UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

December 20, 2016, at 1:30 p.m.

---

1. **15-90811-E-7** **ASSN., GOLD STRIKE**
15-9061 **HEIGHTS HOMEOWNERS**
INDIAN VILLAGE ESTATES, LLC V.
GOLD STRIKE HEIGHTS

CONTINUED MOTION FOR SUMMARY JUDGMENT, MOTION FOR SUMMARY JUDGMENT
11-3-16 [68]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney, Defendant's Attorney, and Chapter 7 Trustee on November 3, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

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

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

On November 3, 2016, Defendant Community Assessment Recovery Services ("Defendant CARS") filed the instant Motion for Summary Judgment. FN.1. The Motion does not comply with Federal

Rule of Civil Procedure 7(b), Federal Rule of Bankruptcy Procedure 7007, Local Bankruptcy Rule 9004-1(a), and the Revised Guidelines for the Preparation of Documents.

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

DECEMBER 1, 2016 HEARING

At the hearing, the court continued the matter to 1:30 p.m. on December 20, 2016, specially set to the court's Sacramento calendar because of the unavailability of Plaintiff's counsel at the December 1, 2016 hearing. Dckt. 92. The court posted the tentative ruling in the Civil Minutes so that the parties could review it easily before the continued hearing.

No supplemental pleadings have been filed since the December 1, 2016 hearing.

PROCEDURAL ISSUES TO BE ADDRESSED

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

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

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

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

> "(3) Separate Notice. Every motion shall be accompanied by a separate notice of hearing stating the Docket Control Number, the date and time of the hearing, the location of the courthouse, the name of the judge hearing the motion, and the courtroom in which the hearing will be held.

> (4) Contents of Notice. The notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition. If written opposition is required, the notice of hearing shall advise potential respondents that the failure to file timely written opposition may result in the motion being resolved without oral argument and the striking of untimely written opposition."

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

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

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

REVIEW OF MOTION FOR MINIMUM PLEADING REQUIREMENTS

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

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

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

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general

pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013 (which contains the same "state with particularity" requirement). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2)), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678–79. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

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

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

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

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

Weatherford, 434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts that will be proved at the hearing).

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

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

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977).

Not stating with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Civil Procedure 7(b) and Federal Rules of Bankruptcy Procedure 7007 and 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try to float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Grounds Stated in "Motion"

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

> A. "Plaintiff cannot establish, as a matter of law, any disputed fact, and Plaintiff cannot establish all of the necessary elements of its claims against CARS, and/or
>
> B. CARS has established the affirmative defenses of immunity and privilege, and it is entitled to judgment in its favor as a matter of law."

Dckt. 68.

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

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

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

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

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

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

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

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

REVIEW OF MOTHORITIES

The court has coined the phrase "Mothorities" to describe the combined one document containing the extensive citations, quotations, legal arguments, conjecture, and speculation in support of the

motion. In presenting a Mothorities, and telling the court to harvest other grounds from the declarations, exhibits, and other evidence, the court is being directed to find whatever are the best grounds the court thinks could exist, state those for movant, advocate those for movant, and then rule on the grounds stated and advocated for movant. Such party "advocacy" is inappropriate.

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

Grounds upon Which Relief Is Based

The court may grant summary judgment or determine the facts that are not in material dispute as provided in Federal Rule of Civil Procedure 54 (a) and (g) and Federal Rule of Bankruptcy Procedure 7054. From the court's review of the Mothorities, pages one through three, the grounds stated by Movant are:

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

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

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

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

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

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

G. Plaintiff IVE was not misled by the use of the GSHA and GSHHA names.

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

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

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

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

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

OPPOSITION STATED BY PLAINTIFF IVE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONSIDERATION OF SPECIFIC CLAIMS AND CAUSES OF ACTION

Declaratory Relief

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

FN.3. 28 U.S.C. § 2201,

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10)

of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

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

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

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

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

Requirement That Complaint to Quiet Title Must Be Verified

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

"§ 761.020. Contents of complaint

The **complaint shall be verified** and shall include all of the following:

(a) A description of the property that is the subject of the action. In the case of tangible personal property, the description shall include its usual location. In the case of real property, the description shall include both its legal description and its street address or common designation, if any.

(b) The title of the plaintiff as to which a determination under this chapter is sought and the basis of the title. If the title is based upon adverse possession, the complaint shall allege the specific facts constituting the adverse possession.

