

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

Pursuant to District Court General Order 612, no persons are permitted to appear in court unless authorized by order of the court. All appearances of parties and attorneys shall be telephonic through CourtCall, which advises the court that it is waiving the fee for the use of its service by *pro se* (not represented by an attorney) parties through April 30, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.**

MODESTO DIVISION CALENDAR

April 23, 2020 at 10:30 a.m.

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- | | | |
|--|-------------|---|
| 1. <u>19-90941-E-7</u> | MARCI ALVES | TRUSTEE'S MOTION TO DISMISS FOR
FAILURE TO APPEAR AT SEC.
341(A) MEETING OF CREDITORS
3-5-20 <u>17</u> |
|--|-------------|---|

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—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and creditors on March 7, 2020. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

April 23, 2020 at 10:30 a.m.

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The hearing on the Motion to Dismiss is continued to 10:30 a.m. on May 14, 2020.

The court extends deadlines to commence an adversary proceeding or contested matter by the Trustee, any creditor, the U.S. Trustee, or other party in interest pursuant to 11 U.S.C. § 523, § 707(b), or § 727, and each of them, are extended through and including July 31, 2020.

The Chapter 7 Trustee, Michael D. McGranahan (“Trustee”), seeks dismissal of the case on the grounds that Marci Ann Alves (“Debtor”) did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341.

Alternatively, if Debtor’s case is not dismissed, Trustee requests that the deadline to object to Debtor’s discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor’s next scheduled Meeting of Creditors, which is set for 10:30 a.m. on April 7, 2020.

As reported by the Trustee, the Debtor was not at the April 7, 2020 continued First Meeting. Trustee’s April 9, 2020 Docket Entry Statement. Due to the COVID-19 travel and meeting restrictions due to health concerns, the U.S. Trustee had to continue all such first meetings. Trustee has scheduled a continued Meeting of Creditors for May 5, 2020 via telephone conference. *Id.*

Debtor’s Response

On April 16, 2020, Debtor filed an Opposition and a Declaration in opposition to the Trustee’s Motion. Dckts. 20, 21. In her Declaration, Debtor recounts commencing this bankruptcy case on October 18, 2019 - six months prior to the hearing on this Motion.

Debtor testifies that her attorney “hired” Kathleen Crist-Walker to “appear” at the meeting. Declaration, ¶ 3; Dckt. 21. Debtor testifies that she did not attend the meeting but “Kathleen Crist-Walker” appeared at the First Meeting of Creditors on December 17, 2019.

Debtor further testifies that the continued First Meeting of Creditors was conducted on January 7, 2020, that Debtor was aware of it, but Debtor “did not attend.” *Id.*, ¶ 4. She testifies in Paragraph 8 of her Declaration that she missed the first two meetings out of “inattention and disorganization.”

For the continued Third First Meeting of Creditors, Debtor testifies that her attorney, David Foyil appeared, but Debtor did not. Her testimony under penalty of perjury as to not being there consists of “I was in route to the Court but failed to make it to the meeting on time.” *Id.*, ¶ 5. In Paragraph 8 of the Declaration, Debtor testifies under penalty of perjury that her boyfriend “insisted” on attending, they argued in the car “the whole way,” and Debtor took several wrong turns. By the time Debtor made it to the courthouse “everyone had left.” In saying “everyone had left,” to the extent Debtor actually drove to the Courthouse that day, she had to be grossly late for “everyone” to be gone.

As stated in the Opposition, Debtor testifies in her Declaration as to several medical and health issues that present her with challenges in life.

Debtor, and Debtor's counsel, plead for Debtor to be allowed one final chance to appear at the First Meeting of Creditors.

DISCUSSION

A review of the court's file indicates that Debtor does not have any prior bankruptcy cases in this District. A review of Debtor's Schedules indicate creditors consistent with obligations relating to ongoing medical and health issues.

In light of these circumstances, the court continues the hearing and will afford Debtor a final opportunity to attend the First Meeting of Creditors, and to attend any further continued ones that are scheduled.

The court also extends the deadlines for commencing adversary proceedings and contested matters by the Trustee, creditors, and other parties in interest arising under 11 U.S.C. § 523, § 707(b), or § 727, to July 31, 2020.

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

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

The Motion to Dismiss the Chapter 7 case filed by the Chapter 7 Trustee, Michael D. McGranahan ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Dismiss is continued to 10:30 a.m. on May 14, 2020.

IT IS FURTHER ORDERED that David Foyil, Debtor's attorney of record in this case shall appear at the continued First Meeting of Creditors on May 5, 2020, and any further continued meeting after that time, and shall not have an attorney who is not Debtor's attorney of record in this case, and for whom no Disclosure of Compensation has been filed, purport to appear as Debtor's counsel at such First Meetings.

IT IS FURTHER ORDERED that if Debtor fails to appear at the May 5, 2020 Meeting of Creditors, or further continued meeting thereafter, this Bankruptcy Case will be dismissed.

IT IS FURTHER ORDERED that the deadlines to commence and adversary proceeding or contested matter by the Trustee, any creditor, the U.S. Trustee, or other party in interest pursuant to 11 U.S.C. § 523, § 707(b), or § 727, and each of them, are extended through and including July 31, 2020.

OAKLAND ZEN CENTER VS.

Local Rule 9014-1(f)(2) Motion—Final Hearing Set for April 9, 2020.

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 4, 2020. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay 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.

The court continued this matter for final hearing at 10:30 a.m. on April 23, 2020.

The Motion for Relief from the Automatic Stay is granted.

Oakland Zen Center ("Movant") seeks relief from the automatic stay with respect to real property commonly known as 23700 Morgan Valley Road, Lower Lake, California ("Property"). Movant has provided the Declaration of Andre Ross to introduce evidence as a basis for Movant's contention that Jesse James Foster ("Debtor") does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Based on the evidence presented, Debtor would be at best a tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of Lake and received a judgment for possession, with a Writ of Possession having been issued by that court on January 15, 2020. Exhibit 3, Dckt. 23.

The Motion and supporting documents recount the re-issuance of the Writ of Possession on February 18, 2020. Exhibit 3, Dckt. 23. Movant asserts that it was unaware of the February 7, 2020 commencement of this Bankruptcy Case until February 21, 2020, when the February 19, 2020 Notice of Stay pursuant to this Bankruptcy Case was served on counsel for Movant.

Movant requests that the court annul the automatic stay as it applies to any acts that occurred prior to having notice of the bankruptcy case.

Movant also requests that the court confirm that the stay in this bankruptcy case terminated, in its entirety, for all parties, purposes, and properties, thirty days after this case was filed as provided in 11 U.S.C. § 362(c)(3).

DEBTOR'S OPPOSITION

Original Opposition (Dckt. 29)

Debtor asserts that the stay should not be lifted because Section 343 will show Debtor is a good tenant and that Movant's unlawful detainer is of a retaliatory nature due to related cases against Movant. Further, Debtor states he has equity and interest in the shell of Oakland Zen Center. Debtor further alleges that Yoshi's Restaurant did not list 23700 Morgan Valley Road in their bankruptcy because "they are a fake non-profit corporation posing as a non-profit corporation to exhort money as an illegal cult and bankrupt corporation aka Yoshi's SF."

As to Debtor's Opposition, Debtor fails to present any evidence regarding his interest, if any, in the property. A Motion for Relief is not the proceeding to argue an issue of whether Debtor is a "good tenant." Additionally, Debtor alleges that he has equity and interest in the "shell" of Oakland Zen Center but again no evidence is presented by Debtor regarding said equity. Finally, Debtor makes a reference to a restaurant that is not the Movant in this Motion.

Amended Opposition (Dckt. 38)

Debtor filed an Amended Response on March 16, 2020. Dckt. 38. For the Amended Response, Debtor uses a form document. This appears to be the response form used in the Central District of California Bankruptcy Court. Bankr. Cent. Dist. Form F 4001-1.RFS.RESPONSE. For this *pro se* Debtor, the use of the form has helped the Debtor in presenting the opposition to the court (though the court would question the use of such form would be appropriate for an attorney admitted to practice in the Eastern District of California).

Debtor first checks the box on the Response, asserting that all necessary parties for this Motion for Relief From the Stay were not served. Response, ¶ 3(a)(1); Dckt. 38. Debtor is the only debtor in this Chapter 7 case. The Certificate of Service documents service on the Debtor and the Chapter 7 Trustee, as well as on various other creditors in this case. Dckt. 26.

The record shows that all required parties in this Chapter 7 case, the *pro se* Debtor and the Chapter 7 Trustee have been served.

