

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

December 10, 2015 at 10:30 a.m.

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1. [14-29231](#)-E-11 MIZU JAPANESE SEAFOOD MOTION FOR TURNOVER  
RLC-19 BUFFET, INC. 11-4-15 [[181](#)]  
Stephen M. Reynolds

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

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

**Below is the court's tentative ruling.**

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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, parties requesting special notice, and Office of the United States Trustee on November 9, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

**The Motion for Turnover is denied without prejudice.**

Mizu Japanese Seafood Buffet, Inc., the Plan Administrator/Debtor ("Plan Administrator-Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the property commonly known as the excess of the \$2,635.00 collected by the California State Board of Equalization from the sale of assets in the amount of \$77,810.75.

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The Plan Administrator-Movant asserts that the California State Board of Equalization filed Proof of Claim No. 6 on November 18, 2014 claiming a priority claim in the amount of \$28,555.75.

Proof of Claim No. 6 states under penalty of perjury that the State Board of Equalization has an unsecured priority claim in the amount of \$28,555.75 and a general unsecured claim in the amount of \$38,255.56. These unsecured claims total \$66,811.31. Proof of Claim No. 6.

On February 10, 2015, the court entered an order to sell property of the estate for the total of \$129,600.00. Dckt. 137. The order authorized that:

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

*Id.*

The Debtor-in-Possession asserts that the California State Board of Equalization sought and obtained \$80,445.73 from the escrow established pursuant to the order approving the sale.

The Debtor-in-Possession argues that counsel for Debtor-in-Possession demanded the return of the sale proceeds taken in excess of the \$2,635.00 sales tax generated by the sale of the estate's assets. No funds have been returned to date.

## **DISCUSSION**

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the an entity fails and refuses to turnover an asset voluntarily. 11 U.S.C. § 542(a) provides:

"542. Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in **possession, custody, or control, during the case, of property** that the **trustee may use, sell, or lease under section 363** of this title, or that the debtor may exempt under section 522 of this title, **shall deliver to the trustee**, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

Federal Rule of Bankruptcy Procedure 7001(1) excludes from the requirement for an adversary proceeding to recover money or property a proceeding to compel the debtor to deliver property to the trustee.

In this Contested Matter, the Plan Administrator-Movant has initiated this proceeding to compel California State Board of Equalization to deliver money (property) to the Plan Administrator-Movant which the Board apparently demanded and was paid through the sale escrow for the property of the estate by the to the Debtor-in-Possession prior to the confirmation of this case.

Prior to confirmation of the bankruptcy case, the Debtor in Possession exercises the powers and rights of a trustee.

The Plan having been confirmed, there is no Debtor in Possession. Upon confirmation of the Plan, all property of the bankruptcy estate reverted in the Debtor, who is the Plan Administrator under the Plan. Plan, Part 5, ¶ (b); Dckt. 138. No trustee, or debtor in possession, has the right to demand the turnover of the money pursuant to 11 U.S.C. § 542(a).

In support of the Motion, the Plan Administrator-Movant provides the declaration of Stephen Reynolds, the Debtor-in-Possession's counsel. Dckt. 183. The declaration seeks to authenticate the Final Seller's Statement dated May 8, 2015 for the sale of the assets. The Final Seller's Statement indicates that a total of \$80,445.73 was paid to California State Board of Equalization for "Tax Amounts Due."

California State Board of Equalization have not filed a response to the instant Motion to explain why it demanded \$80,445.73 from the escrow of the sale.

In substance, it appears that the Plan Administrator-Movant contends that: (1) the State of California violated the automatic stay by obtaining possession of and retaining control over \$80,445.73 of sales proceeds which were property of the bankruptcy estate; (2) the violation of the stay continued in the case at least through confirmation of the Plan; (3) the State of California has taken \$80,445.73 of what was property of the estate and has paid itself other than as permitted by the Confirmed Plan; and (4) through the conversion of the monies the bankruptcy estate and now the Plan Estate has been damaged. It appears that there may be a mix of statutory, tort, and contract claims.

However, the Plan Administrator-Movant does not show how there is property to be turned over to a "trustee." However, the Plan Administrator-Movant appears to assert that the State of California has much bigger problems than merely turning over monies it took in violation of the automatic stay. Unaddressed in the Motion is what action is to be taken, if any, against the fiduciaries of the estate during the term of the Debtor in Possession who allowed the \$80,445.73 to be taken by the State of California from the sale escrow. The Debtor in Possession was the only person authorized to sell the property, the Debtor in Possession was authorized to execute the documents necessary to complete the sale. Only costs and expenses, including sales taxes, necessary to effectuate the sale were authorized to be paid from the escrow. No claims, secured, unsecured, or priority were authorized to be paid from the escrow.

Therefore, 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 for Turnover of Property filed by the Trustee having been presented to the court, and upon review of

the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Turnover of Property is denied without prejudice.

2. [11-27845](#)-E-11 IVAN/MARETTA LEE CONTINUED ORDER TO SHOW CAUSE -  
Raymond E. Willis FAILURE TO PAY FEES  
10-27-15 [[388](#)]

**Final Ruling:** No appearance at the December 10, 2015 hearing is required.  
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The court having previously issued an order discharging the Order to Show Cause and waiving the reopening fee (Dckt. 392), **the matter is removed from the calendar.**

3. [15-21449-E-7](#) BALBIR/SAWARNJIT SEKHON MOTION TO SELL  
MPD-3 Mikalah R. Liviakis 11-19-15 [[107](#)]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 19, 2015. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

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

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

- A. The estate's interest in a promissory note dated July 16, 2014 in the original sum of \$142,000.00 payable by Mehar Sekhon Hotel Group, LLC to the Debtor Balbir Singh Sekhon, a married man as his sole and separate property.



Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The sale of the Note to the Buyers provides for the immediate cash of \$30,000.00 to the estate. The sale includes provisions for the Debtor's exemptions and allows for the release of potentially burdensome property of the estate. The sale contemplates any proper offsetting on the Note. The Trustee, in his fiduciary role, determined that the proposed sale is in the best interest of the estate and all parties involved.

Therefore, the Motion is granted.

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

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

The Motion to Sell Property filed by John Reger, the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the John Reger, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Balbir Sing Sekhon, Sawarnjit Kaur Sekhon, and Mehar Sekhon Hotel Group, LLC, through its sole managing member Gursahib Sekhon or nominee ("Buyer"), the Property commonly known as the estate's interest in a promissory note dated July 16, 2014 in the original sum of \$142,000.00 payable by Mehar Sekhon Hotel Group, LLC to the Debtor Balbir Singh Sekhon, a married man as his sole and separate property ("Property"), on the following terms:

1. The Property shall be sold to Buyer for \$54,073.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 111, and as further provided in this Order.
2. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

4. [11-48050-E-7](#) STAFF USA, INC.  
TAA-5 W. Austin Cooper

MOTION FOR ADMINISTRATIVE  
EXPENSES  
11-12-15 [[411](#)]

**Final Ruling:** No appearance at the December 10, 2015 hearing is required.  
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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, parties requesting special notice, and Office of the United States Trustee on November 12, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Administrative Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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 Administrative Fees is granted.**

Thomas Aceituno, the Chapter 7 Trustee, filed the instant Motion for allowance of Administrative Income Tax Claims on November 12, 2015. Dckt. 411. FN.1. The Trustee requests that the court authorize on a retroactive basis the payment of \$800.00 for tax year 2013 and \$800.00 for tax year 2014 and to authorize the payment of \$800.00 for tax year 2015 as administrative expense.

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FN.1. The Trustee improperly combined the Motion with the Declaration into a single document. Pursuant to the Local Bankruptcy Rules, each pleading paper should be filed separately from each other, linked together through the use of docket control numbers. See Local Bankr. R. 9014-1.  
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The Trustee states that on January 2, 2014, the Trustee paid the Franchise Tax Board the amount of \$800.00 as the estimated minimum tax owed to the state for tax year 2014. On March 17, 2014, the Trustee states he paid the Franchise Tax Board the amount of \$800.00 as the estimated minimum tax owed to the state for tax year 2013.

