus County Case No. 656608, recorded on August 2, 2011, Document No. 2011-0063508-00, with the xxxx County Recorder, against the real property commonly known as 1484 Waterthrush Way, Turlock, 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.

19. 11-93464-E-7 CARLOS/NANCY SILVEIRA MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.
MSN-1 Mark Nelson 10-24-16 [22]

Final Ruling: No appearance at the December 1, 2016 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, Creditor, and Office of the United States Trustee on October 24, 2016. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 Capital One Bank (USA) N.A. ("Creditor") against property of Carlos Silveira and Nancy Silveira ("Debtor") commonly known as 7087 Turnberry Lane, Riverbank, California ("Property").

A judgment was entered against Debtor Nancy Silveira in favor of Creditor in the amount of $4,181.28. An abstract of judgment was recorded with Stanislaus County on September 6, 2011, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $144,600.00 as of the date of the petition. The unavoidable consensual liens that total $228,968.55 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $5,000.00 on Amended Schedule C. Dckt. 21.

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 the 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 Capital One Bank (USA) N.A., California Superior Court for Stanislaus County Case No. 653972, recorded on September 6, 2011, Document No. 2011-0073304-00, with the Stanislaus County Recorder, against the real property commonly known as 7087 Turnberry Lane, Riverbank, 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.

20. 11-93464-E-7 CARLOS/NANCY SILVEIRA MOTION TO AVOID LIEN OF FORD MOTOR CREDIT COMPANY, LLC
MSN-2 Mark Nelson 10-24-16 [27]

Final Ruling: No appearance at the December 1, 2016 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, Creditor, and Office of the United States Trustee on October 24, 2016. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 Ford Motor Credit Company LLC ("Creditor") against property of Carlos Silveira and Nancy Silveira ("Debtor") commonly known as 7087 Turnberry Lane, Riverbank, California ("Property").

A judgment was entered against Debtor Carlos Silveira in favor of Creditor in the amount of $3,689.73. An abstract of judgment was recorded with Stanislaus County on February 17, 2011, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $144,600.00 as of the date of the petition. The unavoidable consensual liens that total $228,968.55 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $5,000.00 on Amended Schedule C. Dckt. 21.

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 the 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 Ford Motor Credit Company LLC, California Superior Court for Stanislaus County Case No. 655815, recorded on February 17, 2011, Document No. 2011-0013476-00, with the Stanislaus County Recorder, against the real property commonly known as 7087 Turnberry Lane, Riverbank, 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.

21. 16-90764-E-7 ROBERT/SUSAN UHALDE MOTION TO AVOID LIEN OF
BSH-1 Brian Haddix AMERICAN CONTRACTORS
INDEMNITY COMPANY
10-24-16 [14]

Final Ruling: No appearance at the December 1, 2016 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 Creditor on October 24, 2016. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 American Contractors Indemnity Company ("Creditor") against property of Robert Uhalde and Susan Uhalde ("Debtor") commonly known as 3813 Palmwood Drive, Modesto, California ("Property").

A judgment was entered against Debtor Robert Uhalde in favor of Creditor in the amount of $22,232.88. An abstract of judgment was recorded with Stanislaus County on January 29, 2014, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $270,000.00 as of the date of the petition. The unavoidable consensual liens that total $166,304.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $175,000.00 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).

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 American Contractors Indemnity Company, California Superior Court for Los Angeles County Case No. 12E07901, recorded on January 29, 2014, Document No. 2014-0005930-00, with the Stanislaus County Recorder, against the real property commonly known as 3813 Palmwood Drive, Modesto, 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.

22. **14-91565-E-7** **RICHARD SINCLAIR** **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS**
HSM-9 **Pro Se** **11-10-16 [462]**

Final Ruling: No appearance at the December 1, 2016 hearing is required.

Local Rule 9014-1(f)(2) Motion—No Hearing Required; Final Hearing and Status Conference Set.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 10, 2016. By the court's calculation, 10 days' notice was provided. 14 days' notice is required.

The Amended Bifurcated Objection to Claim of Exemption 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further.

The court shall conduct a status conference on the Amended Bifurcated Objection to Claim of Exemption at 2:00 p.m. on December 15, 2016, to be conducted in conjunction with the Trustee's Motion to settle the underlying claims at issue.

The court sets 10:30 a.m. on January 26, 2017, as the continued hearing date on the Objection to Claim of Exemption. Debtor shall file and serve on or before December 29, 2016, opposition to the Objection, including all supporting admissible evidence, addressing only his alleged entitlement to the claimed exemption, and no other issues. On or before January 12, 2017, the Trustee shall file and serve a Reply, if any, to the Debtor's Opposition

Gary Farrar, the Chapter 7 Trustee, filed an Amended Bifurcated Objection to Claim of Exemption as required by the court from the August 25, 2016 hearing. *See* Dckt. 457. The Trustee objects to the "Personal Injury" exemption claimed as "malicious prosecution suit" under California Code of Civil Procedure § 704.140 filed by Richard Sinclair ("Debtor").

Trustee notes that Debtor maintains several claims against Andrew Katakis, California Equity Management Group, Inc., New Century Townhomes (formerly Fox Hollow of Turlock Owner's Association), and their counsel. Those claims include: malicious prosecution, intentional infliction of emotional distress, stalking, elder abuse, violations of Due Process under the Constitution, and violations

of Consumers Legal Remedies Act; Debtor seeks injunctive relief for those claims. Trustee believes that the "malicious prosecution suit" referred to on Debtor's Schedule C is Stanislaus County Superior Court Case No. 668157.

The Trustee informs the court that an agreement has been reached with the cross-defendants in the malicious prosecution suit for settlement of the claims at issue, contingent upon final documentation and bankruptcy court approval.

DEBTOR'S STATUS CONFERENCE STATEMENT

Debtor filed a Status Conference Statement on November 16, 2016. Dckt. 468. FN.1. Debtor recounts the court's August 25, 2016 hearing and that Debtor did not oppose the ruling. Debtor states that he did not receive notice of the December 1, 2016, but he was informed by the clerk of the court. Since the last hearing, Debtor has prepared and intends to file an amended complaint in his state court case.

FN.1. Debtor failed to attach a Docket Control Number to the Statement per Local Bankruptcy Rule 9014-1(c)(1) & (4). Also, Debtor failed to certify his statement under penalty of perjury.

Debtor asserts that determining what amount to list as an exemption pursuant to § 704.140 is "too hard" right now. Debtor states that he has not received a copy of any proposed settlement, but he alleges that he seeks $40,000,000.00 in his amended state court claim.

TRUSTEE'S STATUS REPORT

The Trustee filed a Status Report on November 17, 2016. Dckt. 472. The Trustee states that the agreement referenced in his Objection has been documented and filed with the court, set for hearing at 2:00 p.m. on December 15, 2016. *See* Dckt. 477. Pursuant to the agreement, the settling parties (*i.e.*, the cross-defendants in the malicious prosecution suit) shall pay $20,000.00 to the Estate in settlement of the cross-claims within ten days after entry of an Order from the Stanislaus Superior Court dismissing the malicious prosecution action in its entirety. Creditors CEMG/Fox Hollow HOA shall irrevocably withdraw Proof of Claim No. 7-1 also.