In the Amended Response, Debtor has stated that he disputes the allegations and checks the following boxes on the Response Form:

(3) [x] More payments have been made to Movant than the Motion accounts for. True and correct copies of canceled checks proving the payments that have been made are attached as Exhibit _____ .

...

(8) [x] Movant's description of the status of the unlawful detainer proceeding is not accurate.

(9) [x] Respondent denies that this bankruptcy case was filed in bad faith.

(10) [x] The Debtor will be prejudiced if the Nonbankruptcy Action is allowed to continue the nonbankruptcy forum.

(11) ☒ Other (specify):

Moviant [sic] breached oral agreements. Debtor does equity in work and donations since 1985. Moviant [sic] is retaliating [sic] RTO, and Guardianship(s), and divorce/ Trust where money was stolen from debtor.

Response, ¶ 3; *Id.*

In his Response, Debtor continues, stating that in the declaration filed with the Response Debtor shows that:

(3) ☒ The Property is fully provided for in the chapter 13 plan and all postpetition plan payments ☒ are current, or ☐ will be cured by the hearing date on this motion.

(4) ☒ The Debtor has equity in the Property in the amount of \$ _____.

...

(7) ☒ The motion should be denied because (specify):

There are several adversary lawsuits and debtor has unfairly enriched the moviant [sic] and has to hire lawyers for numerous harrasment [sic] suits and matters in state court. Moviants [sic] motives are fraudulent.

Response ¶ 4; *Id.*

The court does not find a declaration filed by Debtor, either separately or attached to the Response. Attached to the Response are the following documents:

- A. Case Cover Sheet for Lake County Superior Court Case NO. CV 420687 (“State Court Action”).
- B. Complaint in State Court Action which has a filed date of March 20, 2020, in which Debtor, Jesse J. Foster is the Plaintiff and the named defendants are Oakland Zen Center and Eri Takahashi. The Complaint seeks recovery of \$189,000.00.
- C. Notice of Vacate the Property, dated July 16, 2019.
- D. Gmail email thread of discussions between eritaka@tenpyozan.org, Kojin An Zen, and Debtor.
- E. Undated 30 Day Notice of Termination of Occupancy/Alleged Tenancy dated
- F. Notice of November 19, 2019 Court Hearing and partly granted request for a temporary restraining order the State Court Action.
- G. January 30, 2020 dated Order staying writ of execution in the Oakland Zen Center v. Jesse Foster et al Lake Count Superior Court Unlawful Detainer Action (“UD Action”).
- H. Original Response to Motion filed by Debtor.

- I. Gmail from Mark Ranft, identified as an attorney with whom Jesse Foster (the Debtor) and Rana Mineri have consulted.
- J. Proof of Service of the Summons and Complaint in the State Court Action.

DISCUSSION

In considering the Motion and Response opposing the Motion, the court first notes that this is a Chapter 7 liquidation, not a Chapter 13 reorganization.

This Chapter 7 case was filed on February 7, 2020. The First Meeting of Creditors was scheduled for March 20, 2020. The restricted access to the courthouse (District Court General Order 612) has necessitated the postponement of all First Meeting of Creditors.

Request for Continuance

On March 20, 2020, Debtor filed a request to have the hearing continued due to the shelter in place recommendation, now directive, due to the COVID-19 virus. Dckt. 39.

Attached to the Request for a Continuance is an email between Debtor and Jacob Faircloth, who is identified as an attorney with the Law Office of Steven Olson. *Id.* at 4. Mr. Faircloth states that due to having to take over the cases for Mr. Olson, he cannot “completely represent a new client.”

With the shelter in place directives, the federal courts are able to afford parties to appear telephonically. The court continues the hearing to allow Debtor to make the arrangements to appear telephonically at the continued hearing.

The court, having been presented with a complete set of documents by the Parties, has reviewed them and sets forth its analysis so that both Parties can be so informed for the continued final hearing of issues they need to address.

Discussion of Motion and Response

Movant has provided a properly authenticated copy of the Writ of Possession. However, this writ was issued on February 18, 2020, after this Bankruptcy Case was filed and while the automatic stay was undisputedly in effect, the case having been filed on February 7, 2020. As well established in the Ninth Circuit, an act taken in violation of the automatic stay is void, not merely voidable. *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001); *(In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992).

However, Congress provides for the court to annul the automatic stay so as to render what was void to not be void. However, retroactive annulment of the automatic stay is within the discretion of the court. *Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.)*, 129 F.3d 1052, 1054 (9th Cir. 1997). The court, in making a case-by-case review, must balance the equities to determine if annulment is justified. *Id.* at 1055. Though not dispositive, most courts consider two factors: "(1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor." *Id.*

In *re Fjeldsted*, the bankruptcy Appellate Panel for the Ninth Circuit expanded the factors a court may consider when deciding whether to annul the stay: the number of times a debtor has filed a petition; the extent of any prejudice, including to a bona fide purchaser; the debtor's overall good faith; the debtor's compliance with the Code; how quickly the creditor moved for annulment; and how quickly the debtor moved to set aside the action which occurred. *In re Fjeldsted*, 293 B.R. 12, 24-25 (B.A.P. 9th Cir. 2003).

The court reviews the various framework of factors and states how they apply in this Motion as follows:

Nat'l Envtl. Waste Corp Factors

(1) whether the creditor was aware of the bankruptcy petition;

Based on the evidence presented, Movant was not aware of this bankruptcy filing and the existence of the automatic stay in at the time it requested the re-issue of the Writ of Possession.

(2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor.

The evidence as it stands shows that Movant would be prejudiced if the stay is not annulled. Movant had already obtained the Judgment prior to the commencement of the case. It was unfortunately dismissed by error. But the State Court Action had already decided in favor of Movant.

Under the *In re Fjeldsted* factors, the Panel looked at refining and providing further guidance to the court as to factors that may apply. Relevant factors here include:

A. Whether creditors knew of the stay but nonetheless too action, and thus compounding the problem;

As explained above, Movant was unaware of the bankruptcy. Though the bankruptcy was filed on February 7, 2020, Debtor did not file a Notice of Stay in the Superior Court until February 19, 2020, and it appears that Debtor did not serve State Court Action counsel until February 21, 2020. Movant had sought re-issuance of the Judgment on February 18, 2020, a day before Debtor filed the Notice and two days before counsel was made aware of the bankruptcy.

B. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative conduct;

Movant has moved within less than two weeks of learning of the bankruptcy case to seek this relief annulling the stay.

C. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;

Movant has expeditiously sought the relief in the form of annulling the stay to give full force and effect to the Judgment in the State Court Action.

D. Whether annulment of the stay will cause irreparable injury to the debtor;

There is no showing that annulling the stay will cause irreparable injury to the Debtor. Debtor was afforded the opportunity to present his case in the State Court Action and lost. A determination that Debtor does not have the right to stay in possession is not an injury to the Debtor, but merely a determination of what rights Debtor had or did not have.

Therefore, the court grants the relief requested and the automatic stay is annulled, effective as of the commencement of this bankruptcy case for Movant as to the State Court Action's re-issuance of the Writ of Possession on February 18, 2020.

Next, the court considers the assertion that the stay in this Bankruptcy Case has terminated in its entirety as provided in 11 U.S.C. § 362(c)(3)(A). Debtor filed an ex parte Motion to Extend the Stay pursuant to 11 U.S.C. § 362(c)(3)(B). Dckt. 17. The ex parte Motion was not served on anyone. The Clerk of the Court issued a Notice to the Debtor that he needed to set the Motion for hearing. Such was not set for hearing and the court has not issued an order extending the stay, as it applies to the Debtor, as provided in 11 U.S.C. § 362(c)(3)(B).

Further, this court's analysis of 11 U.S.C. § 362(c)(3)(A) is that the stay terminated as to Debtor as of March 8, 2020, thirty days after the filing of the instant case. As to what remains of the bankruptcy estate within the subject Property, the court turns to Trustee and provides for Trustee to file a response or opposition at the date prescribed in the order.

Finally, Movant also seeks relief under 11 U.S.C. § 362(j), where a party may seek an order confirming the automatic termination of the stay. This relief is not applicable here as the court found that the stay indeed existed under 11 U.S.C. § 362(c)(3) but terminated thirty days after the petition was filed since Debtor did not extend the automatic stay beyond that time.

Bankruptcy Relief From Stay is a "Summary Proceeding"

In opposing the Motion, Debtor asserts many grounds going to the underlying substantive dispute with Movant in the State Court Action. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.

