UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Thomas C. Holman
Bankruptcy Judge
Sacramento, California

May 6, 2014 at 9:32 A.M.

1.	13-30690-B-11 WILLIAM PRIOR 13-2288 JWK-3 PRIOR V. TRI COUNTIES BANK ET AL	CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING 12-27-13 [93]

Tentative Ruling: This motion continued from March 25, 2014. The court now issues the following tentative ruling.

The plaintiff debtor's opposition is overruled. The motion is granted. All claims for relief in the plaintiff debtor's complaint are dismissed without leave to amend based on the court's lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

I. BACKGROUND

Debtor William Prior and his wife, Lynair Prior, acquired real property located at 750, 760, 770 and 780 Lincoln Way, Auburn, California ("Property 1"). On or about December 1, 2005, the Priors were parties to a lease with Citizens Bank of Nevada County ("Citizens Bank"), pursuant to which Citizens Bank had agreed to lease portions of Property 1 for use as a bank branch.

In or about January 2006, the debtor and Citizens entered into the following agreements:

1.) The debtor entered into a contract to purchase real property located at 905 Lincoln Way, Auburn, California ("Property 2").

2.) The debtor entered into a loan transaction with Citizens, pursuant to which prior borrowed $1,000,000.00 ("Loan 1"). Loan 1 was secured by a deed of trust on Property 1. The debtor used a portion of the proceeds from Loan 1 as a down payment toward purchase of Property 2. Copies of the promissory note and Deed of Trust evidencing Loan 1 are attached to the proof of claim filed by Tri Counties Bank in the debtor's parent bankruptcy case and are filed as exhibits to TCB's motion for summary judgment. The deed of trust on Property 1 provides, inter alia:

Amendments. This Deed of Trust, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust. No alteration or amendment

to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

The deed of trust further defines "Related Documents" as follows:

> Related Documents. The words "Related Documents" mean all promissory notes, credit agreement, loan agreements, environmental agreements, security agreements, mortgages, deeds of trust, security deed, collateral mortgages, and all other instruments, agreements or documents, whether new or hereafter existing, executed in connection with the Indebtedness.

3.) The debtor entered into another loan transaction with Citizens, pursuant to which the debtor borrowed $1,000,000.00 ("Loan 2," and, collectively with Loan 1, the "Loans"). Loan 2 was secured by a deed of trust on Property 2. The debtor used the loan proceeds from Loan 2 to complete the purchase of Property 2. Copies of the promissory note and Deed of Trust evidencing Loan 2 are attached to the proof of claim filed by Tri Counties Bank in the debtor's parent bankruptcy case and are filed as exhibits to TCB's motion for summary judgment. The deed of trust on Property 2 provides, inter alia:

> Amendments. This Deed of Trust, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust. No alteration or amendment to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

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4.) The debtor and Citizens entered into an agreement to terminate the lease of Property 1 and entered into a new lease agreement (the "Lease"), pursuant to which Citizens agreed to lease Property 2 through April 30, 2011. A copy of the Lease is attached to the complaint. Paragraph 21.4 of the Lease states the following:

> 21.4 Entire Agreement. This Lease constitutes the entire agreement between Landlord and Tenant relative to the Premises and supercedes any prior agreements, brochures or representations, whether written or oral. This lease may be altered, amended or revoked only in writing signed by both Landlord and Tenant. This Lease shall not be effective or binding in any way until fully executed by both parties.

Neither of the deeds of trust related to Loan 1 or Loan 2 specifically references the Lease. The Lease does not specifically reference Loan 1 or Loan 2 or any document related thereto.

The Lease expired by its own terms on or about April 30, 2011. On or about May 23, 2011, the debtor and Citizens entered into a forbearance agreement (the "Forbearance Agreement"), pursuant to which Citizens renewed the lease of Property 2 for five years. Citizens also agreed to pay the debtor $24,550.27 (the "Tax Payment") for reimbursement of certain property tax liabilities incurred during the term of the Lease. Citizens also agreed to forbear in the exercise of certain of its rights and remedies for alleged defaults under its various loan agreements with the the debtor.

Citizens failed in September 2011 and was taken over by the Federal Deposit Insurance Corporation, as receiver (the "FDIC-R"). Following Citizens' failure, the FDIC-R entered into an agreement with defendant Tri Counties Bank ("TCB"), pursuant to which the FDIC-R transferred the rights of Citizens under Loan 1 and Loan 2 to TCB.

Prior to Citizens' failure, it had not paid the Tax Payment required by the Forbearance Agreement to the debtor. The debtor filed a timely proof of claim with the FDIC-R for the amount of the Tax Payment, and on or about February 16, 2012, was issued a receivership certificate, representing an acknowledged claim against the receivership estate. The debtor has not received any funds on account of his allowed claim based on the receivership certificate from the FDIC-R.

Thereafter, on or about March 14, 2012, the FDIC-R repudiated the lease of Property 2. On or about June 15, 2012, the debtor filed a proof of claim with the FDIC-R in the amount of $461,096.44 for the balance due on Citizens' lease of Property 2 from the debtor (the "Rent Claim"). On July 25, 2012, the FDIC-R sent the debtor a notice (the "Notice") informing him that the Rent Claim was disallowed, based on the FDIC-R's repudiation of the lease. The Notice also stated that if the debtor did not agree with the disallowance, he had the right to file a lawsuit in the United States District Court for the District in which Citizens was located within 60 days from the date of the Notice. The Notice further stated that if the debtor did not file a lawsuit before the end of the 60-day period, the disallowance would be final, the debtor's claim would be forever barred and he would have no further rights or remedies with respect to the Rent Claim.

On April 19, 2013, TCB caused defendant Placer Foreclosure, Inc. ("Placer Foreclosuire") to record a Notice of Default and Election to Sell Under Deed of Trust with respect to Loan 1 and Property 1, asserting that Loan 1 was in default in the amount of $24,360.93 as of April 19, 2013. Also on April 19, 2013, TCB caused Placer Foreclosure to file a Notice of Default and Election to Sell Under Deed of Trust with respect to Loan 2 and Property 2, asserting that Loan 2 was in default in the amount of $24,350.16 as of April 19, 2013.

On July 8, 2013, 348 days after the date of the Notice, the debtor filed a lawsuit in Placer County Superior Court against TCB and Placer Foreclosure. The lawsuit sought the following relief:

1.) Judgment declaring that the debtor was not in default under the promissory notes or deeds of trust relating to Loan 1 and Loan 2.

2.) Judgment declaring that the notices of default recorded against Property 1 and Property 2 failed to comply with applicable law.

3.) Judgment declaring that The debtor is entitled to set off amounts owing to the debtor under the Lease against amounts due under Loan 1 and Loan 2 and that Loan 1 and Loan 2 are satisfied in full.

4.) Injunctive relief prohibiting the defendants from conducting nonjudicial foreclosure proceedings with respect to the deeds of trust securing Loan 1 and Loan 2.

The FDIC-R filed a complaint in intervention in the Placer County lawsuit on or about August 12, 2013, seeking a judicial determination that the Loans were not repudiated by the FDIC-R and are fully enforceable and that the debtor may not set off amounts allegedly owed to him under the Lease and the Forbearance Agreement against amounts he owes under the Loans.

On August 14, 2013, The debtor commenced the present chapter 11 bankruptcy case. On August 27, 2013, the debtor filed a notice of removal which removed the Placer County lawsuit to this court. The FDIC-R filed the instant motion to dismiss on December 27, 2013.

II. ANALYSIS

A. Summary of Motion and Arguments

The FDIC-R seeks dismissal of the adversary proceeding with prejudice pursuant to Fed. R. Civ. P. 12(b)(1), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012. Rule 12(b)(1) provides for dismissal of adversary proceedings by motion on the ground of lack of subject matter jurisdiction.

The FDIC-R argues in the motion that as a result of the failure and receivership of Citizens, the debtor was required to file any and all administrative claims relating to Citizens with the FDIC-R. Although The debtor did file administrative claims with the FDIC-R, one of which was allowed in the other disallowed, he did not seek judicial review of the disallowance of the Rent Claim within 60 days following its disallowance. The FDIC-R argues that the debtor is seeking remedies outside of and contrary to administrative proceedings created by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, codified at 12 U.S.C. § 1821 ("FIRREA"), and that he is barred from doing so by his failure to comply with the 60-day period mandated by 12 U.S.C. § 1821(d)(6). The FDIC-R argues that his failure to do so imposes a jurisdictional bar pursuant to 12 U.S.C. § 1821(d)(13)(D) that requires dismissal of this action.

The debtor argues in opposition to the motion that the FDIC-R is attempting to deprive him of a right of setoff against TCB, which he characterizes as a defense or affirmative defense. He argues that he is asserting no claim against TCB, the FDIC-R or Placer Foreclosure and that he is instead merely asserting his defense to TCB's claim against him through the adversary proceeding. He argues that the jurisdictional bar of 12 U.S.C. § 1821(d)(13)(D) does not apply because the FDIC's claims adjudication process does not apply to setoff defenses or other affirmative defenses.

B. Issues to Be Decided

Due to the manner in which the debtor filed claims with the FDIC and the manner in which they were addressed by the FDIC, the court identifies the following separate issues to be resolved on this motion:

1.) Whether the bankruptcy court has jurisdiction to hear a claim for setoff asserted by a debtor in an adversary proceeding associated with a bankruptcy case.

2.) Whether the debtor can assert a setoff against TCB's claim in the bankruptcy case in the amount of the Tax Payment, which Tax Payment the FDIC-R allowed as a claim against the receivership estate of Citizens and for which the FDIC-R issued the debtor a receivership certificate in the amount of the Tax Payment.

3.) Whether the debtor can assert a setoff against TCB's claim in the bankruptcy case in the amount of the Rent Claim, which Rent Claim the debtor filed with the receivership estate of Citizens and which Rent Claim the FDIC-R disallowed, and for which the debtor did not seek judicial review pursuant to 12 U.S.C. § 1821(d)(6) within the time allowed by that statute.

