UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

March 14, 2019 at 10:30 a.m.

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1. 18-90811-E-7 MF-3 | **SHORGHEH/JAKLIN LATIFI** **David Johnston** | **OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS** **2-4-19 [27]**

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

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on February 4, 2019. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Objection to Claimed Exemptions 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Claimed Exemptions is overruled.

The Chapter 7 Trustee, Michael D. McGranahan ("Trustee"), objects to Shorgheh A. Latifi and Jaklin Y. Latifi's ("Debtor") claimed exemptions under California Code of Civil Procedure § 704.060 as to Debtor's 2003 Chevrolet Silverado truck ("Vehicle"). Trustee argues that the Vehicle is not a "tool of the trade" as the California Code of Civil Procedure requires unless it meets the following:

A. The vehicle is used to either transport persons for profit or is designed, used and maintained primarily for transportation of property; and

B. The vehicle is registered as a commercial vehicle.

Trustee argues that it is unlikely that the Vehicle meets the requirements because it is a consumer make and model. Trustee requested information from Debtor regarding the Vehicle and entitlement to the exemption but received no response.

The evidence provided in support of the Objection is a copy of Debtor's Schedules A/B and C. Exhibit A, Dckt. 27.

On Debtor's Schedule I, Debtor indicates he is a truck driver for DTL Logistics, Inc. Schedule I, Dckt. 14.

DISCUSSION

A claimed exemption is presumptively valid. *In re Carter,* 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, "the objecting party has the burden of proving that the exemptions are not properly claimed." FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005). If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to produce unequivocal evidence to demonstrate the exemption is proper. *In re Elliott*, 523 B.R. 188, 192 (9th Cir. B.A.P. 2014). The burden of persuasion, however, always remains with the objecting party. *Id*.

California Code of Civil Procedure section 704.060 provides an exemption for personal property necessary to and used in the exercise of a trade, business, or profession. The question of whether section 704.060 applies generally poses a question of fact in the trial court to be determined upon common-sense principles, in view of the circumstances of the particular case. *Kono v. Meeker,* 196 Cal. App. 4th 81, 87 (2011). The purpose and policy of the exemption is to protect the basic tools and utensils necessary to aid the debtor in continuing in his means of livelihood. *Id*. at p. 89.

Trustee argues that under *In re Rawn*, 199 B.R. 733, 737 (Bankr. E.D.Cal. 1996)("Rawn"), "a vehicle may be exempt as a tool of the trade, but only if:

A. The vehicle is used to either transport persons for profit or is designed, used and maintained primarily for transportation of property; and

B. The vehicle is registered as a commercial vehicle."

Objection, Dckt. 27. The Motion paraphrases the ruling and does not quote the actual holding. This is an incorrect statement of law.

In *Rawn*, the debtor sought to claim his 1991 Ford LTD exempt as a tool of his mechanical engineer trade. *Id.* at 734. The court in *Rawn* found the debtor had not provided evidence to show the Ford LTD was used for any business purpose, and that the vehicle was merely the debtor's transportation to and from work. *Id*. at 736.

> California cases purporting to interpret the scope of the tools of the trade exemption are few and far between. In *Lopp v. Lopp*, 198 Cal. App. 2d 474, 18 Cal. Rptr. 338 (Cal. Ct. App. 1961), the court focused on whether the vehicle was "necessary" to the trade or business in affirming the trial court's finding that a pick-up truck used for the mounting and dismounting of tires constituted a tool of the trade. *Id.* at 339.
> . . .
> The most popularly cited case on the subject appears to be *In re Dubrock*, 5 Bankr. 353 (W.D. Kty. 1980). The *Dubrock* court, in ascertaining whether a car was a tool of the trade, reasoned that the car would constitute a tool of the trade only "if the occupation of the owner is uniquely dependent on its use." *Id.* at 354. The Court emphasized that the mere transport of the owner to and from work was "hardly comparable as an essential instrument of employment." *Id.*
>
> *Dubrock* is not a California case and was decided before California opted out of the federal exemption scheme. However, it echoes the "necessity" requirement that California cases have held to be a requisite component of any tools of the trade exemption. *Dubrock* has also been cited with approval by courts in several circuits, including bankruptcy courts in the Ninth Circuit. *See. e.g. In re Dillon*, 18 Bankr. 252, 255 (E.D. Cal. 1982).
>
> Therefore, **the standard articulated under California case law attempting to demarcate the parameters of the tools of the trade exemption focus on the necessity of the vehicle to the particular trade.** As a direct consequence of the paucity of case law interpreting the breadth of the tools of the trade exemption, bankruptcy courts are left with the daunting task of **ascertaining whether a particular vehicle is necessary to the debtor's trade** in the absence of any bright guidelines delineated by relevant state law
>
> Raymond is a mechanical engineer. **The mere fact that he is required to supply his own transportation in order to commute to and from work is not, in and of itself, necessary to the execution of his trade**. This conclusion is supported by analogy to California case law which has looked to the intrinsic qualities of the trade of the debtor, rather than the basic need of providing transportation to and from work, in evaluating whether the tool is necessary to the trade. *Lopp*, 18 Cal. Rptr. at 340; *Sun LTD*, 96 Cal. App. 3d 38, 157 Cal. Rptr. 576. Other courts have echoed the

> reasoning that HN5 the debtor's use of a vehicle as means of transportation to and from work does not constitute a necessary tool of the trade subject to exemption. *Dubrock*, 5 Bankr. at 354 ("It is not sufficient if one's dependence on the car is limited to use for travel to and from work.") (citations omitted).

In re Rawn, 199 B.R. at 735 (emphasis added). The express language of the holding in Rawn demonstrates that the tool of the trade exemption does not have a second element that it be a "commercial vehicle." Such contention by the Trustee is erroneous.

Finding that the vehicle was not a tool of the trade, the court in *Rawn* then considered whether the vehicle was covered as a commercial vehicle. *Id*. The exemption's coverage of commercial vehicles was clearly a distinct question:

> **If a vehicle is not** exempt per se as **a tool of the trade**, it may still qualify as exempt property if it is a commercial vehicle.

Id (emphasis added). The court in *Rawn* held that the debtor's vehicle did not meet the California state law requirements for a commercial vehicle. *Id*. at 737.

The decision in *Rawn* relies on *Sun Ltd. v. Casey*, 96 Cal.App.3d 38 (1979), a California case interpreting an older, similar version of the exemption statute. In that case, the court held that a real estate agent's car was a tool of her trade covered by the exemption because she used it to take herself and prospective buyers to and from listed properties. *Sun Ltd.*, 96 Cal.App.3d at 40.

The holding in *Rawn* is that a vehicle may be exempt under California Code of Civil Procedure section 704.060 either by virtue of being a tool of the trade, or of being a commercial vehicle.

Rebutting Presumptive Validity

Trustee argues that Debtor cannot claim an exemption under California Code of Civil Procedure section 704.060 because "[i]t is unlikely that the truck meets both of the requirements of Rawn as it is a consumer make and model."

Trustee has not actually provided evidence that the Vehicle is not a "commercial vehicle" under California law. Rather, Trustee states that he requested verifying information and such information was not provided to him. Objection, Dckt. 27 at 2:6.5-10.5.

Furthermore, Trustee has not provided evidence that the Vehicle is not exempt as a tool of the trade. The Trustee does not argue, citing the court to evidence (including Schedules and Statement of Financial Affairs) to rebut the claim of exemption on Schedule C.

A review of Debtor's Schedule I shows Debtor works as a truck driver for DTL Logistics, Inc. Dckt. 14. While it is suspect whether a trucking company would require Debtor to use is pickup truck in the course of the business, no information was provided as to the business or how the Vehicle may be used in

the business. The burden is on the Trustee to present such evidence to the court. *In re Elliott*, 523 B.R. at 192.

Trustee's counsel has filed his Declaration testifying as to the requests for information that he made to Debtor's counsel, and the failure of Debtor to provide any such information. Dckt. 29.

On Schedule A/B Debtor lists owning three vehicles, for which the Silverado has the lowest value, $3,500. Dckt. 14 at 4. On Schedule J Debtor lists having a business expense for meals given that he is a "long distance truck driver." Dckt. 14 at 27. The court does not see any such expense for a vehicle that is a tool of the trade, with there being a transportation expense of only $200 for Debtor's three vehicles. However, the Trustee has not directed the court to consider such evidence.

Rather, the Trustee merely stands on: (1) a misstatement of the decision in *Rawn* and (2) a statment that requested information was not provided (for which the Trustee does not provide any authority that the failure to voluntarily provide such information is sufficient to rebut the claim of exemption).

It appears that the Trustee foretells his failure, stating only "It is unlikely that the truck meets both of the requirements of Rawn as it is a consumer make and model." Objection, p. 2:10-11; Dckt. 27. Merely stating that something is unlikely does not rebut the claim of an exemption.

Trustee has not rebutted the presumptive validity of Debtor's claimed exemption, and the Objection is overruled. *In re Carter,* 182 F.3d at 1029.

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 Claimed Exemptions filed by Michael D. McGranahan ("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 Objection is overruled.

2. **13-90323-E-12 FW-19** **FRANCISCO/ORIANA SILVA** **Gabriel Waddell** **MOTION FOR ENTRY OF DISCHARGE** **1-24-19 [281]**

Final Ruling: No appearance at the March 14, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on January 24, 2019. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Discharge 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Discharge is granted.

The Motion for Entry of Discharge has been filed by Francisco Mendes Silva and Oriana Fatima Silva ("Debtor"). With some exceptions, 11 U.S.C. § 1228 permits the discharge of debts provided for in a plan or disallowed under 11 U.S.C. § 502 after the completion of plan payments. Jan Johnson's ("the Chapter 12 Trustee") final report was filed on November 7, 2018, and no objection was filed within the specified thirty-day period. *See* FED. R. BANKR. P. 5009. The order approving final report and discharging the Chapter 12 Trustee was entered on December 21, 2018. Dckt. 276. The entry of an order approving the final report is evidence that the estate has been fully administered. *See In re Avery*, 272 B.R. 718, 729 (Bankr. E.D. Cal. 2002).