The Debtor's fight with Movant is over that dispute, not merely Debtor continuing in possession of the Property. In choosing to file this Chapter 7 case, there is no plan for restructuring Debtor's finances. On Schedule I Debtor lists having income of \$742 a month, which includes \$300 a month in purported wages from Movant. Dckt. 16 at 28-29.

Debtor having chosen to file this Chapter 7 case, the various claims, rights and interests in the State Court Action are now property of the Bankruptcy Estate in this case (11 U.S.C. § 541(a)) under the control of the Chapter 7 Trustee. This being a Motion filed pursuant to Local Bankruptcy Rule 9014-1(f)(2), no written opposition was required for the March 26, 2020 hearing.

With respect to whether Movant can evict Debtor from the Property, such matter is properly determined in the State Court. It is not part of any reorganization or restructuring in this case. While Debtor

purports to having filed the State Court Action on March 15, 2020, that was after Debtor commenced this Bankruptcy Case. It appears that the claims which are asserted in the State Court Action are property of this Bankruptcy Estate.

TRUSTEE'S NON-OPPOSITION

On March 30, Trustee filed a statement of no opposition to Movant's motion to confirm termination of the stay. Trustee's March 30, 2020 Docket Entry.

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

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

The Motion for Relief from the Automatic Stay filed by Oakland Zen Center ("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 automatic stay provisions of 11 U.S.C. § 362(a) are (1) annulled, effective as of the commencement of this bankruptcy case, with respect to all actions, acts, order, and judgments in connection with the *Oakland Zen Center v. Jesse Foster, et al.* California Superior Court, for Lake County, Lake County, Case No. 42011 State Court Action, and vacated to allow Movant, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 23700 Morgan Valley Road, Lower Lake, California ("Property") to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause, this matter having already been continued twenty-eight days due to the COVID-19 restricted access to the courthouse to afford the Debtor with adequate notice of the telephonic appearance procedures.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on February 12, 2019. By the court's calculation, 2 days' notice was provided. The court set the hearing for February 14, 2019. Dckt. 29.

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

<p>The Motion for Authority to Use Cash Collateral is granted.</p>

Debtor in Possession Mike Tamana Freight Lines, LLC filed the initial First Day Motion to use cash collateral to pay necessary expenses for the estate to continue to operate the transportation business that is included in the estate. The Debtor in Possession is continuing to operate on interim post-petition financing terms.

The Expenses to be paid with cash collateral are set forth in Exhibit C (Dckt. 23) filed in support of this Motion.

The court has conducted a series of prior hearings, issuing prior orders and making findings thereon. A review of the prior hearing is set forth in the Civil Minutes from the January 23, 2020 prior hearing. Dckt. 435.

**SEVENTH SET OF SUPPLEMENTAL PLEADINGS
FOR APRIL 23, 2020 HEARING**

On April 8, 2020 Debtor in Possession filed its Seventh Set of Supplemental Exhibits and Declaration of Amanjot Tamana, the Responsible Representative of the Debtor in Possession. Dckts. 473, 474.

The Debtor in Possession projected the following financial consequences of operating under the cash collateral budget for the 13 week period starting May 11, 2020:

Total Revenue.....	\$5,785,000
Total Expenses.....	<u>(\$5,697,432)</u>
Net Operating Income For the 13 Week Period.....	\$87,568

Exhibit I, Dckt. 474.

	Week Starting On:	11-May-2020	18-May-2020	25-May-2020	01-Jun-2020	08-Jun-2020	15-Jun-2020	22-Jun-2020	29-Jun-2020
Income									
Revenue		\$445,000	\$445,000	\$445,000	\$445,000	\$445,000	\$445,000	\$445,000	\$445,000
Brokerage Revenue		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Total Income		\$445,000	\$445,000	\$445,000	\$445,000	\$445,000	\$445,000	\$445,000	\$445,000
Expenses									
Payroll - Paylocity (incl. driver payroll, office payroll, office pay roll taxes, driver, officer salary)									
		\$135,000	\$135,000	\$135,000	\$135,000	\$135,000	\$135,000	\$135,000	\$135,000
Benefits		\$0	\$0	\$0	\$20,000	\$0	\$0	\$0	\$20,000
Workers Comp		\$0	\$0	\$0	\$40,000	\$0	\$0	\$0	\$40,000
Diesel/DEF/Reefer		\$68,000	\$68,000	\$68,000	\$68,000	\$68,000	\$68,000	\$68,000	\$68,000
Carrier Pay		\$40,000	\$40,000	\$40,000	\$40,000	\$40,000	\$40,000	\$40,000	\$40,000
Insurance		\$95,000	\$0	\$0	\$95,000	\$0	\$0	\$0	\$95,000
Stonemark Insurance		\$0	\$0	\$0	\$15,000	\$0	\$0	\$0	\$15,000
Car		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Ceres Yard		\$0	\$0	\$6,800	\$0	\$0	\$0	\$6,800	\$0
Houston Yard		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Unloading/ Lumpers		\$15,000	\$15,000	\$15,000	\$15,000	\$15,000	\$15,000	\$15,000	\$15,000
Scales		\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000
Truck and Trailer Washing		\$1,200	\$1,200	\$1,200	\$1,200	\$1,200	\$1,200	\$1,200	\$1,200
Tolls		\$500	\$500	\$500	\$500	\$500	\$500	\$500	\$500
Gps/Elogs/Trailer Temp		\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500
Transflo		\$400	\$400	\$400	\$400	\$400	\$400	\$400	\$400
Recruiting		\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500
Maintenance		\$16,000	\$16,000	\$16,000	\$16,000	\$16,000	\$16,000	\$16,000	\$16,000
Safety		\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000
Oregon Tax/NM Tax		\$0	\$0	\$0	\$25,000	\$0	\$0	\$0	\$25,000
IT Expense/Software		\$0	\$0	\$9,000	\$0	\$0	\$0	\$0	\$9,000
Miscellaneous		\$2,500	\$2,500	\$2,500	\$2,500	\$2,500	\$2,500	\$2,500	\$2,500
Utilities		\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500
Carrier Cure Payments from Assumption**		\$3,900	\$3,900	\$3,900	\$3,900	\$3,900	\$3,900	\$3,900	\$3,900
Other Expenses		\$2,500	\$2,500	\$2,500	\$2,500	\$2,500	\$2,500	\$2,500	\$2,500
Equip. Adq. Protection Pmts									
Allegiance Fin. Group		\$0	\$30,414	\$0	\$0	\$0	\$30,414	\$0	\$0
Banc of America		\$0	\$0	\$0	\$0	\$17,061	\$0	\$0	\$0
BB&T Commercial Equip.		\$0	\$0	\$0	\$26,048	\$0	\$0	\$0	\$26,048
First Midwest		\$0	\$0	\$0	\$6,128	\$0	\$0	\$0	\$6,128
Hitachi		\$0	\$3,818	\$0	\$0	\$0	\$3,818	\$0	\$0
Lee Financial		\$0	\$0	\$31,641	\$0	\$59,828	\$0	\$31,641	\$0
People's Capital		\$12,391	\$0	\$28,663	\$0	\$0	\$12,391	\$28,663	\$0
Signature Financial		\$0	\$0	\$0	\$0	\$14,219	\$0	\$0	\$0
TAB Bank		\$0	\$8,034	\$2,544	\$0	\$0	\$0	\$10,578	\$0
TCF Equipment Fin.		\$0	\$0	\$0	\$12,790	\$0	\$0	\$0	\$12,790
Volvo		\$0	\$0	\$12,964	\$0	\$0	\$32,418	\$0	\$0
Wells Fargo Equip. Fin.		\$3,687	\$0	\$20,142	\$16,379	\$16,476	\$0	\$0	\$20,142
Daimler Financial		\$0	\$31,641	\$0	\$0	\$0	\$31,641	\$0	\$0
Equip. Adq. Protection Cure Pmts									
Wells Fargo Equip. Fin.		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
People's Capital		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Daimler Financial		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
TCF Equipment Fin.		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Other Expenses									
Heavy Duty Tax		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Registration		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Crestmark DIP Fees		\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000
US Trustee Fees		\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Total Expenses		\$407,578	\$370,407	\$408,254	\$552,845	\$404,084	\$407,182	\$374,182	\$565,608
Net Income/(Loss)									
		\$37,422	\$74,593	\$36,746	-\$107,845	\$40,916	\$37,818	\$70,818	-\$120,608
Cumulative Free Cash		\$37,422	\$112,015	\$148,762	\$40,917	\$81,833	\$119,651	\$190,469	\$69,861

**The DIP will file a motion to assume carrier-executory contracts, and thus, this row reflects amounts for cure payments.

