

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

March 7, 2024 at 10:30 a.m.

- | | | |
|--|--|--|
| 1. 23-90111-E-11
DL-5 | MICHAEL HOFMANN
Brian Haddix | MOTION TO SELL FREE AND CLEAR
OF LIENS AND/OR MOTION FOR
COMPENSATION FOR KELLER
WILLIAMS MARKET CENTER 153,
REALTOR(S)
2-3-24 [249] |
|--|--|--|

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. Two Proofs of Service were filed in this matter. The first Proof of Service (Docket 253) states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 11 Subchapter V Trustee, parties requesting special notice, and Office of the United States Trustee on February 3, 2024. The second Proof of Service (Docket 255) states all creditors and parties of interest were served on February 5, 2024. By the court's calculation, 33 and 31 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

Movant appears to be 2 and 4 days short for providing notice as required by FED. R. BANKR. P. 2002(a)(2) and LOCAL BANKR. R. 9014-1(f)(1)(B). **In light of the substantial period of notice given, this Motion being part of a larger process that the Parties in Interest have been collaborating to move this case positively forward, and the issues to addressed (which should be able to be addressed at the March 7, 2024 hearing), the court shortens the notice period to the time given.**

The Motion to Sell Property 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 Sell Property is ~~XXXXXXX~~.

The Bankruptcy Code permits Walter R. Dahl, the Chapter 11 Subchapter V Trustee, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Although a Subchapter V Trustee does not normally have authority to conduct a sale of property of the Bankruptcy Estate, the court entered an Order on July 7, 2023 authorizing Movant to market and sell property of the Estate in this case. Order, Docket 119. Here, Movant proposes to sell the real property commonly known as 13330 Valley Home Road, Oakdale, California, 95361 (“Property”).

The proposed purchaser of the Property is Patrick and Tracy Cleghorn (“Purchaser”), and the terms of the sale are:

- A. The sales price is \$519,000.00. Motion, Docket 229, p. 3:2-17.
- B. The terms of sale provides that Trustee disclaims all representations and warranties, express or implied as to the Property, other than the warranty of title, and that the Residence is being sold “AS IS, WITH ALL FAULTS”. *Id.*
- C. The Purchaser understands that the sale of the Property is subject overbidding at the Hearing on this Motion. *Id.*
- D. The terms of sale include a real estate brokerage fee of 5.0% of the sales price, to be shared between Trustee’s broker/agent and Purchaser’s broker/agent as they agree, and to be paid directly from escrow upon closing. *Id.*
- E. Exhibit B, Docket 251 is a true and correct copy of the sale agreement which lists all the terms of sale.

The Movant has proposed terms and conditions of bidding at the Hearing which are:

- A. In order for a party other than the Purchaser to qualify as a bidder at the Hearing, the party must have provided the Movant an initial deposit of \$5,000.00 via cashiers check. Following the conclusion of the Hearing, Movant shall refund to all qualified bidders their initial deposit. Motion, Docket 229, p. 3:19-28.
- B. The initial overbid at the Hearing shall be no less than \$5,000.00 over \$519,000.00. Thereafter, the court may establish the minimum overbid increments. *Id.*
- C. The in-court auction shall proceed until no higher bid is received from a qualified bidder. *Id.*

- D. In the event the highest bidder fails to tender the additional deposit or otherwise defaults, Movant is authorized to sell the Property to the second highest bidder. Motion, Docket 229, p. 4:1-22.
- E. The highest bidder at the Hearing shall execute and deliver to Movant within two business days following the conclusion of the Hearing, a purchase and sale agreement substantially on the same terms and conditions as the Purchaser's sale agreement. *Id.*
- F. In the event that the highest bidder elects not to purchase, the second highest bidder will be notified via email, and shall execute and deliver to Movant within two business days following the notification a purchase and sale agreement substantially on the same terms and conditions of the Purchaser's sale agreement. *Id.*
- G. In the event that the Property is sold to another buyer at the Hearing, Movant shall reimburse Purchaser at close of escrow from the sale proceeds up to \$5,000.00 for any inspection report, service or appraisal performs and paid by the Purchaser. *Id.*

Movant submits the declaration of Paul Boudier, Movant's real estate agent in the sale, to provide testimony as to fairness of the sale. Decl., Docket 252.

