UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

May 14, 2014 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled "Amended Civil Minute Order."

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	13-27002-D-7 FF-2	RICHARD ROBERTS	MOTION TO CONVERT CASE TO CHAPTER 13 4-17-14 [40]

Final ruling:

The court finds that a hearing will not be helpful and is not necessary. This is the debtor's motion to convert this case to chapter 13. The motion was brought pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

The motion will be denied for two reasons. First, it was signed and filed by an attorney who is not the attorney of record for the debtor in this case. The motion was signed and filed by Brian Turner, of the law firm of Fraley & Fraley, whereas the attorney of record is Richard Dwyer, of the Law Office of Richard Dwyer. Mr. Turner has not made an appearance as an attorney of record in any of the manners authorized by local rule. See LBR 2017-1(b)(2). Thus, he is not authorized to participate in this case. LBR 2017-1(b)(1) ["no attorney may participate in any action unless the attorney has appeared as an attorney of record."].

Second, the motion is not accompanied by evidence establishing its factual allegations and demonstrating that the debtor is entitled to the relief requested, as required by LBR 9014-1(d)(6). In particular, the court takes judicial notice of the debtor's schedules of income and expenses filed in this case, which, together with those filed as exhibits in support of this motion, strongly suggest that the debtor has forfeited his right to have the case converted to chapter 13. See Marrama v. Citizens Bank, 549 U.S. 365, 371 (2007). The evidence in support of the motion, consisting of the debtor's declaration and the amended Schedules I and J filed as exhibits, does not support a contrary conclusion.

In sworn schedules filed May 22, 2013 and September 4, 2013, the debtor stated his gross income from his job as a software engineer with Montserrat Volcano Observatory, a job he stated he had held for seven months, was $3,643 per month. In stark contrast, on amended schedules filed as exhibits in support of this motion, the debtor continues to list his job and employer as software engineer with Montserrat Volcano Observatory, and continues to state he has been employed there for seven months; however, he now lists his gross income as $9,637 per month. His testimony in support of the motion refers to his "new income," but offers no explanation for this dramatic increase in income.[1] The debtor adds in his declaration that since the filing of this case, his wife has decided to move back into the family home, and thus, her income and expenses are included in his plan. (In contrast, the debtor listed his marital status on his original Schedule I as single, and where required to list his wife's name in answer to question 16 on his statement of financial affairs, the debtor instead answered "None.") According to the amended Schedules I and J filed in support of this motion, the debtor's 12- and 14-year old children have also moved back into the home. His 18-year old son, however, has apparently moved out. In other words, there are now two more people in the home than were living there before, not three more.

Apparently in an attempt to offset this dramatic alleged increase in his household's income, the debtor has also drastically increased his household expenses, far more than reasonably attributable to his wife and younger children moving back into the home, especially considering that the debtor's 18-year old son has moved out. For example, whereas the debtor listed his electricity and heating fuel expense at $150 on May 22, 2013 and $259 on September 4, 2013, he now lists it at $1,000 per month. And whereas his food expense was listed at $600 on his May and September schedules, he now claims it is $1,800 per month. Whereas medical and dental expenses were listed at $40, they are now listed at $800 per month; transportation expenses are up from $450 to $1,250, and on top of that, the debtor has added a new "travel" expense, $800 per month.[2] Thus, whereas the debtor previously listed his and his son's total household expenses as $3,443 (in May 2013) and $3,345 (in September), he now lists the total for the household of four at $8,917 per month.

The court notes that in October of 2013, the chapter 7 trustee in this case filed a complaint objecting to the debtor's discharge, alleging the debtor had concealed assets. Although the debtor, in January of this year, stipulated to an extension of his time to respond to the complaint, he has not filed a response, and the stipulated extension date has passed. Thus, it appears the debtor has delayed the trustee's administration of the case and, possibly, his investigation of assets that might be available to the estate. In any event, however, based on the drastic unexplained changes in the debtor's schedules, the court is unable to conclude that this motion to convert has been filed in good faith. The court reaches this conclusion despite the fact that the debtor indicates he intends to propose a 100% plan if the case is converted. It appears clear the debtor has reported drastic

increases in his household's expenses, not justified by the alleged increase in the household's size from two persons to four persons, solely in an attempt to offset a drastic and previously unsuggested increase in his income, thereby proposing to make a smaller plan payment than he can actually afford (assuming the newly-reported income figures are accurate) and transferring to creditors the risk the debtor will not be able to complete the plan. As a result of the above, the motion will be denied by minute order. No appearance is necessary.

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1 The court notes that, where required to disclose on his original and first amended Schedules I any increases or decreases in income reasonably expected to occur in the next year, the debtor answered "None." If in fact the debtor correctly stated his then-income on those schedules, it would be surprising if he did not know, at the time those schedules were filed, that his income would soon increase by 164%.

2 The debtor has noted on his latest version of Schedule I that his employer is located on the Caribbean island of Montserrat. To the extent, if any, he claims the new $800 per month travel expense relates to travel to that island, the court questions why it was not included on his original or first amended schedule, filed when the debtor had the same job. Further, nothing about the location of the job would account for the increase in <u>other</u> transportation expenses from $450 to $1,250 per month.

2.	14-21505-D-7 VVF-1 AMERICAN HONDA FINANCE CORPORATION VS.	ROGELIO CABAGNOT AND JEANNETTE DANO	MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION 4-8-14 [29]

Final ruling:

This matter is resolved without oral argument. This is American Honda Finance Corporation's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtors are not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. Accordingly, the court will grant relief from stay by minute order. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). There will be no further relief afforded. No appearance is necessary.

3.	14-22005-D-7 MDR-1	NESAR NOORI	MOTION TO AVOID LIEN OF ASSET ACCEPTANCE, LLC 4-8-14 [11]

Final ruling:

This is the debtor's motion to avoid an alleged judicial lien held by Asset Acceptance, LLC (the "creditor"). No party-in-interest has filed opposition. However, that does not, by itself, entitle the debtor to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." <u>All Points Capital Corp. v.</u>

Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).)

Thus, the court will consider the merits of the motion. "There are four basic elements of an avoidable lien under § 522(f)(1)(A): First, there must be an exemption to which the debtor would have been entitled under subsection (b) of this section. 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be . . . a judicial lien. 11 U.S.C. § 522(f)(1)." In re Goswami, 304 B.R. 386, 390-91 (9th Cir. BAP 2003), citing In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added). The debtor claims the creditor has a lien on the debtor's personal property by virtue of an abstract of judgment recorded in the Yolo County Recorder's Office. The debtor has scheduled personal property assets claimed to have a total value of $4,126.99, all of which has been claimed as exempt. (The debtor has scheduled no real property.) Thus, the debtor concludes that the creditor's lien impairs exemptions to which the debtor would be entitled.

The problem is that the third and fourth requirements, above, include an underlying requirement that there be a lien for the court to avoid, whereas here, the creditor does not have a lien on any assets of the debtor. Under California law, the recording of an abstract of judgment with the county recorder of a particular county creates a judicial lien on real property of the judgment debtor in the county. Cal. Code Civ. Proc. § 697.310(a). There is no provision under which the recording of an abstract of judgment creates a lien of any sort on the judgment debtor's personal property. Thus, because there is no lien here to avoid, the motion will be denied.

The motion will be denied by minute order. No appearance is necessary.

4.	14-22005-D-7 MDR-2	NESAR NOORI	MOTION TO AVOID LIEN OF BANK OF AMERICA 4-8-14 [16]

Final ruling:

This is the debtor's motion to avoid an alleged judicial lien held by Bank of America (the "creditor"). No party-in-interest has filed opposition. However, that does not, by itself, entitle the debtor to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).)

Thus, the court will consider the merits of the motion. "There are four basic elements of an avoidable lien under § 522(f)(1)(A): First, there must be an exemption to which the debtor would have been entitled under subsection (b) of this section. 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be . . . a judicial lien. 11 U.S.C. § 522(f)(1)." In re Goswami, 304 B.R. 386, 390-91 (9th Cir. BAP 2003), citing In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added). The debtor claims the creditor has a lien on the debtor's personal property by virtue of an abstract of judgment recorded in the Yolo County Recorder's Office. The debtor has scheduled personal property assets claimed to have a total value of $4,126.99, all of which has been claimed as exempt. (The debtor has scheduled no real property.) Thus, the debtor concludes that the creditor's lien impairs exemptions to which the debtor would be entitled.

The problem is that the third and fourth requirements, above, include an underlying requirement that there be a lien for the court to avoid, whereas here, the creditor does not have a lien on any assets of the debtor. Under California law, the recording of an abstract of judgment with the county recorder of a particular county creates a judicial lien on real property of the judgment debtor in the county. Cal. Code Civ. Proc. § 697.310(a). There is no provision under which the recording of an abstract of judgment creates a lien of any sort on the judgment debtor's personal property. Thus, because there is no lien here to avoid, the motion will be denied.

The motion will be denied by minute order. No appearance is necessary.

5.	14-22005-D-7 MDR-3	NESAR NOORI	MOTION TO AVOID LIEN OF BANK OF AMERICA, N.A. 4-8-14 [21]

Final ruling:

This is the debtor's motion to avoid an alleged judicial lien held by Bank of America, N.A. (the "creditor"). No party-in-interest has filed opposition. However, that does not, by itself, entitle the debtor to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).)

Thus, the court will consider the merits of the motion. "There are four basic elements of an avoidable lien under § 522(f)(1)(A): First, there must be an exemption to which the debtor would have been entitled under subsection (b) of this section. 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be . . . a judicial lien. 11 U.S.C. § 522(f)(1)." In re Goswami, 304 B.R. 386, 390-91 (9th Cir. BAP 2003), citing In re Mohring, 142 B.R.

389, 392 (Bankr. E.D. Cal. 1992) (emphasis added). The debtor claims the creditor has a lien on the debtor's personal property by virtue of an abstract of judgment recorded in the Yolo County Recorder's Office. The debtor has scheduled personal property assets claimed to have a total value of $4,126.99, all of which has been claimed as exempt. (The debtor has scheduled no real property.) Thus, the debtor concludes that the creditor's lien impairs exemptions to which the debtor would be entitled.