The Trustee hired a certified public accountant to prepare the estate's income tax returns and tax year 2013 and 2014 have been filed. The Trustee

asserts that both taxes show that no other amounts are due for 2013 or 2014 and neither return has been selected for examination.

The Trustee is seeking the retroactive approval for the payment of the minimum state taxes for tax year 2013 and 2014 and for the approval of for the payment of \$800.00 as a minimum state income taxes for tax year 2015.

In relevant part, 11 U.S.C. § 503 states:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1)(A) the actual, necessary costs and expenses of preserving the estate including-

(B) any tax--

(I) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;. . .

When a case is converted to one under Chapter 7, 11 U.S.C. § 726(b) provides that the administrative expenses of § 503(b) incurred under Chapter 7 after conversion have priority in distribution over the administrative expenses incurred under the other Chapters. 4 COLLIER ON BANKRUPTCY ¶ 726.03 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). 11 U.S.C. § 503(a) states that an entity may timely file a request for payment of an administrative expense, "or may tardily file such request if permitted by the court for cause."

Here, the Trustee is seeking both retroactive authorization to pay the taxes owed for 2013 and 2014 tax year as well as authorization to pay the taxes for tax year 2015. Pursuant to 11 U.S.C. § 503(b)(1)(B), the taxes paid by the Trustee are administrative expenses.

While the court is closely reviews requests for retroactive authorization, the unique facts of the instant case, the fact the case was converted from a Chapter 11 to a Chapter 7, and the pendency of the case since 2011, the court finds cause for the retroactive authorization. The Trustee paid actual and necessary administrative expenses of the estate. The Trustee, however, should note that the court will not provide such leniency in the future and the Trustee shall provide explicit grounds stated with particularity as to why retroactive authorization should be granted.

Therefore, the Motion is granted and the Trustee is authorized to pay a total of \$2,400.00 to the Franchise Tax Board for income taxes for tax years 2013, 2014, and 2015.

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 Administrative Fees filed by 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 a total of \$2,400.00 to the Franchise Tax Board for income taxes for tax years 2013, 2014, and 2015.

5. 11-48050-E-7 STAFF USA, INC.  
TAA-6 W. Austin Cooper

MOTION FOR ADMINISTRATIVE  
EXPENSES  
11-16-15 [[415](#)]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on November 16, 2015. By the court's calculation, 24 days' notice was provided. 28 days' notice is required.

The Motion for Administrative 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. At the hearing -----.

**The Motion for Administrative Fees is granted.**

Thomas Aceituno, the Chapter 7 Trustee, filed the instant Motion for allowance of Administrative Tax Claims on November 16, 2015. Dckt. 415. FN.1. The Trustee requests that the court authorize the payment of the California Employment Development Department taxes as a reasonable administrative expense of the Chapter 11 estate to the extent and priority such expenses are paid by the Chapter 7 estate in the amount of \$7,238.90.

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FN.1. The Trustee improperly combined the Motion with the Declaration into a single document. Pursuant to the Local Bankruptcy Rules, each pleading paper

should be filed separately from each other, linked together through the use of docket control numbers. See Local Bankr. R. 9014-1.

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The Trustee states that the California Employment Development Department filed Proof of Claim No. 27-1 on February 2, 2014. The Proof of Claim asserts a claim for an administrative tax in the amount of \$7,238.90 which were incurred during the Chapter 11 proceeding.

The Debtor originally filed a Chapter 11 on September 1, 2011. On October 29, 2013, the case was converted to one under a Chapter 7.

In relevant part, 11 U.S.C. § 503 states:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1)(A) the actual, necessary costs and expenses of preserving the estate including-

(B) any tax--

(I) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;. . .

When a case is converted to one under Chapter 7, 11 U.S.C. § 726(b) provides that the administrative expenses of § 503(b) incurred under Chapter 7 after conversion have priority in distribution over the administrative expenses incurred under the other Chapters. 4 COLLIER ON BANKRUPTCY ¶ 726.03 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). 11 U.S.C. § 503(a) states that an entity may timely file a request for payment of an administrative expense.

Here, the Trustee is seeking both retroactive authorization to pay the taxes owed for 2013 and 2014 tax year as well as authorization to pay the taxes for tax year 2015. Pursuant to 11 U.S.C. § 503(b)(1)(B), the taxes paid by the Trustee are administrative expenses.

Given the unique facts of the instant case, the fact the case was converted from a Chapter 11 to a Chapter 7, and the pendency of the case since 2011, the court finds the taxes owed to California Employment Development Department are administrative expenses. This is an actual and necessary administrative expenses of the estate.

Therefore, the Motion is granted and the Trustee is authorized to pay a total of \$2,400.00 to the Franchise Tax Board for income taxes for tax years 2013, 2014, and 2015.

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 Administrative Fees filed by 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 a total of \$7,238.90 to the California Employment Development Department for administrative fees incurred while the case was pending as one under Chapter 11.

6. 14-20352-E-11 PATRICK GREENWELL  
PBG-9 Patrick B. Greenwell

MOTION FOR FINAL DECREE AND  
ORDER CLOSING CASE  
11-25-15 [136]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on November 24, 2015. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion for Entry of Final Decree and Order Closing 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. At the hearing -----.

**The Motion for Entry of Final Decree and Order Closing Case is granted.**

Patrick Greenwell, Plan Administrator, filed the instant Motion for Entry of Final Decree and Order Closing Case on November 25, 2015. Dckt. 136.

Federal Rules of Bankruptcy Procedure Rule 3022 provides that, after an estate is fully administered in a Chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case. 11 U.S.C. § 350(a) additionally states that the court is required to close a case after an estate is fully administered and the court has discharged the trustee." The fact that the estate has been fully

administered merely means that all available property has been collected and all required payments made. *In re Menk* (9th Cir. BAP 1999) 241 BR 896, 911.

To determine whether a Chapter 11 case has been "fully administered," the court considers whether:

- the plan confirmation order is final;
- deposits required by the plan have been distributed;
- property to be transferred under the plan has been transferred;
- the debtor (or the debtor's successor under the plan) has taken control of the business or of the property dealt with by the plan;
- plan payments have commenced; and
- all motions, contested matters and adversary proceedings have been finally resolved.

Fed. R. Bankr. P. 3022, Adv. Comm. Note (1991). Additionally, unless the Chapter 11 plan or confirmation order provides otherwise, a Chapter 11 case should not remain open solely because plan payments have not been completed. See Fed. R. Bankr. P. 3022, Adv. Comm. Note (1991); see *In re John G. Berg Assocs., Inc.* (BC ED PA 1992) 138 BR 782, 786.

The Plan Administrator states that the court approved the Plan Administrator's Plan of Reorganization on April 27, 2015.

The Plan Administrator asserts that all assets of the estate not abandoned to the Debtor have been liquidated and all litigation has been resolved. The Plan Administrator states that there are no outstanding deposits that require distribution under the Plan and no outstanding property transfers. The Debtor is current on all quarterly fees with the United States Trustee's office. Lastly, the Plan Administrator is not currently in default under any provision of the Plan.

Thus, the court finds that Debtors have satisfactorily met the above-listed factors, determining whether the Chapter 11 bankruptcy estate has been fully administered within the meaning of 11 U.S.C. § 350(a). The court will enter a final decree closing Debtors' case.