The Trustee asserts that any discussion of the claimed exemption is premature until such time as the court rules on the proposed settlement agreement. Assuming that the Trustee's Motion to Compromise is granted on December 15, 2016, the Trustee proposes the following schedule be set regarding the Objection:

A. December 29, 2016: Deadline for Debtor to file opposition to the Objection, including all supporting evidence, addressing only his alleged entitlement to the claimed exemption, and no other issues;

B. January 12, 2017: Deadline for the Trustee to file a reply to the Debtor's Opposition, as well as any evidence, if any;

C. January 19, 2017: Deadline for Debtor to file a surreply, replying only to the issues raised in the Trustee's reply; and

D. January 26, 2017, 10:30 a.m.: Final hearing on the Objection.

APPLICABLE LAW

California has created its own set of exemptions for debtors in bankruptcy, which a debtor may elect in lieu of the standard exemptions otherwise available under California law. *Diaz v. Kosmala (In re Diaz)*, 547 B.R. 329, 334 (B.A.P. 9th Cir. 2016). Debtors in California are not permitted to claim the Federal Bankruptcy Exemptions listed in 11 U.S.C. § 522(d). *In re Pashenee*, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015).

> "§ 703.130. Exemptions in bankruptcy
>
> Pursuant to the authority of paragraph (2) of subsection (b) of Section 522 of Title 11 of the United States Code, the exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code (Bankruptcy) are not authorized in this state.

Cal. C.C.P. § 703.130. The alternative exemptions that may be used under California law in a bankruptcy case are provided for (in pertinent part) as follows:

> § 703.140. Election of exemptions if bankruptcy petition is filed
>
> (a) In a case under Title 11 of the United States Code, all of the exemptions provided by this chapter [Cal. C.C.P. §§ 704.010 - 704.995], including the homestead exemption, other than the provisions of subdivision (b) are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure, but the **exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter,** . . . .
>
> (3) If the petition is filed for an unmarried person, that person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), **but not both**.

Cal. C.C.P. 703.140(a) (emphasis added).

The general burden regarding California exemptions is that the claimant (debtor in a bankruptcy case or judgment debtor in a state court case) has the burden of proof when claiming an exemption. *See In re Diaz*, 547 B.R. 329 (citing Cal. Code Civ. P. § 703.580(b)); *In re Tallerico*, 532 B.R. 774, 780 (Bankr. E.D. Cal. 2015) (citing Cal. Code Civ. P. § 703.580(b)).

DISCUSSION

The court has set the hearing on the Motion to Compromise for 2:00 p.m. on December 15, 2016. Dckt. 483. That hearing will influence the court's decision on the Amended Bifurcated Objection to Claim of Exemption. Accordingly, the court continues the hearing on the matter to 10:30 a.m. on January 26, 2017.

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 Amended Bifurcated Objection to Claim of Exemption filed by the Chapter 7 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 hearing on the Objection is continued to 10:30 a.m. on January 26, 2017.
>
> **IT IS FURTHER ORDERED** that the following schedule is set for deadlines relating to the January 26, 2017 hearing:
>
> A. December 29, 2016, for Debtor to file opposition to the Objection, including all supporting evidence, addressing only his alleged entitlement to the claimed exemption, and no other issues;
>
> B. January 12, 2017, for the Trustee to file a reply to the Debtor's Opposition, as well as any evidence, if any; and
>
> C. January 19, 2017, for Debtor to file a surreply, replying only to the issues raised in the Trustee's reply.
>
> **IT IS FURTHER ORDERED** that the court shall conduct a Status Conference regarding this Objection at 2:00 p.m. on December 15, 2016, in conjunction with the hearing on the Trustee's Motion to Approve Compromise of the claims that are the subject of this Objection.

23. 14-91565-E-7 RICHARD SINCLAIR **MOTION FOR SUMMARY JUDGMENT**
15-9007 **10-28-16 [53]**
KATAKIS ET AL V. SINCLAIR

Final Ruling: No appearance at the December 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on one of Plaintiffs' Attorneys on October 31, 2016. By the court's calculation, 31 days' notice was provided. 14 days' notice is required.

The Motion for Summary Judgment 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion for Summary Judgment is removed from the calendar, having been stayed by the court previously. The court has set a status conference for this Motion to be conducted on December 15, 2016.

Richard Sinclair ("Debtor") filed a Motion for Summary Judgment in this adversary proceeding on October 28, 2016. Upon review of the Motion, the court noted that "[t]he parties have demonstrated the ability to engage in protracted , non-productive, expensive, time consuming litigation" and concluded that "all proceedings in connection with or related to the Motion for Summary Judgment (Dckt. 53) filed by Richard Sinclair, the Defendant-Debtor, are stayed pending further order of this court . . . ." Dckt. 64.

The court ordered Debtor and Kimberly Deede, as counsel for Plaintiffs, to appear personally at 2:00 p.m. on December 15, 2016, for a Status Conference regarding the Motion. No telephonic appearances were permitted. Additionally, the court ordered that on or before December 5, 2016, Debtor; Andrew Katakis; California Equity Management Group, Inc.; and New Century Townhomes of Turlock Owners' Association each file separate status reports of eight pages or fewer, addressing the following:

A. Identify all existing final judgments and decisions upon which the Plaintiffs based their claims of nondischargeability pursuant to 11 U.S.C. § 523(a)(6) of the obligations asserted in the Complaint.

B. Identify any existing non-bankruptcy judicial proceedings in which either the Plaintiffs or the Defendant-Debtor is seeking a judgment upon which Plaintiffs or Defendant-Debtor intend to assert such judgments and decisions as the basis for granting or

denying the relief requested in the Complaint to determine that such non-bankruptcy court judgment obligations are nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

C. Identify what evidence, if any, the party intends to present to the court other than the non-bankruptcy court judgments and decisions relevant to a determination of whether such non-bankruptcy court judgments are nondischargeable pursuant to 11 U.S.C. § 523(a)(6) as requested in the Complaint.

The court having stayed the matter until ordered otherwise, and having set a status conference hearing for 2:00 p.m. on December 15, 2016, **the matter is removed from the calendar.**

24. 16-90765-E-7 DONALD/CATHERINE MASON MOTION TO COMPEL ABANDONMENT
DEF-1 David Foyil 11-1-16 [23]

Final Ruling: No appearance at the December 1, 2016 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, creditors, parties requesting special notice, and Office of the United States Trustee on November 1, 2016. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Compel Abandonment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 Compel Abandonment is granted.

After notice and a hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or is 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 Donald Mason and Catherine Mason ("Debtor") requests the court to order the Trustee to abandon the real property located at 6442 Usher Drive, Valley Springs, California ("Property"). The Property is encumbered by the liens of PNC Mortgage and Ditech Financial, LLC, securing claims of $226,000.00 and $199,489.67, respectively. The Declaration of Debtor Donald Mason has been filed in support of the Motion and values the Property at $272,700.00.

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 caused by 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.