The problem is that the third and fourth requirements, above, include an underlying requirement that there be a lien for the court to avoid, whereas here, the creditor does not have a lien on any assets of the debtor. Under California law, the recording of an abstract of judgment with the county recorder of a particular county creates a judicial lien on real property of the judgment debtor in the county. Cal. Code Civ. Proc. § 697.310(a). There is no provision under which the recording of an abstract of judgment creates a lien of any sort on the judgment debtor's personal property. Thus, because there is no lien here to avoid, the motion will be denied.

The motion will be denied by minute order. No appearance is necessary.

6.	13-28020-D-7 EJS-1	ROGER/BONNIE TURNER	CONTINUED MOTION TO AVOID LIEN OF GE MONEY BANK, CAPITAL ONE BANK (USA), N.A., THE GOLDEN ONE CREDIT UNION, ET AL. 3-12-14 [48]

Final ruling:

This is the debtors' motion to avoid four different judicial liens. As to two of those liens, the hearing was continued to allow the debtors to correct service defects. On April 17, 2014, the debtors filed a proof of service purporting to evidence service, on April 17, 2014, in the manner required by Fed. R. Bankr. P. 7004, on the two creditors not previously served correctly. However, although the proof of service refers to a notice of continued hearing, there is no such notice on file. Thus, the court is unable to determine whether notice of the continued hearing was properly given.

As a result of this notice defect, as to creditors Golden 1 Credit Union and FIA Card Services, N.A., the court will continue the hearing one more time, to May 28, 2014. The moving parties shall, no later than May 14, 2014, submit a copy of the notice of continued hearing actually served on April 17, 2014, authenticated by a declaration of the person who served it evidencing that it is the notice actually served. Alternatively, the moving parties shall file another notice of continued hearing, giving notice of the continued hearing date of May 28, 2014, and serve it, together with the motion and supporting documents, on Golden 1 Credit Union and FIA Card Services, N.A., in accordance with Fed. R. Bankr. 7004, no later than May 14, 2014, and file a proof of service.

The hearing will be continued by minute order. No appearance is necessary.

7.	10-47422-D-7 12-2118 FARRAR V. LEXINGTON CONSULTING, INC. ET AL	DENNIS/SHERYL LANCASTER HSM-2	CONTINUED MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR PARTIAL SUMMARY ADJUDICATION 2-14-14 [74]

Final ruling:

The hearing on this motion is continued to May 28, 2014 at 10:00 a.m. No appearance is necessary.

8.	13-35327-D-12	LAURA BRANDON	CONTINUED STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION 12-3-13 [1]

Tentative ruling:

This is the fourth continued status conference in this chapter 12 case. In a tentative ruling issued in advance of the previous hearing, held March 19, 2014, the court advised the debtor and her counsel that several newly-added creditors had not been served with notice of the case, notice of the deadline to file claims, notice of the status conference, or copies of the debtor's status report. The court also noted that the debtor had failed to file an amended master address list, and thus, notices sent in the future by the Bankruptcy Noticing Center would not be served on those newly-added creditors.

In its ruling for the March 19, 2014 hearing, the court stated the debtor would be required to file a notice of continued hearing and to serve it, together with a copy of the scheduling order and the debtor's status report, on the newly-added creditors. The ruling stated the debtor would also be required to file an amended master address list to include those creditors, and to serve them with the Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines. At the conclusion of the hearing, the court stated the debtor would have until April 30, 2014 to comply.

On April 30, 2014, the debtor filed a notice of continued status conference, and served it on two of the five newly-added creditors, but not on the other three, despite the fact that the new creditors had been listed by name in the court's tentative ruling. Further, contrary to the explicit instructions in the tentative ruling, the debtor did not serve scheduling order, the debtor's status report, or the Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines. And also contrary to those instructions, the debtor has not filed an amended master address list. Thus, the following creditors, listed on the debtor's amended schedules filed March 5, 2014, were not served with the notice of continued status conference or any of the other documents required by the ruling to be served. And they were not served with the debtor's motion to confirm a first amended chapter 13 plan, filed April 30, 2014. The creditors who have not been served are: (1) Arlene Reyes, listed on the amended Schedule F as being owed $25,000 on account of a personal loan; (2) Chris and Rhea Newell, listed on the amended Schedule G as parties to a month-to-month lease; and (3) Manuel Guzman, listed on the amended Schedule G as a party to a "month-to-month [presumably, lease]."

The debtor determined by at least early March that those creditors should be

listed on her schedules, yet she did not add them to her master address list in this case, and still has not done so. Despite the requirements clearly set forth in the court's tentative ruling for March 19, 2014, the debtor failed to serve those creditors with the notice of continued status conference or other documents required to be served. She did not serve them with the motion to confirm an amended plan. The order under which this status conference was originally scheduled states that the court may consider at the status conference, among other things, dismissal or conversion of the case. The court is concerned about the debtor's repeated failures to serve the appropriate parties in this case, as evidenced by tentative rulings issued in advance of earlier sessions of the status conference, and as highlighted most recently by the debtor's failure to notice the newly-added creditors, even when instructed to do so by the court. Lastly, the debtor has not timely confirmed a plan under 11 U.S.C. § 1224, nor has the debtor obtained an extension of time to have a plan confirmed. As a result of the foregoing, the court will consider at this status conference whether to dismiss the case.

9.	13-35327-D-12 WW-2	LAURA BRANDON	CONTINUED MOTION TO AVOID LIEN OF KIM KNORR 3-4-14 [37]

10.	14-21028-D-7 SSA-2	DANNY CAAMAL	OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS 4-8-14 [19]

Tentative ruling:

This is the trustee's objection to the debtor's claim of exemption of the real property located at 1441 Trellis St., Manteca, California, in the amount of $72,783.75, which the debtor claimed under Cal. Code Civ. Proc. § 704.730(a)(1), the homestead exemption. The trustee objected to the exemption on the ground that the debtor's street address, as listed on his petition, is 1365 Gianna Lane, Manteca, and thus, it appears the debtor is not entitled to exempt the Trellis St. property as his homestead.

On April 9, 2014, the day after the trustee filed this objection, the debtor filed amended Schedules A and C on which he deleted the Trellis St. property altogether. Thus, he is no longer claiming an exemption in the Trellis St. property, and the trustee's exemption is moot. The trustee, however, has filed a supplemental objection in which he points out that he has obtained a property profile from Stewart Title that purports to show the property in the names of Victor and Maria Caamal and Danny and Susan Caamal as co-owners. (Danny and Susan Caamal are the debtor and his non-filing spouse.) The trustee has also submitted a copy of a grant deed recorded in 2002 naming Victor and Maria Caamal and Danny and Susan Caamal as grantees, all as joint tenants.[1] The trustee adds that to the best of his knowledge, there have been no changes to the state of title to the property; thus, he concludes that the debtor has an interest in the property, together with his

spouse and Victor and Maria Caamal. The trustee requests that, despite the filing of the amended schedules, his objection to the debtor's original claim of exemption be sustained and that the court make a finding that the debtor and his spouse are co-owners of the property, together with Victor and Maria Caamal.

There are at least two problems with the requested relief. First, the filing of the amended Schedule C, on which the debtor did not claim an exemption in the Trellis St. property, moots the trustee's objection to the original claim of exemption in that property because the original claim of exemption is simply of no force or effect. As to the trustee's request for a finding that the property is owned by the debtor, his spouse, and Victor and Maria Caamal, the trustee did not include a request for such a finding in his original objection, and his supplemental objection was not filed or served on 28 days' notice. But even if the request had been timely made, the court would deny it because the trustee has not submitted admissible evidence sufficient to support the requested finding. The grant deed was recorded 14 years ago; the property profile is (1) undated, and (2) inadmissible hearsay. The trustee has submitted no admissible evidence as to the state of title to the property on the date this case was filed; his conclusion as to the state of title is mere speculation. Further, it appears this relief would need to be obtained through an adversary proceeding pursuant to FRBP 7001(2) and (9).

The court recognizes that the debtor's amended Schedule A raises questions about the reliability of the original or the amended schedule, as both cannot be accurate. The trustee may have other remedies to address the discrepancy; however, disallowance of an exemption the debtor is no longer claiming is not an appropriate remedy. Accordingly, the objection will be overruled as moot.

The court will hear the matter.

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1 The trustee notes that the debtor has filed an amended statement of financial affairs on which he lists the property as property held for another person; namely, Victor and Maria Caamal, who are listed as the owners.

11.	13-23829-D-7 13-2208 PYFROM V. MCGOVERN, JR	ROY MCGOVERN FWS-1	MOTION TO SUBSTITUTE ATTORNEY 4-9-14 [21]

12. 13-29030-D-7 WILLIAM/JANET CHENG — MOTION TO VACATE, SET ASIDE THE 3/21/14 MINUTE ORDER EXTENDING DEADLINE TO FILE A COMPLAINT OBJECTING TO CHENGS DISCHARGE 4-1-14 [317]

Final ruling:

This motion will be denied because the moving parties failed to include a docket control number on the motion and other documents filed with the motion, as required by LBR 9014-1(c). This ruling may appear harsh at first glance. However, the court has repeatedly cautioned the debtors about their failure to include a docket control number on earlier motions (see rulings at DNs 65 and 208), and their continuing failure to include a docket control number has created considerable disarray in the docket. The court again cautions the debtors to familiarize themselves with the court's local rules, and in regard to this particular ruling, with LBR 9014-1(c) regarding the use and manner of formatting docket control numbers.

As a result of this procedural defect, the motion will be denied by minute order. No appearance is necessary.

13. 14-22632-D-7 PHILLIP/KATELYNN HAWKINS — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 4-15-14 [10]
AMERICREDIT FINANCIAL SERVICES, INC. VS.

