

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Wednesday, March 30, 2022
Place: Department A – Courtroom #11
Fresno, California

Beginning the week of June 28, 2021, and in accordance with District Court General Order No. 631, the court resumed in-person courtroom proceedings in Fresno. Parties to a case may still appear by telephone, provided they comply with the court's telephonic appearance procedures, which can be found on the court's website.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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

1. [20-10010](#)-A-11 **IN RE: EDUARDO/AMALIA GARCIA**
[GAG-1](#)

CONTINUED STATUS CONFERENCE RE: OBJECTION TO CLAIM OF NINO GLOBAL, LLC, CLAIM NUMBER 13, AND/OR, OBJECTION TO CLAIM OF NINO GLOBAL, LLC, CLAIM NUMBER 14, OBJECTION TO CLAIM OF PLATINUM FARMS SERVICES, LLC, CLAIM NUMBER 16, OBJECTION TO CLAIM OF NINO GLOBAL, LLC, CLAIM NUMBER 17
5-24-2021 [[593](#)]

AMALIA GARCIA/MV
LEONARD WELSH/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

At the hearing, the parties should be prepared to explain why the parties did not file joint or unilateral status report(s) by March 23, 2022, as ordered at the last status conference hearing. Doc. #875.

2. [21-11814](#)-A-11 **IN RE: MARK FORREST**
[CAE-1](#)

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 SUBCHAPTER V VOLUNTARY PETITION
7-22-2021 [[1](#)]

LEONARD WELSH/ATTY. FOR DBT.

NO RULING.

3. [21-11814](#)-A-11 **IN RE: MARK FORREST**
[LKW-12](#)

MOTION TO CONFIRM CHAPTER 11 PLAN
2-15-2022 [[145](#)]

MARK FORREST/MV
LEONARD WELSH/ATTY. FOR DBT.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the chapter 11 plan on February 15, 2022. Doc. #152.

4. [22-10416](#)-A-11 **IN RE: KR CITRUS, INC., A CALIFORNIA CORPORATION**
[WJH-1](#)

CONTINUED RE: MOTION TO USE CASH COLLATERAL
3-21-2022 [[14](#)]

KR CITRUS, INC., A CALIFORNIA CORPORATION/MV
RILEY WALTER/ATTY. FOR DBT.

NO RULING.

1. [22-10212](#)-A-7 **IN RE: DAVID/HADASSAH FLEISCHER**
[GT-1](#)

MOTION TO AVOID LIEN OF CF MADERA, LLC
2-24-2022 [\[17\]](#)

HADASSAH FLEISCHER/MV
GRISELDA TORRES/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion will be DENIED WITHOUT PREJUDICE.

In order to avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). 11 U.S.C. § 522(f)(1); Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003) (quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)).

Federal Rule of Bankruptcy Procedure ("Rule") 4003(b)(1) allows a party in interest to object to a claim of exemption within 30 days after the conclusion of the § 341 meeting of creditors or 30 days after the filing of an amended Schedule C, whichever is later. In this case, the meeting of creditors is scheduled to be held on March 24, 2022. Notice of Chapter 7 Bankruptcy Case, Doc. #8.

Because parties in interest will still be able to object to the debtors' claimed exemption under Rule 4003 for thirty days after March 24, 2022, the debtors cannot yet establish that they are entitled to the scheduled exemption the debtors assert is impaired by the lien. This motion is therefore premature and not ripe for hearing because the debtors cannot satisfy the requirements to avoid a lien under § 522(f)(1).

MOTION FOR COMPENSATION FOR SOUSA AND COMPANY, LLP, ACCOUNTANT(S)
2-11-2022 [\[404\]](#)

JACOB EATON/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance
with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Sousa and Company LLP ("Movant"), accountants for chapter 7 trustee David M. Sousa ("Trustee"), requests allowance of interim compensation and reimbursement for expenses for services rendered from June 17, 2020 through November 30, 2021. Doc. #404. Movant provided accounting services valued at \$74,660.00, and requests compensation for that amount. Doc. #404. Movant requests reimbursement for expenses in the amount of \$1.81. Doc. #404. Two prior interim fee applications have been submitted and granted by the court totaling \$52,504.07. Order, Doc. #263; Order, Doc. #323.

Section 330(a)(1) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a "professional person." 11 U.S.C. § 330(a)(1). In determining the amount of reasonable compensation to be awarded to a professional person, the court shall consider the nature, extent, and value of such services, taking into account all relevant factors. 11 U.S.C. § 330(a)(3).

Movant's services included, without limitation: (1) extensive adjustments to books and records from accrual basis to cash basis for taxation purposes; (2) reviewing and organizing thousands of pages of financial information obtained through discovery in bankruptcy related litigation; (3) reviewing and comparing certain transactions covering a six-year period relevant to the bankruptcy related litigation; and (4) communicating and consulting with Trustee. Ex. 1, Doc. #407; Decl. of David M. Sousa, Doc. #406. The court finds the compensation and reimbursement sought are reasonable, actual, and necessary.

This motion is GRANTED on an interim basis. The court allows interim compensation in the amount of \$74,660.00 and reimbursement for expenses in the

amount of \$1.81. Trustee is authorized to make a combined payment of \$74,661.81, representing compensation and reimbursement, to Movant. Trustee is authorized to pay the amount allowed by this order from available funds only if the estate is administratively solvent and such payment is consistent with the priorities of the Bankruptcy Code.

