UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

April 21, 2022 at 10:30 a.m.

1.	**18-90029-E-11** **FWP-13**	**JEFFERY ARAMBEL** **Pro Se**	**CONTINUED MOTION TO ABANDON** **4-8-21 [1410]**

Item 1 thru 2

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

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 holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on April 8, 2021. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Abandon 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 Abandon is continued to 10:30 a.m. on May 26, 2022

REVIEW OF MOTION

The Motion filed by Focus Management Group USA, Inc. ("the Plan Administrator") requests that the court authorize the Plan Administrator to abandon the following properties commonly known as:

1. the Arambel Business Park,
2. the Begun Ranch,
3. the Lismer Ranch,
4. the Carlilie Ranch,
5. the Judy Gail Ranch,
6. the Rogers Road property, and
7. the Gravel Pit property
8. the Murphy Ranch 756,
9. the Murphy 240 Rangeland,

(the "Properties").

The Declaration of Juanita Schwartzkopf has been filed in support of the Motion. Dckt. 1412. Ms. Schwartzkopf provides testimony that while the Properties have substantial market value, they are of inconsequential value as there is no realizable equity because the debt secured by the Properties exceeds the value of the real properties. *Id.*, ¶ 24. Moreover, according to the Plan Administrator, the properties are burdensome because the Estate does not have the funds to continue paying the costs of carrying the Properties including insurance, real property taxes, and other charges or the costs of administration of such properties. *Id.*, ¶36.

Ms. Schwartzkopf testifies that the Properties have been actively marketed by the Reorganizing Debtor and by the Plan Administrator for over 16 months during the Negotiated Period (Plan provision during which Debtor was to perform certain duties regarding plan assets) and for years prior to the Plan confirmation but that unfortunately they were not sold. *Id.*, ¶18. The Plan Administrator being unable to obtain offers in an amount that was sufficient to pay the secured claims on and tax liabilities related to the Properties. *Id.* Additionally, the Plan Administrator explains that SBN V Ag I LLC ("Summit") as one of the primary sources of funds for the post-confirmation administration of the Estate has indicated they will no longer consent to further use of their cash collateral for pursuing short sales of its collateral. *Id.,* ¶ 37. Ms. Schwartzkopf also testifies that Summit has informed the Plan Administrator that it intends to proceed promptly with non-judicial foreclosure of the Properties. *Id.*, ¶35.

Creditor's Opposition

Creditor with secured claim, American AgCredit does not object in its entirety to the abandonment of the Properties, instead Creditor American AgCredit objects specifically as to the timing of the abandonment of the Murphy Ranch Property. Dckt. 14216. American AgCredit explains that for the last five months they have been engaged in the Lot Line Adjustment ("Adjustment") process with the County of Stanislaus related to the Murphy Ranch 756 and the Murphy 240 Rangeland. Thus, American AgCredit requests that the abandonment not occur until the County of Stanislaus approves the adjustment, the adjustment is fully recorded and the appropriate quitclaim deeds by and between the Plan

Administrator and American AgCredit are approved by the parties' title companies and successfully recorded..

Plan Administrator's Reply

The Plan Administrator filed a Reply indicating they are amenable to deferring the effective date of the abandonment of the Murphy Ranches for a reasonable time during which the Adjustment may be and should be completed; but asks the court for the authority to effectuate the abandonment of the Murphy Ranches at such future time as the Plan Administrator determines in its business judgment that the abandonment should be effective, even if the Adjustment has not been fully completed. Dckt. 1434..

The Plan Administrator believes this a reasonable request on the basis that the Plan Administrator seeks to avoid capital gains taxes in the event that Summit proceeds with foreclosure remedies; the Plan Administrator will continue to work diligently with Creditor to get the Adjustment resolved; an d even after abandonment, the Adjustment process mat still continue after the abandonment where Debtor has pledged to continue working with Creditor to complete the Adjustment process.

SBN V Ag I LLC ("Summit") Response

Summit filed a Response in support of the Motion on May 7, 2021 stating that they support the abandonment of the Properties and the Plan Administrator's proposal of temporary deferral of the Murphy Properties to a later date to as to allow for the Adjustment process but they continue to reserve their right to commence non-judicial foreclosure proceedings and request that any order approving the abandonment make it clear that any delay in abandonment is without prejudice to Summit's rights to provide notice of relief from stay and commence its foreclosure rights and remedies. Dckt. 1438.

DISCUSSION

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

The court finds that the Property secures claims that exceed the value of the Property, and there are negative financial consequences for the Estate if it retains the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and authorizes the Plan Administrator to immediately abandon the following properties:

1. the Arambel Business Park,
2. the Begun Ranch,
3. the Lismer Ranch,
4. the Carlilie Ranch,
5. the Judy Gail Ranch,
6. the Rogers Road property, and
7. the Gravel Pit property

With respect to the Murphy Ranch 756 and the Murphy 240 Rangeland, completion of the lot line adjustment to correct for the Debtor having recorded Certificates of Compliance, without Creditor's consent that negatively impact its collateral, which Creditor has now foreclosed on.

Rather than having a vague "the Plan Administrator can abandon at some point in the future, and then potentially having emergency motions to modify that authorization," the court bifurcates the orders on the relief requested and issues a final order for abandonment of seven properties above, and continues the hearing on the request to abandon the Murphy Ranch 756 and the Murphy 240 Rangeland properties to 10:30 a.m. on August 12, 2021.

In addition to helping the parties avoid "abandonment anxiety," the properties being in the Plan Estate, this federal court has jurisdiction to address the issue of the adjustments by Debtor to the property that is currently in the Plan Estate through an adversary proceeding that Creditor may believe necessary with third-parties (not the Plan Administrator) to correctly identify the property foreclosed on through these bankruptcy proceedings.

August 12, 2021 Hearing

The Plan Administrator filed an updated Status Report on August 10, 2021, Dckt. 1498, concerning this Motion. The Plan Administrator advises the court that additional time is needed and a continuance of this hearing is requested to late September 2021. A non-judicial foreclosure sale of the Murphy Ranches could be conducted in mid-October 2021, and the Plan Administrator wants to insure that the abandonment occurs before that time.

September 30, 2021 Hearing

No further documents have been filed in this Contested Matter as of the court's September 28, 2021 review of the Docket. At the hearing, counsel for the Plan Administrator reported that the lot line adjustments have not yet been completed, and the Parties agreed to a further continuance of this hearing.

October 21, 2021 Hearing

At the hearing, the Parties requested a continuance to allow for all of the preliminary steps to be taken so that the abandonment may occur.

November 16, 2021 Status Report

The Plan Administrator filed an updated Status Report on November 16, 2021, reporting that the abandonment cannot be completed at this time and a further continuance was necessary. Dckt. 1585.

December 16, 2021 Hearing

Attorneys for the Plan Administrator filed a Status Report requesting a further continuance as further negotiations were conducted.

March 10, 2022 Hearing

At the hearing counsel for the Plan Administrator reported that all documents have been received for the lot line adjustment and it may now be completed. There still remain some quit claim deeds required, but the parties are waiting on information from the County as to what, if any, quit claims will be required.

