UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 25, 2018, at 10:30 a.m.

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1. **94-24117-E-7** **RONALD KLASSEN** **MOTION TO CLOSE REOPENED CASE**
DMW-1 **Pro Se** **12-15-17 [11]**

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on December 23, 2017. By the court's calculation, 31 days' notice was provided. The court set the hearing for 10:30 a.m. on January 25, 2018. Dckt. 13.

The Motion to Close Reopened Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing **----------**.

The Motion to Close Reopened Case is ~~granted~~.

Douglas Whatley ("the Chapter 7 Trustee") moves for the court to close this reopened case. He argues that the case was filed on May 24, 1994, and a discharge was granted on November 20, 1994.

In August 2017, the case was reopened to administer an unreported lawsuit titled *In re Roman Catholic Bishop of Great Fall, Montana*, Case No. 17-60271. The Chapter 7 Trustee contacted the United

States Bankruptcy Court located in Sacramento to acquire the schedules and petition filed in 1994. He discovered that the files had been destroyed, however, and were not available in any form.

Due to the age of this case and due to the destruction of the files, the Chapter 7 Trustee argues that this case cannot be administered. He moves for the case to be closed.

At the hearing, the Chapter 7 Trustee advised the court why the historical file in this case is necessary to administer this undisclosed asset. He reported **xxxxxxxxxxxxxxxxxxxxxxx**.

~~The Chapter 7 Trustee has demonstrated that he is prevented from administering this case. A review of the court's docket shows that all that is available is a Docket List from the original filing, which shows that twenty-three items were filed on the docket in addition to certain non-document entries (e.g., Final Decree & Case Closed). Dckt. 2.~~

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 Douglas Whatley ("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 Close Reopened Case is granted, and Ronald Klassen's ("Debtor") Case No. 94-24117 is closed, with no further action required by the parties.~~

2. **17-22347-E-11** **UNITED CHARTER LLC** **CONTINUED MOTION TO USE CASH COLLATERAL**
JJG-1 **Jeffrey Goodrich** **8-3-17 [32]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2017. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Use Cash Collateral is denied without prejudice.

United Charter, LLC ("Debtor in Possession") moves the court for an additional order approving a stipulation with East-West Bank ("Creditor") (collectively, "the Parties") to use cash collateral and grant a replacement lien in all post-petition rents, issues, and profits from Debtor in Possession's real property.

AUGUST 17, 2017 HEARING

At the hearing, the court granted Debtor in Possession's request for a continuance and continued the hearing to 10:30 a.m. on August 31, 2017. Dckt. 42. The court ordered that supplemental pleadings be filed and served on or before August 24, 2017. Dckt. 48.

REVIEW OF AMENDED STIPULATION FILED ON AUGUST 24, 2017

The parties filed an Amended Stipulation on August 24, 2017. Dckt. 50. The properties at issue in the Stipulation are part of an industrial complex covering more than 175,000 square feet and made up of

eighteen contiguous parcels. The properties are identified commonly as: 1904, 1908, 1912, 1916, 1920, 1928, and 1936 Weber Avenue; 1881 E. Market Street; and 1523, 1531, 1555, and 1617 E. Main Street ("Properties").

The Stipulation contains the following terms:

A. Debtor in Possession is entitled to use cash collateral to pay actual and necessary operating expenses incurred after the petition date as set forth in an attached budget.

B. All cash collateral shall be deposited into a segregated bank account.

C. Debtor in Possession may pay other expenses outside of the ordinary course of business with Creditor's written approval, and remaining net cash collateral shall be paid monthly to Creditor.

D. Debtor in Possession shall make monthly adequate protection payments to Creditor in the amount of net rents after payment of amounts set forth in the budget (approximately $7,785.00 per month) no later than the fifteenth of each month, and such payment are retroactive to the petition date.

    1. Within five days of entry of an order approving the Stipulation, Debtor in Possession shall deliver an adequate protection payment in an amount sufficient to pay the accrued adequate protection payments from the petition date less the amount Debtor in Possession paid, with Creditor's prior consent, for the April 2017 delinquent property taxes.

E. Creditor shall be granted a valid, duly-perfected, enforceable, and non-avoidable replacement lien and security interest of the same priority in all post-petition cash collateral.

F. The post-petition liens in favor of Creditor shall secure repayment to Creditor of the difference between the actual amount of cash collateral spent by Debtor in Possession from and after the petition date and the cash collateral collected but not spent for the same time period.

G. During the Stipulation's term, no priority claims or other claims for costs or expenses of administration that have been or may be incurred, shall have priority over or parity with either–

    1. Creditor's claim for repayment of Debtor in Possession's obligations under loan documents, or

    2. Creditor's security interest in and lien upon the Properties and their rents, and no costs or administrative expenses shall be imposed against Creditor, its claims, or the collateral.

H. Upon entry of an order by the court approving the Stipulation, Debtor in Possession's right to use cash collateral shall become effective as of the petition date and continue until the sooner of–

1. October 31, 2017,

2. A default, or

3. Further court order.

The attached budget includes the following proposed uses of cash collateral:

Description	Typical Monthly Amount	Approximate Payment Date
Cal Water: Water Bill	$118.00	16th every month
PG&E: Power Bill	$250.00	16th every month
Property Insurance	$2,035.00	25th every month for 9 months
Maintenance	$1,000.00	As needed
Franchise Tax Board	$75.00	$900 per annum April 13th
Backflow Water Testing	$6.25	$75.00 per annum February 24th
Property Tax: County	$3,800.00	$22,800 semi-annually
Accounting	$500.00	$15,000 per annum—paid one payment
Bay Alarm	$103.00	13th every month
Contingency	$500	Subject to Bank approval

Typical Amount Total	**$7,785.00**	

AUGUST 31, 2017 HEARING

At the August 31, 2017 hearing, the court noted that the parties had identified the court's concerns about distinguishing between Debtor and Debtor in Possession, that they had removed a provision that would give Creditor a replacement lien condition upon Debtor in Possession having waived any objection to Creditor's lien, and that they had removed provisions under which they could bilaterally authorize continued use of cash collateral without court approval. Dckt. 59

Capital Contributions

At the August 31, 2017, the court and the parties also discussed the use of capital contributions in this case.

Schedules D, E, and F filed in this case demonstrate that the reorganization taking place is a three-party restructure: Debtor in Possession/ Raymond Zhang (principal), East-West Bank (Secured Claim), and Wayne Bier (secured claim). For unsecured claims, the only significant non-insider is the City of Stockton for "fines" in the amount of $27,613.45 (which claim is listed as disputed). Schedules, Dckt. 12 at 9–12. That a limited number of parties would seek to use a Chapter 11 proceeding as a structure to achieve a better financial result for all is not inappropriate, and in fact it exemplifies conduct that persons in other bankruptcy cases should emulate.

Though a limited group, federal law requires certain conduct of the various "players" in a bankruptcy case, including accurate disclosures, the fiduciary capacity of a "debtor in possession," and compliance with the law. While the court appreciates the need for there to be "reasonable" compliance with the law and for "formalities" not to unduly hinder the parties in their effective prosecution of a bankruptcy case, cutting too many corners will only lead to potentially greater negative consequences for the parties and their attorneys than would otherwise exist.

The court noted that the operation of the bankruptcy estate by Debtor in Possession is being funded significantly through a cash inflow labeled as "Capital Contributions." In reviewing the July 2017 monthly operating report, the court saw that it states that "Capital Contributions" totaling $25,500.00 were made to the bankruptcy estate since this case was commenced. Dckt. 36 at 8. That represents 35.17% of the total cash receipts for the bankruptcy estate since this case was commenced.

The court clarified that the concept of a "capital contribution" and the bankruptcy estate are inconsistent. A capital contribution is defined under California law as being:

> " (c) 'Contribution' means **any benefit provided by a person to a limited liability company**:
>
> (1) In order to become a member upon formation of the limited liability company and in accordance with an agreement between or among the persons that have agreed to become the initial members of the limited liability company.
>
> (2) In order to become a member after formation of the limited liability company and in accordance with an agreement between the person and the limited liability company.
>
> (3) In the **person's capacity as a member and in accordance with the operating agreement or an agreement between the member and the limited liability company**."