Debtor has also requested inappropriately in the corresponding Memorandum of Points and Authorities that the fourteen-day stay imposed by Federal Rule of Bankruptcy Procedure 6004(h) be waived so that a sale may proceed immediately upon possible entry of a court order approving a sale. Dckt. 26. Debtor has an offer from Our Parents Home LLC to purchase the Property for $285,000.00. Exhibit A, Dckt. 27. Debtor is reminded that Local Bankruptcy Rule 9014-1(d)(1) requires that "[w]ithout incorporation by reference to any other document, exhibit or supporting pleading, the motion . . . shall set forth the relief or order sought."

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 Compel Abandonment 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 Motion to Compel Abandonment is granted, and the property commonly known as 6442 Usher Drive, Valley Springs, California, is abandoned to Donald Mason and Catherine Mason by this order, with no further act of the Trustee required.

25. **14-90777-E-7** **DWIGHT/KATHRYN PFAFF** **MOTION TO AVOID LIEN OF**
ALF-3 **Ashley Amerio** **CENTRAL STATE CREDIT UNION**
11-11-16 [38]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on November 11, 2016. By the court's calculation, 20 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Central State Credit Union ("Creditor") against property of Dwight Pfaff and Kathryn Pfaff ("Debtor") commonly known as 6628 Old Emigrant Trail West, Mountain Ranch, California ("Property").

A judgment was entered against Debtor Dwight Pfaff in favor of Creditor in the amount of $7,443.32. An abstract of judgment was recorded with Calaveras County on May 7, 2014, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $248,000.00 as of the date of the petition. The unavoidable consensual liens that total $253,928.27 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 35. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 29.

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 the 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 Central State Credit Union, California Superior Court for Calaveras County Case No. 14CF11095, recorded on May 7, 2014, Document No. 2014 4447, with the Calaveras County Recorder, against the real property commonly known as 6628 Old Emigrant Trail West, Mountain Ranch, 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.

26. 16-90682-E-7 MDM-1 | **PATRICIA SCHOW, Christian Younger** | **CONTINUED TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS 9-20-16 [11]**

Final Ruling: No appearance at the November 10, 2016 hearing is required.

Local Rule 9014-1(f)(1) Motion—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 creditors on September 20, 2016. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Dismiss is denied.

Michael McGranahan, the Chapter 7 Trustee, filed the Instant Motion to Dismiss on September 20, 2016. Dckt. 11. The Trustee moves for dismissal based on the Debtor's failure to appear and testify at the Meeting of Creditors held on September 20, 2016. Alternatively, if Debtor's case is not dismissed, the Trustee requests that the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor's next scheduled Meeting of Creditors, which is set for 10:30 a.m. on November 15, 2016. If Debtor fails to appear at the continued Meeting of Creditors, the Trustee requests that the case be dismissed without further hearing.

DEBTOR'S DECLARATION

Patricia Schow ("Debtor") filed a Declaration in Response to Trustee's Motion to Dismiss Chapter 7 case on October 11, 2016. Dckt. 15. Debtor's Declaration indicates that she was unable to attend her Meeting of Creditors on September 20, 2016, because she was ill. Debtor indicates that she will attend her continued Meeting of Creditors set for 10:30 a.m. on November 15, 2016. Unfortunately for the Debtor, a promise to perform is not evidence of such.

NOVEMBER 10, 2016 HEARING

At the hearing, the court continued the matter to 10:30 a.m. on December 1, 2016. Dckt. 17.

TRUSTEE'S REPORT OF NO DISTRIBUTION

The Trustee filed a report of no distribution on November 15, 2016. *See* Dckt. 21. Trustee reports that Debtor appeared at the Meeting of Creditors.

DISCUSSION

Attendance at the Meeting of Creditors is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 707(a)(1). Trustee having reported that Debtor appeared at the Meeting and that there will be no distribution in the case, the Motion 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 Dismiss the Chapter 7 case filed by the Chapter 7 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 Dismiss is denied.

27. **16-90083-E-7** **VALLEY DISTRIBUTORS, INC.** **MOTION TO PAY**
SSA-10 **Iain MacDonald** **10-26-16 [247]**

Final Ruling: No appearance at the December 1, 2016 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, creditors, parties requesting special notice, and Office of the United States Trustee on October 26, 2016. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Pay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 Pay is granted.

Irma Edmonds, the Chapter 7 Trustee, filed the instant Motion on October 26, 2016. FN. 1. The Motion is filed pursuant to Federal Rule of Bankruptcy Procedure 4001(d)(1). The Trustee requests authorization to pay $101,021.77 to American Express Bank, FSB to complete and finalize implementation of the remaining portions of the Stipulated Agreement between the parties previously approved by the court to satisfy, in part, its secured claim. Dckt. 88.

FN.1. The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here, the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

The material provisions of the stipulation state that American Express Bank, FSB, the holder of a secured claim, will subordinate its claims to allow the bankruptcy estate to deduct all of its administrative expenses in the case pursuant to 11 U.S.C. § 503 and thereafter divide the residual proceedings remaining

to be allocated 60% to American Express Bank, FSB and 40% to the bankruptcy estate for case administration.

The allowed disbursements submitted and approved by American Express Bank, FSB provide for the following disbursements from $343,056.54 sales proceeds:

A. Payments to the estate of all its administrative expenses incurred:$174,686.92

B. Division of residual balance $168,369.62 as follows:

60% ($168,369.62) =	$101,021.77 to American Express Bank, FSB
40% ($168,369.62) =	$67,347.85 to VDI Bankruptcy Estate

VDI/American Express Recap Sheet. Exhibit 2, Dckt. 252.

The Trustee's declaration indicates that the Trustee presently has sufficient funds on hand to pay the claim as agreed as submitted by the Motion.

The Trustee, having presented evidence of a Stipulated Agreement executed between the Trustee and American Express Bank, FSB; prior approval of the court to operate the Debtor's business pursuant to 11 U.S.C. § 721; to use cash collateral pursuant to 11 U.S.C. § 363(c)(1)–(3); and to comply with Federal Rule of Bankruptcy Procedure 4001(d), the court grants the Motion to Pay.

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 Pay filed by Chapter 7 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 is granted, and the Trustee is authorized to pay $101,021.77 to American Express Bank, FSB to complete and finalize implementation of the remaining portions of the Stipulated Agreement between the parties previously approved by the court to satisfy, in part, its secured claim.

28.	**16-90083-E-7** **SSA-11**	**VALLEY DISTRIBUTORS, INC.** **Iain MacDonald**	**MOTION FOR COMPENSATION FOR HUISMAN AUCTIONS, INC., AUCTIONEER(S)** **11-9-16 [254]**

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

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

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

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 November 9, 2016. By the court's calculation, 22 days' notice was provided. 21 days' notice is required (Fed. R. Bankr. P. 2002(a)(6), twenty-one-day notice requirement when requested fees exceed $1,000.00).

The Motion for Allowance of Professional Fees 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Allowance of Professional Fees is granted.

Irma Edmonds, the Chapter 7 Trustee ("Client") brings a Motion for Allowance of Professional Fees for Huisman Auctions, Inc., the Auctioneer ("Applicant"), who makes a First and Final Request for the Allowance of Fees and Expenses in this case. Additionally, Client moves to modify the court's prior order relating to $36,500.00 approved as expenses in a liquidation budget analysis.