3. [18-14920](#)-A-7 **IN RE: SOUTH LAKES DAIRY FARM, A CALIFORNIA
[SJS-3](#) GENERAL PARTNERSHIP**

MOTION TO EMPLOY SHANON J. SLACK AS ATTORNEY(S)
3-9-2022 [[418](#)]

DAVID SOUSA/MV
JACOB EATON/ATTY. FOR DBT.
SHANON SLACK/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

David M. Sousa ("Trustee"), the chapter 7 trustee of the bankruptcy estate of South Lakes Dairy Farm ("Debtor"), requests court approval to employ Slack Law Group APC ("SLG") as general insolvency counsel to Trustee. Doc. #418.

Section 327(a) of the Bankruptcy Code provides that "the trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under" the Bankruptcy Code. 11 U.S.C. § 327(a).

Trustee previously employed Baker Manok & Jensen PC as general counsel, but on February 23, 2022, the court entered a consent order granting the substitution of SLG for Baker Manok & Jensen PC as general counsel of record. Order, Doc. #415. Shanon J. Slack, principal of SLG, conducted a search of the files of SLG and testifies that SLG does not hold or represent any interest adverse to Debtor, any creditors, Trustee, or the chapter 7 estate, and has no connection with creditors or other parties in interest relating to Debtor or Debtor's case except for SLG's employment by Trustee. Decl. of Shanon J. Slack, Doc. #421. SLG has not received a retainer in this matter and will submit applications for compensation pursuant to 11 U.S.C. §§ 330 and 331. Id. Trustee requests this employment application be granted with an effective date 30 days prior to the filing of the application pursuant to LBR 2014-1(b)(1). Doc. #418. The application was filed March 9, 2022. Thirty days prior to March 9, 2022 is February 7, 2022.

The court has considered the applications and supporting papers and finds that SLG is disinterested and has no connection with Debtor, creditors, or other parties in interest.

Accordingly, the application will be GRANTED.

4. [21-11034](#)-A-7 **IN RE: ESPERANZA GONZALEZ**
[DMG-3](#)

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH
ABLP PROPERTIES, VISALIA LLC AND ABLP REIT LLC AND/OR MOTION TO SELL,
MOTION TO APPROVE CORPORATE DISSOLUTIONS
3-2-2022 [[81](#)]

JAMES SALVEN/MV
JUSTIN HARRIS/ATTY. FOR DBT.
D. GARDNER/ATTY. FOR MV.
ORDER DOC # 92

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

DISPOSITION: Continued to April 27, 2022 at 1:30 p.m.

NO ORDER REQUIRED.

On March 16, 2022, the court issued an order continuing the hearing on the motion to compromise controversy to April 27, 2022 at 1:30 p.m. Doc. #92.

Opposition to the motion shall be filed and served no later than April 13, 2022. Replies to the opposition shall be filed and served no later than April 20, 2022.

5. [08-16938](#)-A-7 **IN RE: PAUL KLIMEK AND CHARLENE MARCUM**
[FW-2](#)

CONTINUED MOTION TO EMPLOY MARIE IANNIELLO-OCCHIGROSSI AS SPECIAL COUNSEL
AND/OR MOTION TO EMPLOY LAURA MULLINS AS SPECIAL COUNSEL
1-18-2022 [[32](#)]

PETER FEAR/MV
PETER SAUER/ATTY. FOR MV.

NO RULING.

CONTINUED STATUS CONFERENCE RE: MOTION OBJECTING TO TRUSTEE'S
FINAL REPORT (ECF NO. 151)
1-6-2022 [\[165\]](#)

UNITED STATES OF AMERICA/MV
DAVID JENKINS/ATTY. FOR DBT.
JONATHAN HAUCK/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Objection will be sustained.

ORDER: The minutes of the hearing will be the court's findings
and conclusions. The court will issue an order after the
hearing.

Notice of the final report of James E. Salven ("Trustee"), the chapter 7 trustee for the bankruptcy estate of Leonard E. Hutchinson and Sonya C. Hutchinson (together, "Debtors"), was issued by the court on December 17, 2021 and served on December 19, 2021. Doc. ##154-155. The United States of America (the "United States") filed a timely objection on January 6, 2022. Doc. #165. After additional briefing and responses of the United States and Trustee, the failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition within 21 days of the date of the notice may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the non-responding parties in interest are entered.

At the February 9, 2022 hearing, the court continued this matter to March 30, 2022 because new factual issues were raised at the hearing that were not included in the parties' prior written pleadings. Specifically, Trustee raised an issue regarding whether Debtors had abandoned their homestead. Per the Joint Status Report filed on March 22, 2022, Trustee has dropped that argument. Doc. #196. Trustee also questioned the validity of the federal tax liens that Trustee alleged had not been renewed. In the Joint Status Report, the parties acknowledge that the United States and Trustee disagree about the effect of the failure to refile federal tax liens, but that "the main issue is the payment of administrative expenses." Doc. #196. The parties indicate that the only real controversy is whether Trustee can pay administrative expenses with the sale proceeds on hand. Doc. #196. Based on the analysis below, because the sale proceeds are wholly subject to Debtors' homestead exemption, the sale proceeds cannot be used to pay administrative expenses.

INTRODUCTION

The United States and Trustee disagree over the proper distribution of the remaining proceeds from the sale of Debtors' residence. Trustee seeks to use the remaining sale proceeds to satisfy approximately \$89,400 in administrative expense claims before paying any funds to the Internal Revenue Service of the United States of America ("IRS") on account of the IRS's secured tax lien. The United States opposes and contends that the remaining sale proceeds are subject to Debtors' allowed homestead exemption and cannot be used to pay administrative expenses under either 11 U.S.C. § 724(b), 11 U.S.C. § 522(k) or 11 U.S.C. § 522(c). In recent filings, Trustee has asked this court to

distribute the remaining sale proceeds between the IRS and the estate on a pro rata basis based on the tax, interest on tax, and penalty allocations of the partially avoided tax lien. The United States opposes this request also.