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtors' Statement of Intentions indicates they will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

14. 12-23736-D-7 KATHERINE HAVEN — MOTION FOR COMPENSATION FOR STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY(S)
SSA-4 — 4-18-14 [192]

15. 11-33637-D-7 JEANETTE LIAS — MOTION TO DISMISS CASE
4-16-14 [374]

Final ruling:

This is the debtor's motion to dismiss this chapter 7 case. The motion will be denied for the following reasons. First, the debtor has not filed an actual motion, as required by Fed. R. Bankr. P. 9014(a), only a Notice of Hearing for Dismissal of Chapter 7 Case and a Notice of Dismissal of Chapter 7 Case. (The latter was inappropriate because the title implies the case has been dismissed.) Second, the moving party served only the chapter 7 trustee, and failed to serve all (or any) creditors, as required by Fed. R. Bankr. P. 2002(a)(4), or the United States Trustee, as required by Fed. R. Bankr. P. 9034(c). For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

16. 11-33637-D-7 JEANETTE LIAS — MOTION TO COMPEL
SCF-3 — 4-8-14 [367]

17. 14-22149-D-7 TERRYLYN MCCAIN — MOTION TO DISMISS ADVERSARY PROCEEDING
14-2078 WSS-1 — 4-11-14 [10]
MCCAIN V. VANZETTI PROPERTIES, L.P. ET AL

Tentative ruling:

This is the motion of several of the defendants in this adversary proceeding (the "defendants") to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"), incorporated herein by Fed. R. Bankr. P. 7012(b), for failure to state a claim upon which relief can be granted. The plaintiff has not filed opposition. However, that does not, by itself, entitle the defendants to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).)

Thus, the court will consider the merits of the motion in light of the

standards for considering a Rule 12(b)(6) motion. A Rule 12(b)(6) motion focuses, with limited exceptions, only on the pleadings. See Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). In ruling on a Rule 12(b)(6) motion, a court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solutions, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The complaint must include "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

The plaintiff's complaint alleges that, prior to the filing of her bankruptcy petition, two of the defendants, whom the plaintiff refers to as the "Investors," commenced an unlawful detainer proceeding against her in state court, and obtained a judgment and writ of execution; that the Sheriff's Department attempted to evict the plaintiff from her property, but the writ of execution contained the wrong address and could not be executed; that the plaintiff thereafter filed her bankruptcy petition; that the next day, she filed a copy of the petition in the court file in the unlawful detainer proceeding; that she handed a copy of the petition to the clerk in courtroom 17, just before a bench trial was going to be conducted in what the plaintiff characterizes as a private trial not open to the public; that the plaintiff presented the bankruptcy papers to the clerk of the court and the attorney for the Investors, and made an oral announcement to the court and the attorney; and that the plaintiff, despite repeated requests, has been unable to view the minutes of the private hearing that was conducted that day.[1]

The plaintiff concludes that "[i]n spite of presenting the bankruptcy petition and automatic stay to the Investors['] attorney[,] they continued to proceeding forward in violation of the automatic stay and amended/edited the previous judgment . . . to now include Plaintiff's address . . . without service to Plaintiff or the renter/tenant." Plaintiff's Complaint, filed March 13, 2014, at 4:28-5:4. In her first cause of action, the plaintiff claims that the "private hearing" conducted after the Investors and their attorney had notice of the automatic stay was a violation of the stay, and that the plaintiff's contact that day with the Investors and their attorney "during the private hearing and being coerced into participating . . ." (id. at 5:23-24) was also in violation of the stay. The plaintiff claims that as a result of those violations of the stay, she suffered emotional distress, was hospitalized, and diagnosed with a cardiac condition, and she seeks general, special, and punitive damages. In her second cause of action, the plaintiff claims the defendants' communications to her after she filed her bankruptcy petition and after they knew she was in bankruptcy violated the Fair Debt Collection Practices Act (the "FDCPA").

The court will take these causes of action in reverse order. The defendants correctly point out that the plaintiff's complaint does not contain any of several allegations required to be made to state a cause of action for violation of the FDCPA. As a result, the court concludes that taking all the plaintiff's factual allegations as true, and drawing all reasonable inferences in favor of the plaintiff, the complaint fails to "state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570.

Turning to the plaintiff's cause of action for violation of the automatic stay, the defendants have submitted as an exhibit a copy of the state court's minute order on the Investors' motion for a new trial and to amend their judgment and writ of possession. The minute order states: (1) "The motion is denied." and (2) "All judicial proceedings are stayed due to the Bankruptcy protections automatic stay."

Defendants' Ex. 11. This court may take judicial notice of the minute order for purposes of ruling on the present Rule 12(b)(6) motion. The general rule is that when a party moving for dismissal under Rule 12(b)(6) presents matters outside the pleadings, "the motion must be treated as one for summary judgment . . ." and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." See Fed. R. Civ. P. 12(d). However, "that rule does not pertain when the additional facts considered by the court are contained in materials of which the court may take judicial notice." Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994).

> When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond. A court may, however, consider certain materials -- documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice -- without converting the motion to dismiss into a motion for summary judgment.

United States v. Ritchie, 342 F.3d 903, 907-08 (9th Cir. 2003). Further, the court "[is] not . . . required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice . . . ." Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010).

The state court's minute order plainly contradicts the plaintiff's allegations that the Investors "continued to proceeding forward in violation of the automatic stay and amended/edited the previous judgment . . . to now include Plaintiff's address . . . without service to Plaintiff or the renter/tenant." The minute order supports a conclusion contrary to the plaintiff's; namely, that the parties continued with the hearing for the sole purpose of determining whether the automatic stay prevented them from going forward, that the state court found the stay did apply, and that the state court denied the Investors' motion. Thus, the state court did not amend or edit the Investors' judgment to add the plaintiff's correct address. The evidence of the minute order, taken together with the allegations of the plaintiff's complaint that are not contradicted by the minute order, supports the conclusion, which the court reaches, that the complaint fails to state a claim to relief that is plausible on its face.

Finally, the defendants request that the plaintiff's complaint be dismissed without leave to amend. The court is inclined to agree that "under no plausible factual scenario could Defendants' conduct, in noticing and commencing an Ex Parte Application to set a motion date for a hearing, without any notice of a bankruptcy filing, be deemed a violation of the automatic stay or . . . an illegal debt collection communication prohibited by the FDCPA." Motion to Dismiss, filed April 11, 2014, at 15:11-15. However, in light of the liberality with which the court is to grant leave to amend,[2] the court will hear from the plaintiff, if she appears at the hearing, to determine whether she wishes to amend her complaint in light of this ruling. If the plaintiff does not appear, the motion will be granted and the complaint will be dismissed without leave to amend. As the court's findings and conclusions herein are applicable to all the defendants, the complaint will be dismissed as to all of them.

The court will hear the matter.

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1 It is clear from the exhibits filed by the defendants in support of this motion, of which the court takes judicial notice (see discussion below), that the "private hearing" was a hearing on the Investors' motion for a new trial and to amend their judgment and writ of possession (what the plaintiff refers to as a writ of execution). In that motion, the Investors sought to amend their judgment and writ of possession to include the plaintiff's correct address.

2 "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2), incorporated herein by Fed. R. Bankr. 7015.

18.	14-22749-D-7 MBB-1 BANK OF AMERICA, N.A. VS.	STACEE BRADFIELD	MOTION FOR RELIEF FROM AUTOMATIC STAY 4-4-14 [10]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtor's Statement of Intentions indicates she will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

19.	10-42050-D-7 12-2381 BURKART V. LAL	VINCENT/MALANIE SINGH CDH-1	MOTION TO AMEND 4-16-14 [69]

Tentative ruling:

The court finds that a hearing will not be helpful and is not necessary. This is the motion of the plaintiff, who is the trustee in the underlying chapter 7 case, for leave to file an amended complaint. The defendant has not filed opposition. The court finds that the trustee has established cause for leave to amend, and the motion will be granted. The trustee will have 30 days from the date of entry of the order in which to file an amended complaint. If the trustee files a timely amended complaint, the defendant shall file an answer or other response within the time fixed by applicable rules. The court will hear this matter.

20. 10-42050-D-7 VINCENT/MALANIE SINGH — MOTION FOR ENTRY OF DEFAULT JUDGMENT
12-2416 CDH-1 — 4-16-14 [51]
BURKART V. PRASAD

Tentative ruling:

This is the motion of chapter 7 trustee, Michael Burkart ("plaintiff"), for entry of default judgment against defendant, Sunila Prasad ("defendant"). The motion was noticed under LBR 9014-1(f)(1) and is unopposed. For the following reasons, the motion will be granted.

BANKRUPTCY COURT AUTHORITY

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), *cert. granted*, 2013 WL 3155257 (June 24, 2013), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, defendant is a creditor in the underlying bankruptcy case. See Claim # 20, filed September 7, 2010. Accordingly, the court has authority to enter a final judgment on the fraudulent transfer claim asserted against defendant.

ANALYSIS

A summons and complaint were served on defendant, who failed to answer within the time provided under FED. R. BANKR. P. 7012(a). On May 17, 2013, the clerk of the court entered an order of default against defendant. There are no other defendants in this matter. Accordingly, the well-pleaded allegations in plaintiff's complaint, except for allegations regarding the amount of damages, are deemed admitted. FED. R. CIV. P. 8(b)(6).

Obtaining a default judgment is a two-step process. See Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986). First, the clerk of the court enters the default of the party who has failed to plead or otherwise defend; the clerk or the court, depending on the nature of the plaintiff's claim, then enters a default judgment. FED. R. CIV. P. 55(a) and (b), incorporated herein by FED. R. BANKR. P. 7055. In this case, the clerk, at the request of plaintiff, entered the default of defendant on May 17, 2013. Plaintiff's motion is for entry of default judgment against defendant, pursuant to FED. R. CIV. P. 55(b). Factors the court must consider include the following: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Eitel, 782 F.2d at 1471-72. Resolution of disputes on their merits is generally favored over default judgments. See id. at 1472.

Similar, albeit differently articulated, considerations are involved in the context of a court's exercise of discretion to set aside a default judgment:

> These considerations, are usually listed as (1) whether the default was willful or culpable; (2) whether granting relief from the default would prejudice the opposing party; and (3) whether the defaulting party has a meritorious defense. Such considerations are, therefore, also appropriate considerations when deciding whether to render a default judgment. This is logical. When faced with the decision concerning whether to render a default judgment in the first place, a court logically should consider whether factors are present that would later oblige the court to set that default judgment aside.

