

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Modesto, California

June 16, 2016 at 10:30 a.m.

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1. [11-94410-E-7](#) SAWTANTRA/ARUNA CHOPRA CONTINUED MOTION FOR LEAVE TO
[14-9033](#) RMY-1 FILE THIRD PARTY COMPLAINT
ARTERBURN ET AL V. CHOPRA AGAINST MID VALLEY SERVICES,
INC.
6-4-15 [[19](#)]

No Tentative Ruling: The Motion for Leave to File Third Party Complaint Against MID Valley Services, Inc. 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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney, Chapter 7 Trustee's Attorney, and Office of the United States Trustee on June 4, 2015. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Motion for Leave to File Third Party Complaint Against MID Valley Services, Inc. was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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.

The Motion for Leave to File Third Party Complaint Against MID Valley Services, Inc. is XXXXX.
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June 16, 2016 at 10:30 a.m.

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Aruna Chopra ("Defendant-Debtor") filed the instant Motion for Leave to file Third Party Complaint Against MID Valley Services, Inc. on June 6, 2015. Dckt. 19.

The Defendant-Debtor seeks leave from the court to file a third party complaint against Mid Valley Services, Inc. alleging the following causes of action: (1) implied indemnity; (2) equitable indemnity; (3) contribution; and (4) declaratory relief. The Defendant-Debtor states that these claims are based upon the Defendant-Debtor's contentions that the acts and omissions of MID Valley Services, Inc. were a superseding cause of any purported damages suffered by Plaintiffs.

STIPULATION

On April 25, 2016, (three days before this hearing), the Parties filed their sixth stipulation to continue this hearing. Dckt. 62. In it, the Parties represent (and certify to the court) that:

"3. This is the sixth request for the requested relief. This requested extension is not being sought for purposed of delay. Rather, while the **Parties have executed the Settlement Agreement and Mutual Release** ("Settlement Agreement"), they are in the process of finalizing the conditions for the effectiveness of the Settlement Agreement...The Parties believe that **with additional time they can finalize the conditions for effectiveness of the Settlement Agreement.**"

Motion, Dckt. 62.

On January 27, 2016, the Parties filed their fifth stipulation to continue the hearing. Dckt. 56. In the fifth stipulation, the Parties represented (and certified to the court) that:

"3. This is the fifth request for the requested relief. This requested extension is not being sought for purposed of delay. Rather, the **Parties are still in the process of negotiating and documenting a settlement** and have exchanged drafts of a settlement agreement...The Parties believe that **with additional time they can finalize the conditions for effectiveness of the Settlement Agreement.**"

Motion, Dckt. 56 (emphasis added).

On December 14, 2015, the Parties filed their fourth stipulation to continue the hearing. Dckt. 51. In the fourth stipulation, the Parties represented (and certified to the court) that:

"3. This is the fourth request for the requested relief. This requested extension is not being sought for purposed of delay. Rather, **the Parties are in the process of negotiating and documenting a settlement**...The Parties believe that **with additional time they can finalize the terms of a settlement**

agreement."

Motion, Dckt. 51 (emphasis added).

It appears that the Parties, if they can settle the disputes, will settle the disputes by the June 16, 2016, final continued hearing date. That will be 185 days since the December 14, 2015 Motion to Continue based upon the parties advising the court that they were documenting a settlement and finalizing the terms. If not settled, then it appears that the Parties will need to have their disputes resolved by the court.

STIPULATION

On June 24, 2015, the Plaintiffs and Defendant-Debtor filed an *ex parte* Application to Approve Stipulation to Extend Deadlines in Scheduling Order and to Continue the Hearing on Motion for Leave to File Third Party Complaint. Dckt. 34. In relevant part, the parties request, through the stipulation and in relevant part, to continue the instant hearing to 10:00 a.m. on August 20, 2015.

The court approved the stipulation on June 25, 2015, approving the requested continuance in light of the parties negotiating the underlying causes of action. Therefore, the instant Motion was continued to 10:00 a.m. on August 20, 2015.

STIPULATION

On August 14, 2015, the parties filed an *ex-parte* Application to Approve Second Stipulation to Extend Deadlines in Scheduling Order and to Continue the Hearing on Motion for Leave to File Third Party Complaint. Dckt. 39. In relevant part, the parties request, through the stipulation and in relevant part, to continue the instant hearing to 10:00 a.m. on October 22, 2015.

The court approved and granted this continuance in light of the parties negotiating the underlying causes of action. Therefore, the instant Motion was continued to 10:00 a.m. on October 22, 2015.

STIPULATION

On October 15, 2015, the parties filed an *ex-parte* Application to Approve Third Stipulation to Extend Deadlines in Scheduling Order and to Continue the Hearing on Motion for Leave to File Third Party Complaint. Dckt. 44. In relevant part, the parties request, through the stipulation and in relevant part, to continue the instant hearing to 10:00 a.m. on December 17, 2015.

The court approved and granted this continuance in light of the parties negotiating the underlying causes of action. Therefore, the instant Motion is continued to 10:00 a.m. on December 17, 2015.

STIPULATION

On December 14, 2015, the parties filed an *ex-parte* Application to Approve Third Stipulation to Extend Deadlines in Scheduling Order and to Continue the Hearing on Motion for Leave to File Third Party Complaint. Dckt. 51. In relevant part, the parties request, through the stipulation and in

relevant part, to continue the instant hearing to 10:00 a.m. on February 4, 2016.

The court approved and granted this continuance in light of the parties negotiating the underlying causes of action. Therefore, the instant Motion is continued to 10:00 a.m. on February 4, 2016.

STIPULATION

On April 26, 2016, the parties filed an ex-parte Application to Approve Sixth Stipulation to Extend Deadlines in Scheduling Order and to Continue the Hearing on Motion for Leave to File Third Party Complaint. Dckt. 62. In relevant part, the parties request, through the stipulation and in relevant part, to continue the instant hearing to 10:30 a.m. on April 28, 2016.

The court approved and granted this continuance in light of the parties negotiating the underlying causes of action. Therefore, the instant Motion is continued to 10:30 a.m. on April. 28, 2016. Dckt. 59.

STIPULATION

On January 27, 2016, the parties filed an ex-parte Application to Approve Third Stipulation to Extend Deadlines in Scheduling Order and to Continue the Hearing on Motion for Leave to File Third Party Complaint. Dckt. 56. In relevant part, the parties request, through the stipulation and in relevant part, to continue the instant hearing to 10:30 a.m. on June 16, 2016.

The court approved and granted this continuance in light of the parties negotiating the underlying causes of action. Therefore, the hearing on the instant Motion is continued to 10:30 a.m. on June 16, 2016. Dckt. 66.

JUNE 16, 2016 HEARING

To date, no supplemental papers have been filed in connection with the instant Motion.

At the hearing, xxxxxx

2. [13-91315](#)-E-7 APPLEGATE JOHNSTON, INC. MOTION FOR SUMMARY JUDGMENT
[15-9047](#) NHA-1 5-16-16 [[16](#)]
MCGRANAHAN V. INTEGRATED
COMMUNICATIONS SYSTEMS

Final Ruling: No appearance at the June 16, 2016 hearing is required.

Local Rule 9014-1(f)(1) Motion

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney on May 16, 2016. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion for Summary Judgment 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 and other parties in interest are entered.

The Motion for Summary Judgment is continued to 10:30 a.m. on July 7, 2016.
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Integrated Communications Systems, ("Defendant") filed the instant "Notice of Motion and Motion by Defendant ICS Integrated Communication Systems for Summary Judgment" on May 16, 2016. Dckt. 16.

The "Motion" states:

PLEASE TAKE NOTICE that on June 16, 2016, at 10:30 a.m. in the Modesto Division of this Court, at 1200 I Street, Suite 4, 2d Floor, Department E in Modesto, California, Defendant ICS Integrated Communications Systems (hereafter "ICS") will and hereby does move under FRBV 7056 for summary judgment in its facor in this Adversary Proceeding.

The Motion is made on the ground that there the undisputed facts show that the two payments that are the object of this claw-back action were nevery property of the debtor, and hence cannot be voided as preferential transfers.

The motion is supported by this Notice, ICS' Memorandum of Points and Authorities, the Declaration of Aaron Colton and Exhibits A - J attached hereto, ICS's Separate Statement of Undisputed Facts, and such other papers, evidence or arguments as may be submitted before or at the hearing on the motion.

Please take notice also that opposition, if any, to the

granting of the motion shall be in writing and shall be served and filed with the Court by the responding party and served on the office of counsel for ICS (as shown in the caption on the first page hereof) at least fourteen (14) days preceding the date or continued date of the hearing, making such opposition due no later than June 2, 2016. Failure to file timely written opposition may result in the motion being resolved without oral argument and the striking of untimely written opposition.

Failure to State with Particularity

In federal court, Federal Rule of Civil Procedure 7 and Federal Rule of Bankruptcy Procedure 7007 govern law and motion practice in federal court. Rule 7(b) specifically requires,

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) **state with particularity the grounds for seeking the order;** and

(C) state the relief sought.

Fed. R. Civ. P. 7(b) [emphasis added].

Plaintiff's Motion fails to state grounds upon which the relief is based, but merely summarizes the general facts around the case. This Motion fails to meet the pleading requirements of Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007. First, the Motion's only ground for relief is based on a legal conclusion with no support. The Motion does not specifically plead how, pursuant to Rule 55, the Defendant is entitled to summary judgment. While the Defendant does provide a Memorandum of Points and Authorities, in which various grounds may or may not be woven between citations, quotations, arguments, and speculation, the Motion itself does not state with particularity the grounds for relief.

In essence, the Defendant is requesting the court to mine the docket and Defendant's filing to piecemeal a proper motion under the Rules. Specifically, This is not the court's responsibility nor role.

Furthermore, the Motion states that it will be based upon "this Notice, ICS' Memorandum of Points and Authorities, the Declaration of Aaron Colton and Exhibits A - J attached hereto, ICS's Separate Statement of Undisputed Facts, and such other papers, evidence or arguments as may be submitted before or at the hearing on the motion." This, however, is not permitted. The Defendant is not be able to present further evidence at the time of the hearing in support. As required by the rules, all evidence in support of the instant Motion should

be filed in conjunction with the Motion. Any evidence presented at the time of hearing would be improper and would not be considered. In fact, the broad statement made by Defendant-Trustee would require the court to not only "mine" through the instant Adversary Proceeding, but also the underlying bankruptcy and an undisclosed number of other actions, whether federal or state, to compile what the Defendant believes is a basis that does not require the moving party to particularly and specifically plead in the Motion.

Mothorities

Taking a look at the Defendant Memorandum of Points and Authority, it appears to be akin to a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities"). When presented with these Mothorities, the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), 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 Defendant. 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.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. 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.

DISCUSSION

On June 1, 2016, Michael McGranahan, the Chapter 7 Trustee and Plaintiff filed an opposition and evidentiary objections. Dckt. 21 and 22.

On June 9, 2016, the Defendant filed a response to each the opposition and evidentiary objections. Dckt. 25 and 26.