The court will explain in the following sections that while the court has subject matter jurisdiction under bankruptcy law to hear a claim for setoff asserted by the debtor against TCB, in doing so, the court cannot ignore the requirements of FIRREA, which imposes a jurisdictional bar for all courts against the assertion of certain types of claims which are subject to FIRREA's claims review and distribution procedures. The debtor's asserted setoffs are in substance claims of the type which are subject to FIRREA's requirements and the debtor cannot assert them against TCB.

C. Rule 12(b)(1)

Fed. R. Civ. P. 12(b)(1) requires dismissal of an action if the court lacks subject matter jurisdiction over the action:

> Pursuant to Rule 12(b)(1), a district court must dismiss an action if it lacks jurisdiction over the subject matter of the suit. See Fed.R.Civ.P. 12(b)(1). "Subject matter jurisdiction can never be forfeited or waived and federal courts have a continuing independent obligation to determine whether subject-matter jurisdiction exists." Leeson v. Transamerica Disability Income Plan, 671 F.3d 969, 976 (9th Cir.2012) (internal quotation marks and citation omitted). A party challenging the court's subject matter jurisdiction under Rule 12(b)(1) may bring a facial challenge or a factual challenge. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir.2000). A facial attack is one where "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.2004). In evaluating such a challenge, the court accepts the factual allegations in the complaint as true. See Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir.2001). In contrast, where the defendant challenges the factual basis underlying the allegations, the court need not accept the allegations as true and may instead make factual determinations. White, 227 F.3d at 1242. "In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where

necessary." Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.1983) (internal citation omitted). When making such a ruling, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir.2003) (citing White, 227 F.3d at 1242). The burden of proof on a Rule 12(b)(1) motion is on a party asserting jurisdiction. Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir.1995).

Alatraqchi v. Uber Technologies, Inc., 2013 WL 4517756 at *3 (N.D. Cal. Aug. 22, 2013).

D. The Court Has Subject Matter Jurisdiction to Determine the Amount of TCB's Claim

As to the first issue for resolution identified by the court, the court finds that as a general proposition it has subject matter jurisdiction to determine the amount of TCB's claim in the bankruptcy case. Pursuant to 28 U.S.C. § 157(b)(1), "[b]ankruptcy judges may hear and determine all cases arising under title 11 or arising in or related to a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." Claims that arise under Title 11 are those that involve a cause of action created or determined by a statutory provision of Title 11. In re Harris Pine Mills, 44 F.3d 1431, 1435 (9th Cir. 1995), citing In re Wood, 825 F.2d 90, 96-97 (5th Cir. 1987). Claims that arise in Title 11 are " 'administrative' matters that arise solely in bankruptcy cases . . . [They] are not based on any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy." Wood, 825 F.2d at 97. Such claims are deemed to be "core" proceeding. In re Harris Pine Mills, 44 F.3d at 1435.

28 U.S.C. § 157((b)(2) sets forth a non-exclusive list of specific core proceedings. 28 U.S.C. § 157(b)(2)(B) includes "allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12 or 13 of title 11" in the list of core proceedings. The fact that allowance or disallowance of a claim is listed as a core proceeding under 28 U.S.C. § 157(b)(2) is not dispositive of the inquiry, as while the statute may grant the court statutory authority, the court may nevertheless lack constitutional authority under Article III to decide the matter. Stern v. Marshall, 564 U.S. __, 131 S.Ct. 2594 (2011).

Putting aside momentarily the question of the effect 12 U.S.C. 1821(d)(13)(D), in this case the general question of whether the bankruptcy court has jurisdiction to determine the amount of TCB's claim in this bankruptcy case is easily resolved. There is an express statutory grant of authority to the bankruptcy court determine the amount of a filed claim in 11 U.S.C. § 502(b). Such proceedings "arise under" the Bankruptcy Code. Adjudicating a counterclaim by the estate against a creditor that has filed a claim in the bankruptcy case, which counterclaim must necessarily be resolved in allowing or disallowing the claim does not offend Article III of the United States Constitution. Stern, 131 S.Ct. at 2620. For jurisdictional purposes, the court treats a setoff like a counterclaim. Because the debtor's claimed setoff must necessarily be adjudicated in the process of allowing or disallowing TCB's claim, doing so does not create any constitutional limitation on

the court's jurisdiction. Therefore, the court has jurisdiction to hear an adversary proceeding which seeks to determine the amount of TCB's claim filed in the bankruptcy case. To the extent that the FDIC-R argues that the court does not have jurisdiction to determine the amount of TCB's claim, other than by application of 12 U.S.C. 1821(d)(13)(D), its argument is not persuasive. The court notes that at the present time the complaint, which is removed from state court, does not allege a specific claim for relief for determination of TCB's claim, but notes that in a separate motion the debtor has requested leave to amend the complaint to include such a claim (Dkt. 184).

The foregoing assumes that the debtor may assert a setoff in the bankruptcy case based on the Tax Payment and the Rent Claim, without considering any restriction imposed by FIRREA. In exercising its jurisdiction to determine the amount of TCB's claim filed in the bankruptcy case the court must consider the effect of the requirements of FIRREA. For the reasons set forth below, FIRREA prevents the debtor from asserting a setoff claim against TCB.

E. The Debtor Cannot Assert His Right to the Tax Payment as a Setoff of TCB's Claim

Having determined that the court has jurisdiction, in a general sense, to determine the amount of TCB's claim in the bankruptcy case, the court next considers whether the debtor can assert a setoff against TCB's claim in the amount of the Tax Payment. Because the debtor filed a claim based on the Tax Payment against the receivership estate and the claim was allowed with the FDIC-R issuing the debtor a receivership certificate, this is not an issue of whether the debtor is barred from asserting his setoff against TCB on a jurisdictional basis for the reason that failed to exhaust the FIRREA administrative claims process. Instead, the inquiry regarding the claim based on the Tax Payment is whether the court has jurisdiction to adjudicate a setoff where the setoff is based on a claim filed against the receivership estate which was allowed and for which the debtor received a receivership certificate.

1. Setoff

"The Bankruptcy Code does not create a right to setoff; it merely preserves the right already given in a nonbankruptcy context. . . . If a party is generally entitled to setoff in the nonbankruptcy context, it is entitled to one under the Bankruptcy Code." In re HAL, Inc., 122 F.3d 851, 852-53 (9th Cir. 1997)(citing Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995)).

Under California law, the right of setoff is codified under Cal. Civ. Proc. Code § 431.70. That section allows a setoff in an action between persons where "cross-demands for money have existed" between those persons "at any point in time when neither demand was barred by the statute of limiations." Cal. Civ Proc. Code § 431.70. The statute further provides that "[n]either person can be deprived of the benefits of this section by the assignment or death of the other." Id.

Under California law, a key feature of the right of setoff is that it can only be applied between two parties who owe each other mutual debts or credits when neither is time-barred:

> The English chancery courts allowed setoff to be raised as a defense

> as early as the 17th century. (Prudential Reinsurance Co. v. Superior Court (1992) 3 Cal.4th 1118, 1124, 14 Cal.Rptr.2d 749, 842 P.2d 48; 3 Story, Commentaries on Equity Jurisprudence (14th ed. 1918) § 1867, pp. 468-469; see also Tigar, Automatic Extinction of Cross-Demands: Compensation from Rome to California (1965) 53 Cal.L.Rev. 224 [tracing the history of setoff to the Roman law concept of compensation].) It was founded on the equitable principle that "either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference, ..." (Kruger v. Wells Fargo Bank (1974) 11 Cal.3d 352, 362, 113 Cal.Rptr. 449, 521 P.2d 441.) Setoff, as it applies to this case, is now codified as section 431.70 of the Code of Civil Procedure, which provides in pertinent part: "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated for so far as they equal each other, ..."

Granberry v. Islay Inv., 9. Cal. 4th 738, 743-44 (1995). Mutuality is essential to the application of setoff:

> In order to assert a set-off, cross-demands for money must exist between the parties. (Cal. Civ. Proc. Code § 431.70; Granberry v. Islay Investments (1995) 9 Cal.4th 738, 743-744, 38 Cal.Rptr.2d 650, 889 P.2d 970; Harrison v. Adams (1942) 20 Cal.2d 646, 648-649, 128 P.2d 9.) The right of setoff arises when two parties are mutually debtor and creditor to each other. (Ibid.) The Supreme Court has held: "[The right to a set-off is] founded on the equitable principle that 'either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference, ...' [Citation.]" (Granberry v. Islay Investments, supra, 9 Cal.4th at p. 744, 38 Cal.Rptr.2d 650, 889 P.2d 970.) The Supreme Court has also held: "[I]t is well settled that a court of equity will compel a set-off when mutual demands are held under such circumstances that one of them should be applied against the other and only the balance recovered." (Harrison v. Adams, supra, 20 Cal.2d at pp. 648-649, 128 P.2d 9; § 431.70.) As the Supreme Court explained in Jess v. Herrmann (1979) 26 Cal.3d 131, 137, 161 Cal.Rptr. 87, 604 P.2d 208, in the ordinary setoff circumstances, "a setoff procedure simply eliminates a superfluous exchange of money between the parties," and "may operate to preclude an unfair distribution of loss if one of the parties is totally insolvent or is unable to pay a portion of the judgment against him."

Birman v. Loeb, 64 Cal.App.4th 502, 518-19 (1998)(foonote omitted).

2. FIRREA

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") is codified at 12 U.S.C. § 1821. 12 U.S.C. § 1821(c)(1) allows the FDIC to act as conservator or receiver for any federally insured depository institution, based on the grounds set forth in 12 U.S.C. § 1821(c)(5).

12 U.S.C. § 1821(d)(2)(A) authorizes the FDIC to succeed to all rights,

titles, powers and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer or director of the institution with respect to the institution and the assets of the institution. 12 U.S.C. § 1821(d)(2)(B) allows the FDIC to operate the institution. 12 U.S.C. § 1821(d)(2)(G) allows the FDIC to merge the failed institution with another insured depository institution or to "transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer." The Ninth Circuit Court of Appeals recognizes the FDIC's authority to limit liabilities assumed by a purchasing bank through a Purchase and Assumption Agreement. W. Park Assocs. v. Butterfield Sav. & Loan Ass'n, 60 F.3d 1452, 1458 (9th Cir. 1995).