Creditor Opposition

Rural Community Assistance Corporation ("Creditor") filed an Opposition to this Motion on February 28, 2024. Opposition, Docket 257. Creditor does not object to the sale of the Property, but wants to ensure that the sale does not include personal property that Creditor has an interest in. *Id.* Creditor obtained an order on September 11, 2023, confirming that the automatic stay did not go into effect as to the items of collateral for Creditor that are owned by Valley Home Rice Company, a company which Debtor is a 49% owner. Order, Docket 159; *See* Schedule A/B, Docket 32 line 19.

The court confirmed that the automatic stay provisions of 11 U.S.C. § 362(a) do not apply to the "inventory, Chattel Paper, Accounts, Accounts Receivable, General Intangibles, Furniture, Fixtures, and Equipment of The Valley Home Rice Company ("VHRC"), which VHRC pledged to secure an obligation owed to [Creditor], which obligation Michael Erich Hofmann ("Debtor") provided an unsecured personal guaranty for." Order, Docket 159.

On February 21, 2024, Creditor filed a fixture filing in two grain storage bins owned by VHRC, serial numbers PNEG-012 and PNEG-013 ("Grain Storage Bins"). Exhibit 3, Docket 258. The Grain Storage Bins are located on the premises of the Property. It appears that the Grain Storage Bins were listed as collateral in the 2019 UCC-1 financing statement (Exhibit 2, Docket 258), as to which the court granted relief from stay in its September 11, 2023 Order. Creditor wants to ensure these and other items of its collateral are not sold in the sale of the Property.

Movant's Response

The Subchapter V Trustee, Movant in this Motion, responded to Creditor's Opposition on March 1, 2024. In his Response, Movant states:

- A. Movant has ensured that none of Creditor's collateral is included in the proposed sale. Docket 260, ¶ 8. In fact, Movant states his real estate agent, Paul Boudier, has advised Purchaser's real estate agent that none of the personal property as listed in Creditor's 2019 UCC financing statement is included in the sale of the Property. *Id.* at ¶ 9.
- B. Movant further states that Movant will advise all potential bidders and other parties in interest at the March 7, 2024 Hearing that the sale of the Property does not include Creditor's collateral, and if any of the collateral remains on the Property at the close of escrow, it may be subject to removal by Creditor or VHRC. *Id.* at ¶ 10.
- C. Movant urges Creditor to expunge its fixture filing, stating it was unnecessary and deficient, and it has clouded title of the Property.
- D. Movant argues the fixture filing was unnecessary because Cal. Com. Code § 9334(f) gives creditor priority without having to file the fixture filing. *Id.* at ¶ 13.
- E. Movant argues the fixture filing is deficient pursuant to Cal. Com. Code § 9502(b)(4) because the fixture filing does not provide the name of a record owner of the real property. The fixture filing only provides the name of VHRC, but VHRC has no interest of record in the Property. *Id.* at ¶ 16.
- F. Finally, Movant argues the post-petition fixture filing violates the automatic stay as it clouds the title of the Property. *Id.* at ¶ 17.

Sale Free and Clear of Liens

The Motion seeks to sell the Property free and clear of the liens of Sharon and Gary Hofmann ("Hofmann Creditor") and "all other parties claiming an interest in the Property" pursuant to 11 U.S.C. §§ 363(f) and (h). Docket 249, ¶ 23e. The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

(f) The trustee, [debtor in possession, or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(1)–(5). Further,

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate’s interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate’s undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

For this Motion, Movant has not expressly identified a reason under 11 U.S.C. § 363(f)(1)-(5) or shown that the conditions of 11 U.S.C. § 363(h) are fulfilled sufficient to sell the Property free and clear of liens. Instead, Movant requests that,

The balance of the sales proceeds to Trustee to be held in a separate interest-bearing account pending entry of an order of the Bankruptcy Court directing Trustee to disburse such proceeds among Michael, Sharon and Gary as their interests have been determined by prior orders of the Stanislaus County Superior Court. The liens, encumbrances, and other interests of Michael, Sharon, Gary, and all other parties claiming an interest in the Residence shall transfer and attach to such proceeds and be of the same validity, force, status, extent and effect, and subject to the same rights of avoidance or other challenge, as such interests in the Residence had prior to the sale. All rights of Trustee, Debtor, Sharon, Gary, and any other party in interest to seek avoidance or challenge the validity, force, status, extent, and effect of such interests shall be expressly reserved.