April 18, 2022 Status Report

On April 18, 2022, the Plan Administrator filed a status report requesting the Abandonment Motion be further continued to May 26, 2022. Dckt. 1672. The Plan Administrator states there are final steps needed to complete the lot line adjustment while preserving the potential abandonment prior to the foreclosure sale.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon filed by Focus Management Group USA, Inc., the 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 Motion to Abandon is continued to May 26, 2022 at 10:20 am in Department E.

2. 18-90029-E-11 FWP-22 JEFFERY ARAMBEL Pro Se MOTION TO USE CASH COLLATERAL 4-1-22 [1663]

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 in Possession (*pro se*), creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on April 1, 2022. By the court's calculation, 20 days' notice was provided. 14 days' notice is required. FED. R. BANKR. P. 4001(b)(2) (requiring fourteen days' notice).

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

The Motion for Authority to Use Cash Collateral is granted.

Focus Management Group USA, Inc. ("Plan Administrator") moves for an order approving the use of cash collateral pursuant to stipulation with SBN V AG I LLC ("Summit"). Plan Administrator requests the use of cash collateral to operate the Reorganizing Debtor's business and pay Plan Expenses.

Plan Administrator proposes to use cash collateral for the following expenses:

> Plan Expenses in accordance with the Stipulated Budget such as insurance and professional fees for the time period of April 1, 2022 through June 30, 2022.
>
> A windup period if the estate is fully administered at that time and as may be extended by Summit's further stipulation.

APPLICABLE LAW

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

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> > (A) such sale or such lease is consistent with such policy; or
> >
> > (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
> >
> > > (I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
> > >
> > > (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

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

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

DISCUSSION

The Plan Administrator has shown that the proposed use of cash collateral is in the best interest of the Estate. The proposed use provides for reorganizing Debtor's business and paying Plan expenses. The Motion is granted, and the Plan Administrator is authorized to use the cash collateral for the period April 1, 2022 through June 30, 2022, including required adequate protection payments. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit"

by The Plan Administrator. All surplus cash collateral is to be held in a cash collateral account and accounted for separately by the Plan Administrator.

Counsel for the Plan Administrator shall prepare and lodge with the court a proposed order consistent with this ruling.

3.	**22-90075-E-7**	**JOSE CHAVEZ AND VERONICA ZUNIGA** **Pro Se**	**ORDER TO SHOW CAUSE - FAILURE TO PAY FEES** **4-5-22 [27]**

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

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*) and Chapter 7 Trustee as stated on the Certificate of Service on April 7, 2022. The court computes that 14 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $338.00 due on March 7, 2022.

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

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $338.00.

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

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

4. 21-90338-E-7 JOSE GUZMAN AND CONTINUED MOTION FOR ENTRY OF
21-9014 GUILLERMINA DE FLORES DEFAULT JUDGMENT
ASM-1 2-4-22 [13]
FH TRUCKING, INC. V. GUZMAN

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

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 Defendant-Debtor, Debtor's Attorney and Chapter 7 Trustee on February 4, 2022. By the court's calculation, 48 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 granted.

FH Trucking, Inc. ("Plaintiff-Creditor") filed the instant Motion for Default Judgment on February 4, 2022. Dckt. 13. Plaintiff-Creditor seeks an entry of default judgment for injunctive relief against Jose Manuel Guzman ("Defendant-Debtor") in the instant Adversary Proceeding No. 21-09014.

The instant Adversary Proceeding was commenced on November 4, 2021. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on November 5, 2021. 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 January 5, 2022. Dckt. 8.

SUMMARY OF COMPLAINT

Plaintiff-Creditor filed a complaint determining Plaintiff-Creditor's claim for $55,920.66 is exempted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A), (B), and (6). Plaintiff-Creditor states Defendant-Debtor accepted employment from Plaintiff-Creditor to provide sub-hauling trucking services. Plaintiff-Creditor states Defendant-Debtor failed to disclose they had no valid driver's license, no valid motor carrier permit, and no vehicle or cargo liability insurance in place. Defendant-Debtor caused a collision while transporting cargo for Plaintiff-Creditor which led to a total loss of cargo. Stanislaus County Superior Court entered money judgment in favor of Plaintiff-Creditor for $55,920.66 and determined Defendant-Debtor's conduct constituted fraud.

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'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 does not offer evidence in support of the allegations. *See id.* at 775.

Grounds Stated in Motion

Movant did not provided any grounds, merely unsupported conclusions of law. The insufficient statements made by Movant are:

1. The Motion seeks entry of default judgment against Defendant-Debtor based on Entry of Default and Order Re: Default Judgment Procedures filed in this action on January 5, 2022.

2. Plaintiff-Creditor asks the court to enter judgment determining the state court judgment is nondischargeable pursuant to 11 U.S.C. 523 (a)(2)(A)and(B) and 11 U.S.C. (a)(6). The court notes there appears to be a typographical error and "11 U.S.C. (a)(6)" should read 11 U.S.C. § 523(a)(6).

3. The facts and evidence supporting the Motion are included in the Declaration of Angelita Priscilla Ochoa.

Those "grounds" are merely a conclusion of law by Movant. Presumably, Movant believed that the court would make those conclusions, but the "grounds" cannot merely state the anticipated conclusions.

However, Movant remedied this with the filing of a Supplement to the Motion. Dckt. 28.

Supplemental Pleading to the Motion

On April 8, 2022, Plaintiff-Creditor filed their supplemental briefing with the court stating with particularity, pursuant to Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, the following grounds for bringing their motion:

1. The proceeding is brought pursuant to 11 U.S.C. § 523(a)(2)(A), (B); and 11 U.S.C. § 523(a)(6).

2. Plaintiff-Creditor is in the commercial freight hauling business and contracts with various merchants for hauling services, including independent sub-haulers.

3. Prior to accepting hauls, independent sub-haulers are required to have a valid commercial driver's license and certificate of insurance.

4. Defendant-Debtor is a sub-hauler who does business as J Flores Transport.

5. Plaintiff-Creditor and Defendant-Debtor would regularly orally agree for Defendant-Debtor to haul in exchange for a fee.

6. As a condition of the agreements, Defendant-Debtor agreed to maintain his licensing and insurance requirements current and in effect.

    a. Defendant-Debtor submitted a certificate of liability insurance to Plaintiff-Creditor demonstrating Defendant-Debtor was insured for $1,000,000.00 between August 9, 2018 to August 9, 2019.

b. Defendant-Debtor submitted a commercial driver's license to Plaintiff-Creditor issued January 15, 2019 and expiring November 11, 2022.

7. In reliance on these representations, Plaintiff-Creditor continued to use Defendant-Debtor for hauler jobs in exchange for a fee.

8. On or about March 29, 2019, Defendant-Debtor accepted a haul for Plaintiff-Creditor's client "Kingspan" from Modesto to Moss Landing in exchange for a fee.

9. Defendant-Debtor was involved in a collision during this haul and was found to be the cause of the accident, driving at high speed.

a. The collision resulted in a total loss of the load.

10. After the collision, it was revealed:

a. Defendant-Debtor's driver's license had been suspended as of March 5, 2019.

b. Defendant-Debtor's Motor Carrier Permit had expired as of February 1, 2019.

c. Defendant-Debtor's liability insurance had expired prior to the collision.