10 MOORE'S FEDERAL PRACTICE § 55.31[2] (Matthew Bender 3d. ed. 2012).

Pursuant to the Fourth Claim for Relief of the First Amended Complaint, plaintiff alleges a fraudulent transfer claim under 11 U.S.C. § 548(a)(1)(A). In particular, plaintiff alleges that debtor, Vincent Singh ("Singh"), made three payments to defendant totaling $16,000.00. The payments consisted of cash, checks, or other forms of transfer directly from Singh or indirectly from one or more accounts in Singh's name, Malanie Singh, Perfect Financial Group, Inc., AAMCO Stockton, Inc., AAMCO Orangevale, Inc., OM L. Singh, John A. Singh, Usha D. Singh, and/or third parties to or for the benefit of defendant. The payments were made as part of a Ponzi scheme perpetrated by Singh. Defendant had invested funds with Singh and received payments in connection with the amounts invested. Although Singh represented that he was making "hard money" loans that would produce funds to be paid back to investors (including defendant), the actual source of the payments from Singh was funds invested by other investors. Pursuant to the Fifth Claim for Relief, plaintiff alleges that, under 11 U.S.C. § 550, he is entitled to recover from defendant any property transferred from Singh by means of an avoidable transfer. Pursuant to the Seventh Claim for Relief, plaintiff alleges that defendant's proof of claim must be disallowed under 11 U.S.C. § 502(d) unless defendant pays to the estate the amount avoided.

A. Propriety of Entering Default Judgment (Eitel Factors)

1. Possibility of Prejudice to Plaintiff

Plaintiff will be prejudiced if default judgment is not granted. Plaintiff, as trustee of a bankruptcy estate being administered in part for the benefit of Ponzi scheme victims, is required to marshal a series of transfers to numerous investors so that each investor can receive his or her aliquot share of investment funds misappropriated by the perpetrator of a Ponzi scheme. Although it seems counterintuitive to claw back funds redistributed to the victims by Singh, it is necessary in ensuring the equality of treatment of similarly situated creditors. Defendant's failure to respond in this action presents a delay that reverberates through the bankruptcy case: plaintiff is prevented from marshaling and accounting for investment funds that are to be distributed on a pro rata basis. Accordingly, plaintiff will be prejudiced.

2. The Merits of Plaintiff's Claims

The following facts are taken as true given defendant's lack of response. As stated earlier, plaintiff's complaint alleges, inter alia, a claim under 11 U.S.C. § 548(a)(1)(A) that the transfers to defendant were made by Singh with an actual intent to hinder, delay, or defraud defendant and other similarly situated creditors. The court agrees with plaintiff that Singh's conduct amounted to a Ponzi scheme, which is sufficient to establish actual intent to defraud creditors within

the meaning of 11 U.S.C. § 548(a)(1)(A). The "existence of a Ponzi scheme is sufficient to establish actual intent under § 548(a)(1)." AFI Holding, Inc. v. Mackenzie (In re AFI Holdings, Inc.), 525 F.3d 700, 704 (9th Cir. 2008) (internal quotation marks omitted).

Plaintiff's complaint adequately alleges that Singh engaged in a Ponzi scheme. In furtherance of this scheme, Singh accepted investment funds from defendant and other similarly situated investors. From time to time, Singh, whether directly or indirectly, distributed payments to the investors as an illusory return on investment. These illusory returns constitute transfers of an interest in property of the debtor within the meaning of 11 U.S.C. § 101(54)(D). The well-pleaded facts show that these transfers were made with an actual intent to hinder, delay, or defraud defendant on or within 2 years before the date of the filing of the petition. Therefore, plaintiff's fourth claim for relief is meritorious.

Although an exception to liability exists in 11 U.S.C. § 548(c) for a defendant who takes in good faith and gives new value, "the defendants' good faith is an affirmative defense under Section 548(c) which must be pleaded in the first instance as a defense by the defendants. It is not incumbent on the plaintiff to plead lack of good faith on the defendants' part because lack of good faith is not an element of a plaintiff's claim under Section 548(a)(1)." Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P. (In re Bayou Grp., LLC), 362 B.R. 624, 639 (Bankr. S.D.N.Y. 2007). As defendant has not filed a response in this action, defendant has not met the burden of proof required to successfully assert a "good faith" defense to plaintiff's fraudulent transfer claim.

Next, plaintiff's complaint adequately alleges that plaintiff is entitled to recover the transfers made to defendant. "[T]o the extent that a transfer is avoided under section . . . 548, . . . the trustee may recover, for the benefit of the estate, the property transferred . . . from— (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made." 11 U.S.C. § 550(a)(1). Therefore, plaintiff's fifth claim for relief is meritorious.

Lastly, plaintiff's complaint adequately alleges that defendant's proof of claim must be disallowed unless defendant pays to the estate the amount of the avoided transfers. "[T]he court shall disallow any claim of any entity from which property is recoverable under section . . . 550, . . . or that is a transferee of a transfer avoidable under section . . . 548, . . ., unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section . . . 550, ..." 11 U.S.C. § 502(d). Therefore, plaintiff's seventh claim for relief is meritorious.

3. Sufficiency of Plaintiff's Complaint

The court finds that plaintiff's complaint is well-pleaded and sets forth plausible facts—not just parroted statutory or boilerplate language—that show that plaintiff is entitled to the relief sought in the fourth and fifth claims for relief. The complaint sufficiently alleges with particularity facts that show Singh engaged in an extensive Ponzi scheme of which defendant was a victim. Pursuant to the scheme, defendant invested funds and also received certain transfers from Singh. The court is satisfied that plaintiff has pleaded the circumstances of the Ponzi scheme constituting actual fraud with particularity. See FED. R. BANKR. P. 7009, which incorporates FED. R. CIV. P. 9(b) (requiring a party who alleges fraud to plead such fraud with particularity). Moreover, plaintiff has pleaded facts that satisfy the elements of a fraudulent transfer claim sounding in actual fraud.

4. The Amount at Stake

Defendant is liable to plaintiff for a sum of money received via at least three transfers from Singh. The total amount of avoidable transfers alleged is $16,000.00, subject to change if and when plaintiff discovers other transfers made to defendant. The amount at stake is not a grossly large number, nor is it a nominal amount. Plaintiff has presented evidence showing that Singh made at least three payments to defendant in the amount alleged. This factor weighs in favor of a default judgment.

5. Possibility of Dispute as to Material Facts

Upon entry of default, all well-pleaded facts in the complaint are taken as true, except allegations relating to damages. Defendant has not advanced any arguments showing material facts in dispute. Given the sufficiency of the complaint and defendant's default, there is no genuine dispute of material fact that would preclude a default judgment.

6. Excusable Neglect

Defendant was properly served with the summons and complaint pursuant to FED. R. BANKR. P. 7004. It is therefore unlikely that defendant's failure to respond to the complaint was due to excusable neglect.

7. Policy in Favor of Deciding on the Merits

"Cases should be decided upon their merits whenever reasonably possible." Eitel, 782 F.2d at 1472. As compelling a factor as this may be, a decision on the merits is not reasonable in light of defendant's complete inaction. Defendant's lack of a response renders a decision on the merits practically impossible. Thus, the ordinary preference to decide cases on the merits must yield to the granting of a default judgment.

B. Damages

The entry of a default judgment establishes the liability of the defaulting party but the moving party still must establish the amount of damages. Geddes v. United Fin. Grp., 559 F.2d 557, 560 (9th Cir. 1977). "A court does not abuse its discretion by failing to hold a hearing [on damages] when the amount of damages is liquidated or can be made certain by computation based on the pleadings or information in the existing record." 10 MOORE'S FEDERAL PRACTICE § 55.32[2][b]. In recommending an award of damages here, the court relies on the copies of checks submitted as evidence by plaintiff. The total amount of transfers, according to this evidence, is $16,000.00.

For the reasons stated, the court will grant the motion by minute order and enter a default judgment in favor of plaintiff. The court will fix damages according to the amount requested in the complaint. Plaintiff shall submit an appropriate form of default judgment. The court will hear the matter.

21. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR ENTRY OF DEFAULT
12-2444 CDH-1 JUDGMENT
BURKART V. THOMSON 4-16-14 [54]

Tentative ruling:

This is the motion of the plaintiff, who is the trustee in the underlying chapter 7 case, for entry of a default judgment against the defendant, who has not responded to the trustee's complaint. The court is not prepared to consider the motion at this time because it does not appear the motion was served on the defendant at his current address.

In his supporting declaration, the trustee's counsel describes his telephone conversation with the defendant on or about February 24, 2014, in which the defendant provided the trustee's counsel with an address on Steiner Drive in Sacramento. The trustee's counsel notes in his declaration that this is different from the address on the defendant's proof of claim. However, the trustee served this motion on the defendant only at the address on his proof of claim, and not at the Steiner Drive address.

The court will hear the matter on May 14, 2014, as scheduled by the trustee; however, if the defendant does not appear, the court intends to continue the hearing to allow the trustee to file and serve a notice of continued hearing, together with the motion and supporting documents, on the defendant at the Steiner Drive address. The court will hear the matter.

22. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR ENTRY OF DEFAULT
12-2454 CDH-1 JUDGMENT
BURKART V. PATEL 4-16-14 [41]

Tentative ruling:

This is the motion of chapter 7 trustee, Michael Burkart ("plaintiff"), for entry of default judgment against defendant, Ziggnasha Patel, aka Ziganasha Patel ("defendant"). The motion was noticed under LBR 9014-1(f)(1) and is unopposed. The court will submit to the district court the following findings of fact and conclusions of law, pursuant to 28 U.S.C. § 157(c)(1).

