UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

January 16, 2014 at 10:30 a.m.

1.	**13-92200-E-7**	**WILLIAM CAVANAGH**	**MOTION TO EXTEND AUTOMATIC STAY**
	AGB-1	**Amanda G. Billyard**	**12-23-13 [5]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on December 23, 2013. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Extend Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtors' second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 13-92074) was dismissed on December 9, 2013, for failure to file the balance of the schedules with the court. *See* Order, Bankr. E.D. Cal. No. 13-92074, Dckt. 12, December 9, 2013. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of

the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008). Courts consider many factors — including those used to determine good faith under §§ 1307(c) and 1325(a) — but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?

2. What has changed so that the present plan is likely to succeed?

Elliot-Cook, 357 B.R. at 814-815.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, due to communication constraints and injuries suffered by Debtor in an accident, he was unable to locate and procure the documents necessary to file the remaining required documents. Debtor suffered from a helicopter accident in August 2013, which created physical ailments that require medical attention. Debtor also states he was having trouble with his phone during the time of the emergency filing and could not reach his attorney. If the automatic stay is not in place, debtor fears his home would be foreclosed upon.

Debtor testifies that his effort to make his Chapter 7 case success is sincere and he wants to protect his home and obtain a fresh start. Debtor believes that he has resolved the communication issue and does not anticipate any further problems providing documentation to his attorney.

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The motion is granted and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay filed by the Debtor having been presented to the court, and upon review

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

IT IS ORDERED that the Motion is granted and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

2.	**13-91607-E-7** **JDP-1**	**KENNETH MATTSON** **James Pitner**	**MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.** **11-27-13 [16]**

DISCHARGED 12-4-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on November 27, 2013. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

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

A judgment was entered against the Debtor in favor of Capital One Bank (USA), N.A. for the sum of $3,722.30. The abstract of judgment was recorded with Stanislaus County on March 14, 2013. That lien attached to the Debtor's residential real property commonly known as 3613 Davis Avenue, Modesto, California.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $60,000.00 as of the date of the petition. The unavoidable consensual liens total $41,244.19 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $13,955.81 in Schedule C. The

respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity (value to this judgment creditor) in excess of the senior liens and claimed exemption to support the judicial lien for the full amount of the judgment. Therefore, the fixing of this judicial lien does not impair the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B). FN.1.

FN.1. A review of Debtor's Amended Schedule C shows that Counsel deducted the costs of sale to determine the exemption amount. However, the statutory formula makes no mention and provides no deduction for costs of sale. *Hanson v. Dobbs (In re Hanson)*, 2007 Bankr. LEXIS 4850 (B.A.P. 9th Cir. Apr. 2, 2007. Furthermore, the Ninth Circuit analyzed the California homestead exemption statutes and found that costs of sale did not have to be accounted for in a forced sale under California law. *See In re Hyman*, 967 F.2d 1316, 1320 (9th Cir. 1992) ("There is no statutory requirement that the sale price also account for selling costs. . . .").

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the motion is denied.

3. 13-91607-E-7 KENNETH MATTSON
JDP-2 James Pitner

MOTION TO AVOID LIEN OF STANISLAUS CREDIT CONTROL SERVICE, INC.
11-27-13 [22]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on November 27, 2013. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

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

A judgment was entered against the Debtor in favor of Stanislaus Credit Control Service, Inc., A California Corporation for the sum of $2252.50. The abstract of judgment was recorded with Stanislaus County on January 3, 2012. That lien attached to the Debtor's residential real property commonly known as 3613 Davis Avenue, Modesto, California.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $60,000.00 as of the date of the petition. The unavoidable consensual liens total $41,244.19 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $13,955.81 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity (value to this judgment creditor) in excess of the senior liens and claimed exemption to support the judicial lien for the full amount of the judgment. Therefore, the fixing of this judicial lien does not impair the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B). FN.1.

FN.1. A review of Debtor's Amended Schedule C shows that Counsel deducted the costs of sale to determine the exemption amount. However, the statutory formula makes no mention and provides no deduction for costs of sale. *Hanson*

v. Dobbs (In re Hanson), 2007 Bankr. LEXIS 4850 (B.A.P. 9th Cir. Apr. 2, 2007. Furthermore, the Ninth Circuit analyzed the California homestead exemption statutes and found that costs of sale did not have to be accounted for in a forced sale under California law. *See In re Hyman*, 967 F.2d 1316, 1320 (9th Cir. 1992) ("There is no statutory requirement that the sale price also account for selling costs. . . .").

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

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

4. 11-94410-E-11 HSM-17 — SAWTANTRA/ARUNA CHOPRA — Robert S. Marticello — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH LOANVEST XI, LP AND/OR MOTION TO SELL 12-13-13 [718]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on December 13, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Gary Farrar, Chapter 11 Trustee, seeks an order approving the Compromise of Controversies and Sale of Claims pursuant to 11 U.S.C. § 363(b). The proposed compromises that are the subject of this Motion relate to certain claims, actions, and other actual and/or potential disputes between Loanvest XI, LP ("Loanvest"), on the one hand, and Sawtantra and Aruna Chopra (the "Debtors") and the Trustee, on the other hand.

Following his appointment herein, the Trustee was made aware of litigation pending between the Debtors and Loanvest, commenced prior to the Trustee's appointment: Chopra et al. v. Loanvest XI. LP, Adv. No. 12-09008-E ("Chopra Adversary"), and Loanvest XI. LP v. Chopra, Adv. No. 12-09027-E ("LoanvestAdversary"). Loanvest asserts that it loaned $810,000 to an entity known as Yosemite Development Enterprises, LLC ("Yosemite"). Loanvest further asserts that the Loan was secured by (i) real property owned by Yosemite in Modesto, California (the "Modesto Property"), (ii) real property owned by the Chopra Family Trust and located at 1907 East F Street in Oakdale, California (the "Oakdale Property"), and (iii) real property owned by the Chopras known as Camino Tessajara and located in Danville, California (the "Danville Property"). Loanvest asserts that Joint-Debtor Aruna Chopra also guaranteed the loan. Loanvest alleges that Yosemite defaulted on the Loan, which ultimately led to a non-judicial foreclosure by Loanvest on the Modesto Property, the Oakdale Property, and the Danville Property. The Debtors appear to have subsequently reacquired the Oakdale Property and is listed on the Debtors' Schedule A as property of the Debtors' bankruptcy estate.

The Debtors allege that on or about January 28, 2010, and prior to Loanvest's foreclosure on the Danville Property, Loanvest and the Debtors entered into a pre-negotiation agreement regarding the loan. It appears that Loanvest and the Debtors were not able to come to an agreement regarding the Loan and/or possible forbearance of foreclosure. The Debtors allege that Loanvest did not engage in good faith negotiations concerning a forbearance agreement under the loan.

Debtors then filed a suit against Loanvest in the Suprior Court of Contra Costa County asserting, among other things, that Loanvest had wrongfully foreclosed on the Danville Property, and sought money damages and equitable relief from Loanvest, and to set aside the sale ofthe Danville Property. Loanvest then filed suit against Joint-Debtor Aruna Chopra in Superior Court of San Mateo County, seeking to collect the alleged deficiency that remained owning under the guaranty after Loanvest completed the foreclosure sales. These actions were removed to this court following the commencement of the Chapter 11 case.

The parties have engaged in three-way settlement negotiations to resolve all disputes at issue in the adversary proceedings and fix the allowed amount of the Loanvest Claim. The Trustee, the Debtors, and Loanvest have executed a Settlement Agreement "Agreement" documenting their agreement. The essential terms of the agreement are as follows:

a. The Loanvest Claim shall be allowed as a general unsecured claim in the Bankruptcy Case in the reduced amount of $295,000.00 (the "Loanvest Allowed Claim"). Loanvest will file an amended proof of claim, amending the Loanvest Claim to the amount of the Loanvest Allowed Claim. Loanvest will support and vote to accept any chapter 11 plan in the Bankruptcy Case that proposes to pay Loanvest on account of the Loanvest Allowed Claim the sum of $225,000.00 as follows: (i) at least $100,000.00 is paid within two (2) years of such plan's effective date; and (ii) the balance is paid within three (3) years of such plan's effective date. The Loan vest Allowed Claim shall be deemed allowed for all purposes in the Bankruptcy Case and Loanvest irrevocably agrees not to amend the Loanvest Claim to an amount in excess of the Loanvest Allowed Claim and/or to assert or file any claim in addition to the Loanvest Allowed Claim. Upon the entry of a final order by the Bankruptcy Court approving the Agreement, Loanvest will take the steps necessary to dismiss with prejudice the San Mateo Action/Loanvest Adversary.

b. The Trustee shall take the steps necessary to dismiss with prejudice the Contra Costa Action/Chopra Adversary. The Debtors will prepare the appropriate pleadings as reasonably necessary for the Trustee to dismiss the Contra Costa Action/Chopra Adversary, and to withdraw, remove or expunge any lis pendens against the Danville Property recorded by the Debtors.

c. The Trustee/estate and Loanvest will exchange releases of claims connected to the facts underlying the Contra Costa Action/Chopra Adversary, and the San Mateo Action/Loanvest Adversary.

d. The Debtors and Loanvest will exchange releases of claims connected to the facts underlying the Contra Costa Action/Chopra Adversary, and the San Mateo Action/Loanvest Adversary.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Here, the Trustee argues that the four factors have been met.

Probability of Success

Trustee argues that the probability of success is a factor weighing in favor of settlement. The Trustee, through his counsel, has investigated the history of disputes between the various parties, all of which pre-date his appointment as Trustee herein. This investigation has included communications with counsel for the Debtors, and counsel for Loan vest. From those discussions, it is clear that the disputes are highly contentious, involving complex factual issues and legal issues, which would cost the estate significant resources to pursue. The crux of the disputes at issue in the Chopra Adversary, namely breach of the so called "pre-negotiation" agreement, involve significant disputes as to the nature of any agreement, and whether there were good-faith negotiations. Fundamentally, the Trustee assesses that the estate has a relatively low probability of success in seeking to unwind the non-judicial foreclosure sale of the Danville Property. Although the Debtors do not explicitly seek to unwind the foreclosure sales of Loanvest's other real property collateral, the Trustee similarly believes the probability of unwinding such sales in low (the Debtors have, in fact, subsequently repurchased one of the foreclosed properties, which is now already an asset of this estate).

With respect to the guarantee claims at issue in the Loanvest Adversary, the reduced Loanvest Allowed Claim of $295,000.00 is a reduction of approximately 45% from Loanvest's $542,676.06 proof of claim. The Trustee assesses that the estate has a relatively low probability of achieving a better result through litigating the Loanvest Adversary or objecting to Loanvest's proof of claim, at least not without significant expense to the estate. Fundamentally, the Loanvest Adversary seeks to liquidate Joint-Debtor Aruna Chopra's guarantee of the Loan, which is integrally related to the foreclosure sales of Loanvest's real property collateral. For the reasons already described, the probability of successfully challenging the foreclosure sales or sales prices at this time is low.