Fees are requested for the period April 28, 2016, through May 9, 2016. *See* Exhibit 3, Dckt. 258. The order of the court approving employment of Applicant was entered on April 13, 2016. Dckt. 86. Applicant requests commission fees in the amount of $57,009.53 and costs in the amount of $38,221.08. FN.1.

FN.1. The Motion requests $57,009.53 as Applicant's commission, but Exhibit 4 (Dckt. 258) lists $57,010.59 as the applicable commission.

ORDER AUTHORIZING EMPLOYMENT AND FEES

The court has previously authorized the employment of Husiman Auctions, Inc., approving a 15% commission of the gross sales prices and the payment of $36,500.00. Order, Dckt. 86. In the Motion now before the court, the Trustee and Auctioneer address extraordinary expenses that were not reasonably anticipated when the employment was originally engaged. The actual expenses total $38,221.08. In addition to the auction, it is asserted that the expenses also relate to steps to be taken by the Trustee to protect the estate from liability from third-parties.

These costs, if known at the time and disclosed to the court, would have been provided for in the order employing. It is proper to increase the amount of expenses to be allowed the Applicant.

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 a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional 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). A professional must exercise good billing judgment with regard to the services provided as the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "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 setting up the auction, filing paperwork, acquiring a bankruptcy bond, advertising, marketing, establishing an online auction, removing debris, and repairing a debris removal truck's tire. The auction resulted in gross sales of $380,063.50. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in the public auction of Debtor's assets. The sale generated $285,137.97 of net monies (exclusive of these requested fees and costs) as recovery for Client. Exhibit 4, Dckt. 258. Applicant requests $57,009.53 as a commission.

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $38,221.08 pursuant to this application. Pursuant to prior order, the court approved costs of $36,500.00.

The costs requested in this Application are,

Description of Cost	**Cost**
Set Up & Check Out	$10,720.00
Administrative Paperwork for 10 Days	$6,640.00
$100,000 Bankruptcy Bond	$1,000.00
Advertising, Marketing & Mailings	$6,879.04
Internet Fee for Online Auction	$3,361.78
Credit Card Fees	$3,077.26
DMV Costs	$4,043.00
Liability Insurance	$2,500.00
Total Costs Requested in Application	$38,221.08

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the fees computed on a percentage basis recovery for Client are reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees of $57,009.53 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant. The Trustee

is authorized to pay from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Costs & Expenses

The First and Final Costs in the amount of $38,221.08 are approved 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.

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

Fees	$57,009.53
Costs and Expenses	$38,221.08

pursuant to this Application as final fees and costs 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 Irma Edmonds, the Chapter 7 Trustee ("Client"), on behalf of Huisman Auctioneers, Inc., Auctioneer 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 Huisman Auctioneers, Inc. is allowed the following fees and expenses as a professional of the Estate:
>
> Huisman Auctioneers, Inc., Professional Employed by the Trustee
>
> Fees in the amount of $57,009.53
> Expenses in the amount of $38,221.08,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as auctioneer for the Trustee.
>
> **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.

29. 15-90284-E-7 ANTONIO/LUCILA AMARAL — CONTINUED ORDER TO APPEAR FOR EXAMINATION (RAFAEL SALDANA)
15-9057
MCGRANAHAN V. SALDANA
CASE CLOSED: 07/27/2016
9-9-16 [50]

APPEARANCE OF RAFAEL SALDANA, THE JUDGMENT DEBTOR, REQUIRED AT THE DECEMBER 1, 2016 HEARING

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Proof of Service states that the Order to Appear for Examination for Enforcement of a Judgment was served on Rafael Saldana ("Defendant"), and Office of the United States Trustee on September 9, 2016. By the court's calculation, 41 days' notice has been provided.

This is a post-judgment order to appear filed by the Plaintiff, Michael McGranahan, for the examination of the judgment creditor, Rafael Saldana. The court signed a default judgment on July 8, 2016, Dckt. 33.

The Order for Appearance and Examination for Enforcement of a Judgment is discharged/sustained.

Michael McGranahan, the Chapter 7 Trustee, applied for an Order for Appearance and Examination on September 9, 2016. As the judgment creditor, the Trustee ordered Rafael Saldana ("Judgment Debtor") to appear and furnish information to aid in enforcement of a money judgment against the Judgment Debtor.

OCTOBER 20, 2016 HEARING

At the hearing, Plaintiff-Trustee's counsel reported that the Judgment Debtor states that a $1,000.00 payment was being sent in immediately. Having been ordered to appear, the court interpreted Defendant's action as taking a step to address the judgment.

The Trustee requested that the Examination be continued, notwithstanding Debtor failing to appear as ordered by the court, to allow Debtor the opportunity to address the judgment before an Order to Show Cause is issued.

The court continued the hearing to 10:30 a.m. on December 1, 2016. Dckt. 52.

DISCUSSION

At the hearing, 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 Order to Appear for Examination for Enforcement of a Judgment 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 is discharged/sustained.

30. 16-90386-E-7 RUBEN/SOFIA AMAYA CONTINUED MOTION TO CONVERT
PBG-1 Patrick Greenwell CASE TO CHAPTER 13
6-20-16 [27]

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

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

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

The Motion to Convert Case to Chapter 13 was served by the Clerk of the Court on Debtor's, Debtor's Attorney, Chapter 7 Trustee, Trustee's Attorney, and Office of the United States Trustee on June 23, 2016. The court computes that 42 days' notice has been provided. 21 days' notice is required. Fed. R. Bankr. P. 2002(a)(4).

The Motion to Convert the Bankruptcy Case 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is denied.

Ruben Amaya and Sofia Amaya ("Debtor") filed an *ex parte* notice of conversion of the bankruptcy case from Chapter 7 to one under Chapter 13. Dckt. 27. No reason is given in the Motion for the conversion. Generally, the court will readily grant such requests to allow a good faith debtor to prosecute a good faith reorganization of personal finances.

TRUSTEE'S OPPOSITION

The Chapter 7 Trustee has filed an Opposition, alleging that the conversion is sought because the Trustee is administering what heretofore were undisclosed assets of the Debtor. Dckt. 28. The Trustee asserts that Debtor affirmatively misrepresented assets and income not only on the Schedules, but also at the First Meeting of Creditors.

The Trustee asserts that while disclosing ownership of one residence, the Debtor owned a second residence that was not disclosed on the Schedules or at the First Meeting of Creditors.

The Trustee notes that the Debtor has failed to amend the schedules to correct the failure to disclose the formerly non-disclosed property or the rental income.

On June 23, 2016, the court issued an Order Setting Hearing, ordering:

> The Trustee has raised significant issues of whether conversion of this Chapter 7 case is proper. Therefore, upon review of the request to convert, opposition, files in this case, and good cause appearing,
>
> **IT IS ORDERED** that the request to convert this case as set forth in the Debtor's Notice of Conversion from Chapter 7 to Chapter 13 filed June 20, 2016, docket entry no. 27, is set for hearing on **August 4, 2016, at 10:30 a.m.** in the United States Courthouse, 1200 I Street, Second Floor, Modesto, California.
>
> **IT IS FURTHER ORDERED** that Ruben Amaya and Sofia Amaya, and each of them, the Chapter 7 Debtor, shall appear in person at the August 4, 2016 hearing, no telephonic appearance permitted.

Dckt. 32.

