UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

May 22, 2014 at 10:30 a.m.

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1. 13-90901-E-12 ANDREW NAPIER — MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
JPJ-1 Scott A. CoBen — 4-8-14 [206]

THE HEARING SHALL BE CONDUCTED AT 3:30 P.M. ON MAY 22, 2014, IN CONJUNCTION WITH THE COURT ORDERED POST-CONFIRMATION STATUS CONFERENCE

Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 8, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

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

The court's decision is to grant the Motion to Dismiss and dismiss the case.

The Chapter 12 Trustee seeks dismissal of the case on the basis that the Debtor is $23,320.79 delinquent in plan payments, which represents three (3) months of the plan payment. Failure to make plan payments is sufficient cause to dismiss the case. 11 U.S.C. § 1208(c)(6).

RESPONSE

Counsel for Debtor responds, stating that Debtor will be current by the date of this hearing.

However, no evidence has been presented in support of Debtor either intending to be current or in fact being current on plan payments to date. Therefore, the motion is granted.

Further, no explanation is provided as to why the Debtor has defaulted under the confirmed plan, why such default should not likely reoccur, and how the Debtor could come up with the “extra” money to cure the defaults.

The Debtor has failed, or refused, to provide any testimony under penalty of perjury in opposition to the Motion to Dismiss. Rather, the court is provided only with a short, one-line response. Dckt. 216.

This is not the Debtor’s first case. It is his third case since March 2010. The Debtor has been challenged in this case with complying with the Bankruptcy Code and being forthright with the court. As stated by the court in the Civil Minutes from the confirmation hearing,

> In his declaration, the Debtor states that Exhibit A is his budget showing $5,100.00 a month in disposable income. This is not the number shown on the budget for average monthly income (which does not list any personal expenses). The Debtor provides no testimony as to how he computes $75,000.00 a month in gross income and the $67,280.00 a month in expenses. The court is not provided with any historical analysis of the income and expenses or evidence to give any credibility to these numbers. This Debtor has filed and confirmed plans in two prior Chapter 13 cases, both of which were dismissed because of substantial defaults under the plans. Clearly the financial information provided by the Debtor to the Chapter 12 Trustee, creditors, and the court did not bear accurate in light of actual events. FN.1. The Debtor has failed to provide the court with any credible testimony as to the feasibility of this Plan. Rather, he merely provide a "believe me because I say its true" statement.
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> Case No. 10-27953, Filed March 29, 2010; Dismissed March 15, 2011.
> In Chapter 12 case 10-27953 the Debtor confirmed a Chapter 12 Plan on July 26, 2010. Dckt. 97. The Plan required monthly payments by the Debtor of $28,320.92. Plan, Dckt. 90. The budget that the Debtor provided in support of confirmation listed monthly average income of $83,256. Exhibit A, Dckt. 92. The average monthly expenses shown on the budget were $55,799. On January 20, 2011, the Chapter 12 Trustee filed a motion to dismiss, asserting that the Debtor was $43,057 delinquent in plan payments, with another monthly payment of $19,236.92 being due on February 1, 2011. Motion, Dckt. 176; Declaration, Dckt. 178. No opposition was filed to the motion.

Case 11-21063, Filed January 14, 2011; Dismissed May 20, 2013. In Chapter 12 case 11-21063 the Debtor confirmed a Chapter 12 Plan on August 31, 2011. Order, Dckt. 88. Under the terms of the Plan the Debtor was required to make $7,050 a month payments of the Chapter 12 Trustee for a period of 36 months. Plan, Dckt. 77. The Debtor provided his declaration in support of confirmation, providing an income and expense projection which was filed as Exhibit A. Declaration, Dckt. 75; Exhibit A, Dckt. 76. For the income projections the Debtor testified to having average gross monthly revenues of $66,000 and monthly non-personal expenses of $56,880. This resulted in his testimony that his average monthly net income was $9,120.00. On March 21, 2013, the Chapter 12 Trustee filed a motion to dismiss asserting that the Debtor was $34,600 in default on the plan payments. Motion, Dckt. 185; Declaration, Dckt. 187. No opposition was filed to the Motion.

...

(6) The debtor will be able to make all payments under the plan and to comply with the plan;

Court Finding: This element is the most problematic for the Debtor in Possession. For two prior cases the Debtor's in Possession testimony under penalty of perjury as to the financial operation of his business and assurances that the two prior confirmed plan were feasible have turned out to be inaccurate. The declaration in the present case is devoid of any evidence from which the court can determine whether the Debtor's in Possession conclusions that the current Plan is feasible are realistic.

The Debtor in Possession argues that he has so significantly changed his business in the last several months that no historic data is relevant. He further argues that he has paid a significant amount to creditors under the prior two plan. As the court noted at the hearing, when a person has a business which generates substantial cash flow and has substantial debt to be paid, making partial payment two prior times and defaulting is not a significant victory. Though significant payments were made, significant defaults occurred and significant claims went unpaid.

The creditor support the Plan, from which the court infers that they believe the Plan is feasible. The court will rely on this inference as "evidence" presented by the creditors their withdrawal of oppositions and affirmative support at the confirmation hearing.

Though sketchy at best, the court will find that this plan is "feasible as any possible plan could be in this case" and give the Debtor in Possession and creditors what they want confirmation of the Plan. As the court admonished the Debtor in Possession at the confirmation hearing, if he defaults under this Plan, the court expects him to immediately address the default with his counsel. In the past, it

> appears that the Debtor ignored the defaults and left it to the Chapter 12 Trustee to file and obtained orders dismissing the case.

Civil Minutes, Dckt. 186.

In confirming the Plan, the court noted that the Debtor was getting a second second-chance, and should not squander it. It appears that he has, spending monies for purposes other than performing his confirmed Chapter 12 Plan. His ex-wife, has raised significant issues concerning the information provided to this court under penalty of perjury by Mr. Napier. While the court acknowledges that an ex-spouse may not be the most unbiased, often times an “ex-“ (spouse, partner, business associate) may provide accurate information.

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 12 case filed by the Chapter 12 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

2. 14-90409-E-7 LAURENCE SPEER — MOTION TO COMPEL ABANDONMENT
JDP-1 James D. Pitner — 4-3-14 [11]

Tentative Ruling: The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, and Office of the United States Trustee on April 3, 2014. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Abandon Property is granted for all property except the Business Checking and Savings Account with Rabobank.

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

The Motion filed by Laurence Elliott Speer ("Debtor") requests the court to order the Trustee to abandon his sole proprietorship dba Speer Flooring Outlet with the following assets:

1. Business name "Speer Flooring Outlet"

2. Business checking and savings account with Rabobank ending in 6838 with an approximate balance of $1,392.00;

3. Carpet displays with no value;

4. Hand and power tools worth approximately $2000;

5. Computer and printer worth $250;

6. A fork lift worth $1,000;

7. A leased credit card machine worth $200;

8. 2012 Toyota Tundra worth $21,808.00 (encumbered with loan of $28,650.02 with Toyota Financial)

(the "Property"). Debtor states that the business has no marketable value outside Debtor's own efforts and is the Debtor's main occupation at the present time. Debtor states that the equity in the Property is exempted pursuant to C.C.P. Sections 703.140(b)(5) and 703.140(b)(6) as set forth in Debtor's Schedule C.

TRUSTEE'S LIMITED OPPOSITION

The Chapter 7 Trustee filed a limited opposition to the abandonment of the business bank account at Rabobank with an approximate balance of $1,392.00. Trustee states that this account will not be fully exempt and therefore should not be abandoned. Trustee states that this portion of relief should be denied.

DISCUSSION

A review of the docket shows that Debtor filed amended Schedule B and C on May 9, 2014. Dckt. 23. Debtor now lists the Business checking and savings account with Rabobank ending in 6838 with a balance of $1,242.69. Debtor only exempts $399.77 of the $1,242.69 on the amended Schedule C. Debtor does not provide an explanation or amendment to the Motion for Abandonment with the amended Schedules. However, it does not appear even with the amendments that Debtor fully exempts the Business checking and savings account with Rabobank. Therefore, the court does not find abandonment proper regarding the business and checking account with Rabobank.

The court determines that the Property, except for the Rabobank business checking and savings account, is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by Laurence Elliott Speer ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the Property identified as:

1. Business name "Speer Flooring Outlet"
2. Carpet displays with no value;
3. Hand and power tools worth approximately $2000;
4. Computer and printer worth $250;
5. A fork lift worth $1,000;
6. A leased credit card machine worth $200;
7. 2012 Toyota Tundra worth $21,808.00 (encumbered with loan of $28,650.02 with Toyota Financial)

and listed on Schedule B by Debtor is abandoned to Laurence Elliott Speer by this order, with no further act of the Trustee required.

3. 13-90514-E-7 SSA-3 — ESTHER MARIN, Pro Se — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH RANDY MCMURRAY 4-9-14 [33]

DISCHARGED 7-3-13

Tentative Ruling: The Motion to Approve Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on April 9, 2014. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirement.)

The Motion For Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of

nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties in interest are entered.

The Motion For Approval of Compromise is granted.

Irma Edmonds, the Chapter 7 Trustee ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Stanislaus Surgical Hospital, Jason Hiat, D.P.M. and the Doctors Company ("Settlor"). The claims and disputes to be resolved by the proposed settlement stem from a medical malpractice lawsuit in Stanislaus County.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit 1 & 2 in support of the Motion, Dckt. 37):

> Following counsel's appointment in this matter, he and Trustee Edmonds participated in a settlement conference in Stanislaus Superior Court on February 20, 2014, before the Honorable Roger M. Beauchesne, Department 24. At the conference, the Court and the parties present secured settlement of debtor's outstanding claims in this matter for the total principal sum of $72,500. The foregoing is allocated, as follows: $33,835 as against Stanislaus Surgical Hospital and $38,665 as against Jason Hiat, D.P.M. and the Doctors Company. The settlement agreements and releases have been signed by Special Counsel, Randy McMurray, Trustee Irma Edmonds, in her capacity as Trustee for debtor's estate and also debtor, Esther Marin.