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 Final Decree and Order Closing Case filed by the Plan Administrator 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 Debtors' Chapter 11 Bankruptcy Case is closed pursuant to 11

7.	<a href="#">14-29361</a> -E-7	WALTER SCHAEFER Douglas B. Jacobs	MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH BANK OF THE WEST AND/OR MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH RYAN BAUER 11-19-15 [ <a href="#">249</a> ]
	DNL-16		

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 19, 2015. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

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

<b>The Motion For Approval of Compromise is granted.</b>
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Kimberly Husted, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Bank of the West and Ryan Bauer("Settlor"). The claims and disputes to be resolved by the proposed settlement are those arising from the unauthorized sale of equipment of the estate and the treatment of the Settlor's claims. .

As discussed more fully previously, the court incorporates the prior factual posture described in the court's prior civil minutes on June 18, 2015. Dckt. 162. However, for ease, the court summarizes the following procedural history:

1. Debtor's bankruptcy estate includes the following assets:
  - a. Almanor Manufacturing, Inc., a corporation incorporated in 1979;
  - b. AMI Precision, Inc., a corporation incorporate in 2009;
  - c. Commercial real property and improvements commonly known as 763 Main Street, Chest, CA ("Shop"); and
  - d. Equipment used by the Debtor in a sheet metal fabrication business, last known as Almanor Precision, that he has operated at the Shop at times through Almanor and AMI. See Dckt. 252, Exhibit C (copy of Debtor's Schedule B).
2. Bank of the West, as successor, asserts first liens against the shop and the Equipment securing a loan made by Sierra West Bank in 1997 to the Debtor and guaranteed by Almanor. Bank of the West has estimated that through March 31, 2015, the sums due on the account is \$448,864.13, which includes principal, interest, expenses, and late charges.
3. Bauer asserts a second lien against the Equipment securing a 2013 settlement with the Debtor based on an uninsured occupational injury sustained while employed by AMI Precision. Bauer estimates that through March 31, 2015, the sums due on the account is \$42,893.12, including principal, interest, late charges, and attorneys fees.
4. On February 9, 2015, without court approval, the Debtor sold the Equipment to Ashman Company Auctioneers and Appraiser, Inc., for \$220,000.00 and agreed to permit Ashman to use the Shop to conduct an in-place auction.
5. On February 17, 2015, the Debtor received from Ashman a \$220,00 wire transfer and thereafter used the funds to pay scheduled and unscheduled obligations, including \$59,000.00 to Robert Stewart, \$5,261.00 to SingletonAuman, PC, \$1,100.00 to PDM Steel, and approximately \$1,705.00 to B&D Precision. The Trustee also believes that the Debtor used the Ashman funds to pay tax liens held by the Internal Revenue Service and Franchise Tax Board in the aggregate amount of \$39,372.23.

6. On February 25, 2015, Ashman removed an Amada Pega 345 Queen CNC Turret Punch from the Shop and sold the Punch to Manufacturing Solutions for \$23,500.00.
7. The Trustee recovered the Equipment, except for the Punch. In addition, the Trustee has recovered from various transferee and the Debtor approximately \$104,566.00 of the Ashman Funds.
8. On June 18, 2015, the court entered an order granting the Trustee's motion to auction the Equipment and employ Ashman as auctioneer. The Equipment was sold by auction resulting in net proceeds, after cost of sale, in the approximate amount of \$170,000.00.
9. Based on their respective liens, Bauer and Bank of the West claim an interest in the Equipment Proceeds.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit P in support of the Motion, Dckt. 252):

- A. Allocation of Equipment Proceeds: The equipment Proceeds shall be allocated as follows:
  1. \$100,000.00 to Bank of the West to pay down its lien.
  2. \$35,000.00 to Bauer in full satisfaction of his lien; and
  3. The balance to the Trustee for the benefit of the Debtor's bankruptcy estate.
  4. The Trustee shall issue payment to Bank of the West and Bauer within 30 days of the hearing in which the agreement is approved.
- B. Bank of the West and Bauer assign to the Trustee all claims and liens against the Ashman Funds, all causes of action related to the Ashman Funds, and any claims they may hold against the transferors, including their agents and affiliates, and transferees, including their agents and affiliates, of the Ashman Funds.
- C. Bank of the West shall retain its claim of lien against the Shop. The balance of the Bank of the West's claim shall be paid from the sale of the Shop.
- D. Mutual release by the Trustee, Bauer, and Bank of the West in connection with the 1997 loan, the 2013 settlement, the sale agreement, the Punch, the Punch Proceeds, the Equipment, and the Equipment Proceeds.

## **DISCUSSION**

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

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

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

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlor has granted a corresponding release for Debtor and the Estate.

#### **Probability of Success**

The Trustee asserts this factor weighs in favor of the compromise because there would be difficulty in any litigation related to the security interest of Bauer and Bank of the West in the Equipment. The Trustee believes that both the Bank of the West and Bauer have perfected liens and have valid claims. There are complicated facts over the rights to the Equipment Proceeds and the rights in the Ashman Funds. Bank of the West believes it is entitled to all the funds until its lien is paid in full while Bauer believes he should receive all of his claim of the lien. The Trustee believes a portion of the funds should be reserved for the estate due to the Trustee's role marshaling the compromise and the Bank of the West will have a continuing lien in the Shop.

While the Trustee believes she would prevail on her claims, she does assert that there are complicated claims that interconnect.

#### **Difficulties in Collection**

The Trustee argues that this factor is neutral because the Trustee is in possession of the Equipment Proceeds. The Trustee does note that given the substantial amount of the proceeds, there are increased bank fees.

#### **Expense, Inconvenience and Delay of Continued Litigation**

Movant argues that litigation would result in significant costs, which are projected based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. Formal discovery would be required, with depositions of the Settlor and document production requests of third parties will be required. The Movant estimates that if the matter went

to trial, litigation expenses would consume a substantial amount of an expected recovery. Movant projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation.

**Paramount Interest of Creditors**

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

**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 to 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.

Unlike the Trustee's prior Motion to Compromise, the instant compromise provides for the settlement of disputes as to the Bank of the West's and Bauer's claims. Rather than agreeing to pay the full claim of Bank of the West and granting Bauer additional collateral not contemplated in his settlement, the compromise provides for the partial payment of the Bank of the West claim, with the remaining secured by the Shop which is anticipated to be sold, and Bauer will have his claim paid in full.

The instant compromise more accurately reflects the positions of Bank of the West and Bauer. Unlike the prior compromise which collectively dealt with Bank of the West, Bauer, and Ashman, the instant compromise more logically follows by dividing the settlement between the parties based on the collateral they argue to have a security interest in. The instant compromise recognizes the standing of the Bank of the West and Bauer and does not convolute their security into a single "liquidation pool" (by combining the interest in the Equipment and allowing for additional collateral as the previous compromise did). The instant compromise does not act as merely a comfort order ensuring the full payment of each creditor. The instant compromise involves an actual controversy over the distribution of the Equipment Proceeds and fairly allocates them based on the risk assessment of the Trustee.

The motion is granted.

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

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

The Motion to Approve Compromise filed by Kimberly Husted, the Chapter 7 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 to Approve Compromise between Movant and Bank of the West and Ryan Bauer ("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 P in support of the Motion(Docket Number 252).

8. [14-29361](#)-E-7 WALTER SCHAEFER  
DNL-17 Douglas B. Jacobs

MOTION TO COMPROMISE  
CONTROVERSY/APPROVE SETTLEMENT  
AGREEMENT WITH ASHMAN COMPANY  
AUCTIONEERS AND APPRAISERS,  
INC.  
11-19-15 [[255](#)]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 19, 2015. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

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

**The Motion For Approval of Compromise is granted.**

Kimberly Husted, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Ashman Company Auctioneers and Appraisers, Inc. ("Settlor"). The claims and disputes to be resolved by the proposed settlement are those arising from the unauthorized sale of equipment of the estate and the treatment of the Settlor's

claims.

