

UNITED STATES BANKRUPTCY COURT  
Eastern District of California  
Honorable René Lastreto II  
Hearing Date: Tuesday, October 26, 2021  
Place: Department B - Courtroom #13  
Fresno, California

*The court resumed in-person courtroom proceedings in Fresno ONLY on June 28, 2021. Parties may still appear telephonically provided that they comply with the court's telephonic appearance procedures. For more information click [here](#).*

**INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS**

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

**No Ruling:** All parties will need to appear at the hearing unless otherwise ordered.

**Tentative Ruling:** If a matter has been designated as a tentative ruling it will be called, **and all parties will need to appear at the hearing unless otherwise ordered.** The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

**Final Ruling:** Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

**Orders:** Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

**THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.**

9:30 AM

1. [21-12134](#)-B-11     **IN RE: WALTER C. SMITH COMPANY, INC.**

STATUS CONFERENCE RE: CHAPTER 11 SUBCHAPTER V VOLUNTARY  
PETITION

9-2-2021    [[1](#)]

RILEY WALTER/ATTY. FOR DBT.

NO RULING.

2. [21-12134](#)-B-11     **IN RE: WALTER C. SMITH COMPANY, INC.**  
[FW-1](#)

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY  
9-7-2021    [[19](#)]

DEBENEDETTO PROPERTIES, LTD/MV

RILEY WALTER/ATTY. FOR DBT.

PETER FEAR/ATTY. FOR MV.

RESPONSIVE PLEADING

WITHDRAWN

FINAL RULING:     There will be no hearing on this matter.

DISPOSITION:     Dropped from calendar.

NO ORDER REQUIRED.

DeBenedetto Properties, Ltd. and Walter C. Smith Company, Inc.  
stipulated to withdraw this motion on October 14, 2021. Doc. #125.  
Accordingly, the motion will be dropped from calendar.

3. [21-12134](#)-B-11     **IN RE: WALTER C. SMITH COMPANY, INC.**  
[SJL-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
10-8-2021    [\[102\]](#)

SIERRA MOUNTAIN CONSTRUCTION,  
INC./MV  
RILEY WALTER/ATTY. FOR DBT.  
MICHAEL ST. JAMES/ATTY. FOR MV.

TENTATIVE RULING:        This matter will proceed as scheduled.

DISPOSITION:                Granted.

ORDER:                        The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

Sierra Mountain Construction, Inc. ("Movant") requests modification of the automatic stay under 11 U.S.C. § 362 to allow it to continue prosecuting pending litigation with Walter C. Smith Company, Inc. ("Debtor") against its insurers with a full reservation of rights in favor of Movant and Debtor. Doc. #102. Movant also seeks waiver of the automatic stay under Fed. R. Bankr. P. 4001(a)(3).

Written opposition was not required and may be presented at the hearing. In the absence of opposition, this motion will be GRANTED.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Movant is a general contractor and entered into a written construction agreement with Debtor in July 2018. Docs. #107, Ex. A. Debtor undertook to perform certain work in connection with a construction project ("Project") for the City of Pacifica. Doc. #106. Subsequently, Movant and Debtor executed a second written agreement in October 2018 that added additional duties to Debtor's scope of performance on the Project (collectively, the "Subcontracts"). Doc. #107, Ex. B.

Under the Subcontracts, Debtor arranged for Movant to be an additional insured on its liability insurance policies. Movant has two policies: \$1 million/occurrence & \$2 million aggregate with Scottsdale (CGL) and \$5 million/occurrence with Navigator (Excess). Doc. #106.

After completing the Project, the owner was dissatisfied with Debtor's performance, failed to pay certain billings, and asserted claims against Movant. *Id.* In response, Movant asserted its right to withhold payments under the contracts and applicable law and

asserted claims against Debtor. As an "additional insured," Movant tendered the claims against it to the insurance carrier, who agreed to pay a portion of Movant's defense costs in connection with the claims against it.

On June 3, 2020, Debtor filed suit against Movant in San Mateo County Superior Court, asserting claims arising out of the Subcontracts and Project. Doug Benton, Movant's President, declares that Debtor's claim is identified as the accounts receivable owed by Movant to Debtor in Schedule A/B as having a value of \$994,000.00. *Id.*; Doc. #69, *Sched. A/B*, ¶ 74.

Movant filed a cross-complaint on November 16, 2020. Movant believes that the insurance carrier has funded Debtor's defense and appointed counsel to represent and defend Debtor at the carrier's expense.

Other parties may assert claims related to the Project, but Movant believes that there may be insurance coverage for some or all of the claims at issue. A "global mediation" is scheduled for November 5, 2021 and will include Debtor, Movant, and other parties. Doc. #106.

Debtor filed chapter 11, subchapter V bankruptcy on September 2, 2021. Doc. #1. Benton claims that Movant attempted to stipulate to stay relief, but Debtor declined unless Movant agreed to waive all defenses to the claim if Movant received anything from the insurance carriers that issued the liability insurance policies. Doc. #106. Movant now seeks stay relief to permit it to prosecute the pending litigation, including the mediation. If Movant is successful, it will be necessary to seek recovery from the insurers. Doc. #105. Since there are multiple non-debtor parties, allowing litigation to proceed is the most efficient way to resolve the claims.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case-by-case basis." *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985). Cause exists to grant stay relief here because Debtor has a \$1 million dollar claim against Movant that will be liquidated and collected if Debtor is meritorious.