Docket 249, ¶ 23e. Movant is requesting a sale free and clear of liens and interests, but that the corresponding liens and interests may attach to proceeds of the sale.

DISCUSSION

Fixture Filing

Movant has asserted that he is not attempting to sell any of Creditor's collateral in this proposed sale, including the Grain Storage Bins. Movant recognizes that a sale of Creditor's collateral is not within the scope of his authorized powers in this case. Movant and Creditor do not appear to be in adverse positions, Creditor merely wishing to ensure they maintain their interest in the Grain storage Bins, and Movant asserting he has no right nor desire to sell the Grain Storage Bins with the Property.

All parties in interest agreeing to the respective rights and interests of the Grain Storage Bins, at the hearing, **XXXXXXX**

In moving the court to expunge the fixture filing pursuant to either 11 U.S.C. §§ 362(a) or 549(a), such matter must be heard by separate motion or possibly an adversary proceeding if not resolved by the Parties. LOCAL BANKRUPTCY RULE 9014-1(d)(5)(A), Federal Rule of Bankruptcy Procedure 7001(2).

However, for purposes of this Motion to Sell, the court notes it does find deficiencies in the fixture filing pursuant to Cal. Com. Code §§ 9334(f) and 9502(b)(4).

Cal. Com. Code § 9334(f) states:

(f) A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if either of the following conditions is satisfied:

- (1) The encumbrancer or owner has, in a signed record, consented to the security interest or disclaimed an interest in the goods as fixtures.
- (2) The debtor has a right to remove the goods as against the encumbrancer or owner.

The court has not been briefed or provided with evidence on whether the conditions of (f)(1) or (f)(2) have been met, but it may be that those conditions are fulfilled as customary and usual conditions in these types of secured transactions. If (f)(1) or (f)(2) are satisfied, Creditor's interest in the Grain Storage Bins would have priority regardless of its fixture filing filed on February 22, 2024, rendering the filing unnecessary.

Moreover, Cal. Com. Code § 9502(b)(4) states:

(b) Except as otherwise provided in subdivision (b) of Section 9501, to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subdivision (a) and also satisfy all of the following conditions:

...

- (4) If the debtor does not have an interest of record in the real property, provide the name of a record owner.

VHRC, the “debtor” referred to in Creditor’s fixture filing, does not have an interest of record in the Property. Therefore, Creditor must have named a record owner in its fixture filing pursuant to Cal. Com. Code § 9502(b)(4), but Creditor has not done so, meaning the fixture filing is deficient. *See* Exhibit 3, Docket 258.

Finally, to the extent that the fixture filing clouds title to the real Property that is the subject of this Motion, the fixture filing indeed is void as it violates the automatic stay of 11 U.S.C. § 362(a)(4) (staying “any act to create, perfect, or enforce any lien against the property of the estate.”). Here, Creditor’s fixture filing was an attempt to perfect a lien in the Grain Storage Bins located on property of the estate, the Property. The court confirmed that the automatic stay as to VHRC’s personal property fixture collateral that was mentioned in Creditor’s 2019 UCC financing statement, but the court did not grant relief from stay as to the Property. The fixture filing includes a legal description of the Property, seeming to encumber the Property owned by the Estate and cloud title in violation of the automatic stay.

At the hearing, **XXXXXXX**

Sale Free and Clear of Liens

Movant requests the court to authorize the sale free and clear of liens without providing any 11 U.S.C. §§ 363(f)(1)-(5) or (h) analysis. While “[i]t has long been recognized that the bankruptcy court has the power to authorize the sale of property free of liens with the liens attaching to the proceeds, with or without the consent of the lienholder,” the court will not do so without Movant appealing to statutory authority. 3 COLLIER ON BANKRUPTCY ¶ 363.06.