The FDIC's authorization to sell assets of a failed institution and to limit the liability of the purchaser of the assets with respect to claims against the failed institution is central to one of FIRREA's core purposes: to efficiently effect the sale of a failed institutions assets and "expeditiously resolve claims against a failed institution without any recourse to litigation." Kosicki v. Nationstar Mortgage, LLC, 947 F.Supp.2d 546, 553 (W.D. Pa. 2013).

FIRREA also gives the FDIC authority to determine claims against a failed depository institution:

> Section 1821(d)(3)(A) of FIRREA provides the FDIC, acting in its capacity as receiver, with the authority to determine claims against a failed depository institution. If a claimant submits a timely claim to the FDIC, it must determine within 180 days whether to allow or disallow the claim. If the FDIC fails to determine the claim or disallows the claim, then, under § 1821(d)(6)(A), the claimant has 60 days to request administrative review or file or continue suit on such claim in the district court. No court has jurisdiction over the claim until the exhaustion of this administrative process.

Intercontinental Travel Marketing, Inc. v. FDIC, 45 F.3d 1278, 1282 (9th Cir. 1994)(footnotes omitted). Allowed claims are subject to a distribution priority scheme set forth under 12 U.S.C. § 1821(d)(11). FIRREA's jurisdictional bar, mentioned by the Intercontinental Travel Marketing court, is found in 12 U.S.C. § 1821(d)(13)(D) and provides:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821(d)(13)(D).

To further aid in the expeditious resolution of claims against a failed institution, 12 U.S.C. § 1821(e)(1) gives the FDIC the authority to disaffirm or repudiate contracts or leases to which failed institution is

a party, the performance of which would be burdensome and the disaffirmance or repudiation of which the FDIC determines will promote the orderly administration of the failed institution's affairs. 12 U.S.C. § 1821(e)(3) provides that claims for damages for repudiation are limited to actual direct compensatory damages determined as of the date of the appointment of the receiver. For leases under which the failed institution is the lessee, 12 U.S.C. § 1821(e)(4) provides that if the receiver repudiates the lease, the receiver is only liable for contractual rent accruing before the later of the date the notice of repudiation is mailed, or the repudiation becomes effective, and the lessor will have no claim for damages under any acceleration clause or other penalty provision in the lease, but will have a claim for unpaid rent due as of the date of the appointment of the receiver.

Claims for contract damages arising from disaffirmation or repudiation of a contract or lease pursuant to 12 U.S.C. § 1821(e) are subject to the claims process of 12 U.S.C. § 1821(d) and to the distribution priority scheme set forth in 12 U.S.C. § 1821(d)(11). Battista v. FDIC, 195 F.3d 1113, 1121 (9th Cir. 1999).

More recently, the Ninth Circuit has held:

> FIRREA's exhaustion requirement applies to any claim or action respecting the assets of a failed institution for which the FDIC is receiver. We have recognized some exceptions, for special situations. However, apart from claims made in connection with bankruptcy proceedings or arising out of a breach of contract fully performed by the aggrieved party but not repudiated by the receiver, all claims or actions must be submitted for administrative resolution. Accordingly, debtors as well as creditors who assert a qualifying claim or action must exhaust. Post-receivership claims arising out of acts by the receiver as well as by the failed institution are likewise subject to exhaustion.

McCarthy v. FDIC, 348 F.3d 1075, 1081 (9th Cir. 2003).

As noted above, in McCarthy the Ninth Circuit identified some exceptions to the general rule that FIRREA's exhaustion requirement applies to "any claim or action respecting the assets of a failed institution for which the FDIC is receiver."

3. FIRREA Preemption of State Law Rights Regarding Preservation of Mutuality

The FDIC-R allowed the debtor a claim in the amount of the Tax Payment against the receivership estate of Citizens based on Citizens' pre-failure breach of the Forbearance Agreement. The debtor now seeks to assert a setoff against TCB's bankruptcy claim in the amount of the Tax Payment. As noted above, California state law provides that assignment of a claim does not deprive a party subject to the claim of the right of setoff against the claim if the party subject to the claim has a cross-demand for money based on a mutual debt. That is what the debtor claims here: that he had a right to a setoff against Citizens based on mutual debts owed by the debtor to Citizens (payments under Loan 1 and Loan 2) and a debt owed to the debtor by Citizens (the Tax Payment pursuant to the Forbearance Agreement). The debtor argues that the FDIC-R assignment of the right to payment on Loan 1 and Loan 2 to TCB does not affect the mutuality of the debt at all, and that he can continue to assert his

setoff right against the assignee of Loan 1 and Loan 2.

This leads the court to the question of whether FIRREA affects the mutuality of the debtor creditor relationship where the FDIC-R has assigned the claim to an assignee bank and the cross-demand of the party subject to the claim is subject to FIRREA's administrative claims process, i.e. whether FIRREA preempts certain California state law rights regarding setoff against assigned claims.

Federal preemption of state law comes in two primary forms: express preemption and implied preemption. It is fundamentally a question of Congressional intent. Express preemption occurs where Congress explicitly defines an intent to pre-empt state law. English v. General Elec. Co., 496 U.S. 72 (1990). In this case, there is no explicit statement in FIRREA itself which states that Congress intended to preempt state law on the issue of preservation of setoff rights where a claim is assigned by the FDIC to an acquiring entity. Express preemption is not at issue.

Implied preemption itself takes two forms: conflict preemption and field preeemption:

> Conflict preemption applies "where compliance with both federal and state regulations is a physical impossibility," and in "those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Arizona v. United States, --- U.S. ----, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351 (2012) (internal quotation marks omitted). Field preemption "can be inferred either where there is a regulatory framework 'so pervasive ... that Congress left no room for the States to supplement it' or where the 'federal interest [is] so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1023 (9th Cir.2013) (alteration in original) (quoting Arizona, 132 S.Ct. at 2501).

Ventress v. Japan Airlines, __ F.3d __, 2014 WL 1258133 at *2 (9th Cir. Mar. 28, 2014).

Of the two forms of implied preemption, the court finds that conflict preemption applies in this case. One of the stated purposes of FIRREA was to "establish a new corporation, known as the Resolution Trust Corporation, to contain, manage and resolve failed savings associations." FIRREA, Pub. L. No. 101-73, § 101(7). Section 212 of FIRREA further established that the Resolution Trust Corporation (the "RTC") would have the ability to "transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer." FIRREA, Pub. L. No. 101-73, § 212(a). Section 212 further authorized the RTC to determine claims with respect to the failed institution, established procedures for the determination of claims and for judicial review of the RTC's determination of claims. As noted above in this decision, FIRREA was designed to effect an efficient and expeditious liquidation of the assets of a failed institution and determination of claims against a failed institution without resort to litigation. These two powers - the ability to transfer any asset or liability of the failed institution and to establish an administrative procedure for determining claims against the failed institution - clearly

demonstrates a Congressional objective in FIRREA to allow the receiver of a failed institution to separate the assets and liabilities of a failed institution, so as to allow the assets to be expeditiously liquidated and the liabilities to be subjected to an orderly claim review and distribution process. This conflicts with the provision of Cal. Civ. Proc. Code § 431.70 which allows the setoff right of a person subject to a claim by another person to be unaffected the assignment of the claim to a third person, as adherence to the California statute would permit a person with a setoff right to bypass FIRREA's claims process; it might also allow persons so situated a greater "recovery" than that which might be allowed under FIRREA's claims distribution process, effectively putting such persons ahead of others with a claim against assets of the failed institution. Adherence to the California statue would also hinder the ability of the FDIC-R to expeditiously liquidate assets of the failed institution, as assets which would be assigned with potential liabilities would be less attractive to an acquiring institution.

Based on the foregoing, the court finds that FIRREA preempts California state law which provides that a right of setoff survives an assignment of a claim where the claim is assigned pursuant to the powers granted to the FDIC-R under FIRREA. With respect to the Tax Payment, the debtor cannot use his right to the Tax Payment as a setoff against TCB's claim in the bankruptcy case. He is limited to the remedy that he has already obtained through the FIRREA claims process, i.e. his allowed claim and receivership certificate.

The debtor's reliance on In re Parker N. Am. Corp., 24 F.3d 1145 (9th Cir. 1994), one of the limited "exceptions" recognized by the Ninth Circuit in McCarthy based on "special situations" is unavailing. The debtor asserts that Parker stands for the proposition that anything which may be described as an affirmative defense is not subject to FIRREA's claims process. The court does not take such an expansive view. In Parker, Parker North American Corporation ("PNA") borrowed $10 million dollars from Sooner Federal Savings and Loan Association ("Old Sooner"). After paying down $4.65 million of the loan, the PNA filed a chapter 11 case and, as debtor in possession, sued Old Sooner in a preference action to recover the $4.65 million. After filing a proof of claim the bankruptcy case Old Sooner failed and went into receivership under the Office of Thrift Supervision. The OTS then transferred some assets of Old Sooner, including Old Sooner's claims against PNA but none of the liabilities represented by the preference action, to Sooner Federal Savings Association ("New Sooner") under the control of the RTC. PNA did not receive notice of the receivership and did not file a claim against the receivership estate of Old Sooner. PNA did continue to pursue its preference action in the bankruptcy court, and the RTC participated in the chapter 11 case. The RTC filed a summary judgment motion in the preference action asserting that PNA's failure to file a claim against Old Sooner's estate was an affirmative defense to the preference action. The bankruptcy court granted the motion, but the district court reversed the bankruptcy court's decision.

On appeal, the Ninth Circuit considered the issue of whether "FIRREA precludes bankruptcy court jurisdiction over a preference action against an institution for which the RTC, in its capacity as a receiver, has filed a proof of claim arising from the same transaction as the alleged preference."