In light of the complex nature of the instant Adversary Proceeding, the substantial opposition and response filed in connection with the Motion, the Defendant failing to properly state with particularity in the Motion the grounds for relief, the court continues the instant hearing to 10:30 a.m. on July 7, 2016 to afford the court the opportunity to review all the pleadings.

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

June 16, 2016 at 10:30 a.m.

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holding that:

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

The Motion for Summary Judgment filed by Defendant 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 continue to 10:30 a.m. on July 7, 2016. No supplemental papers to be filed in connection with the instant Motion.

3. [16-90421](#)-E-7 SHARON LEE

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
5-31-16 [[11](#)]

Final Ruling: No appearance at the June 16, 2016 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Sharon Berry Lee ("Debtor"), Debtor's Attorney, Trustee, and other such other parties in interest as stated on the Certificate of Service on May 31, 2016. The court computes that 16 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case (\$335.00 due on May 16, 2016).

The court's decision is to discharge the Order to Show Cause, and the case shall proceed in this court.
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The court's docket reflects that the default in payment which is the subjection of the Order to Show Cause has been cured.

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

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

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions ordered, and the case shall proceed in this court.

4. [13-90323](#)-E-12 FRANCISCO/ORIANA SILVA
FW-16

OBJECTION TO CLAIM OF
STANISLAUS COUNTY TREASURER TAX
COLLECTOR, CLAIM NUMBER 25,
OBJECTION TO CLAIM OF
STANISLAUS COUNTY TREASURER TAX
COLLECTOR, CLAIM NUMBER 26,
ETC.
4-28-16 [[231](#)]

Tentative Ruling: The Objection to Claim 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 3007-1 Objection to Claim - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Chapter 12 Trustee, and Office of the United States Trustee on April 28, 2016. By the court's calculation, 49 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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(b)(1)(A) 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 and other parties in interest are entered.

The Objection to Proof of Claim Number 25, 26, and 27 of Stanislaus County Treasurer Tax Collector is overruled without prejudice.

Francisco Mendes Silva and Oriana Fatima Silva, the Debtor in Possession ("Objector"), requests that the court disallow the amended claims of Stanislaus County Treasurer Tax Collector ("Creditor"), Proofs of Claim No. 25, 26, and

27 ("Claim"), Official Registry of Claims in this case. The Claims are asserted to be secured in the amounts of \$2,463.92 for Proof of Claim No. 25, \$4,410.43 for Proof of Claim No. 26, and \$29,492.02 for Proof of Claim No. 27.

Objector asserts that on June 15, 2015, the Creditor filed three proofs of claim as follows:

1. Proof of Claim No. 25.
 - a. \$2,463.92 secured claim on the property commonly known as 213 Barnhart Road, Ceres, California.
2. Proof of Claim No. 26
 - a. \$4,410.42 secured claim on the real property commonly known as 6400 Crowslanding Road, Ceres, California.
3. Proof of Claim No. 27
 - a. \$4,410.43 secured claim on the real property commonly known as 300 E. Barnhart Road Ceres, California.

All three Proofs of Claim indicate that it is the debt owing as of February 25, 2013, the date of filing the instant petition.

The Objector states that on February 22, 2016, Creditor filed amendments to each of the Claims. The Objector asserts that the amended proofs of claim add amounts that came due after the filing of the petition in this case. Therefore, the Objector asserts that they should be disallowed in the amount of the increased amendments.

The Objection fails to identify what additional amounts were added.

CREDITOR'S OPPOSITION

The Creditor filed an opposition on June 2, 2106. Dckt. 236. The Objector states that the amended claims are allowed because the accruing of post-petition interest is part of the amount owed under the Chapter 13 bankruptcy.

The Objector states that the claims state that additional penalties and interest accrue at a rate of 18% annum, or 1.5% per month, if they go into default and are not paid.

The amended claims include original amounts owed as of February 25, 2013, and the additional accrued penalties, interest, costs and fees owing as of February 22, 2016.

The Objector argues that the pre-petition penalties and post-petition penalties continue to accrue and are allowable as part of the secured claim under 11 U.S.C. § 502(b).

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is

allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

11 U.S.C. § 506(b) [emphasis added] deals with the determination of secured status. Specifically, 11 U.S.C. § 506 states:

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, **interest on such claim**, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

California's Revenue and Taxation Code states the following:

(a) Redemption penalties are the sum of the following:(1) Beginning July 1st of the year of the declaration of tax default, **on the declared amount of defaulted taxes at the rate of 1½ percent a month to the time of redemption**. If the last day of any month falls on a Saturday, Sunday, or legal holiday, the additional penalty of 1½ percent shall attach after the close of business on the next business day. . .

(b) For purposes of an administrative hearing or any claim in a bankruptcy proceeding pertaining to the property being redeemed, the assessment of penalties determined pursuant to subdivision (a) with respect to the redemption of that property constitutes the assessment of interest.

Cal. Rev. & Tax. Code § 4103 [emphasis added].

Here, the Objector does not provide specific grounds to disallow the amendments. The Objector appears to rely on 11 U.S.C. § 502(b)(2) that claims are allowed except to the extent that "such claim is for unmatured interest." This is not applicable to the instant case, where the Creditor is a tax assessment in which there is applicable state law. Here, as courts have found elsewhere, the post-petition charges are allowed as part of the secured claim. See 11 U.S.C. § 506(b).

Looking at Proof of Claim No. 25, the original claim amount was \$2,463.92 and the February 22, 2016 amount is \$2,744.74. At 18% interest, the claim increased by \$443.50 for each year's interest. It appears that this is the accruing interest which is part of the secured claim.

The Objector has failed to meet its burden to overcome the prima facie validity of the Creditor's claims nor has provided basis as to why the post-petition charges are not allowed under the Bankruptcy Code.

Based on the evidence before the court, the Objection to the Proof of Claim is overruled.

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 Claim of Stanislaus County Treasurer Tax Collector, Creditor filed in this case by Francisco Mendes Silva and Oriana Fatima Silva, 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 objection to Proof of Claim Numbers 25, 26, and 27 of Stanislaus County Treasurer Tax Collector is overruled without prejudice.

Final Ruling: No appearance at the June 16, 2016 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, Chapter 7 Trustee, and creditors on May 18, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion of Convert 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 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 the Chapter 7 Bankruptcy Case Pursuant to 11 U.S.C. Section 707(b) is granted and the case is dismissed.

Tracy Hope Davis, the United States Trustee, filed the instant Motion to Dismiss pursuant to 11 U.S.C. § 707(b) on May 18, 2016, dckt. 16. The United States Trustee makes the following arguments:

1. The Debtor's Chapter 7 case is presumptively abusive under 11 U.S.C. § 707(b)(1)
2. The Debtor's Chapter 7 case is an abuse under 11 U.S.C. § 707(b)(3)(B)

The U.S. Trustee asserts that on Schedule I and J, the Debtor states that he has a net income of more than \$800.00 per month. Dckt. 1. Additionally, based on the Debtor's pay advices, it appears that the Debtor understated his monthly "take home" pay by nearly \$500.00. Specifically, in Schedule I, the Debtor reported employment income of \$5,655.07 and payroll deductions of \$1,895.73 per month. But the most recent pay advice provided by the Debtor suggests employment income of \$6,155.00 per month (for a net amount of

\$4,259.27 after scheduled payroll deductions.

Additionally, the Debtor scheduled and budgeted more than \$500.00 to pay for his former spouse's care even though the Debtor has no obligation to make this payments.

Based on this information and adjustments, the U.S. Trustee argues that the Debtor's actual net monthly income exceeds \$1,800.00 which is sufficient to repay the Debtor's general unsecured debt in less than 36 months.

The U.S. Trustee admits that while the \$1,800.00 figure includes Social Security Income, even without it, the Debtor would still have monthly net income of nearly \$420.00. This would enable the Debtor to pay more than \$24,000.00 to his general unsecured creditors over a 60-month plan.

Furthermore, the U.S. Trustee states that the Debtor could also pay his priority tax debt of \$30,000.00 in full since it is already budgeted for priority tax payment on his Schedule J. In light of his ability to pay both partial unsecured and the priority claim, the U.S. Trustee states that the Debtor could pay \$54,000.00 to unsecured creditors in total, which represents more than 50% of the Debtor's total unsecured debts.

The U.S. Trustee argues that given the totality of the circumstances, including the Debtor's ability to pay and his allegedly inaccurate disclosures of his income and expenses, demonstrates abuse and should be dismissed.

APPLICABLE LAW

11 U.S.C. § 707 provides in relevant part:

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of--

(I) 25 percent of the debtor's nonpriority

unsecured claims in the case, or \$7,4751, whichever is greater; or

(II) \$12,4751.

(ii) (I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 302 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual

administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed \$1,8751 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of--

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B) (i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide--

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of--

(I) 25 percent of the debtor's nonpriority unsecured claims, or \$7,4751 , whichever is greater; or

(II) \$12,4751.

(C) As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated. . .

(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider--

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

DISCUSSION

The Movant's grounds are well-taken.

The instant case was filed on February 19, 2016. Dckt. 1.

A review of the Debtor's Schedule I and J indicate that the Debtor reports that he has a monthly "take home" pay of \$3,759.34. Dckt. 1. The Debtor also lists receiving \$1,409.00 per month in Social Security Income.

However, reviewing the pay advices submitted by the U.S. Trustee, the Debtor's take home pay appears to be \$4,259.27 which is \$499.93 higher than what the Debtor reports on Schedule I for employment information.

Then, turning the attention to Schedule J, The Debtor makes a payment of \$516.50 for the 2012 Nissan Murano, which is in the possession of the Debtor's ex spouse" who "is required to make the car payments in lieu of alimony." The Debtor admitted to the U.S. Trustee that the loan is in his name but now that he knows he is not responsible for keeping the loan current, he would amend the schedules to exclude the car payment. No such amendment has been made to date.

With the adjustments noted by the U.S. Trustee, it appears that the Debtor has disposable income of \$429.28 per month which could be applied to the payment of the Debtor's unsecured debts.

The court concurs with the U.S. Trustee's analysis. Excluding the Social Security Income, the Debtor has monthly disposable income which could be applied to the benefit of creditors in a Chapter 13. The Debtor, facially, appears to offer inaccurate and overstated expenses and income to qualify for a Chapter 7. The Debtor admitted that a \$516.50 car payment is no longer his responsibility but has failed to file any amended schedules to indicate the additional \$516.50 in disposable income.

Under 11 U.S.C. § 707(b), the presumption of bad faith exist and, given the totality of circumstances, cause exists to dismiss the instant case. The Debtor has failed to accurately and truthfully state his financial reality which raises serious concerns over the appropriateness of a Chapter 7.

Therefore, 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 7 case 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 to Dismiss pursuant to 11 U.S.C. § 707(b) is granted and the case is dismissed.

6. [16-90139](#)-E-7 AJAVA SYSTEMS, INC.
BJ-1

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH 680D, LLC
5-26-16 [[83](#)]

Tentative Ruling: The Motion for Approval of Compromise 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 whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Petitioning Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on May 26, 2016. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----.