The Motion states and Debtor's Declarations (Dckt. 283 & 284) certify that Debtor:

A. has completed the plan payments;

B. does not have any delinquent domestic support obligations;

C. has not received a discharge in a case under Chapter 7, 11, or 12 during the four-year period prior to filing of this case or a discharge under a Chapter 13 case during the two-year period prior to filing of this case;

D. is not subject to the provisions of 11 U.S.C. § 522(q)(1); and

E. is not a party to a pending proceeding which implicates 11 U.S.C. § 522(q)(1).

There being no objection, Debtor is entitled to a discharge.

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 Entry of Discharge filed by Francisco Mendes Silva and Oriana Fatima Silva ("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 court shall enter the discharge for Francisco Mendes Silva and Oriana Fatima Silva in this case.

3.	**18-90237-E-7** **SSA-3**	**JOANN MERENDA** **Steven Altman**	**MOTION BY STEVEN S. ALTMAN TO WITHDRAW AS ATTORNEY** **2-20-19 [69]**

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)(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 February 20, 2019. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion to Withdraw as Attorney 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 Withdraw as Attorney is xxxxxxxxxxxxx.

Steven S. Altman ("Movant"), counsel of record for Joann E. Merenda ("Debtor"), filed a Motion to Withdraw as Attorney as Debtor's counsel in the bankruptcy case. Movant states the following:

A. The Motion is brought pursuant to Local Bankruptcy Rule 2017-1(e) and California Rule of Professional Conduct 3-700(C)(1).

B. Counsel cannot effectively represent Debtor due to inconsistency of and lack of communication.

C. Counsel has put forth various strategic suggestions, all of which Debtor has either overtly avoided or disagreed with.

D. Counsel notified Debtor that Trustee requested documents from her, which she has yet to provide.

APPLICABLE LAW

District Court Rule 182(d) governs the withdrawal of counsel. LOCAL BANKR. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. CAL. LOCAL R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, No. 1:08cv01523 OWW GSA, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. June 23, 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554 (Cal. Ct. App. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 559.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. CAL. LOCAL R. 180(e).

Termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdraw from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. CAL. R. PROF'L CONDUCT 3- 700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probable cause and for the purpose of harassing or maliciously injuring any person and (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act. CAL. R. PROF'L CONDUCT 3-700(B).

Permissive withdrawal is limited to certain situations, including the one relevant for this Motion:

(1) The client

> (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.

CAL. R. PROF'L. CONDUCT 1.16(b)(4).

DISCUSSION

Review of Minimum Pleading Requirements for a Motion

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).

Federal Rule of Bankruptcy Procedure 9013 incorporates the "state with particularity" requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court 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."

Grounds Stated in Motion

The grounds stated in the Motion with particularity are::

A. Debtor retained Movant as counsel in Chapter 13 case.

B. The case was converted to one under Chapter 7 due to Debtor's performance issues and feasibility.

C. As referenced by the supporting declaration and memorandum of points and authorities filed, an actual conflict exists between counsel and Debtor in the continued representation of Debtor in these proceedings.

D. Based upon the foregoing, Movant requested leave to withdraw.

E. Movant provided a copy of the Motion and supporting documents to Debtor, in addition to communicating directly with Debtor.

Those "grounds" do not inform the court the basis for the legal or factual basis for the relief requested.

While the court is cognizant of the delicate nature of a withdrawal of counsel, such does not open the door to a "read the other pleadings filed and state the grounds for me" pleading practice.

Review of Supporting Documents

Given the situation, the court has reviewed the additional documents. In the Memorandum of Points and Authorities, Movant provides a little more clarity. Dckt. 71. Movant states that Debtor has failed to listen and act upon the case requirements and strategy as advanced by Movant, and failed to produce requested financial documents. *Id*. at 2:10-13. Movant argues that these failures present substantial and irreconcilable differences.

Movant cites various grounds for withdrawal of counsel, including where client conduct renders it unreasonable difficult for the attorney to carry out employment effectively, and where the client breaches obligations as to case administration or payment of fees/expenses. However, while Movant provides law and conclusions, there is no analysis explaining how the facts at hand apply to the legal authority.

In the supporting Declaration, Movant states under penalty of perjury:

1. Debtor could not confirm a Chapter 13 plan because of ongoing family law proceedings, and unstable income. Dckt. 72, ¶ 3. As a result, the case was converted to Chapter 7. *Id.*, ¶ 4.

2. Attending a total of four 341 Meetings, Debtor was informed by Movant and the Trustee that certain financial documents were required to be produced. Debtor has not produced those documents. Id., ¶¶ 4-5. Debtor's failure to produce the documents resulted in an extension of the date to object to discharge. *Id.*, ¶ 8.

3. Debtor is not receptive to and holds contrary views on strategy in this case, resulting in irreconcilable conflict between her and movant and necessitating withdrawal. *Id.,* ¶ 9.

Conclusion

At the hearing, **xxxxxxxxxxxxxx**.

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 Withdraw filed by Steven Altman ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the Motion to Withdraw is **xxxxxxxxxxxx**.

4.	**12-93049-E-11** **BLF-1**	**MARK/ANGELA GARCIA** **Mark Hannon**	**MOTION TO EMPLOY LORIS L. BAKKEN AS SPECIAL COUNSEL** **2-15-19 [1018]**

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 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on February 15, 2019. By the court's calculation, 27 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 11 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 Employ is granted.

The Plan Administrator, Gary R. Farrar ("Plan Administrator"), seeks to employ Loris L. Bakken, Bakken Law Firm as special counsel ("Special Counsel") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Plan Administrator seeks the employment of Special Counsel to prepare a motions to incur post-petition debt and refinance of real property of the Estate.

Plan Administrator asserts refinancing is in the best interest of the Estate, and argues that Special Counsel's appointment and retention is necessary to properly advise and represent him in preparing the appropriate motions for bankruptcy court approval. Under the agreement, Special Counsel will be compensated by the hour at her current hourly rate of $300.00. Motion, Dckt. 1018.

In support of the Motion, Plan Administrator filed the Declaration of Special Counsel, who testifies that she is qualified to draft and defend these motions, and has substantial experience in bankruptcy cases. Loris L. Bakken testifies she and her firm 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.

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 Special Counsel, considering the declaration demonstrating that Special Counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Loris L. Bakken as Special Counsel for the Chapter 11 Estate. Approval of the hourly rate 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 Gary R. Farrar ("Plan Administrator") 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 Plan Administrator is authorized to employ Loris L. Bakken as Special Counsel for Plan Administrator.
>
> **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.

5. **12-93049-E-11** **MARK/ANGELA GARCIA** **MOTION TO APPROVE POSTPETITION**
BLF-2 **Mark Hannon** **REFINANCE OF REAL PROPERTY**
2-15-19 [1023]

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)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on February 15, 2019. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Motion to Approve Postpetition Refinance of Real Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 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 Approve Postpetition Refinance of Real Property is xxxxx.

The Plan Administrator, Gary Farrar ("Plan Administrator"), filed this Motion seeking authorization for Mark Garcia and Angela Garcia ("Debtor") to incur debt. The Motion seeks to refinance the debt secured by real property commonly known as 900 G Street, Modesto, California (the "G Street Property"), paying off the First Deed of Trust of G Street Investments, LLC and allowing for the subsequent sale G Street Property.

The Motion states with particularity the following terms of the agreement:

A. The loan amount is $750,000.00.

B. The lender is Denise LaBarre.

C. The Proceeds shall be used to pay the full balance of the lien of G Street Investments, LLC. Any excess funds would be put towards plan payments, operating expenses, and expenses related to the sale of property known as 1508 Prospect Lane, Modesto, California (the "Prospect Property")..

D. Interest rate of 10 percent, increased to 13 percent upon default.

E. Monthly payment is $6,250.00.

F. Term is 24 Months, beginning April 1, 2019 and ending March 1, 2021 with a balloon payment.

G. Lender is guaranteed at least 6 months' interest notwithstanding prepayment.

H. Estimated loan fees of $35,628.00.

I. Estimated liens to be paid total $758,705.51 (including $8,705.51 from creditor Stanislaus County Tax Collector and $750,000.00 from G Street Investments, LLC).

The Motion also requests pursuant to 11 U.S.C. § 364(d) that the lender be granted a lien senior to the liens of creditors United States Fire Insurance Company ("USFIC") and Bankers Insurance Company ("BIC"). Plan Administrator argues the junior lienholders will be adequately protected to the same extent as before this loan.

Though not stated clearly in the Motion, the post-petition financing appears to be sought in part to allow Debtor's continued operation of Debtor's business. Declaration, ¶ 8 Dckt. 1026. Within 6 months, Debtor intends to sell the Prospect Property *Id*, ¶ 5.

Debtor estimates the net proceeds of the proposed post-petition financing will be $21,984.93. *Id*., ¶ 4. However, this estimation relies on the court also granting Debtor's separate motion for post-petition financing (Dckt. 1030) which seeks the sum of $130,000.00 secured by the Prospect Property.

Debtor provides testimony that his bid at foreclosure on the Prospect Property was $230,000.00, and therefore he believes the fair market value of the Property to be the same. *Id*., ¶ 5. Debtor concludes that therefore, there is $100,000.00 in equity in the Property after the proposed $130,000.00 in post-petition financing (while liens on the Property total $54,923.19, Debtor proposes to pay the liens with the post-petition financing).

No estimated fair market value of the G Street Property is stated. However, Schedule A/B states a value of $650,000.00. Dckt. 55.

APPLICABLE LAW

Priming lien

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." FED. R. BANKR. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id.* at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

The Bankruptcy Code provides that the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if:

> (A) the trustee is unable to obtain such credit otherwise; and
>
> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(d)(1).