11. Defendant-Debtor never informed Plaintiff-Creditor of the loss of license, permit, and insurance.

12. Defendant-Debtor was required to disclose these facts due to the condition of his agreement with Plaintiff-Creditor.

13. Plaintiff-Creditor would not have hired Defendant-Debtor if they knew of the loss of license and insurance.

14. Due to the lack of insurance, the total loss fell on Plaintiff-Creditor.

15. There was a total loss of $61,545.55, which Plaintiff-Creditor was able to reduce to $48,905.32.

16. The total loss has been fully paid to client Kingspan by Plaintiff-Creditor.

17. Plaintiff-Creditor commenced a state court action against Defendant-Debtor to recover damages.

18. Stanislaus County Superior court entered judgment in favor of Defendant-Debtor.

19. Stanislaus Superior Court found Defendant-Debtor's conduct constitutes fraud as defined by California Civil Code § 3294(a)(3).

The declaration of Angelita P. Ochoain has been filed in support of the Motion. Dckt. 15.

FIRST CLAIM FOR RELIEF
11 U.S.C. § 523(a)(2)(A)

Pursuant to 11 U.S.C. § 523(a)(2)(A), a debt is nondischargeable if it was obtained by false pretenses, a false representation, or actual fraud, other than a statement involving the debtor's financial condition. To establish a debt is nondischargeable, a party must show:

(1) Debtor made representations;

(2) At the time Debtor knew were false;

(3) Made with the intent to deceive the creditor;

(4) Creditor relied on such representations; and

(5) Creditor sustained loss and damage as a proximate result of such representations.

Household Credit Servs. v. Ettell (*In re Ettell*), 188 F.3d 1141, 1144 (9th Cir. 1999).

Defendant-Debtor's Representations

Here, Defendant-Debtor submitted a certificate of liability insurance to Plaintiff-Creditor which indicated Defendant-Debtor was insured for $1,000,000.00 between August 9, 2018 to August 9, 2019. Additionally, Defendant-Debtor submitted a commercial driver's license to Plaintiff-Creditor which indicated it was issued January 15, 2019 and expired November 11, 2022. The date of the collision was on our before March 29, 2019. These were condition-precedents for employment with Plaintiff-Creditor.

Defendant-Debtor's driver's license was suspended as of March 5, 2019. Defendant-Debtor's Motor Carrier Permit was expired as of February 1, 2019. Defendant-Debtor's liability insurance had expired prior to the collision.

Defendant-Debtor failed to inform Plaintiff-Creditor that Defendant-Debtor's license was suspended and that he lost his insurance. Defendant-Debtor's failure to inform amounts to a representation that he still could legally haul loads for Plaintiff-Creditor.

Therefore, on the date of the collision, March 29, 2019, there were representations that Debtor was insured and licensed to haul the load.

Defendant-Debtor's Knowledge of Falsity

The California Patrol determined Defendant-Debtor's license was suspended and Defendant-Debtor's Motor Carrier Permit had expired. Although there is not evidence of a statement that Defendant-Debtor knew he was suspended, pursuant to California Vehicle Code § 13106, the California Department of Motor Vehicles is required to notify a driver that their license has been suspended.

There is no evidence that Defendant-Debtor attempted to rebut any presumption of notice. Additionally, Defendant-Debtor has not made and response to this adversary making such argument that they never received notice of a suspension. Therefore, presumes Defendant-Debtor knew that he had no active license and continued to make the representation that he was licensed to drive the hauler.

Additionally, Defendant-Debtor's Carrier Permit had expired. Pursuant to California Code of Regulations § 220.04, a permit is limited to twelve (12) months. Upon the court's independent review of a Motor Carrier Permit Application, the application clearly states that a permit is limited to twelve months. [Fn.1.] Therefore, it can be presumed, absent of Defendant-Debtor arguing otherwise, Defendant-Debtor was on notice that their Carrier Permit had expired.

FN. 1. https://www.dmv.ca.gov/portal/file/application-for-motor-carrier-permit-mc-706-m-pdf/

Additionally, Defendant-Debtor admitted on a phone call with California Patrol Officer on April 9, 2019 that his insurance had lapsed prior to the collision. Traffic Collision Report, Exhibit B, Dckt. 16. Pursuant to Federal Rules of Evidence 801(d)(2), an opposing party's statement is not hearsay. Therefore, the court will consider this statement as evidence showing Defendant-Debtor knew that his insurance had lapsed.

The court finds Defendant-Debtor had adequate knowledge his license was suspended, his carrier permit had expired, and his insurance had lapsed.

Defendant-Debtor's Intent to Deceive

As having a valid commercial license and liability insurance was a condition-precedent for employment, had Defendant-Debtor notified Plaintiff-Creditor of the loss of license and insurance, Defendant-Debtor would not have been given the job. Defendant-Debtor's failure to notify Plaintiff-Creditor that he could no longer legally transport loads for Plaintiff-Creditor was undoubtedly done to continue employment. Therefore, Defendant-Debtor had the requisite intent to deceive Plaintiff-Creditor into believing he still met the conditions required to transport the load.

Plaintiff-Creditor's Reliance

Defendant-Debtor made representations that his commercial driver's license would expire over three (3) years after the collision occurred. Plaintiff-Creditor received a copy of the commercial driver's license prior to employment. The license has been submitted as Exhibit A. Commercial Drivers License, Exhibit A, Dckt. 16. It was more than reasonable and justifiable for Plaintiff-Creditor to rely on the license to believe Defendant-Debtor would be commercially licensed on the date of the collision.

Defendant-Debtor also made representations that he would be insured on the date of the collision and until five (5) months after the date of the collision. Defendant-Debtor provided Plaintiff-Creditor a copy of the insurance prior to employment. Plaintiff-Creditor has submitted a copy of the insurance as Exhibit A. Certificate fo Liability Insurance, Exhibit A, Dckt. 16. It was more than reasonable and justifiable for Plaintiff-Creditor to rely on the representation that Defendant-Debtor would have liability insurance on the date of the collision.

Damages

Plaintiff-Creditor incurred damages by becoming responsible for their client Kingspan's loss. See Invoice, Exhibit C, Dckt. 16. Plaintiff-Creditor paid $48,905.32 to Kingspan to cover the loss. Additionally, a default judgment was entered for $55,920.66 in favor of Plaintiff-Creditor in state court for damages incurred by covering Kingspan's loss arising out Defendant-Debtor's conduct. See Judgment, Exhibit D, Dckt. 16.

Nondischargeable

It is clear to the court that the underlying debt has satisfied all requirements of nondischargeability under 11 U.S.C. § 523(a)(2)(A). Therefore, the debt is nondischargeable. The court will find judgment in favor of Plaintiff-Creditor under 11 U.S.C. § 523(a)(2)(A).

SECOND CLAIM FOR RELIEF
11 U.S.C. § 523(a)(2)(B)

Pursuant to 11 U.S.C. § 523(a)(2)(B), a debt is nondischargeable if there is a use of a statement in writing that is (I) materially false; (ii) respecting the debtor's financial condition; (iii) which the creditor reasonably relied on; and (iv) debtor had the intent to deceive. There are five elements that must be proved in order to determine a debt nondischargeable under 11 U.S.C. § 523(a)(2)(B):

(1) in writing;

(2) materially false;

(3) respecting debtor's financial condition;

(4) creditor reasonably relied; and

(5) debtor made with intent to deceive.

Ins. Co. of N. Am. v. Cohn (*In re Cohn*), 54 F.3d 1108, 1114 (3d Cir. 1995); *First Bank Sys., N.A. v. Foley*, 156 B.R. 645, 648 (Bankr. D.N.D. 1993).