The Ninth Circuit affirmed the district court's reversal of the

bankruptcy court and held that "FIRREA is inapplicable to claims against the RTC that arise only incidentally to the bankruptcy court's determination of the RTC's claim against the debtor." Parker, 24 F.3d at 1156. In construing PNA's preference claim as one arising incidentally to the bankruptcy court's determination of the RTC's claim, the Parker court stated that "[i]n this case, we think PNA's preference action is in substance an affirmative defense." Id. at 1155. Central to the Parker court's reasoning was the fact that PNA was not a creditor of the RTC, but a debtor of the RTC, and that the FIRREA administrative claims procedure was only applicable to creditors of the failed institution. Id. at 1153. The decision that PNA's preference action was in substance an affirmative defense that could be decided in determining the amount of the RTC's claim was consistent with the Supreme Court's later holding in Stern v. Marshall, as the preference claim was one that "stem[med] from the bankruptcy itself," and "would necessarily be resolved in the claims allowance process." Stern, 131 S.Ct. at 2618.

The court finds Parker inapplicable here for three reasons. First, since Parker the Ninth Circuit in McCarthy undercut the central tenet of Parker's analysis when it held that the FIRREA claims process applies equally to debtors and creditors with qualifying claims. Second, the debtor does not recognize that his alleged affirmative defense of setoff in this case is based on a demand, i.e. a claim, for money arising out of a right to payment under the Forbearance Agreement and does not "arise only incidentally" to this court's determination of TCB's claim. As such the debtor's claim was "susceptible of resolution through the claims procedure." Unlike PNA, the debtor here is not merely defending against the efforts of the FDIC-R to collect a debt; he is trying to establish a claim against Citizens for the purpose of trying to assert that claim against TCB. Repetition of his assertion that he is not trying to enforce a claim against TCB but is instead merely raising a defense does not effect a substantive change in the nature of his claim.

Furthermore, the debtor is not and was not ever put into the "absurd" position imagined by the Parker court of having to present to the RTC "all potential affirmative defenses that might be asserted in response to unknown and asserted claims or actions by the RTC." Id. at 1155 (citing RTC v. Midwest Fed. Sav. Bank of Minot, 4 F.3d 1490, 1496-97 (9th Cir. 1994). In fact, it is apparent that the debtor was completely cognizant of his claim against Citizens because he timely filed two claims against the receivership estate, one of which was allowed. That he has yet to receive payment based on his receivership certificate or that he might obtain a greater benefit from asserting an offset against TCB rather than settling for a distribution from the receivership estate does not justify treating his claim as the type of affirmative defense recognized by Parker. Third, as recognized by the McCarthy court, Parker is a special situation that should be confined to its specific facts. This is not a case like Parker or RTC v. Midwest Fed. Sav. Bank, where a debtor asserted an affirmative defense against the RTC or the FDIC to a claim made by the RTC or the FDIC.

The court is also not persuaded by the debtor's reliance on Sharpe v. FDIC, 126 F.3d 1147, 1157 (9th Cir. 1997), another special case identified by the McCarthy court. In Sharpe, the plaintiffs and Pioneer Bank entered into a settlement agreement pursuant to which the bank was to wire-transfer $510,000.00 to the plaintiffs and the plaintiffs were to deliver a note and deed of trust and a request for a reconveyance. It was to be a simultaneous exchange of funds for documents. The plaintiffs

delivered the documents to the bank, and the bank gave the plaintiffs two cashier's checks. Shortly thereafter, before the cashier's checks were cashed, the bank was seized by state regulators and put into receivership, with the FDIC as receiver. The FDIC took possession of the documents delivered by the plaintiffs, but refused to honor the cashier's checks. The FDIC instead asserted that the plaintiffs were required to participate in the FIRREA claims process and accept a dividend through its distribution scheme, and allowed a claim in favor of the plaintiffs.

The Ninth Circuit in Sharpe addressed the issue of whether the district court had jurisdiction to decide a claim by the plaintiffs against the FDIC for payment pursuant to the settlement agreement in light of the fact that they had been allowed a claim in the FIRREA claims process. The Sharpe court held that the district court did have jurisdiction, under the particular circumstances of that case, because the FDIC, not the failed bank, materially breached the settlement agreement by refusing to honor the cashier's checks. The post-receivership breach by the FDIC gave rise to a contract claim by the plaintiffs against the FDIC that was not subject to the administrative claims process. The Sharpe court specifically pointed out that under FIRREA the FDIC did have the power to avoid liability by disaffirming or repudiating a contract, but that the procedures for doing so under 11 U.S.C. § 1821(e) were not followed.

The court also acknowledges that the Sharpe court also raised a preemption issue where it noted that to allow the FDIC to avoid contractual obligations by invoking the administrative claims process would effectively preempt state contract law, and the "the statute does not indicate that Congress intended to preempt state law so broadly." Sharpe, 126 F.3d at 1156. The court's own limited application of preemption authority does not purport to preempt state contract law completely but merely to preempt one aspect of the right of setoff under state law so as to avoid a direct conflict with Congressional objectives embodied in FIRREA.

The court also does not agree with the debtor's argument, based on Murphy v. FDIC, 38 F.3d 1490 (9th Cir. 1994), FDIC v. Craft, 157 F.3d 697 (9th Cir. 1998) and FDIC v. Mademoiselle of Cal., 379 F.2d 660 (9th Cir. 1967) that he may assert his right of setoff directly against TCB and that FIRREA does not affect mutuality between the debtor and TCB. Mademoiselle was decided long before FIRREA was enacted, and has no applicability to the court's analysis of the effect of FIRREA on state law setoff rights. Both Craft and Murphy are factually distinguishable from this case. Craft and Murphy addressed the availability of a setoff right where the debtor of the failed bank sought to exercise that right against the FDIC itself as it stood in the shoes of the failed bank. Neither Craft nor Murphy addressed the issue of whether a debtor of a failed institution with a mutual claim against the institution could assert that claim against an entity that acquired the claim from the FDIC.

F. The Asserted Setoff Based on the Rent Claim Is Jurisdictionally Barred by FIRREA Because the Debtor Did Not Exhaust the Administrative Claims Process

The debtor's asserted setoff against TCB based on the Rent Claim is barred by FIRREA's jurisdictional bar because he did not exhaust the administrative claims process.

The debtor cannot assert the Rent Claim as a setoff against TCB for the reasons set forth in this ruling in part II(E), supra. The Rent Claim is based on an asserted right to payment by the debtor against Citizens pursuant to the lease of Property 2. As this court has explained in connection with the Tax Payment, FIRREA preempts state law which preserves mutuality between parties for the purposes of setoff when the claim being set off is assigned to a third party. This allows the FDIC-R to separate Citizens' liability for a breach of the lease of Property 2 from the Loans which were subsequently assigned to TCB. The debtor cannot set off the Rent Claim against amounts owed to TBC pursuant to the Loans.

Furthermore, the Rent Claim is clearly a claim that is susceptible of resolution through the administrative claims process; the debtor himself filed a proof of claim against the receivership estate of Citizens in a certain amount, based on remaining amounts due under the lease of Property 2 following the repudiation of the lease by the FDIC-R. As discussed in part II(E), supra, claims for contract damages arising from disaffirmation or repudiation of a contract or lease pursuant to 12 U.S.C. § 1821(e) are subject to the claims process of 12 U.S.C. § 1821(d) and to the distribution priority scheme set forth in 12 U.S.C. § 1821(d)(11). Battista v. FDIC, 195 F.3d 1113, 1121 (9th Cir. 1999). Although the debtor attempts to characterize the Rent Claim as a claim for payment of "future rent," based on the FDIC-R's communication to him that informed him that "future rent" was not the responsibility of the FDIC-R, the debtor had not such claim for future rent because there was no longer any agreement for payment of rent–the FDIC-R repudiated that agreement. What the debtor had following the repudiation of the lease was a claim for damages based on the repudiation. That is a claim that is subject to FIRREA's claims review and distribution process. It was also subject to FIRREA's requirements regarding administrative exhaustion.

The debtor did not exhaust his administrative remedies by seeking judicial review in federal district court following disallowance of the Rent Claim, and the court is now barred by 12 U.S.C. § 1821(d)(13)(D) from adjudicating that claim here as a setoff against TCB. His repeated assertions characterizing his claim as a setoff against TCB is unavailing, as he cannot assert a setoff against TCB, for the reasons stated above.

G. All Claims Are Dismissed Because All Are Based on the Debtor's Setoff Argument

Finally, the court dismisses all claims for relief in the complaint pursuant to Fed. R. Civ. P. 12(b)(1) because all of the debtors' claims are based on the assertion that he may set off amounts owed to him against amounts claimed by TCB. As described above, the debtor is not entitled to that setoff and his claims to payment have either been resolved by the FIRREA claims process or were subject to administrative exhaustion and were not exhausted.

The court will issue a memorandum opinion and order that are consistent with this ruling.

2. 13-30690-B-11 WILLIAM PRIOR
13-2288 NJR-2
PRIOR V. TRI COUNTIES BANK ET AL

CONTINUED AMENDED MOTION FOR SUMMARY JUDGMENT
1-3-14 [107]

Tentative Ruling: The motion is dismissed.

Elsewhere on this calendar the court has granted plaintiff in intervention Federal Deposit Insurance Corporation's ("FDIC-R") motion to dismiss the complaint for lack of subject matter jurisdiction. The court does not have subject matter jurisdiction to determine the merits of this summary judgment motion. Accordingly, the motion is dismissed.

The court will issue a minute order.

3. 13-30690-B-11 WILLIAM PRIOR
13-2288 WFH-2
PRIOR V. TRI COUNTIES BANK ET AL

CONTINUED MOTION FOR PARTIAL SUMMARY JUDGMENT
1-14-14 [111]

Tentative Ruling: The motion is dismissed.

Elsewhere on this calendar the court has granted plaintiff in intervention Federal Deposit Insurance Corporation's ("FDIC-R") motion to dismiss the complaint for lack of subject matter jurisdiction. The court does not have subject matter jurisdiction to determine the merits of this summary judgment motion. Accordingly, the motion is dismissed.

The court will issue a minute order.

4. 14-21401-B-7 WILLIAM AUGER
HLG-1

MOTION TO COMPEL ABANDONMENT
4-14-14 [11]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is continued to June 17, 2014, at 9:32 a.m.