Difficulties in Collection

The Trustee has no information concerning the financial condition of Loanvest, and collection does not appear to be a significant factor in the proposed compromises.

Expense, Inconvenience and Delay of Continued Litigation

The Trusteee states the complexity of litigation factor also favors settlement in this instance. Trustee argues the disputes at issue are contentious, and involve complex issues of fact and law involving the “pre-negotiation" agreement, and whether Loan vest engaged in good faith settlement negotiations. There are significant legal disputes concerning the validity of the non-judicial foreclosure sales. The facts and legal theories underlying the disputes will be time consuming and expensive to develop, and may require written discovery, as well as one or more depositions. The Agreement allows the estate to mitigate those costs, and provides a significant benefit for unsecured creditors of this estate.

Paramount Interest of Creditors

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

Consideration of Additional Offers

At the hearing, the court shall announce the proposed settlement and request any other parties interested in making an offer to the Trustee for the claims or interests in the property to state their offers in open court.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compromise filed by the Gary Farrar, Chapter 11 Trustee ("Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compromise Controversy Loanvest XI, LP ("Loanvest"), on the one hand, and Sawtantra and Aruna Chopra (the "Debtors") and the Trustee, on the other hand, is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit C in support of the motion on December 13, 2013(Docket Number 723).

5. 11-94410-E-11 SAWTANTRA/ARUNA CHOPRA
12-9008 Evan D. Smiley
CHOPRA ET AL V. LOANVEST XI, LP

CONTINUED PRE-TRIAL CONFERENCE RE: NOTICE OF REMOVAL
4-30-12 [1]

CONT FROM 12-19-13

Plaintiff's Atty: Evan D. Smiley
Defendant's Atty: Stephen D. Finestone

Adv. Filed: 4/30/12
Answer: 9/12/12

Nature of Action:
Recovery of money/property - turnover of property
Declaratory judgment
Determination of removed claim or cause

Notes:
Continued from 10/10/13 by stipulation of the parties.

6. 11-94410-E-11 SAWTANTRA/ARUNA CHOPRA
12-9027 Evan D. Smiley
LOANVEST XI, LP V. CHOPRA

CONTINUED PRE-TRIAL CONFERENCE RE: NOTICE OF REMOVAL
8-31-12 [1]

CONT FROM 12-19-13

Plaintiff's Atty: Charles A. Hansen; Stephen D. Finestone
Defendant's Atty: Evan D. Smiley

Adv. Filed: 8/31/12
Answer: none

Notes:
Continued from 10/10/13 by stipulation of the parties.

7. 13-90514-E-7 ESTHER MARIN **MOTION TO EMPLOY RANDY MCMURRAY**
SSA-2 Pro Se **AS SPECIAL COUNSEL**
12-6-13 [21]

DISCHARGED 7-3-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, all creditors, and Office of the United States Trustee on December 6, 2013. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted. No appearance required.

Chapter 7 Trustee, Irma Edmonds, seeks to employ counsel The Cochran Law Group, LLP (which has changed its name to McMurray Henriks, LLP), *Nunc Pro Tunc*, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of counsel to assist the Trustee in the medical malpractice claim. The Trustee states Debtor failed to list on Schedule B a claim in a pending medical malpractice lawsuit and discovered the claim at the 341 meeting. Debtor hired the Cochran Law Group on September 2, 2010. Debtor executed a Contingency Fee Agreement with the firm. Dckt. 26. The main cause of action is against Stanislaus Surgical Hospital, medical practitioners and staff for an arthroscopy on Debtor's left ankle, when surgery was commenced on Debtor's right ankle by mistake.

The Trustee argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present medical malpractice suit.

Randy McMurray, partner with the firm McMurray Henriks, LLP, testifies that he is experienced in the area of medical malpractice law and is qualified to represent the Trustee and the estate in connection with this case. Mr. McMurray testifies he, his firm, or proposed joint special counsel do not represent or hold any interest adverse to the Debtor or to

the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ McMurray Henriks, LLP as counsel for the Chapter 7 estate on the terms and conditions set forth in the Contingency Fee Retainer Agreement filed as Exhibit 1, Dckt. 26. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ McMurray Henriks, LLP (formerly The Cochran Firm) as counsel for the Chapter 7 Trustee, effective September 2, 2010, on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit 1, Dckt. 26.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

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

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

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

8. 13-91016-E-7 MIGUEL/JOANN VALENCIA — MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13
PK-2 Peter Koulouris — 11-30-13 [40]

DISCHARGED 9-10-13

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 30, 2013. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny without prejudice the Motion to Convert. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Debtors seek to convert this case from Chapter 7 to Chapter 13. Debtors contend that their financial situation has unexpectedly changed and they now desire to convert to a Chapter 13. Debtors indicate that they no longer have a $158.00 per month expenditure for their daughter's braces, or an auto installment payment of $248.00, as the final payment has been made.

The Bankruptcy Code authorizes a one-time, near absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

TRUSTEE'S OBJECTION

The Chapter 7 Trutsee, Michael McGranahan, objects to the Motion based on bad faith or lack of good faith and the fact that the Chapter 13 plan attached as Exhibit D is not feasible and fails to adequately provide for claims in the estate. The Trustee states that the Debtors do not address the legal situation that has arisen prompting this motion to convert their case form Chapter 7 to Chapter 13.

The Trustee states the legal situation is that the Trustee, through Mr. Robert Brazeal of PMZ Real Estate in Modesto, has determined that the Debtors' real property residence has a current market value of $330,000 to $335,000 as opposed to Debtors' stated value of $257,600 in their Amended

Schedule "A" filed on October 23, 2013 at Docket Entry 33. Mr. Brazeal was employed specifically to appraise the real property generally described as 2709 Torrey Pines Way, Modesto, California 95355, bearing APN: 077-043-049 (the "Property"). Mr. Brazeal testifies that the Property would be listed between $340,000 and $345,000 and most likely sell in the range of $330,000 to $335,000, allowing a normal time to market the property in the Modesto area. Mr. Brazeal further testifies that due to the low inventory in the Modesto market, that it would take perhaps 30 days for an offer to be made and accepted, and 45 days for a customary time in which to close escrow.

The Trustee states that the testimony of Kenneth Sanders, a former Chapter 7 Trustee, is inaccurate. The Trustee and his counsel have worked with the Internal Revenue Service ("IRS") and has spoken with Thomas Rohall, Esq., District Counsel for the IRS and agreed to a "carve out" from the IRS lien for payment of administrative expenses, priority claims, and general unsecured claims that significantly exceeds Debtors' proposed plan distribution to unsecured creditors. Trustee argues that Mr. Sanders' declaration lacks foundation, relevancy and constitutes inadmissable expert testimony to which the Trustee objects under Federal Rules of Evidence Rules 104 and 702. Trustee argues that Mr. Sanders' analysis of the sale of the Property is seriously flawed. Trustee lists several discrepancies in his testimony, including deducting the sale of 7% when it is state 8% is deducted, fails to account for the administrative claim and that Trustee and his professionals are entitled to, and failure to account for the IRS's timely filed secured tax lien.

The Trustee cites several factors determining that the Debtors have acted in bad faith.

First, the Trustee argues that the Debtors have not accurately stated their debts and expenses. To support their Motion, Debtors submit a proposed Amended Schedule "I" and "J" in their Joint Declaration. There are numerous discrepancies between Schedule "I" and "J" as originally filed and Schedules "I" and "J" attached to Debtors' Joint Declaration. This includes the statement that their house payment does not include taxes or insurance but they do not include those expenses in Schedule J. Trustee also notes that they have deleted their automobile payment but propose a payment to Ally Financial in their proposed Chapter 13 plan. Debtors deleted their automobile insurance and decreased their transportation/gas expense from $375.00 to $120.00. The Trustee states these operational expenses for a 2001 Lincoln and 2005 Chevrolet Tahoe are not realistic. The accuracy and veracity of the Debtors' schedules is further supplemented by the fact that on July 22, 2013, the IRS filed Claim No. 13 in the total amount of $78,919.26. Of this amount $77,233.31 is a secured claim by virtue of a secured tax lien. The priority claim of the IRS is $1,685.95. Debtors' amended their Schedule D to reflect four (4) IRS secured claims totaling $80,084.16. Trustee states that this amendment, filed after the IRS proof of claim was filed is yet another inaccurate statement made by the Debtors.

The Trustee submits that the Debtors significantly undervalued their Property in their initial schedules. It is only through the Chapter 7 Trustee's efforts with Mr. Brazeal, the estate's broker, that the Trustee determined the value of the Property to be between $330,000.00 and $335,000.00.

Trustee further argues that the Debtors had to have known that the value of their Property was greater than the stated amount of $233,438.04 in their original schedules and $257,600.00 in their Amended Schedule "A". Now that the Chapter 7 Trustee wants to sell the Debtors' Property, (after attempting to strike a compromise with the Debtors for the purchase of non-exempt equity from them based upon erroneous values in Debtors' schedules), Debtors employ new counsel and seek an order from this Court allowing them to convert this case to Chapter 13. Trustee argues that the Debtors are attempting to unfairly manipulate the Bankruptcy Code and system. Trustee states that only when Debtors realized that the Trustee knew their Property was more valuable than they disclosed, did Debtors seek new counsel and move to convert their case from Chapter 7 to Chapter 13 to save their Property.

Additionally, the Trustee argues that a greater return will be provided through a "carve-out" agreement with the IRS, then as otherwise proposed under Debtors' Chapter 13 Plan. Mr. Rohall has authorized the Trustee to represent to this Court that the IRS is on board with the "carve-out" agreement upon the sale of the Property.

The Trustee also argues that in the Chapter 7 case, Debtors sought to discharge all of their unsecured debt totaling $92,812.39. Now, Debtors seek to pay 2.8% to unsecured creditors on $79,344.15. Debtors schedules state unsecured claims total $92,812.39. Trustee argues that there is no explanation for this discrepancy. Trustee states that creditors will receive a 19% dividend, after payment of the consensual first position note secured by the property, payment of the IRS lien, and after deducting the Trustee’s commission, professional fees and payment of priority claims.

The Trustee argues that the Debtors have not been forthcoming with the Bankruptcy Court and their creditors by intentionally undervaluing their Property. The Trustee on the other hand argues he has worked diligently to seek an appropriate "carve-out" of the tax penalties and interest on those tax penalties for the benefit of the bankruptcy estate. Trustee contends that there are numerous errors as pointed out above with regard to the Debtors' schedules and Plan as they do not provide for any homeowner's insurance, payment of property taxes, or automobile insurance. Moreover, Trustee argues their Chapter 13 Plan falls short of providing for payment in full of the IRS tax lien in the amount of $77,233.31. Debtors' Proposed Chapter 13 Plan only provides to pay the amount of $52,787.15, a difference of $24,446.16.