Collier on Bankruptcy describes the relation of 11 U.S.C. § 523(a)(2)(B) with 11 U.S.C. § 523(a)(2)(A). While the elements of the two statutes largely overlap, if the representation creditor asserts to be false concerns the financial condition of a debtor, 11 U.S.C. § 523(a)(2)(B) requires the misrepresentation to be made in writing. To satisfy the writing requirement, the statement must have been written by the debtor, signed by the debtor, or written by someone else but adopted by the debtor. Additionally, a creditor must justifiably rely on the writing.

The scope of a debtor's "financial condition" includes any statement that has a direct relation to or impact on the debtor's overall financial status. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1761 (2018). These statements regarding financial conditions relate more generally to representations which a creditor relies on when extending money, property, services, or credit. *Id.* at 1764.

Here, the certificate of liability insurance and commercial license were in writing, however, the court is not compelled that they relate to Defendant-Debtor's financial condition. Although driving a commercial vehicle without these documents may be illegal, this false representation is far different than, for example, making a statement regarding a debtor's wealth and riches, or stating a claim to an asset that may significantly increase an individuals networth, in turn causing a creditor to extend credit to the debtor. Having proper license and insurance makes Defendant-Debtor "employable," rather than "financially desirable."

The court finds the written representations of having a commercial license and liability insurance falls outside the scope of 11 U.S.C. § 523(a)(2)(B). Therefore, the court does not find judgment in favor of Plaintiff-Creditor under this section.

THIRD CLAIM FOR RELIEF
11 U.S.C. § 523(a)(6)

Pursuant to 11 U.S.C. § 523(a)(6), a debt is nondischargeable if there was willful and malicious injury by the debtor to another entity or to the property of another entity.

The United States Supreme Court set the standard for willful and malicious in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). In *Geiger*, a creditor-patient sought to determine a medical malpractice judgment was nondischargeable against a debtor-physician. The creditor-patient alleged the malpractice judgment was nondischargeable because the debtor-physician acted with "willful and malicious injury." *Id.* at 60. The creditor-patient sought treatment from debtor-physician for a foot injury. *Id.* at 59. Debtor-physician examined the foot and knew one form of treatment would be more effective, however, he prescribed another treatment to keep costs down. *Id.* Debtor-physician then took off on a trip and other physicians treated creditor-patient. *Id.* When debtor-physician returned, he cancelled all treatment for patient-creditor, believing the infection subsided. *Id.* Debtor-physician was grossly incorrect. The infection had not healed and patient-debtor had to amputate her right leg below the knee. *Id.* Trial found in favor of creditor-patient for malpractice and awarded creditor-patient $355,000 in damages. *Id.* Debtor-physician carried no malpractice insurance. *Id.* The Court determined although Debtor-physician's conduct fell below the standard of care, the § 523(a)(6) exemption applies only to acts done with actual intent to cause the injury. *Id.* at 61. The Court stated:

> The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury."

Id. Additionally, *Geiger* touched on whether a failure to carry malpractice insurance should be excepted from discharge. The Court found Congress can make such decision, but until they decide, courts must

follow the "current direction § 523(a)(6)" which provides: reckless or negligently inflicted injuries do not fall within the scope of 11 U.S.C. § 523(a)(6). *Id.* at 64.

The Court also makes the compelling argument that if 11 U.S.C. § 523(a)(6) were to be constructed to focus on the willful and malicious conduct of performing the act, rather than the intent to cause the injuries, a "construction so broad would be incompatible with the well-known guide that exceptions to discharge should be confined to those plainly expressed." *Id.* (citing *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)).

One exception plainly expressed under 11 U.S.C. § 523(a)(9) is debts arising from death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft, if the debtor was intoxicated. With a broad interpretation of willful and malicious injury, there would be no such need to add this exception. The court could simply focus on the willful and malicious act of driving intoxicated, and conclude that the act which caused the injury suffices under 11 U.S.C. § 523(a)(9). It is hard to imagine Congress writing this exception if it could be covered under (a)(6).

Additionally, the Court provides other examples which may result from a broader construction, "Every traffic accident stemming from an initial intentional act -- for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic -- could fit the description. . . . A 'knowing breach of contract' could also qualify." *Geiger*, 523 U.S. at 62. The "fresh start" policy encompassing the Bankruptcy Code favors broad construction of exceptions to discharge favorable to debtors. *Grogan v. Garner*, 498 U.S. 279, 283 (1991). Such a fresh start is part of Bankruptcy being a redemptive judicial process, not just for debtor but creditors as well, providing both with the ability to address prior financial distress and foibles. With such broad construction of 11 U.S.C. § 523(a)(6), it is easy to imagine the stripping of the "fresh start," and bankruptcy court may start look much less desirable to ease debtor's financial distress.

In 2010, twelve years after *Geiger*, the Ninth Circuit Court of Appeals had the opportunity to address this willful and malicious injury standard. As stated by the Ninth Circuit in *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010), the willful injury standard in this Circuit is met "**only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct."** *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002). This second part, "the debtor believes the injury is substantially certain to result from his own conduct" requires such a belief be shown, not merely that others would conclude such.

In *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002), the Ninth Circuit Court of Appeals stated the requirements of 11 U.S.C. § 523(a)(6) as follows:

> The question presented on appeal is whether a finding of "willful and malicious injury" must be based on the debtor's subjective knowledge or intent or whether such a finding can be predicated upon an objective evaluation of the debtor's conduct. We hold that *§ 523(a)(6)*'s willful injury requirement is met **only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct.**

Id. at 1173.

With respect to the evidence of the subjective motive, the Ninth Circuit is clear that the court does not merely accept what a debtor states his or her intent was, but in Footnote 6 in *Carillo v. Su*, the Circuit states:

> 6. **To be clear, when we speak of "actual knowledge" we are not suggesting that a court must simply take the debtor's word for his state of mind**. In addition to what a debtor may admit to knowing, **the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action.** *See, e.g., Spokane Ry. Credit Union v. Endicott (In re Endicott)*, 254 B.R. 471, 477 n. 9 (Bankr. D. Idaho, 2000) ("The use of the term 'objective' is not talismanic nor at odds with *Geiger* if it is viewed as **simply recognizing that a debtor will have to deal with any direct or circumstantial evidence which would indicate that he must have had a substantially certain belief that his act would injure, notwithstanding any subjective denial of such knowledge."**). This approach, however, remains fundamentally subjective in that it retains its focus on what was actually going through the mind of the debtor at the time he acted. This subjective approach explains how courts have typically resolved the applicability of § 523(a)(6) in the context of motor vehicle accidents. When car accidents occur and there is **no evidence, beyond evidence of (at times) extreme recklessness, that the driver expressly sought to crash into another, § 523(a)(6)'s nondischargeability provision typically has been found inapplicable.** *See Madden v. Fate (In re Fate)*, 100 B.R. 141 (Bankr. D. Mass. 1989); *Mugge v. Roemer (In re Roemer)*, 76 B.R. 126 (Bankr. S.D. Ill. 1987); *Cooper v. Noller (In re Noller)*, 56 B.R. 36 (Bankr. E.D. Wis. 1985); *In re Donnelly*, 6 B.R. at 23. When, however, the evidence demonstrates that the driver purposefully crashed his car into another's, § 523(a)(6) applies and the driver's debt stemming from that "accident" is nondischargeable. *See Stubbs v. Mode (In re Mode)*, 231 B.R. 295 (Bankr. E.D. Ark. 1999); *Grange Mut. Cas. Co. v. Chapman (In re Chapman)*, 228 B.R. 899 (Bankr. N.D. Ohio 1998).