DEBTOR'S REPLY

The Debtor filed a reply on July 29, 2016. Dckt. 38. The Debtor states that they listed their primary residence in the petition and exempted their equity. The exempt equity was up to $175,000.00 because of Debtor Ruben Amaya's total disability. No rental income or rental property was listed.

Debtor states that they testified truthfully, that they did not have a rental on the property, and that they received no rental income.

A Report of No Distribution was filed on May 27, 2016. Dckt. 9.

The Trustee arranged for a realtor to visit the Debtor's residence. The Debtor asserts that the Trustee's realtor valued the home at approximately $100,000.00 more than the Debtor's value, based upon a unit being available to act as a rental. The Trustee filed a Notice of Possible Recovery of Assets on May 31, 2016. Dckt. 11.

The Debtor filed a Notice of Conversion from Chapter 7 to Chapter 13 on June 20, 2016. Dckt. 27.

The Debtor argues that the Trustee is incorrect that there are two residences and that the Debtor rents out one of them. The Debtor has considered this property as one residence, not two. Debtor Ruben Amaya's parents lived in the second living quarters until their death several years ago. After that, Debtor

Ruben Amaya's brother lived there. The Debtor asserts that neither the parents nor the brother ever paid rent; it was a family home. The Debtor argues that various family members have stayed there over the last few years, ranging from a couple of nights to a couple of months. None has ever paid rent. The second living quarters has never produced an income and has never been rented to anyone.

When Debtor filed the petition, the Debtor was of the opinion that the real property was valued at $170,000.00, which is the amount listed in the Schedules.

The Debtor admits that the current Schedule J shows a current deficit of $3.00 per month. However, the Debtor states that there is future rental value of the second living quarters and would generate enough additional income to make up the existing deficit and to fund a Chapter 13 Plan.

The Debtor states that once a conversion takes place, the Debtor will amend the schedules to list the anticipated income from the second living quarters.

Finally, the Debtor claims to not have any "education, training or experience in real estate or rentals." Dckt. 38.

AUGUST 4, 2016 HEARING

At the hearing, the court expressed doubts about Debtor's Schedules and lack of property insurance. The court continued the matter to September 29, 2016, at 10:30 a.m. and required Debtor to file supplemental pleadings on or before September 15, 2016. Dckt. 42.

DEBTORS' SUPPLEMENTAL PLEADINGS

Debtor filed a Supplemental Pleading on September 15, 2016. Dckt. 46. Debtor provided a liquidation analysis for a potential sale of their home. If they sell for $251,000.00, they expect that the sale would produce $23,113.00 for distribution to creditors. They compute that number as follows:

A.	Sales Price	$251,000.00
B.	Costs of Sale (8%)	$20,080.00
C.	1st T.D.	$5,282.00
D.	Capital One Judgment	$12,214.00
E.	Citibank Judgment	$5,240.00
F.	Homestead Exemption	$175,000.00
G.	Trustee's Compensation	$4,068.00
H.	Trustee's Attorney (est.)	$6,000.00

I.	**NET TO CREDITORS**	**$23,113.00**	

Also, Debtor analyzed what would happen if their income changes. First, they mention that a proposed Amended Schedule I (Exhibit 1, Dckt. 48) would show existing income supplemented by $950.00 per month in rent, giving a total income of $2,327.00 per month. Second, they reference an Amended Schedule J (Exhibit 2, Dckt. 48) that shows lower expenses from house payments being deleted because fewer than sixty months' worth of payments remain and would be paid through a Chapter 13 Plan.

Finally, Debtor proposes a Chapter 13 Plan (Exhibit 3, Dckt. 48) that pays creditors over sixty months as follows:

A.	Chase Home Equity	$97.28	
B.	Capital One Judgment	$259.91	
C.	Citibank Judgment	$111.33	
D.	Attorney's Fees	$50.00	
E.	Unsecured Creditors	$385.22	
F.	Trustee Compensation	$100.42	
G.	**TOTAL**		**$1,004.16**

SEPTEMBER 29, 2016 HEARING

The Trustee stated his opposition at the hearing, first focusing on the fact that there are two houses on the property, with the Debtor trying to claim a homestead exemption on both. The Trustee intends to present evidence that the Debtor misrepresented that he did not own the second house.

Second, with respect to the liquidation analysis, the Trustee believes that Debtor has unreasonably used the lowest value in the range. At the higher value, general unsecured claims could be paid in full within a year.

Third, it is not feasible based on existing Schedules I and J.

At the hearing, Debtor argued that he had now rented the second house for $950.00. Debtor's counsel said that the $950.00 amount was what Debtor's counsel computed the median rent to be for the home. Counsel could not inform the court to whom the second house was rented (family, friend, or unrelated person). Additionally, Counsel advised the court that Debtor did not attempt to rent the house for more, but just used counsel's $950.00 number.

Because the property is property of the estate, an attempt to "rent" the house is not effective because the property is in the estate and under the sole control of the Trustee. That Debtor may have a possible tenant, who will pay fair market rental value, is relevant to whether a plan would be feasible. But there is no indication that $950.00 per month is a reasonable rent, especially in light of counsel for Debtor not knowing whether the proposed tenant is a family member or friend.

The court continued the hearing on the matter to 10:30 a.m. on December 1, 2016. Dckt. 50. Any opposition by the Trustee was to be filed by November 10, 2016, and any reply by Debtor was to be filed by November 17, 2016.

TRUSTEE'S SUPPLEMENTAL PLEADING

The Trustee filed a Memorandum of Points and Authorities in Support of Opposition to the Motion on November 10, 2016. Dckt. 55. In short, the Trustee argues that the Motion should be denied because Debtor has acted in bad faith by not disclosing property.

This court has documented the history and allegations of there being another residence on Debtor's property that has not been disclosed—and that arguably has been concealed deliberately. The Trustee adds to the evidence by presenting the following:

A. At the Meeting of Creditors, the Trustee asked and the Debtor confirmed that there was only a one-family house on the property with no additional tenants.

B. On May 26, 2016, Bob Brazeal inspected the residence personally.

1. Mr. Brazeal asked about the second residence, and Debtor stated that the house was not on his property and that he knew nothing about it.

2. Mr. Brazeal saw multiple cars by the second residence.

3. Mr. Brazeal and Debtor knocked on the door of the second residence, and Mr. Brazeal witnessed home furnishings and three people inside, including one person who was cooking.

4. Mr. Brazeal estimates the value of the property to be between $251,000 and $270,000 (Debtor valued the property at $170,000).

The Trustee asserts that Debtor misrepresented facts in the petition and schedules and at the Meeting of Creditors. The Trustee believes that the misrepresentation is material because of the second house's size (three bedrooms, one bath), location (completely detached and on Debtor's property), and effect on the value of the property (significant increase in market value and significant rental income). The Trustee stresses that an important factor in determining the existence of bad faith is whether the Debtor has misrepresented material facts. *See In re Rognstad*, 121 B.R. 45, 50 (Bankr. D. Haw. 1990) ("The finding of bad faith may rest on such nondisclosure or misrepresentation and even subsequent amendments do not vitiate bad faith in failing to disclose relevant facts.").