The ability to prime an existing lien is extraordinary, and is only used as a last resort. *In re Seth Co., Inc.,* 281 B.R. 150, 153 (Bankr. D. Conn. 2002); *In re Stoney Creek Techs., LLC,* 364 B.R. 882, 890 (Bankr. E.D. Pa. 2007); *In re YL W. 87th Holdings I LLC,* 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010); *In re DB Capital Holdings, LLC,* 454 B.R. 804, 822 (Bankr. D. Colo. 2011); *In re Packard Square LLC,* 574 B.R. 107, 116 (Bankr. E.D. Mich.), reconsideration denied, 579 B.R. 434 (Bankr. E.D. Mich. 2017); 3 COLLIER ON BANKRUPTCY P 364.05 (16th 2018).

The first prong of § 364(d)(1) requires the movant affirmatively to demonstrate, not merely assume, that less onerous post-petition financing was unavailable. *Suntrust Bank v. Den-Mark Const., Inc.*, 406 B.R. 683, 690 (E.D.N.C. 2009). However, a movant is not required to seek credit from every possible lender before concluding that such credit is unavailable. *In re Snowshoe Co., Inc.,* 789 F.2d 1085, 1088 (4th Cir.1986).

The second prong requires a showing there is adequate protection of the interest of the holder of the lien on the property on which such senior lien is proposed to be granted. *Suntrust Bank*, 406 B.R. at 693. This requirement is designed to preserve the secured creditor's position at the time of the bankruptcy. *In re Campbell Sod, Inc.,* 378 B.R. 647, 653 (Bankr.D.Kan.2007) .

The trustee has the burden of proof on the issue of adequate protection. 11 U.S.C. § 364(d)(2). Adequate protection is not defined in the Bankruptcy Code, but is generally fashioned as appropriate, on a case-by-case basis, to protect the existing lienholder from any diminution in the value of its collateral as a result of the grant of a lien under section 364. 3 COLLIER ON BANKRUPTCY P 364.05 [1] (16th 2018).

Bankruptcy Code section 361 provides adequate protection may be provided by (1) requiring periodic payments; (2) providing a replacement lien; or (3) giving (not by administrative expense) the "indubitable equivalent" of the creditor's interest in property. 11 U.S.C. § 361.

Additionally, the credit and its terms must be authorized by the court after notice and a hearing. 3 COLLIER ON BANKRUPTCY P 364.05 (16th 2018).

DISCUSSION

Authority of Plan Administrator To Seek Authorization To Obtain Credit

11 U.S.C. § 364 specifies the trustee's power to seek post-petition financing. Under 11 U.S.C. § 1107, the debtor in possession may exercise the powers of the trustee in a Chapter 11 case.

The movant here is the Plan Administrator, and not a trustee or debtor in possession. Plan Administrator has not explained what authority and standing he has to bring the present motion.

The Amended Plan states the following relevant here for execution of the Plan:

> Plan Administrator will pay the above monthly or quarterly payments on Class 3, 4, 6, 9 and 10.1 claims from business income and rental income and if necessary, from the sale or refinancing of the Commercial Property and other real or personal property owned by the Debtors.

Amended Plan, Dckt. 740 at 13:11-13. The Plan does not specify or provide for the use of 11 U.S.C. § 364(d) in execution of the Plan.

Reviewing the Motion and supporting documents, no argument or legal authority is proffered to support the Plan Administrator bringing the present Motion. Rather, that issue has been left for the court to sift through the Plan and determine possible explicit or implicit authority.

At the hearing, **xxxxxxxxxxxxx**.

In reviewing the Amended Plan and Amended Disclosure Statement, it is apparent that either the sale of property or refinancing of debt was necessary at some point. The secured claim of G Street Investment, LLC was set to fully mature August 31, 2018. Up to that maturity date, the Amended Plan provided for interest-only payments to be made. The Amended Disclosure Statement makes clear that in the event of default or failure to perform, the available remedy was foreclosure on the G Street Property, with Debtor specifically waiving other remedies, including the ability to further modify the plan to provide alternative remedies. Amended Disclosure Statement, Dckt. 739. Thus, without a sale of property or further financing, Debtor would lose the commercial property where Debtor's business is run.

Based on the necessity for further financing to the successful reorganization in this case, the court finds it reasonable to infer the Amended Plan provided the Plan Administrator to bring motions to incur debt under the provisions of 11 U.S.C. § 364.

Failure To Show Alternative Financing

Plan Administrator provides the following evidence as to whether other financing was available:

1. "[Plan Administrator] discussed with Debtors efforts in seeking alternate financing and . . . believe that the proposed financing will allow the Debtors to continue making plan payments and continue operating their business." Declaration Of Gary Farrar, ¶ 10 Dckt. 1025.

2. "[Mark Garcia] contacted several possible lenders; however, Lender offered the best and highest loan amount and most favorable rate. I negotiated the Mortgage Agreement with Lender in good faith and at arm's length and was able to negotiate a more favorable interest rate and obtain the highest loan amount available to me." Declaration Of Mark Garcia, ¶ 6 Dckt. 1026.

As discussed, *supra*, the ability to prime an existing lien is extraordinary, and is only used as a last resort. *In re Seth Co., Inc.,* 281 B.R. 153. Here, Plan Administrator has not provided the court detailed information as to alternative financing sought, or what may be available.

Debtor testifies only that the loan sought here was the "best and highest loan amount and most favorable rate." It is not surprising that the extraordinary relief of a priming lien would result in better loan terms, or a higher credit limit. However, this is not the inquiry of 11 U.S.C. § 364.

Plan Administrator has not demonstrated inability to obtain credit otherwise.

At the hearing, **xxxxxxxxxxxxxxx**.

Adequate Protection

Plan Administrator argues adequate protection exists because all secured creditors are protected to the same extent they would be before the post-petition financing.

This argument is well-taken. Adequate protection for the purposes of 11 U.S.C. § 364 is designed to preserve the secured creditor's position at the time of the bankruptcy. *In re Campbell Sod, Inc.,* 378 B.R. 653. One method of conferring adequate protection is giving the "indubitable equivalent" of the creditor's interest in property. 11 U.S.C. § 361.

Here, the G Street Property was valued at $650,000.00 at the time of filing. Schedule A/B, Dckt. 55. After the lien of G Street Investments, LLC amounting to $750,000.00, no equity existed for junior lienholders. Further, the post-petition financing sought is to be used to satisfy the First Deed Of Trust of G

Street Investments, LLC. Therefore, all creditors with secured claims are in the same position and receiving the equivalent as before the post-petition financing.

Agreement Terms

Plan Administrator argues the terms here are fair and reasonable because Debtor contacted several lenders and the terms herein were the most favorable interest rate and highest loan amount.

The loan is for the amount of $750,00.00 at an interest rate of 10 percent, maturing within 2 years. Exhibit B, Dckt. 1028. The loan is sought to payoff the First Deed of Trust of G Street Investments, LLC.

The Amended Plan provides that the secured claim of G Street Investments, LLC is in the amount of $750,000.00 to be paid on or before August 31, 2018 with an interest rate of 6.8 percent. Amended Plan, Dckt. 740. The Plan provides for interest only payments of $4,250.00. *Id*.

Here, the loan is sought to keep the Plan funded, as well as provide funds to prepare the Prospect Property for sale. Through the sale of the Prospect Property, Plan Administrator and Debtor anticipate a fair market value upwards of $230,000.00.

While the fees for the post-petition financing sought total $44,386.37 and additional costs will be incurred from higher interest rates, Debtor and the Estate will be able to generate further income from the continued operation of Debtor's business and the sale of the Prospect Property.

On the evidence presented, the terms are reasonable and in the best interest of the Estate.

Conclusion

At the hearing, **XXXXXXXXXXXXX**.

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 Incur Debt filed by the Plan Administrator, Gary Farrar ("Plan Administrator") 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 **xxxxxxx**.

6. 12-93049-E-11 BLF-3 | **MARK/ANGELA GARCIA** **Mark Hannon** | **MOTION TO APPROVE POSTPETITION FINANCING OF REAL PROPERTY 2-15-19 [1030]**

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's, Debtor's Attorney, Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on February 15, 2019. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Motion to Approve Postpetition Refinance of Real Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 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 Approve Postpetition Refinance of Real Property is xxxxx.

The Plan Administrator, Gary Farrar ("Plan Administrator"), filed this Motion seeking authorization for Mark Garcia and Angela Garcia ("Debtor") to incur debt. The Motion seeks to refinance the debt secured by real property commonly known as 1508 Prospect Lane, Modesto, California (the "Property"), paying off the First Deed of Trust of G Street Investments, LLC and allowing for the subsequent sale Prospect Property .

The Motion states with particularity the following terms of the agreement:

A. The loan amount is $130,000.00.

B. The lender is George Wake.

C. The Proceeds shall be used to pay the full balance of the lien of G Street Investments, LLC on Debtor's property 900 G Street, Modesto, California (the "G Street Property"). Any excess funds would be put towards plan payments, operating expenses, and expenses related to the sale of the G Street Property.

D. Interest rate of 11 percent, increased to 14 percent upon default.

E. Monthly payment is $1,191.67.

F. Term is 18 Months, beginning April 1, 2019 and ending September 1, 2020 with a balloon payment.

G. Lender is guaranteed at least 6 months' interest notwithstanding prepayment.

H. Estimated loan fees of $8,758.37.

I. Estimated liens to be paid total $54,923.19

Motion, Dckt. 1030.

The Motion also requests pursuant to 11 U.S.C. § 364(d) that the lender be granted a lien senior to the $400,000.00 lien of creditor United States Fire Insurance Company ("USFIC"). Plan Administrator argues the junior lienholder will be adequately protected because there is $133,000.00 in equity remaining in the Prospect Property .

Though not stated clearly in the Motion, the post-petition financing appears to be sought in part to allow Debtor's continued operation of Debtor's business at the G Street Property. Declaration, ¶ 8 Dckt. 1032. Within 6 months, Debtor intends to sell the Prospect Property at a greater sale price having used excess post-petition financing funds to pay for improvements. *Id*, ¶ 5.

Debtor estimates the net proceeds of the proposed post-petition financing, which will be will be $21,984.93, which will be used for plan payments, operating expenses, and expenses related to the sale of the G Street Property. *Id.*, ¶ 4. This estimation relies on the court also granting Debtor's separate motion for post-petition financing (Dckt. 1023) which seeks the sum of $750,000.00 secured by the G Street Property.