However, the Trustee states she and Special Counsel have gotten into a dispute regarding propriety of the turnover of the settlement funds. Trustee states she has requested the entire funds as property of the estate and pursuant to her duties as Chapter 7 Trustee but that the McMurray firm contends that pursuant to the present Court order appointing said firm and endorsements of the settlement proceeds in their favor and debtor Marin, absent court order they are justified in holding the funds in question and it is believed the contend they are doing so out of, in part, to fulfill their fiduciary duties.

Trustee requests the court to direct the full gross proceeds received by Special Counsel of $72,500 to be deposited into her trust account. The Trustee states she is filing a motion to secured Special Counsel's fees and costs for this matter.

OPPOSITION

Special Counsel McMurray Henriks, LL partially objects to the Trustee's Motion, requesting that the Court deny the Trustee's request for an order directing the full gross proceeds received by Special Counsel for $72,500.00 to be deposited into the Trustee's account. Special Counsel requests an order directing it to deduct the amount of approved fees and costs from the settlement proceeds currently held in the trust account and remit the remainder to the Trustee.

Special Counsel states that Trustee's request is unjustly burdensome to Special Counsel, which is a small, self-funded law firm, and which took a big risk and advanced a significant amount of costs and expenses to fund the underlying medical malpractice lawsuit – at Trustee's request.

REPLY

Trustee states that notwithstanding the prior engagement agreement executed between the Debtor and Special Counsel, it is clear that the settlement proceeds arising from the resolution of the medical malpractice claim constitutes property of the estate. Trustee states she is fulfilling her normal assigned duties and that there will not be any hardship to the firm if funds are remitted to the Trustee and thereafter disbursed.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released.

Probability of Success

Trustee states that the litigation is a medical malpractice case which is a specialized area of law. The Trustee believes based upon her communications with Special Counsel and his firm that the debtor does have a meritorious case and would prevail on the issue of liability with a high degree of certainty at time of trial. However that said, litigation involving medical malpractice is costly. Additionally, the unknown variables in this matter are both the costs of litigation to get this matter to trial, coupled with the uncertainty as to the nature and extent of damages a jury, as the trier of fact, would award in this case.

Difficulties in Collection

Since there are medical doctors and a medical facility, which carries malpractice insurance, Trustee states the issue of collection in this matter is not at issue.

Expense, Inconvenience and Delay of Continued Litigation

Trustee argues that the medical malpractice area of law is itself a speciality of which a limited number of counsel practice. It entails significant understanding of medial care, diagnosis, procedures in the operating room and standard of care involving hospitals or medical facilities and physicians and their support staff. Based upon the nature and complexity of this matter, number of parties, Trustee estimates that after start of a jury trial, this matter would take a minimum of 5 to 7 days to try. The case would involve multiple parties, including doctors or hospital experts on both sides, discussing standard of care and negligence issues. In addition, other health care witnesses and also potential economic experts could be called concerning debtor's medical condition, emotional and/or economic losses and residual injuries. Trustee states that conservatively speaking, trial costs alone could exceed $20,000.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to the Movant to purchase or prosecute the property, claims, or interests of the estate to present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The motion is granted.

SETTLEMENT PROCEEDS AND SPECIAL COUNSEL FEES

On January 19, 2014, the court filed its order authorizing the employment of McMurray Henriks, LLP (formerly the Cochran Firm) as special counsel for the Chapter 7 Trustee. The employment was authorized on the terms set forth in the Contingent Fee Agreement (Exhibit 1, Dckt. 26) and as allowed pursuant to 11 U.S.C. §§ 330 and 328. Order, Dckt. 30.

The fee agreement provides for a contingent fee computed on the following percentages,

A. 40% of the first $50,000.00 recovered;

B. 33 1/3% of the next $50,000.00 recovered;

C. 25% of the next $500,000.00 recovered;

D. 15% of the recovery which exceeds $600,000.00 recovered on the claim, by way of settlement or judgment.

In addition, attorneys will be reimbursed for the costs and expenses which were necessary to advance in asserting the estate's claims. The Fee Agreement provides for the granting of an attorneys' lien on the claim, to the extent permitted by law, to secure the monies due McMurray Henriks, LLP under the Fee Agreement.

The court notes that, as required by the Bankruptcy Code and pursuant to the terms of the order authorizing employment, the Chapter 7 Trustee has filed a motion for approval of attorneys' fees and costs for McMurray Henriks, LLP. DCN: SSA-4, Dckt. 39, set for hearing on May 22, 2014. The Motion computes the payment of fees and costs to Special Counsel based on a $72,500.00 recovery (presuming that the court will approve the current compromise).

The Trustee seeks to have allowed, and be authorized to pay Special Counsel $23,843.64 in fees (which is the amount computed using the percentage schedules in the Fee Agreement, after deducting the costs to be reimbursed) and $10,969.08 in costs (all costs and expenses billed by Special Counsel).

The Trustee requests in the present Motion that the court not only approve the Settlement, but order Special Counsel to turn over the $75,000.00 settlement proceeds – which are property of the bankruptcy estate. 11 U.S.C. § 541. The Chapter 7 Trustee is the person authorized to collect and hold property of the estate. 11 U.S.C. § 704(a)(1),(2).

The Trustee asserts that a dispute has arisen and Special Counsel has taken possession and control of the settlement proceeds, refusing to turn them over to the Trustee. Special Counsel purports to be fulfilling its "fiduciary duty" by retaining possession of the property of the estate to the exclusion of the Chapter 7 Trustee.

In asserting the right to retain possession of property of the Estate, and as justification for refusing to deliver the property of the Estate to the Trustee, Special Counsel argues that the court issue an order allowing Special Counsel to pay itself "approved fees and costs" from the settlement. It is asserted that the Court's order authorizing the Trustee to employ Special Counsel binds the Trustee. Opposition, Dckt. 47.

In the points and authorities portion of the Opposition, Special Counsel argues that if it is required to comply with Bankruptcy Law and turn over the property of the estate to the Trustee, it "would penalize counsel for a job well done and would tell counsel and all other attorneys that they should think twice before again working for persons or business in bankruptcy proceedings." Quoting *In re Confections By Sandra, Inc.*, 83 B.R. 729, 732-733 (B.A.P. 9th Cir. 1987). Interestingly, Special Counsel provides no argument as to why turning over this property of the estate to the Trustee as required under the Bankruptcy Code, having Special Counsel's fees approved, and then have Special Counsel's fees paid like every other professional in a bankruptcy case would "penalize counsel." Rather, it appears that Special Counsel contends that it is "above the law," and it will act on its own terms without regard to the law.

While citing *In re Confections by Sandra, Inc.* for a sensational quote, it does not appear that the decision has been considered for the merits of the decision. In that case, the bankruptcy court reduced the fees of counsel under a contingent fee agreement from the percentages approved at the time of employment. The Bankruptcy Appellate Panel reversed the trial court, finding that the bankruptcy court judge did not make any findings that the prior approved fee computation method was "improvident in light of developments unanticipated." See 11 U.S.C. § 328(a).

In reading *In re Confections by Sandra, Inc.*, the court could not find the "quote" stated by Special Counsel in its opposition. Rather, Special Counsel has truncated the quote, making it misleading. The full quote from the case is,

> "The [Minnesota District] court stated, "'**to deny the fee now because it exceeds time charges and looks high in hindsight** would penalize counsel for a job well done and would tell counsel and all other attorneys that they should think twice before again working for' persons or businesses in bankruptcy proceedings." Id. at 49 (citing Boston and Maine Corp., supra 778 F.2d at 895)."

In re Confections by Sandra, Inc., 83 B.R. at 732 (emphasis added).

It appears that Special Counsel's argument is merely that if it is not allowed to keep all of the money it says it is entitled to, then it is penalized. That is not the law, and that is not what was stated by the Bankruptcy Appellate Panel.

The court has not appointed Special Counsel to be the "Super Fiduciary" of the bankruptcy estate to supplant the Trustee and withhold property of the estate from the Trustee. The court's order approving employemnt expressly provides that fees can be paid only after approved by the court pursuant to 11 U.S.C. §§ 330 and 328. The order includes the standard language that funds received by the counsel are property of the bankruptcy estate. Further, that any funds received which constitute an "advance payment" shall be held in the attorney-client trust account.

The Chapter 7 Trustee made no payment to Special Counsel. The Debtor made no payment to Special Counsel. The court did not authorize the Trustee to make any advance payment (retainer) to Special Counsel. In effect, what has happened is that Special Counsel has highjacked the settlement proceeds, which are 100% property of the bankruptcy estate. Special Counsel may have a lien on such property of the estate, but that does not give Special Counsel the ability to withhold property of the estate from the Trustee (any more than a deed of trust on real property would, in and of itself, allow Bank of America, N.A. to unilaterally take possession of the property from a trustee).

The court grants the Trustee's request and also orders Special Counsel to turn over all of the settlement proceeds to the Trustee. Such proceeds remain subject to all liens of Special Counsel and the right to be paid, in the manner specified in the Bankruptcy Code, for professionals engaged by the Trustee. FN.1.

FN.1. The court does not know if Special Counsel works in an environment where attorneys and clients actively work to lie, cheat, and steal from each other, or where the courts do not apply the law, but act on an ad hoc, whim of the judge manner. That is not the practice in this court or the Eastern District of California. Being familiar with the judges in the Bankruptcy and District Courts for the Central District of California, this court is confident that such does not occur in those federal courts either.