An Eleventh Circuit case, *Hope v. Walker* (*In re Walker*), 48 F.3d 1161 (11th Cir. 1995), looked to a debtor's lack of statutorily required insurance and answered the question of whether monetary damages arising from the failure to obtain insurance constitutes willful and malicious injury.

In *Walker*, the court found an employer's failure to operate with workers' compensation insurance is a clear example of recklessness. *Id.* at 1165. However, the failure to insure does not guarantee an employee will suffer a physical or economic injury on the job. *Id.* Although the uninsured may be subjected to other penalties, the uninsured should not be denied their discharge as an additional penalty. *Id.* The plain language of § 523(a)(6) "excepts from discharge debts arising from 'willful and malicious injury' rather than 'willful and malicious acts which cause an injury.'" *Id.* at 1164 (citing *Eaves v. Hampel* (In re Hampel), 110 Bankr. 88, 93 (Bankr.M.D.Ga.1990)). Absent an intent to injure or a showing that injuries were substantially certain to occur due to the failure to act, the debt remains dischargeable under 11 U.S.C. § 523(a)(6).

Similar to the aforementioned case, here, Plaintiff-Creditor is arguing that because Defendant-Debtor intentionally accepted the load without disclosing to Plaintiff-Creditor that he was not licensed or insured, his actions fell under 11 U.S.C. § 523(a)(6). This is an improper reading of "willful

and malicious injury" under the statute. Rather, Plaintiff-Creditor is contending the act of not gaining insurance was willful and malicious which caused the injury. As stated in *Walker*, this is insufficient. There must be an intent to injure or substantial certainty of injury.

No evidence supports that the injury Plaintiff-Creditor faced from loss of load as a result of Defendant-Debtor's misrepresentations was intentional. Plaintiff-Creditor would need to show Defendant-Debtor intended to cause the monetary damages to Plaintiff-Creditor by not being insured. There is no such evidence to support this. Although an accident may have been foreseeable, and Defendant-Debtor may have been speeding and driving recklessly, this is not sufficient for 11 U.S.C. § 523(a)(6). Reckless or negligently inflicted injuries do not fall within the scope of 11 U.S.C. § 523(a)(6) Defendant-Debtor's actions and resulting damages must have been intentional.

The court does not find sufficient evidence to support a finding in favor of Plaintiff-Creditor under 11 U.S.C. § 523(a)(6).

COURT'S RULING

The underlying debt has satisfied all requirements for it to be considered nondischargeable under 11 U.S.C. § 523(a)(2)(A). The court finds judgment in favor of Plaintiff-Creditor under 11 U.S.C. § 523(a)(2)(A). The court does not find the underlying debt falls within the scope of nondischargeability under 11 U.S.C. § 523(a)(2)(A), (6).

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 FH Trucking, Inc. ("Plaintiff-Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that judgment is granted for Plaintiff-Creditor FH Trucking, Inc. and against Jose Manuel Guzman, the Defendant Debtor, on the claim for relief pursuant to 11 U.S.C. § 523(a)(2)(A), and judgment shall be entered that the obligation owing on the judgment obtained by Plaintiff-Creditor against Defendant-Debtor in the California Superior Court for the County of Stanislaus, case number CV-19-002757, is nondischargeable and may be enforced, including any additional amount accruing thereto, through that state court proceeding or as otherwise permitted under applicable California Law.
>
> **IT IS FURTHER ORDERED** that judgment is granted for Defendant-Debtor and against Plaintiff-Creditor on the claims for relief pursuant to 11 U.S.C. § 523(a)(2)(B) and § 523(a)(6).
>
> Counsel for Plaintiff-Creditor shall prepare and lodge with the court a proposed judgment consistent with this Ruling.

Requests for attorney's fees and costs, if any, shall be made as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

5. 19-90464-E-7 MAS-1 | **RICHARD RICKS** | **MOTION TO AMEND**
Pro Se | **3-29-22 [182]**

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 (*pro se*), Chapter 7 Trustee, creditors, and Office of the United States Trustee on March 29, 2022. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

The Motion to Amend Order 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 Amend Order is denied, without prejudice.

Serlin & Whitford, LLP, special counsel for the Chapter 7 Trustee, ("Special Counsel") has filed a Motion seeking the court "modify" its prior order granting Special Counsel Compensation in this case. Motion, Dckt. 182. The court's order granting Special Counsel fees in the amount of $23,905.00 and expenses in the amount of $377.80 was entered on June 24, 2021, Dckt. 134. The Motion to Modify was filed on March 29, 2022, which is seven months and 24 days after the entry of the Order allowing Special Counsel fees and costs.

The grounds stated with particularity in the Motion are:

1. "The prior order provided for fees in an amount then thought to be the maximum likely recoverable under the Court approved contingency fee agreement between Chapter 7 Trustee Irma Edmonds (the "Trustee") 22 and S&W, which order (Docket No. 115) approved a contingency fee of 35% of proceeds recovered in Adv. Pro. case no. 20-09013 ("Hughes adv. pro.")." Motion, p. 1:19-23; Dckt. 182.

2. "The prior fee order was entered substantially contemporaneously with an order approving a settlement of the Hughes adv. pro., which settlement called for, inter alia, certain property in Oklahoma to be conveyed to the Trustee for sale by the estate." *Id*., p. 1:25-27.

3. "The Trustee's application to pay S&W as special litigation counsel (Docket Nos.124-127, inclusive) contemplated that 35% of net proceeds of that Oklahoma property would be $13,755 but noted that the final amount was impossible to determine until the Oklahoma property was sold." *Id*., p. 1:27-28, 2:1-2.

4. "The Trustee obtained an order approving the sale of the Oklahoma property (Docket No. 160) for about $100,000, an amount more than double the amount expected at the time this Court approved S&W's fees." *Id*., p. 2:3-5.

5. "Unfortunately, instead of tracking the fee agreement, the Court's order approving S&W fees (Docket No. 134) simply authorized payment based on the then contemplated sale price." *Id*., p. 2:5-7.

6. "The Oklahoma property sale has just closed, and net sales proceeds received by the trustee are equal to $87,387.24, which would entitle S&W to a contingency fee based on those sale proceeds of $30,585.53, which amount is, of course, far greater than the $13,755 expected at the time the compromise of the Hughes adv. pro. and the fees of S&W were approved." *Id*., p. 7-10.

7. "In light of the foregoing, it is appropriate and necessary that the Court enter an order modifying its prior order approving S& W's contingency fees to reflect the actuality of the net sales proceeds obtained by the Trustee of the Oklahoma property, which property was only obtained due to the litigation success of S&W in the Hughes adv. pro. Specifically, S&W seeks a modified order allowing a total of $40,735.53 in fees." *Id*., p. 2:12-16.

No legal basis for modifying the prior is provided, just that it should be "modified."

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.

Here, while an explanation is given as to what transpired almost seven months ago, it is not stated how such constitutes a legal basis for "modifying" the prior final order of this court.