Debtor provides testimony that his bid at foreclosure on the Prospect Property was $230,000.00, and therefore he believes the fair market value of the Prospect Property to be the same. *Id.*, ¶ 5. Debtor concludes that therefore, there is $100,000.00 in equity in the Prospect Property after the proposed $130,000.00 in post-petition financing (while liens on the Prospect Property total $54,923.19, Debtor proposes to pay the liens with the post-petition financing).

APPLICABLE LAW

Priming lien

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." FED. R. BANKR. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id.* at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

The Bankruptcy Code provides that the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if:

> (A) the trustee is unable to obtain such credit otherwise; and
>
> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(d)(1).

The ability to prime an existing lien is extraordinary, and is only used as a last resort. *In re Seth Co., Inc.,* 281 B.R. 150, 153 (Bankr. D. Conn. 2002); *In re Stoney Creek Techs., LLC,* 364 B.R. 882, 890 (Bankr. E.D. Pa. 2007); *In re YL W. 87th Holdings I LLC,* 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010); *In re DB Capital Holdings, LLC,* 454 B.R. 804, 822 (Bankr. D. Colo. 2011); *In re Packard Square LLC,* 574 B.R. 107, 116 (Bankr. E.D. Mich.), reconsideration denied, 579 B.R. 434 (Bankr. E.D. Mich. 2017); 3 COLLIER ON BANKRUPTCY P 364.05 (16th 2018).

The first prong of § 364(d)(1) requires the movant affirmatively to demonstrate, not merely assume, that less onerous post-petition financing was unavailable. *Suntrust Bank v. Den-Mark Const., Inc.*, 406 B.R. 683, 690 (E.D.N.C. 2009). However, a movant is not required to seek credit from every possible lender before concluding that such credit is unavailable. *In re Snowshoe Co., Inc.,* 789 F.2d 1085, 1088 (4th Cir.1986).

The second prong requires a showing there is adequate protection of the interest of the holder of the lien on the property on which such senior lien is proposed to be granted. *Suntrust Bank*, 406 B.R. at 693. This requirement is designed to preserve the secured creditor's position at the time of the bankruptcy. *In re Campbell Sod, Inc.,* 378 B.R. 647, 653 (Bankr.D.Kan.2007) .

The trustee has the burden of proof on the issue of adequate protection. 11 U.S.C. § 364(d)(2). Adequate protection is not defined in the Bankruptcy Code, but is generally fashioned as appropriate, on a case-by-case basis, to protect the existing lienholder from any diminution in the value of its collateral as a result of the grant of a lien under section 364. 3 COLLIER ON BANKRUPTCY P 364.05 [1] (16th 2018).

Bankruptcy Code section 361 provides adequate protection may be provided by (1) requiring periodic payments; (2) providing a replacement lien; or (3) giving (not by administrative expense) the "indubitable equivalent" of the creditor's interest in property. 11 U.S.C. § 361.

Additionally, the credit and its terms must be authorized by the court after notice and a hearing. 3 COLLIER ON BANKRUPTCY P 364.05 (16th 2018).

DISCUSSION

Authority of Plan Administrator To Seek Authorization To Obtain Credit

11 U.S.C. § 364 specifies the trustee's power to seek post-petition financing. Under 11 U.S.C. § 1107, the debtor in possession may exercise the powers of the trustee in a Chapter 11 case.

The movant here is the Plan Administrator, and not a trustee or debtor in possession. Plan Administrator has not explained what authority and standing he has to bring the present motion.

The Amended Plan states the following relevant here for execution of the Plan:

> Plan Administrator will pay the above monthly or quarterly payments on Class 3, 4, 6, 9 and 10.1 claims from business income and rental income and if necessary, from the sale or refinancing of the Commercial Property and other real or personal property owned by the Debtors.

Amended Plan, Dckt. 740 at 13:11-13. The Plan does not specify or provide for the use of 11 U.S.C. § 364(d) in execution of the Plan.

Reviewing the Motion and supporting documents, no argument or legal authority is proffered to support the Plan Administrator bringing the present Motion. Rather, that issue has been left for the court to sift through the Plan and determine possible explicit or implicit authority.

At the hearing, **xxxxxxxxxxxxx**.

In reviewing the Amended Plan and Amended Disclosure Statement, it is apparent that either the sale of property or refinancing of debt was necessary at some point. The secured claim of G Street Investment, LLC was set to fully mature August 31, 2018. Up to that maturity date, the Amended Plan provided for interest-only payments to be made. The Amended Disclosure Statement makes clear that in the event of default or failure to perform, the available remedy was foreclosure on the G Street Property, with Debtor specifically waiving other remedies, including the ability to further modify the plan to provide alternative remedies. Amended Disclosure Statement, Dckt. 739. Thus, without a sale of property or further financing, Debtor would lose the commercial property where Debtor's business is run.

Based on the necessity for further financing to the successful reorganization in this case, the court finds it reasonable to infer the Amended Plan provided the Plan Administrator to bring motions to incur debt under the provisions of 11 U.S.C. § 364.

Failure To Show Alternative Financing

Plan Administrator provides the following evidence as to whether other financing was available:

1. "[Plan Administrator] discussed with Debtors efforts in seeking alternate financing and . . . believe that the proposed financing will allow the Debtors to continue making plan payments and continue operating their business." Declaration Of Gary Farrar, ¶ 10 Dckt. 1025.

2. "[Mark Garcia] contacted several possible lenders; however, Lender offered the best and highest loan amount and most favorable rate. I negotiated the Mortgage Agreement with Lender in good faith and at arm's length and was able to negotiate a more favorable interest rate and obtain the highest loan amount available to me." Declaration Of Mark Garcia, ¶ 6 Dckt. 1026.

As discussed, *supra*, the ability to prime an existing lien is extraordinary, and is only used as a last resort. *In re Seth Co., Inc.,* 281 B.R. 153. Here, Plan Administrator has not provided the court detailed information as to alternative financing sought, or what may be available.

Debtor testifies only that the loan sought here was the "best and highest loan amount and most favorable rate." It is not surprising that the extraordinary relief of a priming lien would result in better loan terms, or a higher credit limit. However, this is not the inquiry of 11 U.S.C. § 364.

Plan Administrator has not demonstrated inability to obtain credit otherwise.

At the hearing, **xxxxxxxxxxxxxxx**.

Adequate Protection

Plan Administrator argues adequate protection exists because of an equity cushion of $100,000.00. Plan Administrator argues further there is an added benefit from Debtor paying the full balance of the lien on the G Street Property.

This argument is not well-taken. Adequate protection for the purposes of 11 U.S.C. § 364 is designed to preserve the secured creditor's position at the time of the bankruptcy. *In re Campbell Sod, Inc.,* 378 B.R. 653.

Here, excepting the lien of USFIC, the Property is valued at $230,000.00 and has liens totaling $54,923.19. Even assuming the $400,000.00 lien of USFIC was junior to all other liens, there would be $175,076.81 in equity to put towards that claim. Where the post-petition financing would decrease the amount USFIC would otherwise receive on its secured claim, USFIC does not appear adequately protected.

Plan Administrator states in the Motion that USFIC has been contacted regarding consent to loan subordination. Motion, ¶ 30 Dckt. 1030.

At the hearing, **xxxxxxxxxxx**.

Agreement Terms

Plan Administrator argues the terms here are fair and reasonable because Debtor contacted several lenders and the terms herein were the most favorable interest rate and highest loan amount.

The loan is for the amount of $130,00.00 at an interest rate of 11 percent, maturing within 18 months. Exhibit B, Dckt. 1028. The loan is sought to payoff the First Deed of Trust of G Street Investments, LLC.

The Amended Plan provides that the secured claim of G Street Investments, LLC is in the amount of $750,000.00 to be paid on or before August 31, 2018 with an interest rate of 6.8 percent. Amended Plan, Dckt. 740. The Plan provides for interest only payments of $4,250.00. *Id*.

Here, the loan is sought to keep the Plan funded, as well as provide funds to prepare the Prospect Property for sale. Through the sale of the Prospect Property, Plan Administrator and Debtor anticipate a fair market value upwards of $230,000.00.

While the fees for the post-petition financing sought total $44,386.37 and additional costs will be incurred from higher interest rates, Debtor and the Estate will be able to generate further income from the continued operation of Debtor's business and the sale of the Prospect Property.

On the evidence presented, the terms are reasonable and in the best interest of the Estate.

Conclusion

At the hearing, **XXXXXXXXXXXXX**.

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 Incur Debt filed by the Plan Administrator, Gary Farrar ("Plan Administrator") 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 **xxxxxxx**.

7. **14-90953-E-7** **MAURICIO MARTIN** **MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.**
SMJ-2 **Scott Johnson** **2-11-19 [22]**

Final Ruling: No appearance at the March 14, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, and Office of the United States Trustee on February 11, 2019. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Capital One Bank (USA), N.A. ("Creditor") against property of Mauricio Roberto Martin ("Debtor") commonly known as 2108 Mather Drive, Modesto, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $3,709.27. Exhibit A, Dckt. 25. An abstract of judgment was recorded with Stanislaus County on February 20, 2014, that encumbers the Property. *Id.*

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of $190,000.00 as of the petition date. Dckt. 27. The unavoidable consensual liens that total $165,366.00 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 28. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $25,786.00 on Amended Schedule C. Dckt. 25.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Mauricio Roberto Martin ("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 judgment lien of Capital One Bank (USA), N.A., California Superior Court for Stanislaus County Case No. 2000090, recorded on February 20, 2014, Document No. 2014-0010869-00 , with the Stanislaus County Recorder, against the real property commonly known as 2108 Mather Drive, Modesto, 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.

8. 18-90859-E-7 EVA MENDEZ
Ralph Avila

TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
2-1-19 [20]

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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), creditors, parties requesting special notice and Office of the United States Trustee on February 3, 2019. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor (*pro se*) has not filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Motion are appropriate.

The Motion to Dismiss is denied without prejudice.

The Chapter 7 Trustee, Gary Farrar ("Trustee"), seeks dismissal of the case on the grounds that Eva Mendez ("Debtor") did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341.