It should also not be strange for Special Counsel that the Trustee, as the fiduciary for the bankruptcy estate, should properly receive, account for, and distribute the property of the estate. While in some circumstances payments from sale escrows (real estate agents) or other transactions may be authorized, such was not sought in conjunction with this matter by the Trustee.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Irma Edmonds, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve Compromise between Movant and Stanislaus Surgical Hospital, Jason Hiat, D.P.M. and the Doctors Company ("Settlor") is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit 1 & 2 in support of the Motion (Docket Number 37).
>
> **IT IS FURTHER ORDERED** that McMurray Henriks, LLP shall turnover the $70,500.00 in settlement proceeds to the Chapter 7 Trustee on or before May 29, 2014. Any and all liens and interests which McMurray Henriks, LLP may assert in the settlement proceeds while in its possession, continue in full force and effect, subject to the order authorizing employment of McMurray Henriks, LLP by the Trustee and applicable law, including 11 U.S.C. §§ 330 and 328.

4. 13-90514-E-7 ESTHER MARIN — MOTION FOR COMPENSATION FOR RANDY MCMURRAY, SPECIAL COUNSEL
SSA-4 Pro Se — 4-9-14 [39]

DISCHARGED 7-3-13

Tentative Ruling: The Motion For Compensation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of

the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on April 9, 2014. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirements.)

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Irma C. Edmonds, Chapter 7 Trustee moves for approval of fees for Special Counsel, McMurray Henriks, LLP, "Attorney" ("Applicant") for Chapter 7 Trustee ("Client") for legal services rendered and expenses incurred on behalf of the bankruptcy estate for prosecution of the underlying legal claim: *Marin v. Stanislaus Surgical Center et al.*, Stanislaus Superior Court No. 667873. The order of the court approving employment of Applicant was entered on January 19, 2014, Dckt. 30.

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in a medical malpractice lawsuit in Stanislaus County, for which Client agreed to a contingent fee of 40% of the first $50,000 and 33 1/3% of the next $50,000.00 of the net after payment of expenses. In approving the employment of applicant, the court approved the contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). Dckt. 30.

Applicant seeks $10,969.08 for reimbursable costs, for postage, filing fees, traveling costs, deposition costs, medical record fees and expert fees. Exhibit 1, Dckt. 43.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (I) unnecessary duplication of services; or
> (ii) services that were not--
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958

(9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including settling the medical malpractice suit. The estate has $39,687.28 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

The court finds that the fees computed on a percentage basis recovery for Client to be reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees of $37,687.28 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant. The Trustee is authorized to disburse from the available funds of the Estate in a manner consistent with the order of distribution in the Chapter 7 case.

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

Fees, Costs and Expenses $37,687.28

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Irma C. Edmonds, Chapter 7 Trustee for Special Counsel,

McMurray Henriks, LLP, "Attorney" ("Applicant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that McMurray Henriks, LLP is allowed the following fees and expenses as a professional of the Estate:

McMurray Henriks, LLP, Professional Employed by Trustee

Fees and Expenses in the amount of $ 37,687.28

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the Settlement Proceeds received for the Stanislaus Surgical Hospital, Jason Hiat, D.P.M. and the Doctors Company claims of the estate, in a manner consistent with the order of distribution in a Chapter 7 case. The Trustee is authorized to immediate pay such fees from the Settlement Proceeds and is not required to wait until the final distribution in this case.

5. 11-91536-E-7 FRANK/MELISSA BADILLO — MOTION TO AVOID LIEN OF DISCOVER BANK
JDP-2 Ann Marie Friend — 4-9-14 [23]

DISCHARGED 8-15-11

Final Ruling: No appearance at the May 22, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on April 9, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid a Judicial Lien is granted.

A judgment was entered against the Debtor in favor of Discover Bank for the sum of $6,074.07. The abstract of judgment was recorded with Stanislaus County on August 17, 2010. That lien attached to the Debtor's residential real property commonly known as 2623 River Creek Circle, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $145,000.00 as of the date of the petition. The unavoidable consensual liens total $157,723.40 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Discover Bank, Stanislaus County Superior Court Case No. 646868, recorded on August 17, 2010, Document No. 2010-0072456-00, with the Stanislaus County Recorder, against the real property commonly known as 2623 River Creek Circle, Modesto, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

6.	**12-92036-E-7 UST-3**	**REYNOL GARCIA AND ENEDINA GARICA Thomas O. Gillis**	**MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR 4-16-14 [141]**

Final Ruling: No appearance at the May 22, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 16, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Extend the Time to File an Objection to Discharge was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Extend the Time to File an Objection to Discharge is granted.

The United States Trustee ("UST") seeks an extension of time to object to the entry of Debtor's discharge. The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b). The UST explains that the court required the Debtors to make a noticed motion before the discharge would be entered (the last day to object to the Debtors' discharge in the Chapter 7 case was February 12, 2013). On February 18, 2014, the Court entered an order compelling the Debtors to appear at a Special Meeting of Creditors on March 13, 2014. UST states that Debtors did not appear and the meeting was continued to April 10, 2014. UST argues that no medical excuse was provided why Debtors appeared at the continued meeting. UST states that Debtors again failed to appear at the continued meeting of creditors but that their counsel of record, Mr. Gillis, attending to inform the Trustee that the Debtors would not be attending any future meetings because they suffered from emotional trauma. The UST states that she plans to file a complaint objecting to Debtor's discharge and that cause exists due to Debtors failure to obey the court order to attend the Special Meeting of Creditors.

The court finds the Debtors failure to attend the court ordered Special Meeting of Creditors is sufficient cause to extend the deadline to file an objection to discharge. Therefore, the motion is granted and the deadline for the Trustee to object to Debtor's discharge is extended to May 31, 2014.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Time to File an Objection to Discharge filed by the United States Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the deadline for the United States Trustee to object to Debtor's discharge is extended to May 31, 2014.

7. 14-90437-E-7 JDP-1 | **BRETT/CHERYL WINFREY** **James D. Pitner** | **MOTION TO AVOID LIEN OF TD BANK USA, N.A.** **4-7-14 [9]**

Final Ruling: No appearance at the May 22, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on April 7, 2014. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid a Judicial Lien is granted.

A judgment was entered against the Debtor in favor of TD Bank USA, N.A. for the sum of $2,738.45. The abstract of judgment was recorded with Stanislaus County on January 2, 2014. That lien attached to the Debtor's residential real property commonly known as 252 N. Reinway Ave., Waterford, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $164,000.00 as of the date of the petition. The unavoidable consensual liens total $195,159.44 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of TD Bank USA, N.A., Stanislaus County Superior Court Case No. 682284, recorded on January 2, 2014, Document No. 2014-0000080-00, with the Stanislaus County Recorder, against the real property commonly known as 252 N. Reinway Ave., Waterford, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

8. 13-90950-E-7 FEDERICO/ILENE RUEZGA — MOTION TO ABANDON
MDM-4 James P. Mootz — 4-11-14 [97]

Final Ruling: No appearance at the May 22, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 11, 2014 By the court's calculation, 41 notice was provided. 28 days' notice is required.

The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b).

Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Michael D. McGranahan ("Trustee") requests the court to authorize Trustee to abandon property commonly described as:

A. One (1) commercial lot, 7,212 sf, Stanislaus County APN 044-053-001, located on Lander Ave., Turlock, CA

B. One (1) commercial lot, 6,488 sf, Stanislaus County APN 044-053-002, located on Lander Ave., Turlock, CA

C. One (1) commercial lot, 6,488 sf, Stanislaus County APN 044-053-003, located on Lander Ave., Turlock, CA

The Trustee states that the value of all three properties are $200,000.00, and the debt on all three properties total $197,816.00. The properties are encumbered by:

1. A First Deed of Trustee in favor of Farmers & Merchants Bank, securing a claim of $95,000;

2. a second deed of trust in favor of Wenceslada Ruezga in the amount of $95,000;

3. and a tax lien in favor of the State of California in the amount of $7,816.

The property value of $200,000.00 is for all three lots and is based on information provided by a licensed real estate broker. The Declaration of Michael D. McGranahan has been filed in support of the motion and testifies that the value of the Property is $200,000.00. Dckt. No. 99.

Trustee states that all three properties are co-owned by non-debtor Nasario Ruezga, debtor's brother. Therefore, the bankruptcy estate owns a one-half interest in the properties. Taking into account mortgages, liens, partial interests, and costs of sale, the properties have no equity for the benefit of the estate, and are over-encumbered and burdensome to the estate Trustee asserts that the estate would potentially suffer detrimental tax consequences should these Properties be foreclosed upon during the pendency of the case.

The court finds that the Property secures claims which exceed the value of the Property, and are negative financial consequences for the Estate if it retains the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and authorizes the Trustee to abandon the Property.

ISSUANCE OF COURT ORDER

The court shall issue an order (not a minute order) substantially in the following form holding that:

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

The Motion to Abandon Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the Property identified as:

1. One (1) commercial lot, 7,212 sf, Stanislaus County APN 044-053-001, located on Lander Ave., Turlock, California

2. One (1) commercial lot, 6,488 sf, Stanislaus County APN 044-053-002, located on Lander Ave., Turlock, California

3. One (1) commercial lot, 6,488 sf, Stanislaus County APN 044-053-003, located on Lander Ave., Turlock, California

is abandoned to Federico Ruezga and Ilene G. Ruezga by this order, with no further act of the Trustee required.

9. 12-92570-E-12 COELHO DAIRY **MOTION TO COMPEL**
TOG-41 Thomas O. Gillis **5-6-14 [494]**

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

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

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

Local Rule 9014-1(f)(2) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the respondent creditor, the Chapter 12 Plan Administrator, and the Office of the United States Trustee on May 6, 2014. By the court's calculation, 16 days' notice was provided. 14 days' notice is required. That requirement was met.

The Motion to Compel Responses to a Request Production of Documents has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Creditor having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is to deny the Motion to Compel Responses to a Request Production of Documents.