	Week Starting On:					Total
	06-Jul-2020	13-Jul-2020	20-Jul-2020	27-Jul-2020	03-Aug-2020	
Income						
Revenue	\$445,000	\$445,000	\$445,000	\$445,000	\$445,000	\$5,785,000
Brokerage Revenue	\$0	\$0	\$0	\$0	\$0	\$0
Total Income	\$445,000	\$445,000	\$445,000	\$445,000	\$445,000	\$5,785,000
Expenses						
Payroll - Paylocity (incl. driver payroll, office payroll, office pay roll taxes, driver, officer salary)	\$135,000	\$135,000	\$135,000	\$135,000	\$135,000	\$1,755,000
Benefits	\$0	\$0	\$0	\$0	\$20,000	\$60,000
Workers Comp	\$0	\$0	\$0	\$0	\$40,000	\$120,000
Diesel/DEF/Reefer	\$68,000	\$68,000	\$68,000	\$68,000	\$68,000	\$884,000
Carrier Pay	\$40,000	\$40,000	\$40,000	\$40,000	\$40,000	\$520,000
Insurance	\$0	\$0	\$0	\$0	\$95,000	\$380,000
Stonemark Insurance	\$0	\$0	\$0	\$0	\$15,000	\$45,000
Car	\$0	\$0	\$0	\$0	\$0	\$0
Ceres Yard	\$0	\$0	\$0	\$6,800	\$0	\$20,400
Houston Yard	\$0	\$0	\$0	\$0	\$0	\$0
Unloading/ Lumpers	\$15,000	\$15,000	\$15,000	\$15,000	\$15,000	\$195,000
Scales	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$13,000
Truck and Trailer Washing	\$1,200	\$1,200	\$1,200	\$1,200	\$1,200	\$15,600
Tolls	\$500	\$500	\$500	\$500	\$500	\$6,500
Gps/Elogs/Trailer Temp	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$19,500
Transflo	\$400	\$400	\$400	\$400	\$400	\$5,200
Recruiting	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$19,500
Maintenance	\$16,000	\$16,000	\$16,000	\$16,000	\$16,000	\$208,000
Safety	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$13,000
Oregon Tax/NM Tax	\$0	\$0	\$0	\$25,000	\$0	\$75,000
IT Expense/Software	\$0	\$0	\$0	\$9,000	\$0	\$27,000
Miscellaneous	\$2,500	\$2,500	\$2,500	\$2,500	\$2,500	\$32,500
Utilities	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$19,500
Carrier Cure Payments from Assumption**	\$3,900	\$3,900	\$3,900	\$3,900	\$3,900	\$50,700
Other Expenses	\$2,500	\$2,500	\$2,500	\$2,500	\$2,500	\$32,500
Equip. Adq. Protection Pmts						
Allegiance Fin. Group	\$0	\$0	\$30,414	\$0	\$0	\$91,242
Banc of America	\$17,061	\$0	\$0	\$0	\$17,061	\$51,183
BB&T Commercial Equip.	\$0	\$0	\$0	\$26,048	\$0	\$78,144
First Midwest	\$0	\$0	\$0	\$6,128	\$0	\$18,384
Hitachi	\$0	\$0	\$3,818	\$0	\$0	\$11,453
Lee Financial	\$59,828	\$0	\$31,641	\$0	\$0	\$214,580
People's Capital	\$0	\$12,391	\$0	\$28,663	\$0	\$123,162
Signature Financial	\$14,219	\$0	\$0	\$0	\$14,219	\$42,656
TAB Bank	\$0	\$0	\$10,578	\$0	\$0	\$31,733
TCF Equipment Fin.	\$0	\$0	\$0	\$0	\$12,790	\$38,370
Volvo	\$0	\$32,418	\$0	\$0	\$0	\$77,799
Wells Fargo Equip. Fin.	\$16,379	\$16,476	\$0	\$20,142	\$16,379	\$146,202
Daimler Financial	\$0	\$0	\$31,641	\$0	\$0	\$94,924
Equip. Adq. Protection Cure Pmts						
Wells Fargo Equip. Fin.	\$0	\$0	\$0	\$0	\$0	\$0
People's Capital	\$0	\$0	\$0	\$0	\$0	\$0
Daimler Financial	\$0	\$0	\$0	\$0	\$0	\$0
TCF Equipment Fin.	\$0	\$0	\$0	\$0	\$0	\$0
Other Expenses						
Heavy Duty Tax	\$0	\$40,700	\$0	\$0	\$0	\$40,700
Registration	\$0	\$0	\$0	\$0	\$0	\$0
Crestmark DIP Fees	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$65,000
US Trustee Fees	\$0	\$0	\$0	\$55,000	\$0	\$55,000
Total Expenses	\$403,987	\$398,485	\$404,592	\$473,281	\$526,949	\$5,697,432
Net Income/(Loss)	\$41,013	\$46,515	\$40,408	-\$28,281	-\$81,949	\$87,568
Cumulative Free Cash	\$110,874	\$157,389	\$197,797	\$169,516	\$87,568	

**The DIP will file a motion to assume carrier-executory contracts, and thus, this row reflects amounts for cure payments.

DISCUSSION

Debtor in Possession has shown that the proposed use of cash collateral is in the best interest of the Estate. The proposed use provides for expenses necessary for the estate to continue to operate the transportation business that is included in the estate. The Motion is granted, and Debtor in Possession is authorized to use the cash collateral for the period May 11, 2020 through August 3, 2020. All surplus cash collateral is to be held in a cash collateral account and accounted for separately by Debtor in Possession.

The court continues the hearing to **xx:xx x.m. on Xxxx xx, 2020**, for Debtor in Possession to file a Supplement to the Motion to extend authorization. That Supplement shall be filed and served on or before **Xxxx xx, 2020**, with any opposition to be presented orally at the continued hearing.

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 Use of Cash Collateral filed by Mike Tamana Freight Lines, LLC (“Debtor in Possession”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the use cash collateral as set forth in the budget filed as Exhibit I (Dckt. 474) is authorized for the period May 11, 2020 through August 3, 2020.

IT IS FURTHER ORDERED that hearing on the Motion to Use Cash Collateral is continued to **Xxxx xx, 2020, at 10:30 a.m.** Supplemental pleadings requesting further use of cash collateral shall be filed and served on or before **Xxxx xx, 2020**, with any opposition to be presented orally at the continued hearing.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on March 19, 2020. By the court’s calculation, 35 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days’ notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

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

The Motion to Sell Property is XXXXXXXXXX .

The Bankruptcy Code permits Michael D. McGranahan, the Chapter 7 Trustee, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the personal property identified as the Bankruptcy Estate’s interest in a Promissory Note for which Karenjit Sandhu is the “maker” of the Note, which Debtor values the interest at \$45,000 (the “Property”)**and has claimed an exemption of \$27,737.95.** ^{FN. 1}

FN. 1. The Trustee’s Motion states that the Debtor has claimed the \$27,737.95 exemption pursuant to California Code of Civil Procedure § 703.140(b)(5). Motion, ¶ 2; Dckt. 120. In the latest Amended Schedule C, filed on November 27, 2019, Debtor has claimed the following exemptions amounts pursuant to California Code of Civil Procedure § 703.140(b)(5):

Property	Value	Amount Claimed as Exempt
Cash	\$25.00	\$25.00
Checking	\$62.05	\$62.05
Sandhu Note	\$45,000.00	\$27,737.95

IRS Tax Refund	\$3,000.00	\$3,000.00
		=====
	Total § 703.140(b) Exemption Claimed	\$30,825.00

California law for this Exemption provides:

(b) The following exemptions may be elected as provided in subdivision (a):

(1) The debtor's aggregate interest, not to exceed twenty-four thousand sixty dollars (\$24,060) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence.

...

(5) The debtor's aggregate interest, not to exceed in value one thousand two hundred eighty dollars (\$1,280) plus any unused amount of the exemption provided under paragraph (1), in any property.

Cal. C.C.P. § 704.140(b)(1), (5). Thus, the Statute allows a maximum of \$25,340.00 in this "wildcard" Section 704.140(b)(5) exemption. Debtor has exceeded that by \$5,480.00. Thus, though Debtor and his counsel, subject to the certifications they have made pursuant to Federal Rule of Bankruptcy Procedure 9011, have stated that based upon existing law the exemption amounts are proper, they do not appear to so be.