Alternatively, if Debtor's case is not dismissed, Trustee requests that the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor's next scheduled Meeting of Creditors, which is set for 01:00 p.m. on February 28, 2019. If Debtor fails to appear at the continued Meeting of Creditors, Trustee requests that the case be dismissed without further hearing.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on February 27, 2019. Dckt. 25. Debtor states that her failure to appear at the § 341(a) Meeting of Creditors was due to a lack of transportation.

DISCUSSION

A review of the docket shows Trustee entered a Trustee Report on February 28, 2019. Trustee reports that Debtor and her counsel appeared at the continued Meeting of Creditors on February 28, 2019.

Based on the foregoing, 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 Dismiss the Chapter 7 case filed by The Chapter 7 Trustee, Gary Farrar ("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 Dismiss is denied without prejudice.

9. 19-90062-E-7 VFG-1 | **UNITED RESORTS, LLC** Michael H. Yi | **POST-ORDER HEARING RE: MOTION FOR RELIEF FROM AUTOMATIC STAY 1-31-19 [10]**

KHATRI BROTHERS VS.

NO TELEPHONIC APPEARANCE PERMITTED FOR STEVEN ALTMAN, COUNSEL FOR KHATRI BROTHERS, OR MICHAEL YI, COUNSEL FOR UNITED RESORTS, LLC

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's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on January 31, 2019. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Post-Order Hearing 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 Post-Order Hearing is xxxxx.

REVIEW OF STIPULATION TO RELIEF FROM AUTOMATIC STAY

On January 31, 2019, Khatri Brothers, a General Partnership ("Khatri Brothers, GP"), filed its Motion for Relief From the Automatic Stay. Dckt. 10.

On February 20, 2019, the Parties lodged with the court a proposed order granting relief pursuant to the Motion for Relief From the Automatic Stay. The relief granted in the proposed order was stated to be:

> 1. The Stipulation, attached as Exhibit A, is approved in its entirety, conditioned upon the following: [the court waiving or not waiving a notice requirement for the order on the Stipulation]

Proposed Order, p. 2:1-2.

The court's practice is to not sign orders which merely state, "whatever is said in the stipulation is the order of the court." With respect to the various recitals, while the Debtor and Khatri Brother, GP may agree between themselves as to certain facts and conclusions, the court has not make such findings. Then, with respect to what has been stipulated to, such may, or may not, properly be the subjection of an order on a motion for relief from the automatic stay.

As an example with respect to the automatic stay, paragraph 11. A. of the Stipulation would have the court purport to order:

> A. The bankruptcy stay under 11 U.S.C. § 362 is modified to surrender possession, title, management, and control of the real and personnel [sic] property located at 1525 McHenry Avenue, Modesto, California, known as the "Budgetel Inn & Suites to lessor and owners, the Khatri Brothers nunc pro tunc effective to the date the Khatri Bros. motion for relief from stay was filed: January 31, 2019.

Stipulation, p. 3; Dckt. 35. As drafted, it may appear that the court is modifying the stay to be a "surrender" of the property, management and control at some nonspecific time in the future. Then, if such was not done, the court would hold the non-surrendering in contempt.

Further, the Stipulation states that there will be *nunc pro tunc* relief. The provisions of 11 U.S.C. § 362(d) allow for the court to annul the stay, providing retroactive relief. As the Ninth Circuit Court of Appeals has noted, *nunc pro tunc* relief is different from retroactive relief. The Ninth Circuit has stated that *nunc pro tunc* approval is not the proper name for seeking retroactive authorization of actions in a bankruptcy case. *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 515 n. 4 (9th Cir. 2007). *Nunc pro tunc* amendments are usually used to correct errors in the record and are extremely limited in scope. *Id.* The Ninth Circuit noted that while it is more accurate to call such after-the-fact authorizations "retroactive approvals," a custom has developed, but is not necessarily correct, to refer to them generically as *nunc pro tunc* in bankruptcy practice. *Id.*

Additionally, the Stipulation contains a provision which concerns the court. In Paragraph L, the Parties purport to agree and Stipulation away rights of any future bankruptcy trustees, stating:

> L. This Stipulation shall be binding upon the parties hereto and upon all of their affiliates, assigns, and successors, including without limitation and also any bankruptcy trustee other than Trustee McGranahan, who may be appointed in the future.

No legal basis is given, and no legal basis exists for Khatri Brothers, GP, the Debtor, and their respective counsel to waive rights of future bankruptcy trustees. In effect, the attorneys are attempting to create a perpetual, *in rem* order that strips future third-party trustee and bankruptcy estates of their rights.

The court is surprised to see such a provision presented (some might say buried) in a Stipulation presented by two experienced attorneys appearing in federal court. Then, to have those two experienced attorneys presenting an order merely saying, "Whatever is in the Stipulation is ordered by the court" creates the appearance that the two attorneys were attempting to mislead the court into issuing an improper order.

ORDER SETTING POST-ORDER HEARING

Based on the court's discussion above, the court issued an Order requiring Steven Altman, counsel for Khatri Brothers, a General Partnership, and Michael H. Yi, counsel for United Resorts, LLC, and each of them, to appear in person at the March 14, 2019 post-order hearing - **NO TELEPHONIC APPEARANCE PERMITTED**. Order, Dckt. 37. The court further Ordered the appearing parties to address the following:

> (1) The appropriateness of the proposed order lodged with the court, what such an order would have "ordered,"
>
> (2) The legal basis for including in the order that language proposed by counsel - "The Stipulation, attached as Exhibit A, is approved in its entirety" which would make such Stipulation binding on all future bankruptcy trustees, and
>
> (3) Whether such an order merely stating "Stipulation . . . is approved" is an order modifying and annulling the automatic stay, or is instead merely an order saying that a stipulation for an order to be issued sometime in the future modifying the automatic stay is approved and may be enforced sometime in the future by a party seeking the issuance of an order modifying the automatic stay.

Id. The court Ordered written responses by Mr. Altman, and Mr. Yi shall be filed and served on the Chapter 7 Trustee, counsel for the Chapter 7 Trustee, and the U.S. Trustee on or before March 7, 2019.

KATHRI BROTHERS GP RESPONSE

Khatri Brothers, GP filed a Response on March 1, 2019. Dckt. 40. Khatri Brothers, GP explains that the proposed order lodged with the court was intended to modify and terminate the stay and turnover property, with the stipulation providing applicable language to that point. Khatri Brothers, GP agrees the language "retroactive relief" would have been more appropriate than "nunc pro tunc."

Khatri Brothers, GP argues that based on the property not being property of the Estate, that the proposed order would become final and non-appealable. Khatri Brothers, GP argues further that the order being binding on subsequent trustees would be a natural outgrowth of the property having been abandoned.

Khatri Brothers, GP asserts the proposed order was intended to modify and annul the stay, and not merely be a comfort order to be operative at some later date.

Counsel for Khatri Brothers, GP concludes that the proposed order was drafted for the dual purpose of providing an expedited resolution and a "degree of transparency and due process." The focal point for the proposed order was to exercise management, supervision, and control over the real property assets not in the Estate.

DISCUSSION

Michael H. Yi, counsel for United Resorts, LLC, did not file a written response.

At the hearing, **XXXXXXXXXXXXXX**.

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 Post-Order Hearing 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 Post-Order Hearing is **xxxxxxxxxxxxx**.

10. 17-90768-E-7 ICE-1 | **PRO SOCCER, INC.** **Steve Altman** | **MOTION TO SELL** **2-6-19 [33]**

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, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on February 6, 2019. By the court's calculation, 36 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).

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 granted.

The Bankruptcy Code permits Irma Edmonds, the Chapter 7 Trustee, ("Movant") to sell property of the estate or under the confirmed plan after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the personal property of the Estate described as lots of children and junior soccer shoes, soccer team jerseys, soccer socks, soccer balls, shin guards, and a single shirt screening press ("Soccer Apparel & Equipment").

The proposed purchaser of the Property is CenCal Cosmos Soccer Club ("Buyer"), and the terms of the sale are:

A. An aggregate purchase price of $2,500.00 ("Purchase Price") to be paid by the Buyer to the Movant.

B. Payment shall be made within 7 days of execution of the agreement.

C. Trustee will recommend minimum overbids of $5000.00 at the hearing on the Motion To Sell.

D. Buyer's deposit shall be returned if the Motion is not granted, buyer is overbid, or Seller fails to perform under the agreement.

E. The Soccer Apparel & Equipment is sold "as is."

Exhibit A, Dckt. 36.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because "cause exists for waiver."

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is not granted.

DISCUSSION

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: xxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because is seeks to liquidate niche sports equipment which would otherwise be of little to no value to the Estate.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Irma Edmonds, the Chapter 7 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 Irma Edmonds, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Buyer or nominee ("Buyer")

the Property commonly known as the Soccer Apparel & Equipment of Pro Soccer, Inc. ("Soccer Apparel & Equipment"), on the following terms:

A. The Property shall be sold to Buyer for $2,500.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 36, 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 Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is not waived for cause.

11. **17-90494-E-7** **DALJEET MANN**
18-9012 **SSA-4**

EDMONDS V. MANN ET AL

CONTINUED MOTION TO TAX COSTS AND/OR MOTION FOR COMPENSATION FOR STEVEN S. ALTMAN, PLAINTIFF'S ATTORNEY
1-18-19 [56]

The Motion to Tax Costs and/or for Allowance of Professional Fees is removed from the calendar by prior Order of the court. Dckt. 68.

12. 19-90122-E-11 MF-7 | **MIKE TAMANA FREIGHT LINES, LLC** | **CONTINUED MOTION FOR CONTEMPT AND/OR MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY**
3-1-19 [66]

NO TELEPHONIC APPEARANCES PERMITTED FOR BRENDA OCHOA AND PARDEEP SINGH OR THEIR COUNSEL

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.

The Motion for Contempt And/Or Sanctions for Violation of the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, 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 for Contempt And/Or Sanctions for Violation of the Automatic Stay is xxxxx.