Debtor-in-Possession, Coelho Dairy, seeks an order compelling Creditor Black Rock Milling, LLC, to produce the records requested in Debtor-in-Possession's Request for Production of Documents (Set 2), a copy of which is attached to this Motion as Exhibit "A." Debtor-in-Possession also requests that the court sanction Black Rock Milling, LLC, pursuant to Federal Rule of Civil Procedure 37.

Debtor-in-Possession states that on March 6, 2014, Debtor-in-Possession served on Black Rock Milling, LLC, a Request for Production of Documents, Set 2. Exhibit A. At the March 27, 2014 hearing for the Confirmation of Debtor-in-Possession's proposed Chapter 12 Plan, Debtor-in-Possession's Counsel Thomas O. Gillis requested that Black Rock Milling, LLC, respond to his request for the Production of Documents, Set 2. The attorney for Black Rock Milling, LLC, told Mr. Gillis that he would have the records to him in two weeks.

On May 1, 2014, Mr. Gillis called Black Rock Milling, LLC's counsel (Mr. Dyer) to inquire about the responses, and to ask why he hadn't signed off on approving the Proposed Order Confirming Plan. Mr. Dyer's secretary stated that Mr. Dyer was in court, and that Mr. Dyer would return Mr. Gillis's call. Mr. Gillis states that he has not yet received a call. On May 2, 2014, Mr. Gillis mailed a demand letter, asking for responses to the Request for Production of Documents. Exhibit B. Debtor-in-Possession states that to date, these responses to the Request for Production have not been received.

OPPOSITION BY CREDITOR

Creditor Black Rock Milling ("Black Rock"), opposes the Motion to compel on the basis that the Debtor-in-Possession is bringing a Motion to Compel for Discover sought in a dismissed adversary proceeding. Additionally, Black Rock states that it intends to provide debtor with all the information requested.

Black Rock states that the Request for Production at issue is for the adversary proceeding, Case No. 14-09002, that was filed by Black Rock, which was dismissed on February 12, 2014. Black Rock states that the Debtor-in-Possession has no right to seek information in a dismissed matter.

Black Rock also states that it has attempted to provide the Debtor-in-Possession with the requested information. On May 1,2014, Black Rock sent a letter to Debtor-in-Possession, stating that Black Rock was having difficulty providing the information in a format in which the information could not be altered.

On May 8, 2014, Black Rock provided Debtor's with a thumb drive including electronic copies of the documents requested. Debtor's counsel stated that the thumb drive did not provide the correct format of the information requested and when such information is provided the present motion would be withdrawn. On May 13, 2014, Black Rock offered to have the Debtor-in-Possession's accountant go to the Black Rock offices and extract the requested date in the correct format to ensure that there would be no further issues with the request. Black Rock has yet to hear back from Debtor's counsel on the offer.

DISCUSSION

The Federal Rules of Civil Procedure relating to discovery during litigation, Rules 26 and 28 to 37, apply in bankruptcy cases, in both contested matters and adversary proceedings, by virtue of incorporation by reference. Fed. R. Bankr. P. 7026 to 7037 and 9014. Federal Rule of Bankruptcy Procedure 7034 sets forth the guidelines for compelling the Production of Documents for inspection and other purposes in a bankruptcy case, and incorporates the provisions of Federal Rule of Civil Procedure 34.

Federal Rule of Civil Procedure 37(a)(1), made applicable in bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7037, requires that a motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." Federal Rule of Civil Procedure 37 Civil Rule 37(c) sanctions the failure to supplement discovery responses.

The certification requirement of Federal Rule of Civil Procedure 37(a)(1) was described in *Shuffle Master v. Progressive Games*, 170 F.R.D. 166 (D. Nev. 1996) as comprising two elements:

> [T]wo components are necessary to constitute a facially valid motion to compel. First is the actual certification document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the performance, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2)conferred or attempted to confer. Each of these two sub components must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

Shuffle Master, 170 F.R.D. at 170. The court went further, stating that "[A] moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" 170 F.R.D. at 171.

The Request for Production of Documents from Black Rock Milling, LLC, filed as Exhibit "A" by the Debtor-in-Possession, Dckt. No. 497, appears to attempts to propound discovery for the Adversary Case, Black Rock Milling Co. V. Coelho Dairy et al, Adversary Case No. 14-09002. The Request asks for electronic, tape, or disc records of the accounting records for transaction that will be submitted as evidence in trial, regarding the objection to claim of Black Rock Milling, LLC, presumably in the adversary proceeding.

On February 18, 2014, the Plaintiff in that case, Black Rock Milling, LLC, filed a Notice of Voluntary Dismissal, without prejudice, against the Defendants, which included the Debtor-in-Possession and the principals of the Debtor-in-Possession. Bankr. E.D. Cal. Adv. No. 4-09002, Dckt. 7, February 18, 2014. The court will exercise jurisdiction over the matter when this Adversary Proceeding was dismissed three months ago. Since there is no pending case, the Plaintiff Creditor cannot have failed to respond and failed to comply with the requirements of Federal Rule of Civil Procedure 34, as made applicable to adversary proceedings under Federal Rule of Bankruptcy Procedure 7034, because the Debtor-in-Possession is no longer entitled to the production of documents in a case that has been dismissed.

The Debtor-in-Possession has not furnished a basis for the court to issue an order to compel in this Adversary Proceeding. The Motion to Compel Responses to Debtor-in-Possession's Request for Production of Documents is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compel filed by the Plaintiffs having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Responses to Debtor-in-Possession's Request for Production of Documents, Set Two, is denied, without prejudice to the Debtor in Possession seeking appropriate discovery in the bankruptcy case or other pending adversary proceeding or contested matter.

10. 14-90177-E-7 MARY JEANTET **TRUSTEE'S MOTION TO DISMISS FOR**
David Foyil **FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS**
4-16-14 [11]

Final Ruling: No appearance at the May 22, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 16, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Dismiss is denied without prejudice, and the deadline for Trustee to file and serve an objection to discharge under § 727 is extended to 60 days after the Continued Meeting of Creditors, to August 9, 2014. The deadline for bringing a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, is extended to 60 days after the continued Meeting of Creditors, to August 9, 2014.

The Chapter 7 Trustee, Michael D. McGranahan ("Trustee"), states that the Debtor did not appear at the regularly scheduled and duly noticed hearing of Meeting of Creditors held on April 15, 2014 pursuant to 11 U.S.C. § 341, and request that the case be dismissed on this basis. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay which is prejudicial to creditors and cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

Alternatively, the Chapter 7 Trustee seeks an extension of time to object to the entry of Debtor's discharge under 11 U.S.C. § 727, and that the deadline to file motions for abuse, other than presumed abuse be extended to 60 days after the date of the continued Section 341(a) meeting.

The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b). The court will extend the deadline for the Chapter 7 Trustee to object to the Debtor's discharge under 11 U.S.C. § 727 and the deadline to

file motions for abuse, other than presumed abuse under 11 U.S.C. § 707 60 days after the date of the continued Meeting of Creditors, which will be held on June 10, 2014. The court finds the Trustee's need to perform further investigation of the Debtor's assets, liabilities, and pre-petition use of Estate property in light of Debtor's failure to appear at her original Meeting of Creditors to be sufficient cause to extend the deadlines to object to the Debtor's discharge and abuse under the dismissal provisions of 11 U.S.C. § 707.

On May 8, 2014, Debtor's counsel filed an Notice of Hearing and Opposition to Trustee's Motion to Dismiss for failure to appear at the First Meeting of Creditors. Dckt. 17. NO declaration is provided in opposition to the Motion to Dismiss. Debtor's counsel has signed the Opposition, stating that the Debtor is physically unable to appear in court, and will appear telephonically at the continued First Meeting of Creditors.

While stating a reason for the Debtor not appearing, no statement is made as to why Debtor's counsel (1) failed to appear at the First Meeting of Creditors and (2) failed to communicate with the Chapter 7 Trustee of the Debtor's inability to appear and make the necessary arrangements for appearing. See Report of Trustee For 341(a) Meeting, April 16, 2014 Docket Entry and Dckt. 11.

The deadline for Trustee to file and serve an objection to discharge under § 727 is extended to 60 days after the Continued Meeting of Creditors, to August 9, 2014. Fed. R. Bankr. P. 4004(a). The deadline for bringing a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, is extended to 60 days after the continued Meeting of Creditors, to August 9, 2014. See Fed. R. Bankr. P. 1017(e).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.
>
> **IT IS FURTHER ORDERED** that the deadline for the Trustee, U.S. Trustee, and all other parties in interest to file and serve an objection to discharge under § 727 is extended to August 9, 2014. Fed. R. Bankr. P. 4004(a).
>
> **IT IS FURTHER ORDERED** that the deadline for the Trustee, U.S. Trustee, and all other parties in interest to file and serve a motion to dismiss the Debtor's case under § 707(b) or (c) for abuse, other than presumed abuse, is extended to August 9, 2014.

11. 13-92082-E-7 ELIZABETH CLEMINS **CONTINUED MOTION TO AVOID LIEN**
Angela Mestre **OF LVNV FUNDING, LLC**
2-28-14 [16]

No Tentative Ruling.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditor, and Office of the United States Trustee on February 28, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required. That requirement was met.

The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion to Avoid a Judicial Lien is ----------.

ORDER CONTINUING HEARING ON MOTION TO AVOID JUDICIAL LIEN

On April 16, 2014, the court issued an order continuing the hearing on this motion, and ordering Angela Mestre, the Debtor's attorney of record in this case, to appear on this hearing date of May 22, 2014. Dckt. No. 22. The court further ordered that Angela Mestre appear at the May 22, 2014 hearing in person, and that no telephonic appearance would be permitted for her and any attorneys for the Debtor.