Furthermore, Movant describes removing and replacing the liens of Hofmann Creditor, but Movant also mentions removing and replacing liens of “all other parties claiming an interest.” Docket 249, ¶ 23e. In addition to requiring a clear statutory basis for selling free and clear of liens, the court cannot grant relief against potential unnamed parties in interest. At the hearing, **XXXXXXX**

Here, it appears that the two facially logical grounds for the other interests in the real estate would be pursuant to 11 U.S.C. § 363(f)(5) which provides:

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest [;]

and 11 U.S.C. § 363(h) and (j), which provide:

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate’s interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety,

...

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor’s spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and

expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

which state grounds that are applicable to the Motion now before the court.

At the hearing, ~~XXXXXXX~~

Overbids

~~At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: XXXXXXX~~

~~Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale price and terms are fair while also ending years-long state court litigation concerning the rights of respective parties in the Property.~~

Percentage Fees

~~Movant has estimated that a five percent broker's commission from the sale of the Property will equal approximately \$25,950. The court finds that the fees computed on a percentage basis recovery for the Estate are reasonable and a fair method of computing the fees in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than five percent commission to be split evenly between Movant and Purchaser's real estate agents.~~

~~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 Sell Property filed by Walter Dahl, the Chapter 11 Subchapter V Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that Walter Dahl, the Chapter 11 Subchapter V Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) and ~~(f)(x)~~ Patrick and Tracy Cleghorn or nominee ("Purchaser"), the Property commonly known as 13330 Valley Home Road, Oakdale, California, 95361 ("Property"), on the following terms:~~

~~A. The Property shall be sold to Buyer for \$519,000, on the terms and conditions set forth in the Cleghorn Purchase and Sale Agreement, Exhibit B, Dekt. 251, and as further provided in this Order.~~

- ~~B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.~~
- ~~C. The Property is sold free and clear of the lien of Sharon and Gary Hofmann (“Hofmann Creditor”), creditor asserting a secured claim, pursuant to 11 U.S.C. § 363(f)(x), with the lien of such creditor attaching to the proceeds. The Chapter 11 subchapter V Trustee shall hold the sale proceeds; after payment of the closing costs, other secured claims, and amount provided in this order; pending further order of the court.~~
- ~~D. The Chapter 11 subchapter V Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.~~
- ~~E. The Chapter 11 subchapter V Trustee is authorized to pay a real estate broker’s commission in an amount not more than 5 percent of the actual purchase price upon consummation of the sale. The 5 percent commission shall be paid to the Chapter 11 Subchapter V Trustee broker, Keller Williams Realty and Paul Boudier [and any Purchaser’s broker/agent which shall share evenly in such commission].~~
- ~~F. Within xx days of completion of the sale of the Property, Rural Community Assistance Corporation (“Creditor”) will remove any items of collateral from the Property as described in their April 22, 2019 UCC-1 financing statement, including two grain storage bins, serial numbers PNEG-012 and PNEG-013, as confirmed to be excluded from provisions of the automatic stay by this court’s September 11, 2023 Order at Docket 159.~~

2. [23-90516-E-7](#)

MICHAEL/LISA FALCONER

[KMT-2](#)

James Mootz

**MOTION TO EMPLOY TMC AUCTION,
INC. AS AUCTIONEER,
AUTHORIZING SALE OF PROPERTY
AT PUBLIC AUCTION AND
AUTHORIZING PAYMENT
OF AUCTIONEER FEES AND EXPENSES
2-8-24 [34]**

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, and Office of the United States Trustee on February 9, 2024. By the court’s calculation, 28 days’ notice was provided. 14 days’ notice is required.

The Motion to Employ 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, **XXXXXXX**.

The Motion to Employ is granted.

Nikki B. Farris, Chapter 7 Trustee(“Trustee”) seeks to employ Lonny Papp (“Auctioneer”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Auctioneer to assist in liquidating the bankruptcy estate’s interest in a 2015 Nissan Altima (“Vehicle”). Docket 34, p. 2:19-20, p. 1:27-28.

Movant filed two sets of documents, one on February 6, 2024 for a February 29 hearing, one on February 8, 2024 for a March 7 hearing. The second set of documents is not filed as an Amended Motion. The documents are nearly identical, though the February 8, 2024 set includes a different hearing date as well as location. Otherwise, they are the same.