As discussed more fully previously, the court incorporates the prior factual posture described in the court's prior civil minutes on June 18, 2015. Dckt. 162. However, for ease, the court summarizes the following procedural history:

1. Debtor's bankruptcy estate includes the following assets:
  - a. Almanor Manufacturing, Inc., a corporation incorporated in 1979;
  - b. AMI Precision, Inc., a corporation incorporate in 2009;
  - c. Commercial real property and improvements commonly known as 763 Main Street, Chest, CA ("Shop"); and
  - d. Equipment used by the Debtor in a sheet metal fabrication business, last known as Almanor Precision, that he has operated at the Shop at times through Almanor and AMI. See Dckt. 252, Exhibit C (copy of Debtor's Schedule B).
2. Bank of the West, as successor, asserts first liens against the shop and the Equipment securing a loan made by Sierra West Bank in 1997 to the Debtor and guaranteed by Almanor. Bank of the West has estimated that through March 31, 2015, the sums due on the account is \$448,864.13, which includes principal, interest, expenses, and late charges.
3. Bauer asserts a second lien against the Equipment securing a 2013 settlement with the Debtor based on an uninsured occupational injury sustained while employed by AMI Precision. Bauer estimates that through March 31, 2015, the sums due on the account is \$42,893.12, including principal, interest, late charges, and attorneys fees.
4. On February 9, 2015, without court approval, the Debtor purported sold the Equipment to Ashman Company Auctioneers and Appraiser, Inc., for \$220,000.00 and agreed to permit Ashman to use the Shop to conduct an in-place auction.
5. On February 17, 2015, the Debtor received from Ashman a \$220,00 wire transfer and thereafter used the funds to pay scheduled and unscheduled obligations, including \$59,000.00 to Robert Stweart, \$5,261.00 to SingletonAuman, PC, \$1,100.00 to PDM Steel, and approximately \$1,705.00 to B&D Precision. The Trustee also believes that the Debtor used the Ashman funds to pay tax liens held by the Internal Revenue Service and Franchise Tax Board in the aggregate amount of \$39,372.23.
6. On February 25, 2015, Ashman removed an Amada Pega 345 Queen CNC Turret Punch from the Shop and sold the Punch to Manufacturing Solutions for \$23,500.00.

7. The Trustee recovered the Equipment, except for the Punch. In addition, the Trustee has recovered from various transferee and the Debtor approximately \$104,566.00 of the Ashman Funds.
8. On June 18, 2015, the court entered an order granting the Trustee's motion to auction the Equipment and employ Ashman as auctioneer. The Equipment was sold by auction resulting in net proceeds, after cost of sale, in the approximate amount of \$170,000.00.
9. Based on their respective liens, Bauer and Bank of the West claim an interest in the Equipment Proceeds.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit P in support of the Motion, Dckt. 252):

- A. Allocation of Ashman Funds: The Ashman Funds shall be allocated as follows:
  1. Ashman shall be entitled to a lien on and payment of 50% of the Ashman Funds that are actually recovered by the Trustee.
  2. The Trustee shall retain the other 50% for the benefit of the estate.
  3. The Trustee shall remit payment to Ashman on account of its secured claim within 30 days of receipt of funds from the Ashman Funds and with respect to any of the Ashman Funds the Trustee recovers prior to entry of the court order approving the agreement, the Trustee shall remit payment within 30 days of entry of court ordering approving the agreement.
- B. Ashman shall assign to the Trustee all claims and liens against the Ashman Funds and Equipment, all causes of action related to the Ashman Funds and Equipment, and any claims they may hold against the transferors, including their agents and affiliates, and transferees, including their agents and affiliates, of the Ashman Funds.
- C. In the event the Trustee does not recover the Tax Payments or any portion thereof, Ashman shall be entitled to an allowed claim in the amount of \$39,372.23, less any amount paid to Ashman on account of the Tax Payments recovered, to be paid with the same claim priority as the claimants would have had for the claims paid if the Tax Payments had not been made. To the extent the claims resulting in the Tax Payments, or any portion thereof, would not have provided a valid claim against the estate, that amount shall be allowed as a general unsecured claim.

- D. In addition to the claim allowed in Paragraph 4 of this agreement, Ashman shall be entitled to an allowed general unsecured claim in the amount of \$157,127.77 less any amounts paid to Ashman on account of the Ashman Funds recovered by the Trustee. The amount deducted from the \$157,127.77 shall not include the funds recovered on account of the Tax Payments as the Tax Payments recovered shall be deducted from the claim allowed in Paragraph 4 of this agreement.
- E. Mutual release between Ashman and the 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 Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

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

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlor has granted a corresponding release for Debtor and the Estate.

### **Probability of Success**

The Trustee asserts this factor weighs in favor of the compromise because the Trustee contends that Ashman has no interest in the Equipment or the Equipment Proceeds as a bona fide purchaser for value. The Trustee argues that Ashman Funds are property of the estate because they are the proceeds of the Equipment. Ashman disputes the Trustee's contentions and believes it should receive a portion of the Equipment Proceeds, it has a right to the Ashman Funds recovered since the funds collected can be traced to the funds paid to the Debtor as a result of the Debtor's misrepresentations, it has a constructive trust in the asserts procured with the Ashman Funds, and the estate should not benefit from any claims that were paid down with the funds that can be traced to the Ashman Funds.

While the Trustee argues that she believes her argument is persuasive, she concedes that the probability of success is ultimately unknown.

**Difficulties in Collection**

The Trustee argues that this factor is neutral. The Trustee notes that the dispute revolves around the allocation of the Ashman Funds, the interests in the Equipment and Equipment Proceeds, and the claims resulting from the Ashman Funds.

**Expense, Inconvenience and Delay of Continued Litigation**

Movant argues that litigation would result in significant costs, which are projected based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. Formal discovery would be required, with depositions of the Settlor and document production requests of third parties will be required. The Movant estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Movant projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation.

**Paramount Interest of Creditors**

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

The Trustee argues that it is in the best interest of the estate because it provides a sure recovery to the estate on account of the Ashman Funds while also not providing Ashman any secured claim or interest in the Equipment or the Equipment Proceeds. The Trustee further argues that while Ashman is provided a general unsecured claim and a potential priority claim, the Trustee believes such concerns are outweighed by the estate being authorized to retain at least \$52,000.00 of the Ashman Funds and Ashman's release of interest in the Equipment and the Equipment proceeds. The potential priority claim is dependant on the determination that claims could have been asserted against the estate if the Tax Payments were not paid. Also, the compromise avoids any potential double recovery as the estate recovered the Equipment and was authorized to sell it.

**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 to 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 instant compromise more soundly and fully deals with the potential claims of Ashman and the Trustee. Rather than providing Ashman with interest in not only the Ashman Funds but also the Equipment, the compromise limits Ashman's recovery to only that being able to recovered from the Ashman Funds.

The compromise, as discussed supra, avoids Ashman from potentially receiving a windfall from the recovery of the Ashman Funds and the sale of the Equipment by limiting Ashman's claims to those just in the funds.

The compromise also ensures that the estate, at a minimum, receives \$52,000.00 of the Ashman Funds. Rather than allowing Ashman to litigate over the full amounts of the funds, the compromise provides for the payment of Ashman to the extent able, with the remaining to be filed as a potential priority claim and unsecured claim, with Ashman granting a release for any recovery from the Equipment and Equipment Proceeds.

The instant compromise, read along with the compromise between the estate, Bank of the West, and Bauer, provides for the efficient, fair, and balanced resolution of the complicated and extra-ordinary facts surrounding the instant case.

The motion is granted.

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

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

The Motion to Approve Compromise filed by Kimberly Husted, ("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 to Approve Compromise between Movant and Ashman Company Auctioneers and Appraisers, Inc. ("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 E in support of the Motion(Docket Number 258).