The court additionally suspended the application of Federal Rule of Bankruptcy Procedure 7041, which incorporates Federal Rule of Civil Procedure 41 to adversary proceedings, and Federal Rule of Civil Procedure 41(a)(1) with respect to this Motion. The court determined that the dismissal of the Motion can only be made upon further order of the court after a noticed hearing.

REVIEW OF THE MOTION

The Debtor, in *pro se*, has filed a Motion to Avoid Lien on Real Estate. The Debtor, in pro se, has used a "Best Case LLC Form" for this purpose. She has signed the Motion using the "/s/ typed signature" which may only be used by persons who are authorized to electronically file pleadings with the court. Local Bankruptcy Rule 5005-1(c)(1), 5005.5-1(a), (d), 9004-1(c).

However, the Debtor in this case is not representing herself, but is represented by counsel, Angela Mestre. Ms. Mestre has appeared as counsel

of record representing the Debtor in this case on multiple occasions. Ms. Mestre has been paid $1,300.00 to represent the Debtor in this Chapter 7 case. Disclosure of Compensation, Dckt. 1 at 36. The form states that counsel, for the $1,300.00 will not represent the Debtor in connection with,

A. Any dischargeability actions;

B. Judicial lien avoidances;

C. Relief from stay actions;

D. Any other adversary proceedings;

E. Negotiations with secured creditors to reduce to market value;

F. Preparation and filing of Reaffirmation Agreements and Applications; and

G. Filing of Motions pursuant to 11 U.S.C. § 522(f)(2)(A) for avoidance of liens on household goods.

While some of these are reasonable, such as adversary proceedings and dischargeability actions, others are patently improper, leaving the poor Debtor to fend for herself in obtaining the basic benefits of a Chapter 7 bankruptcy case – such as avoiding judicial liens, at least advising on the merits of a motion for relief from the stay; advising and assisting with reaffirmation agreements, and motions to avoid liens that impair exemptions on household goods.

For the $1,300.00 in fees counsel states that she will only assist the Debtor in,

A. Initial consultation, analysis of Debtor's financial situation and advise whether to file bankruptcy;

B. Prepare and file petition, schedules and statement of affairs;

C. Exemption planning; and

D. Representation at First Meeting of Creditors.

Id. On its face, this Disclosure indicates that counsel's "representation" of the Debtor is limited to (1) telling the Debtor that she should file bankruptcy, (2) telling the Debtor to pay counsel $1,300.00, (3) preparing the petition, schedules, and statement of financial affairs, and (4) showing up at the First Meeting of Creditors. After that, and anything that flows from the bankruptcy — "The Debtor is on her own."

Filing of bankruptcy is a difficult enough experience with knowledgeable counsel providing the necessary representation to take a client through a "simple" Chapter 7 case. There is nothing to indicate that the Debtor has any knowledge or ability to understand or prosecute the

"avoiding of a judicial lien," "avoiding a lien that impairs exempt household goods," or "a motion for relief from the stay."

In the Eastern District of California representation of a debtor includes the basic necessary services, which includes the necessary, reasonable services, for avoiding of liens which impair exemptions. As discussed below, it appears that for a knowledgeable, experienced attorney, the motion to avoid a judicial lien was a simple task, well within a $1,300.00 fee for a Chapter 7 case.

Additionally, the court cannot imagine how this Debtor was able to get a Best Case, LLC form document. It appears that counsel may be providing the forms, pushing the poor Debtor further into the legal swamp to flounder and possibly lose her rights.

REVIEW OF MOTION

The Form Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. Debtor seeks to avoid and cancel a judicial lien held by Lvnv Funding, LLC, pursuant to 11 U.S.C. § 522(f).

B. A judgment was entered against the Debtor in favor of Lvnv Funding, LLC, for the sum of $4,714.27.

C. The abstract of judgment was recorded with Stanislaus County on June 10, 2013.

D. On June 10, 2013, the creditor recorded a judicial lien against the Debtor's residence, listed on Schedule A, commonly known as 2724 Rosewood Avenue.

E. The "estimated" fair market value of the Rosewood Property is $133,243.00, directing the court to review Exhibit B (a Zillow.com printout).

F. Debtor's interest in the Rosewood Property has been claimed as "full exempt" (which is a term the court does not recognize) in the bankruptcy case, directing the court to read Exhibit D (copy of Schedule C).

G. Debtor alleges the legal conclusion that the Lvnv Funding Llc judgment lien "[i]mpairs exemptions to which the debtor(s) would be entitled under 11 U.S.C. § 522(b)." (The court is always concerned with a pro se or attorney uses a form in which it appear that the parties do not know whether there is only one or multiple debtors in a case. Such indicates that review of the pleading may have only been cursory.)

H. It is alleged that the Rosewood Property is encumbered by a lien by "Wells Fargo Home Mortgage) with a balance of $106,263.19, directing the court to review Exhibits E and F

(Schedule D and a document bearing the letterhead Wells Fargo, Home Mortgage).

FAILURE TO COMPLY WITH FED. R. BANK. P. 9013

The Motion to Avoid the Judicial Lien does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based.

In seeking to avoid a judicial lien pursuant to 11 U.S.C. § 522(f)(1)(A), the Movant must show that the fixing of a judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B). The Movant must show that the respondent judgment creditor holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property, and that after application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity in the Movant's property to support the judicial lien.

Here, the Debtor argues that the lien recorded by Lvnv Funding, LLC, impairs the exemption to which Debtor is entitled. Debtor makes no mention, however, of the exemption that Debtor has claimed on the property. Instead, Debtor merely alleges that she is entitled to the avoidance and cancellation of the judicial lien of the respondent creditor.

The court cannot determine from the motion itself, the grounds being asserted, including – what exemption has been claimed, and if the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B). Part of the reason why Debtor might not have felt the need to supply such critical information is because the Motion appears to be nothing more than a form template, in which Debtor's attorney is filling in the blanks with her client's information, rather than properly pleading the Debtor's case.

Some confusion has also been created by Movant failing to comply with Federal Rule of Bankruptcy Procedure 9013 (requiring the motion to state with particularity the grounds for the relief requested) and Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents which require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents.

The document prepared includes the motion and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents, ¶(3)(a). The court's expectation is that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l)

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court. (Some running hundreds of pages.) It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents which can then be used by the court.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

FAILURE TO PROVIDE EVIDENCE IN SUPPORT OF THE MOTION

The Debtor, appearing in pro se, has presented the court with allegations in the Motion for which there is no competent evidence or properly authenticated documents. The Debtor seeks to assert the value of

the Property based upon the hearsay statements of Zillow.com. Merely because someone finds something on the internet doesn't make it true or credible evidence. Fed. R. Evid. 601, 602, 801, 802, 901. While the court may take notice of the Schedules, an out of court notice from "Wells Fargo Mortgage Company" and a printout from the internet are not part of the court's file as documents which have been properly authenticated or testimony based on the personal knowledge of the declarant.

NEED FOR FURTHER HEARING

The defects in the motion are so gross and the Debtor appears to have been abandoned by counsel, the court can proceed only with the participation of Debtor's counsel of record. The court continues the hearing to allow Debtor's counsel to appear in court, no telephonic appearance permitted, to address this motion and how it will be properly prosecuted.

AMENDED SCHEDULES AND DISCLOSURE OF COMPENSATION

The docket reflects that Debtor (presumably through her counsel of record, Angela Mestre) filed an Amended Disclosure of Compensation. Dckt. No. 26. Comparing the Amended Disclosure to the Original Disclosure of Attorney Compensation filed along with the Debtor's petition on November 22, 2013, Dckt. No. 36, the only changes made in Debtor Counsel's new Disclosure of Compensation Form is: (1.) The addition of "lien avoidance" in section enumerating Debtor's counsel's responsibilities, other than the preparation of filing Debtor's bankruptcy paperwork and representing Debtor at her meeting of creditors and all confirmation hearings; and (2.) the removal of this language in Line No. 7:

> Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding; negotiations with secured creditors to reduce to market value. Preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

Id. at 2. Ms. Mestre does not provide an explanation for whether the agreement between Ms. Mestre and Debtor has been modified, and whether Ms. Mestre has enlarged the scope of representation to provide the most basic of legal services in Debtor's bankruptcy case. Ms. Mestre's response to the court's allegations that she has abandoned her client is to work in one additional task to the legal services she plans on providing Debtor in the course of this case.

There have been no revisions or Amended Motion to Avoid the Judicial Lien of Lvnv Funding, LLC, filed on the Debtor's behalf. There is no indication that Debtor's attorney is attempting to salvage the present Motion and the court is still unclear as to whether Ms. Mestre has properly advised Debtor of her full rights and responsibilities, and the duties that Debtor must fulfill in prosecuting her case.

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Avoid the Judicial Lien is ----------.

12. 13-91588-E-12 MARY JO MEIRINHO **MOTION TO DISMISS CASE**
Scott A. CoBen **4-22-14 [118]**

Final Ruling: No appearance at the May 22, 2014 hearing is required.

An Order Setting Hearing on Debtor-in-Possession's Request for Dismissal for this hearing date was issued by the court on May 5, 2014. Dckt. No. 119. Responses and Opposition were required to be filed on or before May 15, 2014. No Opposition to the Motion were filed. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to grant the Motion to Dismiss.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

> Debtor-in-Possession, May Jo Meirnho, "hereby dismisses" her Chapter 12 bankruptcy case without prejudice immediately.

Presumably, the Debtor in Possession is relying on the provisions of 11 U.S.C. § 1208 which give a Chapter 12 Debtor in Possession an almost absolute right to dismiss a Chapter 12 case. However, a Debtor may not engage in bad faith or fraud, and then attempt to dismiss a case, as a matter of right. A Chapter 12 case may even if converted to one under Chapter 7 if the court determines that fraud has occurred in the Chapter 12 case. 11 U.S.C. § 1208(d).