The Motion For Approval of Compromise is granted.
--

Michael F. McGranahan, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with 680D, LLC ("Settlor"). The claims and disputes to be resolved by the proposed settlement are those arising from the storage and purchase of certain assets after the Debtor ceased operations of the leased food processing plant. Specifically, the estate's equipment remains on the plant premises. Settlor contends that it is entitled to recover a storage fee for the reasonable warehouse value of storing the Estate's equipment at the plan from and after the petition date. Additionally, Settlor disputes the ownership of the following items: (1) 1

glycoi chiller; (2) chiller, roof counted; (3) chiller with 2 freeon electric motors; (4) case sealer; and (5) elevant dumper unit.

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 A in support of the Motion, Dckt. 85):

- A. The Storage and Disputed Assets Dispute shall be deemed fully and finally compromised, resolved and settled and Trustee shall pay the Settlor \$50,000.00 as follows:
 - 1. If Settlor is the successful purchaser of the Purchase Assets, Settlor will be provided a credit in the Settlement Amount against the purchase price;
 - 2. If a bidder other than Settlor is the successful purchaser of the Purchase Assets, the Settlement Amount shall be by the Trustee to Settlor for the purchase price.
- B. Effective as of the closing (and if applicable, payment of the Settlement Payment), Settlor hereby release, and forever discharge Trustee, the Estate, the Debtor and their respectice successors and assignees from any and all claims, demands, actions, liabilities, losses, damages, and causes of action, including costs, fees, interest and attorneys' fees, in regard to or in any way arising from or relating to the Disputes. Settlor understands that this release extends to any and all current and future claims, demands, actions and causes of action of any and every kind of nature whatsoever, contractual, tortious, or otherwise, known or unknown, contemplated or uncontropted, in connection with or in any way arising from or relating to the Disputes.
- C. Settlor hereby agrees to waive all rights given by section 1542 of the Civil Code of the State of California.

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. Settlor has granted a corresponding release for Debtor and the Estate.

Probability of Success

The Trustee argues that, with respect to the Storage Issue, the estate's equipment remains in the plan and the lease terminated prepetition. There is a legitimate risk that an administrative expenses for the storage could be asserted against the estate. Here, the rent under the terminated lease is \$27,000.00 per month. The Trustee strongly supports settlement.

As to the Disputed Assets, the chiller equipment is affixed to the plan in such a fashion that it would likely be considered as a fixture that reverted to the landlord upon lease termination. The Trustee could conduct discovery and attempt to defend but probability of the success is uncertain and supports settlement.

Difficulties in Collection

The estate is not seeking to recover from Settlor and does not believe collectability is an issue

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that litigation would result in significant costs, which are projected based on the unsettled nature of the claim, the need for a warehouse rent expert witness, and the loss of value due to depreciation. Formal discovery would be required, with depositions of the Settlor, Settlor's relatives, and document production requests of third parties will be required. The Movant estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Movant projects that the proposed settlement nets approximately the same or a greater recovery for the Estate than if the case proceed to trial, but without the costs of litigation.

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 ~~XXXXXXXXXXXXXXXXXXXX~~.

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 settlement provides for the complete resolution of both the storage fee issue as well as the dispute concerning certain assets. The settlement agreement contemplates what will happen in the context of the selling of the items and how those proceeds would be used against the settlement amount. The settlement avoids any possible liability of 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 Approve Compromise filed by Michael D. McGranahan, the 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 680D, LLC ("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 A in support of the Motion(Docket Number 85).

7. [16-90139](#)-E-7 AJAVA SYSTEMS, INC.
BJ-2

MOTION TO SELL FREE AND CLEAR
OF LIENS
5-26-16 [[88](#)]

Tentative Ruling: The Motion to Sell Property 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 whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Petitioning Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on May 26, 2016. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----
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The Motion to Sell Property is granted.
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The Bankruptcy Code permits the Chapter 7 Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the personal property specifically listed in Exhibit B of Dckt. 90 ("Property").

The proposed purchaser of the Property is 680D, LLC and the terms of the sale are:

1. Purchase Price of \$230,000.00.
 - a. Upon execution of the agreement, Buyer will deposit with the Trustee the sum of \$20,000.00 in immediately available funds to be credited against the Purchase Price at Closing. The deposit will serve as liquidated damages in the event of default by the purchaser.
2. The sale will be free and clear of interest in the purchase assets represented by:
 - a. The UCC Financing Statement in favor of Turlock Business Services, Inc. Dba Express Employment Professionals filed January 13, 2016.
 - b. The Notice of Attachment Lien in favor of New Century Transport LLC filed January 7, 2016.
 - c. The Notice of Attachment Lien in Favor of Pacific Gold Milk Producers, Inc. filed January 4, 2016.

The bankruptcy case was filed on February 8, 2016.

3. The sale will be as is, where is, with all faults.
4. The successful purchaser shall be deemed a good faith purchaser entitled to the protection of 11 U.S.C. § 363(m), provided such purchaser provides admissible evidence sufficient to support such a finding.
5. The closing shall be at the office of the Trustee on or about the 22nd day after entry of the order approving sale.
6. At the closing, Buyer shall deliver to the Trustee the balance of the purchase price, after application of: (1) deposit and (b) the credit of \$50,000.00 in immediately available funds. Any successful purchaser other than Buyer shall be required to deliver to the Trustee the balance of the purchase price after application of the deposit in immediately available funds.
7. If Buyer is the successful purchaser, the Trustee will pay the Settlement Amount to Buyer from the Purchase Price.

SALE FREE AND CLEAR OF LIENS

The Motion seeks to sell Property free and clear of the liens of UCC Financing Statement of Turlock Business Services, Inc., New Century Transport LLC, and Pacific Gold Milk Producers, Inc. ("Creditor"). The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

"(f) The trustee [debtor in possession or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity

other than the estate, only if-

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f)(1).

For this Motion, the Movant has established that as to the Notice of Attachment liens of New Century Transport and Pacific Gold Milk Producers are terminated pursuant to California Code of Civil Procedure § 493.030(b) which provides

(a) The making of a general assignment for the benefit of creditors terminates a lien of a temporary protective order or of attachment if the lien was created within 90 days prior to the making of the general assignment.

(b) The filing of a petition commencing a voluntary or involuntary case under Title 11 of the United States Code (Bankruptcy)¹ terminates a lien of a temporary protective order or of attachment if the lien was created within 90 days prior to the filing of the petition.

(c) Subdivisions (a) and (b) do not apply unless all liens of attachment on the defendant's property in other states that were created within 90 days prior to the making of a general assignment for the benefit of creditors or the filing of a petition commencing a case under Title 11 of the United States Code (Bankruptcy) have terminated.

Cal. Civ. Proc. Code § 493.030 (West). The Movant argues that the instant case was filed February 8, 2016 which is within 90 days prior to the filing of the petition. As such, as a matter of non-bankruptcy law, the Movant asserts that the assets can be sold free and clear pursuant to 11 U.S.C. § 363(f)(1).

As to the UCC Financing Statement of Turlock Business, the Movant argues that because the Financing Statement was filed on January 13, 2016, well within the 90 days prior to filing the petition date, that pursuant to 11 U.S.C. § 547 the lien may be avoidable. As such, and due to the apparent avoidability, the Movant asserts that the Property can be sold free and clear pursuant to 11 U.S.C. § 363(f)(4). Additionally, the Movant argues that because the creditor failed to file an opposition to the instant Motion, that this can be construed as consent under 11 U.S.C. § 363(f)(2).

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. Given the unique facts of the instant case and the unknown nature of certain pieces of the Property being construed as fixtures and the possible administrative storage expense, the terms of the sale are in the best interest of the parties. The sale contemplates a set off from the settlement amount between the parties for the purchase price of the property. As discussed by the Movant, the Property are currently being stored at the Plant leased by the Debtor from the Buyer. The Debtor, prior to filing, closed the food processing business at the plant and kept the equipment there. The proposed sale allows for the Trustee to liquidate the field-specific equipment in order to bring equity into the estate while settling potential administrative concerns.

Additionally, the Movant has made a sufficient showing under 11 U.S.C. § 363(f) that the Property can be sold free and clear. Both under nonbankruptcy law and bankruptcy law, the liens appear to either be terminated by state law or raise to the level of a bona fide dispute. The liens attach to the sales proceeds, pending entry of further order or judgment.

Therefore, 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 Sell Property filed by Michael D. McGranahan 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 Michael D. McGranahan, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) and (f) to 680D, LLC or nominee ("Buyer"), the Property specifically listed on Exhibit B, Dckt. 90, on the following terms:

1. The Property shall be sold to Buyer for \$230,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 90, and as further provided in this Order.
2. The sale proceeds shall first be applied to closing costs, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
3. The Property is sold free and clear of the lien of UCC Financing Statement of Turlock Business Services, Inc., New Century Transport LLC, and Pacific Gold Milk

Producers, Inc., creditor asserting a secured claim, pursuant to 11 U.S.C. §363(f), with the lien of such creditor attaching to the proceeds. The Trustee shall hold the sale proceeds; after payment of the closing costs, other secured claims, and amount provided in this order; with the liens of the above creditors attaching to the sales proceeds pending further order or judgment of the court.

4. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

8. [16-90148-E-7](#) SANDRA MONTIEL
CJY-1

MOTION TO AVOID LIEN OF
AMERICAN EXPRESS CENTURION BANK
5-10-16 [[13](#)]

Final Ruling: No appearance at the June 16, 2016 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, Chapter 7 Trustee, American Express Centurion Bank, and Office of the United States Trustee on May 10, 2016. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of American Express Centurion Bank ("Creditor") against property of Sandra Montiel ("Debtor") commonly known as 5229 Gatwick Court, Salida, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$15,875.02. An abstract of judgment was recorded with Stanislaus County on January 19, 2016, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$271,000.00 as of the date of the petition. The unavoidable consensual liens total \$325,123.26 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of \$100.00 on Schedule C.

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 American Express Centurion Bank, California Superior Court for Stanislaus County Case No. 659971, recorded on January 19, 2016, Document No. 2016-0004695-00 with the Stanislaus County Recorder, against the real property commonly known as 5229 Gatwick Court, Salida, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

Tentative Ruling: The Motion to Abandon Property 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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 31, 2016. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----
-----.

The 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 known as 1133 South Minaret Avenue, Turlock, California (the "Property"). The Property was to be purchased for \$180,000.00. However, the buyer decided to cancel the contract due to the

Property having been occupied by vagrant individuals who occupied or slept on the premises and used drug related paraphernalia.

The Trustee has investigated whether hiring personel to board up the Property and provide security at night would be beneficial. The Trustee determined that it would cost the estate substantial monies to achieve such.

The Trustee states that he and his counsel have met with the Debtor and Debtor's husband who have refused to advance funds as an administrative expense for the benefit of the estate to be repaid upon the sale of the property.

There are currently no active buyers and the Trustee's broker has indicated that the property is presently condemned by the City of Turlock until and unless requisite repairs to electrical and other property items are taken care of. The estimated cost would be at least \$1,000.00. The Trustee states that he has no funds at hand nor the ability to borrow against the Property.

The estate is completely insolvent. The Trustee argues that while it is possible that the Property has some equity for the estate, it has proven to be very burdensome to the estate and to the Trustee to maintain and administer.