Review of Order on Compensation, Ruling, and Motion

Special Counsel is correct that the Motion for Compensation states that compensation for Special Counsel is requested to be in the amount of 35% of the net proceeds from the sale of the Oklahoma Property, in addition to 35% of other amounts stated in the Motion. Motion, ¶ B; Dckt. 123. In the Motion, the Trustee states that the final amount of net proceeds has not been determined, the property not having been sold, but the Trustee estimates for purposes of the Motion for Compensation that the 35% would be $13,755.00. That would be 35% of net proceeds of $39,330.00.

In the Motion to Modify, Special Counsel states that the actual net proceeds received by the Trustee are $87,387.24 – which is 222.2% greater than the amount stated to the court in requesting a contingent percentage amount.

Further, in the Trustee's Motion for Special Counsel Compensation, the Trustee asserts that a total of $24,282.80 (which is comprised of 35% of all the component monies recovered and expenses) is "reasonable compensation for services rendered to the bankruptcy estate." *Id*., p. 5:9-12; Dckt. 124.

In connection with the Motion to Modify, the Chapter 7 Trustee does not provide her declaration explaining her 222.2% miscalculation of the net sales proceeds. Trustee does not also state whether she concurs that a 222.2% increase in the attorney's fees for Special Counsel are reasonable compensation.

Review of Adversary Proceeding For Which Special Counsel Represented the Trustee

Special Counsel, who was pre-petition and post-petition counsel for Hirst Law Group (in the bankruptcy case and an adversary commenced by Hirst Law Group against the Debtor), was appointed as special counsel to represent the Chapter 7 Trustee to assist in locating and recovering assets theretofore undisclosed assets that the Debtor had transferred prepetition. 19-90464; Motion to Employ Special Counsel, Dckt. 110. While requesting employment of Special Counsel on a contingent fee basis, neither the Motion to Employ, the Trustee's Declaration, or Special Counsel's Declaration project an amount on which the contingent fee would be computed. *Id.*; Dckt. 110, 111, 112.

The Adversary Proceeding, 20-09013, seeking to recover the Property which generated the net proceeds for the Bankruptcy Estate was commenced on November 19, 2020. Three months after the Adversary Proceeding was commenced, the Trustee filed a Motion for Summary Judgment. 20-09013; Dckt. 15. The hearing on the Motion for Summary Judgment was conducted on March 25, 2021, with the court taking the matter under submission to allow the parties time to discussion possible consensual resolutions in light of the discussion at the hearing and what was posted as the court's tentative ruling (which tentative was to grant the Motion for Summary Judgment). *Id.*; Civil Minutes, Dckt. 33.

The Parties to the Adversary Proceeding engaged in constructive, economic minded, settlement discussion, leading to the agreed resolution of the Adversary Proceeding, with the Settlement Agreement having been reached by October 6, 2021 (Notice of Conditional Settlement filed with the court). *Id.*; Dckt. 44. In the Bankruptcy Case, the court had approved the Settlement by Order docketed on June 24, 2021. Dckt. 133.

From the commencement of the Adversary Proceeding to the approval of the Settlement seven months passed. On January 7, 2022, Special Counsel filed a request to have the pre-trial conference be vacated. 20-090143; Notices, Dckt. 45, 46. The Notices clearly state that the performance under the Settlement is in process.

In the Bankruptcy Case the court authorized the sale of the Oklahoma Property, from which the net sales proceeds were generated, by an Order entered on January 31, 2022. Order, Dckt. 160.

Hearing on Motion for Compensation Tentative Ruling, and No Statement of Error or Request for Correction Made by Special Counsel or General Counsel for the Trustee (who filed the Motion)

The hearing on the Motion for Compensation for Special Counsel was held on June 24, 2021. Civil Minutes; Dckt. 132. Both the Trustee's General Counsel and Trustee's Special Counsel appeared at the hearing. *Id.*

The court's posted tentative ruling for the June 24, 2021 hearing on the Motion for Compensation stated allowing Special Counsel the $23,905.00 in fees and $377.80 in expenses as set for in the court's final ruling (Civil Minutes and Order; Dckts. 132, 133). No opposition to the court's tentative ruling was stated by the Trustee's General Counsel or Special Counsel, no corrections were requested, and it was not presented to the court that allowing the specific amount of attorney's fees was an error of some sort. No appeal was taken from the court's final order on the Motion for Compensation for Special Counsel.

It appears that Special Counsel's attention is that the court erred in granting the Motion for Compensation for specific dollar amounts as to fees, and should have approved the fees on a contingent basis, subject to the provisions of 11 U.S.C. § 328(a) allowing the court to modify such an allowance if subsequent information is presented to the court showing that the allowance of such fees was improvident in light of developments not capable of being anticipated a the time the order was entered.

Legal Authority to Modify or Amend Final Orders and Judgments

Special Counsel does not identify what legal authority exists for amending the final order allowing Compensation for Special Counsel. The court will not attempt to provide an exhaustive memo of such legal bases, but can identify some well known one as authorized by the US Supreme Court in the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure.

First, Federal Rule of Civil Procedure 59, as incorporated into Federal Rule of Bankruptcy Procedure 9023, permits the filing of a motion to amend a judgment or order, with such motion to amend required to be filed no later than fourteen (14) days after the entry of the order or judgment. The present Motion to Modify has not been filed in that fourteen (14) day period following the June 24, 2021 entry of the Order allowing compensation for Special Counsel.

Another possible option to obtain relief from a prior order or judgment is found in Federal Rule of Civil Procedure 60, as incorporated into Federal Rule of Bankruptcy Procedure 9024. Under Federal Rule of Bankruptcy Procedure 60(a), if the court made a clerical error in issuing the order or judgment, then it may be corrected. There is no stated time period for such a correction to be made.

However, the correction has to be of a "clerical error," and not an asserted mistake in the ruling. As discussed in 12 Moore's Federal Practice - Civil § 60.11, a "clerical mistake" is one described as (emphasis added):

> [a] Mistake Is "Clerical" if it Misrepresents Court's Actual Intention
>
> **Rule 60(a) applies when the record indicates that the court intended to do one thing but, by virtue of a clerical mistake or oversight, did another.** The mistake to be corrected must be clerical or mechanical, because **Rule 60(a) does not provide relief from substantive errors in judgment** (see [3], below). The Seventh Circuit expressed this idea clearly when it observed that:
>
> If the **flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction**; if the judgment captures the

original meaning but is infected by error, then the parties must seek another source of authority to correct the mistake.

. . .

[b] Transcription Errors and Mathematical Mistakes Are Typical "Clerical" Mistakes

The typical clerical mistake is one that occurs in transcribing the judgment. For example, one court intended, in its original judgment, to simply recite the stipulation of the parties concerning attorney's fees but, in doing so, misstated the amounts agreed to for fees. That type of error in expression was remediable under Rule 60(a).

Computational errors are another classic example of a mechanical or clerical mistake. One employment discrimination judgment was erroneous because the judgment inadvertently undercounted the plaintiff's period of unemployment by two weeks and three days. This counting error resulted in a considerably smaller damage award than the court intended, and the court properly used Rule 60(a) to correct its error.