In addition to denying the Motion because of bad faith, the Trustee asserts that the Code's policy of granting a debtor a fresh start is only afforded to the "honest but unfortunate debtor." *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007). The Trustee asserts that Debtor could not propose a Chapter 13 plan under 11 U.S.C. § 1325(a)(3) because the plan cannot be presented in good faith. This presumes that Debtor has so polluted Debtor's credibility well that nothing from Debtor can be believed.

DEBTOR'S SUPPLEMENTAL SUPPORT DOCUMENT

Debtor filed a Support Document on November 18, 2016. Dckt. 60. The court ordered the Debtor to file a reply to the Trustee's Opposition by November 17, 2016. Court deadlines are not set arbitrarily. Fortunately for the Debtor, the court has had time to review the pleading and has decided to overlook Debtor's failure.

Debtor's first argument is that the $170,000.00 valuation of the property was based on Debtor's own opinion and upon an estimate listed on Zillow. Debtor stresses that even since filing Schedules, the estimate on Zillow has only appeared as $195,000.00. Debtor emphasizes that the opinions of value may not be accurate, but they does not rise to the level of misrepresentation.

Second, Debtor claims to have never denied the existence of additional living quarters on the property. Debtor was never asked if there was a second living quarters or room for a second family; they were asked if there was a tenant arrangement or anyone else living there, to which Debtor answered, "No." Debtor claims that the response was accurate because no one has ever rented the property; people would just stay there from time to time.

Third, Debtor stresses that Debtor Ruben Amaya is blind and would have no way of identifying a second home on a parcel map that was apparently shown to him by the Trustee's realtor. Debtor believes that the property has one home with two living quarters.

Debtor objects to the Trustee's reliance on *Marrama v. Citizens Bank* because that case involved numerous misrepresentations, claims that property value was $0, failure to disclose recent transfers of property, and admittances that the transfers were to avoid creditors' reach. This case only involves a miscommunication that has been put out of proportion by the Trustee.

Debtor also stresses that reliance on *Leavitt v. Soto (In re Leavitt)* is inappropriate because that case had numerous lies, transfers of property and money, and serious omissions, while this case relates to one misstatement.

Debtor emphasizes that the Ninth Circuit follows a totality of the circumstances test, which favors Debtor because there is no history of bankruptcy filings and dismissals, no state court litigation to avoid, and no egregious behavior by the Debtor.

DISCUSSION

The court begins with the Bankruptcy Code, which provides for the conversion of a Chapter 7 case by a debtor to one under Chapter 13 as follows:

> "§ 706. Conversion
>
> (a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable."

Debtor asserts that this is an all but absolute right to convert, which a debtor may exercise at any time (even when it works to eject a Chapter 7 trustee in the process of administering assets of discovered assets). This section can be compared to the analogous right of a Chapter 13 debtor to dismiss a Chapter 13 case as provided in 11 U.S.C. § 1307(b), which states:

> "(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable."

In enacting § 1307(b), Congress went so far as to state that the court "shall" dismiss the case when requested by the debtor. In § 706(a), Congress did not use the "shall" language concerning an attempt by a debtor to convert a case out of Chapter 7.

The U.S. Supreme Court addressed the provisions of 11 U.S.C. § 1307, determining that such "shall" language represents an almost absolute right to dismiss a Chapter 13 case, but it is limited based on the good or bad faith of the debtor. In *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007), the Supreme Court states:

> "An issue that has arisen with disturbing frequency is whether a debtor who acts in bad faith prior to, or in the course of, filing a Chapter 13 petition by, for example, fraudulently concealing significant assets, thereby forfeits his right to obtain Chapter 13 relief. The issue may arise at the outset of a Chapter 13 case in response to a motion by creditors or by the United States trustee either to dismiss the case or to convert it to Chapter 7, see § 1307(c). It also may arise in a Chapter 7 case when a debtor files a motion under § 706(a) to convert to Chapter 13."

This issue of lack of good faith and a debtor who does not truthfully fulfill obligations of disclosure and truthfulness is identified by the Supreme Court itself as one occurring with "disturbing frequency."

In *Marrama*, the Chapter 7 debtor did not accurately provide information about his home. While disclosing the home to the Chapter 7 trustee, he did not accurately describe his interest in it and did not disclose that he had transferred the home into the trust (for which he was the beneficiary) in the year prior to commencing the bankruptcy case. When the Chapter 7 trustee announced that he was going to recover the house from the trust and administer it as part of the Chapter 7 estate, Marrama elected to convert the case to one under Chapter 13 and dispossess the Chapter 7 trustee. The Chapter 7 trustee and creditors opposed, based on Marrama not disclosing the transfer into the trust and stating the value of his interest at $0, contending that the requested conversion was in bad faith. Marrama's "error" was explained as a mere

"scrivener's error" in describing his house. The bankruptcy court rejected the claimed "error," and denied the requested conversion to Chapter 7.

In describing the ability of a debtor to convert a case from Chapter 7 to Chapter 13, the Supreme Court explained:

> The class of honest but unfortunate debtors who do possess an absolute right to convert their cases from Chapter 7 to Chapter 13 includes the vast majority of the hundreds of thousands of individuals who file Chapter 7 petitions each year. Congress sought to give these individuals the chance to repay their debts should they acquire the means to do so. . .
>
> Nothing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. [FN.11] On the contrary, the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate "to prevent an abuse of process" described in § 105(a) of the Code, is surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.
>
> ----------
>
> FN.11. We have no occasion here to articulate with precision what conduct qualifies as 'bad faith' sufficient to permit a bankruptcy judge to dismiss a Chapter 13 case or to deny conversion from Chapter 7. It suffices to emphasize that the debtor's conduct must, in fact, be atypical. Limiting dismissal or denial of conversion to extraordinary cases is particularly appropriate in light of the fact that lack of good faith in proposing a Chapter 13 plan is an express statutory ground for denying plan confirmation. 11 U.S.C. § 1325(a)(3); *see In re Love*, 957 F.2d, at 1356 ('Because dismissal is harsh . . . the bankruptcy court should be more reluctant to dismiss a petition . . . for lack of good faith than to reject a plan for lack of good faith under Section 1325(a)')."
>
> ----------

Marrama v. Citizens Bank of Mass., 549 U.S. at 374–75.

In *Marrama*, the Supreme Court considered a debtor who disclosed the home and that he had an interest as the beneficiary of the trust, but "neglected" to state that he had transferred it into the trust. Though the trustee could easily determine such from a review of the real property records and could have a real estate professional provide an opinion of value of the property and the debtor's interest (and not have to rely on the debtor's valuation of $0.00), that conduct was sufficient for the bankruptcy court to deny the request to convert based on that debtor's bad faith.

The Ninth Circuit Court of Appeals addressed this issue in *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008), in which the debtor sought to dismiss a Chapter 13 case rather than having it converted to one under Chapter 7. The Ninth Circuit has determined that even the election to dismiss a Chapter 13 case pursuant to 11 U.S.C. § 1307(b) ("shall" dismiss language of statute) is subject to the requirement that the election be in good faith. The Ninth Circuit found that it was not unreasonable for the bankruptcy judge to conclude that the Chapter 13 debtor's conduct in *Rosson* indicated that the dismissal was sought to "abscond with the funds" in the bankruptcy estate that could properly be disbursed to creditors. " In sum, it is clear from the record that the bankruptcy court acted 'to prevent' what it reasonably perceived to be 'an abuse of process.'" *Id.* at 774 (citing 11 U.S.C. § 105(a)).