> (c) The adverse claims to the title of the plaintiff against which a determination is sought.
>
> (d) The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint shall include a statement of the reasons why a determination as of that date is sought.
>
> (e) A prayer for the determination of the title of the plaintiff against the adverse claims.

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

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

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

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

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

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

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

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

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

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

IMMUNITY AND GOOD FAITH

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

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

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

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

> "(d) All of the following shall constitute privileged communications pursuant to Section 47:
>
> (1) The mailing, publication, and delivery of notices as required by this section.
>
> (2) Performance of the procedures set forth in this article.

(3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure."

From the Complaint, and conflicting evidence presented, it appears that Plaintiff IVE contends that Defendant CARS with full knowledge of the asserted deficiency in its actions (GSHA's suspension of power) proceeded to improperly conduct foreclosure sales. Further, after the sales were completed, and with knowledge that the suspended corporation was the purchaser, Defendant CARS executed the trustee's deed naming another person, GSHHA, as the purported purchaser at the trustee sales.

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

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

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

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

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

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

F. Sixth Cause of Action for Slander of Title—This cause of action asserts that GSHHA and Defendant CARS acted with malice, fraud and/or oppression, in noticing the

defaults, noticing the trustee sales, conducting the trustee sales, and then recording the trustee deeds, resulting in Plaintiff IVE's title to the twenty-one lots being slandered. Plaintiff IVE does not assert that such occurred in error or by mere negligence, but that such conduct was done with the knowledge that the person for whom the sales were being conducted, GSHA, could not act to have such sales conducted.

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

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

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

Requirement of Tender

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

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

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

C. In footnote 4, the Supreme Court discusses the tender requirement, stating, "Tender has been excused when, among other circumstances, the plaintiff alleges the foreclosure deed is facially void, as arguably is the case when the entity that initiated the sale lacked authority to do so. (*Ibid*.; *In re Cedano* (Bankr. 9th Cir. 2012) 470 B.R. 522, 529–30; *Lester v. J.P. Morgan Chase Bank* (N.D. Cal. 2013) 926 F. Supp. 2d 1081, 1093; *Barrionuevo v. Chase Bank, N.A.*,885 F. Supp. 2d 964, 969–970)." *Id.* The Supreme Court did not address the issue of tender under the specific circumstances in *Yvanva*.

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

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

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

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

> "The logic of defendants' no-prejudice argument implies that anyone, even a stranger to the debt, could declare a default and order a trustee's sale—and the borrower would be left with no recourse because, after all, he or she owed the debt to someone, though not to the foreclosing entity. This would be an "odd result" indeed. (*Reinagel*, 735 F.3d at p. 225.) As a district court observed in rejecting the no-prejudice argument, '[b]anks are neither private attorneys general nor bounty hunters, armed with

> a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust.' (*Miller v. Homecomings Financial, LLC* (S.D.Tex. 2012) 881 F. Supp. 2d 825, 832.)" *Id.* at 938.

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

UNDISPUTED FACTS FOR TRIAL

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

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

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

22. Rebecca Jolly possessed no ill-will or any malice towards IVE, Mark Weiner or Don Lee, before, during, or after the foreclosure process.	
23. Prior to filing the instant lawsuit, IVE failed to tender to GSHHA the amount of the outstanding assessments on all of the thirty-one lots.	

The court denies the Motion for Summary Judgment. The court determines that no relief is requested under the First Cause of Action (Declaratory Relief), with a determination of the actual, existing, interests of the parties stated in other Causes of Action. Further, the court makes the determinations set forth above as undisputed pursuant to Federal Rule of Civil Procedure 54(g) and Federal Rule of Bankruptcy Procedure 7054.

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

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

2. **16-20227-E-13** **PAMELA BEARD HUGHES** **CONTINUED MOTION FOR RELIEF**
ABG-2 **Mikalah Liviakis** **FROM AUTOMATIC STAY**
10-24-16 [47]

21ST MORTGAGE CORPORATION
VS.

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were not served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 24, 2016. 43 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from Automatic Stay is granted.

Pamela Hughes ("Debtor") commenced this bankruptcy case on November 15, 2016. 21st Mortgage Corporation ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2003 HBOS Manufacturing Oakwood (27'x56') Mobilehome, located at 6421 Capital Circle, Sacramento, California ("Property"). The moving party has provided the Declaration of Trey Gibson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. FN. 1.