As the personal property for which the debtors seek abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtors' claims of exemption pursuant to Fed. R. Bankr. P. 4003(b)(1) has expired.

5. 12-28102-B-7 RALPH/SUZANNE EMERSON
DNL-2

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH ROBERT K. STEPHENSON AND/OR MOTION TO SELL
4-8-14 [321]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is continued to May 20, 2014, at 9:32 a.m. pursuant to the notice of continued hearing filed on April 29, 2014 (Dkt. 329).

Pursuant to LBR 9014-1(j), continuances of hearings must be approved by the court. A request for a continuance of the hearing may be made in advance of the hearing if it is made by written application. The movant is advised that simply filing a notice of continued hearing is ineffective to continue the hearing on the motion. However, in this instance the court treats the notice of continued hearing as a written application for a continuance and grants the request.

The court will issue a minute order.

6. 13-33506-B-7 HAROLD/CATHERINE KAY
MPD-7

MOTION FOR COMPENSATION FOR MICHAEL P. DACQUISTO, TRUSTEE'S ATTORNEY
4-3-14 [89]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of $7280.00 in fees and $459.70 in costs, for a total of $7739.70 in fees and costs, for the period November 12, 2013, through and including April 1, 2014, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

By order entered on December 9, 2013 (Dkt. 26), the court authorized the chapter 7 trustee to retain the applicant as counsel for the chapter 7 trustee in this case, with an effective date of employment of November 12, 2013. The applicant now seeks compensation for services rendered and costs incurred during the period November 12, 2013, through and including April 1, 2014. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

7. 13-33107-B-7 BLL-7 — BUTTE STEEL & FABRICATION, INC. — MOTION FOR COMPENSATION FOR WEST AUCTION, INC., AUCTIONEER(S) 4-8-14 [109]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves $860.00 in fees for the applicant on a first and final basis. The approved fees shall be paid as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On October 8, 2013, the debtor filed a chapter 7 petition. By order entered on February 7, 2014 (Dkt. 97)(the "Order"), the court authorized the chapter 7 trustee to retain applicant as auctioneer for the trustee in this case for the purpose of selling the estate's interest in unencumbered vehicles and rolling stock. As set forth in the report of sale filed as Exhibit "B" to the motion (Dkt. 111 at 4-12), gross proceeds from the sale of the property totaled $8600.00. The applicant now seeks approval of fees equal to a 10% commission on the sale. The court finds that the approved commission is reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

8. 14-20010-B-7 UST-1 — ALI/KELLY AKYUZ — MOTION TO DISMISS CASE 3-24-14 [38]

Tentative Ruling: The debtor's written opposition is overruled. The motion is granted. The bankruptcy case is dismissed pursuant to 11 U.S.C. § 707(a) and (b)(1).

The United States trustee (the "UST") seeks dismissal of this case for cause pursuant to 11 U.S.C. § 707(a).

The UST argues that a presumption of abuse arises in this case pursuant to 11 U.S.C. § 707(b)(2). The UST also argues that the totality of the debtors' financial circumstances demonstrates abuse, pursuant to 11 U.S.C. § 707(b)(3).

As for the UST's argument under § 707(b)(2), a presumption of abuse arises in this case pursuant to § 707(b)(2)(A) for the reasons set forth in the UST's motion. The debtors' opposition does not rebut the presumption of abuse by demonstrating any of the special circumstances described under § 707(b)(2)(B).

As to the merits of the UST's request for dismissal pursuant to 11 U.S.C. § 707(b)(1) for abuse under § 707(b)(3), the court agrees with the UST that the totality of the debtors' financial circumstances demonstrate

abuse in this case for the purposes of 11 U.S.C. § 707(b)(3), for the reasons stated in the motion. Specifically, joint debtor Ali Akyuz's voluntary 401(k) contribution of $1383.52 per month and his 401(k) loan repayments totaling $1,053.52 per month are not reasonably necessary for the debtors' maintenance or support. As stated by the Ninth Circuit Bankruptcy Appellate Panel in In re Ng, 477 B.R. 118, 126 (9th Cir. BAP 2012):

> No guidance is provided in § 707(b)(3)(B) as to the factors a bankruptcy court should consider in evaluating a request for dismissal of a bankruptcy case for abuse under the totality of the circumstances, other than that those circumstances should relate to "the debtor's financial situation." While BAPCPA changed the standard for dismissal in this context from "substantial abuse" to "abuse," in analyzing the new § 707(b) the courts have recognized that it is "best understood as a codification of pre-BAPCPA case law and, as such, pre-BAPCPA case law is still applicable when determining whether to dismiss a case for abuse." In re Clark, 2012 WL 1309549 *1-2, 2012 Bankr.LEXIS 1639 *4 (Bankr.N.D.Cal.2012)(quoting In re Stewart, 383 B.R. 429, 432 (Bankr.N.D.Ohio 2008)); In re Stewart, 410 B.R. 912, 922 (Bankr.D.Or.2009). These bankruptcy courts, and the bankruptcy court in this appeal, have therefore continued to apply the non-exclusive list of factors to be considered when evaluating the totality of the circumstances identified for use under pre-BAPCPA Code provisions in In re Price:
>
> > (1) Whether the debtor has a likelihood of sufficient future income to fund a Chapter 11, 12, or 13 plan which would pay a substantial portion of the unsecured claims; Whether the debtor's petition was filed as a consequence of illness, disability, unemployment, or some other calamity; (3) Whether the schedules suggest the debtor obtained cash advancements and consumer goods on credit exceeding his or her ability to repay them; (4) Whether the debtor's proposed family budget is excessive or extravagant; (5) Whether the debtor's statement of income and expenses is misrepresentative of the debtor's financial condition; and (6) Whether the debtor has engaged in eve-of-bankruptcy purchases.
>
> 353 F.3d at 1139-40. Although the Ninth Circuit indicated that this list was non-exclusive, it also held that:
>
> > The primary factor defining substantial abuse is the debtor's ability to pay his debts as determined by the ability to fund a Chapter 13 plan. Thus, we have concluded that a "debtor's ability to pay his debts will, standing alone, justify a section 707(b) dismissal."
>
> Id. at 1140 (quoting In re Kelly, 841 F.2d 908, 914 (9th Cir.1988)); see also Reed v. Anderson (In re Reed), 422 B.R. 214, 233 (Bankr.C.D.Cal.2009)(debtor's ability to pay constitutes abuse under totality of the circumstances test of § 707(b)(3)(B) even if debtor passes the means test of § 707(b)(2)).

In re Ng, 477 B.R. 118, 126 (9th Cir. BAP 2012).

With respect to retirement contributions, bankruptcy courts have

discretion to determine whether retirement contributions are a reasonably necessary expense for a particular debtor, based on the specific facts of each individual case. Hebbring v. U.S. Trustee, 463 F.3d 902 (9th Cir. 2006). "In making this fact-intensive determination, courts should consider a number of factors, including but not limited to: the debtor's age, income, overall budget, expected date of retirement, existing retirement savings, and amount of contributions; the likelihood that stopping contributions will jeopardize the debtor's fresh start by forcing the debtor to make up lost contributions after emerging from bankruptcy; and the needs of the debtor's dependents." Id. at 907.

As the UST argues, in this case, there is no indication that debtors are near retirement age or will be retiring soon. Joint debtor Ali Akyuz has annual income in excess of $150,000.00, and joint debtor Kelly Akyuz does not work outside of the home. The UST alleges without dispute that without their 401(k) contributions the debtors would have the ability to pay a 56% dividend on unsecured claims in a chapter 13 proceeding.

In light of the foregoing, the court finds that the debtors' failure to rebut the presumption of abuse that arises under § 707(b)(2) and totality of the debtor's financial circumstances demonstrate abuse pursuant to § 707(b)(3), which abuse constitutes grounds for dismissal pursuant to 11 U.S.C. § 707(b)(1).

The court will issue a minute order.

9. 13-21613-B-7 MUHAMMAD ADENWALA — MOTION TO AVOID LIEN OF SUN VALLEY OAKS OWNERS' ASSOCIATION
BSJ-3 — 4-2-14 [46]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. In this instance the court issues the following tentative ruling on the merits of the motion.

The motion is denied.

By this motion the debtor seeks to avoid a lien in favor of Sun Valley Oaks Owners' Association ("Sun Valley"), based on a recorded Notice of Delinquent Assessment, to the extent that it encumbers the debtor's claim of exemption in his residence located at 8580 Parkwood Court, Roseville, California. Section 522(f), however, permits avoidance of only two specific types of liens, either 1.) judicial liens, or 2.) a non-possessory non-purchase money security interests in certain personal property listed under § 522(f)(1)(B). The lien of Sun Valley falls into neither of the foregoing categories. The lien of Sun Valley is a statutory lien under Cal. Civil Code § 5675. Under California law, judicial liens on real property are created by recording an abstract of money judgment with the county recorder for the county in which the real property is located. Cal. Civ. Proc. Code § 697.310(a). The Notice of Delinquent Assessment is not an abstract of money judgment.

The court will issue a minute order.

10. 12-39020-B-7 GURSHARAN BANGA
HLG-2

MOTION TO AVOID LIEN OF INVESTMENT RETRIEVERS, INC.
4-9-14 [24]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

11. 09-34235-B-7 SIERRA WEST BUSINESS PARK, LLC
JRR-2

MOTION FOR COMPENSATION FOR BACHECKI, CROM & CO., LLP, ACCOUNTANT(S)
4-2-14 [360]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves on an interim basis $4,558.00 in fees and $56.63 in costs, for a total of $4,4614.53, to be paid as a chapter 7 administrative expense to Bachecki, Crom & Co., LLP, ("BCC") accountant for the chapter 7 estate. Except as so ordered, the motion is denied.

By order entered January 7, 2014, the court approved the employment of BCC as accountant for the estate. The trustee now seeks approval of fees and costs for BCC for services rendered between January 8, 2014, and March 26, 2014. The approved fees and costs are reasonable compensation for actual, necessary services.

The court will issue a minute order.