A copy of the Promissory Note is filed as Exhibit A (Dckt. 125). The basic information from the Note is:

Maker (the person owing the obligation) is.....Karenjit Sandu

The Payee (the person to who the money is owed) is.....Kamldip Dhami, the Debtor

The Date of the Note is.....January 1, 2017

The Obligation Owed on the Note.....\$45,000

The Interest Rate on the Obligation.....3% per annum

Payment Terms.....Amortized over Ten Years,
First Payment Due
January 1, 2018

Also filed as Exhibit C is a “curious” document, which is titled “Assignment of Promissory Note.” Dckt. 124 at 15. The purported “Assignor” is Karenjit Sundhu, the person obligated to pay \$45,000 on the Note. The purported “Assignee” is Harnit Dhami, who is identified as the Debtor’s sister.

In the Assignment, it states that Karenjit Sandhu, the person who owes the \$45,000, has good title to the Note - the Note that actually belongs to the Debtor and is owned by the Bankruptcy Estate. This may indicate someone, or some persons, are improperly attempting to assert ownership in an asset of the bankruptcy estate - an asset protected by the automatic stay.

As discussed below, the Trustee believes that Harnit Dhami is also obligated to pay on this note, having his attorney make demand on her for payment. Motion ¶ 4; Dckt. 120. The Trustee’s counsel confirms in her Declaration that she told Debtor’s counsel she would do this, but does not provide testimony as to having yet made that demand on Harnit Dhami.

This interpretation that the “assignment” is actually an assumption of liability, adding Harnit Dhami as an additional obligor, is supported by the admission of Debtor through the testimony under penalty of perjury by his attorney, Marty Gill. Mr. Gill testifies, that “the obligation to pay was assigned to Harnit Dharni.” Declaration ¶ 2; Dckt. 124. While incorrectly using the term “assigned,” Mr. Gill clearly testifies that Harnit Dharni has an obligation to pay the debt owed on the \$45,000 Note.

OBLIGATION OWING ON THE NOTE

With respect to the obligation owing on the Note, the Trustee provides the Declaration of Harry Gill, Debtor’s counsel. Dckt. 124. Mr. Gill testifies that the Debtor has presented Mr. Gill with unidentified “evidence” of, and Mr. Gill heard the evidence say, that at some unspecified time the Debtor received one payment of \$5,283.22 on the Note “before the obligation to pay was assigned to Harnit Dhami.” The court does not find such hearsay testimony by a licensed attorney to be credible.

REVIEW OF PROPOSED SALE

The proposed purchaser of the Property is Kamaldip S. Dhami (“Buyer”), the Debtor, and the terms of the sale are:

- A. Buyer will purchase the Property from the bankruptcy estate for \$16,000.00. Payment Dates, Closing Date, As Is, etc.
- B. Agreement is conditional and subject to approval by the court, and subject to overbidding.
- C. Buyer shall pay any transfer fees and costs that may be incurred in connection with the transaction. Trustee will not incur or be responsible for costs or fees in connection with the related transactions.
- D. The Purchase is made “as-is,” and no warranties.
- E. Parties have exchanged mutual releases.

- F. Each party shall bear its own attorney's fees and costs in connection with this Agreement.

In the Motion the Trustee makes the statement that:

4. Mr. McGranahan notified Debtor, through counsel, that he intended to send a demand to Harnit Dharni for payment on the Note as the estate's nonexempt interest is approximately \$17,262.05. (Bakken Dec., ¶ 2).

Motion, ¶ 4, Dckt. 120.

If the Trustee is making demand to Harnit Dharni, the Debtor's sister for payment, it is unclear why the Trustee is seeking to sell the Note. It appears that the Trustee treats the "assignment" as an assumption of liability on the Note, and now there are two persons who are liable for payment of the obligation:

Karenjit Sandu, the Original Obligor on the Note, the Maker

and

Harnit Dharni, the person who was "assigned" Karenjit Sandu's obligations under the Note.

The Trustee Requests Overbidding Procedures

Trustee proposes the following overbidding terms and conditions:

- A. Any party overbidding must agree to purchase the Property on the identical terms as set forth in the Motion and proposed Agreement (aside from increased price:, and
- B. The first overbid must be at least \$44,737.95 (\$1,000.00 more than the Purchase Amount together with Debtor's exemption of \$27,737.95), and
- C. Successive bids must be in increments of at least \$1,000.00.

DISCUSSION

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

~~Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale will allow Trustee to receive \$16,000.00 out of \$17,262.05 without incurring collection costs or additional delay.~~

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

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

~~The Motion to Sell Property filed by Michael D. McGranahan, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing;~~

~~**IT IS ORDERED** that Michael D. McGranahan, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Kamaldip S. Dhami or nominee ("Buyer"), the Property identified as the \$45,000.00 Promissory Note ("Property"); on the following terms:~~

~~A. The Property shall be sold to Buyer for \$16,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 125, and as further provided in this Order.~~

~~B. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.~~

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on March 19, 2020. 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.

<p>The Motion to Abandon is denied without prejudice.</p>
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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 Motion filed by Michael D. McGranahan ("the Chapter 7 Trustee") requests that the court authorize him to abandon property commonly known as two promissory notes: (1) Promissory Note Rec. For Rancho Market - Shivneel Sujendra Prasad with a value of \$15,000.00 and (2) Promissory Note Rec. Kuldip Singh; GASAABI LLC - Oklahoma with a value of \$300,000.00 ("Property"). The Declaration of Michael D. McGranahan has been filed in support of the Motion and provides testimony that the Property is directly related to litigation that will either deem the Property invalid, or the litigation will be so time consuming as to diminish any potential recovery such that it would be of inconsequential value to the estate.

In the Motion, the Trustee provides no information about the litigation concerning the Notes, why the Trustee will be handing over more than \$300,000 in promissory notes to the Debtor, or what the Trustee has done to attempt to settle the litigation or sell the Notes to those opposed to the Debtor, rather than just giving the Notes to the Debtor so he could fight with the other persons. Nothing about the litigation or the nature of the defenses raised is provided.

Additionally, the Trustee does not provide any information in the Motion about any attempts to sell the notes to a debt buyer or assigning it to a collection agency/attorney.

While the court defers to the business judgment of a trustee or debtor in possession, such fiduciary of the bankruptcy estate must provide the court and parties in interest with a colorable showing that some of the obvious alternatives were investigated. The Trustee does testify:

2. I investigated the Notes and the corresponding Lawsuits and discussed with my counsel, Loris L. Bakken, and confirmed that the litigation directly relates to the Notes and that it is likely that the Notes will be deemed invalid or, in the alternative, that the litigation would be so time consuming as to diminish any potential recovery such that they would be of inconsequential value to the estate.

Declaration ¶ 2; Dckt. 129.

In light of other issues relating to the conduct of the Debtor in filing Schedules under penalty of perjury in this case and the pleadings filed with questionable certifications made by Debtor and Debtor's counsel pursuant to Federal Rule of Bankruptcy Procedure 9011, what the Trustee has presented is not sufficient for the court to conclude that the authorization should be given to dump these notes back to the Debtor.

~~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 Chapter 7 Trustee to abandon the Property.~~

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

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

~~The Motion to Abandon Property filed by Michael D. McGranahan ("the Chapter 7 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing;~~

~~**IT IS ORDERED** that the Motion to Compel Abandonment is granted, and the Property identified as notes: (1) Promissory Note Rec. For Rancho Market - Shivneel Sujendra Prasad with a value of \$15,000.00 and (2) Promissory Note Rec. Kuldip Singh; GASAABI LLC - Oklahoma with a value of \$300,000.00 is abandoned to Kamaldip S. Dhami by this order, with no further act of the Chapter 7 Trustee required.~~

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 2, 2020. By the court's calculation, 52 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

<p>The Motion to Sell Property is granted.</p>

The Bankruptcy Code permits Gary Farrar, the Chapter 7 Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the estate's non-exempt one-fourth interest in the real property commonly known as 5260 Northway Road, Pleasant, California ("Property").

The proposed purchaser of the Property is Global Capital Concepts, Inc. ("Buyer"), and a summary of the terms of the sale are (the full terms of the sale are set forth in the Sale Agreement filed as Exhibit E in support of the Motion, Dckt. 43):

- A. Buyer to purchase the one-fourth interest for \$90,000.00.
- B. Buyer will provide a \$4,500.00 deposit.
- C. The bankruptcy estate's interest in the Property will be transferred to Buyer by a Grant Deed.
- D. Buyer to pay the \$85,500.00 balance within 10 days of entry of the court's order approving the sale.