FN.1. Movant filed the motion and points & authorities and the declaration & exhibits in this matter as one document each. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents, as required by Local Bankruptcy Rule 9004(a). Failure to comply is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

DECEMBER 6, 2016 HEARING

At the hearing, the court continued the matter to 1:30 p.m. on December 20, 2016, for the parties to finalize an adequate protection order. Dckt. 77. The court announced that if such an order is no filed with the court by December 14, 2016, then the court may remove this matter from the calender and issue an order thereon.

STIPULATION STATE AT DECEMBER 6, 2016 HEARING

At the hearing, Debtor and Movant outlined terms for an adequate protection stipulation. The basic terms were stated to be:

I. The Trustee is holding $2,000.00 in undisbursed monies. (As noted below, the Trustee states he is not holding any money.)

A. Upon confirmation of an amended plan, $2,000.00 to creditor will apply to arrearage.

B. Movant agrees to take the loan out of default so Debtor can make direct payments.

C. The Debtor is pursuing Motions asserting automatic stay violations, which when the monies are recovered they can be used to accelerate the cure of the post-petition arrearage to Movant.

D. The parties will agree to a "3 strikes" default provision, after which Movant will be entitled to relief from the stay.

At the hearing, the Trustee reported that he is not holding $2,000.00, but that the monies paid into the plan by the Debtor have been disbursed as required by the Plan.

MOTION FOR RELIEF

The Gibson Declaration provides testimony that Debtor has not made five post-petition payments, with a total of $3,529.40 in post-petition payments past due.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $75,000.00, as stated in Schedules A/B and D filed by Debtor.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $75,659.27, as stated in the Gibson Declaration, while the value of the Property is determined to be $75,000.00, as stated in Schedules B and D filed by Debtor.

TRUSTEE'S RESPONSE

The Trustee filed a Response on November 21, 2016. Dckt. 53. The Trustee states that Debtor is current under the confirmed plan that classifies Movant in Class 4. The Trustee also notes that Debtor

proposed a Modified Plan that was denied by the court. Debtor has paid $7,529.00 to the Trustee, who holds $1,218.46 currently.

DEBTOR'S "OPPOSITION"

Debtor filed a Response on November 22, 2016, which the court interprets as an Opposition. Dckt. 61. Debtor confirms that she is delinquent in payments to Movant, but she asserts that she now seeks confirmation of another modified plan that will cure the mortgage arrears and make monthly payments to Movant.

Debtor asserts that she was not able to cancel certain auto-draft payments that had been established prior to filing for bankruptcy, which caused her to miss mortgage payments. Debtor is pursuing sanctions against at least two creditors she alleges violated the automatic stay by taking her automatic payments despite being notified of the bankruptcy case. *See* Dckts. 63 & 70.

DISCUSSION

No supplemental pleading (i.e., stipulation for adequate protection payments) has been filed by either party.

Debtor has filed a Modified Plan and Motion to Confirm. The court has reviewed the Motion to Confirm the Modified Plan and the Declaration in support filed by the Debtor. Dckt. 59. The Motion appears to comply with Federal Rule of Bankruptcy Procedure 9013 (stating grounds with particularity), and the Declaration appears to provide testimony as to facts to support confirmation based upon the Debtor's personal knowledge. Fed. R. Evid. 601, 602.

Though the Debtor has not provided testimony that she is current on the proposed plan payments, there is no evidence she is not. The Creditor rushed to file this motion upon denial of the prior plan, stating as grounds the prior defaults and the court not confirming the prior plan. In reviewing the Civil Minutes from that denial, one of the items which weighed heavy with the court was the Debtor ignoring the alleged violations of the automatic stay and merely seeking to may Creditor delay getting any arrearage payments until the 28th month of the Plan.

Under the current proposed Plan Debtor again delays making any cure payments to Movant until the 28 month of the Plan. Debtor does not advance an argument why Movant an be forced to have its arrearage payment delayed two years. With a monthly plan payment of $1,299.00, the Plan should be able to fund the following:

Plan Payment For 54 Months	$1,299
Trustee Fee (Est. 7%)	($91)
Movant's Current Monthly Payment	($706)
Movant's $3,200 Arrearage Over 54 Months	($60)
Dodge Car Loan	($382)

Monthly Amount For Legal Fees $2,575 ($42 over 60 months)	($60)

Surplus After Payment of Above	$0

It appears Debtor could properly fund a plan to provide for paying Movant on its secured claim arrearage without deferring that payment for sixty months. However, it appears that the arrearage payment is being deferred to pay Debtor's counsel the balance due on his legal fees (after having received a partial payment from Debtor's legal insurance).