9. [14-28881-E-7](#) CURTIS/LORRA DARLING  
DPC-4 Mikalah R. Liviakis

MOTION TO AUTHORIZE  
DISBURSEMENT OF FUNDS  
11-10-15 [[77](#)]

**Final Ruling:** No appearance at the December 8, 2015 hearing is required.  
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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 November 10, 2015. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

**The Motion to Authorize Disbursement of Funds is granted.**

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Authorize Disbursement of Funds on November 10, 2015. Dckt. 77. The Trustee seeks the court to amend its prior order entered November 7, 2014 which stated:

All proceeds remaining after payment of the above costs and the liens senior in priority to the avoided Judicial Lien of Arrow Financial (Order avoiding lien pursuant to 11 U.S.C. § 522(f), Dckt. 34) shall be disbursed directly from escrow to the Chapter 13 Trustee, David Cusick. The Chapter 13 Trustee shall hold said proceeds, which shall not be disbursed except upon further order of the court.

Dckt. 42.

The Trustee states that the Debtor filed the instant case on August 31, 2014. The Debtor's reported on Schedule A real property commonly known as 921 Beeler Way, Galt, California. The reported value on Schedule C was \$347,000.00 with a secured claim of \$320,000.00, and a claimed exemption of \$27,000.00. The Debtor's proposed plan proposed to sell the property. This plan was confirmed on November 25, 2014.

The Debtor's filed a Motion to Avoid Judicial Lien held by Arrow Financial Services, LLC on September 22, 2014. Dckt. 20. The creditor was listed as Central Portfolio Control on Schedule D and was included in the confirmed plan in Class 2C. The Debtor's Motion was granted and the order was entered on October 15, 2014.

The Motion to Authorize the Sale of the property was filed on October 8, 2014. Dckt. 25. The order granting the Motion was entered November 7, 2014. Dckt. 42.

The Trustee received \$8,081.15 from escrow on the sale of the property.

On July 14, 2015, the case was voluntarily converted to one under Chapter 7. Dckt. 64. On November 3, 2015, the Debtor were granted a discharge. Dckt. 75.

The Trustee is seeking to authorize the Trustee to disburse all of the monies currently held by the Trustee to the Debtor.

Here, the court had previously ordered that the Chapter 13 Trustee to hold onto the proceeds from the sale of the property until further order of the court. Since the sale, the case has been converted to a Chapter 7 and the Debtor have since received their discharge. At the time of the conversion, Eric Nims was appointed as the Chapter 7 Trustee and the Chapter 13 Trustee was released as the controlling fiduciary of the estate.

Since the Debtor have since received their discharge and the case is no longer a Chapter 13, there is cause to order the Trustee to release the \$8,081.15 the Trustee is holding for the Debtor from the sale of the property to the Debtor.

Therefore, the Motion is granted and David Cusick, the Chapter 13 Trustee, is authorized to disburse the \$8,081.15 being held from the sale of the property to Curtis and Lorra Darling.

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 to Authorize Disbursement of Funds filed by 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 Motion is granted and David Cusick, the Chapter 13 Trustee, is authorized to disburse the \$8,081.15 being held from the sale of the property to Curtis and Lorra Darling.

10. [10-20293-E-7](#) LLOYD/KATRINA DOUGLAS  
GMR-3 Mikalah R. Liviakis

MOTION FOR COMPENSATION FOR  
GABRIELSON AND COMPANY,  
ACCOUNTANT(S)  
11-5-15 [[114](#)]

**Final Ruling: No appearance at the December 10, 2015 hearing is required.**  
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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 November 4, 2015. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

**The Motion for Allowance of Professional Fees is granted.**

Gabrielson & Company, the Accountant ("Applicant") for Geoffrey Richards, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period July 17, 2015, through November 2, 2015. The order of the court approving employment of Applicant was entered on July 20, 2015. Dckt. 112. Applicant requests fees in the amount of \$1,897.50 and costs in the amount of \$107.15.

Trustee filed a statement of consent on November 5, 2015. Dckt. 118.

#### **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

**December 10, 2015 at 10:30 a.m.**

**- Page 30 of 51 -**

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 preparing federal and California estate income tax returns, and other administrative functions. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

#### **FEES AND COSTS & EXPENSES REQUESTED**

##### **Fees**

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

Prepared Federal and California Estate Income Tax Returns: Applicant spent 4.1 hours in this category. Applicant assisted Client with preparing first and final 2015 federal and California estate income tax returns for the separate taxable estates of Debtors Lloyd and Katrina Douglas. Dckt. 117.

Administrative Functions: Applicant spent 1.4 hours in this category. Applicant prepared the accountant declaration and related employment documents for trustee's review, as well as documents for this fee application.

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

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Michael Gabrielson	5.5	\$345.00	\$1,897.50
	0	\$0.00	<u>\$0.00</u>
<b>Total Fees For Period of Application</b>			\$1,897.50

Dckt. 116, Exh. 1.

##### **Costs and Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$107.15 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopying	\$0.20 per page	\$67.80
Postage		\$39.35
		\$0.00
Total Costs Requested in Application		\$107.15

Dckt. 116 Ex. 2. FN.1.

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FN.1. A review of the Applicant's expenses shows that the Applicant charged \$0.20 per page. In the Eastern District of California, the maximum allowed charge for photocopies is \$0.10 per page, absent the applicant showing that the actual expense paid for the copies was greater. None was shown here. The court has reduced the expense accordingly to \$33.90 for photocopying expenses, for a total reimbursement of \$73.25 for expenses.  
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**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$1,897.50 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 case.

**Costs and Expenses**

The First and Final Costs in the amount of \$73.25 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 case.

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

Fees	\$1,897.50
Costs and Expenses	\$73.25

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Gabrielson & Company ("Applicant"), Accountant for 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 Gabrielson & Company is allowed the following fees and expenses as a professional of the Estate:

Gabrielson & Company, Professional Employed by Trustee

Fees in the amount of \$1,897.50  
Expenses in the amount of \$73.25,

**IT IS FURTHER ORDERED** that the costs of \$33.90 are not allowed by the court.

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$1,897.50 and costs of \$73.25 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.

**IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

11. [10-20293-E-7](#) LLOYD/KATRINA DOUGLAS  
HCS-3 Mikalah R. Liviakis

MOTION FOR COMPENSATION BY THE  
LAW OFFICE OF HERUM, CRABTREE,  
SUNTAG FOR DANA A. SUNTAG,  
TRUSTEE'S ATTORNEY(S)  
11-10-15 [[120](#)]

**Final Ruling: No appearance at the December 10, 2015 hearing is required.**  
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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 November 10, 2015. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

**The Motion for Allowance of Professional Fees is granted.**

Herum\Crabtree\Suntag, the Attorney ("Applicant") for Geoffrey Richards, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. FN.1.

-----  
FN.1. The court notes that Applicant's Notice of Hearing is dated October 28, 2015, and provides the date and time of the hearing as "December 10, 2015, at 9:30 a.m.," rather than the correct time of 10:30 a.m. Dckt. 121 (emphasis removed). However, given that no party filed opposition to the motion, and 30 days' notice was properly given to all interested parties, the court waives this defect.  
-----

The period for which the fees are requested is for the period November 18, 2014, through December 8, 2015. The order of the court approving employment of Applicant was entered on December 20, 2014. Dckt. 87. Applicant requests fees in the amount of \$4,216.75 and costs in the amount of \$255.12.

**STATUTORY BASIS FOR PROFESSIONAL FEES**

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

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

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

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

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

**Benefit to the Estate**

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work

in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

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

*Id.* at 959.

Counsel assisted the Trustee in enforcing rights of the estate to conduct a short-sale and obtain a carve out of approximately \$28,000.00 from the sale of over-encumbered property. The Trustee is currently holding approximately \$23,623.00, with no other recovery of additional monies anticipated.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including general case administration, and significant motions and contested matters. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

#### **FEES AND COSTS & EXPENSES REQUESTED**

##### **Fees**

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

General Case Administration: Applicant spent 4.2 hours in this category. Applicant assisted Client by preparing the motion to employ application, advising the Client on exemptions, and preparing the instant application for compensation.