- E. Trustee to hold the purchase amount and the Grant Deed until 15 court days after the court approves the sale.
- F. If a third party becomes the successful court-approved buyer, Buyer is entitled to a breakup fee from the bankruptcy estate as reimbursement of the expenses incurred by Buyer in an amount of \$10,000.00.
- G. Buyer to pay any and all costs and fees that may be incurred in connection with the transactions related to the Agreement.
- H. Buyer is buying the Property “as is,” no warranties or representations.
- I. Parties to exchange mutual releases.
- J. Each party to bear its own attorney’s fees and costs in connection with the Agreement. In the even of breach, breaching party will pay the reasonable attorney’s fees of the non-breaching party.

The Motion states with particularity the steps taken by the Trustee to value the Property, the other experts he consulted in evaluating his options, and various factors he considered in exercising his business judgment to proceed with the present sale. The Motion documents, and the Trustee’s Declaration support the steps taken by the Trustee in reaching his business decision.

Overbidding Procedures

Trustee proposes the following overbidding terms:

- 1. First overbid to be at least \$101,000.00 (\$1,000.00 more than the Purchase Amount together with the breakup fee of \$10,000).
- 2. Trustee is amenable to other terms that are agreeable to the court.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale will provide the estate with \$90,000.00 for a one-fourth interest in real property, without having to engage in litigation to sell the entire interest in the Property.

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

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

The Motion to Sell Property filed by Gary Farrar, the Chapter 7 Trustee, (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Gary R. Farrar, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Global Capital Concepts, Inc. or nominee (“Buyer”), the estate’s non-exempt one-fourth interest in the real property commonly known as 5260 Northway Road, Pleasant, California (“Property”), on the following terms:

- A. The Property shall be sold to Buyer for \$90,000.00, on the terms and conditions set forth in the Sale Agreement, Exhibit E, Dckt. 43, and as further provided in this Order.
- B. The sale proceeds shall first be applied to closing costs, other customary and contractual costs and expenses incurred to effectuate the sale.
- C. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Trustee's Attorney, and Attorney for Defendant John Sims, on March 26, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Supplemental Order to Order Approving Settlement is denied without prejudice.

Burger Physical Therapy Services ("Movant" or "Plaintiff") requests the court for a supplemental order to the court's earlier order approving the settlement agreement between Chapter 7 Trustee Irma Edmonds and John C. Sims, individually and as Trustee of the G&M Baker 1994 Trust regarding Trustee's Preference Claim against Sims. The request for such a supplemental order is provided for in this court's order remanding the *Burger Physical Therapy Services, Inc. v. Sims* adversary proceeding back to state court. 17-9021; Order, Dckt. 69.

**HISTORY OF COURT GRANTING MOTION FOR
CHAPTER 7 TRUSTEE TO SELL ASSETS AND RIGHTS
OF THE BANKRUPTCY ESTATE TO JOHN SIMS**

On January 31, 2018, Irma Edmonds, the Chapter 7 Trustee ("Trustee"), requested that the court approve a compromise and settle competing claims and defenses with John Sims, individually and as trustee of the G&M Baker 1994 Trust ("Defendant Sims").

After parties provided the court with supplemental pleadings addressing certain issues identified by the court, the Motion to Approve the Settlement was granted, with the terms thereof as modified in the order granting that motion stating that Plaintiff's claims, if any, were not transferred, therefore not included in the settlement. Order, Dckt. 100.

In the Civil Minutes from the hearing, the court addressed that supplemental proceedings might be required in this court. The court further noted that:

In remanding and abstaining, this court recognizes that it could exercise federal court jurisdiction for this determination. Out of further regard for the State Court judge to whom the matter is remanded, if that judge determines that properly be determined by a federal court judge, this court will exercise such jurisdiction if the State Court judge orders the parties to obtain such determination by supplemental motion for determination of the rights transferred by the Chapter 7 Trustee under the Settlement and what rights, if any, were not transferred (or such other proceeding as Plaintiff and Defendants determine proper).

16-90603, Civil Minutes at p. 14, Dckt. 99.

Movant Plaintiff comes now and makes this motion pursuant to the court's order on the Motion for Remand in the Adversary Proceeding where the court provided that in the event the state court judge requires this court to determine the right and property of the parties involved, such determination may be sought by motion:

If the State Court judge concludes that determination of this federal court of what rights and property were acquired by Defendants from the Chapter 7 Trustee is necessary, in that State Court judge's opinion, upon order of said State Court judge, Plaintiff and Defendants may seek such determination by motion for supplemental order to the Order Approving the Settlement or such other federal court proceeding as proper under the Federal Rules of Bankruptcy Procedure.

17-09021, Order, Dckt. 69.

DISCUSSION

Review of the Motion

The Motion begins with a recitation of the prior Motion to Approve the Compromise with Defendant Sims, the court's Order granting that Motion, and the court's order remanding the State Court Action back to the State Court. Motion, p. 1:21-28, 2:1-3; Dckt. 162.

The Motion states that the State Court judge to whom the State Court Action was remanded has issued an order stating that the bankruptcy court "should resolve the issue of Burger's standing to pursue its state law claims against Sims." This court's order was not for this court to determine a "standing issue"

in the state court, but to clarify, if necessary, “what rights and property were acquired by Defendants from the Chapter7 Trustee.”

The grounds stated with particularity in the Motion are:

1. “Burger has standing to pursue its state law claims against Sims because the claims are personal to Burger and were never owned by Mark One Corporation's ("Mark One") bankruptcy estate.”
2. “Thus, the claims were not sold to Sims as part of his settlement of the Trustee's preference action against Sims.
3. “Moreover, Burger's claims are particularized and not shared by any other creditors of Mark One.”
4. “Sims took specific and direct actions to tortiously interfere with Burger's contractual relationship with Mark One and the economic advantage Burger had with Mark One.”
5. “Under the relevant California and federal authorities, Burger thus has standing to pursue its state law claims against Sims in the Stanislaus County Superior Court.”

Id., p. 2:7-14; *Id.*

The Motion then continues to state that the Motion, the above grounds stated with particularity as required by Federal Rule of Bankruptcy Procedure 9013 (which incorporates the Federal Rule of Civil Procedure 7(b) motion pleading requirement into bankruptcy case motions), is based on the Notice, Motion, Points and Authorities, Declaration, Request for Judicial Notice, and the Exhibit List, filed with the Motion. *Id.*, p. 2:15-18.

The Request for Judicial Notice is six pages in length, listing 22 documents from the State Court Action. The Points and Authorities is nineteen pages in length, which ten and one-half pages of facts and grounds, and then eight pages of argument and legal points and authorities. Dckt. 166.

There are four exhibits documents filed, Dckts. 167, 168, 169, and 170. These total four hundred and fifty (450) pages in length.

The Motion does not state what rights Plaintiff asserts to have and why it is not a right or claim that the Chapter 7 bankruptcy trustee had and was sold to Defendant Sims.

It appears that Plaintiff, as Defendant Sims does below, is seeking to bring dysfunctional state court litigation to this federal court.

Opposition Filed by Defendant Sims

Defendant Sims begins his Opposition with several assertions of little merit.

Defective Service

Defendant Sims first asserts that the motion should be denied because the motion was improperly served. Plaintiff served the motion by mail to the wrong address. Defendant Sims states that counsel's address in Plaintiff's Proof of Service is an old address that has not been Counsel's address since March 31, 2019. Counsel further states that a formal Notice of Address was sent to Plaintiff on June of 2019.

Defendant Sims' Counsel of record in this contested matter is the counsel who was served with the Motion and supporting pleadings. As noted by Plaintiff's Reply, because Counsel appears on the roster of users consenting to service by electronic means in this Bankruptcy Court, service by email is proper. Plaintiff provides the Declaration of Jamie P. Dreher to establish that Counsel was served at cszandj@sbcglobal.net. via five (5) separate emails on March 26, 2020.

Plaintiff argues that Defendant Sims was effectively served by Plaintiff's counsel emailing it to Defendant Sims' counsel as provided in Local Bankruptcy Rule 7005-1. That Rule relates to a person consenting to electronic service. It appears that the assertion that Defendant Sims' counsel "consented" is that he did not "object" in the past. The court is not convinced that mere silence is consent.

However, the U.S. Supreme Court has provided in Federal Rule of Bankruptcy Procedure 9036, effective December 1, 2019, that a registered user with the court's electronic filing system is effectively served electronically by the Clerk of the Court by having the pleadings filed with the Court.