Cal. Corp. § 17701.02(c). The "capital contribution" would be made to the limited liability company by one of the members. The limited liability company is United Charter, LLC, Debtor that commenced this voluntary bankruptcy case.

By operation of federal law all of the assets of Debtor were transferred into the bankruptcy estate in this case upon the filing of the bankrupt petition. 11 U.S.C. § 541(a). Because this is a Chapter 11 case, a bankruptcy trustee was not immediately appointed to manage the bankruptcy estate, but Debtor accepted the role of serving as "Debtor in Possession," 11 U.S.C. § 1001(1), who then exercises the powers and is subject to the fiduciary obligations of a bankruptcy trustee. 11 U.S.C. § 1107. The bankruptcy estate is not Debtor, the property of the bankruptcy estate is not Debtor's property, and Debtor exercises power and control over the property of the estate (here the real estate and its operation) solely in its fiduciary capacity as Debtor in Possession.

The "capital contribution" made by the member of United Charter, LLC would have been to Debtor, United Charter, LLC. It has not been explained how the money was then transferred from United Charter, LLC into the bankruptcy estate. The bankruptcy estate is not a "limited liability company" that has "members" from whom "capital contributions" may be received.

The most common method by which new money is placed in a bankruptcy estate is by a loan made pursuant to 11 U.S.C. § 364. Other than for an unsecured loan in the ordinary course of business, court authorization for such a loan is required. If court authorization is not obtained, the "lender's" right and ability to be repaid for the loan is impaired.

If things "do not go well" and this case is converted to one under Chapter 7 or if a Chapter 11 trustee is appointed, it has already been disclosed that there is a substantial preference that such trustee may be pursuing against the principal of Debtor. Debtor in Possession (Debtor and its principal as the managing member) has chosen not pursuing such preference at this time, believing that there may well be time for any subsequently appointed trustee to pursue it at a later date. The decision not to assert such rights may limit how long Debtor can serve as Debtor in Possession, or how the conduct of Debtor in fulling the fiduciary role of Debtor in Possession, counsel for Debtor in Possession, and the principal who is acting for Debtor in Possession if the preference is less collectable at that later date after the trustee is appointed than if Debtor in Possession had pursued it from day one.

Additionally, the principal making the "capital contribution" may be believing that if the "finances hit the fan" in this case, whatever he may owe on a preference can be offset against the "capital contributions." While such an offset might be properly provided for as part of court-approved post-petition credit pursuant to 11 U.S.C. § 364, none exists here and the principal (who, with the assistance of other professionals of the bankruptcy estate, has made the decision that the estate should not be seeking the recovery of the preference from him) may be in for a rude awakening of an even bigger loss.

With respect to such "capital contributions," Counsel for Debtor in Possession addressed that he and independent counsel for the member making such "capital contributions" will be addressing the points.

The court granted the motion to approve the cash collateral stipulation and authorized Debtor in Possession to use cash collateral for the period June 1, 2017, through October 31, 2017. Dckt. 61. The court continued the hearing to 10:30 a.m. on October 5, 2017, to consider a motion to extend the authorization to use cash collateral and ordered Debtor in Possession to file and serve any supplemental pleading by September 21, 2017.

DEBTOR IN POSSESSION'S SUPPLEMENT

Debtor in Possession filed a Supplement to the Motion on September 21, 2017. Dckt. 71. Debtor in Possession reports that the Parties "remain in discussions for a consensual extension of such authority [to use cash collateral], but as of the filing of this Supplement no such agreement has been reached." *Id.* at 1:25–27. Debtor in Possession requests that the court extend the authorization to use cash collateral on the same terms as approved at the August 31, 2017 hearing through January 31, 2018.

OCTOBER 5, 2017 HEARING

At the hearing, the court authorized the use of cash collateral for the period November 1, 2017, through January 31, 2018. Dckt. 75. The court set a continued hearing for 10:30 a.m. on January 25, 2018, to consider a supplement to the motion to extend authorization to use cash collateral. Dckt. 77. The court ordered that any supplemental pleadings be submitted by January 11, 2018.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> > (A) such sale or such lease is consistent with such policy; or
> >
> > (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
> >
> > > (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

> (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

RULING

No further supplemental pleadings have been filed requesting further authorization to use cash collateral, and the deadline to file any such request has passed. The court treats that failure as Debtor in Possession's indication that authorization is no longer sought. The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Use Cash Collateral filed by Debtor in Possession 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.

3. **17-22347-E-11** **UNITED CHARTER LLC** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY, FOR TURNOVER OF CASH COLLATERAL, TO APPOINT TRUSTEE, TO DISMISS CASE AND/OR TO CONVERT CASE CHAPTER 7**
MET-1 **Jeffrey Goodrich**

EAST WEST BANK VS.

11-22-17 [80]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on November 22, 2017. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is xxxxxxxxxxxxx.

East West Bank ("Movant") seeks relief from the automatic stay with respect to United Charter LLC's ("Debtor in Possession") real property commonly known as 1904, 1908, 1912, 1916, 1920, 1928, 1936 Weber Avenue, 1881 E. Market Street, 1617, 1555, 1531, 1523 E. Main Street, Stockton, California ("Property"). Movant has provided multiple declarations to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The L. Kurth DeMoss Declaration states that there are seven pre-petition payments in default, with a pre-petition arrearage of $783,312.79. Dckt. 84. Pursuant to a cash collateral stipulation, the Declaration provides evidence that Movant has received $31,477.98 in payments as of November 2, 2017.

The DeMoss Declaration mentions an auction for the Property through auctioneer Ten-X and states that a review of the website during the auction showed bids of $4.5 million, $5.5 million, and then $7 million at the end of the auction. That testimony is further explained and clarified by the Declaration of

Mary Tang. Dckt. 83. The Tang Declaration states that the Property did not sell for $7 million as listed on the Ten-X website; instead, the highest bid received was $3 million.

Grounds Stated with Particularity (FED. R. BANKR. P. 9013)
Upon Which the Requested Relief Is Based

The Motion for Relief From the Automatic Stay states with particularity the following grounds as the basis for the requested relief:

> "The Motion is based upon cause, lack of adequate protection, and lack of equity. In the alternative, Movant requests that the Court issue an order requiring a Chapter 11 Trustee to be appointed, the case dismissed, or the case be converted to Chapter 7.
>
> The Bankruptcy Court has jurisdiction over this proceeding pursuant to 11 U.S.C. §362, 28 U.S.C. §157 and §1334, and it is a core proceeding within the definition of 28 U.S.C. §157(b).
>
> On or about April 7, 2017, UNITED CHARTER LLC ("Debtor") filed a Petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Eastern District of California, Division of Sacramento, Case No. 17-22347.
>
> This Motion is based upon the Notice of Hearing, the Motion, the Memorandum of Points and Authorities, the Declarations of L. Kurth DeMoss, Colin Morrison, and Mary Ellmann Tang, the Exhibits to the Motion Notice of Hearing, and the pleadings on file herein, the records and files in this action, and upon such further oral and documentary evidence as may be presented."

Motion, p. 2:2–15.

On its face, the "grounds" appear to be the "factual finding" by Movant that there is a "lack of equity" in the Property, as well as Movant's legal conclusions that cause exists and that Movant's interests are not adequately protected. There is little for the court to consider as "grounds," but merely adopt the legal conclusions and one factual finding of Movant. As discussed below, such pleading does not satisfy the basic law and motion pleading requirements of the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure.

It may be that Movant asserts that the court can canvas the notice of hearing, the points and authorities, three declarations, all of the exhibits, all of the pleadings filed in this case, and the records and files in this bankruptcy case, as well as whatever else Movant (without regard to the Local Bankruptcy Rules for the proper filing of pleadings and evidence) dumps on the court at the hearing. Then from canvassing everything above, the court can then draft for Movant the grounds and state them as required by Federal Rule of Bankruptcy Procedure 9013 for Movant. As discussed below, the court declines the opportunity to provide such legal services for a party in a contested matter or adversary proceeding.