Significant Motions and Other Contested Matters: Applicant spent 14 hours in this category. Applicant assisted with preparing documents for a short sale of real property at 3635 Bass Street, West Sacramento, California, preparing a motion to employ and compensate a realtor, and negotiated between the buyer and creditor to reduce the lien so that the estate gained a meaningful distribution from the sale.

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

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Dana A. Suntag, Attorney	3.4	\$325.00	\$1,105.00
Wendy A. Locke, Attorney	13.1	\$225.00	\$2,947.50
Audrey A. Dutra, Paralegal	1.2	\$90.00	\$108.00
	0	\$0.00	<u>\$0.00</u>
<b>Total Fees For Period of Application</b>			<b>\$4,160.50</b>

Dckt. 124, Exh. A.

**Costs and Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$255.12 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopying	\$0.10 per page	\$161.10
Postage		\$94.02
		\$0.00
<b>Total Costs Requested in Application</b>		<b>\$255.12</b>

Dckt. 124, Exh. A.

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$4,160.50 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 case.

**Costs and Expenses**

The First and Final Costs in the amount of \$255.12 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 case.

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

Fees	\$4,160.50
Costs and Expenses	\$255.12

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Herum\Crabtree\Suntag ("Applicant"), Attorney for 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 Herum\Crabtree\Suntag is allowed the following fees and expenses as a professional of the Estate:

Herum\Crabtree\Suntag, Professional Employed by Trustee

Fees in the amount of \$4,160.50  
Expenses in the amount of \$255.12,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$4,160.50 and costs of \$255.12 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.

**IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

12. [11-27845-E-11](#) IVAN/MARETTA LEE  
[15-2194](#) TGC-1  
LEE ET AL V. INDYMAC MORTGAGE  
SERVICES ET AL

AMENDED MOTION TO DISMISS  
ADVERSARY PROCEEDING  
10-29-15 [[13](#)]

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor's Attorney, and Interested parties on October 29, 2015. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

**The Motion for Dismissal of Adversary Proceeding is granted and the First and Second Causes of Action as to Bank of America, N.A. are dismissed.**

Bank of America, N.A. ("Defendant") filed the instant Amended Motion to Dismiss Complaint on October 29, 2015. Dckt. 11. The Defendant asks the court to grant its Motion to Dismiss the Complaint filed by Ivan and Maretta Lee ("Plaintiff-Debtor") for failure to state a claim for injunctive or declaratory relief.

**PLAINTIFF-DEBTOR'S ADVERSARY COMPLAINT**

The Plaintiff-Debtor filed the instant complaint on September 30, 2015.

Dckt. 1. The complaint alleges the following:

1. Plaintiff-Debtor filed a petition for Chapter 11 relief on March 30, 2011;
2. Defendant, IndyMac Mortgage Services ("IndyMac"), is a Southern Californian Division of OneWest Bank, N.A., and is authorized to engage in business as a mortgage company in California at all relevant times. Defendant IndyMac is the creditor whose claim in this bankruptcy case is secured by the real property located at 272 Christine Drive, Sacramento, CA;
3. Defendant Shellpoint Mortgage Servicing, Corporation ("Shellpoint"), is a South Carolina Corporation, doing business as a mortgage company in California. Defendant Shellpoint is the creditor whose claim in the bankruptcy case is secured by the real property located at 2323-2331 Grove Avenue, Sacramento, CA;
4. Defendant City of Sacramento Community Development Department of Housing and Dangerous Buildings Division (City of Sacramento DDHDBD) is a Government Agency located in Sacramento County, CA;
5. Defendant City of Sacramento is a Government Agency located in Sacramento County, CA;
6. Defendant Bank of America, N.A. ("BANA"), is an FDIC creditor whose claim is secured by the first lien on 272 Christine Drive, Sacramento CA, and the first lien on 2323-2331 Grove Avenue, Sacramento, CA;
7. Plaintiff-Debtor's Plan was confirmed May 4, 2012;
8. Pursuant to the confirmed Plan, the real property at 272 Christine Drive was to be surrendered on the effective date of the plan. The confirmation order would constitute an order for relief from stay. Any secured claim is satisfied in full through surrender of the collateral. Due to BNYM's 11 U.S.C. § 1111(b) election, BANA may not assert a deficiency claim as a general unsecured claim;
9. Pursuant to the Confirmed Plan, Plaintiff-Debtor would surrender and abandon the collateral at 2323-2331 Grove Avenue to The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate holders of the CWMBBS, Inc., CHL Mortgage Pass-Through Trust 2006-OA5, Mortgage Pass Through Certificates, Series 2006-OA5, its assignees and/or successors in interest (BNYM) on the effective date of the Plan. The confirmation order would constitute an order for relief from stay, with the Federal Rule of Bankruptcy procedure 4001(a)(3) 14-day stay waived. Any secured claim is satisfied in full through surrender of the collateral;
10. Plaintiff-Debtors fully complied with the terms and provisions

of the Confirmed Plan. The final Decree was entered on January 4, 2013, and the case was closed pursuant to the Court Notice;

11. Pursuant to the Plan, the real property at 272 Christine Drive was surrendered;
12. Pursuant to the Plan, the real property at 2323-2331 Grove Avenue was surrendered and abandoned;
13. Defendant BANA has not complied with the terms and provisions of the confirmed Plan regarding the surrender and abandonment of 272 Christine Drive and 2323 Grove Avenue. After the confirmed Plan was issued, Defendant BANA assigned the loan for 272 Christine Drive to Defendant IndyMac. Defendant BANA also assigned the loan for 2323-2331 Grove Avenue to be serviced by Defendant Shellpoint;
14. On February 17, 2015, Defendant IndyMac stated that to Plaintiff-Debtor that 272 Christine Drive has not been surrendered, and currently charges Plaintiff-Debtors for the mortgage for the property. The statement claims a total amount of \$78,629.60 is due for the 272 Christine Drive property;
15. On June 4, 2015, Defendant Shellpoint stated to Plaintiff-Debtor that the 2323-2331 Grove Avenue property was not surrendered or abandoned. Defendant Shellpoint states that, because Plaintiff-Debtors "have not taken steps to resolve the delinquency, we have been instructed by the owner of your mortgage loan to commence foreclosure;"
16. Plaintiff-Debtor asserts that Defendant IndyMac violates 11 U.S.C. 1141 by claiming that the 272 Christine Drive property was not surrendered or abandoned, proceeding with the mortgage, and by proceeding with foreclosure;
17. Plaintiff-Debtor asserts that Defendant Shellpoint violates 11 U.S.C. 1141 by claiming that the 2323-2331 Grove Avenue property was not surrendered or abandoned, proceeding with the mortgage, and by proceeding with foreclosure;
18. In a letter dated July 14, 2015, Defendant City of Sacramento ordered Plaintiff-Debtors to pay an administrative penalty of \$2,500.00 for the 2323 Grove Avenue property. Plaintiff-Debtor asserts this letter violates the confirmed Plan because the property was surrendered and abandoned on the effective date of the Plan;
19. In a second letter, also dated July 14, 2015, Defendant City of Sacramento ordered Plaintiff-Debtors to pay monitoring fee of \$150.00 for the 2323 Grove Avenue property. Plaintiff-Debtor asserts this letter violates the confirmed Plan because the property was surrendered and abandoned on the effective date of the Plan;
20. The foreclosure proceedings on the surrendered properties

violate the order of this court confirming the Chapter 11 Plan. This proceeding was listed in 2015 in Plaintiff-Debtor's credit reports;

21. On May 21, 2015, Plaintiff-Debtor's counsel informed Defendants IndyMac and BANA that their actions violated the Plan. Plaintiff-Debtor asserts there was no response by either Defendant;
22. City of Sacramento filed a lawsuit against Plaintiff-Debtor Maretta Dunigan, aka Maretta Lee, for penalties and equitable relief regarding the 2323 Grove Avenue real property, for actions that occurred on or after April 26, 2013. This lawsuit violates the order of this court confirming the Chapter 11 Plan because those actions were after the property at 2323 Grove Avenue was surrendered and abandoned.