In a recent decision in this case, Hutchinson v. United States (In re Hutchinson), 15 F.4th 1229, 2021 U.S. App. LEXIS 38052 (9th Cir. Dec. 23, 2021), the Ninth Circuit did not decide how the remaining proceeds from the sale of Debtors' residence should be distributed. Hutchinson, 15 F.4th at 1236 n.3 ("No issue concerning the proper distribution of the proceeds of sale of the Orosi residence has been presented to us."). Rather, Hutchinson stated that, in the context of a chapter 7 case, only a trustee can avoid the penalty portion of a federal tax lien, and when so avoided the lien is preserved for the benefit of the estate. Hutchinson, 15 F.4th at 1235-36.

As discussed in more detail below, the court determines that:

- (1) To the extent the sale proceeds are allocated to the tax and interest on tax portions of the IRS's most senior tax lien, the sale proceeds should be paid first to the United States with respect to the tax and interest on tax portions of the lien pursuant to 11 U.S.C. § 522(c) (2) (B).
- (2) To the extent the sale proceeds are allocated to the avoided penalty portion of the IRS's most senior tax lien, those proceeds, while they remain subject to Debtors' homestead exemption, are payable to the estate. Because these funds remain subject to Debtors' homestead exemption, these funds may not be used to pay administrative expenses pursuant to 11 U.S.C. § 522(k) or § 522(c).

RELEVANT FACTS

The following facts are relevant to the matter at hand. Debtors commenced this bankruptcy case under chapter 7 of the Bankruptcy Code on June 11, 2017. Doc. #1. Trustee was appointed as the chapter 7 trustee. Doc. #2. At the time the bankruptcy case was filed, Debtors resided at 41727 Rd. 125, Orosi, Tulare County, California ("Orosi") and claimed a \$100,000 homestead exemption in the property. Schedules A/B & C, Doc. #1. No objections to the claimed exemption were raised.

Prior to the filing of the bankruptcy petition, IRS recorded multiple liens for unpaid taxes, interest, and penalties that attached to Orosi. The IRS lien with the first priority was for 2008 and 2009 taxes assessed on May 2, 2011 and filed on May 23, 2011. Doc. #196. Of a total tax lien of \$219,257.27, \$62,913.27 is attributable to tax, \$24,244.46 is attributable to interest on tax, and \$132,099.54 is attributable to penalties. Doc. #163. On August 17, 2017, the IRS filed a proof of claim asserting a secured claim amount of \$412,067.44 and an unsecured amount of \$179,316.18, of which \$176,889.91 is claimed as entitled to priority. Claim 5.

On August 8, 2017, Debtors initiated an adversary proceeding by filing a complaint asserting two causes of action. Adv. Proc. No. 17-01076, Doc. #1. The first cause of action sought to avoid the penalty portions of the IRS's liens under 11 U.S.C. § 724(a) to the extent of Debtors' asserted homestead exemption. Id. The second cause of action sought to preserve the avoided amount for the benefit of Debtors. Id. Debtors, the United States, and Trustee engaged in vigorous debate in both the bankruptcy case and the adversary proceeding regarding the rights of these three parties in Orosi, which generated multiple published opinions, including the recent panel decision of the Ninth Circuit.

During the bankruptcy case, on August 20, 2018, the United States moved to compel Trustee to abandon Orosi for being of inconsequential value and benefit to the estate. Doc. #53. The United States argued that the IRS was entitled to collect on all of the tax and interest on tax portions of the liens represented in Claim 5 (roughly \$206,000) prior to the payment on account of any penalty portion of its tax liens and, therefore, Orosi was significantly overencumbered and there would be no payment to Trustee from the sale of Orosi. Doc. #53; Doc. #55. Trustee opposed the motion, arguing that the IRS's claim was actually comprised of multiple liens recorded on three separate dates so the tax, interest on tax, and penalty portions of the IRS's liens should be determined on a lien by lien basis. In his opposition, Trustee stated that, using this approach and based on the most senior tax lien recorded on May 23, 2011, which secured taxes, interest on taxes and penalties owed for two separate tax years, the first \$87,158.73 in proceeds from the sale of Orosi (after payment of the broker's fee, costs of sale and a senior consensual lien) would go to the United States for tax and interest on tax, and the next \$132,099.54, representing the penalty portions of the most senior IRS tax lien, would go to the estate for the benefit of creditors, assuming all of the interest allocation of the tax lien is attributable to the tax. Doc. #62 at 3:12-19. Trustee made similar statements in a Joint Statement filed in the adversary proceeding, where Trustee agreed with the United States that the IRS would collect on the tax and interest on tax portions of a tax lien before Trustee would be entitled to collect any amount for penalties on a lien by lien basis. See Adv. Proc. No. 17-01076, Doc. #79.

In ruling on the motion to compel abandonment, the court agreed with Trustee's position and determined that the lien by lien approach was the appropriate analysis. Doc. #71 Transcript. The court denied the United States' motion to compel abandonment after explaining that Trustee could realize money for the benefit of the estate after paying the United States on the tax and interest on tax portions of a tax lien on a lien by lien basis. Under relevant authority, the tax and interest on tax portion of the most senior secured IRS lien that were not avoidable, totaling \$87,157.73, would be paid and then the avoidable penalty portion of the most senior IRS tax lien, in the amount of \$132,099.54, would be paid before any sale proceeds would be allocated with respect to the next senior IRS tax lien. Doc. #157; Doc. #163.

Trustee eventually sold Orosi for a gross sales price of \$201,250 on or about February 7, 2020. Ex. B, Doc. #151; Doc. #196. After deducting the approved real estate commission, paying the first deed of trust and other costs of sale in full, there remained \$94,767.41. Ex. B, Doc. #151. As of the filing of Trustee's Final Report, \$92,652.71 remained in the estate's account from the sale of Orosi. Exs. B & D, Doc. #151.