When a movant prays for relief from the automatic stay to initiate or continue non-bankruptcy court proceedings, a bankruptcy court must consider the "Curtis factors" in making its decision. *Kronemyer v. Am. Contractors Indem. Co. (In re Kronemyer)*, 405 B.R. 915, 921 (B.A.P. 9th Cir. 2009). The relevant factors in this case include:

1. Whether the relief will result in a partial or complete resolution of the issues;
2. The lack of any connection with or interference with the bankruptcy case;
3. Whether the foreign proceeding involves the debtor as a fiduciary;
4. Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases;

5. Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;
6. Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question;
7. Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee, and other interested parties;
8. Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c);
9. Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f);
10. The interests of judicial economy and the expeditious and economical determination of litigation for the parties;
11. Whether the foreign proceedings have progressed to the point where the parties are prepared for trial, and
12. The impact of the stay on the parties and the "balance of hurt."

*Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004) citing *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984); see also *Kronemyer*, 405 B.R. at 921.

Here, (1) stay relief may result in complete resolution of the claims asserted by both Debtor and Movant, as well as those involving non-debtor third parties. If Movant is successful, then it will have a partial resolution and need to seek recovery from the insurers, but the litigation involving Debtor will be resolved. (2) the claims arose before the petition was filed and litigation will not interfere with the bankruptcy case. (3) The foreign proceeding does not appear to involve Debtor as a fiduciary. (4) The claims involve solely state law causes of action and there is otherwise no basis for federal jurisdiction outside of 28 U.S.C. § 1334. (5) Movant believes that Debtor's insurance carrier is assuming financial responsibility for defending the litigation. Doc. #106. (6) The action does involve third parties, but Debtor is not functioning as a bailee or conduit for goods or proceeds. (7) Litigation in another forum would not prejudice the interests of other creditors. In fact, Debtor is also seeking voluntary dismissal in matter #4 below, to which Debtor's largest creditors have assented. THA-2. This supports litigation in another forum. (8) The claim may be subject to equitable subordination under § 510(c) because the insurer is involved in litigation. (9) Success in the foreign proceeding could potentially result in an avoidable judicial lien under § 522(f), but it is unlikely because Movant states it will be seeking insurance proceeds from the insurer if successful. So, it is unlikely Movant will obtain a judicial lien against Debtor. (10) The interests of judicial economy and the expeditious and economical determination of litigation favors granting stay relief so that Debtor, Movant, and interested third parties can

resolve their claims in state court. (11) Litigation has been ongoing, and mediation is currently pending. The filing of this bankruptcy may postpone litigation if stay relief is not granted. (12) Parties in interest will not be negatively impacted by stay relief because Movant is seeking insurance proceeds only. The *Curtis* factors weigh in favor of stay relief.

Movants seek relief from the stay for cause based on permissive abstention under 28 U.S.C. § 1334(c)(1). "Where a bankruptcy court may abstain from deciding issues in favor of an imminent state court trial involving the same issues, cause may exist for lifting the stay as to the state court trial." *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir. 1990).

The Ninth Circuit in *Tucson Estates* set forth the following factors to consider when deciding whether to abstain from exercising jurisdiction:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court's docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

*Id.*, at 1167 quoting *In re Republic Reader's Serv., Inc.*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987).

Here, (1) efficient administration of the estate will be optimized if the court abstains from the litigation because the litigation involves multiple non-debtor third parties, is already in progress, and concerns insurance proceeds. The ongoing litigation will be temporarily delayed, and the court's docket burdened, if the court does not abstain. (2) State law issues predominate. The litigation concerns solely state law claims, and this court only has jurisdiction under 28 U.S.C. § 1334. (3) It is unclear whether the applicable law is unsettled or difficult, but the state court is experienced in resolving the claims asserted by Movant. (4) There are many related proceedings in state court because the action involves other non-debtor third parties. (5) There is no jurisdictional basis to hear the claims other than 28 U.S.C. § 1334.

(6) The proceeding is not related to the main bankruptcy case and arose before the case was commenced. (7) This is not a "core" proceeding. (8) Severing state law claims from core bankruptcy matters to allow judgments entered in state court with enforcement left to this court is probably not feasible, since Movant would need to seek insurance proceeds from Debtor's insurer. (9) While not heavily burdened, the bankruptcy court's docket would be lightened by abstaining from this proceeding. (10) Commencement of the proceeding in bankruptcy court likely does not involve forum shopping. Related actions are not subject to the automatic stay, and if Debtor were to remove them to bankruptcy court, Movant states it would seek to remand. (11) The litigation could involve a right to a jury trial, but it is unclear whether that right is asserted here. (12) There are other non-debtor parties involved in the litigation, including the City of Pacifica and nearby homeowners.

After considering all of the discretionary abstention factors, the court is inclined to exercise its discretion to abstain from this proceeding.