Defendant Sims' counsel of record in this bankruptcy case, and for the Adversary Proceeding and the contested matter to which the supplemental motion was made, was electronically served as provided in Federal Rule of Bankruptcy Procedure 9036.

The opposition that Defendant Sims was not served is overruled.

Request for Continuance

Defendant Sims' Counsel argues that Plaintiff's Counsel refused to change the hearing date after Defendant Sims' Counsel reached out seeking accommodations for both parties due to current staffing issues everyone was facing due to COVID-19 national crisis and the uncertainty in the court's calendar. Defendant Sims' Counsel also informed Plaintiff's Counsel that he had received a jury summons for federal court in Fresno. The summons did not provide a date but stated that Counsel was "on call" for thirty days starting on April 20th. Counsel was concerned that not knowing when he could be called, he had to make sure his case load would be ready in case he had to take a leave. Specifically, Defendant Sims asserts that "Sims' Counsel believed civility would rule the day and nobody would try to take advantage of the crises facing the country."

A properly authenticated copy of the email sent by Plaintiff's Counsel to Defendant Sims' Counsel was filed by Plaintiff's Counsel in support of their Reply. Dckt. 177. The email, dated April 2, 2020, specifically alludes to the jury summons where Counsel Jamie Dreher states:

I understand you have a jury summons for April 20 and following.
I highly doubt juries will be called in that week. But, if you are called in, of course we would continue the hearing.

[. . .]

So, and assuming you are planning on opposing the motion, please do that (not due for another week by my count), we will file a reply, and if you are called into jury trial we will immediately notify the court and request a continuance.

Email, Ex. 3 at 16.

Plaintiff's Counsel did not refuse to continue the hearing. It explicitly states that if Counsel is called for jury duty, Plaintiff's Counsel would continue the hearing, but exhorts Defendant Sims' Counsel to file an opposition.

Moreover, Plaintiff's Counsel had other reasons why the hearing should not be unnecessarily continued. Plaintiff's Counsel states there were concerns regarding Defendant Sims; namely that Plaintiff's Counsel had been informed Defendant Sims was transferring or concealing assets so that time is of the essence.

At this point, the court does not see an unreasonable refusal from Plaintiff to continue the hearing that would warrant a continuance and a briefing schedule.

What this request does show is that the virus of the ongoing dysfunctional prosecution of the State Court Action is being delivered to this federal court. The court declines such infectious opportunity.

The Request for Continuance is denied.

**Bankruptcy Court Order Required the Consent
of Defendant Sims For This Court to Clarify the
Assets Sold If Determined Necessary by the State Court Judge**

The court turns to Defendant Sims' third assertion that Plaintiff lacks standing to bring this motion. Defendant Sims argues that the motion was supposed to be a joint request because the order's language stated:

“[U]pon order of said State Court judge, Plaintiff and Defendants may seek such determination by motion for supplemental order to the Order Approving the Settlement . . .”

Motion, at 3.

Defendant Sims interprets the court's use of the word “and” to be in the conjunctive, meaning that both Plaintiff and Defendant Sims must file agree to file the supplemental motion. Thus, so long as Defendant Sims refuses to join with the Plaintiff, then Defendant Sims can forever delay the State Court Action and prevent the federal court from addressing a perceived ambiguity in an order of this federal court.

Webster's Dictionary provides the following definition of the word “and:”

- 1 —used as a function word to indicate connection or addition especially of items within the same class or type —used to join sentence elements of the same grammatical rank or function
- 2 a —used as a function word to express logical modification, consequence, antithesis, or supplementary explanation

b —used as a function word to join one finite verb (such as go, come, try) to another so that together they are logically equivalent to an infinitive of purpose
//come and see me
- 3 obsolete : if
- 4 —used in logic to form a conjunction

and so forth
1 : and others or more of the same or similar kind
2 : further in the same or similar manner
3 : and the rest
4 : and other things

<https://www.merriam-webster.com/dictionary/and>.

The court recognizes that in the world of precise use of words by attorneys in interpreting contracts and statutes the word “and” is used to mean that each and every element is required. As opposed to “or,” which would mean one or the other.

But as seen above, the definition also can be used to indicate things or person of the same or similar kind.

It is obvious that in making the Order authorizing the supplemental motion that Plaintiff and Defendant Sims were of the same kind and could in the same manner seek such determination. It appears further clear, in the context of that Order it would necessarily be that either of them could seek that relief.

In the Civil Minutes from the hearing on the Motion to Approve the Compromise, the court addresses the need to address any clarifying questions concerning what was acquired by Defendant Sims that the State Court judge might have.

Therefore, as set forth in a related motion, the court will remand the State Court Action back to the Superior Court and abstain from making a determination of what state law rights remain (are not property of the Bankruptcy Estate after the approved Settlement between the Chapter 7 Trustee and Defendants). The court does so in due regard for the expertise of the state court judges on the matters of state law, as well as the State’s interest in making sure that all of the rights arising under state law have been addressed.

In remanding and abstaining, this court recognizes that it could exercise federal court jurisdiction for this determination. Out of further regard for the State Court judge to whom the matter is remanded, if that judge determines that such issues should properly be determined by a federal court judge, this court will exercise such jurisdiction if the State Court judge orders the parties to obtain such determination by supplemental motion for determination of the rights transferred by the Chapter 7 Trustee under the Settlement and what rights, if any, were not transferred (or such other proceeding as Plaintiff and Defendants determine proper).

Civil Minutes, p. 14; Dckt. 99. If the State Court judge concluded that such determination by this court was needed for specific rights at issue, this court **will** exercise its jurisdiction to make that clarification.

The court's use of the word "and" was intended to mean that each of them had the equal ability to seek such supplemental order for relief. That way, none was to be subjected to the crafty, abusing pleading practices each accused the other.

Unfortunately, the court erred in its use of the word "and," resulting in Defendant Sims' very experienced counsel to believe that the court had granted to Defendant Sims a veto right as to this court exercising federal court jurisdiction. Such is the unfortunate error of this court.

The court will *sua sponte* acknowledge its clerical error and issue an amended order as provided in Federal Rule of Civil Procedure 60(a) and Federal Rule of Bankruptcy Procedure 9014 to clarify the confusion sown by this court making it appear to Defendant Sims that Defendant Sims controls the exercise of federal judicial power to address orders of the federal court.

Defendant Sims' Objection on the basis that his concurrence is required to seek the supplemental order as determined necessary by the State Court judge is overruled.

CONSIDERATION OF THE MOTION

As shown above, the Motion filed by Plaintiff does not state any grounds for which supplemental relief may be granted. The Motion could be quite simple. It could identify each cause of action that Plaintiff is asserting in State Court Against Defendant Sims. It could state the grounds for each such claim and why such claim, and any of the necessary elements of such claims, are not claims and rights that the Chapter 7 trustee had as property and rights of the bankruptcy estate that the Chapter 7 trustee sold to Defendant Sims.

Plaintiff could then have filed a simple points and authorities providing the legal support for the elements of such claims. The points and authorities could have simply identified why and how, as a matter of state and federal law, such claims and the elements of such claims were not rights of the Debtor that became property of the bankruptcy estate or were rights of the Chapter 7 trustee and the bankruptcy estate under federal law.

Instead, Plaintiff has deluged the court with more than 400 pages of pleadings from the State Court Action. The State Court judge can address and consider those 400 pages of pleadings. All this court would need is a copy of the First Amended Complaint showing the causes of action pleaded, so that Plaintiff would document that it is stating with particularity in the Motion those same claims (and not engaging in

some sneaky, under handed, court abusing practices that Defendant Sims feels compelled to repeatedly state in his pleadings filed in this court).

The court declines the opportunity presented by Plaintiff to review, analyze, organize, and articulate from pleadings filed in the State Court what could be grounds and relevant to this very limited scope Supplemental Motion in this federal court proceeding:

Plaintiff's Original State Court Complaint (15 pages)

Defendant Sims Points and Authorities in Support of General Demurrer (81 pages)

The State Court's order overruling the General Demurrer (2 pages)

Defendant Sims' Answer to the First Amended Complaint (11 pages)

Defendant Sims' Notice of Motion for Summary Judgment (5 pages)

Defendant Sims' Points and Authorities for the Summary Judgment Motion (19 pages)

Defendant Sims' Request for Judicial Notice (68 pages)

Defendant Sims' Statement of Undisputed Facts (34 pages)

Plaintiff's Memorandum in Opposition to Summary Judgment (19 pages)

Plaintiff's Counsel's Declaration in Opposition to Summary Judgment (40 pages)

Plaintiff's Request for Judicial Notice (100 pages)

Plaintiff's Opposition to Statement of Undisputed Facts (48 pages)

Defendant Sims' Further Request for Judicial Notice (12 pages)

Defendant Sims' Opposition to Plaintiff's Statement of Undisputed Facts (22 pages)

State Court's Tentative Ruling on Motion for Summary Judgment (2 pages)

Defendant Sims' Supplemental Brief in Support of Summary Judgment (12 pages)

Plaintiff's Supplemental Brief in Opposition to Summary Judgment (14 pages)

Plaintiff's Counsel's Supplemental Declaration (43 pages)

Defendant Sims' Supplemental Reply Brief (2 pages)

Plaintiff's Response to Defendant Sims' Supplemental Reply Brief (10 pages)

The relevance of these hundreds of pages of State Court pleadings eludes the court.