Mike Tamana Freight Lines, LLC, the Debtor in Possession, ("ΔIP") has filed a Motion to Hold HSD Trucking, Inc. ("HSD") in Contempt for an asserted violation of the automatic stay. The Motion states with particularity (Fed. R. Bankr. P. 9013) grounds, which include the following:

A. Prior to commencement of this Chapter 11 case Mike Tamana Freight Lines, LLC, the Debtor contracted with HSD to provide trucking services for the Debtor.

B. As of the commencement of this case HSD was owed payment for pre-petition trucking services, which HSD asserts to be approximately $5,000.

C. After the commencement of this case the ΔIP, as the fiduciary of the bankruptcy estate serving in lieu of a trustee being appointed, contracted with HSD to provide trucking services to the bankruptcy estate.

D. HSD contracted with the ΔIP, the fiduciary of the bankruptcy estate, to provide trucking services to the bankruptcy estate.

E. HSD took possession of the goods to be delivered, but after taking possession and control of the goods that HSD contracted to deliver for the bankruptcy estate, HSD failed to deliver the goods as contracted.

F. HSD advised the ΔIP that it would not deliver the goods unless the ΔIP paid HSD not only the $1,700 contract price for the services contracted to be provided to the bankruptcy estate, but the prepetition claim as well.

G. ΔIP asserts that taking possession of the goods to be delivered, refusing to deliver, and retaining possession of the goods, and demanding payment of the pre-petition claim as a condition to perform the post-petition contract and release the post-petition goods is a violation of the automatic stay for which HSD can be subject to sanctions.

H. Counsel for the ΔIP attempted to communicate that the ΔIP asserts that the conduct is in violation of the automatic stay, but such communications were not productive.

Motion, Dckt. 66.

The Declaration of Amajot Tamana ("Aman") is provided in support of the Motion. Dckt. 67. With respect to the post-petition contract between the ΔIP and HSD, Aman testifies:

> 5. On or about February 27, 2019, HSD Trucking accepted a contract from the Debtor in Possession to deliver goods for one of its customers.

Declaration ¶ 5, *Id.* His testimony continues, stating that after obtaining possession of the goods to be shipped pursuant to the post-petition contract:

> After picking up the load, HSD Trucking notified the Debtor in Possession that it would not deliver the goods unless it was paid both for the new post-petition delivery (approximately $1,700) and for its pre-petition claim (approximately $5,000).

Id. Aman's testimony continues, authenticating an email exchange in which the demand for payment of the pre-petition claim as a condition of performing the post-petition contract, stating:

> 7. On March 1, 2019, HSD Trucking sent an email to me in which it refusing to deliver the load until its entire claim was paid in full. A true and correct copy of that email is attached as Exhibit "C." In the email, HSD Trucking acknowledges that this case has been commenced, but nevertheless demands full payment on its claim.

Id. ¶ 7. He further testifies that HSD continues to fail to perform the post-petition contract, stating:

> 8. As of this filing, HSD Trucking has not delivered the goods to their destination nor returned them to the Debtor in Possession.

Id. ¶ 8.

Matthew Olson, Esq., counsel for the ΔIP, provides his declaration in support of the Motion. Dckt. 68. In it he testifies as to his communications with HSD concerning the asserted violation of the automatic stay. Declaration ¶ 3,4; *Id.*

Exhibit C is an email thread of communications between Aman for the ΔIP and a person identified in the email as Brenda Ochoa for HSD. Dckt. 69. A February 28, 2019 email stated to be from Brenda Ochoa for HSD to Aman for the ΔIP, which states:

> I apologize for the situation but, I have been forced in this situation I [sic] have had several companies go sideways leaving us with extensive accounts in limbo and unfortunately we can not continue to operate on benefit of the doubt. I really wish there was anything that can be done but at this point **I [sic] need the entire amount cleared prior to any new loads.** And again please remember Taran does not have the authority to override my decision. **I am the person in charge of accounting and at this point I need the entire amount.**

Id. at 10 (emphasis added). This demand for payment of the "entire amount" is in response to Aman stating in his email that the ΔIP can pre-pay for the post-petition services, but would be in violation with the court if the ΔIP were to pay the pre-petition claim. *Id.* at 11.

MARCH 5, 2019 HEARING &
ORDER CONTINUING HEARING

At the March 5, 2019 hearing gon the Motion, HSD did not make an appearance. ΔIP reported that no change in circumstances occurred. Civil Minutes, Dckt. 76.

The court issued an Order continuing the hearing to March 14, 2019. Order, Dckt. 74. The court further Ordered that HSD shall file and serve responsive pleadings on or before March 13, 2019, and that Brenda Ochoa and Pardeep Singh, and each of them, shall appear in person at the March 14, 2019 hearing - **NO TELEPHONIC APPEARANCES PERMITTED**.

Additionally, the court noted for HSD that a corporation cannot appear in pro se and must be represented by counsel.

APPLICABLE LAW

Congress has provided in 11 U.S.C. § 362(a) for an automatic stay that goes into effect upon the commencement of the bankruptcy case. The stay exists both as to the debtor and the bankruptcy estate. These stays are summarized as follows:

Stay As to Debtor	**Stay as to the Bankruptcy Estate, Trustee, and Debtor in Possession**
(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or **to recover a claim against the debtor that arose before the commencement of the case under this title**;	
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;	(2) the enforcement, against the debtor **or against property of the estate**, of a judgment obtained before the commencement of the case under this title;
	(3) **any act to obtain possession of property of the estate** or of **property from the estate** or to **exercise control over property of the estate**;
	(4) **any act** to create, perfect, or enforce **any lien against property of the estate**;
(5) any act to create, perfect, or enforce **against property of the debtor** any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;	
(6) **any act to collect**, assess, or recover **a claim against the debtor** that arose before the commencement of the case under this title	
(7) the **setoff of any debt owing to the debtor** that arose before the commencement of the case under this title **against any claim against the debtor**;	

When a creditor has notice of a bankruptcy case, it is the creditor's burden to determine the extent of the automatic stay and seek such relief as is appropriate. COLLIER ON BANKRUPTCY,

SIXTEENTH EDITION, ¶ 362.02; *Carter v. Buskirk (In re Carter)*, 691 F.2d 390 (8th Cir. 1982); *Hillis Motors v. Hawaii Automobile Dealers' Association (In re Hillis Motors)*, 997 F.2d 581, 586 (9th Cir. 1993) ("Where through an action an individual or entity would exercise control over property of the estate, that party must obtain advance relief from the automatic stay from the bankruptcy court. *Carroll v. Tri-Growth Centre City Ltd. (In re Carroll)*, 903 F.2d 1266, 1270-71 (9th Cir. 1990).")

The prohibition on exercising control over property of the bankruptcy estate is discussed in COLLIER IN BANKRUPTCY as follows:

> [5] Acts to Obtain Possession of Property of the Estate or Property from the Estate; § 362(a)(3)
>
> Section 362(a)(3) stays all actions, whether judicial or private, that seek to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. The trustee or debtor in possession takes control of all property of the estate in order to maintain any going concern value and to assure an equitable distribution of the property among creditors. **This requires that no entity seek to interfere with these tasks by taking possession of or exercising control over property of the estate. It also requires that no entity grab non-estate property from the estate without the court supervision that comes from a stay relief proceeding.**
>
> This provision should be read with sections 542 and 543, which assist the trustee in obtaining possession of property of the estate that is in the possession of third parties, by requiring turnover of the property to the trustee. **The failure of an entity in possession of estate property to turn over the property to the trustee would be a violation of section 362(a)(3)** except as may otherwise be provided in section 542. And the Third Circuit has ruled that a franchisor's actions, both outside the bankruptcy court and in the bankruptcy case itself, to obtain possession of a debtor's franchise prepetition might violate the automatic stay. The better view, however, is that proper objections in the bankruptcy court do not violate the stay.
>
> **The property protected may be property of the estate or property in the possession of the estate.** An example of the latter would be property which was leased or bailed to the debtor prior to the commencement of the case. If, however, the property in question is not property of the estate and was not in possession of the debtor at the time of the commencement of the case, section 362(a)(3) is inapplicable.
>
> The stay applies to attempts to obtain or exercise control over both tangible and intangible property. It may even apply to a town ordinance that attempts to revoke a debtor's estoppel right to have a zoning application processed. It also protects fraudulent transfer and other causes of action that are vested in the trustee. However, some courts have held that fraudulently transferred property is not

> property of the bankruptcy estate, and therefore not protected by section 362(a)(3), until it is recovered.
>
> Property of the estate includes exempt property until the property is released to the debtor. Therefore, a creditor must obtain relief from the stay before proceeding against such property

COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 362.03 (emphasis added).

With respect to the stay of any attempt to collect a prepetition debt. Collier on Bankruptcy explains:

> [8] Acts to Collect, Assess or Recover Claims Against the Debtor; §?362(a)(6)
>
> Section 362(a)(6) stays any act to collect, assess or recover a prepetition claim against the debtor. The wording of this provision is somewhat similar to that of section 362(a)(1) but the provision applies to any "act" whether or not that act is related to an "action" or a "proceeding." **Thus, any act taken to collect, assess or recover a prepetition claim against the debtor, whether the act is taken against the estate or against the debtor, is stayed.**

COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 362.03.

Sanctions and Relief Pursuant to 11 U.S.C. § 105(a)

Collier on bankruptcy, sixteenth edition, ¶ 362.12[2] provides a good overrule of a violation of the automatic stay being remedied as contempt, with compensatory and punitive damages available to be ordered by the court. Because the person that is the target of the alleged violation of the automatic stay is a limited liability company and the bankruptcy estate, the provisions of 11 U.S.C. § 362(k) that apply to an individual are not implicated in the present Motion. *In re Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1542 (9th Cir. 1996), addressing this under the predecessor provision of 11 U.S.C. § 362(h), which was renumber § 362(k) as part of subsequent amendments to 11 U.S.C. § 362.

In the Ninth Circuit, it has been determined that in addition to the inherent contempt power of a federal court, "Under § 105, Congress expressly grants court's independent statutory powers in bankruptcy proceedings to "carry out the provisions of" the Bankruptcy Code through "any order, process, or judgment that is necessary or appropriate." 11 U.S.C. § 105(a)." *Id.* at 1553. This follows well established law throughout the country. *See Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1309 (11th Cir. 1982).