Accordingly, this motion will be GRANTED for the limited purpose of continuing with the state court action to resolve the parties' claims. If Movant is successful, it may seek relief against the insurance policy, only. The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived to prevent impeding mediation scheduled for November 5, 2021.

4. [21-12134](#)-B-11 **IN RE: WALTER C. SMITH COMPANY, INC.**  
[THA-2](#)

MOTION TO DISMISS CASE  
10-12-2021 [109]

WALTER C. SMITH COMPANY,  
INC./MV  
RILEY WALTER/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Chapter 11 Subchapter V Debtor Walter C. Smith Company, Inc. ("Debtor") moves to voluntarily dismiss the case pursuant to 11 U.S.C. § 1112(b). Doc. #109.

The motion is supported by the declarations of:

- i. William J. Asbury, the sole managing member of R & B Leasing and Finance, LLC, which is the largest unsecured creditor of Debtor with a claim of \$600,000. Doc. #111.
- ii. Michael A. DeBenedetto, Debtor's president. Doc. #112.
- iii. Jaymie Smith, Trustee of the (a) Anthony D. DeBenedetto and Margaret A. DeBenedetto Trust, (b) Anthony D. DeBenedetto Survivor's Trust and the (c) Anthony and Margaret DeBenedetto

Grandchildren Trust, which collectively are owed approximately \$150,726 plus other obligations under the Stock Redemption Agreement ("SRA"). Smith is also the General Partner and authorized representative of DeBenedetto Properties, Ltd., owed approximately \$115,000 plus other obligations under the SRA. Doc. #114.

- iv. Scott M. DeBenedetto, owed approximately \$11,161 plus other obligations under the SRA. Doc. #115.
- v. Stephen W. DeBenedetto, owed approximately \$366 plus other obligations under the SRA. Doc. #116.

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rule").

This motion was filed and served on exactly 14 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2).

Rule 2002(a)(4) requires at least 21 days' notice in a chapter 11 reorganization case to the debtor, trustee, and all creditors of a hearing on dismissal or conversion, with certain exceptions inapplicable here.

This motion was filed on October 12, 2021, which is exactly 14 days before the scheduled hearing on October 26, 2021. Doc. #110. Though sufficient for LBR 9014-1(f)(2) notice, Rule 2002(a)(4) requires 21 days' notice. No order shortening time under the procedure specified in LBR 9014-1(f)(3) was requested or filed with this motion.

Accordingly, this motion will be DENIED WITHOUT PREJUDICE.

5. [20-11992](#)-B-11 **IN RE: CHAR PHAR INVESTMENTS, LLC**  
[WLC-12](#)

CONTINUED CHAPTER 11 DISCLOSURE STATEMENT FILED BY DEBTOR  
CHAR PHAR INVESTMENTS, LLC  
7-6-2021 [[228](#)]

WILLIAM COWIN/ATTY. FOR DBT.  
DISMISSED 9/28/21

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

Debtor-in-possession Char Phar Investments, LLC voluntarily dismissed this case pursuant to 11 U.S.C. § 1112(b) on September 28, 2021. Doc. #291. Accordingly, approval of the disclosure statement will be DENIED AS MOOT.



6. [21-12134](#)-B-11     **IN RE: WALTER C. SMITH COMPANY, INC.**  
[WJH-4](#)

CONTINUED MOTION TO EMPLOY HAL BOLEN AS SPECIAL COUNSEL  
9-16-2021    [\[54\]](#)

WALTER C. SMITH COMPANY,  
INC./MV  
RILEY WALTER/ATTY. FOR DBT.

FINAL RULING:       There will be no hearing on this matter.

DISPOSITION:        Denied without prejudice.

ORDER:                The court will issue an order.

This hearing was continued from October 14, 2021. There was no appearance at that hearing except by the United States Trustee.

Debtor Walter C. Smith Company, Inc. ("Debtor") asks the court to approve the Debtor's retention of Bolen Fransen Cutts LLP ("Special Counsel") as special counsel for matters relating to redemption of stock for the chapter 11 subchapter V estate. Doc. #54.

At the last hearing, Debtor and Special Counsel did not appear. The motion was continued, and Special Counsel was directed to file and serve any additional evidence not later than October 19, 2021. Doc. #124. No additional evidence was filed.

This motion will be DENIED WITHOUT PREJUDICE.

11 U.S.C. § 1184 gives the subchapter V debtor all rights, except the right to compensation under § 330, and powers of a trustee serving under this chapter, including operating the business of the debtor, and requires it to perform all functions and duties of a trustee, except those specified in § 1106(a)(2), (3), or (4).

Under 11 U.S.C. § 327(e), an attorney that has represented the debtor can be employed by the estate for a specified special purpose other than to conduct the case, with the court's approval if it is in the best interest of the estate, the proposed attorney does not hold or represent an interest adverse to the estate with respect to the matter on which such attorney is to be employed.