12. 13-30038-B-7 JAMES/WENDY ELMORE
JRR-1

MOTION TO SELL
4-8-14 [28]

Tentative Ruling: The motion is granted in part. Pursuant to 11 U.S.C. § 363(b), the debtors are authorized to short sell real property located at 8324 Forest Creek Lane, Orangevale, California (APN 261-0450-065) (the "Property") to 4 Neighbors LLC on the terms set forth in the residential purchase agreement attached as Exhibit "A" to the motion (Dkt. 31 at 2), provided that the court's ruling does not authorize sale of the Property to any other purchaser, does not authorize sale of the Property free and clear of liens, and does not require any lienholder to reconvey or release its interest in the Property unless it has voluntarily agrees to do so. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves a commission of 6% of the gross sale price of the Property, to

be paid as a chapter 7 administrative expense to Lisa McKee Lyon Real Estate ("Lyon"). The 14-day stay of the order granting this motion under Fed. R. Bankr. P. 6004(h) is waived. Except as so ordered, the motion is denied.

The sale will be subject to overbidding on terms approved by the court at the hearing.

The court approved employment of Lyon as real estate agent for the trustee by order entered October 23, 2013 (Dkt. 19). The court finds that the approved commission is reasonable compensation for actual, necessary services.

The court will issue a minute order.

13. 13-20440-B-7 JOHN/GAIL SIMS — MOTION TO COMPEL ABANDONMENT
HAW-1 — 4-8-14 [53]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to 11 U.S.C. § 554(b), the debtors' interests in real property located at 242 Nevada Street, Nevada city, California (the "Real Property") and all personal property listed on Schedule B (the "Personal Property") are deemed abandoned by the estate. Except as so ordered, the motion is denied.

The debtors allege without dispute that the Real Property has a value of $311,000.00 and is encumbered by secured debt in the amount of approximately $402,000.00. As for the Personal Property, which consists of various items listed on Schedule B, the debtors have claimed all of the items and entirely exempt, with the exception of a 2012 Acura MDX (the "MDX"). The debtors allege without dispute that the value of the MDX is $25,000.00 and that the MDX is encumbered by secured debt with a balance of $42,500.00. The Real Property and the Personal Property are of inconsequential value and benefit to the estate.

The court will issue a minute order.

14. 14-22144-B-7 DENNIS MARSHALL AND VANESSA LOCK-MARSHALL — CONTINUED MOTION TO COMPEL ABANDONMENT
RSG-1 — 3-21-14 [9]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to 11 U.S.C. §554(b), the business name "Birds Eye View Garden Shop," the Bank of America checking account (ending 2472), fixtures and equipment listed at line 29 on Schedule B, a

cash register listed at line 29 on Schedule B and business inventory listed at line 30 on Schedule B (collectively, the "Property") are deemed abandoned by the estate. Except as so ordered, the motion is denied.

The debtors allege without dispute that the Property is of inconsequential value and benefit to the estate. With the exception of the cash register listed at line 30 on schedule B with a value of $800.00, the debtors have claimed all of the value of the Property as exempt. Considering the fact that the chapter 7 trustee has filed a statement of non-opposition to the motion, as filed a report of no distribution in the case and that liquidation of the cash register would yield little benefit to creditors after costs of administration are considered, the court finds that all of the Property is of inconsequential value and benefit to the estate.

The court will issue a minute order.

15. 10-44715-B-13 CHRISTOPHER/LISA LOMBARDO — MOTION TO STRIKE
14-2031 PLC-1 — 4-8-14 [17]
LOMBARDO ET AL V. BANK OF AMERICA N.A. ET AL

Tentative Ruling: None.

16. 13-20149-B-7 IGOR MIROSHNICHENKO — MOTION TO AVOID LIEN OF PROGRESSIVE CHOICE INSURANCE COMPANY
MS-1 — 3-27-14 [23]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A), subject to the provisions of 11 U.S.C. § 349. The judicial lien in favor of Progressive Choice Insurance Company, recorded in the official records of Sacramento County, Book No. 20120507, is avoided as against the real property located at 449 Harding Avenue, Sacramento, CA 95833 (the "Property").

The Property had a value of $150,888.00 as of the date of the petition. The unavoidable liens total approximately $191,673.94. The debtor claimed the Property as exempt under California Code of Civil Procedure Section 703.140(b)(5), under which he exempted $1.00. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the Property. 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 this judicial lien impairs the debtor's exemption of the Property and its fixing is avoided.

The court will issue a minute order.

17. 14-21452-B-7 BEATRICE LUNA — MOTION TO COMPEL ABANDONMENT
LLL-1 — 4-10-14 [12]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

18. 11-46760-B-7 BRIAN/RANDI THIEL — MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH AND CUNNINGHAM FOR J. LUKE HENDRIX, TRUSTEE'S ATTORNEY
DNL-9 — 4-4-14 [208]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of $39,374.00 in fees and $1,475.58 in expenses, for a total of $40,849.58, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

By order entered on January 23, 2012 (Dkt. 41), the court authorized the chapter 7 trustee to retain Desmond, Nolan, Livaich & Cunningham ("DNLC") as general bankruptcy counsel in this case, with an effective date of employment of January 3, 2012. The trustee now seeks compensation for services rendered and costs incurred by DNLC during the period of January 3, 2012, through and including March 27, 2014. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

19. 14-21360-B-7 STEVEN/JULIE AASEN — CONTINUED MOTION TO COMPEL ABANDONMENT
JRR-1 — 3-4-14 [10]

Tentative Ruling: The motion is granted in part. Pursuant to 11 U.S.C. § 554(b), the estate's interest in the business checking account listed on Line 2 of amended Schedule B (Dkt. 15, p.4) as well as the business tools listed on Line 29 of amended Schedule B (Dkt. 15, p.6) and more fully described in the supplemental attachment to the original Schedule B (Dkt. 1, p.24-25) (collectively, the "Business Assets") are deemed abandoned by the estate. The debtors' request to compel abandonment of the estate's interest in the business name "Aasen Construction," goodwill, fixtures, business accounts receivable, and a commercial lease

(collectively, the "Other Assets") is denied without prejudice. Except as so ordered, the motion is denied.

The debtors allege without dispute that the Business Assets are of inconsequential value and benefit to the estate because they have been claimed as fully exempt on amended Schedule C (Dkt. 15, p.7). As the deadline for interested parties to object to the debtors' claim of exemptions pursuant to Federal Rule of Bankruptcy Procedure 4003(b) has now expired, the court finds that the debtors have satisfied their burden of establishing that the Business Assets are of inconsequential value and benefit to the estate. In re Viet Vu, 245 B.R. 644, 647 (9th Cir. BAP 2000).

The court does not deem abandoned the estate's interest in the Other Assets because the debtors state under penalty of perjury on their schedules that they do not hold any interest in such assets. The court may only deem property of the estate as abandoned; according to the sworn schedules, there is no property of the estate consisting of the Other Assets. As such, the debtors' request to compel abandonment of the estate's interest in the Other Assets is denied without prejudice.

The court will issue a minute order.

20.	08-32280-B-7 DNL-4	HEAVEN INVESTMENT HOLDING CORP.	MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH SARAS CHANDRA 3-28-14 [290]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This matter is continued to June 17, 2014, at 9:32 a.m. Opposition is due by June 3, 2014. Replies, if any, are due by June 10, 2014.

For counsel's future reference, Local Bankruptcy Rule 9014-1(j) states that "continuances of hearings must be approved by the Court. A request for a continuance must be made orally at the scheduled hearing or in advance of it if made by written application. A written application shall disclose whether all other parties-in-interest oppose or support the request for a continuance." LBR 9014-1(j). Simply filing a notice of rescheduled hearing (Dkt. 297) purporting to continue the matter is ineffective. However, in this instance the court treats the notice of rescheduled hearing as a request for a continuance and grants that request. Therefore, this matter is continued to June 17, 2014, at 9:32 a.m.

The court will issue a minute order.

21. 14-22890-B-7 ANGELINA/MIGUEL PEINADO — MOTION TO COMPEL ABANDONMENT
MMN-1 — 4-22-14 [16]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is continued to June 17, 2014, at 9:32 a.m.

As the personal property for which the debtors seek abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtors' claims of exemptions pursuant to Federal Rule of Bankruptcy Procedure 4003(b)(1) has expired.

The court will issue a minute order.

22. 12-20997-B-11 DONALD/ELIZABETH HYATT — MOTION TO CONVERT CASE TO CHAPTER 7
UST-1 — 4-8-14 [58]

Tentative Ruling: The debtors' opposition is overruled. The motion is granted in part, and the case is converted to one under chapter 7 pursuant to 11 U.S.C. §§ 1112(b)(4)(A) and (J), and for unreasonable delay that is prejudicial to creditors. Except as so ordered, the motion is denied.

By this motion, the United States Trustee (the "UST") seeks conversion of this case to one under chapter 7 for cause pursuant to 11 U.S.C. § 1112(b) and for unreasonable delay that is prejudicial to creditors. Pursuant to 11 U.S.C. § 1112(b)(1), the court shall convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, for cause. Section 1112(b) also limits the foregoing directive in several ways:

> First, under section 1112(b)(2), the court shall not convert or dismiss the case, even if the movant establishes cause, if the court determines that specifically identified unusual circumstances exist and such circumstances establish that conversion or dismissal would not be in the best interests of creditors and the estate.
>
> Second, under section 1112(b)(1), if cause is established and no specifically identified unusual circumstances are established, the court must convert or dismiss the case for cause unless the court determines that a trustee should be appointed under section 1104(a). Section 1104(a)(3) states that, rather than converting or dismissing the case, the court may appoint a chapter 11 trustee if doing so would be in the best interests of creditors and the estate.
>
> Third, under section 1112(b)(2), if cause is established and no specifically identified unusual circumstances are established, the

court must convert or dismiss the case for cause unless the debtor or another party in interest opposing dismissal or conversion establishes the requirements of section 1112(b)(2)(A) and (B). Under section 1112(b)(2), the debtor or other opposing party in interest must establish that:

> (1) There is a reasonable likelihood that a plan will be confirmed within the time limitations specified in the subsection;
>
> (2) The grounds for converting or dismissing the case include an act or omission by the debtor other than substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; and
>
> (3) There exists a reasonable justification for the act or omission demonstrating cause to dismiss the case and the act or omission will be cured within a reasonable time fixed by the court.