The Trustee submits Debtors' behavior is egregious. Trustee states Debtors' proposed Chapter 13 Plan shows they paid their new counsel $4,000 to propose a plan that pays less to unsecured creditors than the Chapter 7 estate will and have manipulated their budget in an unrealistic manner in an attempt to save their Property. The Trustee submits Debtors' actions are sufficient to show bad faith in this instance, especially towards the unsecured creditors.

Lastly, the Trustee argues that the Debtors have failed to demonstrate that they have sufficient disposable income to make a chapter 13 plan both feasible and confirmable. The proposed Amended Schedule "I" shows that Mrs. Valencia's income has decreased by $479.17 in average monthly

unemployment benefits, while Mr. Valencia's income remains the same. Trustee states that the Debtors have taken such actions when they clearly cannot afford the payments that will be required under their Chapter 13 Plan to satisfy the substantial debts they have incurred beginning with the IRS claim since 2005 and the other approximately $92,000 in unsecured debt that have incurred over the course of that time. Thus, the Trustee states he can provide a significantly greater dividend to general unsecured creditors than the Debtors propose to pay under their Chapter 13 Plan.

DISCUSSION

A "bankruptcy judge may override a Chapter 7 debtor's conversion right based on a finding of bad faith." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 379 (2007). The authority to convert is left to the discretion of the bankruptcy court. *Id.* at 377. In determining whether the debtor's conversion involved bad faith, "a bankruptcy judge must review the totality of the circumstances." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). Under the "totality of the circumstances" test, the court examines whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or filed his Chapter 13 petition or plan in an inequitable manner. *Id.* Debtor's history of filings and dismissals is relevant in determination of "bad faith." *Id.*

As addressed by the Supreme Court the rights of a debtor to convert or dismiss a Chapter 13 case are almost absolute. However, the overriding factor goes to the core of bankruptcy proceedings. With the ability to get great benefits from bankruptcy, debtors must proceed in good faith, providing candid, honest information. The Ninth Circuit Court of Appeals most recently review this concept in *Danielson v. Flores (In re Flores)*, ___ F.4th ___, 2013 U.S. App. LEXIS 18413 (9th Cir. 2013), stating,

> "Finally, our interpretation of § 1325(b)(1)(B) is consistent with the policies that underlie the Bankruptcy Code and the BAPCPA amendments. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" Marrama v. Citizens Bank, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991))."

The Collier on Bankruptcy discussion of Marrama notes there being a simple, practical reason for the conversion right to 13 being "almost absolute," if converted it is the bankruptcy judge who will consider whether it should be reconverted to a Chapter 7 due to the debtor's conduct. 6 COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 706.02.

Here, the Debtors' case has not previously been converted, the Trustee has raised some serious issues regarding the conduct of the Debtors. The conduct of Debtors raises significant credibility issues. The court has to question the value of the subject property (the only evidence being the real estate appraiser of the Trustee, how the Debtors going to fund a plan with less income, what are the explanations for the several different changes in expenses, and whether the plan passes the Chapter 7 Liquidation analysis. Possibly bona fide, good faith answers exist to these questions,

but the Debtors have mutely failed to provide them.

Based on the evidence provided, the court is justified to maintain this as a Chapter 7 case and provide the Debtors and their counsel with exactly what they sought – the extraordinary relief of a Chapter 7 case and the bankruptcy trustee proceeding with an orderly liquidation of their assets.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Convert having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Convert is denied without prejudice.

9. 13-90323-E-12 FRANCISCO/ORIANA SILVA
PLF-7 Peter L. Fear

MOTION FOR COMPENSATION FOR PETER L. FEAR, DEBTORS' ATTORNEY(S), FEES: $9,124.50, EXPENSES: $747.70
12-10-13 [85]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 10, 2013. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

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

The Interim Application for Fees is granted. No appearance required.

FEES REQUESTED

Law Offices of Peter L. Fear, Counsel for the Debtors in Possession, makes a Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period February 26, 2013 through November 30, 2013. The order of the court approving employment of counsel was entered on March 22, 2013. Counsel has not applied for previous interim fees.

Description of Services for Which Fees Are Requested

Case Administration: Counsel spent 7.10 hours in this category for total fees of $1,777.50. Counsel sent a number of letters to various creditors who were attempting to get a judgment against the Debtors, informing them of the automatic stay; communicated with Debtors regarding the case status and case outlook; complied with court's order to serve the status conference order; prepared status reports; communicated with Counsel for Nebraska Bank.

Asset Disposition: Counsel spent 2.70 hours in this category for total fees of $513.50. Counsel prepared and filed a motion to authorize Debtors to lease the dairy property to a dairy farmer, which was granted.

Meeting of and Communications with Creditors: Counsel spent 10.10 hours in this category for total fees of $1,950.50. Counsel prepared for the 241 meeting of creditors; attended the meeting with Debtors; conferred with Debtors regarding the meeting and analyzed several issues that were raised.

Fee/Employment Applications: Counsel spent 5.0 hours in this category for total fees of $770.00. Counsel prepared and filed ex parte application to approve employment of the law firm as counsel for Debtors, and prepared the instant application.

Financing/Cash Collateral: Counsel spent 4.5 hours in this category for total fees of $567.00. Counsel prepared and filed a motion for authority to use cash collateral, which was granted.

Plan and Disclosure Statement: Counsel spent 38.6 hours in this category for total fees of $9,124.50. Counsel spent a substantial amount of time analyzing options with Debtors for a Chapter 12 plan; prepared a plan, along with th emotion to confirm; negotiated with counsel for the primary secured lender and worked out acceptable treatment of their claims; prepared and filed motions to value collateral; appeared at several hearings; prepared several supplemental declarations of Debtors providing evidence of the Debtor's attempts to find an acceptable tenant; confirmation of plan.

DISCUSSION

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).

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

> (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful confirmation of a Chapter 12 plan. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are $295.00/hour for counsel Peter Fear for 32.5 hours; $195.00.00/hour for counsel Gabriel Waddell for 16.60 hours and $100/hour for 16.60 hours; and $95.00/hour for Stacia Wesseler for 2.3 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $14,703.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 12 case.

Total first interim professional fees for Counsel are allowed pursuant to 11 U.S.C. § 331, which are subject to final review pursuant to 11 U.S.C. § 330, in the amount of $14,703.00. The court commonly authorizes the payment of 50% of the fees on an interim basis, which amount is $7,351.50, from the available funds of the Estate as permitted by any stipulation or order authorizing the use of cash collateral or from unencumbered funds in a manner consistent with the order of distribution in this Chapter 12 case. Counsel is authorized to apply any retainer funds to the payment of these interim fees.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $747.70 for copies and postage. The total costs in the amount of $747.70 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 12 case.

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

Attorneys' Fees	$14,703.00
Costs and Expenses	$ 747.00

For a total interim allowance of $15,450.00 in Attorneys' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Law Offices of Peter L. Fear is allowed the following fees and expenses as a professional of the Estate:

Law Offices of Peter L. Fear, Counsel for the Estate
Applicant's Fees Allowed in the amount of $ 14,703.00
Applicants Expenses Allowed in the amount of $ 747.00.

IT IS FURTHER ORDERED that this is a interim allowance of fees and the debtor in possession is authorized to pay $7,351.50 of the allowed fees and $747.00 of the allowed expenses from funds of the Estate as permitted by a cash collateral stipulation or order, or from unencumbered monies of the estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order. Counsel is authorized to pay the allowed fees from any retainer or other source of monies.

10. 13-92028-E-7 JUANA ANDRADE
TOG-6 Thomas O. Gillis

MOTION TO AVOID LIEN OF MODESTO IRRIGATION DISTRICT
12-5-13 [12]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on December 5, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Avoid a Judicial Lien without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

A judgment was entered against the Debtor in favor of Modesto Irrigation District for the sum of $47,000.39. The abstract of judgment was recorded with Stanislaus County on September 27, 2013. That lien attached to the Debtor's residential real property commonly known as 1100 Windy Court, Modesto, California.

However, Debtor served Modesto Irrigation District at a P.O. Box in Modesto. Service upon a post office box is plainly deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the motion is denied without prejudice.

11. 13-90231-E-7 JOSE/MARIA PEREZ — **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Thomas O. Gillis — **12-17-13 [47]**

Final Ruling: The court issued an order to show cause based on Debtor's failure to pay the required fees in this case ($37 due on December 4, 2013). The court docket reflects that on December 30, 2013, the Debtor paid the fees upon which the Order to Show Cause was based.

The Order to Show Cause is discharged. No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

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

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

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

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

12. 13-90231-E-7 JOSE/MARIA PEREZ — **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Thomas O. Gillis — **12-17-13 [48]**

Final Ruling: The court issued an order to show cause based on Debtor's failure to pay the required fees in this case ($12.50 due on December 5, 2013). The court docket reflects that on December 30, 2013, the Debtor paid the fees upon which the Order to Show Cause was based.

The Order to Show Cause is discharged. No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

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

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

13. 10-90332-E-7 MICHAEL ESPINO-TELLEZ
CWC-7 Christian J. Younger

MOTION FOR COMPENSATION FOR CARL W. COLLINS, CHAPTER 7 TRUSTEE(S), FEES: $14,234.00, EXPENSES: $803.12
12-5-13 [67]

DISCHARGED 5-25-10

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 5, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Carl W. Collins, Attorney at Law, Counsel for the Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period May 6, 2010 through December 5, 2013. The order of the court approving employment of counsel was entered on May 17, 2010.

Description of Services for Which Fees Are Requested

Communications: Counsel communicated with the Trustee and investigated the financial affairs of the Debtor regarding identification and review of potential assets of the bankruptcy estate, including real property co-owned by the Debtor with a third party.

Employment: Counsel prepared and filed an application to employ counsel for the Trustee, and to employ the real estate broker; prepared fee applications for the same.

Motion to Compel Abandonment: Counsel reviewed motion of co-owned real property and prepared, revised and filed an objection to the motion that was sustained.

Adversary Proceeding: Counsel reviewed proper profile of co-owned real property; drafted and filed Adversary Proceeding for authorization to sell co-owned real property; drafted initial discovery disclosures; prepared status reports and appeared at all status conferences; reviewed Answer filed by defendant; propounded discovery; issued subpoena to Wells Fargo Bank for Debtor's loan documents; reviewed documents in response to subpoena; drafted and filed Application for 2004 exam of Debtor; drafted and filed disclosure of expert witness; conducted settlement negotiations; drafted and filed stipulation to dismiss adversary proceeding.

Settlement Agreement: Counsel drafted a settlement agreement and pleadings on a Motion to Approve Settlement of Compromise and obtained a court order thereon.

DISCUSSION

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).