DEBTOR IN POSSESSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION

Debtor in Possession filed a Memorandum of Points and Authorities in Opposition on December 11, 2017. Dckt. 103. Debtor in Possession disagrees with Movant's portrayal of the condition of the Property, of Debtor in Possession's rehabilitation efforts, and with Debtor in Possession's compliance with the cash collateral stipulation.

Debtor in Possession relates that a property tenant in August 2016 was discovered operating an illegal marijuana business and had rewired the electrical wiring and built illegal interior walls and ceilings. Debtor in Possession was required to make numerous repairs to comply with building codes and to restore power. While those repairs were happening, Debtor in Possession was not receiving rental income and was unable to make its monthly mortgage payments, leading to default. Debtor in Possession filed this case to prevent a foreclosure sale.

Debtor in Possession argues that improvements have been made to the Property as well, including install a fence around more than fifteen acres, cleaning up all trash, removing weeds, trimming overgrown grass, and removing broken window glass. Currently, Debtor in Possession states that there are no uncorrected citations by the City of Stockton or any other government agency.

When the Property was offered at auction through Ten-X, Debtor in Possession did not receive a successful third-party bid that was sufficient to Movant's secured claim. Debtor in Possession decided to list the Property for sale in the local market and tried to secure a tenant in the interim period before a potential sale.

Debtor in Possession heard from seven prospective tenants, six of whom have shown a strong interest in leasing the Property. Two potential tenants signed leases that await court approval, two are waiting for approval from the City of Stockton, and two have withdrawn interest because of city requirements. The remaining potential tenant is Wal-Mart, who has not yet clarified its interest.

For the two tenants awaiting court approval, Debtor in Possession states that they will lease 38,000 square feet and add $9,000.00 per month in the first year to Debtor in Possession's gross revenue from the Property. Debtor in Possession expects the monthly gross from those two leases to increase to $10,500.00 in their second years.

The other two leases would cover 30,0000 square feet and add approximately $7,000.00 per month to Debtor in Possession's gross revenue from the Property. A lease by Wal-Mart could be for 45,000.00 square feet and could add between $15,000.00 and $18,000.00 per month to gross revenue. Debtor in Possession is also finalizing a listing agreement for the Property with a broker, John Anderson.

In contrast to Movant's contention, Debtor in Possession argues that the April 10, 2017 property taxes were paid late because of a misunderstanding about whether there was authority to pay the taxes. For the "irregular" payments, Debtor in Possession argues that irregularity is not an event of default under the cash collateral stipulation. Additionally, for the one notice of default issued, Debtor in Possession cured the default.

Debtor in Possession argues that Movant has not calculated the cash collateral stipulation correctly. Debtor in Possession interprets the stipulation to require it to pay to Movant all net rents collected, after payment of $7,785.00 in monthly expenses and after paying the April 10, 2017 property taxes. Debtor in Possession argues that the most recent Operating Report for October 2017 shows Movant being overpaid, when $23,713.00 was due and $31,477.98 was paid. *Compare* Dckt. 98 (Operating Report), *with* Dckt. 84 (DeMoss Declaration stating that $31,477.98 was paid).

Debtor in Possession states that a Plan of Reorganization and Disclosure Statement have been drafted and are being finalized and will show Movant as the only creditor with a secured claim.

Debtor in Possession contends that its actions in prosecuting this case do not warrant granting relief from the automatic stay for Movant. To Debtor in Possession, Movant's accusations are misleading in a case that is being prosecuted in good faith.

DECEMBER 21, 2017 HEARING

At the hearing, the parties addressed information that may be "in flux." Dckt. 121. Counsel for Debtor in Possession stated that the potential preference issue is being addressed, as well as how Debtor in Possession's principal can be an independent fiduciary that does not have a conflict of interest due to the alleged preference.

The court continued the hearing to 10:30 a.m. on January 25, 2018. Dckt. 122. Supplemental pleadings were ordered to be served and filed on or before January 10, 2018, and opposition on or before January 19, 2018. Any final reply could be presented orally at the hearing or filed on or before January 23, 2018.

MOVANT'S SUPPLEMENT

Movant filed a Supplement on January 10, 2018. Dckt. 130. Movant argues that it has received copies of two leases. One lease is for Lionel Anthony Villareal D.B.A. A-1 Mobil Company, and it commenced September 2017 at $4,000.00 per month for the first two years, and then $5,000.00 per month for the third year. The other lease is for Espino Juan Antonio Navarro D.B.A. Central Pallets, and it commenced December 1, 2017 at $9,000.00 per month for the first year, with increases of approximately $450.00 per month for next two years. Movant states that rent rolls have increased from $15,400.00 in September 2017 to $24,900.00.

Movant notes, though, that A-1 Mobil Company had two checks bounce in December 2017 and has not paid the $4,000.00 rent.

For property taxes that were due April 2017 and December 2017, the San Joaquin County Assessor's website does not show that either has been paid. Movant received bank statements from Debtor in Possession showing that $28,599.85 was paid in December 2017, and Movant believes that amount is for April 2017 taxes and penalties.

Movant studied the lease listing agreement attached to John Anderson's Second Supplemental Declaration in support of a Motion to Employ and noted that the agreement includes lot line adjustments. *See* Dckt. 129. Movant is not aware of any approved lot line adjustments, however.

Movant argues that property taxes increased significantly in December 2017, which should cause Debtor in Possession to set aside $13,066.20 per month to pay overhead expenses. Calculating from the $24,900.00 in rent currently, Movant notes that Debtor in Possession will have only $11,833.00 with which to pay.

Movant argues that the factual grounds it has set out above are grounds for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1). Additionally, Movant argues that there is support for relief under 11 U.S.C. § 362(d)(2) as well. Movant argues that Debtor in Possession does not dispute a lack of equity. Then, Movant asserts that the increased property taxes, city citations, and vacant tenancies support a position that the Property is not necessary for an effective reorganization.

DEBTOR IN POSSESSION'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

Debtor in Possession filed a Supplemental Memorandum of Points and Authorities on January 16, 2018. Dckt. 134. Debtor in Possession confirms that it has executed the two new leases mentioned by Movant and also states that a third lease was not consummated.

Debtor in Possession counters Movant by stating that A-1 Mobile paid December 2017's rent and owes only January 2018 rent. Debtor in Possession also asserts that the property taxes have been paid. Debtor in Possession notes that there is an issue, however, of whether the San Joaquin Tax Collector will waive a late penalty that Debtor in Possession believes was inappropriate.

Debtor in Possession states that the lot line reference in the lease listing agreement was meant to be a convenient reference for the broker, but nothing more.

Debtor in Possession agrees with Movant that the cash collateral budget will need to be adjusted because of the increase in property taxes, but before submitting a new budget, Debtor in Possession seeks to employ an appraiser to reassess the Property's value and then seek a court order valuing the Property under 11 U.S.C. § 506.

Legally, Debtor in Possession argues that there is no cause to grant relief because rental income has increased, and if the Property's value is tied to how much rental income it generates, then the Property has increased in value significantly.

Additionally, Debtor in Possession notes that Movant asserts that a net operating income of $26,111.38 will be required to keep its claim current. While Debtor in Possession does not have that income currently, Debtor in Possession believes that it will be able to present a confirmable plan because there is additional space at the Property that is available to be rented. Debtor in Possession asserts that the additional space can generate $30,000.00 to $35,000.00 per month.

Debtor in Possession argues that the unsecured claims will support confirmation of a plan and argues that its ability to increase rental income so quickly indicates that it can propose a feasibly plan.

DISCUSSION

As indicated above, the present Motion suffers from several pleading issues. Before getting to the substance of the Motion, the court first addresses Movant's election to combine multiple claims for different types of relief in one motion.

Monthly Operating Report

The last Monthly Operating Report filed by Debtor in Possession is for November 2017. MOR filed December 18, 2017, Dckt. 115. It states that the Estate's actual revenues are $16,000.00 and that expenses are ($16,883). For the period from the filing of the case through November 2017, Debtor in Possession reports running a negative cash flow of ($57,270.00).