Dckt. 1. ¶ 3-24.

Plaintiff-Debtor alleges two claims for relief:

1. Injunctive relief under 11 U.S.C. § 1141 and Federal Rule of Bankruptcy Procedure 7065;
  - a. Injunctive relief against Defendant Shellpoint for the scheduled foreclosure, because Plaintiff-Debtors have no other plain, speedy, or adequate remedy, and the injunctive relief is necessary and appropriate at this time to prevent irreparable injury, loss or damage to Plaintiff-Debtor's interests;
  - b. If Defendant Shellpoint is not temporarily restrained from proceeding with foreclosure of the surrendered property, Plaintiff-Debtors will suffer immediate, irreparable injury, loss or damage and the administration of this Chapter 11 case and confirmed Plan will be impaired;
2. Declaratory Judgment under 11 U.S.C. § 1141 and Federal Rule of Bankruptcy Procedure 7001(9);
  - a. An actual controversy has arisen between Plaintiff-Debtors and Defendants concerning their respective rights and duties. Plaintiff-Debtor contends that the confirmed Plan remains in full force and effect, and Defendants are bound by the terms and provisions of the Plan, whether or not the case was closed. Defendant disputes these contentions and asserts that the case was dismissed, so the properties were not surrendered; thus, the Plan does not bind the parties;
  - b. Plaintiff-Debtors request a judicial determination of their rights and duties, and a declaration as to the binding terms and provisions of the confirmed Plan whether or not the case is closed by the Court, because the case was fully administered;
  - c. A judicial declaration is necessary and appropriate at this time under the circumstances so Defendants are informed of the

**December 10, 2015 at 10:30 a.m.**

**- Page 43 of 51 -**

binding nature of the confirmed Plan.

Plaintiff-Debtor prays for relief, under Federal Rule of Civil Procedure 65 as incorporated by Federal Rule of Bankruptcy procedure 7065:

1. For a temporary restraining order, restraining Defendant Shellpoint's attorneys, agents and employees and successors from proceeding with the foreclosure of the surrendered property at 2323-2331 Grove Avenue, Sacramento, CA;
2. For a temporary restraining order, restraining Defendant IndyMac's attorneys, agents and employees and successors from proceeding with the mortgage on the surrendered property at 272 Christine Drive, Sacramento, CA;
3. That Defendant Shellpoint, its attorneys, agents and employees and successors be preliminarily and permanently enjoined from proceeding with the foreclosure of the surrendered property at 2323-2331 Grove Avenue, Sacramento, CA;
4. That the foreclosure proceedings listed in 2015 in Plaintiff-Debtor's credit reports for the properties surrendered pursuant to the Order of the Bankruptcy Court confirming the Chapter 11 Plan be removed from their credit reports;
5. That Defendant City of Sacramento, its attorneys, agents and employees, and successors be preliminarily and permanently enjoined from proceeding with the orders issued by letters dated July 14, 2015, for: (a) administrative penalty for 2323 Grove Avenue, Sacramento, CA; and (b) monitoring fee for 2323 Grove Avenue, Sacramento, CA;
6. For a declaration pursuant to Federal Rule of Bankruptcy Procedure 7001(9) that the Plan remains in full force and effect and must be complied with by Defendants IndyMac, Shellpoint, and BANA, that the property at 272 Christine Drive, Sacramento, CA was abandoned, and that the property at 2323-2331 Grove Avenue, Sacramento, CA was surrendered and abandoned regardless of whether or not the case is closed because the case was fully administered;
7. For an order dismissing the lawsuit filed on August 24, 2015, by the City of Sacramento against Plaintiff-Debtor Maretta Dunigan aka Maretta Lee, regarding the surrendered property at 2323 Grove Avenue, Sacramento, CA, because that order violates the confirmation order for the Chapter 11 Plan;
8. Any other and further relief this court deems just and proper.

Dckt. 1.

**DEFENDANT BANA'S MOTION TO DISMISS**

Defendant BANA filed the instant Motion to Dismiss the Adversary Proceeding on October 29, 2015. Dckt. 11.

The Defendant asserts that the court should dismiss the complaint

because Plaintiff-Debtor cannot seek injunctive relief against Defendant BANA. Also, Plaintiff-Debtor has failed to state a claim for declaratory relief.

For the Plaintiff-Debtor's request for injunctive relief, Defendant BANA argues that seeking injunctive relief against BANA would be pointless. First, BANA assigned its interest in both properties to Defendants Shellpoint and IndyMac. Second, while BANA was the creditor for both loans when the Plan was confirmed, nothing in the confirmation order enjoined BANA from assigning its interest to third parties. On these two grounds, Plaintiff-Debtor cannot prevail against Defendant BANA on any theory of liability. In addition to the above failure, Defendant BANA asserts Plaintiff-Debtor cannot show irreparable harm arising from the foreclosure proceedings, that equities favor the plaintiff, or that any public interest would be served by granting injunctive relief. First, the Plan requires surrender of the properties to the mortgage lender. Second, Plaintiff-Debtors are in default and do not dispute that fact in the Adversary Complaint. Thus, the foreclosure proceedings will not harm Plaintiff-Debtor, the equities do not favor Plaintiff-Debtor, and no public interest is served by granting injunctive relief.

On Plaintiff-Debtor's request for declaratory relief, Defendant BANA asserts various grounds to deny the request for declaratory relief. First, declaratory relief should be pled as a form of relief, not as an independent cause of action. Second, declaratory relief is improper because it relies on the same faulty theory that Defendants did not have the right to initiate the foreclosure. Third, Plaintiff-Debtor failed to plead any facts that demonstrate a present controversy involving BANA, because BANA assigned its interest in both properties to Defendants Shellpoint and IndyMac. Similarly, there is no violation of the Plan because the Plan does not require that surrender be accepted in lieu of foreclosure; the plan lifts the stay affecting the properties so that Defendants may pursue the non-judicial foreclosure process under California law.

On these grounds, Defendant BANA requests the court to grant Defendant's Motion to Dismiss Adversary Complaint without leave to amend.

#### **PLAINTIFF DEBTOR'S OPPOSITION**

The Plaintiff-Debtor filed opposition on November 25, 2015. Dckt. 21.

Plaintiff-Debtor reasserts substantively similar facts as the Complaint. However, Plaintiff-Debtor disputes Defendant BANA's argument, and states:

...since it was the creditor of the two properties that were surrendered and abandoned at the time [BANA] was the creditor, [BANA] violated the bankruptcy court confirmation of the Chapter 11 Plan surrendering and abandoning the two properties by assigning the loans to IndyMac and Shellpoint after the properties were surrendered and abandoned

Dckt. 21 ¶ 5.

Based on that fact, Plaintiff-Debtor asserts that "[d]ue to the improper actions of [BANA], defendant IndyMac stated to Plaintiff-Debtors that 272 Christine Drive, Sacramento, CA has not been surrendered." *Id.* ¶ 6.

Similarly, Plaintiff-Debtor asserts:

[d]ue to the improper actions of [BANA], defendant Shellpoint stated to Plaintiffs that 2323-2331 Grove Avenue, Sacramento, CA has not been surrendered or abandoned...Shellpoint states that because Plaintiffs 'have not taken steps to resolve the delinquency, we have been instructed by the owner of your mortgage loan to commence foreclosure.

Id. ¶ 7.

Finally, Plaintiff-Debtor responds to BANA's argument that there is no irreparable harm:

[c]ontrary to the allegations of [BANA] in its motion, the foreclosure of either property will provide irreparable harm to Plaintiffs since IndyMac and Shellpoint state that Plaintiffs are the owners of the property and the foreclosure will provide damaging statements to Plaintiff's credit report statements.

Dckt. 21 ¶ 8.