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

> (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful negotiation of the settlement of the Adversary Proceeding regarding the sell of co-owned real property. The estate has $24,680.18.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are $295.00/hour for counsel and $90.00/hour for paralegals. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $14,234.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $803.12 for filing fee, copies and postage. The total costs in the amount of $803.12 are approved and

authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	$14,234.00
Costs and Expenses	$ 803.12

For a total final allowance of $15,037.12 in Attorneys' Fees and Costs in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Carl W. Collins, Attorney at Law is allowed the following fees and expenses as a professional of the Estate:
>
> Carl W. Collins, Attorney at Law, Counsel for the Estate
> Applicant's Fees Allowed in the amount of $14,234.00
> Applicants Expenses Allowed in the amount of $ 803.12.
>
> **IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

14. 11-92335-E-7 DUANE/SHERI GASPARD
SSA-4 Andrew David Smith

MOTION FOR COMPENSATION FOR STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY(S), FESE: $6,375.00, EXPENSES: $73.88
11-20-13 [48]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 2013. By the court's calculation, 57 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Steven S. Altman, Counsel for Irma C. Edmonds, the Chapter 7 Trustee, makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period January 30, 2013 through November 13, 2013. The order of the court approving employment of counsel was entered on March 1, 2013.

Description of Services for Which Fees Are Requested

In addition to performing the initial application for appointment, review of schedules, and statement of affairs for conflict and legal issues, Counsel performed the principal tasks of identifying and prosecuting potential preference and/or fraudulent conveyance claims on behalf of the bankruptcy estate for the Trustee. Counsel identified and recovered the sum of $13,200 on behalf of Trustee concerning the Davidson claim. A Motion to Approve Compromise of that matter was filed and approved by this court.

Counsel also identified and recovered the sum of $2,500 on behalf of the Trustee concerning the Stockton Police Officer's Association claim. A

motion to approve compromise was filed and approved by this court. Counsel also prepared an adversary complaint and attempted service on William Gespard. The claim was for the amount of $8,100. Counsel later learned that this transferee was deceased and left no residual estate. As such, the adversary complaint was dismissed.

Case Administration: Counsel spent 4.4 hours on case administration, which included the Transmittal of Proof of Claim on behalf of the Stockton Police Association, and preparing the motion to compromise and supporting documents for settlements of the Davidson and Stockton Police Association claims.

Fee Applications: Counsel spent 3.8 hours on preparing applications to employ and to request fees.

Litigation: Counsel spent 13.9 hours on litigating three different adversary proceedings concerning the Davidson Claim, the Stockton Police Officer's Association Claim, and the previously mentioned litigation involving defendant William Gespard.

Asset Recovery and Claims: Counsel spent 2.3 hours on claims administration, and 1.2 hours on Asset Analysis and Recovery.

DISCUSSION

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).

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

> (a) Is the burden of the probable cost of legal 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 Counsel's services led the settlement of the Davidson claim, which was resolved when Trustee Counsel negotiated a settlement for $13,200 for the estate after letters and settlement negotiations with opposing counsel. Counsel also settled its adversary proceeding with the Stockton Police Officer's Association, and filed a motion to approve the compromise that the Association and Counsel reached for a settlement of $2,500.

Counsel also filed an adversary suit against William Gespard for a potential preference claim in the amount of $8,100 on behalf of the Estate. Counsel served Gespard and propounded informal discovery, which revealed that defendant Gespard had died prior to the litigation, without leaving a probate estate that the Trustee could discern. Counsel then filed an application of dismissal of the adversary proceedings against Gespard.

FEES ALLOWED

The hourly rates for the fees billed in this case are $250.00/hour for counsel for a total of 25.5 hours of service. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $6,375.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $73.88. These expenses include fees for copying and postage fees. Photocopy charges of ten cents per copy, which charges are based upon estimated actual cost of such copies, conform with the guidelines for compensation of professionals issued by the judges of the Eastern District. The total costs in the amount of $73.88 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	$6,375.00
Costs and Expenses	$ 73.88

For a total final allowance of $6,448.88 in Attorneys' Fees and Costs in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Steven S. Altman is allowed the following fees and expenses as a professional of the Estate:
>
> Steven S. Altman, Counsel for the Chapter 7 Trustee
> Applicant's Fees Allowed in the amount of $6,375.00
> Applicants Expenses Allowed in the amount of $73.88,
>
> **IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

15. 12-92645-E-7 JOHN/JAN PIEL MOTION TO ABANDON
MDM-4 Cheryl L. Sommers 12-10-13 [132]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, other parties in interest, and Office of the United States Trustee on December 10, 2013. By the court's calculation, 37 days' notice was provided. 28 days' notice is required. That requirement was met.

Final Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Abandon Real Property is granted and the Trustee is ordered to abandon the property. No appearance required.

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

Here, Trustee seeks an order from the court authorizing the abandonment of Debtors' 50% interest in the Oakridge Partnership. The sole asset of the Oakridge Partnership is the real property commonly known as 2641 Highway 4, Arnold, California. This property was listed as an asset on Debtors' Schedule A and abandoned as to the Debtors by an order from this court, dated May 7, 2013 (MDM-2).

The partnership is still in operation, with rents being collected from commercial space, but is not profitable; partner capital contributions were required at year end 2012. The estate owns a partial interest--half the stock-and thus, sale or liquidation of the partnership would require the cooperation of the non-filing partner. Trustee believes that the partnership interest is of no value to the estate and should be abandoned.

Based on the evidence presented by Trustee, showing that the partnership has insufficient value to warrant administration and is burdensome to the Estate, the court determines that the property is of

inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the personal property identified as:
>
> 1. Debtors' 50% interest in the Oakridge Partnership
>
> is abandoned to the Debtors by this order, with no further act of the Trustee required.

16. 11-94146-E-11 DJP-1 | **DOMINIC/MARIA DEPALMA** | **Naresh Channaveerappa** | **CONTINUED MOTION TO DISMISS CASE** | **9-12-13 [366]**

CONT. FROM 12-19-13

Final Ruling: Movant, Farmers & Merchant Bank of Central California, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Dismiss the Bankruptcy Case was dismissed without prejudice, and the matter is removed from the calendar.**

17. 12-92049-E-7 ROBERT/KATHERINE MATTEUCCI
12-9032 GRANT BISHOP MOTORS, INC. V. MATTEUCCI ET AL

MOTION TO DISMISS ADVERSARY PROCEEDING
12-2-13 [29]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff and Plaintiff's Attorney on December 2, 2013. The Proof of Service, however, is not signed by the apparent server, Joshua M. Penera. By the court's calculation, 45 days' notice was provided. 28 days' notice is required. That requirement was met.

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

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

Debtors Katherine S. Matteucci and Robert A Matteucci ("Defendants") are defendants in this adversary proceeding, initiated by Plaintiff Grant Bishop Motors, Inc, DBA Modesto European ("Plaintiff"). Plaintiff filed an Adversary Complaint on November 2, 2012, objecting to the discharge of alleged debt of $213,729.16 of Defendants in their bankruptcy case. Plaintiff's Complaint, filed on November 2, 2012 (Dckt. No. 1), alleges that Defendant and Joint Debtor Katherine Matteucci, through her position as Controller of the Plaintiff business, made inappropriate and fraudulent withdrawals of company funds and concealed her actions from company officers and personnel. Plaintiff objected to Debtors' discharge of the debt owed to the Plaintiff under 11 U.S.C. § § 727(a)(4), 523(a)(2)(A) and (2)(B)(i)-(iv), 523(a)(4), and 524(a)(3), for false oaths on Debtors' bankruptcy documents, fraud, embezzlement, willful and malicious injury, and community claims, respectively.

Defendants argue that the adversary case should be dismissed on grounds, which upon the court's examination, do not appear to be bases for a Motion to Dismiss under Fed. R. Civ. P. 12(b), as incorporated by Fed. R. Bankr. P. 7012. Rather, Defendants are taking positions on the claims for relief enumerated in Plaintiff's Complaint, and expect their case to be litigated through this motion. Defendants' Motion consists of mostly refutations of Plaintiff's factual allegations, woefully unsupported by direct evidence and legal authority. The grounds for dismissal appear to be for either a Motion for Summary Judgment or as clearly asserted in an Answer

to the Complaint. The court does not deem this Motion to Dismiss to be a motion for summary judgment.

The argument section of Defendants' Memorandum of Points and Authorities is in equal parts a recitation of tangential, asserted facts in the case, and a series of complex responses and objections to Plaintiff's exhibits and factual allegations. The court will summarize Defendants' contentions, distilling Defendants' arguments as follows:

1. The method of search used by "their" (this is presumably referring to Plaintiff's witness) to determine the amount owed to Defendants is unreliable, as the search was conducted electronically using the name of Katherine or Sheri Matteucci in the search criteria. Defendants state that Katherine was employed by the Plaintiff business for twenty years, and that her name was used throughout for many transactions at her job. Defendants appear to be objecting to Plaintiff's method in assessing how much Defendants owe.

2. Defendants point out that Page 15, "Exhibit in support of disclosure of expert witness," Paragraph 2, Exhibit 1, Page 3 states that random, excess unearned bonuses in the amount of $37,250.00 were not authorized. Debtor appears to be referring to Exhibit 1, the Written Report of Dennis Frankeberger, Dckt. No 27 filed on June 13, 2013. The comments on this document, which calculates the losses from unauthorized disbursements via Katherine, state that the expert witness did not find any calculations or documentation on these additional amounts. Under the supervision and General Manager Kelly Robinson and Vice President of Grant Bishop Motors, Inc, as being Katherine's direct supervisor, he did in fact authorize additional amounts paid to Katherine as well as several other employees which additional amounts were paid for tasks that went beyond employees' job descriptions.

   Defendants assert that there is supporting evidence in the business office of Plaintiff business, signed by Kelly Robinson authorizing the additional payments to Katherine. Defendants state that they are unable to subpoena these records "based on lack of finances."

3. Paragraph 3 of that same exhibit states that as part of Katherine's pay plan written in 1995, she would receive an additional supplement pay of $250.00 per month based on the estimated amount that was paid for other management staff health insurance, which Katherine did not elect because her husband covered the insurance for all the household. Defendants object to the statement in the exhibit alleging that insurance was paid in the amount of $10,875.00, on behalf of Katherine, stating that it is false and that Defendants have paystubs reflecting insurance payments that were in fact deducted from Katherine's pay.

4. Again, Defendants dispute Plaintiff's characterization of the losses summarized in Plaintiff's Exhibit 1 in Support of Disclosure of Expert Witnesses, Dckt. No. 27, by stating that the alleged losses of $26,369.39 were the result of excess amounts being withdrawn from Katherine's employee investment account, which were audited annually

by a CPA. Defendants state that the audits never reflected any discrepancies. There is a deposit from the Valley First Credit Union that is not listed in the report. It is unclear what this deposit is for; Defendants merely state that Kahterine has requested a copy of the bank draft proving the deposit, and due to the "length of time" the bank may not be able to retrieve the front and back copy of the draft.