As evidence, Attorney Bolen incorporates the motion and the Statement of Connections and verifies its information as correct. Doc. #56. The Verified Statement of Connections discloses that Special Counsel represented Debtor as of November 2019 as general counsel, and has advised Debtor on numerous business, transactional, and litigation matters affecting Debtor's operations. Doc. #57, Ex. A. Special Counsel reviewed a list of creditors and has no connections with any of the creditors on both related and totally unrelated matters and has not obtained through any previous representation the confidential information of a creditor that could be used in a way adverse to that creditor.

Proposed special counsel must not represent or hold any interest adverse to the debtor or the estate with respect to the matter on which such attorney is employed. § 327(e). Special Counsel here was owed \$43,295.40 as of the petition date, according to the attached verified statement of connections. Doc. #57, Ex. A. This sum will purportedly be included in Special Counsel's first interim fee application. This is problematic.

First, it is not specified whether the alleged unpaid fees are unrelated to the matter on which Attorney Bolen is to be employed as special counsel. The application specifies representation will be for "matters relating to redemption of stock." Doc. #54. Attorney Bolen's firm represented Debtor in corporate law and transactions. *Id.* That would presumably include stock redemptions and related matters.

Second, the application is not limiting. Though the redemption issues are specified, the application is clear that may not be the only area in which proposed Special Counsel may be employed. The other areas may include areas in which compensation is still owed the firm.

Third, the amount purportedly owed proposed counsel's firm far exceeds the \$10,000 "no look" threshold for subchapter V debtors under § 1195.

Fourth, the statement that the unpaid fees will be included in the first interim fee application suggests proposed Special Counsel is not waiving the fee claim.

There is a question, then, whether proposed Special Counsel is a "disinterested person" under § 101(14) and whether it holds an adverse interest which may be disqualifying. "Adverse interest" includes possession or assertion of an economic interest lessening the value of the estate. *Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139, 148-49 (B.A.P. 9th Cir., 2006). Pursuit of a prepetition claim for over \$43,000.00 is assertion of an economic interest lessening the estate's value. Asserting that claim as part of the first interim fee application is more concerning. *See, Sundance Self Storage El Dorado, L.P.*, 482 B.R. 613, 627 (B. Ct. E.D. Cal. 2012) (holding counsel with a pre-petition claim for unpaid fees is a "creditor" and not disinterested and elevating that claim to administrative expense status is adverse to the estate).

The court agrees proposed counsel is exceedingly competent to handle corporate matters. But the statutory requirements for employment by the Debtor in a bankruptcy case must be observed.

As noted above, Special Counsel failed to file any additional evidence clarifying the connections and the substantial claim owed to Special Counsel. Accordingly, this motion will be DENIED.

1:30 PM

1. [20-13420](#)-B-7     **IN RE: CHRISTOPHER MARTENS**  
[DMG-5](#)

MOTION TO SELL  
9-22-2021    [[86](#)]

JEFFREY VETTER/MV  
PETER FEAR/ATTY. FOR DBT.  
D. GARDNER/ATTY. FOR MV.

TENTATIVE RULING:        This hearing will proceed for higher and  
better bids only.

DISPOSITION:                Granted.

ORDER:                        The minutes of the hearing will be court's  
findings and conclusions. The prevailing party  
will prepare the order.

Chapter 7 Trustee Jeffrey Vetter ("Trustee") asks the court to approve the sale of certain personal property to the debtor, Christopher Martens ("Debtor"), for \$10,000.00 subject to higher and better bids.

No party in interest timely filed written opposition. This motion will be GRANTED and proceed for higher and better bids only.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will proceed for higher and better bids only. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

11 U.S.C. § 363(b)(1) allows the trustee to "sell or lease, other than in the ordinary course of business, property of the estate."

The property to be sold ("Sale Property") is the estate's interest in a 2008 BMW; Jewelry; Bank Account; Interest in Acorn Securities, LLC; Interest in Christopher R. Martens Law Corp. Trustee agreed to accept \$10,000.00 from Debtor for the purchase subject to higher and better bids which is or was paid by Debtor over four monthly payments of \$2,500.00.

Trustee asks that the sale be subject to higher and better bids at the hearing. Doc. #88. The terms for higher and better bids are:

- a. \$500 deposit paid to Trustee by October 22, 2021.
- b. Bidders to provide proof to Trustee's satisfaction the purchase price will be tendered no later than close of business October 22, 2021.
- c. Successful bids entitled to credit of deposit against purchase price.
- d. Bidder or authorized representative to participate in the hearing. Representative to provide proof of authority to Trustee and the court.
- e. Bidding in \$100.00 increments.
- f. Deposit returned to unsuccessful bidder after the sale hearing.
- g. Purchaser to purchase all assets together. *Id.*

Proposed sales under 11 U.S.C. § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. *In re Alaska Fishing Adventure, LLC*, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) citing *240 North Brand Partners v. Colony GFP Partners, Ltd. P'ship (In re 240 N. Brand Partners)*, 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996); *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991). In the context of sales of estate property under § 363, a bankruptcy court "should determine only whether the trustee's judgment was reasonable and whether a sound business justification exists supporting the sale and its terms." *Alaska Fishing Adventure, LLC*, 594 B.R. at 889 quoting 3 Collier on Bankruptcy ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed.). "[T]he trustee's business judgment is to be given great judicial deference." *Id.* citing *In re Psychometric Sys., Inc.*, 367 B.R. 670, 674 (Bankr. D. Colo. 2007); *In re Bakalis*, 220 B.R. 525, 531-32 (Bankr. E.D.N.Y. 1998).