In considering whether a debtor is acting in bad faith, "a bankruptcy judge must review the totality of the circumstances." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). Under the "totality of the circumstances" test, the court examines whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or filed his Chapter 13 petition or plan in an inequitable manner. *Id.* Debtor's history of filings and dismissals is relevant in determination of "bad faith." *Id.*

Debtor's Conduct Has Not Been, and Is Not, in Good Faith

Significant issues exist in connection with this case. While Debtor claims a homestead exemption in all of the property, there are two residences. Whether the exemption can be claimed in the value of the second residence still has not been addressed by Debtor. Debtor appears to have left that "work" for the court to do for the Debtor. Since Debtor does not reside in the second home, the court is not presented with any basis for concluding that the Debtor resides there.

The court is not convinced by Debtor's dismissive and questionable interpretation of the questions asked at the Meeting of Creditors. That Debtor would even try to distinguish that a question referred to whether or not there was a tenant agreement indicates that Debtor is trying to hide something, whether or not Debtor actually knows that the omission is material to the case. The Trustee has provided evidence that one of the questions asked was whether Debtor wanted to add anything else to the information provided at the Meeting of Creditors. Debtor added nothing. If Debtor's only objection was to the form of the question, then Debtor could have taken the opportunity to resolve any ambiguity about how the additional living quarters/house was being used.

The court does not find Debtor's contention that Debtor has always considered the two homes as one "residence" to be credible. Debtor testifies that the second home was used as parent's living "quarters" for a number of years. Then, Debtor's brother and various other family members have used the "second living quarters." Nobody ever paid any rent, even when the Debtor was "driven" into bankruptcy. Declaration, ¶ 6, Dckt. 39. Ruben Amaya, one of the two debtors testifies that he has developed his opinion as to value by "monitoring property values" in the neighborhood and conducting on-line research. *Id.* ¶ 7. But Mr. Amaya and his counsel deride the testimony of the broker about discussing the second residence on the property by arguing that "Mr Amaya is totally blind and would have no idea of what the realtor was looking at or referring to...." Support Brief, p. 2:20–21. This is a contention that Mr. Amaya could have had no idea of what the broker was discussing when the broker was "looking at" the second residence.

Under penalty of perjury Debtor stated having income of only $1,402.00 a month. Schedule I, Dckt. 1 at 30–31. Debtor's expenses exhausted their limited income. Schedule J, *id.* at 32–33. Once the Trustee discovered the second residence on the property, the Debtor now states that they will become landlords and generate $900.00 a month in additional income. Declaration, Dckt. 39. But no thought is given to the costs and expenses of becoming a landlord (other than $69 per month for insurance).

The court cannot, and does not, ignore that Debtor has been and is represented by counsel. When Schedule A was completed, Debtor stated under penalty of perjury that Debtor had only a "single family residence." Dckt. 1 at 12. Debtor has not amended Schedule A, even after being told by the realtor there is a second structure on the property, and Debtor admits that the property is not a "single family residence," but is used for multi-family residences (parents, then brother, and then various other family members).

The court also concludes that the expenses stated on Schedule J are not credible. No property insurance has been listed. Debtor argues that is a mere oversight, but it causes an even further excess of expenses over Debtor's limited income. Debtor states having $30 per month vehicle insurance expense, and only $75 for transportation expenses. Debtor lists owning a 2002 vehicle with 290,000 miles on it. The court does not understand these expenses for such an aged vehicle.

Debtor does not disclose any other income, whether CalFresh, welfare, governmental support, or family support to pay any expenses. Possibly such assistance exists, but it has not been disclosed.

Given the $1,400 income, the court does not find there to be any prospect of any possible, credible plan. The court does not find Debtor's arguments that they will now become a landlord and generate $900 per month income credible. Debtor has demonstrated an inability to so do, but instead use the second residence on the property as free housing for family. Such is laudable, so long as one is doing it with their money, not their creditors' money by not paying their debts.

The proposed Chapter 13 Plan floated by Debtor is filed as Exhibit 3, Dckt. 48. This plan would commit Debtor to fund the plan with $1,005.00 per month for sixty months. These payments would total $60,300.00. It is inconceivable that Debtor can generate $1,005.00 of projected disposable income based on current income and the economic projections.

Debtor projects having $2,327.00 in monthly income. This increase occurs based on Debtor becoming a landlord and successfully operating as a landlord for sixty months. The increased income to generate the $1,005.00 comes from $950.00 in rental income.

As discussed above, Debtor's contention that Debtor can become and operate the business of renting residential property is not credible. Debtor offers no evidence of any ability to do such work. The court begins with the Debtor's proposed business income from residential property.

Debtor states that there will be $950.00 per month in gross rental income. There has been none in the past, and there is no demonstrated ability to generate such income. Debtor then states that the only expense in generating such income is $25.00 per month for repairs and maintenance. Business Income and Expenses form, Exhibit 1, Dckt. 48 at 5. There is no expense for landlord insurance, liability insurance, property damage insurance, or other protection for the value of the rental property. For the $11,400.00 in

income, Debtor makes no provision for taxes. Debtor makes no provision for paying any registration or inspection fees to the County. Debtor offers no explanation as to how $25.00 per month is adequate to maintain a $1,000.00 per month rental property.

Debtor also revises the expenses previously stated on Schedule J. As Exhibit 2 uses the Schedule J form to show the new expenses. *Id.* at 7–8. On Original Schedule J, Debtor states having a negative Monthly Income of ($3.00). To create the appearance of there being $1,005.00 to fund a plan, on Exhibit 2 Debtor changes expenses to create more "net income."

On Exhibit 2, Debtor shows a monthly insurance expense of $69.00, having listed $0.00 on Schedule J. Debtor argues that this was a mere oversight in not listing that expense. But that has to be the expense for insurance on Debtor's own residence, not residential real property. No such necessary insurance expense for a landlord is listed on the Business Income and Expense form (Exhibit 1), nor on Exhibit 2.

Debtor now states that the $75.00 transportation expense stated under penalty of perjury on Schedule J is not the correct amount and increases it to $125.00. No explanation has been provided for increasing this expense.

Another "expense" stated under penalty of perjury disappears altogether. On Schedule J, Debtor stated under penalty of perjury having a $200.00 per month expense for rent or mortgage. Dckt. 1 at 32. On Exhibit 2, Debtor now lists this expense at $0.00, though. There is no explanation as to who or how this expense, previously stated under penalty of perjury, exists any longer.

Debtor has demonstrated that there is no Chapter 13 plan, there is no feasible plan, and the financial information provided is not credible.

Debtor's most recent argument that they did not "lie" about there not being a second residence further manifests bad faith. Debtor contends they were never asked, "if there was a second living quarters." It was Debtor's responsibility to clearly disclose the assets (as was Marrama's), and not merely provide an incomplete description and then complain that the trustee didn't interrogate them sufficiently. Debtor's contention that Debtor's response of "No" to the question "Do you have a tenant arrangement or anyone else living there" as being "accurate" only compounds the bad faith. Debtor now admits that there were others "living there," parents, brother, and various other family members.