Trustee argues that Auctioneer's appointment and retention is necessary to liquidate the Vehicle and produce the highest and best return to the estate. Declaration, Docket 36, p. 3:7-8.

Auctioneer's Employment Agreement contains the following terms:

1. **Description of Services.** Subject to bankruptcy court approval, Seller hereby retains Auctioneer to act as her agent and to sell the assets of the above-referenced bankruptcy estate (hereinafter referred to as "the Property") at public auction (hereinafter referred to as "the Sale"). Auctioneer hereby agrees to use its professional skill, knowledge and experience to the best advantage of both parties, but makes no representations or warranties regarding the outcome of the Sale, except to the extent as may be provided for in this Agreement.
2. **Description of Property to be Sold.** Property consists of, but is not limited to, the assets listed below ("Property"): See attached schedule A.
3. **Sale Location.** The sale will be held at 1551 Vineyard Road, Roseville, CA 95678. (Hereinafter referred to as "the Sale Site").
4. **Sale Date.** The sale will be conducted on a mutually agreed-upon date following Court approval of the Motion to Employ.
5. **Title.** Subject to bankruptcy court approval, Seller warrants and represents that she has the right to convey free and clear title to the Property at the time of sale, subject to any liens against the Property to be paid by the Trustee.
6. **Advertising.** Auctioneer shall be authorized to use the debtor's name in any advertising placed by Auctioneer.
7. **Insurance.** Seller shall carry and maintain full fire (including extended coverage), vandalism, burglary, theft and liability insurance on the Property until the Property is delivered to purchasers, or otherwise Seller shall assume full responsibility for said risks should Seller fail to provide such insurance. Seller hereby waives any rights of subrogation against Auctioneer with respect to any of the above-mentioned risks. Seller further agrees to defend, indemnify and hold harmless Auctioneer from any and all liability arising from injury to the property, person or other entities in any way associated with this Agreement, or the Property sold pursuant to this Agreement, occurring other than by intentional wrongful act or negligence of Auctioneer or persons employed by Auctioneer.
8. **Reserve Prices.** The Sale will be for all the Property and will be without limit and without reserve. Seller shall not bid at the Sale, nor allow anyone to bid on Seller's behalf unless Seller discloses such intent to Auctioneer in writing prior to Sale, which shall constitute Seller's agreement to pay commissions due on any actual purchases made.
9. **Exclusivity.** Seller shall grant Auctioneer the right to be the sole party authorized to sell the Property bound by this Agreement. The Property will be sold in such lots as Auctioneer may determine to be in the best interest of the sale.
10. **Sale Expenses.** Subject to bankruptcy court approval, Seller shall be responsible for all sale

Exhibit A, Docket 38.

Lonny Papp, an owner of TMC Auction, Inc., testifies that TMC Auction Inc. is a “full-service auction company providing auctions and accelerated marketing services, as well as liquidations of business and other financial assets for corporations, financial institutions, trustees, individuals, and estates,” and “has extensive experience in assisting bankruptcy trustees similar to the Trustee.” Declaration, Docket 37, ¶ 2. Furthermore, Lonny Papp testifies that TMC Auction Inc. has “extensive experience in valuing and auctioning vehicles similar to the Vehicle,” that he believes “an auction will maximize the return to the estate for the assets sought to be sold,” and that TMC Auction Inc. “has a large, nationwide customer base, and can generate interest in the Vehicle from potential buyers through its marketing efforts.” *Id.* at ¶ 4

Lonny Papp testifies he and the TMC Auction Inc. 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. *Id.*

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Auctioneer, considering the declaration demonstrating that Auctioneer 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 Lonny Papp as Auctioneer for the Chapter 7 Estate on the terms and conditions set forth in the Auction Agreement filed as Exhibit A, Dckt. 38. 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.

As stated in the Motion, Auctioneer is not being paid a Buyer’s Premium or other amount from a third party for serving as a professional for the Trustee and Bankruptcy Estate, other than a fee reimbursing Auctioneer for credit card, debit card or other charges for the method of payment chosen by the Buyer.

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 Employ filed by Nikki B. Farris (“Trustee”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted, and Trustee is authorized to employ Lonny Papp as Auctioneer for Trustee on the terms and conditions as set forth in the Auction Agreement filed as Exhibit A, Dckt. 38.