While Debtor is attempting to prosecute a plan, it does not properly address Movant's secured claim. 11 U.S.C. § 1325(a)(5)(B)(iii)(I) & (II) requires monthly payments to be in equal amounts that "shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan." Deferring payment to Movant on the post-petition arrearage is improper. *See In re Kirk*, 465 B.R. 300, 305 (Bankr. N.D. Ala. 2012) ("[S]taggering payments to secured claimants post-confirmation to allow attorney's fees and other administrative expenses to be more rapidly paid is not permissible under the statutory framework for distribution of chapter 13 plan payments.") (citing *In re Willis*, 460 B.R. 784 (Bankr. D. Kan. 2011)); *see also In re Parker*, 1 BAMSL 685 (Bankr. E.D. Mo. 1981) (requiring creditor to wait twenty-one months before receiving payments on its secured claim does not meet requirements of 11 U.S.C. § 1325(a)(5)(B)(ii)).

While this court will allow some "flexibility" with stepped up payments based on objective future events, the court has been unwilling to allow a creditor to go unpaid on an arrearage claim for years.

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because Debtor's continued use of the Property without providing adequate protection harms Movant's interest in the Property.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by 21st Mortgage Corporation ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Property, under its security agreement, loan documents granting it a lien in the asset identified as a 2003 HBOS Manufacturing Oakwood (27'x56') Mobilehome, located at 6421 Capital Circle, Sacramento, California ("Property"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Property to the obligation secured thereby.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

No other additional relief is granted.

3. **16-27675-E-13** **DAWN BASURTO** **MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY**
GME-1 **Pro Se** **11-22-16 [10]**

VULGARA TILE, HARDWOOD, AND CARPET INC. VS.

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on November 22, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is granted, with the court confirming that the Automatic Stay is not in effect in this case.

Dawn Basurto ("Debtor") commenced this bankruptcy case on November 18, 2016. Vulgara Tile, Hardwood and Carpet, Inc. ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2954 Great Egret Way, Sacramento, California ("Property"). The moving party has provided the Declaration of George Eckert to introduce evidence as a basis for Movant's contention that Debtor does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Movant asserts it purchased the Property at a pre-petition Trustee's Sale on October 14, 2016. Based on the evidence presented, Debtor would be at best a tenant at sufferance.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on December 6, 2016, in which he does not oppose the Motion. Dckt. 23.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on December 12, 2016. Dckt. 28. Debtor asserts that she is seeking legal representation for this case, but has not found counsel yet. She states that she is seeking a loan modification with Carrington Financial and has employed a third party to assist her. Debtor argues that the facts of this case are more complicated than have been alleged, and she wants to present her arguments before the court.

Debtor moves for the Motion to be denied, or alternatively, continued sixty days while Debtor seeks to employ counsel.

REVIEW OF DEBTOR'S PRIOR BANKRUPTCY CASES

This is Debtor's fourth bankruptcy case filed individually within the last year. Anthony Basurto, listed the Property on his Petitions as his residence and Schedules C and , also filed two bankruptcies within the past year (from the date of the Motion, but more than one year from the date of the hearing). In those cases Anthony Basurto listed "Dawn Basurto" as his spouse. The cases are as follows:

A. Case No. 15-28915

1. Debtor: Anthony Basurto
2. Filed: November 17, 2015
3. Dismissal Date: December 7, 2015
4. Reason for Dismissal: Failure to timely file documents (no filing fee paid)

B. Case No. 16-20207

1. Debtor: Anthony Basurto
2. Filed: January 14, 2016
3. Dismissal Date: March 31, 2016
4. Reason for Dismissal: Failure to make plan payments

C. Case No. 16-22462

1. Debtor: Dawn Basurto

2. Filed: April 19, 2016

3. Dismissal Date: June 27, 2016 (Dismissed four and one-half months before filing of current bankruptcy case.)

4. Reason for Dismissal: Failure to appear at Meeting of Creditors, failure to provide tax transcripts or copies of federal income tax report, failure to provide employer payment advices, failure to complete credit counseling