The Property is encumbered by the liens of Ocwen Loan Servicing, City of Modesto, securing claims of \$112,000.00 and \$258,53.00, respectively. The Declaration of Michael D. McGranahan has been filed in support of the motion and testifies that the value of the Property is \$180,000.00.

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.

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

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

The Motion to Abandon Property filed by 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. 1133 South Minaret Avenue, Turlock, California (the "Property")

is abandoned to Rachel Mariscal Marmol by this order, with no further act of the Trustee required.

10. [15-90358](#)-E-11 LAWRENCE/JUDITH SOUZA
MHK-12

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH TURLOCK AIR PARK
5-19-16 [[329](#)]

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 - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on May 19, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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). 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 for Approval of Compromise is granted.
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Lawrence James Souza and Judith Louise Souza, the Debtor in Possession, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Turlock Air Park ("TAP"), Elaine Marie Wilson, John

Souza, Jr. and Mary Carolyn Souza, and the Estate of Gurmukh Gill (collectively "Settlor").

After the deaths of Debtor-in-Possession Lawrence Souza's sister, brother in law, mother and father, he along with his siblings (Elaine, John, and Mary Ann) became estranged in a series of disputes over the administration of the estates.

After litigation was commenced and arbitration conducted in 2009, the parties entered into a written settlement agreement that had Elaine, John, the estate of Mary Ann, and Lawrence each received a one-quarter interest in TAP. Also, as part of the settlement, Debtor-in-Possession gave two promissory notes to each Elaine, John, and Mary Ann's estate, one for \$120,000.00 and the other for \$5,305.12. Each such note bears interest at 3% per year, from July 13, 2002. Each such note is payable upon disposition of all or substantially all of TAP's assets. (The six promissory notes are collectively referred to as the "Notes").

In addition to being TAP shareholders, Elaine, John, and Debtor-in-Possession held positions on TAP's board of directors and served as officers. Following the settlement, further disputes arose between Debtor-in-Possession and TAP and its shareholder around the operation of TAP and the relationship of TAP to Souza Propane, Inc. TAP's shareholders alleged that Debtor-in-Possession improperly caused TAP to accept the renewal of the lease which led to a loss.

Furthermore, Debtor-in-Possession asserts that by 2007, the other shareholders improperly excluded Debtor-in-Possession from operation of TAP.

Although the disputes were ongoing, TAP sold its real property and related personal property in 2015 and received net proceeds consisting of \$2,323,304.77 in cash and \$1,000,000.00 secured carry-back promissory note that bears interest at 3% per year and is due and payable in 2019. TAP continues to hold the net sale proceeds and the carry back note.

Debtor-in-Possession contends that he is entitled to receive no less than one-quarter of the value of the net proceeds of sale of TAP's property or at least approximately \$580,826.00 plus at least one quarter of the \$809,000.00 present value of the Carry Back Note, which totals \$787,076.00, without regard to the amounts owed by Debtor-in-Possession under the Notes.

By contrast, Elaine, John, and the Gill Estate contend that as co-shareholders in TAP, and under the first settlement agreement, they each have rights to offset the amount owed by Debtor-in-Possession on the Notes against the amount otherwise payable to Debtor-in-Possession as shareholder in TAP on account of the sale of TAP's real and business property. The siblings contend that the aggregate amount owing to them under the Notes was \$556,482.62 as of April 13, 2016.

The Debtors-in-Possession believe that no perfected security interests exist against Debtor-in-Possession's 25% interest in TAP or the proceeds of that interest.

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 and 2 in support of the Motion, Dckt. 333):

- A. TAP is to pay the Debtors-in-Possession the sum of \$450,000.00 by wire no later than 7 days after entry of an order approving the agreement
- B. The Debtors-in-Possession receipt and negotiation of the wire transfer and Debtor-in-Possession Lawrence Souza's execution of the Agreement cause the cancellation of any promissory notes or obligations owed by TAP to the Debtors-in-Possession, the cancellation of any stock or share certificates in TAP held or owned by the Debtors-in-Possession and the resignation of Debtor-in-Possession Lawrence Souza as a director, officer, or any other corporate position with TAP.
- C. The Agreement effects a general release of claims held by TAP, Elaine, John, and the Gill Estate against the Debtors, Debtors-in-Possession and their bankruptcy estate; and also a release of claims held by the Debtors-in-Possession against TAP, Elaine, John, and the Gill Estate.
- D. Each party is to bear his, her, or its own attorneys fees and costs.

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. Settlor has granted a corresponding release for Debtor and the Estate.

Probability of Success

The Movant asserts that if it was to go to litigation, the legal issue to be resolved would be whether TAP can properly reduce the amount payable to Debtor-in-Possession on account of his ownership interest in TAP, by the amount of Debtor-in-Possession owes the other shareholders on account of the Notes. Issues concerning set-offs pursuant to 11 U.S.C. § 553 would be raised.

Additionally, the court would need to determine if there had been any breach of fiduciary duties in the running of TAP under California state law in terms of the renewal of the lease and how responses to certain requests were handled.

The Movant argues that the probability is unclear given these unusual facts. A great deal of testimony would be needed to establish the facts and the legal principles concerning set offs would require briefing.

Due to the unclear nature of success, the Movant states the factor weighs in favor of settlement.

Difficulties in Collection

The Movant believes that collections from TAP of amounts payable to Debtor-in-Possession on account of his ownership interest would not be difficult should the estate succeed in its claims TAP for same. Though there may be appellate review of any decision favorable to the Debtors-in-Possession. This Movant asserts that this factor is neutral.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that litigation would result in significant costs which are projected based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. Formal discovery would be required, with depositions of the Settlor, Settlor's relatives, and document production requests of third parties in California will be required. The Movant estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Movant projects that the proposed settlement nets approximately the same or a greater recovery for the Estate than if the case proceed to trial, but without the costs of litigation.

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 instant case has been pending for approximately 14-months with

significant progress in settling claims in the estate. The factual circumstances surrounding this case, with multiple interests in numerous corporations and shared interests with family are extra-ordinary and requires significant factual and legal discovery. The settlement proposed offers the cleanest and equitable settlement of the decades of litigation between the parties to settle the various claims. 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 Approve Compromise filed by Lawrence James Souza and Judith Louise Souza, the Debtor in Possession, ("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 Turlock Air Park, Elaine Marie Wilson, John Souza, Jr. and Mary Carolyn Souza, and the Estate of Gurmukh Gill ("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 and 2 in support of the Motion(Docket Number 333).

IT IS FURTHER ORDERED that the settlement proceeds shall be deposited by the Debtors in Possession into a separate blocked interest bearing account at xxxxxxxxxxxxxxxx, from which no monies will be disbursed except upon further order of the court.

Tentative Ruling: The Motion for Turnover 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, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 19, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Turnover 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 and other parties in interest are entered.

The Motion for Turnover is granted.
--

Gary Farrar, the Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to: (1) the real property commonly known as 421 S.W. Fairway Landing, Port St. Lucie, Florida ("Property"); (2) post-petition annuity proceeds the Debtor has received from her nonexempt annuity; or (3) a money judgment for the amount of the post-petition annuity proceeds.

The Debtor scheduled the annuity and valued it at \$75,000.00 and exempted its full amount. The annuity makes monthly payments in the amount of \$538.71 and the Debtor has received eleven monthly payments totaling \$5,925.81 since filing this case. The court sustained the Trustee's objections to the Annuity exemption in full.

The Debtor scheduled the Property and valued it at \$150,000.00 and exempted \$175,000.00. The court sustained the Trustee's objections to the Property for all amounts in excess of \$75,000.00.

The annuity proceeds the Debtor received post-petition and the Property (except as to the value of the exemption) are property of the bankruptcy estate.

The Trustee alleges that he has tried for 9 months to obtain the turnover of the annuity proceeds but the Debtor has rebuked the Trustee's efforts.

The Trustee states that he has already received from the annuity company a check of \$40,494.04 which "represents the commuted value of the remaining guaranteed annuity payments."

The Trustee has employed a relator to market and sell the Property. However, the Trustee reports that the Debtor has failed to cooperate.

The Trustee requests that the court grant the instant Motion and order the Debtor to turn over the Property and all post-petition Annuity proceeds, and enter a money judgment against the Debtor if she claims she no longer has possession, custody, or control of the post-petition annuity proceeds or fails to turn them over.

DEBTOR'S OPPOSITION

The Debtor filed an opposition to the instant Motion on June 3, 2016. Dckt. 84. FN.1.

FN.1. To the extent that the Debtor rehashes her prior arguments as to the Objection to Exemptions, the court will not reargue the basis of sustaining the objections. If the Debtor wishes to have the court reconsider and vacate the orders, the Debtor may file a Motion to Reconsider.

First, the Debtor asserts that the Debtor is now entitled to a homestead exemption of \$175,000.00 in view of the "attempted sale of the homestead." The Debtor argues that since the Trustee is no seeking to sell the Debtor's homestead, and now that she is 65 years old, she qualifies for the \$175,000.00 exemption pursuant to California Code of Civil Procedure § 704.730(a)(3).

As to the annuity benefits received post-petition, the Debtor argues that California Code of Civil Procedure § 704.100(b) creates an exemption in cash value in annuities of \$9,700.00. This is much more than the benefits the Debtor received post-petition.

The Debtor's declaration states the following, as to the amount received post-petition:

I am entitled to an exemption of \$9,700.00 in an annuity under California law and an unlimited exemption under Florida law. Since the Trustee has liquidated the entity, the only cash

value available to me is the payments received post-petition which are less than \$6,000. Because the exemption allowable is \$9,700, these payments received are exempt.

Dckt. 85.

APPLICABLE LAW

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Trustee has initiated this proceeding to compel Debtors deliver property to the Trustee. Federal Rule of Bankruptcy Procedure permits the trustee to obtain turnover from the Debtor without filing an adversary proceeding. This Motion for the injunctive relief, in the form of a court order requiring that Debtors turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

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." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *In re Hernandez*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); See also 11 U.S.C.A. §§ 541(a), 542(a). Section 542(a) requires one in possession of property of the estate to deliver such property to the Trustee. Pursuant to 11 U.S.C. § 542, a Trustee is entitled to turnover of all property of estate from Debtors. Most notably, pursuant to 11 U.S.C. § 521(a)(4), the Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

Cal. Code Civ. Proc. Section 704.100(c) states:

Benefits from matured life insurance policies (including endowment and annuity policies) are exempt to the extent reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor.

Cal. Code. Civ. Proc. §707.730(a)(3)(A) states:

For purposes of the instant Objection, California law provides the following homestead exemption:

(a) The amount of the homestead exemption is one of the following:

(1) Seventy-five thousand dollars (\$75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).

(2) One hundred thousand dollars (\$100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(3) One hundred seventy-five thousand dollars (\$175,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead any one of the following:

(A) A person 65 years of age or older.

(B) A person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph as to his or her inability to engage in substantial gainful employment.

(C) A person 55 years of age or older with a gross annual income of not more than twenty-five thousand dollars (\$25,000) or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than thirty-five thousand dollars (\$35,000) and the sale is an involuntary sale.