What is clear to the court is that there is a dysfunctional practice occurring between the Parties, which will not be transported to this court.

The Motion is denied without prejudice. Plaintiff may file a new motion, which states with particularity the claims that it is asserting in state court, the elements of those claims, and the basis for asserting that they were not property or rights of the bankruptcy estate that were transferred from the Chapter 7 trustee to Defendant Sims.

That can be supported by a focused points and authorities which explain to the court the elements of the claims being asserted, the legal authorities for why such are personal to the Plaintiff and not owned or controlled by the Debtor corporation or the Chapter 7 bankruptcy trustee, and why they are not rights that were property of the bankruptcy estate or rights of the Chapter 7 trustee which were transferred to Defendant Sims.

Then, Defendant Sims can file an opposition, focused on the claims and the law. There will be no name calling, how uncivil Defendant Sims and his counsel find the opponents, or derogatory statements about the opponent or opponent's counsel - by neither, either, or any of Defendant Sims, Defendant Sims' counsel, Plaintiff, or Plaintiff's counsel, and each of them, individually, jointly, separately, or in conjunction with any other person (as that term is defined in the United States Bankruptcy Code as it exists on April 22, 2020).

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 a Supplemental Order filed by Burger Physical Therapy having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

FINAL RULINGS

8. [19-91112-E-7](#)
[JAD-1](#)

DANIEL/SOPHIA LOVE
Jessica Dorn

MOTION TO AVOID LIEN OF CAPITAL
ONE BANK (USA) N.A.
3-25-20 [\[16\]](#)

Final Ruling: No appearance at the April 23, 2020 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, Chapter 7 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on March 25, 2020. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.
--

This Motion requests an order avoiding the judicial lien of Capital One Bank (USA) N.A. ("Creditor") against property of the debtor, Daniel J. Love and Sophia M. Love ("Debtors") commonly known as 305 Fullerton Drive, Turlock, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$5,547.41. Exhibit A, Dckt. 19. An abstract of judgment was recorded with Stanislaus County on September 26, 2019, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$305,453.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$219,080.57 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an

exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$86,372.43 on Schedule C. Dckt. 1.

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

FN. 1. The court notes that the two page Motion and one page Points and Authorities were filed as separate documents. While the court is aware of it strongly making the point of attorneys improperly combining the points and authorities into one dreaded, improper "Mothorities," the Local Bankruptcy Rules do allow for the combining of the points and authorities with the motion for "simple" contested matters, those being ones in which the combined motion/points and authorities is not more than six pages (including the caption page) in length. L.B.R. 9014-1(d)(4).

ISSUANCE OF A COURT-DRAFTED ORDER

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

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

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

IT IS ORDERED that the judgment lien of Capital One Bank (USA) N.A., California Superior Court for Stanislaus County Case No. CV-19-002857, recorded on September 26, 2019, Document No. 2019-0066548-00, with the Stanislaus County Recorder, against the real property commonly known as 305 Fullerton Drive, Turlock, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

Final Ruling: No appearance at the April 23, 2020 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*), Chapter 7 Trustee, and Trustee's Attorney as stated on the Certificate of Service on April 4, 2020. The court computes that 19 days' notice has been provided.

The court issued an Order to Show Cause based on Trustee's failure to pay the required fees in this case: \$11.00 due on March 19, 2020.

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

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

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 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.

Final Ruling: No appearance at the April 23, 2020 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's, Debtor's Attorney, Chapter 7 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on March 12, 2020. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees 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 Allowance of Professional Fees is granted for Counsel to the Debtor in Possession during the period prior to the conversion of this case to one under Chapter 7.

Dahl Law, the Attorney ("Applicant") for Jamie Benjamin Billman and Melissa Marnell Billman, the Debtor, during the period in which they were serving as the Debtor in Possession prior to the case being converted to one under Chapter 7 ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period November 2, 2019, through February 17, 2020. The order of the court approving employment of Applicant was entered on December 5, 2019. Dckt. 37. Applicant requests fees in the amount of \$25,375.00 and costs in the amount of \$282.20.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of

Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

- (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include providing general case administration; analyzed real property for potential sale and purchases; engaged in communications related to business operations; and drafted responses to motions for relief. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Accounting and Auditing: Applicant spent 0.60 hours in this category. Applicant communicated with Debtor and accounting firm and assemble documents for accounting firm.

Asset Analysis and Recovery: Applicant spent 6.4 hours in this category. Applicant engaged in numerous communications with Debtor and other individuals and analyzed potential issues related to possible sale of selected properties.

Asset Disposition Proceedings: Applicant spent 1.6 hours in this category. Applicant communicated with Debtor and potential buyers regarding sale of property of the estate, including the sale of the 2017 Jayco motor home.

Business Analysis and Operations: Applicant spent 1.9 hours in this category. Applicant communicated with Debtor regarding status and recommendations of Chapter 11 filing; communicated with Debtor regarding potential start up of new business; and communicated with third parties regarding status of bonded jobs and Chapter 7 of Debtor's business.

Case Administration: Applicant spent 86.80 hours in this category. Applicant communicated with Debtor regarding the petition, data and documents required for the filing and confirmation of plan; advised on decision by providing pros and cons for conversion to Chapter 7; attended meeting of creditors; filed motion to convert; communicated with creditors and city officials; requested business statements to complete business operating reports; requested extension of deadline to file schedules and

statements; gathered data to complete trustee required business documents; drafted and reviewed petition and schedules; reviewed insurance records; and communicated with Debtor and filed Debtor's business Chapter 7 bankruptcy case.

Claims Administration and Objections: Applicant spent 5.9 hours in this category. Applicant communicated with creditors and third parties related to claims filed on the status of the Chapter 11 case, vehicles, and real property; communicated with third parties about the scope of the automatic stay; and communicated as it pertained to a possible cash collateral stipulation for real property.

Fee/Employment Applications: Applicant spent 4.7 hours in this category. Applicant prepared motion for employment; drafted the supporting declaration; communicate with accountants and prepared the motion to employ accountants; and drafted supporting documents.

Motions for Relief from Stay: Applicant spent 1.8 hours in this category. Applicant drafted and electronically filed Debtor's response to relief from stay motions of two creditors.

Compensation Motion: Applicant spent 11.80 hours in this category. Applicant prepared the motion to approve compensation and supporting documents; filed and served the motion, and anticipates appearing at the hearing for this motion.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Walter R. Dahl	40.0	\$435.00	\$17,400.00
Choquette Marrow	55.30	\$125.00	\$6,912.50
Colin Hoffman	12.5	\$85.00	\$1,062.50
	0	\$0.00	<u>\$0.00</u>
Total Fees for Period of Application			\$25,375.00

Applicant is also seeking \$1,703.00 in fees for the instant compensation motion. This comes to a total of \$27,078.00 in fees.

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$282.20 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Filing Fee	\$0.00	\$46.00
Postage		\$190.95
Photocopies		\$45.25
		\$0.00
Total Costs Requested in Application		\$282.20

Applicant is also seeking \$175.30 in costs for the instant compensation motion. This comes to a total of \$457.50 in costs.

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$27,078.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Costs & Expenses

First and Final Costs in the amount of \$457.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	\$27,078.00
Costs and Expenses	\$457.50

pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Dahl Law (“Applicant”), as the Attorney for Jamie Benjamin Billman and Melissa Marnell Billman, while serving as the Debtor in Possession prior to it being converted to one under Chapter 7, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Dahl Law is allowed the following fees and expenses as a professional of the Estate:

Dahl Law, Professional employed by the Debtor in Possession in this case,

Fees in the amount of \$27,078.00

Expenses in the amount of \$457.50,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for said Debtor in Possession.