D. Case No. 16-26235

1. Debtor: Dawn Basurto

2. Filed: September 20, 2016

3. Dismissal Date: October 11, 2016 (Dismissed one month before filing of current case.)

4. Reason for Dismissal: Failure to timely file documents (no filing fee paid)

E. Case No. 16-26830

1. Debtor: Dawn Basurto

2. Filed: October 14, 2016

3. Dismissal Date: November 1, 2016 (Dismissed four days before filing of current case.)

4. Reason for Dismissal: Failure to timely file documents (no filing fee paid)

F. Case No. 16-27675 (present case)

1. Debtor: Dawn Basurto

2. Filed: November 18, 2016

DISCUSSION

A review of the dockets in the various cases reveals that neither Debtor nor Anthony Basurto ever moved to have the automatic stay extended or imposed in the various bankruptcy cases they filed. That same review also shows that neither Debtor nor Anthony Basurto has been represented by counsel in any of the six past filings. The only time they were represented by legal counsel was when they filed jointly in Case No. 11-33759. Debtor has experience filing bankruptcy cases, and if she wanted to be represented by legal counsel, then she would have done so by now. The court is not persuaded by Debtor's argument that this Motion should be continued while she seeks to employ legal counsel. Debtor has not shown how a good reason for continuance of a determination that the automatic stay has not gone into effect in this case as Congress has provided in 11 U.S.C. § 362(c)(4).

This is Debtor's fourth bankruptcy case as an individual that was pending and dismissed in the one year prior to the filing of the current bankruptcy case. Pursuant to 11 U.S.C. § 362(c)(4)(A)(i), Congress has statutorily provided that the provisions of the automatic stay did not go into effect upon Debtor filing the current bankruptcy case.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions imposed if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(4)(B).

The subsequently filed case is presumed to be filed in bad faith if two or more of Debtor's cases were both pending within the year preceding filing of the instant case. *Id.* § 362(c)(4)(D)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(4)(D). Debtor has not moved for the stay to be imposed, and therefore, the automatic stay is not in effect in this case.

Movant has provided a properly authenticated copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership. Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2).

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, relief from stay proceedings are summary proceedings that address issues arising only under 11 U.S.C. Section 362(d). No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427, at *8–9 (B.A.P. 9th Cir. Aug. 1, 2005) (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay in a Contested Matter (Fed. R. Bankr. P. 9014).

The court shall issue an order confirming that the automatic stay is not in effect in this case to allow Vulgara Tile, Hardwood and Carpet, Inc., and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 2954 Great Egret Way, Sacramento, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

11 U.S.C. § 362(d)(4) Relief

Movant also requests that the court grant relief pursuant to 11 U.S.C. § 362(d)(4), which will preclude the automatic stay in any subsequent bankruptcy case going into effect as to this property, unless the bankruptcy judge in that case so orders. 11 U.S.C. § 362(d)(4) provides:

> "(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either–
>
> (A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or
>
> (B) multiple bankruptcy filings affecting such real property.

> If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording."

This section provides for a "creditor" whose "claim is secured" by property subject to 11 U.S.C. § 362(a) to seek relief under § 362(d)(4). Here, the evidence presented is that Movant is not a "creditor" with a "claim secured by" the property at issue, but the owner of the property who is attempting to obtain possession of it from Debtor and Debtor's spouse.

Debtor's opposition provides little to counter a contention that the multiple filing of bankruptcy cases has not been for purposes of hindering, delaying, and defrauding persons with respect to the Property at issue. Debtor states that she desired to obtain a loan modification to avoid the creditor who held the claim secured by the property from foreclosing. That did not occur an a foreclosure occurred and Movant has presented evidence that it was the buyer at the foreclosure sale.

Debtor appears to blame some unnamed third-party for providing "bad advice" with respect to the loan modification process. However, that does not create an automatic stay in this case. In the Opposition and Debtor's declaration, she asserts that the foreclosure sale occurred on October 14, 2016, during the pendency of a prior bankruptcy case.

That prior case, 16-26830, was filed on October 14, 2016. However, Debtor had pending and dismissed to prior bankruptcy cases in the one year period prior to the filing of case 16-26830. Those were

Case No. 16-22462:

Filed.....April 19, 2016
Dismissed.....June 27, 2016

Case No. 16-26235

Filed.....September 20, 2016
Dismissed.....October 11, 2016

With these two cases, the provisions of 11 U.S.C. § 362(c)(4) were in effect in the October 14, 2016 filed case, 16-26830, with no automatic stay going into effect in that case. Thus, while filed, Debtor has not show that it worked to make the foreclosure sale ineffective and somehow prevented Movant from becoming the owner of the Property at issue.