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be

apportioned between the spouses on the basis of their proportionate interests in the homestead.

California Code of Civil Procedure § 704.730.

DISCUSSION

First, to address the annuity, the court previously addressed the basis for exemption:

First, in order for Debtor to claim an exemption on the Annuity, Debtor must show that is not an investment and an actual life insurance policy. Here, the Debtor has failed on the first level to show that the annuity is an "actual" life insurance policy and not an investment. The crux of the difference between a life insurance and annuity is the timing of the benefit to the estate. The life insurance is a contract "whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event where the contingent of the unknown event is mortality." *Estate of Short v. Payne (In re Payne)*, 323 B.R. 723, 728 (B.A.P. 9th Cir. 2005). Annuities, on the other hand, are periodic set payments set for a specific time, which offers immediate benefit. *Id.*

Debtor offers no evidence to support the contention that the annuity can qualify under the life insurance exemption. Further, on Schedule C this asset is described as a "defined benefit retirement annuity," for which the exemption is claimed under California Code of Civil Procedure § 704.100(c); "(c) Benefits from **matured life insurance policies** (including endowment and annuity policies) are exempt to the extent reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor." [Emphasis added]

Here, based on the evidence presented, Debtor is attempting to exempt an annuity, not benefits from a matured life insurance policy, which does not qualify under California Code of Civil Procedure § 704.100.

Furthermore, even if, arguendo, the Debtor's annuity qualified for the exemption, the Debtor has not met the burden to show why the annuity (if it were classified as a life insurance policy) is "reasonably necessary" for support. The Debtor has the burden of proving that the annuity would be reasonably necessary for support. However, as discussed supra, the Debtor failed to reach the burden of the annuity qualifying as a life insurance policy.

The Debtor filed an amended Schedule C on June 3, 2016. Dckt. 83. The Debtor remains to claim an exemption pursuant to California Code of Civil Procedure § 704.100. The only difference between the most recent Schedule C and the previously one filed is that the Debtor removed the subsection (c).

As discussed in the Objection to Exemption, the Debtor's exemption for annuity was disallowed for the reasons stated supra. The Debtor cannot come back and reclaim the same exemption for which the court had previously disallowed. The Debtor has not provided any of the necessary information or argument to justify the use of the exemption. As of April 7, 2016, the Debtor's use of California Code of Civil Procedure § 704.100 for the annuity was disallowed. Dckt. 68. The Debtor does not have any exemption claim against the annuity. Therefore, as to the annuity, the Motion is granted.

The court has previously addressed the homestead exemption as well previously:

As to the homestead exemption, it is settled in the Ninth Circuit that the applicability and validity of exemptions is determined as of the petition date. *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 392 (B.A.P. 9th Cir. 2003); Citing *White v. Stump*, 266 U.S. 310 (1924), and *In re Herman*, 120 B.R. 127, 230 (B.A.P. 9th Cir. 1990). As stated in *White*,

"[t]he point of time which is to separate the old situation from the new in the bankrupt's affairs is the date when the petition is filed. This has been recognized in our decisions. Thus we have said that the law discloses a purpose 'to fix the line of cleavage' with special regard to the conditions existing when the petition is filed, *Everett v. Judson*, 228 U.S. 474, 479, and that -- 'It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed and that his estate passes actually or potentially into the control of the bankruptcy court.' *Bailey v. Baker Ice Machine Co.*, 239 U.S. 268, 275; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 307.

White v. Stump, 266 at 313.

The date the cleavage in this case occurred, by which the rights and interests of the estate were created, was May 14, 2015. 11 U.S.C. § 541(a). This effectuated the "sale" of whatever interests the Debtor had to the bankruptcy estate and cleaved away from the Estate is that portion of the value of the property is the Debtor's homestead exemption as of May 14, 2015. To claim a \$175,000.00 homestead exemption on the Property, Debtor had to be sixty-five years old as of May 14, 2015. She was not, but was only sixty-four years old.

Dckt. 66.

The Debtor argues that now, because the Trustee is attempting to sell the Property, that the date of "sale" should be the instant date. As of today, the Debtor is 65 years old. Therefore, the Debtor argues that she now qualifies for the \$175,000.00 exemption.

Unfortunately, this is inaccurate. As stated by the court previously, the "cleavage" date is May 14, 2015, the petition date. As discussed supra, the effective date for exemptions is the date the petition is filed as that is the time when whatever interests the Debtor had is transferred to the estate. The Debtor needed to be 65 at the time of petition date. The Debtor was not and therefore, as discussed in the Objection to Exemptions, the Debtor is not entitled to the \$175,000.00 exemption.

Therefore, the Motion is granted and the court orders the immediate turnover of the real property and the \$5,925.81 in annuity proceeds. The order to turn over the amount of the annuity proceeds is without prejudice to the Trustee's right to claim interest on such amounts from an earlier date if Debtor fails to comply with this order.

The court reserves for further adversary proceeding, motion for sanctions, or other appropriate proceeding the entry of a judgment (for which an adversary proceeding is required) or order for a monetary "judgement" as requested by the Trustee.

Enforcement of Court Orders

Federal Rule of Bankruptcy Procedure 9014 makes the enforcement of judgments provisions of the Federal Rules of Civil Procedure incorporated into the Federal Rules of Bankruptcy Procedure, including:

- A. Fed. R. Civ. P. 64, Fed. R. Bankr. P. 7064; Seizing of Person or Property, which includes:
 - 1. All of the applicable state law and federal which provides for the seizing of a person or property to enforce a judgment (which definition includes an order);
 - 2. With Remedies include:
 - a. Arrest,
 - b. Sequestration, and
 - c. Other Corresponding or Equivalent Remedies.
- B. Fed. R. Civ. P. 70, Fed. R. Bankr. P. 7070; Judgment for Specific Acts; Vesting Title, including:
 - 1. Judgment Divesting a Party of Title to Property;
 - 2. Ordering Another Person to Perform the Specific Acts of a Party that Fails to Comply Within the Time Period to Complete a Specific Act;
 - 3. Issue a Writ of Assistance; and
 - 4. Holding the Disobedient Party in Contempt (for which the civil sanctions issued by the bankruptcy judge include incarceration until there is compliance with the Order.

In addition, the bankruptcy court may refer the matter to the Article III district court judge to exercise that court's punitive contempt power to address the failure to comply with the order of the bankruptcy judge.

Finally, in addition to the normal state enforcement officers, orders of federal judges may also be enforced by the United States Marshal.

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

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

The Motion for Turnover of 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 for Turnover of Property is granted.

IT IS FURTHER ORDERED that Susan Fiscoe ("Debtor"), shall deliver on or before July 14, 2016, possession of the real property commonly known as 421 S.W. Fairway Landing, Port St. Lucie, Florida (the "Property"), with all of their personal property, personal property of any other persons which Debtors, and each of them, allowed access to the Property; and any other person or persons that Debtors, and each of them, allowed access to the Property removed from the Property.

IT IS FURTHER ORDERED that Susan Fiscoe ("Debtor"), shall deliver on or before July 14, 2016, possession of post-petition annuity proceeds the Debtor has received from her nonexempt annuity to Gary Farrar, the Chapter 7 Trustee.

The issuance of this order is without prejudice to the rights of the Trustee and bankruptcy estate arising from the failure to comply with prior orders of this court or other claims or rights against the Debtor.

12. [08-92474-E-7](#) DARLENE BLAN
SCB-2

MOTION TO EMPLOY LEZZLIE
HORNSBY AS SPECIAL COUNSEL
5-11-16 [[33](#)]

Tentative Ruling: The Motion to Employ 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, creditor, and Office of the United States Trustee on May 11, 2016. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Employ 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 and other parties in interest are entered.

The Motion to Employ is granted.

Chapter 7 Trustee, Gary R. Farrar, seeks to employ Special Counsel Lezzlie Hornsby, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Special Counsel to assist the Trustee in continuing litigation in a multi-district product liability lawsuit in the United States District Court for the Southern District of West Virginia. *In re: C.R. Bard, Inc.*, Pelvic Repair System Products Liability Litigation, MDL No. 2187. Ms. Hornsby represented the Debtors in the case and the Trustee argues that the continued representation by Ms. Hornby will prevent any further delay.

The Trustee argues that Counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present interest in the product liability case. The Trustee has been informed that the parties are still litigating and have reached a proposed

settlement. Based on this, the Trustee wishes to retain Ms. Hornsby to continue prosecuting the lawsuit.

The Trustee proposes to employ Ms. Hornsby on the same terms and conditions as the existing fee agreement between the firm and the Debtor with the exception of the Arbitration and Choice of Law provisions.

Under the Fee Agreement, legal fees are 40% of all amounts collected from the law suit and reimbursement of costs, only if there is recovery. If there is no recovery, Ms. Hornsby and the firm will not receive any fees or costs.

Lezzlie Hornsby, an associate of Clark, Love and Hutson, GP, testifies that she is representing that she nor anyone at the firm have any connection with the parties involved nor any connection to the Debtor's creditors. Lezzlie Hornsby testifies she and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

The Declaration does state that, because the bankruptcy court has jurisdiction, Section XII and Section III are stricken from the fee agreement.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

The contingent fee agreement, originally signed by the Debtor, is filed as Exhibit B in support of the Motion. Dckt. 37. The employment is approved subject to those terms as modified by the agreement of the Parties.

Taking into account all of the relevant factors in connection with the employment and compensation of Counsel, considering the declaration demonstrating that Counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Lezzlie Hornsby as special counsel for the Chapter 7 estate on the terms and conditions set forth in the Agreement filed as Exhibit B, Dckt. 37. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ Lezzlie Hornsby as special counsel for the Chapter 7 Trustee on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit B, Dckt. 37, with Section XII and Section III (Arbitration and Choice of Law provisions) are stricken from the fee agreement.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

13. [16-90277](#)-E-7 BENSON CONSTRUCTION,
ADJ-2 INC.

MOTION TO EMPLOY FIRST CAPITOL
AUCTION, INC. AS AUCTIONEER(S)
5-26-16 [[19](#)]

Tentative Ruling: The Motion to Employ 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.

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 May 26, 2016. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----
-----.

The Motion to Employ is granted.

Chapter 7 Trustee, Michael D. McGranahan, seeks to employ Auctioneer First Capitol Auction, Inc., pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Auctioneer to assist the Trustee in selling vehicles owned by the Estate through public action.

The Trustee argues that Auctioneer's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present ownership interest in seven vehicles and trailers in which the Trustee seeks to have sold at public auction for the benefit of the estate, debtors, and other parties in interest.