BANKRUPTCY COURT AUTHORITY

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), *cert. granted*, 2013 WL 3155257 (June 24, 2013), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, defendant is neither a creditor in the underlying bankruptcy case, nor was defendant sufficiently active in the case to give rise to a finding of a waiver of defendant's right to an Article III

adjudication. Accordingly, the court does not have authority to enter a final judgment on the fraudulent transfer claim asserted against defendant. Thus, the court will submit the following as its findings of fact and conclusions of law, together with its recommendation, to the district court. 1

ANALYSIS

A summons and complaint were served on defendant, who failed to answer within the time provided under FED. R. BANKR. P. 7012(a). On May 17, 2013, the clerk of the court entered an order of default against defendant. There are no other defendants in this matter. Accordingly, the well-pleaded allegations in plaintiff's complaint, except for allegations regarding the amount of damages, are deemed admitted. FED. R. CIV. P. 8(b)(6).

Obtaining a default judgment is a two-step process. See Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986). First, the clerk of the court enters the default of the party who has failed to plead or otherwise defend; the clerk or the court, depending on the nature of the plaintiff's claim, then enters a default judgment. FED. R. CIV. P. 55(a) and (b), incorporated herein by FED. R. BANKR. P. 7055. In this case, the clerk, at the request of plaintiff, entered the default of defendant on May 17, 2013. Plaintiff's motion is for entry of default judgment against defendant, pursuant to FED. R. CIV. P. 55(b). Factors the court must consider include the following: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Eitel, 782 F.2d at 1471-72. Resolution of disputes on their merits is generally favored over default judgments. See id. at 1472.

Similar, albeit differently articulated, considerations are involved in the context of a court's exercise of discretion to set aside a default judgment:

> These considerations, are usually listed as (1) whether the default was willful or culpable; (2) whether granting relief from the default would prejudice the opposing party; and (3) whether the defaulting party has a meritorious defense. Such considerations are, therefore, also appropriate considerations when deciding whether to render a default judgment. This is logical. When faced with the decision concerning whether to render a default judgment in the first place, a court logically should consider whether factors are present that would later oblige the court to set that default judgment aside.

10 MOORE'S FEDERAL PRACTICE § 55.31[2] (Matthew Bender 3d. ed. 2012).

Pursuant to the Fourth Claim for Relief of the First Amended Complaint, plaintiff alleges a fraudulent transfer claim under 11 U.S.C. § 548(a)(1)(A). In particular, plaintiff alleges that debtor, Vincent Singh ("Singh"), made four payments to defendant totaling $27,800.00. The payments consisted of cash, checks, or other forms of transfer directly from Singh or indirectly from one or more accounts in Singh's name, Malanie Singh, Perfect Financial Group, Inc., AAMCO Stockton, Inc., AAMCO Orangevale, Inc., OM L. Singh, John A. Singh, Usha D. Singh, and/or third parties to or for the benefit of defendant. The payments were made as part of a Ponzi scheme perpetrated by Singh. Defendant had invested funds with Singh and received payments in connection with the amounts invested. Although Singh

represented that he was making "hard money" loans that would produce funds to be paid back to investors (including defendant), the actual source of the payments from Singh was funds invested by other investors. Pursuant to the Fifth Claim for Relief, plaintiff alleges that, under 11 U.S.C. § 550, he is entitled to recover from defendant any property transferred from Singh by means of an avoidable transfer.

A. Propriety of Entering Default Judgment (Eitel Factors)

1. Possibility of Prejudice to Plaintiff

Plaintiff will be prejudiced if default judgment is not granted. Plaintiff, as trustee of a bankruptcy estate being administered in part for the benefit of Ponzi scheme victims, is required to marshal a series of transfers to numerous investors so that each investor can receive his or her aliquot share of investment funds misappropriated by the perpetrator of a Ponzi scheme. Although it seems counterintuitive to claw back funds redistributed to the victims by Singh, it is necessary in ensuring the equality of treatment of similarly situated creditors. Defendant's failure to respond in this action presents a delay that reverberates through the bankruptcy case: plaintiff is prevented from marshaling and accounting for investment funds that are to be distributed on a pro rata basis. Accordingly, plaintiff will be prejudiced.

2. The Merits of Plaintiff's Claims

The following facts are taken as true given defendant's lack of response. As stated earlier, plaintiff's complaint alleges, inter alia, a claim under 11 U.S.C. § 548(a)(1)(A) that the transfers to defendant were made by Singh with an actual intent to hinder, delay, or defraud defendant and other similarly situated creditors. The court agrees with plaintiff that Singh's conduct amounted to a Ponzi scheme, which is sufficient to establish actual intent to defraud creditors within the meaning of 11 U.S.C. § 548(a)(1)(A). The "existence of a Ponzi scheme is sufficient to establish actual intent under § 548(a)(1)." AFI Holding, Inc. v. Mackenzie (In re AFI Holdings, Inc.), 525 F.3d 700, 704 (9th Cir. 2008) (internal quotation marks omitted).

Plaintiff's complaint adequately alleges that Singh engaged in a Ponzi scheme. In furtherance of this scheme, Singh accepted investment funds from defendant and other similarly situated investors. From time to time, Singh, whether directly or indirectly, distributed payments to the investors as an illusory return on investment. These illusory returns constitute transfers of an interest in property of the debtor within the meaning of 11 U.S.C. § 101(54)(D). The well-pleaded facts show that these transfers were made with an actual intent to hinder, delay, or defraud defendant on or within 2 years before the date of the filing of the petition. Therefore, plaintiff's fourth claim for relief is meritorious.

Although an exception to liability exists in 11 U.S.C. § 548(c) for a defendant who takes in good faith and gives new value, "the defendants' good faith is an affirmative defense under Section 548(c) which must be pleaded in the first instance as a defense by the defendants. It is not incumbent on the plaintiff to plead lack of good faith on the defendants' part because lack of good faith is not an element of a plaintiff's claim under Section 548(a)(1)." Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P. (In re Bayou Grp., LLC), 362 B.R. 624, 639 (Bankr. S.D.N.Y. 2007). As defendant has not filed a response in this action, defendant has not met the burden of proof required to successfully assert a "good faith" defense to

plaintiff's fraudulent transfer claim.

Lastly, plaintiff's complaint adequately alleges that plaintiff is entitled to recover the transfers made to defendant. "[T]o the extent that a transfer is avoided under section . . . 548, . . . the trustee may recover, for the benefit of the estate, the property transferred . . . from— (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made." 11 U.S.C. § 550(a)(1). Therefore, plaintiff's fifth claim for relief is meritorious.

3. Sufficiency of Plaintiff's Complaint

The court finds that plaintiff's complaint is well-pleaded and sets forth plausible facts—not just parroted statutory or boilerplate language—that show that plaintiff is entitled to the relief sought in the fourth and fifth claims for relief. The complaint sufficiently alleges with particularity facts that show Singh engaged in an extensive Ponzi scheme of which defendant was a victim. Pursuant to the scheme, defendant invested funds and also received certain transfers from Singh. The court is satisfied that plaintiff has pleaded the circumstances of the Ponzi scheme constituting actual fraud with particularity. See FED. R. BANKR. P. 7009, which incorporates FED. R. CIV. P. 9(b) (requiring a party who alleges fraud to plead such fraud with particularity). Moreover, plaintiff has pleaded facts that satisfy the elements of a fraudulent transfer claim sounding in actual fraud.

4. The Amount at Stake

Defendant is liable to plaintiff for a sum of money received via at least four transfers from Singh. The total amount of avoidable transfers alleged is $27,800.00, subject to change if and when plaintiff discovers other transfers made to defendant. The amount at stake is not a grossly large number, nor is it a nominal amount. Plaintiff has presented evidence showing that Singh made at least four payments to defendant in the amount alleged. This factor weighs in favor of a default judgment.

5. Possibility of Dispute as to Material Facts

Upon entry of default, all well-pleaded facts in the complaint are taken as true, except allegations relating to damages. Defendant has not advanced any arguments showing material facts in dispute. Given the sufficiency of the complaint and defendant's default, there is no genuine dispute of material fact that would preclude a default judgment.

6. Excusable Neglect

Defendant was properly served with the summons and complaint pursuant to FED. R. BANKR. P. 7004. It is therefore unlikely that defendant's failure to respond to the complaint was due to excusable neglect.

7. Policy in Favor of Deciding on the Merits

"Cases should be decided upon their merits whenever reasonably possible." Eitel, 782 F.2d at 1472. As compelling a factor as this may be, a decision on the merits is not reasonable in light of defendant's complete inaction. Defendant's lack of a response renders a decision on the merits practically impossible. Thus, the ordinary preference to decide cases on the merits must yield to the granting of a default judgment.

B. Damages

The entry of a default judgment establishes the liability of the defaulting party but the moving party still must establish the amount of damages. Geddes v. United Fin. Grp., 559 F.2d 557, 560 (9th Cir. 1977). "A court does not abuse its discretion by failing to hold a hearing [on damages] when the amount of damages is liquidated or can be made certain by computation based on the pleadings or information in the existing record." 10 MOORE'S FEDERAL PRACTICE § 55.32[2][b]. In recommending an award of damages here, the court relies on the copies of checks submitted as evidence by plaintiff. The total amount of transfers, according to this evidence, is $27,800.00.

For the reasons stated, the court will recommend entry of a default judgment in favor of plaintiff, with damages in the amount requested in the complaint. The court will hear the matter.

1

> **In sum, § 157(b)(1) provides bankruptcy courts the power to hear fraudulent [transfer] cases and to submit reports and recommendations to the district courts. Such cases remain in the core, and the § 157(b)(1) power to 'hear and determine' them authorizes the bankruptcy courts to issue proposed findings of fact and conclusions of law. Only the power to enter final judgment is abrogated.**

Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553, 565-66 (9th Cir. 2012), cert. granted, 2013 WL 3155257 (June 24, 2013).

23.	13-24251-D-7 13-2201 BENGE ET AL V. HAMILTON	LARRY/LAURA HAMILTON HF-1	MOTION TO SUBSTITUTE TONY BENGE AS ADMINISTRATOR OF THE ESTATE OF CAROLYN BENGE, AND AS TRUSTEE OF THE LOUIE AND CAROLYN BENGE FAMILY TRUST DATED APRIL 14, 1996 4-14-14 [27]

Tentative ruling:

This is a motion to substitute the plaintiff's son, Tony Benge, for the plaintiff, Carolyn Benge, who has died.1 The defendant has filed opposition, and the plaintiff's counsel has filed a reply. For the following reasons, the motion will be granted.