Defendant Katherine Matteucci further contests the unauthorized expenditures listed on Page 5 of Exhibit 1, stating that the list of allegations concerning payments that Katherine made for personal reasons are "absurdly false." Some of the items on the list in the report were payments made to a storage company paid on behalf of Mr. Theodore Stevens' classic car collection, and purchase of classic cars.

5. The financial statements were provided to the owners and management of Plaintiff company on a monthly basis, reflecting all items listed on the itemized disclosure report from plaintiff. Most items were issued by a check, signed by the director of the Plaintiff company, Kelly Robinson.

6. Defendants object to Plaintiff's Exhibit 1 bacause the alleged losses date back to the year 2000 because the amounts are estimated on "memory and hard copy samples." Defendants then go on to dispute very specific payments, including purchasers of business supplies, gifts for annual Christmas parties, and business events.

7. Of actual concern to the court, Defendant Debtors state that they have unavailingly sought the services of counsel but have not been financially able to retain an attorney, and have tried to contacts Plaintiff's counsel multiple times. Plaintiffs state that Defendants have tried to meet and confer with Plaintiff's attorney, and that their requests to meet have been ignored.

Plaintiff's counsel is reminded that a refusal to meet and confer with the opposing party, regarding discovery procedures and the production of documents, depositions, subpoenas, and admissions is sanctionable behavior. The court is interested in further hearing from Defendants' on this aspect of Defendants' Motion, as Plaintiff counsel's lack of communication is not addressed in Plaintiff's opposition.

Even after having reviewed Plaintiff's Adversary Complaint, Defendant's Answer (Dckt. No. 10), and the exhibits cited by Defendants, the court cannot determine in this Adversary Proceeding most of what these responses and factual contentions pursuant to a motion to dismiss. Defendants are essentially presenting arguments and evidence that must be made at trial or legal arguments as to such evidence which is set forth in trial briefs. The issue of such arguments being submitted at the wrong stage of the proceeding notwithstanding, there is not enough evidence in the court's record for the court to fully appreciate Defendants' version of the facts.

Additionally, there are several procedural and substantive defects with Defendants' Motion and supporting pleadings that provide further cause for the court's denial of Defendants' Motion to Dismiss the case.

SUBSTANTIVE ISSUES

No Legal Authority Cited

Debtors' Motion and Memorandum of Points and Authorities do not cite any legal authority. Failure to cite legal authority justifying the relief sought is a ground for denial of the motion. LBR 9014-1(d)(5), 1001-1(g). LBR 9014-1(d)(5) requires that each motion, opposition, and reply cite legal authority relied upon by the filing party.

Relief Requested and Grounds Stated

Pursuant to Federal Rule of Bankruptcy Procedure 7007, which incorporates Federal Rule of Civil Procedure 7(b) to this Adversary Proceeding, the motion itself state both the grounds upon which the relief is based and the relief with particularity. The Motion simply states:

> Debtor hereby moves the Court to dismiss Plaintiff's Adversary Complaint with prejudice. The bases for this Motion are set forth in the accompanying Memorandum.

From reading the Motion, the court has no idea of the grounds on which Defendants are requesting that the adversary is dismissed. The court has no way to determine, from the Motion, the legal authority on which Defendants request that relief should be accorded. Defendants instruct the court to read the Memorandum of Points of Authorities to determine the bases for this motion. It is not, however, for the court to canvas other pleadings, and wait until the hearing, to receive additional evidence from a movant to "draft the motion" for Movants.

Mothorities

Defendants are essentially requesting the court to treat the points and authorities as the "motion." As shown in the court's examination of the pleadings above, however, the Memorandum of Points of Authorities is nearly illegible in the legal and factual arguments being presented. Defendants are asking that the court accept a combined motion and points and authorities ("Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Bankr. P. 9013), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant.

The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties

to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

Moreover, Defendants' Motion provides no basis for the relief requested. Defendants acknowledge as such, instructing the court to read the Memorandum of Points and Authorities to understand the basis for the Motion to Dismiss.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled. Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007.

Here, Defendant's Motion gives no indication of why Defendants are entitled to relief. Defendant's Memorandum in support of their Motion to Dismiss takes issues with certain as shown in the exhibits of Plaintiff's case, and Defendants use the motion as an opportunity to register their objections to the exhibits and Plaintiff's counsel apparent refusal to meet and confer.

PROCEDURAL DEFECTS

Notice of Hearing

No notice of hearing was filed for this Motion pursuant to Local Bankruptcy Rule 9014-1(f) and 9014-1(d)(2)-(3). Local Bankruptcy Rule 9014-1(d)(2) requires that 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,1 the name of the judge hearing the

motion, and the courtroom1 in which the hearing will be held. Local Bankruptcy Rule 9014-1(d)(3) further provides that the he 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. Since a Notice of Hearing was not filed, none of these requirements were met.

Additionally, had dismissal of the adversary proceeding been requested pursuant Fed. R. Bankr. P. 7041, Defendants would have had to serve the Trustee and the United Trustee in their bankruptcy case.

Docket Control Number

Defendants are advised that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. This is not correct. Not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

PLAINTIFF'S REPLY

Plaintiff replies to the Motion to Dismiss the Adversary Proceeding by asserting that the Motion is substantively and procedurally deficient, the Defendants are attempting to procure summary judgment improperly, and that summary judgment cannot be granted because facts are still at issue.

Plaintiff argues that the Motion to Dismiss is deficient. Under Fed. R. Civ. P. 12(b), the grounds for a Motion to Dismiss are the following:

1. The lack of subject-matter jurisdiction;
2. lack of personal jurisdiction;
3. improper venue;
4. insufficient process;
5. failure to state a claim upon which relief can be granted; and
6. failure to join a party under Rule 19.

As Plaintiff correctly, none of these grounds are stated in Defendant's Motion. Defendants appear to advance their theory of the case based on unsubstantiated claims. Plaintiff asserts that Defendants are really attempting to request summary judgment from the court.

The court agrees with Plaintiff, and notes that Defendants have not submitted a summary judgment motion advancing arguments under Fed. R. Civ. P. 56, as made applicable to adversary proceedings by Fed. R. Bankr. P. 7056, and that the form of Defendant's Motion does not comply with Local Bankruptcy Rule 7056-1, which governs the content and procedural requirements for motions for summary judgment or partial summary judgment.

The court finds that the motion is rife with procedural and substantive defects, which violate the Federal and Local Bankruptcy Rules cited above. Each defect provides cause for the court to deny the Motion in and of themselves. Defendants also fail to adequately plead for a dismissal

of the adversary proceeding under Motion to Dismiss under Fed. R. Civ. P. 12(b), as incorporated by Fed. R. Bankr. P. 7012. Thus, the motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Adversary Proceeding filed by Defendants having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss the Adversary Proceeding is denied.

18. 13-92054-E-7 BSH-1 — CHARLENE STRANSKY, Brian S. Haddix — MOTION TO AVOID LIEN OF FIA CARD SERVICES, N.A. 1-2-14 [14]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on only on respondent creditors on January 2, 2014. The Chapter 7 Trustee was not served. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Avoid Lien without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

A review of the Proof of Service shows that the Motion and supporting pleadings were not served on the Chapter 7 Trustee, a party in interest to the Motion. Furthermore, the Certificate of Service, filed on January 2, 2014 (Dckt. No. 19) does not state the Debtor's name. The caption in the Certificate of Service reflects a different case title and number altogether. Additionally, Counsel for Debtor also states in his declaration of service that the Motion and Notice of Hearing were served on January 16, 2014, and not January 2, 2014.

If the Movant can provide timely proof of service of the Trustee at the hearing, however, the court will issue the following alternative tentative ruling.

A judgment was entered against the Debtor in favor of FIA Card Services, N.A. for the sum of $12,590.83. The abstract of judgment was recorded with the Stanislaus County Recorder on August 26, 2013. That lien attached to the Debtor's residential real property commonly known as 1514 Inyo Ave., Newman, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $115,000.00 as of the date of the petition. The unavoidable consensual liens total $53,403.08 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $61,760.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of FIA Card Services, N.A., Stanislaus County Superior Court Case No. 676312, Document No. 2013-0072922-00, recorded on August 26, 2013, with the Stanislaus County Recorder, against the real property commonly known as 1514 Inyo Avenue, Newman, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

19. 10-90358-E-7 SCF-2 | **DIAMOND METAL SALES, INC. Richard L. Andersen** | **MOTION FOR COMPENSATION FOR RYAN, CHRISTIE, QUINN AND HORN, ACCOUNTANT(S), FEES: $3,190.00, EXPENSES: $0.00 12-13-13 [27]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors, and Office of the United States Trustee on December 13, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Ryan, Christie, Quinn & Horn, Accountants for the Estate, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of October 8, 2013 through the December 2, 2013. The order of the court approving employment of Accountants was entered on November 23, 2013.

Description of Services for Which Fees Are Requested

During the service period, Accountants conducted communications regarding overview of the case, and reviewed and executed their employment and fee application. The Accountants reviewed and analyzed tax returns, and corresponded with Trustee regarding the filing of tax returns, and letters to taxing authorities.

DISCUSSION

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).

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

(a) Is the burden of the probable cost of legal 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 Accountants prepared the Debtor business's 2009, 2010, 2011, 2012, and 2013 federal and state corporate tax returns. Accountants reviewed the Debtor's 2008 federal and state corporate tax returns, to determine the availability of any tax attributes that might benefit the bankruptcy corporation. Most of the other hours billed by Accountants in this case involved correspondence with tax authorities and Trustee regarding the preparation and execution of the tax returns. Accountants' work benefitted the Estate in that Accountants filed timely state and federal corporate tax returns on behalf of the Debtor company.

FEES ALLOWED

The hourly rates for the fees billed in this case are $250.00/hour for Paul E. Quinn, CPA, and $175.00/hour for Deborah A. Monis, CPA. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total accountants' fees in the amount of $3,190.00, representing 15.70 hours of services rendered, are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	$3,190.00,
Costs and Expenses	$ 0.00

For a total final allowance of $3,190.00 in Accountants' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by [Counsel, Accountant] having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Ryan, Christie, Quinn & Horn is allowed the following fees and expenses as a professional of the Estate:

Ryan, Christie, Quinn & Horn, Accountants for the Estate Applicant's Fees Allowed in the amount of $ 3,190.00, Applicants Expenses Allowed in the amount of $ 0.00,

IT IS FURTHER ORDERED that this is the final allowance of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

20. 13-91566-E-7 BSH-1 FELIX/REBECCA MANGUERRA Brian S. Haddix MOTION TO AVOID LIEN OF DISCOVER BANK (DISCOVER CARD) 12-11-13 [18]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on December 11, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of the Stanislaus Credit Control Service, Inc. for the sum of $6,320.67. The abstract of judgment was recorded with the Stanislaus County Recorder on October 1, 2010. That lien attached to the Debtor's residential real property commonly known as 4624 Sundown Place, Salida, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $238,818.00 as of the date of the petition. The unavoidable consensual liens total $241,414.50 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $19,741.24 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Stanislaus Credit Control Service, Inc., Stanislaus County Superior Court Case No. 655210, recorded on October 1, 2010, with the Stanislaus County Recorder, against the real property commonly known as 4624 Sundown Place, Salida, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

21. 13-92066-E-7 MEDARDO COCONI — MOTION TO ABANDON
EJN-1 Brian S. Haddix — 12-19-13 [9]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, other parties in interest, and Office of the United States Trustee were filed on December 19, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Trustee requests that the court authorize the abandonment of Debtor's mobile home park on the ground that such items are burdensome or of inconsequential value to the estate.