Multiple Claims for Relief Combined into One Motion

The court notes that this Motion attempts to join multiple claims for relief in one motion. The Motion seeks different types of relief, based on different legal authorities, in this one Motion. These multiple claims for relief are stated as:

A. Grant Relief from the Automatic Stay

B. Order Debtor to Turn Over Cash Collateral to Movant (sounding as a mandatory injunction)

C. Appoint a Chapter 11 Trustee

D. Dismiss the Case

E. Convert the Case to Chapter 7

Motion, p. 2:16–21. The first states a claim for relief arising under 11 U.S.C. § 362. The second appears to be requesting a mandatory injunction for Debtor in Possession to deliver collateral to Movant. The third distinct request for relief is the appointment of a trustee, dismissal of a case, or conversion to Chapter 7 (the court required to consider these three alternatives when presented with a motion seeking relief of any of the other two).

Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allow a party to join as many claims as it may have against an opposing party in a complaint. However, for the bankruptcy court's contested matter practice (motions and applications not made in an adversary proceeding), the United States Supreme Court has not included Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018. Federal Rule of Bankruptcy Procedure 9014(b). Though this court may make such Rule 7018 provisions applicable in a contested matter, it has not done so for this contested matter, and Movant

has not requested such application of Rule 7018 in this Contested Matter. Federal Rule of Bankruptcy Procedure 9014 does not provide a mechanism for a party to unilaterally impose the application in a contested matter.

The reason for the Supreme Court not allowing a party to combine various different claims for relief into one motion, as opposed to a complaint, is founded on several very practical principles. First, in a contested matter, the hearing can be conducted within fourteen to twenty-eight days. LOCAL BANKR. R. 9014-1(f); FED. R. BANKR. P. 9006(d), 2002. This can be contrasted to an adversary proceeding in which the responsive pleadings are not due until thirty-days after the issuance of a summons, no substantive motion generally not heard until nine to twelve months into the adversary proceeding, and the trial being conducted eighteen to twenty-four months after the complaint is filed.

Second, a motion may be only between the debtor and movant, such as a motion for relief from the automatic stay, or it may be between the movant and the world, such as a motion to dismiss, convert, or appoint a trustee. Throwing different claims for different relief in one motion can create a procedural mess of a conflicting "maybe they are, but maybe they are not, parties in interest" situation.

Request for "Turn Over" of Property of the Bankruptcy Estate

Included in the prayer of the Motion, Movant demands that the court order Debtor in Possession (though the motion states to have "Debtor" turn over the property of the estate, the court presumes that Movant actually is referencing Debtor in Possession, who is actually in possession of property of the bankruptcy estate) turn over "Cash Collateral" to Movant. The Motion does not state what grounds exist and any legal authority for the court to order such a "turn over" of the cash collateral.

In the twenty-page Points and Authorities, Movant provides a two-page discussion of "cash collateral. Dckt. 82 at 9–10. In the two pages, the legal discussion (which does not constitute grounds stated with particularity in the motion) why the court "must" order that the cash collateral be "turned over" to Movant consists of :

> "Movant duly filed a Notice of Perfection pursuant to § 546(b) on April 24, 2017. See Doc. #14. No other creditors claim an interest in the rents generated by the Property. Accordingly, the Court should order the Debtor to turn over the Cash Collateral to Movant."

Id., at 2:18–21. That statement reads in the general nature of the now clearly disapproved assertion that 11 U.S.C. § 105(a) empowers a bankruptcy judge to order whatever he or she thinks "right," notwithstanding any legal authority for such exercise of federal judicial power. *Stern v. Marshall*, 564 U.S. 462 (2011).

The Supreme Court has expressly provided in Federal Rule of Bankruptcy Procedure 7001(7) that a request for injunctive relief, such as a mandatory injunction requiring an opposing party to do something, must be by adversary proceeding. An exception is a proceeding to compel the debtor to deliver property to the trustee or a proceeding under 11 U.S.C. § 554(b) (compelling abandonment of property by a trustee, which abandonment is then made to the debtor) or § 725 (disposition of property not otherwise administered by a Chapter 7 trustee).

Interestingly, the term "turnover" and the court issuing an order for "turn over" of property arises under 11 U.S.C. § 542 and § 543, in which by motion the bankruptcy trustee may obtain an order for other persons to "turn over" property of the estate to the trustee. Movant is not a trustee and is not entitled to assert rights to have property of the estate "turned over" to Movant by virtue of a motion filed with the court.

Review of Minimum Pleading Requirements for a Motion

As addressed above, the Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. Fed. R. Bankr. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

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

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to 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.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

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

Review of Points and Authorities Grounds for Relief from Automatic Stay

While inappropriate as a pleading device by Movant, the court has reviewed the portion of Movant's Memorandum of Points and Authorities relating to the request for relief from the automatic stay to see if there is anything in the nature of irreparable harm that has been inadequately pleaded by Movant. Movant presents the following six arguments for cause under 11 U.S.C. § 362(d)(1):

1. A confirmable plan is not possible;

2. The auction requirement of $7.8 million price demonstrates that Debtor in Possession is not reasonable about settling debts;

3. Debtor in Possession has purposely failed to pay property taxes;

4. Cash collateral payments have been irregular;

5. Continued property violations are negatively affecting the Property; and

6. Debtor in Possession's actions regarding the auction may have been harmful to the Property's value.

The court is unpersuaded by any of the six arguments presented by Movant. First, a confirmable plan may be possible in this case. Movant presents its first argument on the grounds that the Property valuation and Debtor in Possession income are too low to pay debts through a Plan. Debtor in Possession has countered by describing how there may be several tenants in the near future that will increase gross revenue dramatically enough to fund a plan. The court declines to rule prematurely that a plan is not possible when Debtor in Possession presents evidence that a plan is being finalized and that more income could be arriving shortly (once the court approves lease agreements).

Second, Movant's entire argument that the auction price was unreasonable is based upon an assertion that Debtor in Possession "was being greedy." Dckt. 82 at 12:21–22. Merely seeking to receive a higher bid than the liabilities in this case is not indicative of greediness, and Movant's assertion is not conclusive proof of any act that warrants granting relief from the automatic stay. Movant has not presented any support for its "greediness" argument.

Third, Debtor in Possession has argued that property taxes were paid, despite Movant's assertion that they were not. Additionally, Debtor in Possession argues that the delay in paying them was due to a question of whether there was authority to pay them under the cash collateral stipulation. The court's latest order approving the continued use of cash collateral allocates $3,800.00 in monthly expenses for county property taxes, estimated to be paid as $22,800.00 semi-annually. Dckt. 77.

Fourth, irregularity of payments is not actually argued as being a ground for relief. Debtor in Possession has demonstrated that it has cured all defaults, but regardless, Movant only asserts that there have been a few "problems" receiving payments. Movant does not actually argue that any of the problems justify the court granting relief from the automatic stay.

Fifth, while Movant argues that it does not have confirmation that the marijuana violations have been resolved and that other tidiness violations have been issued, Debtor in Possession has provided a substantial timeline of events demonstrating how all violations have been cured. Debtor in Possession even asserts that as of now there are no violations on the Property asserted by the City of Stockton.

Sixth, Movant argues that redacting the minimum price for the Property at auction and that "increasing the bids to $4.5 million and $5.5 million" may have dampened the bidding process. As before, that contention is unsupported by any factual or legal basis, and Movant does not actually argue that its unsupported speculation is worthy of the court granting relief.

Under 11 U.S.C. § 362(d)(2), Movant argues that there is no equity in the Property valued at $4,580,000.00 with encumbrances of $5,357,181.59. Movant also alleges that the Property is not necessary for an effective reorganization because they are not generating sufficient revenue. As Debtor in Possession has presented, there may a significant increase in revenue in the near future, and the Property is necessary to generate those leasehold funds.

As stated by the court at the prior hearing, Movant's Motion for Relief from the Automatic Stay is lacking and has been rebutted sufficiently, both for the first hearing and now again with the supplemental pleadings, for the court to determine that denying the Motion is appropriate. Debtor in Possession has shown that it is receiving timely rent from the Property's tenants, that taxes have been paid (aside from late fees), that a broker is sought to be employed to generate more income, and that it is moving toward presenting a plan of reorganization. Movant's grounds have each been countered.

The court does not reach or address the additional requested relief. Denial of the Motion is without prejudice.