The complaint herein was filed by Carolyn Benge, individually and as trustee of the Trust. It alleges that the defendant built a fence and a swimming pool on the defendant's property that did not allow for a required easement for access to his and/or a third party's adjacent property, resulting in the plaintiff's driveway being the only means of access. The complaint alleges state law claims for aiding and abetting certain other individuals in trespassing on the plaintiff's property, resulting in damages for which the defendant is alleged to be liable on a debt that should be determined to be nondischargeable under § 523(a)(6) of the Bankruptcy Code.

The motion is brought pursuant to Fed. R. Civ. P. 25(a) ("Rule 25(a)"), which provides:

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Rule 25(a), incorporated herein by Fed. R. Bankr. P. 7025.[2] California law, in turn, provides that "[a] pending action or proceeding does not abate by the death of a party if the cause of action survives." Id. § 377.21. And "[o]n motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest." Id. § 377.22.[3]

Thus, the "proper party" to be substituted into the case under Rule 25(a), for the purpose of maintaining the claims of the plaintiff individually, is the personal representative of the plaintiff or, if none, the plaintiff's successor in interest.[4] California law defines a decedent's "personal representative" as an "executor, administrator, administrator with the will annexed, special administrator, successor personal representative, public administrator acting pursuant to Section 7660, or a person who performs substantially the same function under the law of another jurisdiction governing the person's status." Cal. Prob. Code § 58(a). A decedent's "successor in interest" means "the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action." Cal. Code. Civ. P. § 377.11. Where the decedent died leaving a will, as here, the "beneficiary of the decedent's estate," in turn, means "the sole beneficiary or all of the beneficiaries who succeed to a cause of action, or to a particular item of property that is the subject of a cause of action, under the decedent's will." Cal. Code Civ. P. § 377.10(a).

Under Carolyn Benge's will, all of her real and personal property except tangible personal property was left to the Trust.[5] Thus, the claims of Carolyn Benge individually that are asserted in this proceeding were devised to the Trust as sole beneficiary, and the Trust is the "successor in interest" to the claims, pursuant to Cal. Code Civ. P. § 377.11. "Subject to Section 7001 [of the Probate Code], title to a decedent's property passes on the decedent's death to the person to whom it is devised in the decedent's last will." Cal. Prob. Code § 7000.[6] ("Person" includes a trust. Cal. Prob. Code § 56.) Thus, the claims asserted by Carolyn Benge individually passed to the Trust on her death, and all claims asserted by Carolyn Benge in this proceeding, both those asserted by her individually and those asserted by her as trustee of the Trust, are now property of the Trust and subject to administration by the present trustee of the Trust. The analysis of the "proper party" to be substituted in as plaintiff herein is thus simplified.

By way of an amendment and restatement of the trust agreement, Carolyn Benge designated Tony Benge as her sole successor trustee.[7] "'Trustee' includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court." Cal. Prob. Code § 84. Thus, under California law, Tony Benge is now the trustee of the Trust. He may accept or reject the trust in the manner described in

Cal. Prob. Code §§ 15600 and 15601, respectively. He may accept the Trust by signing the trust instrument or a separate written acceptance, or by "[k]nowingly exercising powers or performing duties under the trust instrument . . . ." (Cal. Prob. Code § 15600(a)). On acceptance of the Trust, Tony Benge has a duty to administer the Trust according to the trust instrument and according to California trust law. Cal. Prob. Code § 16000. As pertinent here, he has a duty "to take reasonable steps to enforce claims that are part of the trust property." Cal. Prob. Code § 16010. Most important for the purpose of this motion, "without the need to obtain court authorization," he has the powers conferred by the trust instrument and the powers conferred by statute. Cal. Prob. Code § 16200 (emphasis added).

Among the exhibits in support of the motion is a document entitled Appointment of Successor Trustee, signed after Carolyn Benge's death by Tony Benge and his brother, Curtis Benge, who is the beneficiary of a special needs trust established by the trust agreement, purporting to appoint Tony Benge as trustee of the Trust. In the absence of any opposition, the court concludes that this document is sufficient to constitute an acceptance of the Trust by Tony Benge as successor trustee. Thus, he has the powers and duties of a trustee under the Trust and under California trust law; pursuant to Cal. Prob. Code § 16200, there is no need for him to obtain state court authorization to exercise those powers and duties.

The defendant makes two arguments in opposition to the motion. First, he cites Cal. Prob. Code § 16249, which provides that the trustee of a trust may prosecute actions for the protection of trust property. The defendant contends that although Tony Benge may be the successor trustee of the Trust, he has no authority to pursue the Trust's claims in this proceeding because the property on which the defendant built the fence and swimming pool was sold at a foreclosure sale in 2012. Thus, in the defendant's view, "[t]here is no trust property that needs protection from [the defendant]." P. & A. in Opp. filed April 23, 2014 ("Opp."), at 2:13-14.

This argument misses the mark by a wide margin. The "property" referred to in the cited Probate Code section is property of the trust, not the adjacent or nearby property of the defendant. Here, the substitute plaintiff, Tony Benge, would be seeking to protect or to vindicate in some fashion the real property on which the plaintiff resided before her death and/or her claims for interference with her right to personal enjoyment of the real property, which, as discussed above, are property of the Trust. The fact that the defendant no longer owns his property has no bearing on this motion.

Second, the defendant contends that although Tony Benge is nominated in the plaintiff's will as executor, he "has not been appointed by a California Superior Court Judge, sitting with Probate Jurisdiction[,] as an Executor, Administrator, or Personal Representative." Opp. at 2:22-23. The defendant cites Cal. Prob. Code § 9820(a), which provides that a personal representative may maintain actions for the benefit of the probate estate. It is true that "[a] person has no power to administer the [probate] estate until the person is appointed personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters." Cal. Prob. C. § 8400(a). However, as discussed above, the claims asserted by Carolyn Benge individually were devised to the Trust at her death, without the need that they be administered in a probate proceeding. Thus, as all of the claims asserted in this proceeding are now property of the Trust, and as Tony Benge is the trustee of the Trust, he may pursue those claims. The court notes that in response to the opposition, Tony Benge has filed in state court a petition for probate of the plaintiff's will, and set a hearing on the petition for June 12, 2014, three days

after the scheduled trial date in this case. As Carolyn Benge's individual claims against the defendant passed to the Trust at her death, they did not become property of her probate estate, and would not be subject to administration in a probate proceeding if one is opened. The court has no reason to inquire whether any further purpose would be served by the opening of a probate proceeding.

The court concludes that all of the claims asserted by Carolyn Benge in this case, those asserted by her individually and as trustee of the Trust, are property of the Trust and subject to administration by Tony Benge as successor trustee of the Trust. Accordingly, the motion will be granted. The court will hear the matter.

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1 The motion states it is brought on behalf of Tony Benge, as the personal representative and administrator of the estate of Carolyn Benge, and as trustee of the Louie and Carolyn Benge Family Trust dated April 14, 1996 (the "Trust").

2 The motion was brought within 90 days after the filing of a notice of the death of the plaintiff.

3 The defendant has not suggested that either the nondischargeability cause of action or the underlying state law claims were extinguished or abated by the plaintiff's death.

4 As to the claims asserted by Carolyn Benge as trustee of the Trust, those claims continue to be property of the Trust; the "proper party" to be substituted in under Rule 25(a) is the successor trustee of the Trust, as discussed below.

5 A copy of the will was submitted as an exhibit in support of the motion; the defendant has not objected to its admission in evidence.

6 Section 7001 provides that the decedent's property is subject to administration under the Probate Code. The Probate Code includes California trust law (Division 9 of the Probate Code). Cal. Prob. Code § 1. Property of the Trust, therefore, including the plaintiff's individual claims that passed to the Trust under her will, is subject to administration under California trust law, as discussed below. Section 7001 does not mean those claims are subject to administration as part of the decedent's probate estate, if any.

7 A copy of the amendment and restatement was submitted as an exhibit in support of the motion; the defendant has not objected to its admission in evidence.

24.	13-31754-D-11 UST-2	VICTOR/SVETLANA PARSHIN	CONTINUED MOTION FOR THE COURT'S DETERMINATION OF THE REASONABLE VALUE OF THE SERVICES OF JEFFERY YAZEL 2-28-14 [64]

Final ruling:

This is a continued hearing on the motion of the United States Trustee (the "UST") for a determination of the reasonable value of the services performed by the debtors' former counsel in this case ("Prior Counsel"), and for an order directing Prior Counsel to disgorge the amount of payments received by him in excess of that

reasonable value. By the time of the original hearing, Prior Counsel had filed a combined application for approval of compensation and response to the motion. The court issued a tentative ruling on the UST's motion indicating that in order to assess the motion, the court would need to rule on Prior Counsel's application for approval of compensation; however, Prior Counsel had failed to apply for approval of compensation in compliance with applicable rules.

In the tentative ruling, the court announced its intention to continue the hearing, stated that Prior Counsel would be required to file and serve a notice of continued hearing on his application for compensation, and essentially provided Prior Counsel with a roadmap for correcting the service and notice defects in his application for compensation. Prior Counsel did not appear at the original hearing on the UST's motion, and has not complied with the requirements set forth in the court's tentative ruling. That is, he has not filed or served a notice of continued hearing on his application for compensation.

Instead, on April 30, 2014, he filed a second application for compensation, together with a supporting declaration and a proof of service. Although the caption of the motion and declaration includes a hearing date of June 11, 2014, Prior Counsel did not file a notice of hearing at all, as required by LBR 9014-1(d)(2). (For that reason, the application will not be set for hearing on June 11, 2014.) Further, the application, declaration, and proof of service do not include a docket control number, as required by LBR 9014-1(c). The proof of service appears to be defective in that it states that service was made on March 19, 2014, whereas the documents purportedly served that day were not signed until April 22, 2014. Finally, despite the explicit cautions in the court's tentative ruling for the original hearing on the UST's motion, Prior Counsel failed to serve his second application for compensation on the party requesting special notice at DN 52 and failed to serve the creditors filing Claim Nos. 2, 3, 4, and 5 at the addresses on their proofs of claim. Also despite the explicit caution in that ruling, Prior Counsel served only one of the many unsecured creditors who have not filed proofs of claim.