Sales to an insider are subject to heightened scrutiny. *Alaska Fishing Adventure, LLC*, 594 B.R. at 887, citing *Mission Product Holdings, Inc. v. Old Cold, LLC (In re Old Cold LLC)*, 558 B.R. 500, 516 (B.A.P. 1st Cir. 2016). This sale is to the Debtor. The Sale Property is listed in the schedules with a combined value of \$27,272.75 as follows:

	<u>Asset</u>	<u>Value</u>	<u>Exemption</u>
i.	2008 BMW	\$3,500	\$3,325
ii.	Jewelry (watches and wedding bands)	\$3,500	\$8,725
iii.	Bank account (Bank of America)	\$1.84	\$1.84
	(EECU - Debtor's daughters)	unknown	\$0.00
	(GlCU - separated spouse)	unknown	\$0.00
iv.	Acorns Securities, LLC	\$270.91	\$0.00
v.	Christopher R. Martens Law Corp.	\$20,000	\$8,725

Doc. #33, *Sched. A/B*. However, the law corporation is subject to multiple encumbrances totaling approximately \$17,818.90:

i.	Canon Financial Services, Inc.	\$13,114.64
ii.	State of California EDD	\$3,060.50

iii. Tulare County Tax Collector	\$507.44
iv. Tulare County Tax Collector	\$219.28
v. Tulare County Tax Collector	\$604.18
vi. Tulare County Tax Collector	\$312.86.

Doc. #1, *Sched. D*.

The sale appears to be in the estate's best interest and represents a valid exercise of Trustee's business judgment. Trustee's declaration states Trustee separately evaluated all Sale Property. Doc. #88. The BMW is subject to a PMSI and after discounting auctioneer commissions and sales expenses, this proposed sale is most efficient and maximizes value. The account balances were evaluated as was the jewelry. Neither the LLC nor the law corporation have hard assets. Both depend on personal services for value and have liabilities. *Id.* After subtracting the encumbrances and exemptions, minimal equity remains for the benefit of the estate.

The motion will be GRANTED. The sale of the Sale Property will be confirmed to Debtor in the absence of higher or better bids.

2. [21-11734](#)-B-7 **IN RE: MARY PANIAGUA**  
[TCS-1](#)

MOTION TO AVOID LIEN OF FIRST NATIONAL BANK OF OMAHA  
9-21-2021 [[13](#)]

MARY PANIAGUA/MV  
TIMOTHY SPRINGER/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Mary Helen Paniagua ("Debtor") seeks to avoid a judicial lien in favor of First National Bank of Omaha ("Creditor") in the amount of \$12,825.11 and encumbering real property located at 6192 West Dupont Drive, Fresno, CA 93722 ("Property"). Doc. #13.

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rule").

Creditor is a bank insured by the Federal Deposit Insurance Corporation ("FDIC"), so it is an insured depository institution.<sup>1</sup> See 11 U.S.C. § 101(35)(A); 12 U.S.C. § 1813(c)(2) (a "insured depository institution" is any bank insured by the FDIC).

Rule 4003(d) requires that proceedings to avoid a lien under 11 U.S.C. § 522(f) "shall be commenced by motion in the manner provided in Rule 9014." Rule 9014(b) requires motions in contested matters to be served upon the parties against whom relief is being sought pursuant to Rule 7004.

Service on insured depository institutions is governed by Rule 7004(h), which requires service to be made by certified mail addressed to a named officer, unless one of three exceptions specified in (h)(1) to (3) have been met. There is no indication in this motion that any of these exceptions apply.

Here, Debtor attempted to serve Creditor at the following addresses:

(*Certified Mail*)  
1. President/CEO/Chief Financial Officer  
First National Bank of Omaha  
1620 Dodge Street  
Omaha, Nebraska 68197

(*Regular Mail*)  
2. President/CEO/Chief Financial Officer  
First National Bank of Omaha  
Attn Bankruptcy  
Po Box 3128  
Omaha NE 68103-0128

(*Regular Mail*)  
3. Donald T Dunning  
James MacLeod  
The Dunning Law Firm  
9619 Chesapeake Dr. Ste 210  
San Diego, CA 92123

Doc. #17. There are issues with each of these addresses.

First, the Ninth Circuit interprets Rule 7004 to require service upon a named officer, rather than to just the title of the office. *In re Schoon*, 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993) ("By addressing the envelope 'Attn: President' the debtors did not serve an officer, they served an *office*." (emphasis in original); see also *Beneficial Cal. Inc. v. Villar (In re Villar)*, 317 B.R. 88, 94 (B.A.P. 9th Cir. 2004). Here, the first and second attempts were addressed to the "President/CEO/Chief Financial Officer" instead of naming the officer charged with responding to the service. Creditor's website indicates that Clark D. Lauritzen is its current Chairman and President as of October 19, 2021.<sup>2</sup>

Second, the first service attempt was made to an out-of-date address. According to the FDIC "BankFind" search tool, Creditor used the 1620 Dodge Street address in Omaha, Nebraska from March 30, 2010 until June 14, 2021. Its new "main office" is now 1601 Capitol Avenue, Omaha, NE 68102. The second service attempt to PO Box 3128 was sufficient because it is listed as the mailing address on the "Contact Us" page of Creditor's website, but the named officer requirement is still not satisfied.<sup>3</sup>

Third, The Dunning Law Firm cannot be presumed to be authorized to accept Rule 7004 service in this case without evidence of an express or implied agency. "An implied agency to receive service is not established by representing a client in an earlier action."

*Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 93 (B.A.P. 9th Cir. 2004); *Rubin v. Pringle (In re Focus Media, Inc.)*, 387 F.3d 1077, 1083 (9th Cir. 2004) (finding that a former attorney must have explicit or implicit authority from client to accept service under Rule 7004(b)).

Service must be addressed to a named officer to comply with Rule 7004(h). But even if Creditor had been properly served, there is no evidence that the abstract of judgment was ever recorded. Doc. #15, Ex. C. Though Debtor declares that Exhibit C is a copy of the "recorded abstract," the page proving that it was recorded is omitted. Doc. #15; *cf.* Doc. #16. Ex. C.

Under Cal. Civ. Proc. Code § 697.310, a judgment lien on real property is created by recording an abstract of judgment with the county recorder. Here, the judgment was issued in the sum of \$12,825.11 on January 11, 2021, but there is no evidence that it was recorded. Debtor filed bankruptcy on July 10, 2021. Doc. #1. If Creditor failed to record the abstract of judgment before the petition date, the automatic stay may have prevented Creditor from creating a judgment lien.

The court is unable to avoid a lien under 11 U.S.C. § 522(f) where it is unclear whether the lien exists. Debtor has therefore failed to make a *prima facie* showing that she is entitled to the relief sought. *Tracht Gut, LLC v. County of L.A. (In re Tracht Gut, LLC)*, 503 B.R. 804, 811 (B.A.P. 9th Cir. 2014).

For the above reasons, this motion will be DENIED WITHOUT PREJUDICE.

---

<sup>1</sup> FDIC Cert #5452. See <https://banks.data.fdic.gov/bankfind-suite/bankfind>.

<sup>2</sup> <https://www.fnbo.com/about-us/leadership/>.

<sup>3</sup> <https://www.fnbo.com/contact-us/>.

3. [21-11674](#)-B-7      **IN RE: JULIO ARELLANO**  
[FWP-2](#)

MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO  
DISCHARGEABILITY OF A DEBT AND/OR MOTION TO EXTEND DEADLINE  
TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR  
10-8-2021    [\[25\]](#)

DIVERSIFIED FINANCIAL  
SERVICES, LLC/MV  
SCOTT LYONS/ATTY. FOR DBT.  
NICHOLAS KOHLMAYER/ATTY. FOR MV.  
WITHDRAWN

FINAL RULING:      There will be no hearing on this matter.

DISPOSITION:      Dropped from calendar.

NO ORDER REQUIRED.

Creditor Diversified Financial Services, LLC withdrew its motion to extend the deadline to file a complaint objecting to the debtor's discharge under 11 U.S.C. § 727 or determining dischargeability of certain debts under 11 U.S.C. § 523 on October 14, 2021. Doc. #31.

Accordingly, this motion will be dropped from calendar.

4. [21-11075](#)-B-7     **IN RE: ANGELICA ALCALA**  
[BLF-3](#)

MOTION TO SELL  
9-23-2021    [\[24\]](#)

IRMA EDMONDS/MV  
MARK ZIMMERMAN/ATTY. FOR DBT.  
LORIS BAKKEN/ATTY. FOR MV.

TENTATIVE RULING:            This matter will proceed as scheduled for  
higher and better bids, only.

DISPOSITION:                    Granted.

ORDER:                            The minutes of the hearing will be the court's  
findings and conclusions. The prevailing party  
will prepare the order after hearing.

Chapter 7 trustee Irma C. Edmonds ("Trustee") seeks authorization to sell the estate's interest in Angelica M. Alcala's ("Debtor") business known as "Smog Shop Hanford Test Only" ("Business") for \$19,984.98 to the Debtor. Doc. #24. This amount consists of 24 monthly payments of \$625.00 due on the first of each month (totaling \$15,000) and credit for Debtor's \$4,984.98 exemption.

No party in interest timely filed written opposition. This motion will be GRANTED and proceed for higher and better bids, only.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will proceed for higher and better bids only. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

11 U.S.C. § 363(b)(1) allows the trustee to "sell or lease, other than in the ordinary course of business, property of the estate."



Trustee proposes to sell the estate's interest in Debtor's Business for \$15,000. Doc. #24. In the schedules, Debtor disclosed a 10% interest in the Business, which she valued at \$4,984.98 in the petition. Doc. #1, *Sched. A/B*. This full amount was claimed exempt under Cal. Code Civ. Proc. § 703.140(b)(5). *Id.*

At the § 341 meeting, Trustee learned that Debtor previously had been the sole owner of the Business with 100% ownership until April 16, 2019, when she transferred a 90% interest to her friend, Hernando Duran, for no consideration (the "Transfer"). Doc. #26. Trustee states that Debtor's position is that Duran contributed a significant labor for 8 years such that he contributed a reasonably equivalent value for his 90% share.