Additional Issues Raised By the Motion

In Movant's twenty pages of arguments, citations, quotations, conjecture, and speculation (the Points and Authorities) there is a passing reference made to an issue that may be significant in this case. If Movant had prepared a motion to convert, appoint a trustee, or dismiss, the issue may have been identified and advanced for the court to consider.

The relevant comments include:

> United Cabinet Supply ("UCS"), an entity owned by Zhang (the president and responsible representative of the Debtor in Possession), occupies space at the Properties and pays $6,000 per month in rent. UCS and other tenants have been late on lease payments causing delayed cash collateral payments to Movant. (Tang Decl. ¶10.)
>
> The September Cash Collateral check was received by Movant's counsel on October 18, 2017, but the amount of the check was only $3,235.00. Debtor's counsel explained that UCS and JAS Trucking paid late. (Tang Decl. ¶10.)
>
> . . .
>
> As evident in the Statement of Financial Affairs, between August 5, 2016 and March 28, 2017, the Debtor paid Raymond Zhang ("Zhang") $344,409.37, which was within the one year period prior to filing this case. Zhang is a co-borrower on the Note and managing member of Debtor (See Declaration for Non-Individual Debtor, Docket #12, p. 1)."

Dckt. 14 at 4:5–10; 5:11–14.

The above, if proven, may well be a basis for concluding that Debtor and Mr. Zhang have irreconcilable conflicts and are unable to serve as Debtor in Possession. However, when just thrown into a motion for relief from the stay, they are lost in the clutter of twenty pages of points and authorities and a motion instructing the court to read everything else in the file to identify the actual grounds asserted.

Additional Issues Arising During the Pendency of this Contested Matter

On Schedule A/B, Debtor states under penalty of perjury that the Property securing Movant's claim has a value of $7,885,018. Dckt. 12 at 4, 7–8, 9. On its proof of claim, Movant uses Debtor's statement of value as the value of its collateral. Proof of Claim No. 3. Movant's claim is stated to be $4,522,031.36 as of the commencement of the case. In the "Mothorities," Movant asserts that the secured claim has grown to $4,751,480.00 as of November 2, 2017. Dckt. 82 at 9:4–5.

While Debtor in Possession has tried to sell (by internet auction) the collateral and pay the secured claim, that sale did not generate a buyer to pay an amount sufficient for Debtor in Possession to seek approval of a sale. Debtor in Possession reported that it did not attempt to lease the Property to any new tenants, having followed the advice of the internet real estate broker that buyers would prefer to buy the Property without any more tenants in place.

Debtor in Possession is allowing to lapse the authorization to use cash collateral. The current order (Dckt. 77) expires on January 31, 2018. Debtor in Possession did not file pleadings for a further extension of that order, nor has Debtor in Possession filed a new motion for authorization to use cash collateral.

As of February 1, 2018, Debtor in Possession will not be authorized to use cash collateral to pay any expenses relating to any of the Properties.

As this court has previously addressed, Raymond Zhang the principal of Debtor in Possession, is also the recipient of what may be a preferential transfer in the amount of $344,409.37. Though raised as a concern, the court cannot find in the file for this case Mr. Zhang and the counsel for Debtor in Possession addressing that conflict. Rather, the statute of limitations for avoiding the preference is ticking down. The court did not and does not find persuasive Debtor in Possession's contention (it being presented by counsel for Debtor in Possession) that there will be more than enough time for a trustee, if one is appointed, to prosecute such a claim. That assertion all but demands the court immediately appoint a trustee to work to recover the monies. Mr. Zhang has not posted a bond or otherwise provided the Estate with any security for that obligation, to the extent it exists (after being asserted by the fiduciary Debtor in Possession or trustee for the Bankruptcy Estate).

In looking at the claims filed in this case, in addition to Movant there are:

A. Internal Revenue Service.....$16,047 Priority Claim (POC 1)

B. Franchise Tax Board.....$ 0 (POC 2)

On its Schedules executed under penalty of perjury by Mr. Zhang, Debtor in Possession also lists a secured claim owed to Wayne Bier in the amount of ($580,000), a property tax secured claim of ($26,078), and general unsecured claims of $9,000.00 to unrelated parties, a disputed unsecured claim for "fines" owed to the City of Stockton, and an unsecured debt of $33,657.93 owed to Raymond Zhang.

At the end of the day, the "real" economic players are Movant, Mr. Bier (whom we have not seen in this case), and Mr. Zhang (both as a creditor and possible "debtor" owing a preference obligation to the Bankruptcy Estate).

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxx**.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by East West Bank ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is **xxxxxxxxx**.
>
> All further and other relief beyond relief from the automatic stay is **xxxxxxxxxxxx**.

4. **17-22347-E-11** **UNITED CHARTER LLC** **MOTION TO EMPLOY THE VIRTUAL REALTY GROUP AS BROKER(S)**
JJG-3 **Jeffrey Goodrich** **12-18-17 [113]**

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, and Office of the United States Trustee on December 28, 2017. By the court's calculation, 26 days' notice was provided. The court set the hearing for 10:30 a.m. on January 25, 2018. Dckt. 125.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor in Possession, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Employ is xxxxxxxxxxxx.

United Charter LLC ("Debtor in Possession") seeks to employ The Virtual Realty Group (Team VRG) ("Broker"). FN.1. Debtor in Possession seeks the employment of Broker to lease industrial warehouse property in Stockton, California.

FN.1. Debtor in Possession has not cited any Code provision to support the Motion. That is a violation of Local Bankruptcy Rule 9014-1(d) and Federal Rule of Bankruptcy Procedure 9013.

Debtor in Possession argues that Broker's appointment and retention is necessary to generate rental income and funds for the Estate. Debtor in Possession argues that generating income will help to confirm a plan of reorganization. The leasing agreement provides that Broker will be compensated 6.00% of the total rent from December 26, 2017, through March 26, 2018. Exhibit B, Dckt. 114 (attached after Broker's Declaration).

John Anderson, a licensed real salesperson of The Virtual Realty Group (Team VRG), testifies that he is familiar with the market in Stockton for warehouse properties and that Broker agrees to represent only Debtor in Possession in leasing property. Mr. Anderson testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

CREDITOR'S OPPOSITION

East West Bank ("Creditor") filed an Opposition on December 19, 2017. Dckt. 116. Creditor opposes the Motion on the ground that Debtor in Possession "has a history of blaming its own professionals when things go wrong." *Id.* at 1:22–23.

Creditor argues that the Motion is misleading, asserting that Mr. Anderson is a salesperson, not a broker, as presented. Creditor even argues that listing Virtual Realty Group as Mr. Anderson's employer is a false representation because it is a cloud-based realty group of which Mr. Anderson is a member.

Creditor reports that Virtual Realty Group provides "'tools' to help members who 'do not need to be told what to do.'" *Id.* at 2:4–5 (citing Exhibit 3, Dckt. 118). Those tools include videos, property brochures, and business cards. *Id.* Furthermore, Creditor argues that Virtual Realty Group holds itself out as primarily working with residential real estate, with commercial transactions happening only occasionally. Mr. Anderson's résumé includes several commercial transactions, but Creditor questions whether he was involved in them because he has been a salesperson for two years. Creditor argues that clearer information needs to be provided to determine if the employment is reasonable.

SUPPLEMENTAL DECLARATION

Mr. Anderson filed a Supplemental Declaration on December 20, 2017. Dckt. 120. He argues first that he has not been misleading. He argues that he described his employment as a licensed salesperson, not as a broker. Mr. Anderson states that he spoke with Broker, and although he is authorized to sign the listing agreement that Debtor in Possession seeks, Eric Israel (Broker's licensed broker principal) will be signing instead.

Mr. Anderson also argues that he is experienced with commercial transactions, having spent more than fifteen years as a buyer and seller of commercial and industrial/development property. In that time, he leased shopping centers, light and heavy industrial properties, medical and professional offices, and negotiated land and industrial purchases. He claims that he was personally able to grow a real estate portfolio for his employer during that time from $14,000,000.00 to over $100,000,000.00.