Due to how this Chapter 12 case has been prosecuted and the Debtor in Possession's inability to proceed with represented sales of property, the court set this Motion for hearing to afford the Chapter 12 Trustee, U.S. Trustee, Creditors, and any other Parties in Interest to bring to the court's attention any facts or circumstances indicating that dismissal is not proper.

DECLARATION OF TIM BYRD

Debtor-in-Possession subsequently filed the Declaration of Tim Byrd in support of the Motion, who testifies that he is the trustee of the Timothy and Suzanne Byrd Revocable Trust along with his wife. Filed May 12, 2014, Dckt. 123. Byrd state that he and his wife have completed the acquisition of the interest of Kay Vlach in her note and deed of trust that encumbers the approximately 30 acres owned by the Debtor-in-Possession.

Byrd then states that Stanislaus County has tentatively approved of a lot line adjustment that results in approximately 20 acres of the Meirinho property being added to the Byrds' existing 20 acre parcel, with the Meirinho property being reduced to 10 acres (which includes the Debtor-in-Possession's home). After the County records the lot line adjustment, the Byrds will acquire the 20 acre portion of the Meirinho property pursuant to the approved lot line adjustment. The outstanding balance of the Note, and all amounts paid by the Byrds to acquire the Vlach Note and Deed of Trust, will be credited against the purchase price for the Meirinho 20 acres, and Debtor-in-Possession will retain title to the 10 acres "free and clear of the deed of trust acquired by the Byrds." Declaration of Tim Byrd, Dckt. No. 123.

Byrd further states that the lot line adjustment is "proceeding as planned," and the deeds reflecting the adjustment and reconveyance of Deed of Trust the Byrds acquired are expected to be recorded and the transaction completed before the end of May 2014. Byrd states that "as long as both parties...proceed in a timely manner to satisfy all conditions to the close on the lot line adjustments, the Byrds have agreed not to exercise the Byrds' right to conduct a foreclosure sale." *Id.* at ¶ 4.

DISCUSSION

Pursuant to 11 U.S.C. § 1208(b), on the request of a debtor, if the case has not been converted under section 706 or 1112 of Title 11, the court shall dismiss the case. Here, the case has not been previously converted under any section of Title 11.

No Parties in Interest have come forward with any opposition to the dismissal of this case. Responses from the Debtor in Possession and Parties in Interest were required to be filed and served on or before May 15, 2014. The Debtor in Possession has provided the Supplemental Declaration. No Parties in Interest have filed any Responses or Opposition to the Chapter 12 case being dismissed.

It appears that the Debtor-in-Possession is moving forward with a liquidation of some property outside of bankruptcy. The Byrds appear to have purchased the claim of the Debtor in Possession main protagonist in this case. Having done so, the Debtor in Possession appears to no longer need the assistance of the Bankruptcy Code in restructuring her finances.

The Motion is granted and the bankruptcy case is dismissed.

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

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

The Motion to Dismiss the Chapter 13 case filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted and the bankruptcy case is dismissed.

13. 13-90789-E-7 EJN-1 — DANA/JENNIFER HENDERSON — Todd Allen Whiteley — OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS — 3-27-14 [31]

Tentative Ruling: The Objection to Debtor's Claim of Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Response Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, and all creditors on March 27, 2014. By the court's calculation, 46 days' notice was provided. 28 days' notice is required. That requirement was met

The Objection to Debtor's Claim of Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is to sustain the Objection to Debtor's Claim of Exemptions.

Relief Requested and Grounds Stated

Pursuant to Federal Rule of Bankruptcy Procedure 9013 (which is similar to Fed. R. Civ. P. 7(b)) requires that the motion itself state both the grounds upon which the relief is based and the relief with particularity. The Motion states:

> A. The Chapter 7 Trustee in this case, Eric Nims ("Trustee"), objects to the Debtors', Dana L. Henderson, Jr. and Jennifer Henderson ("Debtors"), tardy exemption to their 2013 state and federal income tax refunds.
>
> B. Trustee objects pursuant to 11 U.S.C. § 522(l), which provides that a party in interest may object to the "list of property that the debtor claims as exempt..."
>
> C. Trustee qualifies as an interested party per Federal Rule of Bankruptcy Procedure 4003(b).
>
> D. This Motion is supported by the Memorandum of Points and Authorities filed concurrently with this Motion, the Trustee's Declaration, the pleadings and papers on file in this case, and written and oral argument as may be presented before the motion is considered by the court.

Mothorities

The Trustee is requesting the court to treat the points and authorities as the "motion." The factual contentions upon which Trustee's request for relief is based are included in the Memorandum of Points and Authorities, and are not stated in the Motion. Instead, the Trustee instructs the court to review the Memorandum of Points and Authorities to determine the facts of this case.

The Trustee is asking that the court accept a combined motion and points and authorities ("Mothorities") in which the court put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Bankr. P. 9013), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Trustee.

The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*,

550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled. Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007.

MEMORANDUM OF POINTS AND AUTHORITIES

On April 24, 2013, the Debtors filed their Chapter 7 petition. In their original Schedule C to the Petition, Debtors used $22,000 of their "wildcard" exemption under California Code of Civil Procedure 703.140(b)(5) to protect any recovery from a potential class-action lawsuit against a builder. The initial meeting of creditors was held on June 3, 2013, at which time the meeting was concluded.

Two days later, on June 5, 2013, Trustee filed a notice of assets and creditors were advised to file claims. On June 18, 2013, Debtors filed an Amended Schedule C in which they shifted their use of the "wildcard" exemption; specifically, Debtors' June 18 amendment dedicated only $5,000 of their wildcard exemption to their class action litigation, and $15,752.00 to equity in their residence.

In their initial bankruptcy petition filed on April 24, 2013, Debtors did not claim any exemption relative to their residence. Trustee's review of Debtors' 2012 Federal and California income tax returns showed they received in the months prior to filing their Petition, approximately $6,800 in combined 2012 State and Federal income tax refunds; of that amount, $5,063.00 was attributed to the Federal refund. In 2011, Debtors' Federal income tax refund alone was $4,548.

Trustee's analysis of Debtors' 2012 Federal Income Tax Return and Pay advises Debtors submitted as part of their "521 documents" shows that approximately 85% of their taxable income is derived from wages, salaries, and other W-2 income. Debtors did not list or exempt any income tax refund for 2013 or otherwise in their Petition. In June of 2013, Trustee submitted to the Internal Revenue Service a tax intercept letter for Debtors' 2013 federal income tax refund. Based on the date of the Debtors' Petition, 31% of any 2013 refund is property of the estate.

On July 1, 2013, Debtors filed a Motion to Compel Abandonment of their residence from the bankruptcy estate. In light of Debtors' June 18, 2013 Amended Schedule C, in which they exempted almost $16,000 of equity in the residence, and other reasons, Trustee filed a non-opposition to the Motion. Pursuant to a Jule 24, 2013 order from the court, the residence was abandoned from the estate.

On February 26, 2014, Debtors filed an Amended Schedule B and (another) Amended Schedule C to their Petition in which they listed and exempted, respectively, their "2013 State and Federal income tax refund" (sic). In February 26, Amended Schedule C, Debtors again shifted their use of the wildcard exemption--this time, they eliminated entirely any claim to the proceeds from the class-action litigation, and dedicated $8,171 of the "wildcard" to the 2013 tax refunds.

On or about March 20, 2014, Trustee received from the IRS Debtors' 2013 Federal Income tax refund in the amount of $8,403. A review of the claims docket in this case shows 11 creditor claims totaling over $52,000. Trustee is obligated to file periodic reports to the Office of the United States Trustee and otherwise perform various case management tasks for all asset cases.

While exemption planning may be permissible, to ensure that it does not trigger denial of discharge or attack as fraudulent transfer, debtors must engage in such exemption planning without any badges of fraud, the most significant of which involves concealment. *In re Gray*, 498 B.R. 238 (Bankr. D. Ariz. 2013). Trustee argues that the facts in that case are similar to the ones in the instant case, in that the court in *Gray* sustained the trustee's objection (on bad faith grounds) to the belated attempted by debtors to claim exempt an unscheduled asset only after the asset was discovered by the trustee.

In the case of *Gray*, Debtors amended their Schedule C to claim prepaid rent and a security deposit for rental properties that weren't initially included in their schedules, until the Trustee inquired about the payments in Debtors' Meeting of Creditors and demanded turnover the originally unscheduled funds. *Id.* The Trustee argued that the debtors' failure to disclose the asset at the outset of this case is grounds for the denial of the exemption.” Debtors responded that an amended claim of exemption may not be denied, solely because of delay or late filing, absent “a showing of a debtor's bad faith or of prejudice to creditors,” citing the Ninth Circuit's holding in *In re Michael*, 163 F.3d 526, 529 (9th Cir.1998).

The court found convincing Trustee’s argument that Trustees should not be expected to ferret out undisclosed assets, by careful examination of check books and bank statements and by examining debtors at the first meeting of creditors, “only to have the assets so discovered to be belatedly claimed as exempt, especially when trustees are paid only $60 for no asset cases.” *Id.* at 240. Trustee argues that here, Debtors' conduct shows gamesmanship. In the space of 10 months, they have presented this court and Trustee with no less than 3 versions of Schedule C. Trustee argues that Debtors are "conducting a shell game-each version moves the amount of the "wildcard exemption to an asset Debtors then find most valuable or vulnerable."

Trustee brings up the case of *In re Andermahr*, in which the court adopted the rule suggested in *Matter of Doan*, 672 F.2d 831, 833 (11th Cir.1982) that an exemption should be allowed no matter when it is claimed absent a showing of bad faith by the debtor or prejudice to creditors. *In re Andermahr*, 30 B.R. 532, 533 (B.A.P. 9th Cir. 1983). In *Andermahr*, the court found that the tax refund did not exist at the time of filing, and otherwise did not require any investigation by the trustee.