Eric Smith, an associate of First Capitol Auction, Inc., testifies that he is representing that he is a disinterested party and has transported the vehicles to Vellajo, California and will seek reimbursement of those expenses. Eric Smith testifies he and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

The terms of the agreement are summarized as follows:

1. Auctioneer to receive a commission of 5% on the gross proceeds of the auction sale. Auctioneer also charges and received from each buyer a 15% buyer's premium on sale items.
2. Auctioneer's commission and expenses will be estimated and noticed in the Trustee's Motion to Sell and creditors will be given the opportunity to object to said fees and costs.
3. Included in the commission (that is, not charged to the estate) will be necessary expenses including, but not limited to, storage, inventory, security, advertising, and other costs of sale. Other extraordinary expenses, such as repair work, vehicle hauling and detailing deemed by Trustee to be necessary and beneficial to the estate, will be paid by the estate from said sale proceeds. These extraordinary expenses will not exceed \$2,130.00 and the extraordinary expenses are for towing. In addition, Auctioneer will conduct an internet auction simultaneously with the live auction, at no additional cost to the estate or buyer.
4. Auctioneer will, within 15 days of the auction sale, turn over the "net" proceeds of sale to Trustee, that is, the gross proceeds less auctioneer's fees and costs, as itemized in the sale motion.
5. Auctioneer will provide a certificate of insurance in the amount of \$1,000,000.00 property insurance and \$2,000,000.00 liability insurance. Auctioneer is licensed to do business in the state of California and is complying in all respects with applicable law. Auctioneer has also executed a bond in favor of the United State in the amount of \$100,000.00 to protect estate funds in its possession and control.

The Debtor filed a non-opposition on May 27, 2016.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions,

including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Auctioneer, considering the declaration demonstrating that Auctioneer does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ First Capitol Auction, Inc. as auctioneer for the Chapter 7 estate on the terms and conditions set forth in the Agreement filed as Exhibit A, Dckt. 22. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ First Capitol Auction, Inc. as auctioneer for the Chapter 7 Trustee on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit A, Dckt. 22.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are

permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

14. [16-90277-E-7](#) BENSON CONSTRUCTION, MOTION TO SELL
ADJ-3 INC. 5-26-16 [[13](#)]

Tentative Ruling: The Motion to Sell Property 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 whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

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 May 26, 2016. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----
-----.

The Motion to Sell Property is granted.
--

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

- A. 1985 Ford F-350 Truck, VIN Number ending 4555, Item number 3369
- B. 2013 Load Trail tandem axel landscape trialer, VIN number ending 0411, Item number 3320,
- C. 2012 Iron Panther UT1376X14 7K utility trailer, VIN number ending 4781, Item number 3422
- D. 2006 Dodge Ram 1500 crew cab pickup, VIN number ending 4973, Item number 3625
- E. 1998 Chevrolet 3500 dump bed truck with contents, VIN number ending 2067, Item number 3370
- F. 2012 Iron Panther UT 1376X14 7K utility trailer with contents, VIN Number ending 4780, Item number 3421
- G. Pacwest utility dump trailer with contents, Item number 3423

As to the Property for public auction, the Movant asserts that the public auction will take place through public auction through a licensed Auctioneer, First Capitol Auction. The Trustee argues that he believe sale by public auction is in the best interests of the creditors and will bring the best possible price. The proposed auction will take June 24, 2016 through June 25, 2016 at the First Capitol Auction facility located at 50 Solano Avenue, Vallejo, California.

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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

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

The Motion to Sell Property filed by Michael D. McGranahan the 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 Michael D. McGranahan, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) through Eric Smith of First Capitol Auction, Inc. At a public auction the Property referenced in Exhibit A, Dckt. 16, on the following terms:

1. The Property shall be sold through public action conducted by Eric Smith of First Capitol Auction, Inc.

for \$20,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 16, and as further provided in this Order.

2. The sale proceeds shall first be applied to closing costs, other customary and contractual costs and expenses incurred in order to effectuate the sale.
4. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
5. The Trustee be and hereby is authorized to pay an auctioneer's commission in an amount equal to five percent (5%) of the actual gross receipt upon consummation of the sale and \$2,130.00 reimbursement for towing expense. The five percent (5%) commission shall be paid to the Trustee's auctioneer, Eric Smith of First Capitol Auction, Inc., subject to the court's further review as provided by 11 U.S.C. § 328.

15. [16-90179](#)-E-7 PRAVINKUMAR/MADHUKANTA
RAC-3 GANDHI

OBJECTION TO CHAPTER 7
TRUSTEE'S REPORT OF NO
DISTRIBUTION
5-6-16 [[33](#)]

**APPEARANCE OF RONALD A. CLIFFORD, COUNSEL FOR THE PATEL
LAW FIRM, IS REQUIRED.**

TELEPHONIC APPEARANCE ALLOWED

Tentative Ruling: The Objection to Chapter 7 Trustee's Report of No Distribution 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) Objection.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on May 6, 2016. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

The Objection to Chapter 7 Trustee's Report of No Distribution was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----.

<p>The Objection to Chapter 7 Trustee's Report of No Distribution is overruled.</p>
--

The Patel Law Firm, P.C. ("Creditor") filed the instant Objection to Chapter 7 Trustee's Notice of No Distribution on May 6, 2016 Dckt. 33.

The Creditor argues that the case should not be closed prior to the three Rule 2004 examinations scheduled to take place after the deadline to respond to the Notice. The Creditor states that it received an order from the court for the Debtor to produce documents and appear for examination pursuant to Fed. R. Bankr. P. 2004. Dckt. 21.

Furthermore, the Creditor states that it also received court orders authorizing the Creditor to have Bhavin Mehta of Mehta & Associates produce documents and appear at an examination. Dckts. 27.

The Creditor argues that closing the case prior to these Rule 2004 examination would deprive the Creditor of its rights under the Bankruptcy Code.

11 U.S.C. § 350(a) states: "After an estate is fully administered and the court has discharged the trustee, the court shall close the case." If no objection to the final report and account is filed, the estate is presumed to have been fully administered and may be closed. *In re Ginsberg*, 164 B.R. 870, 873 (Bankr. S.D.N.Y. 1994).

Creditor seeks to have its day in court to extend the deadline for filing objections to discharge and conduct Rule 2004 examinations. These are not objections to the Trustee's report, but to make sure that the court does not inadvertently allow the case to be closed while matters are pending. Nowhere in the prayer is any mention of any failure by the trustee to collect and reduce to money the property of the estate; failure of the trustee to account for all property received; or failure by the trustee to investigate the financial affairs of the debtor.

Additionally, this is not the Creditor's first time attempting to make such an Objection. In the Debtor's prior case (Case No. 15-90459), the Creditor filed a nearly identical Objection as the instant. Case No. 15-90459, Dckt. 36. Both Objections were filed by the Creditor by their counsel, Ronald Clifford. As discussed supra, the Creditor and Creditor's counsel failed to provide any argument as to the report itself. The court does not understand why, after counsel had previously sought the same Objection against the same Debtor, less than a year ago, the Creditor has returned with the same Objection.

There can be no doubt that Creditor and its counsel, Ronald Clifford, are well aware of the deficiencies in the present Objection. In ruling on the deficient objection in the prior case, the court included in its written ruling for Creditor:

"The Creditor argues that closing the case prior to these Rule 2004 examination would deprive the Creditor its rights.

11 U.S.C. § 350(a) states: "After an estate is fully administered and the court has discharged the trustee, the court shall close the case." If no objection to the final report and account is filed, the estate is presumed to have been fully administered and may be closed. *In re Ginsberg*, 164 B.R. 870, 873 (Bankr. S.D.N.Y. 1994).

Creditor seeks to have its day in court to extend the deadline for filing objections to discharge and conduct Rule 2004 examinations. These are not objections to the Trustee's report, but to make sure that the court does not inadvertently allow the case to be closed while matters are pending.

The court overrules the Objection. Further, that this case shall not be closed except upon further order of the court. Finally, that the court shall conduct a Chapter 7 Status Conference at 10:30 a.m. on November 12, 2015."

15-90459; Civil Minutes, Dckt. 61. It appears that the present Objection has been filed solely for the purpose of causing the Chapter 7 Trustee unnecessary cost and expense, as well as wasting the time and resources of the court.

The court overrules the Objection. Further, that this case shall not be closed except upon further order of the court.

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 Chapter 7 Trustee's Report of No Distribution filed by Creditor(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 Objection is overruled.

IT IS FURTHER ORDERED that the Clerk of the Court shall not close this bankruptcy case except upon further order of the court.

16. [16-90179-E-7](#) PRAVINKUMAR/MADHUKANTA MOTION TO EXTEND DEADLINE TO
RAC-4 GANDHI FILE A COMPLAINT OBJECTING TO
DISCHARGE OF THE DEBTOR
5-6-16 [[28](#)]

Final Ruling: No appearance at the June 16, 2016 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, Chapter 7 Trustee, creditors, and Office of the United States Trustee on May 6, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor 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 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 Deadline to File a Complaint Objecting to Discharge of the Debtor is granted.

The Patel Law Firm ("Creditor") filed the instant Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor on May 6, 2016. Dckt. 28.

The Creditor states that the deadline to file a complaint objecting to the discharge of the Debtors is set for June 13, 2016. The Creditor requests that the deadline for the Creditor to file a complaint objecting to the discharge of the Debtors be extended until August 12, 2016.

The Creditor argues that cause exists because this is an extraordinarily complex case, involving three prior bankruptcy cases since March, 2015. The Creditor states that the Debtor may have fraudulently transferred assets pre-petition to avoid the reach of the creditors. The Creditor has obtained an order authorizing the Creditor to conduct an examination pursuant to Fed. R. Bankr. P. 2004. The Debtor had until June 6, 2016 to produce certain documents to the Creditor and a scheduled examination on June 21, 2016. The Creditor also obtained an order authorizing the Creditor

to conduct an examination of Bhavin Mehta of Mehta & Associates, which is set for June 30, 2016.

The Creditor asserts that in light of the two pending examinations and the documents to be produced, cause exists to extend the deadline to file a complaint objecting to discharge of the Debtor.

Federal Rule of Bankruptcy Procedure 1017(e)(1) provides that the court may extend for cause the time for filing a motion pursuant to 11 U.S.C. § 707(b). 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 may extend this deadline, so long as the request for the extension of time was filed prior to the expiration of the deadline. Fed. R. Bankr. P. 9006(b)(1).

Seeing as no objections and for cause, the court grants the Motion and extends the deadline to file a complaint objecting to discharge of the Debtors to August 12, 2016

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

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

The Motion for to extend the Deadline to File a Complaint Objecting to the Discharge of the Debtors filed by the Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the deadline to file a complain objecting to discharge of the Debtors is set for August 12, 2016.

17. [16-90179-E-7](#) PRAVINKUMAR/MADHUKANTA MOTION TO EXTEND DEADLINE TO
RAC-4 GANDHI FILE A COMPLAINT OBJECTING TO
DISCHARGE OF THE DEBTOR
5-13-16 [[38](#)]

Final Ruling: No appearance at the June 16, 2016 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, Chapter 7 Trustee, creditors, and Office of the United States Trustee on May 6, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor 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 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.

<p>The Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor is granted.</p>
--

Joginder Dhailwal, as an individual and as the Administrator of the Estate of Sukminder Dkailwai ("Creditor") filed the instant Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor on May 13, 2016. Dckt. 38.

FN.1. The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

The Creditor states that the deadline to file a complaint objecting to the discharge of the Debtors is set for June 13, 2016. The Creditor requests

that the deadline for the Creditor to file a complaint objecting to the discharge of the Debtors be extended until August 12, 2016.