The hearing on the UST's motion will be continued once again, to July 23, 2014, at 10:00 a.m. If Prior Counsel has not by that date obtained an order on a motion complying in all respects with applicable rules, including the federal bankruptcy rules and the court's local rules, the court intends to grant the UST's motion in full and order Prior Counsel to disgorge all funds received for fees and costs, whether as a retainer or otherwise. The hearing will be continued by minute order. No appearance is necessary on May 14, 2014.

25.	09-29162-D-11 MAS-2	SK FOODS, L.P.	MOTION TO SELL 4-16-14 [4815]

This matter will not be called before 11:00 a.m.

26. 09-29162-D-11 SK FOODS, L.P. MOTION TO SELL
MAS-3 4-16-14 [4825]

This matter will not be called before 11:00 a.m.

27. 09-29162-D-11 SK FOODS, L.P. MOTION TO SELL
MAS-4 4-18-14 [4836]

This matter will not be called before 11:00 a.m.

28. 09-29162-D-11 SK FOODS, L.P. MOTION TO SELL
MAS-5 4-16-14 [4819]

This matter will not be called before 11:00 a.m.

29. 09-29162-D-11 SK FOODS, L.P. CONTINUED STATUS CONFERENCE RE:
11-2348 COMPLAINT
SHARP V. BLACKSTONE RANCH 5-6-11 [1]
CORPORATION ET AL

This matter will not be called before 11:00 a.m.

30. 13-35769-D-7 LARRY/CORINNA HAYES — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 4-2-14 [19]

TOYOTA MOTOR CREDIT CORPORATION VS.

Final ruling:

The matter is resolved without oral argument. The court's records indicate that the trustee has filed a statement of non-opposition, no other timely opposition has been filed and the relief requested in the motion is supported by the record. The debtors received their discharge on March 31, 2014 and, as a result, the stay is no longer in effect as to the debtors (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtors as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

31. 12-20571-D-7 PRITPAUL SAPPAL — MOTION TO EMPLOY GONZALES AND SISTO, LLP AS ACCOUNTANT(S)
DNL-6 — 4-11-14 [194]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to employ Gonzales and Sisto, LLP as accountant is supported by the record. As such the court will grant the motion to employ Gonzales and Sisto, LLP as accountant. Moving party is to submit an appropriate order. No appearance is necessary.

32. 13-35671-D-11 CARLYLE STATION LLC — MOTION TO CONVERT CASE TO CHAPTER 7 OR MOTION TO DISMISS CASE
UST-2 — 4-15-14 [126]

This matter will not be called before 10:45 a.m.

33. 13-35671-D-11 CARLYLE STATION LLC — MOTION FOR DETERMINATION OF THE REASONABLE VALUE OF THE SERVICES OF TORY M. PANKOPF, ESQ.
UST-3 — 4-16-14 [129]

This matter will not be called before 10:45 a.m.

34. 12-31973-D-7 CHESTER/SHERRI LEASURE — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 4-3-14 [108]
SANTANDER CONSUMER USA, INC.
VS.
Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtors received their discharge on October 8, 2014 and, as a result, the stay is no longer in effect as to the debtors (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtors as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

35. 11-24177-D-7 SCOTT/ROBIN PAYTON — MOTION FOR RELIEF FROM AUTOMATIC STAY
RCO-1 — 4-10-14 [107]
BANK OF AMERICA, N.A. VS.
Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtors received their discharge on December 18, 2012 and, as a result, the stay is no longer in effect as to the debtors (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtors as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

36. 14-21879-D-7 JASON/DAMETA DAVIS — MOTION FOR RELIEF FROM AUTOMATIC STAY
PD-1 — 4-15-14 [14]
WELLS FARGO BANK, N.A. VS.

Final ruling:

This matter is resolved without oral argument. This is Wells Fargo Bank, N.A.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

37. 11-22685-D-7 AMS-1 SHAPELL INDUSTRIES, INC. VS.
BLUE RIBBON STAIRS, INC.
MOTION FOR RELIEF FROM AUTOMATIC STAY
4-9-14 [1113]

Final ruling:

This matter is resolved without oral argument. This is Shapell Industries, Inc.'s motion seeking relief from automatic stay to pursue available insurance proceeds. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is cause for granting limited relief from stay to allow the moving party to proceed with litigation, as is necessary, to collect against available insurance proceeds. Accordingly, the court will grant limited relief from stay to allow the moving party to proceed to judgment against the debtor for the limited purpose of pursuing any available insurance proceeds. There will be no further relief afforded. Moving party is to submit an appropriate order. No appearance is necessary.

38. 11-22685-D-7 AMS-2 KB HOME SACRAMENTO, INC. VS.
BLUE RIBBON STAIRS, INC.
MOTION FOR RELIEF FROM AUTOMATIC STAY
4-10-14 [1119]

Final ruling:

This matter is resolved without oral argument. This is KB Home Sacramento, Inc.'s motion seeking relief from automatic stay to pursue available insurance proceeds. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is cause for granting limited relief from stay to allow the moving party to proceed with litigation, as is necessary, to collect against available insurance proceeds. Accordingly, the court will grant limited relief from stay to allow the moving party to proceed to judgment against the debtor for the limited purpose of pursuing any available insurance proceeds. There will be no further relief afforded. Moving party is to submit an appropriate order. No appearance is necessary.

39. 14-22492-D-12 CHARLES CORNELL
ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
4-16-14 [28]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

40. 14-20196-D-11 LABOUR OF LOVE CHURCH OF GOD IN CHRIST
UST-1
MOTION TO DISMISS CASE
4-8-14 [52]

41. 12-41497-D-7 KELLEY HODGSON
MBB-1
THE BANK OF NEW YORK MELLON
VS.
MOTION FOR RELIEF FROM AUTOMATIC STAY
4-7-14 [34]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that the trustee has filed a statement of non-opposition, no other timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received her discharge on March 25, 2013 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

42. 14-22401-D-7 GILBERTO/CARMEN MIRANDA
CONTINUED AMENDED MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
3-27-14 [22]

43. 14-22526-D-7 DAVID JONES
PA-2
MOTION TO EMPLOY ESTELA O. PINO AS ATTORNEY
4-30-14 [13]

44. 14-22149-D-7 TERRYLYN MCCAIN — MOTION TO DISMISS ADVERSARY PROCEEDING
14-2078 WSS-1 — 4-30-14 [18]
MCCAIN V. VANZETTI PROPERTIES, L.P. ET AL

Final ruling:

This is the motion of defendant Tim F. Tuitavuki (the "defendant") to dismiss the plaintiff's complaint in this proceeding pursuant to Fed. R. Civ. P. 12(b)(6), incorporated herein by Fed. R. Bankr. P. 7012(b). The motion will be denied because the moving party failed to give proper notice of the hearing. The notice of hearing states that any written response or opposition to the motion must be filed and served at least 7 calendar days before the hearing date. The notice adds, "A failure to file a written response or opposition to the Motion may waive the right to present opposition or be heard at the hearing on this Motion pursuant to Local Bankruptcy Rule 9014-1(f)(1)(B)." By contrast, the local rule cited, LBR 9014-1(f)(1)(B), requires the filing of written opposition at least 14 days prior to the hearing date, not seven days, and comes into play only where the moving party gives at least 28 days' notice of the hearing. Here, the moving party gave only 14 days' notice of the hearing, and was not at liberty to unilaterally shorten the written response deadline to a deadline of his choosing. The local rule is clear: when fewer than 28 days' notice is given, no written opposition is required (LBR 9014-1(f)(2)(C)), and the notice of hearing must so state. LBR 9014-1(d)(3). The cautionary language included in the notice here – that a failure to file written opposition may waive the right to be heard at the hearing – is directly contrary to the court's local rules.

Further, the moving papers include a docket control number previously used by the moving parties' co-defendants for their own motion. As with the notice of hearing, this is in contravention of the court's local rule. See LBR 9014-1(c).

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

45. 13-24251-D-7 LARRY/LAURA HAMILTON — MOTION FOR LEAVE TO AMEND ANSWER TO ADD AFFIRMATIVE DEFENSES
13-2201 ADS-1 — 4-23-14 [32]
BENGE ET AL V. HAMILTON

Tentative ruling:

This is the defendant's motion for leave to amend his answer to the plaintiff's complaint to add the affirmative defenses of laches and the statute of limitations. The plaintiff has filed opposition. For the following reasons, the motion will be denied.

The complaint commencing this adversary proceeding was filed on June 19, 2013. The defendant, through counsel, filed an answer on July 18, 2013. The answer did not include any affirmative defenses. The parties filed a joint discovery plan on August 8, 2013, in which they indicated that a trial date in late 2013 or early 2014 would allow them time to complete discovery. Both parties' attorneys appeared at a status conference on August 15, 2013. On August 19, 2013, the court issued a

scheduling order in which it set a discovery bar date of November 22, 2013 and a dispositive motions bar date of January 9, 2014. In early February 2014, both parties filed pretrial statements; the defendant did not indicate in his statement that he intended to seek leave to amend his answer. A pretrial conference was held on February 27, 2014, at which both parties' counsel appeared. Trial was set for June 9, 2014, and the pretrial conference was concluded. On February 27, 2014, the court issued a notice of and order for trial. On March 26, 2014, the plaintiff's counsel filed a statement noting the death of the plaintiff on March 4, 2014. On April 14, 2014, the plaintiff's counsel filed a motion to substitute the alleged administrator of the plaintiff's estate and alleged successor administrator of her trust as the plaintiff in this action. That motion, which is opposed by the defendant, is also on this calendar.

Under the rule that governs this motion, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The courts are to apply the rule "with extreme liberality," Forsyth v. Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997), considering the following factors: "(1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party." Id. These factors are not to be given equal weight, Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995); thus, "it is the consideration of prejudice to the opposing party that carries the greatest weight." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

The court takes seriously the admonition that motions for leave to amend are to be viewed with extreme liberality. However, in this case, the motion simply comes too late – nine months after the defendant filed his answer, five months after the close of discovery, and less than one month before the trial date. The defendant seeks to add two brand-new affirmative defenses that, it appears to the court, would be fact intensive. If the motion were granted, the court would need to vacate the trial date and set a new discovery bar date and a new dispositive motions bar date.