Debtor's bad faith, and sophistication of bad faith, is amplified by the argument that "Other people would stay there [at the undisclosed second residence on the property] from time to time but no one lived there." Debtor now seeks to parse the word "stay" with the word "live" to justify their deception. Debtor's own prior testimony shows that this continuing argument is not in good faith.

> "Mr. Amaya's parents lived in the second living quarters until their death several years ago. After that Mr. Amaya's brother lived there. Neither the parents nor the brother ever paid rent, it was a family home. Various family members have stayed there over the last few years from a couple of nights to a couple of months."

Declaration of Ruben Amaya and Sofia Amaya, ¶ 6; Dckt. 47. This testimony avoids stating how long the parents "lived" in the "living quarters." It does not from the testimony appear to have been only for a short visit. Then, both debtors testify under penalty of perjury that Debtor's brother "lived there," again for an unstated duration. Then, various other family members have "stayed" there for months at a time. This testimony shows that the use of the second residence by others was not for a "weekend stay by a relative," but as a residence for family members to live in for extended periods of time.

Debtor has not sufficiently convinced the court that conversion of this case to one under Chapter 13 is appropriate and in good faith. To the contrary, it appears to be merely a dodge to dispossess the Chapter 7 Trustee and to prevent the proper administration of the Chapter 7 bankruptcy estate. The Debtor has demonstrated that their intention is to take what will be the non-exempt value in the real property and divert it away from creditors. Debtor has not shown any ability to fund a $60,000.00 plan. To the contrary, the Debtor's own evidence clearly and convincingly shows that they cannot perform any such plan.

The Motion to Convert the Case 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 Convert filed by Ruben Rodriguez Amaya and Sofia Amaya 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 Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is denied.

31. **16-90386-E-7** **RUBEN/SOFIA AMAYA** **CONTINUED MOTION TO EMPLOY**
HCS-2 **Patrick Greenwell** **PMZ REAL ESTATE AS REALTOR(S)**
6-17-16 [22]

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

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

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

The Motion to Employ was served by the Clerk of the Court on Debtor's, Debtor's Attorney, Chapter 7 Trustee, Trustee's Attorney, and Office of the United States Trustee on June 23, 2016. The court computes that 42 days' notice has been provided.

The Motion to Employ 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Employ Realtor is granted.

Gary Farrar, the Chapter 7 Trustee, seeks to employ Realtor PMZ Real Estate, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Realtor to assist the Trustee in valuing, marketing, and possibly listing for sale real property commonly known as 308 Orange Avenue, Modesto, California ("Property").

The court set the matter for hearing in light of the Motion to Convert. Dckt. 33.

The Trustee argues that Realtor's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present formerly unreported assets to be valued, and potentially sold, for the benefit of the estate.

Bob Brazeal, an associate of PMZ Real Estate, testifies that he is representing the Trustee in valuing and possibly selling the Property. Bob Brazeal testifies he and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

AUGUST 4, 2016 HEARING

At the hearing, the court continued the matter to 10:30 a.m. on September 29, 2016.

SEPTEMBER 29, 2016 HEARING

At the hearing, the court continued the matter to 10:30 a.m. on December 1, 2016.

DISCUSSION

A review of the docket shows that no additional pleadings have been filed for this matter since the last hearing.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor-in-possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of the realtor, considering the declaration demonstrating that the realtor does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ PMZ Real Estate as Realtor for the Chapter 7 estate. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by the Chapter 7 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 Employ is granted, and the Chapter 7 Trustee is authorized to employ PMZ Real Estate as Realtor for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

32. **11-90487-E-7** **JOSE/PATRICIA SANCHEZ** **MOTION TO AVOID LIEN OF**
CJY-2 **Christian Younger** **STANISLAUS CREDIT CONTROL SERVICE, INC.**
11-7-16 [53]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on November 7, 2016. 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Stanislaus Credit Control Service, Inc. ("Creditor") against property of Jose Sanchez and Patricia Sanchez ("Debtor") commonly known as 2040 Lunar Drive, Ceres, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $1,869.98. An abstract of judgment was recorded with Stanislaus County on October 15, 2010, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $80,000.00 as of the date of the petition. Dckt. 19. The unavoidable consensual liens that total $169,733.84 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 51. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $1,000.00 on Amended Schedule C. Dckt. 51.

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 the 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 Stanislaus Credit Control Service, Inc., California Superior Court for Stanislaus County Case No. 655913, recorded on October 15, 2010, Document No. 2010-0092728-00, with the Stanislaus County Recorder, against the real property commonly known as 2040 Lunar Drive, Ceres, 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.

33. **12-93092-E-7** **ALFRED/PATRICIA HINOJOS** **MOTION TO AVOID LIEN OF DAVID KLEINER**
BSH-2 **Brian Haddix** **10-24-16 [27]**

Final Ruling: No appearance at the December 1, 2016 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 Creditor on October 24, 2016. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 David Kleiner ("Creditor") against property of Alfred Hinojos and Patricia Hinojos ("Debtor") commonly known as 2500 Latour Court, Modesto, California ("Property").

A judgment was entered against Debtor Patricia Hinojos in favor of Creditor in the amount of $32,766.45. An abstract of judgment was recorded with Stanislaus County on May 12, 2010, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $170,000.00 as of the date of the petition. The unavoidable consensual liens that total $244,710.73 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.740(b)(5) in the amount of $2.00 on Amended Schedule C. Dckt. 24.

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 David Kleiner, California Superior Court for Stanislaus County Case No. 612867, recorded on May 12, 2010, Document No. 2010-0042012-00, with the Stanislaus County Recorder, against the real property commonly known as 2500 Latour Court, Modesto, 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.

34.	**12-93092-E-7** **BSH-3**	**ALFRED/PATRICIA HINOJOS** **Brian Haddix**	**MOTION TO AVOID LIEN OF CITIBANK (SOUTH DAKOTA), N.A.** **10-24-16 [33]**

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.

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 Creditor on October 24, 2016. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 Citibank (South Dakota), N.A. ("Creditor") against property of Alfred Hinojos and Patricia Hinojos ("Debtor") commonly known as 2500 Latour Court, Modesto, California ("Property").

Debtor failed to file the correct abstract of judgment, however. *See* Exhibit A, Dckt. 35. Debtor filed an abstract of judgment associated with the Motion to Avoid Lien of David Kleiner (BSH-3) also set for this December 1, 2016 hearing.

Without the correct abstract being filed, the court cannot grant the Motion. Accordingly, the Motion is denied without prejudice.

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 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.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR FILES THE CORRECT ABSTRACT OF JUDGMENT

A judgment was entered against Debtor in favor of Creditor in the amount of $10,546.34. An abstract of judgment was recorded with Stanislaus County on October 27, 2011, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $170,000.00 as of the date of the petition. The unavoidable consensual liens that total $244,710.73 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.740(b)(5) in the amount of $2.00 on Amended Schedule C. Dckt. 24.

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 Citibank (South Dakota), N.A., California Superior Court for xxxx County Case No. xxxx, recorded on October 27, 2011, Document No. 2011-0089186, with the Stanislaus County Recorder, against the real property commonly known as 2500 Latour Court, Modesto, 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.