SECOND SUPPLEMENTAL DECLARATION

Mr. Anderson filed a Second Supplemental Declaration on January 9, 2018. Dckt. 129. The Second Supplemental Declaration was filed to introduce to exhibits. FN.2. One is a signed leasing agreement, signed by both Mr. Anderson and Mr. Israel for Virtual Realty Group. The other exhibit is an updated résumé for Mr. Anderson that includes more description of the projects he has worked on during his career.

FN.2. The Anderson Declaration and Exhibits were filed in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Parties are reminded of the court's expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

APPLICABLE LAW

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.

DISCUSSION

While John Anderson has provided additional information concerning his experience, the conduct of Debtor in Possession raises serious concerns whether such employment is proper at this time. Debtor in Possession will not be authorized to use cash collateral after January 31, 2018. The Bankruptcy Estate has been operating at a loss since the filing of this case. Other than the real property, the principal asset of the Estate is a possible preference claim against Mr. Zhang, the responsible person for Debtor in Possession fulfilling its fiduciary duties.

The court is concerned that granting the present Motion may create the appearance that the court is finding that everything is going smoothly in this case.

At the hearing, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker 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 John Anderson, as the agent, and The Virtual Realty Group (Team VRG) as Broker for the Chapter 11 Estate on the terms and conditions set forth in the Lease Listing Agreement filed as Exhibit A, Dckt. 129. Approval of the commission 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 United Charter LLC ("Debtor in Possession") 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 Debtor in Possession is authorized to employ John Anderson, as the agent, and The Virtual Realty Group (Team VRG) as Broker for Debtor in Possession on the terms and conditions as set forth in the Lease Listing Agreement filed as Exhibit A, Dckt. 129.

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.

5. **17-22347-E-11** **UNITED CHARTER LLC** **STATUS CONFERENCE RE: VOLUNTARY PETITION**
Jeffrey Goodrich **4-7-17 [1]**

Debtor's Atty: Jeffrey J. Goodrich

Notes:
Continued from 9/6/17 to 1/17/18
Order rescheduling status conference to 1/25/18 to be heard in conjunction with other motions on calendar filed 12/26/17 [Dckt 123]

Operating Reports filed: 9/21/17, 10/17/17, 12/4/17 [Oct], 12/18/17

JANUARY 25, 2018 STATUS CONFERENCE

At the Status Conference it was reported **xxxxxxxxxxxxxxxxxxxx.**

SEPTEMBER 6, 2017 STATUS CONFERENCE

Debtor in Possession and active parties in this case have been before the court for several recent matters relating to the actions being taken by Debtor in Possession in prosecution of this case. Such hearings have provided the court and the active parties in interest in this case with the information that would normally be presented at a Status Conference. In light of the proceedings in this case, the court continues the Status Conference.

MAY 31, 2017 STATUS CONFERENCE

STATUS CONFERENCE SUMMARY

This Chapter 11 case was commenced with the filing of a voluntary Chapter 11 petition on April 7, 2017. In the Status Report filed on May 5, 2017, Debtor in Possession reports that it believes the Estate is solvent based on the ownership of several parcels of real property in Stockton, California. The Chapter 11 case was filed to afford Debtor in Possession the opportunity to reorganize the Estate rather than having foreclosures on the real property of Debtor to be conducted. Case Number: 2017-22347, Filed: 5/31/2017 Dckt. 25.

Debtor in Possession reports that all cash collateral is being deposited in bank accounts. Further, Debtor in Possession believes that stipulations for the use of cash collateral will be reached with the respective creditors.

6. 14-29361-E-7 WALTER SCHAEFER MOTION TO ABANDON
DNL-26 Douglas Jacobs 12-21-17 [409]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 21, 2017. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

The Motion to Abandon was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Abandon is granted.

After notice and hearing, the court may order a 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).

The Motion filed by Kimberly Husted ("the Chapter 7 Trustee") requests that the court authorize her to abandon property commonly known as 728 Clifford Drive, Westwood, California ("Property"). The Property is encumbered by the lien of U.S. Bank Home Mortgage, securing a claim of $266,428.59. The Declaration of Kimberly Husted has been filed in support of the Motion and provides testimony that the value of the Property is $312,000.00.

The Property's value as stated in the Declaration of Kimberly Husted and in Schedule A is $312,000.00. Walter Schaefer ("Debtor") claims an exemption on the Property of $32,500.00, and U.S. Bank Home Mortgage asserts a secured claim totaling $266,428.59 against the Property. That amounts to $298,928.59. Additionally, extensive issues with the Property's plumbing and sewer systems have been

discovered resulting in liability issues and necessary repairs. After accounting for Debtor's exemption, U.S. Bank Home Mortgage's secured claim, and the plumbing and sewage liability and cost, no meaningful value remains for administration of a sale of the Property, nor does the Estate retain any value from the Property. The Chapter 7 Trustee argues that sale and administrative costs would be more than the remaining equity. Therefore, the Chapter 7 Trustee requests that the court order the Property abandoned to Debtor.

The court finds that the Property secures a claim that equates to the value of the Property, and there are negative financial consequences for the Estate if it retains the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and authorizes the Chapter 7 Trustee to abandon the Property.

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

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

The Motion to Abandon Property filed by Kimberly Husted ("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 Compel Abandonment is granted, and the Property identified as 728 Clifford Drive, Westwood, California, is abandoned to Walter Schaefer ("Debtor") by this order, with no further act of the Chapter 7 Trustee required.

7. 14-29361-E-7 WALTER SCHAEFER MOTION TO USE CASH COLLATERAL
DNL-27 Douglas Jacobs 12-21-17 [414]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 21, 2017. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Authority to Use Cash Collateral is granted in part and denied in part.

Kimberly Husted ("the Chapter 7 Trustee") moves the court for an order authorizing the Chapter 7 Trustee to use cash collateral to repair Walter Schaefer's ("Debtor") rental property commonly known as 728 Clifford Drive, Westwood, California ("Property"). The Chapter 7 Trustee states that after complaints from tenants at the Property, a licensed plumber inspected the Property and found extensive plumbing and sewage issues to septic tanks, the sewer line, and potentially, leech fields.

In anticipation of selling the Property, the Chapter 7 Trustee took efforts to preserve the Property, which included immediate repairs in the amount of $2,495.00, and the Chapter 7 Trustee anticipates that an additional $2,000.00 in repairs will be necessary. The Chapter 7 Trustee is holding approximately $11,000.00 from rent payments by the Property tenants, and she requests authority to use those funds for the repairs.

The Chapter 7 Trustee has also moved in a separate motion for the Property to be abandoned back to Debtor. The Chapter 7 Trustee states that the first expenses of $2,495.00 were spent while the Chapter 7 Trustee was working to sell the Property to generate funds for the Estate. The remaining $2,000.00 that the Chapter 7 Trustee seeks approval for relates to anticipated repairs.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

The Chapter 7 Trustee directs the court to 11 U.S.C. § 506(c) for being able to recover expenses by showing that such expenses incurred were reasonable, necessary, and beneficial. *See also Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp., Inc.*, 255 F.3d 1061, 1068 (9th Cir. 2001).

DISCUSSION

Much like when seeking permission from the court to incur administrative expenses, the Chapter 7 Trustee must show that the expenses are reasonable and necessary to the preservation of the Estate. In this case, the Chapter 7 Trustee spent $2,495.00 when there appeared to be a potential sale of the Property. Those expenses were deemed necessary to preserve the Property in anticipation of any sale. The court agrees that those expenses from cash collateral of withheld rental income were necessary and beneficial to the Estate.

The remaining $2,000.00 that the Chapter 7 Trustee requests authority to use, however, is for anticipated repairs to the Property. The Chapter 7 Trustee has moved to abandon the Property, though, and the court has not been presented with an argument why those expenses are necessary for preserving or benefitting the Estate. Those expenses are not approved by the 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 for Approval of Cash Collateral Stipulation filed by Debtor in Possession 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 in part, and Kimberly Husted ("the Chapter 7 Trustee") is authorized to use $2,495.00 from cash collateral (specified as coming from approximately $11,000.00 held from property rental income) for repairs made to 728 Clifford Drive, Westwood, California ("Property").