The real property at issue here located at 500 Monroe Street, Lot 15, Oskaloosa, KS. The property is also described in Debtor's Schedule A (filed with the court on November 20, 2013) as follows:

> 30 Space Mobile Home park with approximately 16 to 18 trailers on site. Approximately 14 to 15 trailers are occupied. Approximately 8 to 10 trailers actually pay rent. (Owned Jointly with Brother)(sic).

Debtor values the mobile park home at $153,00.00. According to Debtor's petition, the amount of the secured claim encumbering the property is $172,174.87. It is unclear, however, what the status on the first mortgage lien apparently held by M&T Bank is, and whether the security interest consists of the property located at 500 Monroe Street (presumably a structure located on the lot), or the lot on which the mobile home park is situated. Trustee does not provide a further description of the liens encumbering the property, and the exact real property Trustee is requesting that the court order abandoned. The Trustee does not describe the tract of land and attendant structures with much specificity, and relies on Debtor's Schedule A for a description of the park.

Federal Rule of Bankruptcy Procedure 9013, which incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b) requires that a moving party plead with particularly the grounds upon which the requested relief is based. Law-and-motion practice in bankruptcy court demonstrates why this particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor’s secured claim, determination of a debtor’s exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

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

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each

> and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

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

Here, Trustee requests court approval to abandon what is described by Debtor's petition as a 30 space mobile home park, with approximately 16 to 18 trailers on site. Trustee does not provide any information on the 14-15 trailers that are occupied--whether those tenants are still leasing their trailers, and why only 8 to 10 trailers are actually paying rent. Trustee does not mention whether Debtor is involved in eviction proceedings against occupants who are not paying rent.

In his Declaration filed on December 19, 2013 (Dckt. No. 11), Trustee states that Debtor's counsel represented to the Trustee that the property produces a negative cash flow, and that no financial statements relating to the property have been produced or are available, and that the former and current property managers have been and are derelict in their duties. These are representations being made by Debtor's counsel, however, and opinions regarding the profitability of the mobile home park are not drawn from Trustee's personal knowledge of the site.

Additionally, the court is left to surmise as to the exact property wishes to be abandoned. It is unclear whether Trustee wishes to abandon the 16-18 trailers on the site, and if the trailers are park-owned. Trustee has not produced any testimony by Debtor attesting to the actual condition of the lot, the acreage of the land, or whether there are structures and amenities on the land. Though Trustee asserts that Debtor's interest in the property is $76,500, Debtor has not confirmed that he holds a 50% ownership in the property and the percentage interest is not indicated on Debtor's petition.

Without direct evidence provided by those who have personal knowledge of the ownership, maintenance, and management of tenants who still reside on the park site, the court cannot yet ascertain whether the property is in fact of inconsequential value and benefit to the Estate.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is denied.

22. 13-90069-E-7 SDM-4 | DONALD/CLAUDETTE BECKWITH Scott D. Mitchell | MOTION TO AVOID LIEN OF MIDLAND FUNDING, LLC 12-5-13 [39]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on December 5, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor Donald Beckwith in favor of Midland Funding, LLC, for the sum of $8,878.56. The abstract of judgment was recorded with Stanislaus County on January 30, 2013. That lien attached to the Debtor's residential real property commonly known as 4928 Audra Court, Turlock, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $157,829.00 as of the date of the petition. The unavoidable consensual liens total $390,317.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of Midland Funding, LLC, Stanislaus County Superior Court Case No. 669253, recorded on January 30, 2012, with the Stanislaus County Recorder, against the real property commonly known as 4928 Audra Court, Turlock, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

23. 11-92487-E-7 SSA-1 — MICHAEL/SHELLEY CUMMINGS — Steven S. Altman — MOTION TO COMPEL ABANDONMENT — 12-24-13 [48]

Local Rule 9014-1(f)(2) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 24, 2013. By the court's calculation, 23 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant Motion to Compel Abandonment, and the Trustee is ordered to abandon the property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here, Debtors assert that the subject property, a Mediated Settlement Claim with PG&E, has inconsequential value and is otherwise burdensome to the Estate to administer. The Chapter 7 Trustee, Michael D. McGranahan, has filed a statement of non-opposition to this Motion.

Debtors originally filed a Chapter 7 case on or about July 12, 2011, which was closed as a "No Asset" case. The case was reopened to allow Trustee to review, analyze, and prosecute a claim advanced by Joint Debtor Michael Edward Cummings against PG&E relating to his employment. The case was reopened on or about June 10, 2013.

Debtors state that Debtors' prior counsel had not adequately informed them about their duties to report and list contingent related claims on their bankruptcy schedules. Debtors, through new counsel, moved to reopen their case to disclose their pending claim and secure its administration. The claim is now listed as "Personal injury claim against PG&E," listed on Debtors' Amended Schedule B (filed on November 26, 2013, Dckt. No. 46).

Debtor's case was reopened by this court on June 10, 2013 (Dckt. No. 25). Debtors participated in a medication concerning the resolution of the PG&E claim on October 23, 2013. The claim has settled for a gross figure of $12,000.00.

Our of the foregoing figures, however, the law firm representing the Debtors, the JML Law firm, a professional corporation, advanced the sum of $4,282.25 in costs. This leaves a residual balance of $7,717.75, before deducting the JML's firm fees, potential taxes attributable to Debtor's wages, and Debtor's exemption claim. Trustee calculates that his distribution arising from the adjudication of the claim will net the bankruptcy estate approximately $3,000.

Debtors note that this figure does not factor in Trustee's statutory commission, and potential professional fees in the Chapter 7 case. Debtors state that the ultimate return to the estate would certainly be an amount of inconsequential value, or an asset which would become burdensome to administer as prescribed by 11 U.S.C. § 554. Based on this calculation, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Abandon Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

1. The Mediated Settlement Personal Injury Claim in the amount of $12,000.00 with PG&E

on Schedule B by the Debtors is abandoned to Michael Edward Cummings and Shelley Ann Cummings, the Debtors by this order, with no further act of the Trustee required.

24. 12-92790-E-7 SSA-2 | **CATHERINE TRIPP** | **Jessica A. Dorn** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH JOHN PIERRE MENDOZA** **12-18-13 [31]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 18, 2013. By the court's calculation, 29 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 2002(a)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

Trustee moves for an order approving a compromise between Debtor's ex-husband and the Trustee.

Debtor filed her Chapter 7 bankruptcy proceeding on October 25, 2012. During the continued 341 Hearing held on January 7, 2013, Trustee discovered that Debtor had transferred her interest by quit claim deed in all the subject properties enumerated in Schedule A to her ex-husband, John-Pierre Mendoza, for no consideration, based upon the claims advanced by the parties that the subject properties were Mendoza's "separate property."

Based on the Exhibit 1, "List of Properties", attached in support of the Motion, Debtor's ex-husband, John-Pierre Mendoza, appears to claim an ownership interest in at least 30 properties, most of which are over-encumbered by one, sometimes two liens. The Schedules of Real Estate presented as Exhibit 1 list John-Pierre Mendoza of JPM Developments as the "sole owner" of the properties, and states that all debt are in Mendoza's name.

Following the investigation of these transfers, Trustee's counsel and Mendoza's counsel entered into substantive discussions to resolve the transfers, with the goal of securing sufficient funds to pay Debtor's outstanding unsecured claims duly filed and allowed.

Trustee has attached the Settlement and Release, entered into by Trustee and Mendoza, as Exhibit 2 to this Motion. The Exhibit reflects the following:

1. Mendoza shall remit a total of $28,000 to the Trustee in settlement of any and all claims the estate has concerning its claim to the subject property, referenced in Exhibit 1. Payment shall be made forthwith.

2. Each party will bear their own fees and costs.

3. Approval of the Settlement is conditioned upon Bankruptcy Court approval.

4. The Bankruptcy Court shall have continuing jurisdiction to oversee and implement the terms and conditions of this settlement, as well as the interpretation of any aspect of this Agreement or any breach arising from this Agreement, assuming the subject Agreement is approved and made the order of the Court.

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Here, the Trustee argues that the four factors have been met. Trustee states that she conferred extensively with her general bankruptcy counsel concerning th proposed settlement. Trustee submits that the agreement meets the best interests of the estate and otherwise meets the standard for approval of the compromise as set forth under *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20L.Ed.2d 1 (1968). *See* also *In re Woodson*, 839 F.2d 619, 629 (9th Cir. 1988).

Probability of Success

Trustee and general bankruptcy counsel believe the result achieved by compromise between the parties will result in a potential payout to unsecured creditors in the range of at least 80% to 90%, if not more. Litigation itself would be a mixed question of law and fact to determine what interest Debtor's bankruptcy estate has in the property Debtor transferred, and what constitutes the separate property of her ex-husband. The success of litigation is uncertain.

Additionally, Trustee's review of the bankruptcy schedules reflects many assets listed in the secured Schedule D section of Debtor's schedules to be over-encumbered.

Difficulties in Collection

Debtor and her ex-husband claim that the assets transferred to her ex-husband were his separate property. To determine who is actually an owner, Trustee would have to trace the purchase price for each assets, and ascertain whether the funds to purchase the asset were community property or separate property funds. Trustee would need to secure the services of a forensic CPA and most likely domestic relations counsel as an expert to demonstrate to the court that the estate has a community property interest in each property.

Furthermore, the properties transferred reflect that many are encumbered with a debt equal, if not more than their fair market value. Given the fact that the estate will realize $28,000 in funds for administration, Trustee asserts that the potential significant fees and costs against problematic litigation has been considered in settling these claims.

Expense, Inconvenience and Delay of Continued Litigation

The litigation is complex, and presents mixed questions of facts of law. Trustee believes that litigating the matter would require the need to employ both a forensic CPA and domestic relations expert, which would be costly to an estate that is currently insolvent.

Paramount Interest of Creditors

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compromise filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compromise with Jon Pierre Mendoza is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit 2 in support of the motion on December 18, 2013 (Docket Number 35).