Here, there is evidence to suggest Debtors knew that they would be entitled to sizeable 2013 tax refund based upon their prior experience; specifically, the $6,800 refund they received in 2012, and the $4,548 federal refund received in 2011. The 2013 tax refund did exist at the time of filing, Trustee's pre-341 meeting of creditors analysis indicated that approximately 85% of Debtors' adjusted gross income is from wages and salaries; thus, it can be fairly said that Debtors made a calculated decision to withhold funds sufficient to consistently generate sizeable annual tax refunds, a portion of which was property of the estate at the time of filing.

Trustee also highlights the chronology of the events in the case. Debtors' 2012 federal income tax return was signed by their CPA on January 31, 2013. Trustee states that it is reasonable to presume that it was filed on that date or shortly thereafter. Trustee states that in the course of Trustee's experience in dealing with thousands of debtors and tax intercept letters, it is his opinion that taxpayers can normally expect to receive their refund no later than 6-10 weeks from the submission of their return. Debtors then likely received their 2012 federal income tax refund in early to mid March of 2013. They filed their petition on April 24, 2013. Trustee states that it is unlikely that Debtors "forgot" about the possibility of a federal income tax refund for 2013 when they filed their petition, when they had just received almost $7,000 in tax refunds the prior month, and are represented by counsel.

Trustee distinguishes the facts of *Andermahr* to those of this case. Presumably, the *Andermahr* case was only open for a few days or weeks before the refund was received by the trustee. Debtors' case was open for eleven months before the Trustee received Debtors' unscheduled federal refund. Trustee assumes that the small delay to creditors in the *Andermahr* court that was found to be non-prejudicial was not similar to the facts in this matter.

Trustee further states that this case was filed in an interim report submitted by the Trustee to the OUST in October, 2013, and other case management tasks required further information; the Trustee obtained a federal tax identification number for the estate, and opened a bank account; he analyzed and evaluated Debtors' finances and assets; investigated the value of Debtors' residence and following further analysis, filed a non-opposition to Debtors' Motion to Compel Abandonment of that residence. Creditors and Trustee have expended considerable time, effort, and resources on Debtors' case. Trustee argues that Debtors' failure to list their 2013 income tax refunds, and belatedly doing so 10 months later, is prejudicial to creditors and the Trustee. Trustee believes that the "attempt to shield that asset, following multiple iterations of Schedule C, smacks of bad faith."

OPPOSITION BY DEBTOR

Debtors respond by arguing that the March 4, 2014 ruling of the Supreme Court in *Law v. Siegel* determined that federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Bankruptcy Code. Debtors argue that unlike their conduct in this case, the conduct of the debtor in *Law v. Siegel* was egregious and intentionally fraudulent; Debtors states that in the case of *Law v. Siegel*, the Debtor created a fictional loan to preserve equity in his house. This conduct, however, was not substantial enough for the Supreme Court to find that it outweighed a Debtors' inherent right to claim and exercise the exemptions provided in the Bankruptcy Code to protect his assets.

Debtors state that they committed no bad acts, and did not conceal assets and create an intentional and deliberate delay in amending an exemption at the expense of creditors and the estate, like the Debtors in the Trustee's cited case of *Tyner v. Nicholson* (In Re Nicholson), 435 B.R. 622 to demonstrate bad faith.

Debtors state that they "timely provided" the Trustee with their 2012 tax return, which led to the Trustee's expectation of a sizeable 2013 tax refund. Debtors state that they did not expect a larger tax refund because they were in unstable financial circumstances; Mr. Henderson, the income earner for Debtors, had lost-long-term employment in June 26, 2012 and had been employed without income, and then was hired at Walmart in November 2012, and finally promoted in March 2013. He had no income and then three different incomes within an 8 month period. The Debtors lacked the stability needed to form an expectation of tax refunds based on past years of stable earnings.

Debtors state that "in the worst case scenario, omitting the tax return was an oversight." Debtors assert that in no event was the omission of the 2013 tax refund from Schedules B and C was an intentional act to conceal. Debtors state that they allotted the wild card exemption to the construction defect class action because Debtors were unaware of other assets in need of protection; since Defendant, the contractor in the lawsuit had the "first right to repair any defects, the Debtors did not have an expectation of a money award.

Debtors claim that the wildcard exemption was claimed on the "off-chance" that some money might trickle down to Debtors from the class action suit. Debtors deny that they intentionally and deliberately delayed in amending exemption at the expense of creditors. Debtors state that once they were aware of this unprotected asset, they acted quickly to amend exemptions to protect the asset. The Trustee filed the notice to file claims on June 6, 2013, and the Debtors state that they "immediately sought to discover the asset" which might provide a recovery. Debtors state that on June 11, 2013, after being unable to reach the Trustee by phone, Debtor's counsel sent an email communication to Trustee, asking Trustee to identify which asset may provide possible recovery to creditors. On June 12, 2013, Debtor's counsel received a reply email stating that an asset report was provided to the Trustee's office to give Trustee an opportunity to verify the fair market value of the scheduled assets, and to investigate the existence of any unscheduled assets. Among those assets include Debtors' Newman residence.

Debtors replied to that email, offering a zillow.com valuation to assist Trustee with his valuation of the home, and informing Trustee that they didn't intend to "place any real value" in any award that might be received in the defective construction suit, because of the contractor's right to repair as a remedy, rather than monetary value to the award. Debtors state that they communicated to the Trustee that they were willing to divert the wildcard exemption from the class-action suit to the asset identified by the Trustee. Debtors also claim that when Trustee identified the Debtors' home as the single asset that was the subject of investigation for value, Debtors "panicked" and obtained a professional valuation for their residence. It was on these grounds that Debtors' Schedules B and C were amended to protect the equity in the home as reflected in the new valuation.

Debtors state that they only learned of the Trustee's interest in the tax return after the Internal Revenue Service informed them that the Trustee had intercepted their 2013 refund, prompting Debtors to amend their Schedules B and C within one day to divert only the wildcard exemption amount of the class action lawsuit which was no longer an asset of the estate, and the unused portion of the wildcard exemption to the 2013 refunds. Debtors argue that their quick response to attempt to discover non-exempt assets and therefore amend exemptions does not meet the "bad faith" element in deliberately delaying in amending exemptions.

Debtors assert that the Trustee was aware that Debtors did not expect any value to come from the construction defect case, and that they were willing to divert those wildcard exemption amounts to other protected assets. Debtors state that thus, it could not be surprising that Debtors amended their Schedule C to protect the 2013 tax income refunds, as was their right under Federal Rule of Bankruptcy Procedure 1009(a), once the Internal Revenue Service had informed them that Trustee had intercepted the 2013 refund.

DISCUSSION

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." Debtors must list all of their assets on their bankruptcy schedules whether or not they claim them as exempt. 11 U.S.C. § 521(a)(1)(B)(I), 522(l).

Federal Rule of Bankruptcy Procedure 1009(a), in which "[a] voluntary petition, list, schedule, or statement may be amended, including exemption claims, by the debtor as a matter of course at any time before the case is closed." The court may disallow the amendment only upon "a showing of bad faith or prejudice to third parties." *Greene v. Savage (In re Greene)*, 583 F.3d 614, 625 (9th Cir. 2009); *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 784 (9th Cir. BAP 2000). On the issue of "prejudice" to third parties, there is an additional requirement: merely showing "prejudice" does not automatically trigger disallowance of an amendment. The court must balance the prejudice to the debtor of disallowing the exemption against the prejudice to third parties in allowing the exemption. *In re Arnold*, 252 B.R.

at 785. The usual ground for a finding of "bad faith" is the debtor's attempt to hide assets. *Id.*

A bankruptcy court may disallow an amended exemption claim if the trustee or another party in interest timely objects and shows that the debtor has acted in bad faith, or that the creditors have been prejudiced. *Tyner v. Nicholson* (*In re Nicholson*), 435 B.R. 622, 634 (9th Cir. BAP 2010). Concealment of assets and the intentional and deliberate delay in amending an exemption at the expense of creditors and the estate constitute "bad faith." *Id.*

The Supreme Court recently held that while a Bankruptcy Court has the authority to issue any order, process, or judgment necessary to carry out the provisions of the Bankruptcy Code, it may not contravene specific statutory provisions. *Law v. Siegel*, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014). The Supreme Court found that the Bankruptcy Court exceeded the limits of its authority by awarding Law's homestead exemption to Siegel, stating that although the statute does not require a debtor to establish a homestead exemption, once he has done so the Bankruptcy Court may not refuse to honor that exemption absent a valid statutory basis for doing so. *Id.* The court stated "The Code's meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions." *Id. citing Hillman v. Maretta*, 569 U. S. ___, ___, 133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013) (slip op., at 12); *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001). The Court made clear that when a debtor claims a state-created exemption, the exemption's scope is determined by state law, which may provide that certain types of debtor misconduct warrant denial of the exemption, but that federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code. *Id.*

The Trustee's Objection pre-dated *Law v. Segal* and appears to have fallen into the 11 U.S.C. § 105(a) trap that a bankruptcy judge can order whatever he or she thinks is necessary. In Law v. Segal the Supreme Court made it clear (once again) that 11 U.S.C. § 105(a) is not a free license for a bankruptcy judge to "meet out justice." Rather, § 105 fills in the gaps when Congress, the legislatures, or common law has not provided for an issue or situation which must necessarily be addressed in the bankruptcy case. Law v. Segal does not mean that the Debtors in this case necessarily win, but that the Trustee must do something more than point at the Debtors and say "bad faith." Legal and equitable claims of the estate or trust, whether under federal or state law, need to be provided to the court.