IT IS FURTHER ORDERED that the Motion is denied in part as to the Chapter 7 Trustee's request to use $2,000.00 of cash collateral for anticipated repairs to the Property, the Property having been abandoned back to Walter Schaefer ("Debtor") and there appearing to be no benefit to the Estate.

8. 17-22593-E-7 HOWARD THOMAS — MOTION TO RELEASE FUNDS HELD BY CHAPTER 13 TRUSTEE
WSS-10 Steven Shumway — 12-21-17 [152]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 21, 2017. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

~~The Motion to Release Funds is denied without prejudice.~~

Howard Thomas ("Debtor") moves for a court order to release an exempt portion of funds held by David Cusick ("the Chapter 13 Trustee") after a sale of Debtor's real property located at 1913 Ambridge Drive, Roseville, California ("Property"). Debtor states that he sold the Property and deposited net proceeds of $70,546.25 with the Chapter 13 Trustee. He also argues exempted $100,000.00 in the Property.

Debtor argues that even if he changes his exemption to be under California Code of Civil Procedure § 703.140(b)(5), then he would be entitled to $26,500.00, plus all excess proceeds from the sale. That excess amount totals $57,000.00. He states that scheduled unsecured claims total slightly more than $13,000.00.

Debtor requests a court order releasing at least $57,000.00 to Debtor and retaining jurisdiction over the remaining funds why any issue about exemptions is resolved with Kimberly Husted ("the Chapter 7 Trustee").

CHAPTER 13 TRUSTEE'S REPLY

The Chapter 13 Trustee filed a Reply on December 28, 2017. Dckt. 155. The Chapter 13 Trustee states that he is holding $66,172.38. $70,546.25 was received, and pursuant to the court's order, the Chapter 13 Trustee withdrew $4,373.87 in compensation.

The Chapter 13 Trustee does not oppose turning over $66,172.38, whether as $57,000.00 to Debtor and $9,172.38 to the Chapter 7 Trustee, or by some other combination. He states that he needs to distribute the funds before he can file a Final Report.

CHAPTER 7 TRUSTEE'S RESPONSE

The Chapter 7 Trustee filed a Response on January 11, 2018. Dckt. 158. The Chapter 7 Trustee argues that abandonment of the funds is premature because the exemption deadline will not pass until January 14, 2018, thirty days after the Meeting of Creditors.

The Chapter 7 Trustee also argues that the net sale proceeds are no longer exempt because more than six months have passed since the net proceeds were received in June 2017. *See* CAL. CIV. P. § 704.720(b). The Chapter 7 Trustee argues that Debtor has made no attempt to reinvest the net proceeds.

Additionally, the Chapter 7 Trustee notes that the claims filing deadline will not pass until March 2018, so any surplus amount cannot be calculated yet for the net proceeds. The Chapter 7 Trustee argues that Debtor has not shown any exigent circumstances to warrant expediting distribution of the funds.

The Chapter 7 Trustee states that she would not oppose immediate disbursement of the funds (less the $10,880.84 already paid to a moving company) if Debtor amends his exemption claims to assert $26,500.00 as a wild card exemption.

DEBTOR'S REPLY

Debtor filed a Reply on January 17, 2018. Dckt. 176. Debtor's counsel argues (no declaration of Debtor provided) that he was prevented from reinvesting the net sale proceeds because he never received the funds. He argues that the court's order approving the sale required the funds be deposited with the Chapter 13 Trustee and denied him the ability to reinvest the funds.

DISCUSSION

While several parties have argued about Debtor's request for a court order releasing the funds, and whether and in what amount they should be released, there is a preliminary problem with the Motion: The Motion does not cite the court to any authority for the requested relief. Local Bankruptcy Rule 9014-1(d)(3)(A) requires reference to legal authority and states:

> The application, motion, contested matter, or other request for relief shall set forth the relief or order sought and shall state with particularity the factual legal grounds therefor. Legal grounds for the relief sought means citation to the statute, rule, case, or common law doctrine that forms the basis of the moving party's request but does not include a discussion of those authorities or argument for the applicability.

Debtor has not cited any legal authority in the Motion and has not filed a separate Memorandum of Points and Authorities.

In response, the Chapter 7 Trustee has raised at least two legal grounds for not granting the Motion with Debtor's current exemption. First, the Chapter 7 Trustee cites California Code of Civil Procedure 704.720(b) (and related Ninth Circuit interpretations) about how funds must be reinvested within six months to qualify for the homestead exemption. A review of the court's order retroactively approving the sale of property reveals that it is the court's standard order for sales of properties and does not prevent Debtor from reinvesting the funds. *See* Dckt. 111. Specifically, the order states that "[a]ll rights, exemptions, and other interests of Debtor continue in the proceeds notwithstanding said proceeds being delivered to the Chapter 13 Trustee." *Id.* (Paragraph F). Debtor's argument that he could not use the funds because they were never delivered to him fails given the court's specific order that his right to exemptions continued despite being delivered to the Chapter 13 Trustee.

Additionally, Debtor offers no evidence that he made any attempt to reinvest the monies into a new residence. The court expressly preserved all of his rights as he asserted them. Those rights being preserved, it was for Debtor to act upon them. As discussed below, there may be reasons why Debtor has been unable to act and why those who owe him a fiduciary duty failed to act.

That being said, as discussed in the court's Civil Minutes from the hearing to retroactively approve the sale, there are extra ordinary facts and circumstances in this case. Civil Minutes, Dckt. 111. This was a situation where Debtor was incarcerated and a woman who held his power of attorney and his attorney in this case were proceeding with a sale intended to pay significant monies to both of them, while potentially wasting Debtor's exemption. As stated in the Civil Minutes:

> "Generally applying these principles, extrapolating from prior hearings and testimony, the failure to obtain prior approval arose due to error. While unclear how a title company could have closed escrow if told by Debtors counsel of the pending bankruptcy case, Debtor and his counsel (and his fiduciary exercising the power of attorney) have come to the court. It appears that Debtors counsel believed that he

could just get this case dismissed days before the escrow closed, not appreciating the courts concerns with how the purported power of attorney was being exercised.

Interests of Debtor

On the second point, approving the sale is in the best interests of Debtor (who has a significant exemption) and the buyer. Not approving the sale could create a series of costly, expensive lawsuits in which the title company, lenders, real estate agents, the buyer, counsel for Debtor, the fiduciary exercising the power of attorney, and insurance companies for all point the finger in the other direction. The costs of such litigation could well exceed the sales price. The sales price is consistent with Debtors stated value of the Property.

This case has a somewhat short, but tortured history in which Debtor, who is incarcerated, has had his financial life handled by a woman who holds his power of attorney (who while stated to be his wife, it has been presented to the court that no marriage license has been filed with the County Recorder) and his attorney.

Debtor has appeared telephonically at a prior status conference, and the court is confident that Debtor's counsel is actually communicating with his client and not merely doing the fiduciary persons bidding."

Dckt. 110.

The troubled history of this case is reviewed in the Civil Minutes from the Status Conference the court ordered in the Chapter 13 case due to the perceived conduct of his fiduciaries.

"On June 14, 2017, Steven Shumway, as the attorney for Putative Debtor, filed a Status Report as requested by the court. Dckt. 47. In it counsel states that on some unstated date prior to February 2015, Putative Debtor married Easter Perkins. Status Report, p. 2:45; Dckt. 47. However, at the June 15, 2017 hearing on the Motion for retroactive approval of the sale of property, Mr. Shumway advised the court that the actual marriage documents may not have been completed. Whether such a marriage exists is an open question, not a fact as stated in the Status Report.

In denying without prejudice the Motion for retroactive approval, **the court noted that Easter Perkins, Mr. Shumway as counsel for Putative Debtor, and others for whom disbursements from the sales proceeds were sought appeared to be more interested in getting their money than properly fulfilling Ms. Perkin's [duties]** under the purported power of attorney in acting in Putative Debtor's interests. **It appeared that Ms. Perkins, with the assistance of Mr. Shumway, was willing to gift more than $12,000.00 to a creditor with an avoidable lien and wasting that much of Putative Debtor's homestead exemption. Civil Minutes, Dckt. 54**."

The referenced prior Civil Minutes were from the Motion to Employ Broker and Sell Property, with Debtor's fiduciary exercising the power of attorney and Debtor's attorney to be paid monies from the proceeds.