Based on the evidence and the law presented by Movant, it does not appear that Movant is a person that is a "creditor" which may seek the relief provided for in 11 U.S.C. § 362(d)(4). The court denies without prejudice such requested relief.

No other or additional relief is granted by the court.

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 Relief From the Automatic Stay filed by Vulgara Tile, Hardwood and Carpet, Inc. ("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 automatic stay provisions of 11 U.S.C. § 362(a) are not in effect in this case, and Vulgara Tile, Hardwood and Carpet, Inc. and its agents, representatives and successors, may exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 2954 Great Egret Way, Sacramento, California.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.
>
> No other or additional relief is granted.

4. **13-22901-E-13** **VICTOR/SANDRA GARCIA**
PGM-7 **Peter Macaluso**

MOTION FOR COMPENSATION BY THE LAW OFFICE OF PETER G. MACALUSO FOR PETER G. MACALUSO, DEBTOR'S ATTORNEY
11-9-16 [161]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 9, 2016. By the court's calculation, 41 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Allowance of Professional Fees is granted

Peter Macaluso, the Attorney ("Applicant") for Victor Garcia and Sandra Garcia, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

The period for which the fees are requested is April 15, 2014, through October 10, 2014. Applicant requests fees in the amount of $2,700.00.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 29, 2016. Dckt. 166. The Trustee objects to $1,635.00 sought as fees for a Motion to Modify Plan (PGM-5). The Motion was denied by the court, and the Trustee does not believe that Client received value for it.

APPLICANT'S REPLY

Applicant filed a Reply on December 13, 2016. Dckt. 169. Applicant asserts that the Trustee is objecting to $1,635.00 of the total $4,050.00 in post-petition fees. The difference is $2,415.00, which would be agreeable to Applicant.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including pursuing two motions to modify plan. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

In this District the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

> "(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> ...
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6)."

An Order Confirming the Chapter 13 Plan expressly provided that Applicant is allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 102. Applicant prepared the order confirming the Plan.

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). He may file a fee application and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

FEES REQUESTED

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

Motion to Modify Plan (PGM-5): Applicant spent 5.45 hours in this category. Applicant assisted Client with responding to the Trustee's Motion to Dismiss by formulating, filing, and seeking confirmation of a modified plan, including responding to the Trustee's opposition. These services total $1,635.00 in fees.

Motion to Modify Plan (PGM-6): Applicant spent 3.55 hours in this category. Applicant assisted Client with formulating, filing, and seeking confirmation of a modified plan, including responding to the Trustee's opposition, ending in submitting an order confirming to the Trustee. These services total $1,065.00 in fees.

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:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Macaluso	9 hours	$300.00	$2,700.00
Total Fees For Period of Application			$2,700.00

In the Motion, Applicant makes the statement that there was actually $4,050.00 in post-confirmation services provided, but only $2,700.00 in services are identified. The court does not know what services were provided and whether they represent true "unanticipated" and "substantial" legal services.

FEES ALLOWED

Applicant has tried to re-classify its requested fees in response to the Trustee's opposition by pointing the court to the total $4,050.00 incurred as post-confirmation fees, but that amount appears to include $1,350.00 in anticipated fees. Only $2,700.00 was unanticipated. Therefore, the correct measurement of fees for the Trustee's opposition is $1,065.00. The court concurs with the Trustee that fees for the Motion to Modify Plan (PGM-5) are not warranted given that the court addressed several issues with the handling of the case, including Debtor's unwillingness to prosecute the case in good faith and untruthful representations to the court. *See* Civil Minutes, Dckt. 128.

However, upon reviewing the Civil Minutes from the hearings on Motions PGM-5 and PGM-6, the court will allocate a portion of the PGM-5 work to PGM-6, on the theory that there had to be "some" work that made PGM-6 easier. This is being done notwithstanding the court's pointed comments to Debtor and Debtor's counsel about their conduct with respect to the attempt to confirm the plan pursuant to PGM-5.

The unique facts surrounding the case, including pursuing motions to modify a plan, raise substantial and unanticipated work for the benefit of the estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Request for Additional Fees in the amount of $1,065.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan. The court allocates an additional $500.00 in fees for applicant, for a total of $1,565.00 in additional fees.

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

Fees $1,565.00

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 Peter Macaluso ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Peter Macaluso is allowed the following fees and expenses as a professional of the Estate:
>
> Peter Macaluso, Professional Employed by Chapter 13 Debtor
>
> Fees $1,565.00
>
> The Fees pursuant to this Applicant are approved as final fees 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 Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.