The most senior IRS lien states "unless notice of lien is refiled by the date in column (e) [June 1, 2021], this notice shall constitute the certificate of release of lien as defined in IRC 6325(a)." IRS's Claim 5; Doc. #196. On February 20, 2019, this court entered judgment avoiding the penalty portion of the most senior IRS lien. Adv. Proc. No. 17-01076, Doc. #99; Doc. #196. The IRS did not refile the notice of tax lien. Doc. #196.

According to the joint status report filed on March 22, 2022;

The United States takes the position that the expiration of the lien did not affect the parties' rights to the funds, see 26 C.F.R. § 301.6323(g)-1(a)(3)(i), and if it did affect the parties it should affect them equally. The Trustee believes that the phrase in that regulation "property or its proceeds that is the subject of a levy or judicial proceeding commenced prior to the end of the

refiling period" refers to property or proceeds subject to a collection action timely filed by the IRS as provided in 26 U.S.C. § 6502. Such an action was never commenced.

Para. 3, Doc. #196.

During this bankruptcy case, Trustee and the professionals employed by Trustee have accumulated fees and expenses totaling approximately \$89,400. Trustee's proposed distribution provides for \$89,400.08 to be used to pay trustee fees and other administrative expenses, primarily fees to professionals employed by Trustee, a \$3,232.03 payment to the IRS on account of its most senior tax lien, and a \$20.60 payment on the secured claim of Capital One Auto Finance, leaving no remaining balance. Tr.'s Final Report, Doc. #151.

LEGAL ANALYSIS

A. Allocation of the Remaining Sale Proceeds

To the extent the IRS continues to hold a valid lien in the sale proceeds, the court must determine how to allocate the sale proceeds with respect to the tax, interest on tax, and penalty portions of the IRS's most senior tax lien because how those proceeds are allocated determines what, if any, rights Trustee may have to use the remaining sale proceeds to pay outstanding administrative expenses.

1. 11 U.S.C. § 724(b) Not Applicable

To the extent Trustee seeks to pay administrative expenses ahead of paying the tax and interest on tax portions of the IRS's most senior tax lien under 11 U.S.C. § 724(b), the court rejects that argument. By its express terms, the special distribution scheme set forth in 11 U.S.C. § 724(b) does not apply when an avoidable tax lien, such as the most senior IRS tax lien at issue in the matter before the court, is involved. Section 724(b) applies to "[p]roperty in which the estate has an interest and that is subject to a lien **that is not avoidable** under this title" 11 U.S.C. § 724(b) (emphasis added); IRS v. Baldiga (In re Hannon), 619 B.R. 524, 534 (D. Mass. 2020) ("By avoiding the penalty and interest on penalty portions of the IRS liens, those funds are no longer 'not avoidable' and, therefore, not subject to § 724(b).").

Trustee used the avoidance powers under § 724(a) to avoid the penalty portions of the IRS's tax liens against Orosi. Thus, Orosi is subject to tax liens that are avoidable and § 724(b), which only applies to property that is subject to a lien that is **not** avoidable under the Bankruptcy Code, does not apply to the facts of this case. Accordingly, the court holds that by the express language of the statute, the priority distribution scheme of 11 U.S.C. § 724(b) does not apply to the tax lien at issue and Trustee cannot use the distribution scheme under 11 U.S.C. § 724(b) to pay administrative expenses ahead of the tax and interest on tax portions of the most senior IRS tax lien. The court need not decide the extent to which the estate has an interest in Orosi for purposes of applying 11 U.S.C. § 724(b).

2. Allocation Analysis

The court holds that the United States should be paid with respect to the tax and interest on tax portions of its tax lien before Trustee is paid on the avoided penalty portion of the same tax lien. Section 724(a) of the Bankruptcy Code permits a chapter 7 trustee to "avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title." 11 U.S.C. § 724(a). Section 726(a)(4), in turn, identifies "any allowed claim, whether secured or

unsecured, for a fine, penalty, or forfeiture . . . arising before the earlier of the order for relief or the appointment of a trustee[.]” 11 U.S.C. § 726(a)(4); see Gill v. Kirresh (In re Gill), 574 B.R. 709, 716 (B.A.P. 9th Cir. 2017) (explaining that a chapter 7 trustee may avoid a tax penalty lien). As the Ninth Circuit Bankruptcy Appellate Panel explained in Gill:

The purpose of § 724(a) is to protect unsecured creditors from the debtor’s wrongdoing. Enforcement of penalties against a debtor’s estate serves not to punish the delinquent taxpayers, but rather their entirely innocent creditors. Innocent creditors should not be punished for the action of delinquent debtor taxpayers. “By avoiding the penalty portions of the tax liens and preserving them for the benefit of creditors, the estate is enriched while the IRS still obtains the principal portion of its liens, with interest in the order and priority of each respective lien.”

Gill, 574 B.R. at 716 (quoting In re Bolden, 327 B.R. 657, 665 (Bankr. C.D. Cal. 2005) (internal citations omitted)).