As to requests for amendments to pleadings, the scheduling order in this case was clear: "Any requests for amendments to pleadings . . . shall set forth the grounds for relief from this scheduling order. Requests for relief from this scheduling order are not favored and will ordinarily be denied unless the moving party makes a strong showing of diligence in complying with this scheduling order." Scheduling Order, filed Aug. 19, 2013, at 8:5-11. Although the defendant has not requested relief from the scheduling order, the granting of his motion would necessarily entail such relief. The court has considered the declarations of the defendant and his attorney in support of the motion, and finds that the defendant has failed to make a showing of diligence in complying with the order. That is, he has failed to make a showing of diligence in determining whether to seek to amend his answer. Accordingly, in light of the prejudice that would necessarily accrue to the plaintiff if the amendment were allowed, the motion will be denied. See Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999) ["A need to reopen discovery and therefore delay the proceedings supports a district court's finding of prejudice from a delayed motion to amend the complaint."].

The court will hear the matter.

46. 09-29162-D-11 SK FOODS, L.P.
SH-258

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH SEGAL & KIRBY, LLP
4-25-14 [4849]

This matter will not be called before 11:00 a.m.

47. 13-35671-D-11 CARLYLE STATION LLC

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
12-13-13 [1]

This matter will not be called before 10:45 a.m.

48. 13-35671-D-11 CARLYLE STATION LLC
TMP-2

CONTINUED MOTION TO USE CASH COLLATERAL
1-27-14 [26]

This matter will not be called before 10:45 a.m.

49. 13-35671-D-11 CARLYLE STATION LLC
TMP-4

CONTINUED MOTION TO VALUE COLLATERAL OF HERITAGE BANK OF COMMERCE
1-31-14 [52]

This matter will not be called before 10:45 a.m.

50. 11-22685-D-7 BLUE RIBBON STAIRS, INC. ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
4-23-14 [1130]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause. No appearance is necessary.

51. 11-22685-D-7 BLUE RIBBON STAIRS, INC. ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
4-24-14 [1131]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause. No appearance is necessary.

52. 13-28288-D-7 MICHAEL MATRACIA MOTION TO DISMISS CASE AND/OR
TMP-2 MOTION TO VACATE DISCHARGE OF DEBTOR
4-23-14 [87]

Tentative ruling:

This is the debtor's second motion to dismiss this chapter 7 case. The trustee opposed the first motion, and it was denied. This motion was noticed pursuant to LBR 9014-1(f)(2); thus, the court will hear opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

The debtor's first motion to dismiss was denied because, among other things, he had failed to appear at the meeting of creditors. He has now done so. However, although the debtor claims he has answered the trustee's questions and provided all the documents she has requested, the trustee has continued the meeting of creditors; it is now scheduled for the same date and time as the hearing on this motion. The court will hear from the trustee as to whether she opposes the motion.

In the meantime, however, the debtor has received a chapter 7 discharge, which he asks the court to vacate so he can, instead, deal with his debts outside of bankruptcy.[1] The debtor offers no authority for the proposition that the court may vacate a discharge simply because the debtor wishes to proceed outside of bankruptcy.[2] Because the court is aware of no authority for vacating a debtor's discharge after it has been entered, simply because the debtor requests it, the court intends to deny the motion. The court will hear the matter.

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1 Entry of a discharge does not prevent a debtor from voluntarily repaying his debts. See § 524(f) of the Code.

2 A debtor may request that the court defer entry of a discharge (Fed. R. Bankr. P. 4004(c)(2)); here, the debtor did not do so.

53. 14-21291-D-7 JOSEPH/NATALIE LAMAESTRA — MOTION FOR RELIEF FROM AUTOMATIC STAY
CJO-1 — 4-24-14 [11]
U.S. BANK TRUST, N.A. VS.

Final ruling:

The matter is resolved without oral argument. This motion was noticed under LBR 9014-1(f)(2). However, the debtors failed to list this property on their Statement of Intentions and the trustee has filed a Report of No Assets. Accordingly, the court finds a hearing is not necessary and will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

54. 13-29398-D-7 DAVID/CAROLYN SOWELS — MOTION TO AVOID LIEN OF RICHARD HANF
TJW-6 — 4-23-14 [54]

Final ruling:

This is the debtors' motion to avoid a judicial lien held by Richard J. Hanf, in his capacity as trustee for the bankruptcy estate of Ernesto Diaz (the "creditor"). The motion will be denied because the moving parties failed to serve the creditor in strict compliance with Fed. R. Bankr. P. 7004(b)(1), as required by Fed. R. Bankr. P. 9014(b). See Frates v. Wells Fargo, N.A. (In re Frates), 2014 Bankr. LEXIS 983, at *9-10 (9th Cir. BAP March 13, 2014). The moving parties served the creditor only through the attorney who obtained the abstract of judgment on the creditor's behalf, with no evidence that attorney is authorized to accept service of process for the creditor pursuant to Rule 7004 in adversary proceedings and contested matters in another bankruptcy case entirely. See Beneficial Cal., Inc. v. Villar (In re Villar), 317 B.R. 88, 93 (9th Cir. BAP 2004). By contrast, the creditor was required to be served directly, by mail to his dwelling house or usual place of abode or to a place where he regularly conducts a business or profession. Rule 7004(b)(1).

As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

55. 13-29398-D-7 DAVID/CAROLYN SOWELS — MOTION TO AVOID LIEN OF WILLIAM HEZMALHALCH ARCHITECTS, INC.
TJW-7 — 4-23-14 [59]

Final ruling:

This is the debtors' motion to avoid a judicial lien held by William Hezmalhalch Architects, Inc. (the "creditor"). The motion will be denied for the following reasons. First, the moving parties failed to serve the creditor in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). See Frates v. Wells Fargo, N.A. (In re Frates), 2014 Bankr. LEXIS 983, at *9-10 (9th Cir. BAP March 13, 2014). The moving parties served the creditor only through the attorney who obtained the abstract of judgment on the creditor's behalf, with no evidence that attorney is authorized to accept service of process for the creditor pursuant to Rule 7004 in adversary proceedings and contested matters in

another case entirely. See Beneficial Cal., Inc. v. Villar (In re Villar), 317 B.R. 88, 93 (9th Cir. BAP 2004). By contrast, the creditor was required to be served directly, to the attention of an officer, managing or general agent, or agent for service of process. Rule 7004(b)(3).

Second, the copy of the abstract of judgment filed as an exhibit names Noonan Ranch Partners, LLC, as the judgment debtor, not the debtors in this case. Although the box on page 1 of the abstract is checked, indicating that information on additional judgment debtors is shown on page 2, there is no copy of page 2 attached. Absent evidence that the lien attached to property of the debtors, there is no lien for the court to avoid. See In re Goswami, 304 B.R. 386, 390-91 (9th Cir. BAP 2003), citing In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992).

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

56.	13-29398-D-7 TJW-8	DAVID/CAROLYN SOWELS	MOTION TO AVOID LIEN OF FIDELITY NATIONAL TITLE COMPANY, INC. 4-23-14 [64]

Final ruling:

This is the debtors' motion to avoid a judicial lien allegedly held by Fidelity National Title Company (the "creditor"). The motion will be denied because the moving parties failed to serve the creditor in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). See Frates v. Wells Fargo, N.A. (In re Frates), 2014 Bankr. LEXIS 983, at *9-10 (9th Cir. BAP March 13, 2014). The moving parties served the creditor only through the attorney who obtained the abstract of judgment on the creditor's behalf, with no evidence that attorney is authorized to accept service of process for the creditor pursuant to Rule 7004 in adversary proceedings and contested matters in another case entirely. See Beneficial Cal., Inc. v. Villar (In re Villar), 317 B.R. 88, 93 (9th Cir. BAP 2004). By contrast, the creditor was required to be served directly, to the attention of an officer, managing or general agent, or agent for service of process. Rule 7004(b)(3).

The court notes that the creditor's abstract of judgment filed as an exhibit names Golf Homes and Land, LLC, as a judgment debtor, as well as debtor David Sowels. In the event a subsequent motion to avoid lien is filed and granted, the order will make clear that the lien is avoided as to the debtor's property, and not as to property, if any, of Golf Homes and Land, LLC.

As a result of the above service defect, the motion will be denied by minute order. No appearance is necessary.

57. 13-29398-D-7 TJW-9 — DAVID/CAROLYN SOWELS — MOTION TO AVOID LIEN OF NORTH VALLEY BANK
4-23-14 [69]

Final ruling:

This is the debtors' motion to avoid a judicial lien allegedly held by North Valley Bank (the "creditor"). The motion will be denied because the moving parties failed to serve the creditor in strict compliance with Fed. R. Bankr. P. 7004(h), as required by Fed. R. Bankr. P. 9014(b). See Frates v. Wells Fargo, N.A. (In re Frates), 2014 Bankr. LEXIS 983, at *9-10 (9th Cir. BAP March 13, 2014). The moving parties served the creditor only through the attorney who obtained the abstract of judgment on the creditor's behalf, with no evidence that attorney is authorized to accept service of process for the creditor pursuant to Rule 7004 in adversary proceedings and contested matters in another case entirely. See Beneficial Cal., Inc. v. Villar (In re Villar), 317 B.R. 88, 93 (9th Cir. BAP 2004). Here, the creditor was required to be served directly, by certified mail, to the attention of an officer (and only an officer). Rule 7004(h).

As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

58. 14-23398-D-11 — JANE LYNCH — CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
4-1-14 [1]

Final ruling:

This case was converted to a case under Chapter 7 on May 5, 2014. Accordingly, this status conference is concluded. No appearance is necessary.

59. 13-35671-D-11 CJJ-3 — CARLYLE STATION LLC — MOTION TO RECONSIDER ORDER GRANTING RELIEF FROM STAY
O.S.T.
5-6-14 [144]

This matter will not be called before 10:45 a.m.