Simple transposition errors resemble computational mistakes, and are almost always correctable as clerical mistakes under Rule 60(a). An illustrative example of transpositional error appeared in a case in which all of the documentary evidence and testimony referred unambiguously to damages in the amount of $296,686.89. However, a special interrogatory submitted by the court to the jury asked about damages in the sum of $269,689.89. This was a simple, unintended transposition of the second and third digits. The court was within the scope of Rule 60(a) when it corrected the verdict in its judgment to reflect the correct amount of damages.

Numerous other examples of these types of "clerical" mistake could be cited:

> •If a consent decree calls for interest at the legal rate, and the clerk inadvertently fills in the blank for the legal rate of interest with what is, in fact, the contract rate, that mistake may be corrected under Rule 60(a).
>
> •An inaccurate description of the metes and bounds of property to which an easement applied may be corrected under Rule 60(a) when the record indicates that terms of the order were different from the relief that the bankruptcy court intended to award when it entered the order.
>
> •If a judgment should, as an undisputed matter of law and fact, reflect that the defendants are jointly liable for the entire amount of the judgment, and the verdict fails to reflect that only because the court's jury instructions were ambiguous on point, the court may correct the verdict in the judgment under Rule 60(a).

•If a summary-judgment order in a class action inadvertently refers to the wrong subpart of Rule 23 applicable to the plaintiff class, this may be corrected by means of Rule 60(a).

•When the clerk fails to timely docket one party's opposition to a motion to dismiss, thus resulting in the issuance by the court of an erroneous order of dismissal, that dismissal order may be set aside under Rule 60(a).

•A district court may, under Rule 60(a), correct its clerical error in designating a post-summary-judgment dismissal as "without prejudice," to reflect that the dismissal is actually "with prejudice."

. . .

[b] Error of Omission Correctable Only if Omission Misrepresents Court's Intentions

Although Rule 60(a) clearly reaches errors of omission, **it will not reach an omission that accurately reflects what the court decided**. **Even omissions that are legally incorrect, but that nonetheless accurately reflect what the court intended, are not reachable by Rule 60(a). . .**

. . .

The distinction between a correctable error of omission that simply conceals a court's true intentions, and a noncorrectable omission that reflects the court's true intent but is legally erroneous, is not an easy one to draw. There are many cases dealing with the situation of a court's failure to award prejudgment interest. When there is no indication in the record that the issue of prejudgment interest was discussed or that the court intended to award it to a successful plaintiff, the omission of prejudgment interest in the judgment may not be "corrected" under Rule 60(a). **Resolution of a dispute over correctability of an error of omission usually turns on what evidence there is in the record as to the court's actual intent at the time of the original judgment or order.**

There are, however, times when the law itself establishes that an omission is an indisputably clerical mistake. If, for example, a statute requires the clerk to add prejudgment interest from the time of the verdict to the time that the judgment is entered, there is a mandatory, clerical duty to add that interest. If the clerk omits this interest in the judgment, the intent of the court is irrelevant, and the omission may be remedied under Rule 60(a). However, if a statute merely provides that a prevailing party is entitled to an award of prejudgment interest, and does not provide for the clerk to automatically enter the amount, an omission of prejudgment interest in the judgment may be either inadvertent clerical error or a substantive legal error that may not be remedied under Rule 60(a). **The record will have to be examined to determine the court's intent at the time of the judgment.** There are a few courts that have held that if, for example, a statute entitles a plaintiff to recover interest and it is omitted from the judgment, that

interest may be added to the judgment by means of Rule 60(a); but this is a decidedly minority view.

[3] Substantive Legal Errors Not Correctable Under Rule 60(a)

Rule 60(a) does not apply if the change sought would affect substantive rights of the parties. As summarized by the Fifth Circuit:

> In sum, the relevant test for the applicability of Rule 60(a) is whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule. … . If … cerebration or research into the law or planetary [sic] excursions into facts is required, Rule 60(a) will not be available to salvage … blunders. Let it be clearly understood that Rule 60(a) is not a perpetual right to apply different legal rules or different factual analyses to a case. **It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations which are reachable through Rule 60(a).**

As phrased by the Ninth Circuit, in deciding whether a trial court may correct a judgment under Rule 60(a), the focus is on what that court originally intended:

> The basic distinction between "clerical mistakes" and mistakes that cannot be corrected pursuant to **Rule 60(a) is that the former consist of "blunders in execution"** whereas that **latter consist of instances where the court changes its mind, either because of a legal or factual mistake in making its original determination**, or because on second thought is has decided to exercise its discretion in a manner different from the way it was exercised in the original determination. *See United States v. Griffin*, 782 F.2d 1393, 1397 (7th Cir. 1986) (emphasis in original).

Even when there is a clear and obvious legal error in a ruling, Rule 60(a) is not a proper vehicle for correcting that error if the error was what the court intended at the time it made the ruling. For example, when a court simply overlooked a recent statutory change in the rate of judgment interest from six percent to eight percent, Rule 60(a) could not be used to change the judgment's erroneous specification of the interest rate. Similarly, when a judgment wholly omits prejudgment interest, the proper vehicle for augmenting the judgment to include prejudgment interest is a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), rather than a motion to correct the judgment pursuant to Rule 60(a).

From a review of the Civil Minutes, which are consistent with the posted tentative ruling for which neither Trustee's General Counsel or Special Counsel identified any error, mistakes, or items in

need of correction, the Order granting compensation for Special Counsel is consistent with the court's Ruling. This does not appear to be a "mere" Rule 60(a) Clerical Error.

Relief From Prior Order of Judgment

The U.S. Supreme Court provides an avenue for relief from a prior judgment or order, even when such is final, in Federal Rule of Civil Procedure 60(b). Relief from such judgment or order may be made for the specified grounds, which includes "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The enumerated grounds include "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). 12 Moore's Federal Practice - Civil § 60.41 provides a discussion of what types of conduct are sufficient to grant relief pursuant to Federal Rule of Civil Procedure 60(b), noting that there is not a simple punch list test. While generally the mistake must be made by a party or party's counsel, it has been recognized that there can be a mistake of the court for which relief may be granted.

However, when one is asserting a "judicial mistake," the Ninth Circuit Court of Appeals has required that the motion seeking relief pursuant to Federal Rule of Civil Procedure 60(b)(1) be filed before the time expires for filing an appeal on the judgment or order. *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966). This use of Rule 60(b)(1) in lieu of an appeal was discussed in the unpublished Ninth Circuit Decision *Sattler v. Russell (In re Sattler)*, 840 Fed. Appx. 214 (9th Cir. 2021), stating:

> "[U]nder Rule 60(b)[,] the [lower court] can, within a reasonable time not exceeding the time for appeal, hold a rehearing and change [its] decision." *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966) (emphasis added). While this rigid timeliness requirement does not apply to "mistakes" other than mistakes of law that go to the merits of a case, *see Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1024 (9th Cir. 2004) (mistake in post-judgment interest rate), that does not help Sattler here, *see, e.g., SEC v. Seaboard Corp.*, 666 F.2d 414, 415-16 (9th Cir. 1982) (courts should not grant a Rule 60(b) motion based only on alleged legal errors, if the motion comes after the time to appeal has expired). Granting motions to vacate orders involving alleged legal errors on the merits, "after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982) (alleged mistake in granting summary judgment). "The uncertainty resulting from such a rule would be unacceptable." Id. [the court then discusses when there can be an exception to the appeal period deadline based on "existence of extraordinary circumstances with prevented or rendered him [person filing the Rule 60(b)(1) motion based on judicial mistake] unable to prosecute an appeal."