"Conflict of Interest

> The Chapter 13 Trustee notes that Steven Shumway may have now created a conflict of interest in that the Motion **Mr. Shumway filed requests not only disbursements to the purported spouse of Debtor and the two sons, but also to Mr. Shumway himself.** That disbursement is for legal services in prior bankruptcy cases, the current bankruptcy case, and for working on the sale.
>
> **At the prior hearing where this legal mess was disclosed, no mention was made by Mr. Shumway that he was "profiting" from the sale and getting any of the sales proceeds**. The court has ordered Mr. Shumway to hold all of the sales proceeds disbursed from escrow on Putative Debtor's interest to be held in Mr. Shumway's trust account and not to be disbursed except upon further order of the court."

Civil Minutes, Dckt. 54.

Though available to Debtor, to get the proceeds, he needed the assistance of the above counsel. The Order approving the sale clearly provides only that the Chapter 13 Trustee is "holding" the monies.

Second, the Chapter 7 Trustee argues that distribution of expected surplus is not necessary yet because the claims filing date has not passed. That deadline is March 19, 2018. Debtor has not presented any reason (such as a purchase of real property he wishes to consummate) why an early distribution would be warranted.

On January 16, 2018, the Chapter 7 Trustee filed her Objection to Claim of Exemption. Dckt. 169. The grounds asserted are the failure to reinvest the monies within the six-month period stated under California Code of Civil Procedure § 704.720.

As a practical matter, Debtor being incarcerated, his ability to reinvest the monies may have been limited. Further, when the property was sold it was by the fiduciary of the Bankruptcy Estate (as a bankruptcy trustee would) not by Debtor personally.

The Chapter 7 Trustee's Objection to Claim of Exemption is based upon the failure to reinvest the monies within the six-month period. Cited first is *In re Golden*, 789 F.2d, 700 (9th Cir. 1986). In *Golden*, the debtor sold his home and held $25,000.00 in sales proceeds. Two months later, he filed a Chapter 7 bankruptcy. When the debtor in *Golden* filed bankruptcy he did not own the house, and only had the $25,000.00 in cash proceeds (subject to the homestead exemption proceeds exemption). The home itself was never property of the bankruptcy estate.

The Chapter 7 Trustee also cites the court to *In re Jacobson*, 676 F.3d 1193, 1198 (9th Cir. 2012). In *Jacobson*, a state court judgment creditor obtained relief from the automatic stay to conduct a judicial sale of the debtor's home. The debtor claimed an exemption pursuant to California Code of Civil Procedure § 704.720. After the sale occurred, the exemption portion of the proceeds were turned over to the debtor. The Ninth Circuit Court of Appeals concluded that there was no material difference between *Golden*, a pre-

petition sale by a creditor and a post-petition sale by a creditor. Because the creditor had the right to force a sale of the property, then the reinvestment requirement of California Code of Civil Procedure § 704.720(b) was applicable.

Debtor's Response to the current Opposition offers an anemic attempt to protect Debtor's rights. The Response offers no citations to the law, cases, or to the legal arguments clearly laid out by the Chapter 7 Trustee. Instead, counsel merely argues that Debtor never "received" the monies. That response and advocacy for Debtor harkens back to when counsel, working with the supposed fiduciary for Debtor under the power of attorney, worked to push the retroactive approval of a sale that would not only have diverted sales proceeds to counsel and the purported fiduciary, but also paid a judgment lien creditor with an avoidable judgment lien, further wasting Debtor's homestead exemption.

Though the Parties and their respective counsel will have to better develop their arguments, because there is a statutory requirement at issue, the court always begins with the statute at issue. California Code of Civil Procedure § 704.720(b) provides:

> "(b) **If a homestead** is sold **under this division** or is damaged or destroyed or is acquired for public use, the proceeds of sale or of insurance or other indemnification for damage or destruction of the homestead or **the proceeds** received as compensation for a homestead acquired for public use **are exempt** in the amount of the homestead exemption provided in Section 704.730. The proceeds are exempt **for a period of six months after the time the proceeds are actually received by the judgment debtor**, except that, if a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during that period, the proceeds thereafter are not exempt."

It appears that this limitation of the homestead exemption arises when there is a sale of the property under Division 2 of the California Code of Civil Procedure—Enforcement of Money Judgments. Here, Debtor, acting as the fiduciary of the Bankruptcy Estate, sold the real property that was property of the bankruptcy estate. Debtor had claimed an exemption in such property. There was no sale under the above Division 2. That differs greatly from both *Jacobson* and *Golden*.

This highlights another concern the court has with the current request. While Debtor's counsel has filed a motion to have the money released, there is no declaration from Debtor. If Debtor is still incarcerated, who actually is getting the money? Is the fiduciary with the power of attorney taking the money? Is counsel paying himself from the money? The Motion and Response fail to provide for and address the legal issues. Rather, it is merely a motion saying "show me the money, and let me take it!"

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxxx**.

The Chapter 7 Trustee has indicated that there would be no opposition to a release of funds if Debtor amends his exemptions, but Debtor has not made a change to his exemptions. As the exemptions stand, Debtor has not presented a sufficient legal ground for releasing the funds to him, and the Chapter 7 Trustee has presented grounds for opposing releasing the funds.

The Motion ~~is denied without prejudice~~.

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

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

The Motion to Release Funds filed by Howard Thomas ("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~~.

9. **17-22593-E-7** **HOWARD THOMAS** **OBJECTION TO CLAIM OF ALADDIN BAIL BONDS, CLAIM NUMBER 4**
WSS-9 **Steven Shumway** **11-30-17 [135]**

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Chapter 7 Trustee, creditors, and Office of the United States Trustee on November 30, 2017. FN.1. By the court's calculation, 56 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

FN.1. The Certificate of Service does not state a date upon which service was performed. Instead, the Certificate states "On this date, I served the following documents," which is followed at the end of the document by "Dated: 11/3017." The Certificate was filed on November 30, 2017, and the court interprets the error to be a mere scrivener's error that was meant to indicate that service was performed on November 30, 2017.

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 4 of Aladdin Bail Bonds is xxxxxx.

Howard Thomas, Chapter 7 Debtor ("Objector") requests that the court disallow the claim of Aladdin Bail Bonds ("Creditor"), Proof of Claim No. 4 ("Claim"), Official Registry of Claims in this case. The Claim is alleged to be unsecured in the amount of $11,200.00. Objector asserts that the claim is for a bail bond with a premium of $1,050.00 and an expense of $15.00, for a total of $1,065.00.

Objector argues that he paid $500.00 against the premium and attended all of the hearings on the case for which the bond was posted. Objector argues that the filed proof of claim is incorrect and should instead be in the amount of $565.00.

FILING OF AMENDED CLAIM

After this Objection was filed, Creditor amended its claim by filing Proof of Claim 4-2 on December 5, 2017. Creditor asserts that the amount of its unsecured claim is $700.00. Attachments to the Proof of Claim show $565.00 remaining on Objector's bond, but the attachments also show an additional $135.00 is due for a bail bond of Darryl Anthony Thomas. The account summary attachment for that bond show that Objector made one payment of $50.00 to that second bond's premium.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Creditor has not responded to this Objection, but Creditor did file an amended proof of claim after the Objection was filed, seeming to agree that the $11,200.00 asserted was incorrect and instead asserting that its claim is for $700.00. Objector argues that the claim is for $565.00, though. Both parties agree that $565.00 is owed on Objector's bail bond, but Proof of Claim 4-2 also includes $135.00 owed for a bond for Darryl Anthony Thomas. Objector has not discussed any obligation he has to pay that bond.

At the hearing, Objector agreed that the Creditor's claim is for $700.00, or Objector disagrees with Proof of Claim 4-2 and argues that he is not liable for the additional $135.00 for Darryl Anthony Thomas's bail bond because **xxxxxxxxx**.

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 Objection to Claim of Aladdin Bail Bonds, Creditor filed in this case by Howard Thomas, Chapter 7 Debtor ("Objector") 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 Objection to Proof of Claim Number 4 of Aladdin Bail Bonds is xxxxxxxxxxx.