By allocating to the United States the tax and interest on tax portions of its tax lien before allocating to Trustee the avoided penalty portion of the same tax lien, the penalty portion of the lien is subordinated to the tax and interest on tax portions. This is consistent with 11 U.S.C. § 724(a), which avoids only the same portion of a tax lien that is also subordinated in § 726(a)(4), and not any other portion of a tax lien. Applying a pro rata distribution scheme as proposed by Trustee, the portion of the tax lien allocated to penalties would be treated on par with the tax and interest on tax portions of the lien. The result in this case is that the estate could receive more than if the portions allocated to tax and interest on tax are paid first. Specifically, if the lien is paid first to the tax and interest on tax portions of the lien, \$487,157.73 would be paid to the United States and \$5,494.98 would be paid to Trustee. Under a pro rata distribution, the United States would receive 39.75% of \$92,652.71, or \$36,829.45, and Trustee would receive 60.25%, or \$55,823.26. This is inconsistent with 11 U.S.C. § 724(a). Accordingly, the United States should be paid with respect to the tax and interest on tax portions of its tax lien before Trustee is paid on the avoided penalty portion of the same tax lien.

B. Homestead Exemption

Trustee relies almost exclusively on an unreported opinion out of the District of Arizona, United States v. Warfield, No. CV-20-08204, 2021 U.S. Dist. LEXIS 75039, 2021 WL 1530094, *1 (D. Ariz. Apr. 19, 2021), for the proposition that the proceeds being held by Trustee from the sale of Debtors’ homestead will not be used to pay administrative expenses. According to Trustee, § 522(c)(2)(B) “makes it clear that any claimed exemption falls in line after the tax lien.” Tr.’s Reply 3:12, Doc. #160. Trustee argues that because tax liens have priority over exemptions and Trustee stands in the shoes of a tax penalty lien holder, Trustee has priority over exemptions for the benefit of the estate.

However, Trustee’s argument ignores the plain language of the Bankruptcy Code and Ninth Circuit authority, both of which are clear that exempt property remains liable for certain tax liens, not that exempt property holds a lower priority than certain tax liens. Nothing in the language of § 522(c)(2)(B) establishes the priority of liens over a claimed exemption. Rather, § 522(c)(2)(B) only informs as to the types of debt for which exempt property may be liable. All proceeds from the sale of Orosi, although potentially liable for certain tax liens, are also exempt.

Warfield is not binding, and the court does not find it persuasive. For unknown reasons, the bankruptcy court in Warfield determined that the debtor's homestead exemption was third in line behind the consensual mortgage and the tax liens. Warfield, 2021 U.S. Dist. LEXIS 75039 at *8. In what it termed a "close call," the district court in Warfield agreed "with the bankruptcy court that Debtor's homestead exemption was third in line behind the Tax Lien, rather than existing alongside the Tax Lien." Warfield, 2021 U.S. Dist. LEXIS 75039 at *25. However, deciding that the homestead exemption was third in line was not necessary to the court's decision in Warfield and is not correct under Ninth Circuit authority. The bankruptcy court in Warfield was asked to decide whether the debtor could claim an avoided tax lien as exempt pursuant to § 522(g). Warfield, 2021 U.S. Dist. LEXIS 75039 at *10. In discussing how it is that a trustee can avoid a penalty portion of a tax lien, the district court felt it necessary to state that tax liens occupy a higher priority than homestead exemptions. This conclusion was reached to solve the problem perceived by the district court that any other interpretation would allow debtors to escape liability for tax liens. In this regard, the analysis in Warfield has been superseded by the recent Ninth Circuit authority of Hutchinson.

The Ninth Circuit in Hutchinson implicitly relied on the conterminous nature of valid exemptions and tax liens covered by § 522(c)(2)(B). In Part II of Hutchinson, the court rejected Debtors' argument that § 522(h) empowered chapter 7 debtors to avoid a tax lien covered by § 522(c)(2)(B). Hutchinson, 15 F.4th at 1232-34. The court reached that conclusion not because tax liens have priority over exemptions, but because the Bankruptcy Code did not authorize chapter 7 debtors, as opposed to trustees, to "remove tax liens from their otherwise exempt property." Hutchinson, 15 F.4th at 1233-34. As the Ninth Circuit reiterated, "Congress could logically have wanted to allow tax penalties to be avoided if that would benefit unsecured creditors while eschewing benefiting debtors who had incurred those penalties by failing to pay their taxes." Id. (citations omitted). That situation exists only if the exemption and the tax lien exist conterminously. If Trustee's argument held true and a tax lien had priority over and primed an exemption rather than existed conterminously with the exemption, avoiding the penalty portion of a tax lien by a debtor would not put the avoided property back in the hands of a debtor as exempt property. Rather, the debtor would continue to have a subordinated exemption right in the property and the avoided portion would benefit creditors, so the Ninth Circuit would not need to reject Debtors' argument that § 522(h) empowered chapter 7 debtors to avoid a tax lien covered by § 522(c)(2)(B).

In Part III of Hutchinson, the Ninth Circuit considered whether tax liens avoided by a chapter 7 trustee can be preserved for the benefit of the debtor. Hutchinson, 15 F.4th at 1234. This part of the decision concerned preservation rather than priority, and the court ultimately held that a chapter 7 debtor cannot preserve for the benefit of the debtor a tax lien avoided by the trustee. Hutchinson, 15 F.4th at 1235-36. Part III expands on the implications of Part II, and repeatedly emphasizes that § 522(c)(2)(B) "makes quite clear that . . . debtors cannot use exemption authority to escape tax liens . . . even if (as here) the tax liens are otherwise avoided by a trustee under § 724(a)." Hutchinson, 15 F.4th at 1235. Section 522(c)(2)(B) "operate[s], vis-à-vis a debtor, to preserve tax liens against otherwise exempt property regardless of whether the trustee has avoided them." Id. (punctuation omitted) (*italics in original*).

Hutchinson says that a chapter 7 debtor's avoidance and preservation powers are "subordinate to § 522(c)(2)(B)'s bright-line rule that debtors lack the right to remove tax liens from their otherwise exempt property." Hutchinson, 15 F.4th at 1235. Section 522(c)(2)(B) establishes the "settled rule that tax liens

apply to exempt property." Id. That tax liens "apply to" exempt property and can be "removed" from exempt property belies Trustee's argument that tax liens have priority over and prime exempt property.