Trustee seeks to liquidate the estate's interest consisting of the Business and the claim to avoid the Transfer. The proposed sale is governed by a purchase and sale agreement filed with this motion. Doc. #27, Ex. A. Under the terms of the sale, Debtor (or the successful overbidder) will make monthly payments of \$625.00 due on the first of each month for 24 months - from October 1, 2021 to October 1, 2023. The sale also factors in Debtor's \$4,984.98 exemption as credit, which brings the total sale price to \$19,984.98.

Proposed sales under 11 U.S.C. § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. *In re Alaska Fishing Adventure, LLC*, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) citing *240 North Brand Partners v. Colony GFP Partners, Ltd. P'ship (In re 240 N. Brand Partners)*, 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996); *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991). In the context of sales of estate property under § 363, a bankruptcy court "should determine only whether the trustee's judgment was reasonable and whether a sound business justification exists supporting the sale and its terms." *Alaska Fishing Adventure, LLC*, 594 B.R. at 889 quoting 3 Collier on Bankruptcy ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed.). "[T]he trustee's business judgment is to be given great judicial deference." *Id.* citing *In re Psychometric Sys., Inc.*, 367 B.R. 670, 674 (Bankr. D. Colo. 2007); *In re Bakalis*, 220 B.R. 525, 531-32 (Bankr. E.D.N.Y. 1998).

Sales to an insider are subject to heightened scrutiny. *Alaska Fishing Adventure, LLC*, 594 B.R. at 887, citing *Mission Product Holdings, Inc. v. Old Cold, LLC (In re Old Cold LLC)*, 558 B.R. 500, 516 (B.A.P. 1st Cir. 2016).

This sale is to Debtor. This warrants scrutiny, but Trustee has submitted evidence of her independent review of the assets/claim to be sold. She has evaluated the assets/claim and determined that a sale to the Debtor subject to higher and better bids would maximize estate recovery. In the end, this process seems to yield the best result. There are also no objections.

When the sale of litigation claims will involve the termination of those claims the court must consider proposed sale offers not only under § 363(b) but also as a settlement of such claims under Fed. R. Bankr. P. 9019. *Simantob v. Claims Prosecutor, LLC (In re Lahijani)*, 325 B.R. 282, 290 (B.A.P. 9th Cir. 2005); *Goodwin v. Mickey Thompson Entertainment Group, Inc.*, 292 B.R. 415, 420 (B.A.P. 9th Cir. 2003).

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of 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 with a proper deference to their reasonable views. *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

The claim here is an avoidable transfer claim relating to the pre-petition transfer of a substantial part of the business. What complicates this is that the consideration was not cash but an alleged long period of service to the business by the transferee. Probability of success is not assured. There are also costs in pursuing the litigation which will negatively impact the creditors. Though the litigation is not complex, evaluating the actual estate "loss" is difficult. In the face of this proposed sale, the estate benefits from resolution, not litigation.

The motion will be GRANTED, and sale confirmed to the Debtor subject to higher and better bids.

Any party wishing to overbid must be present at the hearing, make overbids in the amount of \$1,000 (starting at \$20,984.98), be aware that their deposit will be forfeited if they do not timely close the sale, and acknowledge that the sale of the estate's interest in the Business and the Transfer are on identical terms as the proposed agreement (Doc. #27, Ex. A), other than the overbid price.

The successful bidder must deposit a cashier's check of \$5,000 with Trustee within seven days of the hearing, which will be applied toward the purchase price if the successful bidder timely completes the purchase. Overbidders must qualify to bid by demonstrating that they have the financial ability to close the transaction within seven days of the hearing.

5. [20-12276](#)-B-7     **IN RE: FRANCISCO PEREZ AND ROSA ORNELAS**  
[THA-3](#)

MOTION TO SELL  
9-23-2021    [\[34\]](#)

JAMES SALVEN/MV  
BENNY BARCO/ATTY. FOR DBT.  
THOMAS ARMSTRONG/ATTY. FOR MV.

TENTATIVE RULING:            This matter will proceed as scheduled for  
higher and better bids, only.

DISPOSITION:                    Granted.

ORDER:                            The minutes of the hearing will be the court's  
findings and conclusions. The prevailing party  
will prepare the order after hearing.

Chapter 7 trustee James E. Salven ("Trustee") seeks authorization to sell the estate's interest in real property located at 821 N. Thorne Ave., Fresno, CA 93728 ("Property") to Francisco Ornelas Perez and Rosa Marie Ornelas ("Debtors") for \$210,000.00, subject to higher and better bids at the hearing. Doc. #34. In the event that there are no overbids, Trustee also requests waiver of the 14-day stay in Fed. R. Bankr. P. ("Rule") 6004(h).

No party in interest timely filed written opposition. This motion will be GRANTED and proceed for higher and better bids, only.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will proceed for higher and better bids only. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

11 U.S.C. § 363(b)(1) allows the trustee to "sell or lease, other than in the ordinary course of business, property of the estate."