7 Lawrence P. King, et. al. Collier on Bankruptcy § 1112.04 (15th ed. rev. 2007); 11 U.S.C. § 1112(b).

Section 1112(b)(4) sets forth a non-exhaustive list of examples of "cause." The court has the discretion to consider cause not specifically listed under § 1112(b). Cause may include unreasonable delay that is prejudicial to creditors. In re Consolidated Pioneer Mortg. Entities, 264 F.3d 803, 808-09 (9th Cir. 2001).

The court finds, for the reasons stated in the motion and accompanying Memorandum of Points and Authorities (Dkt. 60) (the "Memo"), that the UST has established cause for dismissal or conversion of this case.

This case was filed on January 18, 2012 (Dkt. 1). As of the date of the hearing on this motion, the case will have been pending for 839 days - well over two (2) years. In that time, the debtors have failed to file a proposed chapter 11 plan of reorganization and disclosure statement despite the fact that the Order After Status Conference issued April 11, 2012 (Dkt. 25) (the "OASC") instructed them to file these documents on or before June 15, 2012. The debtors' exclusivity period to file a chapter 11 plan expired on May 17, 2012, by operation of 11 U.S.C. § 1121(b). The debtors failed to seek either an extension of the exclusivity period or relief from the OASC. The UST correctly states that the only other significant activities in this case were a motion for relief from the automatic stay filed by creditor Bank of the West on April 17, 2012 (Dkt. 27), which the debtors did not oppose, and the debtors' filing of monthly operating reports. The foregoing constitutes an unreasonable delay that is prejudicial to creditors and cause to convert or dismiss the case.

With regard to section 1112(b)(4)(J), the court finds that the debtors' failure to file a chapter 11 plan and disclosure statement within the time fixed by the OASC constitutes cause to convert or dismiss this case pursuant to that section. With regard to section 1112(b)(4)(A), the UST points out in the Memo that the debtors' monthly operating report for February 2014 (Dkt. 57) shows a cumulative case-to-date loss of $65,636.00. It also shows an end of the month balance of $3,458.00 and that the debtors spent nearly all of their cash receipts for February 2014 rather than committing those funds to supporting a viable chapter 11

plan.

In opposition to this motion, the debtors' main assertion is that they met with their attorney, Brandon Scott Johnston ("Mr. Johnston") shortly after the court issued the OASC and believed that he was going to promptly file a chapter 11 plan and disclosure statement which they allegedly approved and signed. The debtors further argue that they have been making payments toward what they thought was their chapter 11 plan, and terminated Mr. Johnston's services once they learned of his alleged neglect in filing the chapter 11 plan and disclosure statement. The debtors claim that the chapter 11 plan they signed allows for a greater distribution to creditors than what they would receive in a case under chapter 7. Finally, the debtors assert that the figures represented in the monthly operating reports in this case are inaccurate as a result of a miscalculation. The debtors filed an amended monthly operating report for the March 2014 on April 14, 2014 (Dkt. 63) which shows a $10,565.00 cumulative case-to-date gain as opposed to the substantial loss noted by UST and reflected in prior monthly operating reports. However, the debtors provide no explanation of the changes made to reach this figure.

The court finds the debtors' opposition unpersuasive. Regarding Mr. Johnston's alleged neglect in handling this case, the debtors are apparently unaware that clients are bound by the actions of their attorney. Link v. Wabash R. Co., 370 U.S. 626, 633-634, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."). This principle was re-affirmed by the U.S. Supreme Court in Pioneer Investment Services Co. v. Brunswick Associated Ltd. Partnership, 507 U.S. 380, 396-397, 113 S.Ct. 1489, 123 L.Ed2d 74 (1993).

The court further finds that the debtors have not established pursuant to section 1112(b)(2) that, even though cause exists, the case should not be converted or dismissed. The debtors have failed to establish any of the requirements of section 1112(b)(2)(A) or (B). Although the debtors claim to have instructed Mr. Johnston to file the chapter 11 plan and disclosure statement that they allegedly signed in 2012, these documents are not on file as of the date of this hearing. The debtors have provided no evidence that these documents even exist and, therefore, no evidence that there is a reasonable likelihood that a chapter 11 plan can be confirmed within a reasonable period of time. Additionally, the debtors have provided no explanation of either (1) what the miscalculation was in their prior monthly operating reports, or (2) how they calculated in their amended monthly operating report for March 2014 a positive cumulative case-to-date balance. Without this information, it is impossible for the court to conclude that there has not been a substantial diminution of the estate when every other monthly operating report filed since October 11, 2012, shows a cumulative case-to-date loss. Furthermore, without a plan on file it is impossible for the court to determine the veracity of the debtors' assertion that creditors will receive a greater distribution in this case than they would if the case were converted to chapter 7.

The court finds that conversion, rather than dismissal, of the case is in the best interests of the creditors and the estate. It appears from a review of the debtors' schedules that the debtors have significant non-exempt assets that could be administered by a chapter 7 trustee.

The court will issue a minute order.

23. 13-25948-B-7 ROBERTO CAMACHO
13-2248 MDI-1
RIGGS V. CAMACHO

MOTION FOR SUMMARY JUDGMENT
3-24-14 [33]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This matter is continued to June 17, 2014, at 9:32 a.m. Opposition is due by June 3, 2014. Replies, if any, are due by June 10, 2014.

This matter is continued because defendant Roberto Camacho's attorney of record, Thomas P. Hogan, has substituted out of the above-captioned adversary proceeding on May 5, 2014.

The court will issue a minute order.

24. 12-36599-B-7 BRANTLEY/ERIN GARRETT
12-2719 AMW-3
DAILY ET AL V. GARRETT ET AL

CONTINUED MOTION FOR SUMMARY JUDGMENT
2-19-14 [111]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This matter is submitted on the papers.

25. 12-37961-B-11 ZF IN LIQUIDATION, LLC
FWP-105

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FELDERSTEIN, FITZGERALD, WILLOUGHBY AND PASCUZZI, LLP FOR THOMAS A. WILLOUGHBY, DEBTOR'S ATTORNEY
3-28-14 [2501]

Tentative Ruling: This motion is unopposed. In this instance, the court issues the following tentative ruling.

The motion is granted to the extent set forth herein. The application is approved on a final basis in the amount of $241,706.00 in fees and $6,554.94 in expenses, for a total of $248,260.94, for the period of July 1, 2013, through and including February 28, 2014. Additionally, $1,182,690.95 in previously approved interim awards is approved on a final basis. Additionally, $9,133.00 in fees and $321.02 in expenses, for a total of $9,454.02 (which includes $475.00 in fees incurred in preparing for and attending the hearing on this matter), for the period

of March 1, 2014, through and including March 31, 2014, is approved on a final basis. The total final award shall be paid as a chapter 11 administrative expense. The debtor is authorized to pay any unpaid allowed fees and expenses, including without limitation $43,622.90 which represents 20% holdback fees for the period of July 1, 2013, through and including December 31, 2013, and $23,974.87 which represents 100% of fees and expenses for the period of January 1, 2014, through and including February 28, 2014, pursuant to the terms of the confirmed chapter 11 plan (Dkt. 1971). Except as so ordered, the motion is denied.

On October 8, 2012, the debtor filed a chapter 11 petition. By order entered on November 9, 2012 (Dkt. 263), the court authorized employment of Felderstein, Fitzgerald, Willoughby & Pascuzzi, LLP as counsel for the debtor. The applicant now seeks final approval of the fees and expenses set forth above. For purposes of this application, the approved fees and expenses are reasonable compensation for actual, necessary and beneficial services.

The court notes that Article III, Section 3.3 of the debtor's chapter 11 plan, confirmed by order entered December 12, 2013 (Dkt. 2403), now governs professional compensation. In relevant part, this provision provides that "each party seeking an award by the Bankruptcy Court of Professional Fees: (a) must file its final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Effective Date on or before the Administrative Claims Bar Date..." Art. III, § 3.3 (Dkt. 1971, p.27). The Administrative Claims Bar Date "shall mean for Administrative Claims other than 503(b)(9) Claims, the first Business Day that is thirty (30) days after the Effective Date pursuant to which Creditors must file a request for payment of any Administrative Claim that arose between October 8, 2012 and the Effective Date, for which notice shall be provided by Proponent in the Notice of Effective Date." Art. I, § 1.11 (Dkt. 1971, p.10). Pursuant to the Notice of Effective Date filed February 28, 2014 (Dkt. 2479), the Effective Date of the plan was February 28, 2014, at 11:59 p.m. Thus, the bar date for professional fees claims in this case was March 31, 2014.

The court will issue a minute order.

26. 12-37961-B-11 ZF IN LIQUIDATION, LLC
FWP-106

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FTI CONSULTING, INC. FOR THOMAS A. WILLOUGHBY, CONSULTANT
3-28-14 [2506]

Tentative Ruling: This motion is unopposed. In this instance, the court issues the following tentative ruling.

The motion is granted to the extent set forth herein. The application is approved on a final basis in the amount of $49,782.00 in fees and $0.00 in expenses, for a total of $49,782.00, for the period of July 1, 2013, through and including February 28, 2014. Additionally, $974,116.01 in previously approved interim awards is approved on a final basis. The total final award shall be paid as a chapter 11 administrative expense. The debtor is authorized to transfer the sum of $13,615.20 to FTI from the escrow account created in connection with the sale of assets, and FTI

is authorized to apply that amount toward the balance of the approved fees and expenses. The debtor is further authorized to pay any unpaid allowed fees and expenses pursuant to the terms of the confirmed chapter 11 plan (Dkt. 1971). Except as so ordered, the motion is denied.

On October 8, 2012, the debtor filed a chapter 11 petition. By order entered on November 13, 2012 (Dkt. 289), the court authorized employment of FTI Consulting, Inc. as Chief Restructuring Officer for the debtor. The applicant now seeks final approval of the fees and expenses set forth above. For purposes of this application, the approved fees and expenses are reasonable compensation for actual, necessary and beneficial services.