The federal court is empowered to issue such orders as necessary to address the contempt, including injunctive, compensatory, and punitive damages. *In re Jove Eng'g, Inc. v. IRS*, 92 F.3d at 1554 ("Therefore, we conclude § 105(a) grants courts independent statutory powers to award monetary and other forms of relief for automatic stay violations to the extent such awards are "necessary or

appropriate" to carry out the provisions of the Bankruptcy Code."). As earlier addressed by the Ninth Circuit Court of Appeals:

> "It is clear that, even though a trustee does not qualify as an "individual" for purposes of section 362(h), a trustee can recover damages in the form of costs and attorney's fees under section 105(a) as a sanction for ordinary civil contempt. *See United States v. Arkison (In re Cascade Roads, Inc.)*, 34 F.3d 756, 767 (9th Cir. 1994) (damages not otherwise available to a corporate debtor under section 362(h) for a creditor's willful violation of the automatic stay were nevertheless available under section 105(a) as a sanction for ordinary civil contempt; distinguishing In re Goodman, supra). It is equally clear that, while an award of damages under section 362(h) is mandatory, an award of damages under section 105(a) is discretionary. *Id.; In re Pace*, 159 Bankr. at 904."

Havelock v. Taxel (In re Pace), 67 F.3d 187, 193 (9th Cir. 1995).

The analysis enunciated by the Ninth Circuit Court of Appeals in a subsequent decision concerning contempt proceedings for alleged violation of the automatic stay is:

> "The threshold standard for imposing a civil contempt sanction in the context of an automatic stay violation therefore dovetails with the threshold standard for awarding damages under § 362(h) [now 11 U.S.C. § 362(k)]. *Pace*, 67 F.3d at 191 (incorporating the willfulness standard of § 362(h) as explicated by *Pinkstaff v. United States (In re Pinkstaff)*, 974 F.2d 113, 115 (9th Cir. 1992)). Under both statutes, the threshold question regarding the propriety of an award turns not on a finding of "bad faith" or subjective intent, but rather on a finding of "willfulness," where willfulness has a particularized meaning in this context:
>
> > "[W]illful violation" does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional.
>
> *Pace*, 67 F.3d at 191; *see also Pinkstaff*, 974 F.2d at 115; *Hardy*, 97 F.3d at 1390; cf. *Bennett*, 298 F.3d at 1069 (describing standard for imposing civil contempt sanctions under § 105(a) for violation of discharge injunction). We review the decision to impose contempt for an abuse of discretion, and underlying factual findings for clear error. *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999)."

Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003). The court in *Knupfer* restated the basic principle that for a bankruptcy judge issuance of contempt sanctions, they are civil penalties, not criminal as a Article III district court judge could award in addition to civil penalties.

"Civil penalties must either be compensatory or designed to coerce compliance. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137-38 (9th Cir. 2001). . .

. . .

The sanctions associated with civil contempt -- that is, compensatory damages, attorney fees, and the offending creditor's compliance -- adequately meet that goal, id. at 507, rendering serious punitive sanctions unnecessary. *See also Sosne v. Reinert Duree (In re Just Brakes Corp. Sys.)*, 108 F.3d 881, 885 (8th Cir. 1997) (holding that "the power to punish" through punitive sanctions extends beyond the remedial goals of § 105(a)); *Griffith v. Oles (In re Hipp)*, 895 F.2d 1503, 1515-16 (5th Cir. 1990) (same)."

Id. at 1193.

DISCUSSION

At the hearing, **XXXXXXXXXXX**.

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 Contempt And/Or Sanctions for Violation of the Automatic Stay by Mike Tamana Freight Lines, LLC, the Debtor in Possession, ("ΔIP") 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 xxxxx.

13. 18-90494-E-7 MELINDA BROOME MOTION FOR ENTRY OF DEFAULT
18-9015 ADJ-2 JUDGMENT
2-14-19 [35]

BILLINGTON WELDING & MFG., INC. V. BROOME

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 Defendant-Debtor , Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on February 14, 2019. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Default Judgment is xxxxx.

Billington Welding & Mfg., Inc. ("Plaintiff") filed the instant Motion for Entry of Default Final Judgment on February 14, 2019, Dckt. 35. Plaintiff seeks an entry of default judgment against Melinda Anne Broome ("Defendant-Debtor") in the instant Adversary Proceeding, No. 18-09015.

The Complaint was filed on October 22, 2018. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on the same day. Dckt. 3. The complaint and summons were properly served on Defendant-Debtor. Dckt. 6.

Defendant-Debtor failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant-Debtor pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on November 27, 2018. Dckt. 9.

REVIEW OF COMPLAINT

Plaintiff filed a complaint objecting to the discharge generally and of several specific claims owed by Defendant-Debtor. The Complaint contains the following general allegations as summarized by the court:

A. Defendant-Debtor was an employee of Plaintiff holding the positions of bookkeeper and then chief financial officer between the years of 1992 and 2016. Dckt. 1 at ¶ 3.

B. Defendant-Debtor used her position with Plaintiff to pay herself $220,947.09 above her authorized wages, and $72,394.51 above her authorized vacation wages. *Id.* at ¶ 13. Defendant-Debtor also used Plaintiff's credit cards to make purchases totaling $13,588.66. *Id.*

C. Defendant-Debtor in her position as Chief Financial Officer was responsible for ensuring the taxes of Plaintiff were paid. *Id*. at ¶ 16. Defendant-Debtor neglected her duty to pay taxes owed to the Internal Revenue Service and State of California Employment Development Department, resulting in damages of $112,338.39. *Id*. Furthermore, Defendant-Debtor represented to Plaintiff that taxes had been paid. *Id*.

D. Defendant-Debtor's conduct resulted in total damages to Plaintiff in the amount of $419,268.65.

First Claim for Relief—False Oath

Plaintiff alleges the following for the First Cause of Action:

A. On July 3, 2018, Defendant-Debtor filed this bankruptcy case, along with her Schedules A/B.

B. Defendant-Debtor failed to report converted income received on her Statement of Financial Affairs.

C. Debtor failed to report significant tax obligations owing from converted monies.

D. As a result of intentional and material omissions in her Schedules and Statement of Financial Affairs, Defendant's discharge should be denied under section 11 U.S.C. § 727(a)(4)(A).

Second Claim for Relief—Fraud

Plaintiff alleges the following for the Second Cause of Action:

A. While working for Plaintiff, Defendant-Debtor embezzled funds of Plaintiff in amounts totaling $306,930.26.

B. As a result of Defendant-Debtor's conduct, discharge as to this debt should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and (B)(I)-(iv).

Third Claim for Relief—Tax Duty

Plaintiff alleges the following for the Second Cause of Action:

A. While working for Plaintiff in a capacity where she was responsible for paying Plaintiff's taxes, Defendant-Debtor represented paying taxes of Plaintiff where Defendant-Debtor did not.

B. Defendant-Debtor's failure to pay taxes resulted in $112,338.39 in tax penalties to Plaintiff.

C. As a result of Defendant-Debtor's conduct, discharge as to this debt should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(1).

Fourth Claim for Relief—Fraud or Defalcation While Acting in a Fiduciary Capacity, Embezzlement or Larceny

Plaintiff alleges the following for the First Cause of Action:

A. While working for Plaintiff, Defendant-Debtor embezzled funds of Plaintiff in amounts totaling $306,930.26.

B. While working for Plaintiff in a capacity where she was responsible for paying Plaintiff's taxes, Defendant-Debtor represented paying taxes of Plaintiff where Defendant-Debtor did not. Defendant-Debtor's failure to pay taxes resulted in $112,338.39 in tax penalties to Plaintiff.

C. As a result of Defendant-Debtor's conduct, discharge as to these debts should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(4).

Fifth Claim for Relief—Willful and Malicious Injury by Debtor to Another Entity or to the Property of Other Entity

Plaintiff alleges the following for the First Cause of Action:

A. While working for Plaintiff, Defendant-Debtor embezzled funds of Plaintiff in amounts totaling $306,930.26.

B. While working for Plaintiff in a capacity where she was responsible for paying Plaintiff's taxes, Defendant-Debtor represented paying taxes of Plaintiff where Defendant-Debtor did not. Defendant-Debtor's failure to pay taxes resulted in $112,338.39 in tax penalties to Plaintiff.

C. As a result of Defendant-Debtor's wilful and malicious injury, discharge as to these debts should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(6).

Prayer

Plaintiff requests the following relief in the Complaint's prayer:

A. Debtor's discharge in this case is denied;

B. Plaintiff's claims be determined to be nondischargeable;

C. Award attorneys' fees and costs; and

D. For such other relief as the court deems just and proper.

RELIEF SOUGHT IN MOTION FOR ENTRY OF DEFAULT JUDGEMENT

In the Motion filed February 14, 2019, Plaintiff only requests damages based on the following:

1. Relief pursuant to its second claim for relief under 11 U.S.C. § 523(a)(2)(A) finding $306,425.54 nondischargeable based on Defendant-Debtor committing fraud by issuing excess regular wages of $220,442.37, excess vacation pay of $72,394.51, and unauthorized credit card charges $13,588.66.

2 Relief pursuant to its fourth claim for relief pursuant to 11 U.S.C. § 523(a)(4) finding $306,425.54 nondischargeable based on Defendant-Debtor embezzling funds by issuing excess regular wages of $220,442.37, excess vacation pay of $72,394.51, and unauthorized credit card charges $13,588.66.

3. Relief pursuant to 11 U.S.C. § 523(a)(6) finding $418,763.93 nondischargeable based on Defendant-Debtor committing wilful and malicious injury by issuing excess regular wages of $220,442.37, excess

vacation pay of $72,394.51, and unauthorized credit card charges $13,588.66.

Motion, Dckt. 35. Plaintiff seeks in the aggregate a maximum of $418,763.93 be found dischargeable based on the second, fourth, and fifth claims for relief.