FACTS PRESENTED BY DEBTORS

The only evidence presented by the Debtors in opposition to the Objection to Claim of Exemption is the declaration of Todd Whiteley, Debtors' counsel in this case. While the Opposition is long on the state of mind of the Debtors and there intentions, it appears that the Debtors have carefully avoided making any statements under penalty of perjury to oppose the Motion. Some of counsel's testimony relates to conversations he had with the Debtors, which in addition to being hearsay raise the specter of whether the attorney-client privilege has now been waived.

ARGUMENTS

In this case, Trustee argues that Debtors' amendments to their Schedule C--three different versions of the Schedule within the span of 10 months--indicates gamesmanship on the Debtors' part and an intent to conceal their federal income tax refund for 2013, when Debtors should have been aware that they would receive a large refund based on their prior federal and California tax returns.

Trustee's analysis of Debtors' 2012 returns and pay advices shows that approximately 85% of Debtors' taxable income is derived from wages, salaries, and other W-2 income, creating an expectation and anticipation that Debtors would receive a similar amount in subsequent years. Instead, Debtors did not list or exempt any income tax refund for 2013, and Trustee submitted to the IRS a tax intercept letter in June, 2013 to seize the refund as property of the estate. Trustee interprets Debtors' shift of their wildcard exemption, which previously included a dedication of $5,000 of their exemption to class-action litigation of which the Joint Debtor husband is involved in, to protecting the proceeds of their previously omitted 2013 tax refunds.

Trustee points to Debtors' dubiously timed amendments to their Schedule C, and their failure to schedule a tax refund that they should have known would be issued the following year, and allegedly retained for eleven months before the Trustee received Debtors' unscheduled federal refund, causing prejudicial delay to Debtors' creditors. Trustee argues that he has made the requisite showing of bad faith and intentional concealment of an asset on the part of the Debtors, warranting denial of the subject exemptions.

Debtors respond by arguing that they have not intentionally and deliberately delayed amending their exemptions, that they did not conceal their tax refund, and that they diligently offered the Trustee assistance in investigating the potential recovery in their residence to creditors in their case. Dckt. No. 39.

CONTINUANCE FOR AMENDED PLEADINGS

The Trustee's Objection pre-dating *Law v. Segal*, it does not provide the court with a clear state or federal law basis for not allowing the exemption. The Debtors, while arguing about their intent and knowledge, fail to provide any evidence thereof. The court is not going to make a decision without each party pulling its weight.

The Trustee shall file an Amended Objection to Claim of Exemption which states with particularity the grounds upon which the objection is based. The Trustee shall file a separate points and authorities, and the evidence supporting the Objection. Alternatively, if in light of *Law v. Segal*, the Trustee may file a Notice of Dismissal of Objection to Claim of Exemption, which shall then conclude this Objection with Prejudice. The Amended Pleadings or Notice of Dismissal shall be filed and served on or before June 9, 2014. On or before June 27, 2014 the Debtors will file an opposition, if any, and supporting evidence to the Amended Objection to Claim of Exemption. On or before July 7, 2014, the Trustee shall file a Reply, if any. The continued hearing on the Objection to Claim of Exemption shall be conducted at 10:30 a.m. on July 24, 2014.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Debtor's Claim of Exemptions filed by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Objection to Claim of Exemption is continued to 10:30 a.m. on July 24, 2014.
>
> **IT IS FURTHER ORDERED** that the Trustee shall file an Amended Objection to Claim of Exemption which states with particularity the grounds upon which the objection is based. The Trustee shall file a separate points and authorities, and the evidence supporting the Objection. Alternatively, if in light of *Law v. Segal* or other authorities, the Trustee has determined that he does not want to prosecute this Objection, Trustee may file a Notice of Dismissal of Objection to Claim of Exemption, which shall then conclude this Objection with Prejudice. The Amended Pleadings or Notice of Dismissal shall be filed and served on or before June 9, 2014. On or before June 27, 2014 the Debtors will file an opposition, if any, and supporting evidence to the Amended Objection to Claim of Exemption. On or before July 7, 2014, the Trustee shall file a Reply, if any.

14. 13-90490-E-7 ISRRAEL/SONIA RUIZ
CWC-2 Marilyn R. Thomassen

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH ISSRAEL RUIZ, SONIA RUIZ, EDGAR ALFREDO RUIZ AND THE BANKRUPTCY ESTATE
4-16-14 [24]

Tentative Ruling: The Motion to Compromise Controversy has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 16, 2014. By the court's calculation, 36 days' notice was provided. 21 days' notice is required.

The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The court's decision is to grant the Motion to Compromise.

Stephen C. Ferlmann, the Chapter 7 Trustee in this case ("Trustee"), seeks a court order authorizing the settlement of a dispute between the Debtors, Israel Ruiz and Sonia Ruiz ("Debtors"), and Edgar Alfredo Ruiz pursuant to Federal Rule of Bankruptcy Rule 9019.

On March 18, 2013, Debtors filed a petition under Chapter 7 of the Bankruptcy Code. Among that assets which constitute property of the

bankruptcy estate is the Debtor's interest in real property commonly described as 2613 Glasgow Drive, Ceres, California.

The bankruptcy estate acquired an interest in the Property upon entry of a summary judgment on February 20, 2014, in Adversary Proceeding No. 13-09019, Complaint to Recover Avoidable Transfer, against Edgar Alfredo Ruiz, the Defendant in that proceeding. The judgment ordered the avoidance of the transfer of any rights and interests by the Debtors in the Property to their son, Edgar Alfredo Ruiz, through a deed recorded with the Stanislaus County Recorder, Document Number 2012-0089235 as a fraudulent transfer pursuant to 11 U.S.C. § § 547 and 548.

Trustee, Edgar Alfredo Ruiz and the Debtors have agreed to settle the dispute whereby Edgar Alfredo Ruiz shall pay the bankruptcy estate, the total sum of $11,000.00 in satisfaction of the Summary Judgment entered in Adversary Proceeding No. 13-09019. The settlement funds will be paid in a lump sum within 14 days after entry of a court order approving this compromise. Debtors have agreed that the settlement funds are not exempt property in this bankruptcy case.

In consideration of the settlement funds, the Summary Judgment entered in Adversary Proceeding No. 13-09019 will be deemed satisfied, and the parties shall release each other from any and all claims which arise from the alleged avoidable transfers described in Adversary Proceeding No. 13-09019. The parties have entered into a Settlement and Mutual Release Agreement, conditioned upon this court's approval. A copy of the Agreement is attached as Exhibit “1" this Motion, Dckt. No. 27.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat’l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Here, the Trustee in his concurrently filed Declaration, Dckt. No. 26, argues that the four factors have been met. The proposed settlement permits the Trustee to settle the adversary proceeding filed against Edgar

Alfredo Ruiz, in exchange for $11,000 that can be used to the benefit of the estate. Trustee states that the settlement agreement was negotiated in good faith and with the advice of each party's respective counsel.

Probability of Success

Trustee states that the probability of success in litigation is not a factor in this case. The estate has obtained a summary judgment against Edgar Alfredo Ruiz in Adversary Proceeding Case No. 130-09019.

Complexity in Litigation

The complexity of legal issues in the litigation is no longer a factor in the case, because the estate has obtained a summary judgment in the subject adversary proceeding.

Difficulties in Collection and Further Expenses to the Estate

The difficulty and further expense to the estate in enforcing the Summary Judgment obtained by Trustee is a significant factor in this matter. The Summary Judgment avoided the recorded deed executed by the Debtors to their son, Edgar Alfredo Ruiz, which transferred their joint tenancy interest in the property as a fraudulent transfer. The Summary Judgment provided that in the event that Edgar Alfredo Ruiz had already disposed of the property, that Trustee may request an amendment to the judgment to provide for a monetary award based upon the market value of the property of $122,000.00.

As the estate had recorded a lis pendens against the property during the pendency of the litigation, the property remains available for liquidation by the estate. However, the estate will incur further expenses in the marketing and sale of the property. Trustee states that such actions will entail further delay distribution of the estate to creditors.

A review of the claims register shows that the total amount of claims is only in the amount of $158.80 from two creditors, so the holders of unsecured claims are owed only $158.80. When Adversary Proceeding No. 13-09019 was commenced on May 6, 2013, the time period for creditors to timely file Proofs of Claim on July 29, 2013, had not yet expired. In settlement discussions between Trustee's counsel and Edgar Alfredo Ruiz's counsel, the parties have acknowledged that the estate has incurred significant legal expenses in obtaining the summary judgment. The amount of settlement is based upon the payment of the estate's legal expenses and a 100% distribution fo the claims of unsecured plus interest.

Paramount Interest of Creditors

It is estimated that the settlement funds will provide a 100% distribution of the claims of unsecured creditors plus interest, with no further delay to the distribution of the estate.

The proposed compromise will provide a prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation. Upon weighing the factors outlined in *A & C*

Props and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compromise filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compromise Controversy against Edgar Alfredo Ruiz is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the motion on April 16, 2014 (Docket Number 27).

15. 13-91290-E-7 JDP-2 | **DONALD TODD** | **James D. Pitner** | **MOTION TO AVOID LIEN OF FRANK ERDMAN** | **4-16-14 [21]**

Final Ruling: No appearance at the May 22, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on April 16, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid a Judicial Lien is granted.

A judgment was entered against the Debtor in favor of Frank Erdman for the sum of $35,312.06. The abstract of judgment was recorded with Sacramento County on March 22, 2013. Exhibit A, Dckt. No. 25. That lien attached to the Debtor's residential real property commonly known as 1416 Stembridge Court, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $149,000.00 as of the date of the petition. The unavoidable consensual liens total $131,887.80 on that same date. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $5,704.07 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Frank Erdman, Stanislaus County Superior Court Case No. 668323, Document No. 2013-0024646-00, recorded on March 22, 2013, with the Stanislaus County Recorder, against the real property commonly known as 1416 Stembridge Court, Modesto, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.