3. [23-90520-E-7](#)

DIANE VARGAS
Pro Se

**ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES**
2-6-24 [42]

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*), and Chapter 13 Trustee as stated on the Certificate of Service on February 8, 2024. The court computes that 21 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$78.00 due on February 1, 2024.

The Order to Show Cause is sustained, and the case is dismissed.

The court's docket reflects that the default in payment that is the subject of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: \$78.00.

The court, upon Chapter 13 Trustee's Motion to Dismiss, converted this case from Chapter 13 to Chapter 7 on February 8, 2024. Order Converting Case to Chapter 7, Docket 52. Nikki B. Farris was appointed as interim trustee on February 9, 2024. Docket 53. There is currently a meeting of creditors scheduled for March 19, 2024 at 9:00 am. Docket 58, §9, Meeting of Creditors.

However, the Debtor has not paid the installment due on February 1, 2024. Additionally, the final installment fee will come due on March 4, 2024, before the date of this Hearing.

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

IT IS ORDERED that the Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

4. [23-90622-E-7](#)
[PSB-1](#)

SAWATHARA THONG
Pauldeep Bains

MOTION TO AVOID LIEN OF CAPITAL
ONE BANK (USA), N.A.
2-6-24 [18]

Items 4 thru 5

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.

CERTIFICATE OF SERVICE SHEET IMPROPERLY FILED

Though notice was provided, Movant has not complied with Local Bankruptcy Rule 7005-1 which requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to ensure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c). The Certificate of Service Sheet that was filed with the court was not filled out. Dockets 28-30. The sheet does not indicate what documents were served, who was served, how service was accomplished, or who accomplished service.

At the hearing, **XXXXXXX**

The Motion to Avoid Judicial Lien 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 Avoid Judicial Lien is granted.~~

This Motion requests an order avoiding the judicial lien of Capital One Bank (USA), N.A. (“Creditor”) against property of the debtor, Sawathara Thong (“Debtor”) commonly known as 3323 Botfuher Rd, Valley Springs, CA, 95252, California (“Property”).

A judgment was entered against Debtor in favor of Creditor in the amount of \$10,261.74. Exhibit D, Dckt. 20. An abstract of judgment was recorded with Calaveras County on July 26, 2023, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$377,880.00 as of the petition date. Dckt. 14. The unavoidable consensual liens that total \$259,190.00 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 14. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730(a) in the amount of \$465,000.00 on Schedule C. Dckt. 14.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

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

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

IT IS ORDERED that the ~~Motion is Granted and the judgment lien of Capital One Bank (USA), N.A., California Superior Court for Calaveras County Case No. 22CF13872, recorded on July 26, 2023, Document No. 2023-005600, with the Calaveras County Recorder, against the real property commonly known as 3323 Botfuher Rd, Valley Springs, CA, 95252, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.~~

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.

CERTIFICATE OF SERVICE SHEET IMPROPERLY FILED

Though notice was provided, Movant has not complied with Local Bankruptcy Rule 7005-1 which requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to ensure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c). The Certificate of Service Sheet that was filed with the court was not filled out. ~~The sheet does not indicate what documents were served, who was served, how service was accomplished, or who accomplished service.~~

At the hearing, **XXXXXXX**

The Motion to Avoid Judicial Lien 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 Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Cavalry SPV I, LLC ("Creditor") against property of the debtor, Sawathara Thong ("Debtor") commonly known as 3323 Botfuher Rd, Valley Springs, CA, 95252, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$11,821.47. Exhibit D, Dckt. 27. An abstract of judgment was recorded with Calaveras County on September 25, 2020, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$377,880.00 as of the petition date. Dckt. 14. The unavoidable consensual liens that total \$259,190.00 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 14. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730(a) in the amount of \$465,000.00 on Schedule C. Dckt. 14.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

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

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

IT IS ORDERED that the ~~Motion is Granted and the judgment lien of Cavalry SPV I, LLC, California Superior Court for San Joaquin County Case No. 39201200276658CLCLSTK, recorded on September 25, 2020, Document No. 2020-013736, with the Calaveras County Recorder, against the real property commonly known as 3323 Botfuher Rd, Valley Springs, CA, 95252, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.~~