EVIDENCE IN SUPPORT OF THE MOTION

On February 14, 2019, Plaintiff filed several supporting Declarations and Exhibits. Dckts. 38-40.

The Declaration of Michelle Gallagher, a certified public account, provides testimony under penalty of perjury that Mrs. Gallagher, while preparing a final paycheck for Defendant-debtor in July 2016, discovered Defendant-Debtor had been overpaying herself significantly. Dckt. 39 at ¶ 4. Mrs. Gallagher testifies further that Defendant-Debtor made unauthorized credit card purchases (*Id*. at ¶ 19), and represented filing and paying Plaintiff's taxes where she had not done so. *Id.* at ¶ 25.

The Declaration of Timothy Billington, Plaintiff's president, provides testimony under penalty of perjury that Defendant-Debtor was hired by Plaintiff as a bookkeeper in 1999 and then held the position of chief financial officer of Plaintiff from the year 2006 until Plaintiff terminated her employment in June 2016. Dckt. 38 at ¶ 3. From at least the beginning of the year 2006 through her termination of employment in June 2016, Defendant was solely responsible for all aspects of Plaintiff's payroll. *Id*. ¶ 4. From at least the beginning of the year 2006 through her termination of employment in June 2016, Defendant had authority to unilaterally write checks and otherwise make withdrawals from the bank accounts maintained by Plaintiff. *Id*. at ¶ 6. Defendant-Debtor made overpayments of her salary and vacation pay, used Plaintiff's credit cards for unauthorized transactions, and failed to file Plaintiff's taxes resulting in significant tax penalties. *Id* at ¶¶ 9, 15, 19, 25.

The Declaration of Anthony D. Johnston, counsel for Plaintiff, provides testimony under penalty of perjury that Plaintiff filed a complaint against Defendant-Debtor in state court seeking damages for the same underlying causes of action forming grounds for nondischargeability. Dckt. 40 at ¶ 7. Mr. Johnston states further default was entered against Defendant-Debtor.

Also attached are several exhibits demonstrating an accounting of amounts owed by Defendant-Debtor for excess salary and vacation pay, unauthorized credit card charges, and tax penalties. Exhibits A-F, Dckt. 41.

DEFENDANT-DEBTOR'S ANSWER

On January 18, 2019, well after the entry of her default on November 9, 2018, Defendant-Debtor filed an Answer generally denying each of the allegations made in the Complaint. Dckt. 20. The Answer indicates Defendant-Debtor is proceeding in *Pro Se.*

Defendant-Debtor's untimely answer does not indicate to the court that there is a good faith opposition to the Complaint, but an eleventh and one-half hour delay tactic. While the court appreciates that for a *pro-se* defendant the trial process can be complex, this is not a surprise to the Defendant-Debtor and her counsel that has assisted her in the filing of the related Chapter 7 bankruptcy case (18-90494, the "Chapter 7 Case").

Defendant-Debtor's bankruptcy counsel are experienced bankruptcy counsel. When the Chapter 7 Case was commenced on July 3, 2018, it was with the knowledge of the claims being prosecuted in State Court by Plaintiff. *See* Statement of Financial Affairs Question 9, listing the pending State Court litigation with Plaintiff.

The Complaint in this Adversary Proceeding was filed on October 22, 2018, and served on Debtor on October 23, 2018. Complaint, Dckt. 1; Cert. of Serv., Dckt. 6. That was one hundred and nineteen (119) days after the Chapter 7 Case was filed.

The Defendant-Debtor's default was not entered until November 27, 2018, which is one hundred and fifty-five (155) days after the commencement of the Chapter 7 Case.

DEFENDANT-DEBTOR'S MOTION TO VACATE ENTRY OF DEFAULT

On February 7, 2019 Defendant-Debtor filed a Memorandum in support of a Motion To Set Aside Entry of Default. Dckt. 28. Defendant-Debtor states in the Memorandum that she is seeking to set aside entry of default for good cause because she did not know default could be entered while a bankruptcy case is pending.

Defendant-Debtor then, for the majority of the Memorandum, seeks to argue the merits of the claims.

Defendant-Debtor concludes that while she cannot afford counsel and is proceeding without knowing the applicable federal rules, that she is attempting to comply.

On February 11, 2019, the court issued an Order providing that Defendant-Debtor shall set the proposed motion to set aside entry of default for hearing.

On March 11, 2019, a month later, Defendant-Debtor sought to set the propose motion for hearing on Marc 14, 2019–3 days before the hearing date.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the Defendant-Debtor's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

> (1) the possibility of prejudice to the plaintiff,
> (2) the merits of plaintiff's substantive claim,
> (3) the sufficiency of the complaint,
> (4) the sum of money at stake in the action,
> (5) the possibility of a dispute concerning material facts,
> (6) whether the default was due to excusable neglect, and
> (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

Nondischargeability

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
> >
> > (B) use of a statement in writing—
> >
> > > (I) that is materially false;
> > >
> > > (ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

. . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

. . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

. . .

11 U.S.C. § 523.

DISCUSSION

The evidence presented establishes a clear picture of the facts giving rise to the Complaint. Defendant-Debtor was hired by Plaintiff as a bookkeeper in 1999, and then promoted to chief financial officer from 2006 to 2016. Dckt. 38 at ¶ 3. In her capacity as a chief financial officer, Defendant-Debtor had access to Plaintiff's accounts and credit cards, as well as control of Plaintiff's payroll. *Id.* at ¶¶ 4, 6. Using her position, Defendant-Debtor overpayed herself $220,947.09 as excess wages and $73,017.47 as excess vacation pay. Dckt. 39 at ¶¶ 11, 18. Defendant-Debtor also made credit card charges for personal expenses totaling $13,611.10. *Id*. at ¶ 20.

In her capacity as chief financial officer, Defendant-Debtor was responsible for filing and paying the taxes of Plaintiff. Dckt. 38 at ¶ 4. Despite making representation that these duties were being performed, Plaintiff's taxes were not in fact being timely filed or paid. Dckt. 39 at ¶ 25. As a result, penalties were assessed against Plaintiff in the amount of $123,823.22. *Id.* at ¶ 27.

Plaintiff filed a complaint in state court seeking damages for Defendant-Debtor's aforementioned conduct. Dckt. 40 at ¶ 7. Default was entered in that case before the Superior Court of California, Stanislaus County, Case No. CV18000096. *Id.*

Applying these factors, the court finds that Plaintiff will be prejudiced if Defendant-Debtor is permitted to discharge debts owing to Plaintiff. In overpaying herself and using corporate funds to pay personal expenses, taking excess vacation benefits, and using Plaintiff's credit cards without authorization, Defendant-Debtor committed fraud while acting in a fiduciary capacity. 11 U.S.C. § 523(a)(4).

As Plaintiff concedes, Defendant-Debtor had the authority to access Plaintiff's payroll and credit cards, and owed a fiduciary duty to the corporation. Defendant-Debtor having access to embezzled funds due to her role as an employee, the provisions of 11 U.S.C. § 523(a)(2) are inapplicable. *See* 4 COLLIER ON BANKRUPTCY P 523.10 [1] (16th 2018).

In determining whether conduct was wilful and malicious for purposes of 11 U.S.C. § 523(a)(6), Colliers provides the following guidance:

> An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will. In the absence of personal animus, it is not entirely clear, however, what type of wrongful conduct rises to level of being "malicious" within the meaning of the subsection. One court has observed that there has been surprisingly little judicial and scholarly commentary discussing the degree or nature of "wrongfulness" that constitutes "malice" and suggested that the totality of the circumstances should be considered in determining whether a wrongful act rises to the level of being "malicious" within the meaning of the subsection. Another court has offered a somewhat more specific standard, suggesting that "malicious" conduct is more culpable than recklessness or otherwise involves aggravated circumstances.

4 COLLIER ON BANKRUPTCY P 523.12 [2] (16th 2018). Here, the court finds Defendant-Debtor's conduct in failing to file and pay tax returns constituted wilful and malicious acts injuring Plaintiff. Defendant-Debtor owed a fiduciary duty to Plaintiff as an employee. Defendant-Debtor made false representations that taxes were filed and paid, even after receiving notices from the Internal Revenue Service that penalties were being assessed for failure to file and pay taxes. Defendant-Debtor acted intentionally and with knowledge of the consequences to Plaintiff; at best, Defendant-Debtor was indifferent to Plaintiff's harm.

The court finds that the Complaint is sufficient as to the claims asserted in the present Motion, and the requests for relief requested therein are meritorious. The court has not been shown that there is or may be any dispute concerning material facts. Defendant-Debtor has not contested any facts in this Adversary Proceeding; while an untimely Answer was filed, Defendant-Debtor merely provides a general denial to allegations in the Complaint. Further, while a Memorandum was filed seeking to set aside entry of default, there is no evidence of excusable neglect by Defendant-Debtor. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant-Debtor has been given several opportunities to respond, and there is no indication that Defendant-Debtor has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against Defendant-Debtor.

Based on the foregoing discussion, the court shall issue an order granting the Motion, and issuing default judgement. The following debts owed to Plaintiff by Defendant-Debtor are nondischargeable:

> $418,763.93 in funds derived from Defendant-Debtor's issuing excess regular wages of $220,442.37, excess vacation pay of $72,394.51, and unauthorized credit card charges $13,588.66.

Additionally, the relief requested pursuant to Plaintiff's second claim for relief under 11 U.S.C. § 523(a)(2)(A) is denied.

No further additional relief is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by Billington Welding & Mfg., Inc. ("Plaintiff") 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 court shall enter judgment in favor of Plaintiff and against Defendant-Debtor Melinda Anne Broome ("Defendant-Debtor") determining that pursuant to 11 U.S.C. § 523(a)(4) and (6) the following debts are nondischargeable:
>
> > $418,763.93 in funds derived from Defendant-Debtor's issuing excess regular wages of $220,442.37, excess vacation pay of $72,394.51, and unauthorized credit card charges $13,588.66.
>
> **IT IS FURTHER ORDERED** that the relief requested pursuant to Plaintiff's second claim for relief under 11 U.S.C. § 523(a)(2)(A) is denied.
>
> No other further relief is granted.
>
> Counsel for Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order.