The Hutchinson court further acknowledges the conterminous nature of allowed exemptions and tax liens by way of two alternative and undesirable scenarios that would result if the court did not restrict a debtor's preservation authority.

On one hand, the Ninth Circuit explains that allowing a debtor to preserve a tax penalty lien avoided by the trustee for the benefit of the debtor could permit the debtor to strip tax liens from exempt property and "would create precisely the kind of end-run around § 522(c)(2)(B)" previously rejected. Hutchinson, 15 F.4th at 1236. In other words, a debtor would be able to launder exempt property through the debtor's preservation power and wash off tax liens.

On the other hand, if a trustee avoided a lien "only to turn over the benefits to the debtor, whose exempt property would then be *subject* to the lien under § 522(c)(2)(B), that would effectively nullify the trustee's express lien-avoidance power under § 724(a)." Hutchinson, 15 F.4th at 1236 (*italics in original*). Either way, the conterminous exemption would either impermissibly enrich the debtor or would create an avoidance paradox.

Regarding the interplay between a debtor's preservation and avoidance powers with § 522(c)(2)(B)'s prohibition on debtors avoiding tax liens, the court stated that "[t]he only way to read these provisions sensibly together is to conclude that, with respect to a tax lien covered by § 522(c)(2)(B), a debtor may not invoke § 522(i)(2) in order to override § 551's otherwise applicable rule that, after the trustee avoids a lien under § 724(a), the lien is preserved for the benefit of the estate." Hutchinson, 15 F.4th at 1236. Under Hutchinson, because the exemption existed conterminously with the tax liens, "the penalty portions of the tax liens that [Trustee] successfully avoided were preserved for the benefit of the estate and not [Debtors]." Id.

The court finds the analysis in In re Selander, 592 B.R. 729 (Bankr. W.D. Wash. 2018), more compelling than Warfield and consistent with Ninth Circuit authority. As the court in Selander explained:

Ordinarily, a debtor's allowed exemption removes property (or a debtor's interest up to a certain value in such property) from the bankruptcy estate and the reach of debtor's creditors. An exception to the general exemption scheme is § 522(c)(2)(B), which provides that exempt property remains liable for a properly noticed tax lien. Accordingly, the IRS retains its interest in the Homestead Exemption even after that property is removed from the bankruptcy estate.

Selander, 592 B.R. at 733 (internal citations omitted). Looking at the Bankruptcy Code as a whole, it makes more sense to the court that a tax lien and a debtor's homestead exemption exist conterminously rather than a tax lien having priority over and priming a debtor's homestead exemption.

Although Trustee will receive some distribution from Orosi sale proceeds, those funds cannot be used to pay administrative expenses. Section 522(k) states that exempt property is not liable for payment of any administrative expense except-

- (1) The aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property

exempted in relation to the value of the property recovered;
and

- (2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery or property under subsection (i) (1) of this section, that the debtor has not paid.

11 U.S.C. § 522(k) (1)-(2). Neither subsection applies here because Trustee, not Debtors, avoided the penalty tax lien. Thus, Trustee cannot use the remaining sale proceeds that are still subject to Debtors' homestead exemption to pay administrative expenses because such payment would violate § 522(k).

Trustee argues that § 522(k) does not prevent him from using the sale proceeds to pay administrative expenses because he holds the equivalent of an IRS tax lien for penalties, which have priority or prime any exemption, and therefore exempt property will not be used to pay administrative expenses. As explained above, the IRS tax liens and Debtors' homestead exemption are conterminous, so this argument fails.

Additionally, the administrative expenses sought to be paid by Trustee all arose post-petition. Section 522(c) (2) (b) specifically provides: "Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor **that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case**, except - . . . a tax lien, notice of which is properly filed[.]" 11 U.S.C. § 522(c) (2) (B) (emphasis added). This subsection limits the liability of exempt property to certain prepetition debts. It is not in conflict with § 522(k) prohibiting exempt property from being used to pay administrative expenses because administrative expenses are not prepetition debts. To the extent Trustee has stepped into the shoes of the IRS, § 522(c) (2) (B) does not authorize Trustee to use exempt property to pay the requested post-petition administrative expenses.

Because Debtors have a homestead exemption of \$100,000 in Orosi, all of the remaining sale proceeds remain subject to that homestead exemption. To the extent that Trustee seeks to use the remaining sale proceeds to pay administrative expenses, such funds may not be used to pay administrative expenses pursuant to 11 U.S.C. § 522(k) or § 522(c).

CONCLUSION

For the foregoing reasons:

- (1) To the extent the sale proceeds are allocated to the tax and interest on tax portions of the IRS's most senior tax lien, the sale proceeds should be paid first to the United States with respect to the tax and interest on tax portions of the lien pursuant to 11 U.S.C. § 522(c) (2) (B).
- (2) To the extent the sale proceeds are allocated to the avoided penalty portion of the IRS's most senior tax lien, those proceeds, while they remain subject to Debtors' homestead exemption, are payable to the estate. Because these funds remain subject to Debtors' homestead exemption, these funds may not be used to pay administrative expenses pursuant to 11 U.S.C. § 522(k) or § 522(c).

MOTION TO SELL
2-15-2022 [\[52\]](#)

IRMA EDMONDS/MV
STEPHEN LABIAK/ATTY. FOR DBT.
ANTHONY JOHNSTON/ATTY. FOR MV.