25. 13-90490-E-7 **ISRRAEL/SONIA RUIZ** **MOTION FOR SUMMARY JUDGMENT**
13-9019 **Marilyn R. Thomassen** **12-4-13 [25]**
FERLMANN V. RUIZ

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Defendant's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 4, 2013. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1).

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

INTRODUCTION

Trustee Stephen C. Ferlmann, Trustee and Plaintiff in this case, moves the court for summary judgment against Defendant, Edgar Alfredo Ruiz ("Defendant") pursuant to Federal Rules of Bankruptcy Procedure 7036, 7056, and Local Rule of Practice 7056-1, for the relief demanded in Plaintiff's Complaint.

Trustee asserts that it is entitled to summary judgment because there is no genuine issue of material fact that needs to be tried in this adversary proceeding. Trustee filed an adversary proceeding under 11 U.S.C. § § 544, 547, 548, and 550, as well as California Civil Code § § 349.04-.05 for avoidance of the transfer of Debtors' joint tenancy interest in real property located at 2613 Glasgow Drive, Ceres, California to the Defendant as a fraudulent and/or preferential transfer.

Trustee requested the judgment of this court declaring that Defendant's alleged title to the subject property is null and void; that the Defendant be required to transfer and deliver up to Plaintiff the Subject Property; and that, if the Defendant has been disposed of the subject property, that judgment be entered against him in favor of Plaintiff for the value of such property in the amount of $122,00.00

Defendant has not responded to Plaintiff's Request for Admissions, Set No. 1, which was served by first class mail on Defendant, by and through his counsel of record, on July 18, 2013. Trustee states that on this basis, Defendant admits all elements of the fraudulent conveyance and/or preferential transfer, and admits facts which bar all of Defendant's claimed affirmative defenses. Trustee asserts that he is entitled to summary

judgment against Defendant pursuant to Fed. R. Civ. P. 36 and 56, as made applicable by Fed. R. Bankr. P. 7036 and 7056. There are no issues as to any material fact, and Plaintiff is entitled to summary judgment as a matter of law.

Fed. R. Bankr. P. Rules 7036 and 7056 provide that requests for admissions are deemed admitted unless they are denied within 30 days after service of the request. Any matter admitted under Fed. R. Civ. P. 36 is "conclusively established unless the court on motion permits withdrawal or amendment of the admission." Trustee maintains that by not responding to Trustee's Request for Admissions Set No. 1, Defendant has admitted that the transfer which is the subject of this adversary proceeding is in fact a fraudulent conveyance and/or a preferential transfer, and has admitted facts which bar any affirmative defenses raised in Defendant's Answer.

Trustee asserts that the admitted facts establish all elements of an avoidable fraudulent conveyance and/or preferential transfer.

FACTS

1. On or about October 5, 2012, within 4 years prior to the filing of Debtor's bankruptcy petition, Debtors transferred their joint tenancy interest in the property located at 2613 Glasgow Drive, Ceres, California ("subject property") to or for the benefit of the Defendant.

2. This transfer was memorialized in a Grant Deed recorded on October 5, 2012, with the Stanislaus County Recorder as Document No. 2012-0089235.

3. At the time of the Transfer, Defendant was and still is Debtor's son.

4. At the time of Debtor's transfer, the subject property had a fair market value of at least $122,000.00.

5. Debtors' transfer to defendant on or about October 5, 2012 of their joint tenancy interest in the subject property was made without the Debtors receiving a reasonably equivalent value in exchange.

6. Defendant did not give new value to or for the benefit of the Debtors after having received the joint tenancy interest in the subject property.

7. Debtors were insolvent at the time of the transfer.

8. Debtor's transfer would have been avoidable under Civ. Proc. Code § § 3439.04 and 3439.05 by Debtors' creditors if Debtors had not filed for relief under Chapter 7 of the Bankruptcy Code.

9. The transfer was made for or on account of an antecedent debt that Debtors owed to Defendant at the time. The transfer

enabled Defendant to receive more than Defendant would have otherwise received in this Chapter 8 case if the transfer had not been made.

10. The transfer was not a substantially contemporaneous exchange.

11. The transfer was not made in payment of a debt incurred by Debtors in the ordinary course of business or financial affairs of the Debtors and Defendant, and not made according to ordinary business terms.

12. Defendant was the "initial transferee" of Debtors' transfer.

13. Defendant is not a secured creditor of Debtors.

SUMMARY JUDGMENT STANDARD

In an adversary proceeding, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); 11 James Wm. Moore et al., Moore's Federal Practice § 56.11[1][b] (3d ed. 2000) ("Moore").

"[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza*), 545 F.3d 702, 707 (9th Cir. 2008) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), *incorporated by* Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707 (*citing Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055-56 (9th Cir. 2002)). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (*citing Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to

the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (*citing Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

On July 18, Defendant was served by mail, through his counsel, Plaintiff's First Request for Admissions, as well as requests for Production of Documents and interrogatories. On August 2, 2013, Defendant requested an extension of time to September 6, 2013, to respond to Plaintiff's propounded discovery. This request was granted and confirmed by email from Trustee's counsel. On September 23, 2013, Plaintiff's counsel contacted Defendant's counsel by letter asking whether Defendant intended to seek relief from the deemed admissions, or to respond to the interrogatories and Trustee's Request for Production of Documents. Plaintiff did not receive any response to the communications and the discovery requests.

The Ninth Circuit has held that unanswered requests for admissions may be exclusively relied on as basis for granting summary judgment. *Conlon v. United States*, 474 F.3d 616 (9th Cir. 2007). The failure to respond to request to admit will permit court to enter summary judgment if facts deemed admitted are dispositive; a court is not required to do so, and the court has discretion to allow untimely answers to request for admissions when such amendment will not prejudice the other party. Fed. R. Civ. P. 36; Fed. R. Bankr. P. 7036, 11 U.S.C.A. *In re Lucas*, 124 B.R. 57 (Bankr. N.D. Ohio 1991).

Fed. R. Civ. P. Rule 36(a) states that a matter is deemed admitted "unless, within 30 days after service of the request ... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney." Fed. R. Civ. P. 36(a). Once admitted, the matter "is conclusively established unless the court on motion permits withdrawal or amendment of the admission" pursuant to Rule 36(b). *Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007).

Since Defendant did not file a response to Trustee's Request for Admissions, and has evinced no intent to do so after Trustee's counsel has contact Defendant's counsel repeatedly regarding the requests, Defendant's non-response will be construed by the court as admissions under Fed. R. Civ. P. 36(a). The court will proceed to consider whether all elements of the Trustee's Claims for relief have been satisfied by the deemed admitted facts.

First Claim for Relief

Trustee's first claim for relief is based on 11 U.S.C. § 544 and Civ. Proc. Code § § 3439.04-.05. 11 U.S.C. § 544 gives Trustee the rights and powers avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable at the commencement of the case, and without regard to any knowledge of the trustee or of any creditors. Civ. Proc. Code § § 3439.04 defines fraudulent transfers as to a creditor, if the Debtor made the transfer or incurred the obligation as follows:

> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
>
> > (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
> >
> > (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

In determining actual intent to effect a fraudulent transfer, consideration may be given, among other factors, to any or all of the following:

> (1) Whether the transfer or obligation was to an insider.
>
> (2) Whether the debtor retained possession or control of the property transferred after the transfer.
>
> (3) Whether the transfer or obligation was disclosed or concealed.
>
> (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (5) Whether the transfer was of substantially all the debtor's assets.
>
> (6) Whether the debtor absconded.
>
> (7) Whether the debtor removed or concealed assets.
>
> (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.

(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Cal. Civ. Code § 3439.04

Here, Defendant received a transfer of Debtors' joint interest in the subject property without receiving a reasonably equivalent value in exchange for the obligation, for an antecedent debt that according to the admitted facts, Debtors already owed Defendant. Defendant is Debtors' son, and is an insider within the scope of 11 U.S.C. § 101(31). There are creditors of Debtors who have allowable claims against them which claims were in existence at the time of the transfer, making Defendant an insider who received preferential treatment in the transaction. Based on the admitted facts, the transfer of the subject property was made with the intent to hinder, delay, or defraud Debtors' then existing and future creditors. Thus, 11 U.S.C. § 544 allows the Trustee Plaintiff to this transaction in Debtors' case.

Second Claim for Relief

11 U.S.C. § 548 sets forth the avoidance powers of a bankruptcy trustee as they relate to fraudulent transfers of a debtor's interest in property.

11 U.S.C. § 548 provides that the trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily–

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

In this case, the transaction satisfies the criteria for transfers that are avoidable by the trustee under 11 U.S.C. § 548. Debtors transferred their joint tenancy interest in the subject property to or for the benefit of the defendant, who is an insider as Debtors' son, within two years of the filing of the bankruptcy petition. The transaction was effected on October 5, 2012, within 2 years before the date of the filing of the petition, and was made in exchange for no consideration by the Defendant insider. Debtors were insolvent the date the transfer was made.

Thus, the transfer may be avoided by Trustee under 11 U.S.C. § 548.

Third Claim for Relief

Pursuant to 11 U.S.C. § 547(b), the Trustee may avoid any transfer of an interest of the debtor in property made between ninety days and one year before the date of the filing of the petition, if the creditor was an insider at the time of such transfer.

Defendant is Debtors' son under the definition of "insider" as stated by 11 U.S.C. § 101(31). The transfer was made within one year prior to March 18, 2013, the date of the commencement of Debtors' bankruptcy case. The transaction has the other hallmarks of preferential transfers as defined by 11 U.S.C. § 547, as Debtors were insolvent, and the transfer enabled Defendant to receive more than he would have received under Chapter 7 of the Bankruptcy Code if the transfer had not been made.

Thus, the transfer may be avoided by Plaintiff pursuant to 11 U.S.C. § 547.

Fourth Claim for Relief

Trustee's Fourth Claim for Relief is brought under 11 U.S.C. § 550, which provides that to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of Title 11, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

Defendant was the initial transferee of the Transfer or entity for whose benefit the transfer was made. The transfer can be avoided, therefore, by the provisions of 11 U.S.C. § 550.