Id., 214-215. Unfortunately, the time to appeal this court's order on the Motion for Compensation expired fourteen (14) days after it was entered on the Docket on June 24, 2021. Fed. R. Bankr. P. 8002(a).

There are other grounds for which Special Counsel may be able to develop a legal basis for granting relief pursuant to Federal Rule of Civil Procedure 60(b). However, such relief does not allow

for “amending” or “modifying” the prior order, but vacating it. If vacated, then the court would issue a new order on the Motion for Compensation.

Additionally, there could be other legal grounds for seeking relief from the Order granting the Motion for Compensation for Special Counsel. The court will leave it to the genius of Special Counsel (as one of our well seasoned judges has been know to say) to develop such grounds and present them to the court in a new motion.

No legal grounds for “Modifying” the prior final order of this court having been stated, 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 Amend Order filed by Serlin & Whiteford, LLP (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Amend Order is denied without prejudice.

6. **22-90083-E-7** **JOSHUA/NANCY LEDFORD** **MOTION TO AVOID LIEN OF STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.**
TPH-1 **Thomas Hogan** **3-21-22 [10]**

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 Chapter 7 Trustee, Creditor, and Office of the United States Trustee on March 21, 2022 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 State Farm Mutual Automobile Insurance Co., ("Creditor") against property of the debtor, Joshua Dale Ledford and Nancy Ledford ("Debtor") commonly known as 3231 Martel Ave, Riverbank, California 95367("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $416,959.65. Exhibit 5, Dckt. 13. An abstract of judgment was recorded with Stanislaus County on August 7, 2018, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $515,000.00 as of the petition date. Dckt. 1. The unavoidable senior consensual liens that total $193,512.00 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. There is also the senior judgment lien of State Farm Insurance for a judgment debt of ($416,959.65). *Id.*

On Schedule C filed by Debtor in this case, Debtor claims an exemption of $1.00 in the Property pursuant to California Code of Civil Procedure § 704.730.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is $321,487.00 in equity to support the judicial lien.

Value of Real Property.....	$515,000.00
Unavoidable Consensual Liens.....	($193,512.00)
Homestead Exemption.....	($ 1.00)
Value in Property for Creditor's Judgment Lien.....	**$321,487.00**

Under the formula, the Debtor could only claim an exemption in the value of the Property that is in excess of the senior consensual lien. Debtor has chosen to claim an exemption of $1.00, as stated on Schedule C. That leaves $321,487.00 of value for Creditor's lien.

Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided in excess of $321,487.00 subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Joshua Dale Ledford and Nancy Ledford ("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 State Farm Mutual Automobile Insurance Co., California Superior Court for Contra Costa County Case No. MSC10-02213, recorded on August 7, 2018, Document No. 2018-0054200-00, with the Stanislaus County Recorder, against the real property commonly known as 3231 Martel Ave, Riverbank, California 95367, is avoided in excess of $321,487.00 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.

FINAL RULINGS

7.	**20-90210-E-11 AF-3**	**JOHN YAP AND IRENE LOKE** **Arasto Farsad**	**MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON; PERSOLVE, LLC; AND THE PNC FINANCIAL SERVICES GROUP, INC.** **2-23-22 [244]**

Final Ruling: No appearance at the April 21, 2022 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 Debtor, Debtor's Attorney, creditors, and Office of the United States Trustee on February 25, 2022. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion to Value Collateral and Secured Claim 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 Value Collateral and Secured Claim of The PNC Financial Services Group, Inc. / Dreambuilder Investments, LLC ("PNC") is granted, and PNC's secured claim is determined to have a value of $0.00.

The Motion to Value filed by John Hst Yap and Irene Laiwah Loke ("Debtor") to value the secured claims of The PNC Financial Services Group, Inc. / Dreambuilder Investments, LLC ("PNC") is accompanied by Debtor's declaration. Declaration, Dckt. 246. Debtor is the owner of the subject real property commonly known as 1106 Lovell Avenue, Campbell, CA 95008 ("Property"). Per the court order entered on November 2, 2020, the value of the Property is $900,000.00 as of the petition filing date. Dckt. 139.

No Proof of Claim has been filed by PNC that appears to be for the claim to be valued. Debtor did not include any supporting documents to demonstrate proof of PNC's secured claim. However, Debtor's prior Motion to Value Collateral (Dckt. 33), in which one of the reliefs Debtor sought is the same as the relief Debtor seeks in the present Motion, includes a supporting document suggesting the existence of PNC's claim. See Exhibit 7, Dckt. 36. Specifically, the Exhibit includes PNC's loan information of $153,467.72. *Id.*

Debtor seeks to value the secured claims of only PNC. Motion, Dckt. 244 at 4. As for the other claims secured by the real property, Debtor has already stipulated with BNY Mellon's / NewRez LLC dba Shellpoint that the value the secured portion of their claim is $900,000.00. *Id.* at 3:¶ 1; Order on Stipulation, Dckt. 139. Additionally, Persolve, LLC (Proof of Claim 1-1) has issued a Satisfaction of Judgment after receiving their payment pursuant to Debtor's confirmed Chapter 11 Plan. The court has not been provided a copy of the Satisfaction of Judgment to ensure Claim 1-1 has been satisfied. However, upon review of the state court docket, on December 7, 2021 an Acknowledgment of Full Satisfaction of Judgment was filed. Therefore, Persolve's claim appears to be satisfied.

The valuation of property that secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2 (case or controversy requirement for the parties seeking relief from a federal court).

DISCUSSION

BNY's senior in priority first deed of trust secures a claim with a balance of approximately $900,000.00 upon stipulation on September 18, 2020. Stipulation, Dckt. 133. The court granted this stipulation on November 2, 2020. Order, Dckt. 139.

PNC's second deed of trust secures a claim with a balance of approximately $154,950.00. Amended Plan, Dckt. 209 at 11. Therefore, PNC's claim secured by a junior deed of trust is completely under-collateralized. PNC's second deed of trust is determined to be in the amount of $0.00, is no

longer a secured lien against Debtor's Property, and is classified as a general unsecured claim for purposes of Debtor's Chapter 11 Plan.

No payments shall be made on PNC's secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by John Hst Yap and Irene Laiwah Loke ("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 pursuant to 11 U.S.C. § 506(a) is granted, and the claim of The PNC Financial Services Group, Inc. / Dreambuilder Investments, LLC ("Creditor") secured by a second in priority deed of trust recorded against the real property commonly known as 1106 Lovell Avenue, Campbell, CA 95008, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $900,000.00 and is encumbered by a senior lien securing a claim in the amount of $900,000.00, which exceeds the value of the Property that is subject to Creditor's lien.

8. 22-90026-E-7 FRANK QUIROGA
Brian Haddix

CONTINUED ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
2-15-22 [19]

Final Ruling: No appearance at the April 21, 2022 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on February 17, 2022. The court computes that 21 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $188.00 due on February 1, 2022.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

At the prior hearing, the court's docket reflected that the default in payment related to the motion to avoid lien. Debtor's counsel reported that the Debtor may have been confused, the final filing fee installment having been recently paid.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured as of February 25, 2022.

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

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