The court notes that Article III, Section 3.3 of the debtor's chapter 11 plan, confirmed by order entered December 12, 2013 (Dkt. 2403), now governs professional compensation. In relevant part, this provision provides that "each party seeking an award by the Bankruptcy Court of Professional Fees: (a) must file its final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Effective Date on or before the Administrative Claims Bar Date..." Art. III, § 3.3 (Dkt. 1971, p.27). The Administrative Claims Bar Date "shall mean for Administrative Claims other than 503(b)(9) Claims, the first Business Day that is thirty (30) days after the Effective Date pursuant to which Creditors must file a request for payment of any Administrative Claim that arose between October 8, 2012 and the Effective Date, for which notice shall be provided by Proponent in the Notice of Effective Date." Art. I, § 1.11 (Dkt. 1971, p.10). Pursuant to the Notice of Effective Date filed February 28, 2014 (Dkt. 2479), the Effective Date of the plan was February 28, 2014, at 11:59 p.m. Thus, the bar date for professional fees claims in this case was March 31, 2014.

The court will issue a minute order.

27. 12-37961-B-11 ZF IN LIQUIDATION, LLC
FXR-50

MOTION FOR COMPENSATION BY THE LAW OFFICE OF LOWENSTEIN SANDLER, LLP FOR JEFFREY D. PROL, CREDITOR COMM. ATY 3-28-14 [2492]

Tentative Ruling: This motion is unopposed. in this instance, the court issues the following tentative ruling.

The motion is granted to the extent set forth herein. The application is approved on a final basis in the amount of $33,035.00 in fees and $841.73 in expenses, for a total of $33,876.73, for the period of December 1, 2013, through and including February 28, 2014 (which includes $4,598.00 in fees for time spent in preparing the present application). Additionally, $1,427,842.56 in previously approved interim awards is approved on a final basis. The total final award shall be paid as a chapter 11 administrative expense. The debtor is authorized to pay any unpaid allowed fees and expenses pursuant to the terms of the confirmed chapter 11 plan (Dkt. 1971). Except as so ordered, the motion is denied.

On October 8, 2012, the debtor filed a chapter 11 petition. By order entered on November 9, 2012 (Dkt. 267), the court authorized employment

of Lowenstein Sandler, LLP as special counsel for the Official Committee of Unsecured Creditors. The applicant now seeks final approval of the fees and expenses set forth above. For purposes of this application, the approved fees and expenses are reasonable compensation for actual, necessary and beneficial services.

The court notes that Article III, Section 3.3 of the debtor's chapter 11 plan, confirmed by order entered December 12, 2013 (Dkt. 2403), now governs professional compensation. In relevant part, this provision provides that "each party seeking an award by the Bankruptcy Court of Professional Fees: (a) must file its final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Effective Date on or before the Administrative Claims Bar Date..." Art. III, § 3.3 (Dkt. 1971, p.27). The Administrative Claims Bar Date "shall mean for Administrative Claims other than 503(b)(9) Claims, the first Business Day that is thirty (30) days after the Effective Date pursuant to which Creditors must file a request for payment of any Administrative Claim that arose between October 8, 2012 and the Effective Date, for which notice shall be provided by Proponent in the Notice of Effective Date." Art. I, § 1.11 (Dkt. 1971, p.10). Pursuant to the Notice of Effective Date filed February 28, 2014 (Dkt. 2479), the Effective Date of the plan was February 28, 2014, at 11:59 p.m. Thus, the bar date for professional fees claims in this case was March 31, 2014.

The court will issue a minute order.

28. 12-37961-B-11 ZF IN LIQUIDATION, LLC — MOTION FOR COMPENSATION FOR
FXR-51 — COHNREZNICK LLP, OTHER PROFESSIONAL
3-28-14 [2497]

Tentative Ruling: This motion is unopposed. In this instance, the court issues the following tentative ruling.

The motion is granted to the extent set forth herein. The application is approved on a final basis in the amount of $14,328.90 in fees and $182.24 in expenses, for a total of $14,511.14, for the period of August 1, 2013, through and including February 28, 2014. Additionally, $486,111.74 in previously approved interim awards is approved on a final basis. The total final award shall be paid as a chapter 11 administrative expense. The debtor is authorized to pay any unpaid allowed fees and expenses pursuant to the terms of the confirmed chapter 11 plan (Dkt. 1971). Except as so ordered, the motion is denied.

On October 8, 2012, the debtor filed a chapter 11 petition. By order entered on November 9, 2012 (Dkt. 264), the court authorized employment of CohnReznick, LLP as financial advisor for the Official Committee of Unsecured Creditors, effective October 22, 2012. The applicant now seeks final approval of the fees and expenses set forth above. For purposes of this application, the approved fees and expenses are reasonable compensation for actual, necessary and beneficial services.

The court notes that Article III, Section 3.3 of the debtor's chapter 11 plan, confirmed by order entered December 12, 2013 (Dkt. 2403), now governs professional compensation. In relevant part, this provision

provides that "each party seeking an award by the Bankruptcy Court of Professional Fees: (a) must file its final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Effective Date on or before the Administrative Claims Bar Date..." Art. III, § 3.3 (Dkt. 1971, p.27). The Administrative Claims Bar Date "shall mean for Administrative Claims other than 503(b)(9) Claims, the first Business Day that is thirty (30) days after the Effective Date pursuant to which Creditors must file a request for payment of any Administrative Claim that arose between October 8, 2012 and the Effective Date, for which notice shall be provided by Proponent in the Notice of Effective Date." Art. I, § 1.11 (Dkt. 1971, p.10). Pursuant to the Notice of Effective Date filed February 28, 2014 (Dkt. 2479), the Effective Date of the plan was February 28, 2014, at 11:59 p.m. Thus, the bar date for professional fees claims in this case was March 31, 2014.

The court will issue a minute order.

29. 12-37961-B-11 ZF IN LIQUIDATION, LLC — MOTION FOR COMPENSATION BY THE LAW OFFICE OF FOX ROTHSCHILD, LLP FOR MICHAEL A. SWEET, CREDITOR COMM. ATY 3-28-14 [2516]
FXR-52

Tentative Ruling: This motion is unopposed. In this instance, the court issues the following tentative ruling.

The motion is granted to the extent set forth herein. The application is approved on a final basis in the amount of $20,832.00 in fees and $158.11 in expenses, for a total of $20,990.11, for the period of February 1, 2014, through and including March 26, 2014. Additionally, $344,695.97 in previously approved interim awards is approved on a final basis. The total final award shall be paid as a chapter 11 administrative expense. The debtor is authorized to pay any unpaid allowed fees and expenses pursuant to the terms of the confirmed chapter 11 plan (Dkt. 1971). Except as so ordered, the motion is denied.

On October 8, 2012, the debtor filed a chapter 11 petition. By order entered on November 9, 2012 (Dkt. 268), the court authorized employment of Fox Rothschild LLP, Local Counsel to the Official Committee of Unsecured Creditors, effective October 18, 2012. The applicant now seeks final approval of the fees and expenses set forth above. For purposes of this application, the approved fees and expenses are reasonable compensation for actual, necessary and beneficial services.

The court notes that Article III, Section 3.3 of the debtor's chapter 11 plan, confirmed by order entered December 12, 2013 (Dkt. 2403), now governs professional compensation. In relevant part, this provision provides that "each party seeking an award by the Bankruptcy Court of Professional Fees: (a) must file its final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Effective Date on or before the Administrative Claims Bar Date..." Art. III, § 3.3 (Dkt. 1971, p.27). The Administrative Claims Bar Date "shall mean for Administrative Claims other than 503(b)(9) Claims, the first Business Day that is thirty (30) days after the Effective Date pursuant to which Creditors must file a request for

payment of any Administrative Claim that arose between October 8, 2012 and the Effective Date, for which notice shall be provided by Proponent in the Notice of Effective Date." Art. I, § 1.11 (Dkt. 1971, p.10). Pursuant to the Notice of Effective Date filed February 28, 2014 (Dkt. 2479), the Effective Date of the plan was February 28, 2014, at 11:59 p.m. Thus, the bar date for professional fees claims in this case was March 31, 2014.

The court will issue a minute order.

30. 12-37961-B-11 ZF IN LIQUIDATION, LLC — MOTION FOR COMPENSATION FOR
HMS-1 — HANK M. SPACONE, CONSULTANT
3-28-14 [2511]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. The application is approved on a first and final basis in the total amount of $16,065.00 in fees and expenses for the period of July 1, 2013, through and including February 28, 2014. The debtor is authorized to pay the total award as a chapter 11 administrative expense pursuant to the terms of the confirmed chapter 11 plan (Dkt. 1971). Except as so ordered, the motion is denied.

On October 8, 2012, the debtor filed a chapter 11 petition. By order entered on July 25, 2013 (Dkt. 2005), the court authorized employment of Hank M. Spacone as claims management consultant for the debtor, effective July 1, 2013. The applicant now seeks first and final compensation for services for the period of July 1, 2013, through and including February 28, 2014. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court notes that Article III, Section 3.3 of the debtor's chapter 11 plan, confirmed by order entered December 12, 2013 (Dkt. 2403), now governs professional compensation. In relevant part, this provision provides that "each party seeking an award by the Bankruptcy Court of Professional Fees: (a) must file its final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Effective Date on or before the Administrative Claims Bar Date..." Art. III, § 3.3 (Dkt. 1971, p.27). The Administrative Claims Bar Date "shall mean for Administrative Claims other than 503(b)(9) Claims, the first Business Day that is thirty (30) days after the Effective Date pursuant to which Creditors must file a request for payment of any Administrative Claim that arose between October 8, 2012 and the Effective Date, for which notice shall be provided by Proponent in the Notice of Effective Date." Art. I, § 1.11 (Dkt. 1971, p.10). Pursuant to the Notice of Effective Date filed February 28, 2014 (Dkt. 2479), the Effective Date of the plan was February 28, 2014, at 11:59 p.m. Thus, the bar date for professional fees claims in this case was March 31, 2014.

The court will issue a minute order.