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

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Irma C. Edmonds ("Trustee"), the chapter 7 trustee of the bankruptcy estate of Judith A. Dimodana ("Debtor"), moves the court pursuant to 11 U.S.C. § 363 for an order authorizing the sale of the bankruptcy estate's interest in a 2017 Kia Sorento (the "Vehicle") to Debtor for the purchase price of \$22,395, less \$8,675 in claimed exemptions, for a net to the estate of \$13,720. Doc. #52.

Pursuant to 11 U.S.C. § 363(b)(1), the trustee, after notice and a hearing, may "use, sell, or lease, other than in the ordinary course of business, property of the estate." Proposed sales under § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. In re Alaska Fishing Adventure, LLC, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) (citing 240 N. Brand Partners, Ltd. v. Colony GFP Partners, L.P. (In re 240 N. Brand Partners, Ltd.), 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996)). "In the context of sales of estate property under § 363, a bankruptcy court 'should determine only whether the trustee's judgment [is] reasonable and whether a sound business justification exists supporting the sale and its terms.'" Alaska Fishing Adventure, 594 B.R. at 889 (quoting 3 COLLIER ON BANKRUPTCY ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed.)). "[T]he trustee's business judgment is to be given great judicial deference." Id. at 889-90 (quoting In re Psychometric Sys., Inc., 367 B.R. 670, 674 (Bankr. D. Colo. 2007)).

Trustee believes that approval of the sale on the terms set forth in the motion is in the best interests of creditors and the estate. Tr. Decl., Doc. #54. Trustee's proposed sale to Debtor is made in consideration of the full and fair

market value of the Vehicle. Doc. #54. Debtor and Trustee agree on the value of the Vehicle, and the estate will not incur any transaction costs in selling the Vehicle to Debtor. Doc. #54. Debtor has allowed exemptions in the Vehicle totaling \$8,675. Am. Schedule C, Doc. #39.

It appears that the sale of the estate's interest in the Vehicle is in the best interests of the estate, the Vehicle will be sold for a fair and reasonable price, and the sale is supported by a valid business judgment and proposed in good faith.

Accordingly, the motion is GRANTED. The court authorizes the sale of the estate's interest in the Vehicle to Debtor on the terms set forth in the motion.

8. [21-12683](#)-A-7 **IN RE: ROSALINDA TELLEZ**
[WKM-2](#)

MOTION TO AVOID LIEN OF UNIFUND CCR, LLC AND/OR MOTION TO AVOID LIEN
OF CAVALRY SPV I, LLC
2-16-2022 [[26](#)]

ROSALINDA TELLEZ/MV
W. MOORE/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Rosalinda Tellez ("Debtor"), the debtor in this chapter 7 case, moves pursuant to 11 U.S.C. § 522(f) and Federal Rules of Bankruptcy Procedure 4003(d) and 9014 to avoid the judicial lien of Unifund CCR LLC ("CCR") and the judicial lien of Cavalry SPV I LLC ("Cavalry") on Debtor's residential real property commonly referred to as 1126 E Street, Los Banos, CA 93635 (the "Property"). Doc. #26; Schedule C, Doc. #30. The court notes that although the docket shows amended schedules were filed on February 16, 2022, the amended schedules do not contain any changes or amendments to previously filed schedules.

In order to avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be

entitled under § 522(b); (2) the property must be listed on the debtors' schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). 11 U.S.C. § 522(f)(1); Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003) (quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)).

Debtor filed the bankruptcy petition on November 23, 2021. A judgment was entered against Rosalinda Tellez aka Rosalinda San Miguel in the amount of \$5,707.02 in favor of CCR on January 25, 2021. Doc. #29. The abstract of judgment was recorded pre-petition in Merced County on April 6, 2021 as document number 2021015459. Doc. #29. A separate judgment was entered against Rosalinda Tellez in the amount of \$1,971.08 in favor of Cavalry on May 14, 2021. Doc. #29. The abstract of judgment was recorded pre-petition in Merced County on October 14, 2021 as document number 2021046079. Doc. #29. The liens attached to Debtor's interest in the Property located in Merced County. Doc. #28.

Where the movant seeks to avoid multiple liens as impairing the debtor's exemption, the liens must be avoided in the reverse order of their priority. Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hanger (In re Hanger), 217 B.R. 592, 595 (B.A.P. 9th Cir. 1997). Liens already avoided are excluded from the exemption-impairment calculation with respect to other liens. Id.; 11 U.S.C. § 522(f)(2)(B). The court "must approach lien avoidance from the back of the line, or at least some point far enough back in line that there is no nonexempt equity in sight." All Points Cap. Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (B.A.P. 9th Cir. 2007). "Judicial liens are avoided in reverse order until the marginal lien, i.e., the junior lien supported in part by equity, is reached." Id.

The Property also is encumbered by a first deed of trust in favor of Midland Mortgage in the amount \$73,057.84. Schedule D, Doc. #30. Debtor claimed an exemption of \$300,000.00 in the Property under California Code of Civil Procedure § 704.730. Schedule C, Doc. #30. Debtor asserts a market value for the Property as of the petition date at \$350,000.00. Schedule A/B, Doc. #30.

Applying the statutory formula to the most junior lien, held by Calvary, first:

Amount of Calvary's judicial lien		\$1,971.08
Total amount of all other liens on the Property (including senior judicial liens)	+	78,764.86
Amount of Debtor's claim of exemption in the Property	+	300,000.00
		\$380,735.94
Value of Debtor's interest in the Property absent liens	-	350,000.00
Amount Calvary's lien impairs Debtor's exemption		\$30,735.94

The § 522(f)(2) formula can be simplified by going through the same order of operations in the reverse, provided that determinations of fractional interests, if any, and lien deductions are completed in the correct order. Property's encumbrances can be re-illustrated as follows:

Fair market value of Property		\$350,000.00
Total amount of all other liens on the Property (including senior judicial liens)	-	78,764.86
Amount of Debtor's claim of exemption in the Property	-	300,000.00
Remaining equity for Cavalry's judicial lien		(\$28,764.86)
Amount of Cavalry's judicial lien	-	1,971.08
Extent Debtor's exemption impaired		(\$30,735.94)

After disposing of Calvary's junior lien, the court finds there is insufficient equity to support Calvary's judicial lien recorded October 14, 2021.