Thus, all elements of Trustee's four claims for relief, in avoiding the transfer of the subject property by Debtors to Defendant, have been met. The Motion for Summary Judgment is granted. The transfer will be avoided

under 11 U.S.C. § 544, 547, and 548 for the benefit of the bankruptcy estate.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Summary Judgment filed by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Summary Judgment is granted.
>
> **IT IS FURTHER ORDERED** that the transfer by the Debtors, Isrrael and Sonia Ruiz, of their joint tenancy interests in the real property commonly known as 2613 Glasgow Drive, Ceres, California to Defendant Edgar Alfredo Ruiz, made on October 5, 2012 and memorialized in the Grant Deed Recorded with the Stanislaus County Recorder as Document No. 2012-0089235 is avoided pursuant to 11 U.S.C. § 547 and § 548.
>
> **IT IS FURTHER ORDERED** that the transfer by the Debtors, Isrrael and Sonia Ruiz, of their joint tenancy interests in the real property commonly known as 2613 Glasgow Drive, Ceres, California to Defendant Edgar Alfredo Ruiz, made on October 5, 2012 and memorialized in the Grant Deed Recorded with the Stanislaus County Recorder as Document No. 2012-0089235 is avoided pursuant to California Civil Code §§ 3439 - 3439.12. The transfer is voided in its entirety.
>
> **IT IS FURTHER ORDERED** that Edgar Alfredo Ruiz execute such deeds and other documents as reasonably necessary to transfer and deliver clear, marketable title to the subject property to Trustee.
>
> **IT IS FURTHER ORDERED** that if Edgar Alfredo Ruiz has already disposed of the property located at 2613 Glasgow Drive, Ceres, California; that clear, marketable title cannot be transferred to or be placed in the Trustee by order of the court, or that the value of the Property is less than $122,000.00, then the Trustee may request an amendment to the judgment to provide for a monetary award as permitted by 11 U.S.C. § 550 and California Civil Code § 3439.07, against Edgar Alfredo Ruiz.
>
> **IT IS FURTHER ORDERED** that Defendant Edgar Alfredo Ruiz's title to the property commonly known as 2613 Glasgow Drive, Ceres, California is null and void, having been avoided by this court.
>
> Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order and Ruling upon which it is based. On or before February 7, 2014, the Plaintiff-Trustee shall file and serve a costs bill and motion for attorneys' fee, if any is proper, and any costs or attorneys' fees allowed shall be enforced as part of the judgment.

26. **13-91891-E-7** **KITTIE NEILSON** **MOTION TO AVOID LIEN OF CACH, LLC**
ALB-2 **Arthur L. Barnes** **11-27-13 [25]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee and respondent creditors on November 27, 2013. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of CACH, LLC for the sum of $26,599.99. The abstract of judgment was recorded with San Joaquin County on May 31, 2013. That lien attached to the Debtor's residential real property commonly known as 220 Edgewood Court, Tracy, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $220,000 as of the date of the petition. The unavoidable consensual liens total $155,000.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $75,000 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

The court shall issue an Order (not a minute order) substantially in the following form holding that:

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of CACH, LLC , San Joaquin County Superior Court Case No. 39-2012-002826150-CL-CL, recorded on May 31, 2013, with the San Joaqiun County Recorder, against the real property commonly known as 220 Edgewood Court, Tracy, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

27. 13-91993-E-7 JDP-1 | **EDISON BIDAN** **James D. Pitner** | **MOTION TO AVOID LIEN OF CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES** **11-20-13 [9]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on November 20, 2013. By the court's calculation, 57 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of David Maxwell-Jolly, acting as Director of the California Department of Health Care Services for the sum of $94,600.00. The abstract of judgment was recorded with Stanislaus County on September 22, 2011. That lien attached to the

Debtor's residential real property commonly known as 245 Pedras Road, Turlock, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $145,000.00 as of the date of the petition. The unavoidable consensual liens total $139,902.71 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $5,097.29 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

The court shall issue an Order (not a minute order) substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of David Maxwell-Jolly, acting as Director of the California Department of Health Care Services, Stanislaus County Superior Court Case No. 648050 recorded on September 22, 2011, with the Stanislaus County Recorder, against the real property commonly known as 245 Pedras Road, Turlock, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

28. 12-91565-E-7 **EVERETT HUNTER** **MOTION FOR TURNOVER O.S.T.**
12-9023 **Pro Se** **1-3-14 [128]**

EIDSON V. HUNTER, JR.
ADV. CASE CLOSED 12/12/13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), and Office of the United States Trustee on January 7, 2014. By the court's calculation, 9 days' notice was provided. 28 days' notice is required.

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

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

Plaintiff requests that the court issue an order for turnover against Everett Earl Hunter, Jr., Defendant, pursuant to California Code of Civil Procedure §§ 699.040 and 708.205.

Plaintiff contends that he obtained a judgment against Defendant on August 13, 2013, in this adversary proceeding for $31,756.20, but it has remained unsatisfied. Plaintiff states Defendant is the sole owner of EH Presents, an event planning business. Plaintiff asserts that EH Presents and EH Foundation are alter egos of Defendant. Plaintiff alleges that EH Presents was the promoter of a New Year's Eve Event that took place at the Double Tree Hotel in Modesto, California. Plaintiff contends that all the proceeds for the New Year's Eve event are for the benefit of Defendant, as he is the sole owner and president of EH Presents. Plaintiff contends that ticket sales alone garnered $6,800.00.

Plaintiff asserts he obtained and delivered a Writ of Execution to the United States Marshal for the judgment amount on December 12, 2013, which was served on the Double Tree Hotel accounting department on Friday, December 27, 2013, requesting any funds Double Tree has collected for the benefit of Defendant. However, Plaintiff contends that Double Tree would

not honor the writ, as it claims it contracted with Louis Bland Entertainment, not Defendant or any of his alter egos. Plaintiff contends that the contract supplied shows a date of December 28, 2013, after the writ had been served. Plaintiff states that Louis Bland Entertainment is a non-entity. Plaintiff argues that this entity was created by Defendant and his personal friend, Lisa Smith.

Plaintiff seeks the court to order third party Double Tree Hotel or Louis Bland Entertainment to immediately turn over funds to satisfy the judgment or in the alternative, to forbid Double Tree Hotel or Louis Bland Entertainment from transferring the property of the ticket proceeds to Defendant or other party until the interests of the property is determined.

The evidence filed in support of the motion consists of testimony of Thomas P. Hogan, attorney for Plaintiff.

DISCUSSION

Enforcement of federal court judgments in California is governed by Code Civ. Proc. §§ 680.010-724.260 generally. Federal Rule of Civil Procedure 69 and Federal Rule of Bankruptcy Procedure 7069 provide that the procedure for enforcing a federal court writ of execution is the state law for enforcement of a judgment, unless there is a specific federal statute or rule applicable to the situation.

Plaintiff seeks the requested relief pursuant to California Code of Civil Procedure § 699.040, which provides (emphasis added),

> (a) If a writ of execution is issued, the judgment creditor may apply to the court *ex parte*, or on noticed motion if the court so directs or a court rule so requires, **for an order directing the judgment debtor to transfer to the levying officer** either or both of the following:
>
> (1) Possession of the property sought to be levied upon if the property is sought to be levied upon by taking it into custody.
>
> (2) Possession of documentary evidence of title to property of or a debt owed to the judgment debtor that is sought to be levied upon. An order pursuant to this paragraph may be served when the property or debt is levied upon or thereafter.
>
> (b) The court may issue an order pursuant to this section upon a showing of need for the order.
>
> (c) The order shall be personally served on the judgment debtor and shall contain a notice to the judgment debtor that failure to comply with the order may subject the judgment debtor to arrest and punishment for contempt of court.

This does not provide the court with authority to issue a turnover order requiring *third parties* to transfer the property sought, rather section 699.040 provides for a turnover order that requires the *judgment debtor* to transfer to the levying officer the property sought. *Office Depot, Inc. v. Zuccarini*, 488 F. Supp. 2d 920, 922 (N.D. Cal. 2007).

Plaintiff also cites and California Code of Civil Procedure § 708.205, which states (emphasis added),

> (a) Except as provided in subdivision (b), **at the conclusion of a proceeding pursuant to this article**, the court may order the judgment debtor's interest in the property in the possession or under the control of the judgment debtor or the third person or **a debt owed by the third person to the judgment debtor to be applied toward the satisfaction of the money judgment if the property is not exempt from enforcement of a money judgment.** Such an order creates a lien on the property or debt.
>
> (b) If a third person examined pursuant to Section 708.120 claims an interest in the property adverse to the judgment debtor or **denies the debt and the court does not determine the matter as provided in subdivision (a) of Section 708.180,** the **court may not order** the property or debt to be applied toward the satisfaction of the money judgment but may make an order pursuant to subdivision (c) or (d) of Section 708.180 forbidding transfer or payment to the extent authorized by that section.

The "Article" referenced in the above section is Article 2 of Chapter 6 of Division 2 (Cal. C.C.P. §§ 708.110 - 708.205), Enforcement of Judgments, of the California Code of Civil Procedure. Section 708.120 provides for the examination of a third person upon application by a judgment creditor who has a money judgment and proof that a third person has possession or control of property in which the judgment debtor has an interest in an amount exceeding $250. The court can order the third person to appear before the court to answer concerning such property or debt. Cal. Code Civ. Proc. § 708.120. The proper court for examination of a person under this article is the court in which the money judgment is entered. Cal. Code Civ. Proc. § 708.160.

If a third person examined pursuant to Section 708.120 claims an interest in the property adverse to the judgment debtor or denies the debt, the court may, if the judgment creditor so requests, determine the interests in the property or the existence of the debt. Cal. Code Civ. Proc. § 708.180

Thus, pursuant to section 708.205, following the examination of a judgment debtor or a third person, the court may order the examined person to turn over property to satisfy the judgment unless the property is exempt from enforcement of a money judgment.

There is no Examination of Third Party which has been ordered or is being conducted. Rather, Plaintiff has served a writ of execution and he

does not believe Double Tree Hotel's response that it did not owe anything to this Judgement Debtor.

The court granted the motion on shortened time and therefore opposition was not required. It appears through argument of Counsel, that Double Tree Hotel denies the debt is owed to Defendant (stating a post-writ contract exists with Louis Bland Entertainment). Furthermore, it appears that there are several factual disputes, including (1) whether Defendant Everett Hunter or his affiliate companies had a contract with Double Tree Hotel for the New Year's Event, (2) if there was a contract with Defendant or his company, the amount owed to him under the contract, (3) if it was one of Everett Hunter's corporations that contracted with the Double Tree Hotel (EH Presents or EH Foundation), whether Plaintiff can pierce the corporate veil to reach the requested funds; (4) if there was not a contract with Everett Hunter or his companies, was the contract with Louis Bland Entertainment valid (having been entered mere days before the event) and (5) whether Defendant Everett Hunter has an interest in Louis Bland Entertainment that Plaintiff will be able to apply the judgment.

What Plaintiff is arguing is that Double Tree Hotel has failed to comply with a properly served writ of execution. If that is the case, it appears that Cal. C.C.P. § 701.010 - 701.070 are the applicable provisions. (Duties and Liabilities of Third Persons After Levy.) Failure to comply with the writ of execution and levy subjects the third party to personal liability to the judgment creditor for the lesser of (1) the value of the payments required to be made to the levying officer or (2) the amount required to satisfy the judgment. In addition, the court may require a third party who fails to comply with the writ of execution and levy to pay the judgment creditor's reasonable attorneys' fees and costs of establishing the liability of the third party. Cal. C.C.P. § 701.020(c).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Turnover filed by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion is _____.