The Creditor argues that cause exists because this is an extraordinarily complex case, involving three prior bankruptcy cases since March, 2015. The Creditor states that the Debtor may have fraudulently transferred assets pre-petition to avoid the reach of the creditors. The Creditor notes that another creditor has obtained an order authorizing an examination of the Debtor pursuant to Fed. R. Bankr. P. 2004. The Debtor had until June 6, 2016 to produce certain documents to the creditor and a scheduled examination on June 21, 2016. That creditor also obtained an order authorizing it to conduct an examination of Bhavin Mehta of Mehta & Associates, which is set for June 30, 2016.

The Creditor asserts that in light of the two pending examinations and the documents to be produced, cause exists to extend the deadline to file a complaint objecting to discharge of the Debtor.

Federal Rule of Bankruptcy Procedure 1017(e)(1) provides that the court may extend for cause the time for filing a motion pursuant to 11 U.S.C. § 707(b). 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 may extend this deadline, so long as the request for the extension of time was filed prior to the expiration of the deadline. Fed. R. Bankr. P. 9006(b)(1).

Seeing as no objections and for cause, the court grants the Motion and extends the deadline to file a complaint objecting to discharge of the Debtors to August 12, 2016

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

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

The Motion for to extend the Deadline to File a Complaint Objecting to the Discharge of the Debtors filed by the Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the deadline to file a complain objecting to discharge of the Debtors is set for August 12, 2016.

18. [16-90083](#)-E-7 VALLEY DISTRIBUTORS,
SSA-2 INC.

CONTINUED MOTION TO USE CASH
COLLATERAL
2-12-16 [[16](#)]

Tentative Ruling: The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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)(3) Motion.

Emergency Hearing Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Trustee, Debtor's Attorney, creditors, and Office of the United States Trustee on February 17, 2016. By the court's calculation, 6 days' notice was provided.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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.

The Motion to Use Cash Collateral is granted, and a supplemental hearing on the further use of cash collateral is set for 10:30 a.m. on August 26, 2016.

Irma Edmonds, the Chapter 7 Trustee, filed the instant Motion for Authorization to Operate Business Pending Hearing in this Matter and Request for *Nunc Pro Tunc* Authority Approving Trustee's Authority to Operate Business Effective February 2, 2016 and Use of Cash Collateral on February 2, 2016. Dckt. 15. The Trustee is seeking authorization pursuant to 11 U.S.C. §§ 363 and 721.

On February 16, 2016, the court issued an order shortening time, setting the Motion for hearing at 1:30 p.m. on February 23, 2016. Dckt. 26. The Order also authorized the Trustee to make ordinary and reasonable expenditures to maintain the premises and also pay from unencumbered monies of the Estate to pay the approximate \$5,733.00 charge to release the subject vehicle.

The Trustee states that Valley Distributors, Inc. ("Debtor"), which previously operated a retail establishment for the sale of lumber, doors, tools, and related supplies at 1900 Paulson Road, Turlock, California ("Property") has ongoing expenses in the form of rent, insurance, security, storage, and utilities where the subject collateral is located.

In addition, the Trustee states that she is seeking authority to pay a charge of approximately \$5,733.00 to Pacific Materials Handling Solutions for repair of the vehicle owned by Debtor, a 2005 GM Trust, Model W-4500, which the Trustee estimates to be worth \$16,000.00.

The Trustee states that she is not aware of any creditor that contends it may have a security agreement or lien in the Debtor's cash collateral which presently is held by the Trustee and totals approximately \$59,200.00.

FEBRUARY 23, 2016 HEARING

At the hearing, the court granted the Motion, issuing the following order:

IT IS ORDERED that the Motion is granted and that the Irma Edmonds, the Chapter 7 Trustee is authorized to operate the Debtor's business pursuant to 11 U.S.C. § 721, retroactively effective as of February 2, 2016.

IT IS FURTHER ORDERED that the Trustee is authorized to use the cash collateral pay the following expenses, granting the Trustee a variance of ten percent, except for the authorization to pay Pacific Material Handling Solutions, in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

<u>EXPENSE</u>	<u>AMOUNT</u>
Rent	\$4,200.00
Alarm/Security	\$183.00
Utilities (TID, etc)	\$1,400.00
Outside Storage	\$115.00
ATT Outside Line	\$500.00
Insurance (Premises Liability Casualty)	\$3,500.00
Vehicle Insurance	\$3,500.00

General Miscellaneous	\$750.00
Pacific Material Handling Solutions, Vehicle Repairs	\$5,733.00

Total Cash Collateral Authorized Pending Noticed Hearing	\$19,881.00

IT IS FURTHER ORDERED that American Express Bank, FSB ("AEB") and any other creditors who have perfected security interests in the cash collateral used by the Trustee are given replacement liens in the other pre-petition and post-petition assets of the estate, in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim. The granting of the replacement lien is without prejudice to the rights of the Trustee to recover from the collateral any monies expended which were reasonably necessary to preserving or disposing of the collateral to the extent of any benefit derived by such creditor pursuant to 11 U.S.C. § 506(c). The liens are perfected upon the issuance of this order, no further act, filing, or other action of AEB or other creditor granted such replacement liens.

IT IS FURTHER ORDERED that the final noticed hearing on the Motion shall be conducted at 10:30 a.m. on March 17, 2016. The Trustee shall serve the Notice of Hearing, Motion, Supporting Pleadings to all parties as required by Federal Rule of Bankruptcy Procedure 4001(b)(1)(C) on or before March 1, 2016.

Dckt. 32.

TRUSTEE'S SUPPLEMENTAL PLEADINGS

The Trustee filed a Supplemental Points and Authorities on February 29, 2016. Dckt. 36. The Trustee states that since the hearing, the Trustee has performed a further UCC-1 search and discovered a potential further secured creditor, Jensen-Byrd Company was February 28, 2012. In turn, from recorded records West American Bank had an original financing statement on file on July 11, 1996, with continuation statements filed April 12, 2001, May 26, 1006, and May 16, 2011. There was a termination statement filed on May 12, 2014.

The Trustee asserts that she has been working with Jensen-Boyd and American Express Bank to work out a consensual agreement for the use of cash collateral, operation of Debtor's business and a mechanism for a proposed stipulation for payment of Trustee's administrative expenses and "carve out" of further monies which could be earmarked for unsecured creditors.

The Trustee requests that the court continue authority to operate Debtor's business under 11 U.S.C. § 721 for a period of ninety days from the

continued hearing. The Trustee also requests for authority to use cash collateral, consistent with the previous budget, with the allowance of any creditor's duly perfected security interest in cash collateral to be given replacement liens in other pre-petition and post-petition assets of the estate.

MARCH 17, 2016 HEARING

At the continued hearing, the court issued the following order:

IT IS ORDERED that the Motion is granted and that the Irma Edmonds, the Chapter 7 Trustee is authorized to operate the Debtor's business pursuant to 11 U.S.C. § 721, retroactively effective as of February 2, 2016.

IT IS FURTHER ORDERED that the Trustee is authorized to use the cash collateral, through and including June 30, 2016, to pay the following expenses, granting the Trustee a variance of ten percent in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

<u>EXPENSE</u>	<u>AMOUNT</u>
Rent	\$4,200.00
Alarm/Security	\$183.00
Utilities (TID, etc)	\$1,400.00
Outside Storage	\$115.00
ATT Outside Line	\$500.00
Insurance (Premises Liability Casualty)	\$3,500.00
Vehicle Insurance	\$3,500.00
General Miscellaneous	\$750.00

Total Cash Collateral Authorized Pending Noticed Hearing	\$14,148.00

IT IS FURTHER ORDERED that American Express Bank, FSB ("AEB") and any other creditors who have perfected security interests in the cash collateral used by the Trustee are given replacement liens in the other pre-petition and post-petition assets of the estate, in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim. The granting of the replacement lien is without prejudice to the rights of the

Trustee to recover from the collateral any monies expended which were reasonably necessary to preserving or disposing of the collateral to the extent of any benefit derived by such creditor pursuant to 11 U.S.C. § 506(c). The liens are perfected upon the issuance of this order, no further act, filing, or other action of AEB or other creditor granted such replacement liens.

IT IS FURTHER ORDERED that a hearing on a request to use additional cash collateral 10:30 a.m. on June 16, 2016. The Trustee shall serve the Notice of Hearing, Motion, Supporting Pleadings to all parties as required by Federal Rule of Bankruptcy Procedure 4001(b)(1)(C) on or before June 2, 2016, and Responses, if any, shall be filed and served on or before June 9, 2016.

IT IS FURTHER ORDERED that the Trustee shall file monthly operating reports in the same form and manner as are filed in a Chapter 11 case.

Dckt. 67.

SUPPLEMENTAL MOTION

On May 20, 2016, the Trustee filed a "Motion of Trustee for Continued Authority to Use Cash Collateral to Operate Debtor's Business Nunc Pro Tunc Effective February 2, 2016." Dckt. 136. FN.1.

FN.1. The court notes that the Trustee's counsel filed the instant request as a separate motion rather than as a supplemental pleading in connection with the original Motion for Authorization to Use Cash Collateral, as instructed by the court. The court corrects the instant error and reviews the supplemental paper in context of the continued motion.

The Trustee reports that she has employed an auctioneer and received court authorized to sell the Debtor's assets through auction sale. Dckt. 86 and 87.

The Trustee states that he expects the auction sale to be completed by May 31, 2016. However, to be prudent, the Trustee requests the authority to use cash collateral funds to remove from the premises, store, and also shred Debtor's books, records and files.

The Trustee argues that she believes it is in the best interest of the estate that she be authorized to use cash collateral as proposed in Exhibit 3. Dckt. 139.

APPLICABLE LAW

In relevant part, for business cases, 11 U.S.C. § 363 states:

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this

title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

11 U.S.C. § 363. In order to determine whether certain transactions are in the ordinary course of business, the courts have developed a two step test: (1) the "horizontal dimension" test to determine whether the transaction is of the sort commonly undertaken by companies in the debtor's industry; and (2) the "vertical dimension" test to determine whether the transaction subjects the creditors to economic risk different from the risk they accepted and could reasonably expect when they extend credit. *See In re Dant & Russel, Inc.*, 853 F.2d 700 (9th Cir. 1988).

Fed. R. Bankr. P. 4001(b) provides the procedures in which a trustee may move the court for authorization to use cash collateral. In relevant part, Fed. R. Bankr. P. 4001(b) states:

(b)(2) Hearing

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

DISCUSSION

As to the Trustee's request for authorization to use cash collateral, the Trustee attached a projected monthly budget. Dckt. 139. Exhibit 3. The following expenses are listed: (deducting the vehicle repair)

<u>EXPENSE</u>	<u>AMOUNT</u>
Rent	\$4,200.00
Alarm/Security	\$183.00
Utilities (TID, etc)	\$1,400.00
Outside Storage	\$115.00
ATT Outside Line	\$500.00
Insurance (Premises Liability Casualty)	\$3,500.00
Vehicle Insurance	\$3,500.00
General Miscellaneous	\$750.00
Storage and Shredding Fees (Est.)	\$5,000.00 - \$10,000.00

Total Cash Pending Noticed Hearing	\$19,148.00 - \$24,148.00

The proposed budget indicates expenses that are all reasonably necessary for the Trustee to continue the operation of the business pending the liquidation. The Trustee has provided sufficient grounds and testimony (Declaration; Dckt. 138) that the above expenses are both the " sort commonly undertaken by companies in the debtor's industry" and that "the transaction subjects the creditors to economic risk different from the risk they accepted and could reasonably expect when they extend credit."