Continuing in reverse order of priority and applying the statutory formula to CCR's senior judicial lien:

Amount of CCR's judicial lien		\$5,707.02
Total amount of all other liens on the Property (excluding junior judicial liens)	+	73,057.84
Amount of Debtor's claim of exemption in the Property	+	300,000.00
		\$378,764.86
Value of Debtor's interest in the Property absent liens	-	350,000.00
Amount CCR's lien impairs Debtor's exemption		\$28,764.86

The § 522(f)(2) formula can be simplified by going through the same order of operations in the reverse, provided that determinations of fractional interests, if any, and lien deductions are completed in the correct order. Property's encumbrances can be re-illustrated as follows:

Fair market value of Property		\$350,000.00
Total amount of all other liens on the Property (excluding junior judicial liens)	-	73,057.84
Amount of Debtor's claim of exemption in the Property	-	300,000.00
Remaining equity for CCR's judicial lien		(\$23,057.84)
Amount of CCR's judicial lien	-	5,707.02
Extent Debtor's exemption impaired		(\$28,764.86)

After application of the arithmetical formula required by § 522(f)(2)(A), the court finds there is insufficient equity to support CCR's judicial lien. Therefore, the fixing of the judicial liens of CCR and Calvary impair Debtor's exemption in the Property and their fixing will be avoided.

Debtor has established the four elements necessary to avoid a lien under 11 U.S.C. § 522(f)(1). Accordingly, this motion is GRANTED.

9. [19-13699](#)-A-7 **IN RE: DAVID GAMA**
[SL-2](#)

MOTION TO AVOID LIEN OF LOANME, INC.
2-21-2022 [\[27\]](#)

DAVID GAMA/MV
SCOTT LYONS/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v.

Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

David James Alexander Gama ("Debtor"), the debtor in this chapter 7 case, moves pursuant to 11 U.S.C. § 522(f) and Federal Rules of Bankruptcy Procedure 4003(d) and 9014 to avoid the judicial lien of LoanMe Inc. ("Creditor") on Debtor's residential real property commonly referred to as 346 W. Wayside Drive, Dinuba, CA 93618 (the "Property"). Doc. #27; Schedule C, Doc. #1.

In order to avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtors' schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). 11 U.S.C. § 522(f)(1); Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003) (quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)).

Before proceeding with the statutory analysis, the court notes that Debtor's Schedules and this motion state that the value of the Property owned by Debtor is \$102,600.50, yet the value of the Property is actually scheduled at \$205,201. Am. Schedule A/B, Doc. #22. Debtor's Schedule A/B indicates that (a) the Property is a single-family home, (b) Debtor is the only person with an interest in the Property, (c) Debtor owns the Property in fee simple, and (d) the Property is not community property. Am. Schedule A/B, Doc. #22. Debtor offers no explanation as to why the value of Debtor's interest in the Property is only half the current value of the Property, and so, for the purposes of the statutory calculation, the court will use the scheduled current value of the Property, \$205,201. As will be demonstrated, this does not change the result, and Creditor's lien will be avoided.

Debtor filed the bankruptcy petition on August 28, 2019. A judgment was entered against David Gama in the amount of \$39,413.69 in favor of Creditor on February 22, 2019. Ex. D, Doc. #30. The abstract of judgment was recorded pre-petition in Tulare County on July 18, 2019 as document number 2019-0038514. Ex. D, Doc. #30. The lien attached to Debtor's interest in the Property located in Tulare County. Doc. #28. The Property also is encumbered by a lien in favor of Carrington Mortgage Services in the amount \$113,151.00. Am. Schedule D, Doc. #22. Debtor claimed an exemption of \$100,000.00 in the Property under California Code of Civil Procedure § 704.730. Schedule C, Doc. #1. Debtor asserts a market value for the Property as of the petition date at \$205,201.00. Am. Schedule A/B, Doc. #22.

Applying the statutory formula:

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Amount of Creditor's judicial lien		\$39,413.69
Total amount of all other liens on the Property (excluding junior judicial liens)	+	113,151.00
Amount of Debtor's claim of exemption in the Property	+	100,000.00
		\$252,564.69
Value of Debtor's interest in the Property absent liens	-	205,201.00
Amount Creditor's lien impairs Debtor's exemption		\$47,363.69

The § 522(f)(2) formula can be simplified by going through the same order of operations in the reverse, provided that determinations of fractional interests, if any, and lien deductions are completed in the correct order. Property's encumbrances can be re-illustrated as follows:

Fair market value of Property		\$205,201.00
Total amount of all other liens on the Property (excluding junior judicial liens)	-	113,151.00
Amount of Debtor's claim of exemption in the Property	-	100,000.00
Remaining equity for Creditor's judicial lien		(\$7,950.00)
Amount of Creditor's judicial lien	-	39,413.69
Extent Debtor's exemption impaired		(\$47,363.69)

After application of the arithmetical formula required by § 522(f)(2)(A), the court finds there is insufficient equity to support Creditor's judicial lien. Therefore, the fixing of this judicial lien impairs Debtor's exemption in the Property and its fixing will be avoided.

Debtor has established the four elements necessary to avoid a lien under 11 U.S.C. § 522(f)(1). Accordingly, this motion is GRANTED.