Proposed sales under 11 U.S.C. § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. *In re Alaska Fishing Adventure, LLC*, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) citing *240 North Brand Partners v. Colony GFP Partners, Ltd. P'ship (In re 240*

*N. Brand Partners*), 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996); *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991). In the context of sales of estate property under § 363, a bankruptcy court "should determine only whether the trustee's judgment was reasonable and whether a sound business justification exists supporting the sale and its terms." *Alaska Fishing Adventure, LLC*, 594 B.R. at 889 quoting 3 Collier on Bankruptcy ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed.). "[T]he trustee's business judgment is to be given great judicial deference.'" *Id.* citing *In re Psychometric Sys., Inc.*, 367 B.R. 670, 674 (Bankr. D. Colo. 2007); *In re Bakalis*, 220 B.R. 525, 531-32 (Bankr. E.D.N.Y. 1998).

Sales to an insider are subject to heightened scrutiny. *Alaska Fishing Adventure, LLC*, 594 B.R. at 887, citing *Mission Product Holdings, Inc. v. Old Cold, LLC (In re Old Cold LLC)*, 558 B.R. 500, 516 (B.A.P. 1st Cir. 2016).

This sale is to the Debtors. Property is scheduled with a value of \$126,040.00 and included a statement that Property needs significant repairs, including flooring replacement and kitchen repairs. Doc. #1, *Sched. A/B*. Debtors had Property appraised on May 8, 2020 for \$137,000. The listed value includes an 8% cost of sale deduction (\$10,960). Property is encumbered by two deeds of trust in favor of Wells Fargo Bank, N.A., and Wells Fargo Home Mortgage in the amounts of \$9,600 and \$21,000 respectively. *Id.*, *Sched. D*. Debtors exempted the property pursuant to Cal. Civ. Proc. Code § 704.730 for 100% of fair market value, up to any applicable statutory limit. *Id.*, *Sched. C*. Trustee states that Property is also subject to an unscheduled judicial lien in favor of State Farm Automobile Insurance Company in the approximate amount of \$37,204.14 as of the petition date. Docs. #36; #37, Ex. 1.

Trustee has investigated the condition and value of the Property. He requested a value from the broker employed by the estate and consulted with her regarding the condition of the Property. *Id.* Property was built in 1928 and has two bedrooms and one bathroom, approximately 1,302-square-feet, and located on a 6,250-square-foot lot. *Id.* Property needs significant repairs, including flooring, kitchen, and other repairs. Debtors have owned Property since May 30, 1997. Trustee's business opinion is that Property has a current fair market value of \$210,000.00. *Id.*

Debtors offered to purchase Property and its non-exempt equity from the estate for \$210,000 "cash," or cash equivalents. Trustee accepted, subject to overbid. *Id.* Debtors have tendered \$25,000 to Trustee and are contributing their \$100,000 allowed exemption toward the purchase price. *Id.* Trustee states that selling the Property and its non-exempt equity avoids sales costs, brokerage commission, and escrow fees of approximately 8%, or \$16,800.00.

Using these figures, Trustee calculates the proposed sale as follows:

Fair Market Value of Property	\$210,000.00
Avoided costs of sale	- \$16,800.00
Consensual liens	- \$30,600.00
Judgment lien	- \$37,204.00
Debtors' claimed exemption	- \$100,000.00
Net to the estate	= <b>\$25,396.00</b>

*Id.* If Property is sold by overbid, real property taxes will also be due and payable upon close of any escrow. Trustee believes that this sale represents a fair value for the sale of Property and is beneficial to creditors and the estate. *Id.* Trustee has presumably conducted due diligence and concluded the sale is in the best interests of creditors and the estate.

It appears that the sale of Property is in the best interests of creditors and the estate, for a fair and reasonable price, supported by a valid business judgment, and proposed in good faith. There are no objections or opposition to the motion.

Accordingly, this motion will be GRANTED. The hearing will proceed for higher and better bids only.

The request to waive the 14-day stay in Rule 6004(h) will be GRANTED provided that there are no successful overbids made for the Property because Debtors already reside at Property, are purchasing non-exempt equity from the estate, and the sale will not require escrow to close.

The motion does not request, nor will the court authorize, the sale free and clear of any liens or interests.

Any party wishing to overbid must deposit \$10,000 in certified funds made payable to "James E. Salven, Chapter 7 Trustee" no later than Thursday, October 21, 2021 at 5:00 p.m. Pacific Standard Time. Unsuccessful bidders' deposits will be returned within 10 days of the hearing. The successful bidder's deposit will be applied toward the purchase price. Overbidders must provide proof of the ability to close escrow and sufficiency of funds, such as a letter of credit from their bank, or other verification satisfactory to Trustee.

Overbidders must be present at the hearing, make overbids in the amount of \$5,000.00, be aware that their deposit will be forfeited if they do not timely close the sale, and acknowledge that no warranties or representations are include with the Property; it is being sold "as-is/where-is", with no warranties, express, implied, or otherwise, and is subject to existing liens of record, known or unknown.