On these grounds, Plaintiff-Debtor requests the court deny Defendant BANA's motion to dismiss and for other and further relief as the court deems proper.

#### **DECEMBER 7, 2015 STIPULATION**

Defendant CIT Bank, N.A. (Formerly known as OneWest Bank, N.A.), filed a Stipulation Resolving Complaint Filed by Debtors against CIT Bank, N.A. (Incorrectly named as IndyMac Mortgage Services) on December 7, 2015. Dckt. 25. Plaintiff-Debtor and Defendant CIT Bank agree as follows:

1. Defendant CIT Bank and its attorneys, agents, and employees and successors shall be barred from taking any action against Plaintiff-Debtors with respect to the Note.
2. Defendant CIT Bank shall remove the listing in Plaintiff-Debtor's credit reports stating that Plaintiff-Debtors owe money to Defendant CIT Bank on account of the Note.
3. Defendant CIT Bank shall have the right to foreclose on the property [at 272 Christine Drive, Sacramento, CA] in accordance with the relief provided in the Plan and Confirmation Order.
4. Upon entry of an order approving this stipulation, the causes of action in the Complaint against Defendant shall be dismissed, without prejudice.

#### **CONFIRMED CHAPTER 11 PLAN**

The following provisions are found in Plaintiff-Debtor's confirmed April 20, 2012 Modified Plan, confirmed May 4, 2012, in the parent bankruptcy

case:

**ARTICLE 4: TREATMENT OF CLAIMS UNDER THE PLAN**

...

C. Classified Claims

...

2d. Bank of America, NA for 272 Christine Dr., Sacramento, CA

Debtor will surrender the collateral at 272 Christine Dr., Sacramento, CA, to Bank of America, NA, on the Effective Date of the Plan. The confirmation order would constitute an order for relief from stay. Any secured claim is satisfied in full through surrender of the collateral. Due to the 11 U.S.C. Section 1111(b) election of [BANA], there will be no deficiency claim treated as a general unsecured claim.

2e. Bank of America, NA for 2323/2331 Grove Ave., Sacramento, CA

Debtor will surrender and abandon the collateral at 2323-2331 Grove Avenue to [BNYM], its assignees and/or successors in interest on the effective date of the Plan. The confirmation order would constitute an order for relief from stay, with the Federal Rule of Bankruptcy procedure 4001(a)(3) 14-day stay waived. Any secured claim is satisfied in full through surrender of the collateral. Due to the 11 U.S.C. Section 1111(b) election of [BNYM], there will be no deficiency claim treated as a general unsecured claim.

...

**ARTICLE 15: GENERAL PROVISIONS**

...

O. Successors And Assigns

The rights, duties and obligations of any Entity named or referred to in the Plan shall be binding upon, and shall inure to the benefit of, the successors and assigns of such Entity.

E.D. Cal. Bankr. Case No. 2011-27845, Dckt. 279, pp. 10, 20.

**APPLICABLE LAW**

Fed. R. Civ. P. 12(b)(6)

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require

that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) (“[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court’s formulation of Rule 12(b)(6), a plaintiff cannot “plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint to survive a motion to dismiss.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. See *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66 (2007). (“[A] plaintiff’s obligation to provide ‘grounds’ of his ‘entitle[ment]’ to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”).

In ruling on a 12(b)(6) motion to dismiss, the Court may consider “allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to “accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

Declaratory Relief

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.1. “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).

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FN.1. 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.

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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.*

**DISCUSSION**

Claims on 272 Christine Drive between Plaintiff-Debtor and Defendant BANA

As provided by the prior Order Approving the December 7, 2015 Stipulation, the claims for injunctive and declaratory relief against BANA, with CIT Bank, N.A. as the loan servicer (improperly listed as IndyMac) on the property commonly known as 272 Christine Drive, Sacramento, CA, are dismissed as moot. The Order language approving the December 7, 2015 Stipulation controls.

Claims on 2323-2331 Grove Avenue between Plaintiff-Debtor and Defendant BANA

Defendant's objection is well-taken.

After reviewing the Plaintiff-Debtor's Complaint, Defendant's Motion to Dismiss, and Plaintiff-Debtor's subsequent Objection, the court cannot determine the threshold issue of who the creditor is for this loan. This matter must be determined for the court to decide on whether there is "an actual controversy" between the rights of both parties. See Cal. Comm. Code §§ 1201(21), 3301 (defining a "holder" of a note, and stating a note holder has a "right to payment"); see *Calderon*, 523 U.S. at 745. On the statements shown below, the court cannot determine whether BANA was the note holder or a servicer for the note holder when the Chapter 11 Plan was confirmed.

First, Plaintiff-Debtor's Complaint states:

15. ...After issuance of the confirmed Plan, Defendant Bank of America, N.A. assigned the loan for 2323-2331 Grove Avenue, Sacramento, Ca to be serviced by Defendant Shellpoint.

Dckt. 1 ¶ 15.

Defendant BANA cites to paragraph 15 of Plaintiff-Debtor's Complaint, cited above, for the assertion that:

...Subsequently, BANA transferred the servicing rights on the Christine Property to IndyMac and the Grove Property to Shellpoint. (Comp. ¶ 15).

Dckt. 11 p. 1 lines 19-22. In a contradictory statement, Defendant BANA also asserts:

Plaintiffs have admitted that BANA has **assigned it [sic] interest** in the loan secured by [the Grove property], and so enjoining BANA from pursuing non-judicial foreclosure would, at best, be pointless...Moreover, the only involvement that BANA has in the events alleged in the Adversary Complaint is that, at the time the Plan was approved, **it was the creditor on both loans** and that subsequent to the Plan's approval it assigned the loans to co-defendants Shellpoint and IndyMac.

*Id.* at p. 2 lines 23-25; *Id.* at p. 2-3 lines 27-2.

Further complicating the matter, Plaintiff-Debtor's Objection claims:

After the issuance of the confirmed Plan, Defendant Bank of America, N.A., **assigned the loan** for 272 Christine Drive, Sacramento, CA to Defendant IndyMac. After the issuance of the confirmed Plan, Defendant Bank of America, N.A., **assigned the loan** for 2323-2331 Grove Avenue, Sacramento, CA **to be serviced by** Defendant Shellpoint. Contrary to the allegations of [BANA], in its motion, **since it was the creditor** of the two properties that were surrendered and abandoned at the time [BANA] **was the creditor**, [BANA] violated the [confirmation order].

Dckt. 21 ¶ 5.

A review of the docket for the parent bankruptcy case shows a Proof of Claim filed on May 8, 2011, by the Bank of New York Mellon. E.D. Cal. Bankr. Case No. 11-27845, Proof of Claim #8. That Proof of Claim asserts that The Bank of New York Mellon, fka The Bank of New York, as Trustee for the Certificate holders of the CWMBS Inc., CHL Mortgage Pass-Through Trust 2006-OA5, Mortgage Pass Through Certificates, Series 2006-OA5 is the Creditor.

Because a 12(b)(6) motion places the final burden on whether there are sufficient facts to support Plaintiff-Debtor's claims, this court cannot hold that the facts stated support an actual controversy between Plaintiff-Debtors

and Defendant BANA. Neither Plaintiff-Debtor nor Defendant BANA provided a factual basis for this court to find whether BANA holds an interest in the property as a creditor, and BANA asserts that any interest BANA has as a loan servicer was assigned to Defendant Shellpoint. Thus, this court cannot find that there is an "actual controversy" between Plaintiff-Debtor and Defendant BANA.

On the submitted evidence, this court finds that Plaintiff-Debtor failed to state a claim against Defendant BANA for injunctive and declaratory relief relating to the property at 2323-2331 Grove Avenue, Sacramento, CA. Thus, the Motion is granted.

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

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

The Motion to Dismiss 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 to Dismiss is granted and the First and Second Causes of Action as to Defendant Bank of America, N.A. are dismissed.