The Trustee's Motion does not identify any creditor who may be asserting a lien in the monies expended. To date, Debtor has not filed Schedules in this case. The court has extended the time to file the Schedules, Statement of Financial Affairs, and related documents until March 1, 2016. Order, Dckt. 12.

On February 19, 2016, American Express Bank, FSB ("AEB") filed Proof of Claim No. 4, asserting a secured claim of \$223,477.81. On the proof of claim form, AEB describes the collateral as "SECURED INSTALLMENT LOAN." From this description, it could appear that AEB is claiming a lien only against an unidentified loan made by Debtor to a third party. (Part 2, § 9, of the proof of claim form requires the creditor to describe the collateral which secures the claim.)

However, in Part 2, § 9, of Proof of Claim No. 4, AEB describes the basis of the claim to be,

"Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as healthcare information."

The court is uncertain how AEB would have a claim against the Debtor for personal injury or wrongful death. Further, the court is uncertain as to what goods AEB (a bank) would be selling to Debtor.

Attachment 1 to Proof of Claim No. 4 is titled "Business Loan and Security Agreement." This appears to be a document supporting the claim. This document indicates that AEB was lending money to the Debtor. Paragraph 11 includes the granting of a security interest in assets of the Debtor. These assets include:

"(a) any and all amounts owing to you now or in the future from any merchant processor or Card Processor, including the Settlement Amounts;

(b) all Accounts;

(c) all Chattel Paper (including Tangible Chattel Paper and Electronic Chattel Paper);

(d) all Instruments;

(e) all Goods, including, without limitation, Equipment, Inventory, Farm Products, Accessions, and As Extracted Collateral;

(f) all Documents;

(g) all General Intangibles (including, without limitation, Payment Intangibles and software);

(h) all Deposit Accounts;

(I) all Letter of Credit Rights;

(j) all Investment Property;

(k) all Supporting Obligations;

(l) all trademarks, trade names, service marks, logos and other sources of business identifiers, and all registrations, recordings and applications with the U.S. Patent and Trademark Office ("USPTO") and all renewals, reissues and extensions thereof (collectively "IP");

(m) any records and data relating to any of the foregoing, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of your right, title and interest in and to all computer software

required to utilize, create, maintain, and process any such records or data on electronic media; and

(n) any and all proceeds of any of the foregoing, including insurance proceeds or other proceeds from the sale, destruction, loss, or other disposition of any of any of the foregoing, and sums due from a third party who has damaged or destroyed any of the foregoing or from that party's insurer, whether due to judgment, settlement or other process."

The Business Loan and Security Agreement continues, stating that "Notwithstanding the foregoing, the Collateral does not include any real estate, motor vehicles, household furniture or fixtures, and any other goods for personal, family or household use."

The last page of Attachment 2 to Proof of Claim No. 4 is a copy of UCC Financing Statement stating a file date of April 10, 2015. This is consistent with the March 25, 2015 date on the Business Loan and Security Agreement. In the collateral description on the Financing Statement, the collateral is described as:

"All assets of the Debtor, whether now owned or hereafter acquired."

It appears that AEB may have a security interest in the monies used and to be used by the Trustee. The monies to be used by the Trustee are only described as "Debtor's cash...which presently held by the Trustee...." Motion ¶ 4, Dckt. 16. In her Declaration, the Trustee states, "I currently have receipts of more than \$59,200 from Debtor's banking operations which can be used to pay expenses on an interim basis." Declaration ¶ 8, Dckt. 17.

There is nothing in the record to indicate that Debtor had a business of "banking operations." Rather, the Motion states that the Debtor's business was "a retail establishment for the sale of lumber, doors, tools, and related supplies...." Motion ¶ 2, Dckt. 16. Piecing the two together, it may be that the Trustee is stating that she is holding \$59,200 in receipts from the operation of Debtor's business, including payment of accounts receivable and from the sale of inventory.

It appears that AEB may have a lien on the monies, and as such, the monies may be cash collateral. 11 U.S.C. § 363(a), (c).

It appears that, if AEB has a lien against the equipment and inventory of Debtor, most of the expenses relating to preserving and protecting that possible collateral. For the other uses of the money, such as repairing the vehicle (against which AEB does not assert a lien), it appears that there will be significant value in excess of the monies used.

The Trustee's supplemental paper does not address specifically the security of AEB and the newly discovered creditor Jensen-Boyd.

Therefore, the court grants the Motion and authorizes the Trustee to use case collateral to pay the specified expenses.

To protect AEB and any other creditors who have perfected security interests in the monies used by the Trustee, AEB and any such other creditors

having an interest in the cash collateral are given replacement liens in the other pre-petition and post-petition assets of the estate, in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim. The granting of the replacement lien is without prejudice to the rights of the Trustee to recover from the collateral any monies expended which were reasonably necessary to preserving or disposing of the collateral to the extent of any benefit derived by such creditor pursuant to 11 U.S.C. § 506(c).

Therefore, the court granted the Motion authorizing the use of cash collateral. Further the court orders that a hearing on a request to use additional cash collateral 10:30 a.m. on August 25, 2016. Any supplemental requests shall be filed and served on or before August 4, 2016. Responses, if any, shall be filed and served on or before August 18, 2016.

CHAMBERS PREPARED 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 for Authority to Use Cash Collateral 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 Trustee is authorized to use the cash collateral, through and including August 31, 2016, to pay the following expenses, granting the Trustee a variance of ten percent in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

<u>EXPENSE</u>	<u>AMOUNT</u>
Rent	\$4,200.00
Alarm/Security	\$183.00
Utilities (TID, etc)	\$1,400.00
Outside Storage	\$115.00
ATT Outside Line	\$500.00
Insurance (Premises Liability Casualty)	\$3,500.00
Vehicle Insurance	\$3,500.00
General Miscellaneous	\$750.00
Storage and Shredding Fees (Est.)	\$5,000.00 - \$10,000.00

Total Cash Pending Noticed Hearing	\$19,148.00 - \$24,148.00

IT IS FURTHER ORDERED that American Express Bank, FSB ("AEB") and any other creditors who have perfected security interests in the cash collateral used by the Trustee are given replacement liens in the other pre-petition and post-petition assets of the estate, in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim. The granting of the replacement lien is without prejudice to the rights of the Trustee to recover from the collateral any monies expended which were reasonably necessary to preserving or disposing of the collateral to the extent of any benefit derived by such creditor pursuant to 11 U.S.C. § 506(c). The liens are perfected upon the issuance of this order, no further act, filing, or other action of AEB or other creditor granted such replacement liens.

IT IS FURTHER ORDERED that a hearing on a request to use additional cash collateral 10:30 a.m. on August 25, 2016.

Any supplemental requests shall be filed and served on or before August 4, 2016. Responses, if any, shall be filed and served on or before August 18, 2016.

IT IS FURTHER ORDERED that the Trustee shall file monthly operating reports in the same form and manner as are filed in a Chapter 11 case.

19. [16-90083](#)-E-7 VALLEY DISTRIBUTORS,
SSA-7 INC.

MOTION FOR CONTINUED AUTHORITY
TO OPERATE DEBTOR'S BUSINESS
NUNC PRO TUNC EFFECTIVE
FEBRUARY 2, 2016
5-20-16 [[130](#)]

Tentative Ruling: The Motion for Continued Authority to Operate Debtor's Business Nunc Pro Tunc Effective February 2, 2016 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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 20, 2016. By the court's calculation, 27 days' notice was provided. 28 days' notice is required.

The Motion for Continued Authority to Operate Debtor's Business Nunc Pro Tunc Effective February 2, 2016 was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----
-----.

<p>The Motion for Continued Authority to Operate Debtor's Business Nunc Pro Tunc Effective February 2, 2016 is granted.</p>
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Irma Edmonds, the Chapter 7 Trustee, filed the instant "Motion of Trustee for Continued Authority to Operate Debtor's Business Nun Pro Tunc Effective February 2, 2016." Dckt. 130.

On March 17, 2016, the court authorized the Trustee to both operate Debtor's business and use cash collateral, through June 16, 2016. Dckt. 67. The Trustee states that she expects the auction sale to be completed by May 31, 2016. However, to be prudent, the Trustee requests authority to operate Debtor's business for the further limited period of 75 days if necessary through August 30, 2016.

APPLICABLE LAW

Section 721 dictates when a court may authorize a trustee to operate a business. Specifically, § 721 states:

The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.

11 U.S.C. § 721. Courts may authorize a Chapter 7 trustee to operate a debtor's business on an interim basis "where doing so will maximize the value of the estate and thus increase creditor recoveries." 6 COLLIER ON BANKRUPTCY ¶ 721.02 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

The Ninth Circuit has found that "bankruptcy courts ... possess the equitable power to approve retroactively a professional's valuable but unauthorized services," but such authorization is limited "to situations in which 'exceptional circumstances' exist." *In re Atkins*, 69 F.3d 970, 973 (9th Cir. 1995). In *Atkins*, the Ninth Circuit held that "[t]o establish the presence of exceptional circumstances, professionals seeking retroactive approval must satisfy two requirements: they must (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankrupt estate in a significant manner." *Id.* at 974.

DISCUSSION

In the instant case, the Trustee is seeking authorization of the court to use cash collateral on a continued interim basis, pending a final hearing, to pay necessary expenses and for authorization to operate the Debtor's business.

First, to address the request to authorize the Trustee to operate the Debtor's business, the court finds that such authorization is in the best interest of the Debtor, the estate, and parties in interest. The Trustee seeks such authorization for the purpose of paying rent on the Property, paying for security, utilities, insurance, and related expenses, until the collateral on the premises can be liquidated in a commercially reasonable fashion. The Trustee has presented sufficient evidence to show that the Trustee's operation of the business will enable the Trustee to continue operation prior to liquidation to ensure the largest return for parties in interest.

Additionally, given the fact that the Trustee has been successful in her wind-down efforts of the Debtor's business, continued authorization to complete the sale of the property is in the best interest of the parties.

Therefore, 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 for Continued Authority to Operate Debtor's Business Nunc Pro Tunc Effective February 2, 2016 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 Motion is granted and that the Irma Edmonds, the Chapter 7 Trustee is authorized to operate the Debtor's business pursuant to 11 U.S.C. § 721, retroactively effective as of February 2, 2016 through and including August 30, 2016.

20.	<u>16-90083</u> -E-7 SSA-8	VALLEY DISTRIBUTORS, INC.	MOTION TO USE CASH COLLATERAL 5-20-16 [<u>136</u>]
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The Trustee having filed a Motion to Use Cash Collateral on May 20, 2016, the court having previously continued the prior Motion to Use Cash Collateral to 10:30 a.m. on June 16, 2016 (Dckt. 67), the court determining that the instant Motion is a supplemental request for the Trustee's prior Motion to Use Cash Collateral, the court will address the instant Motion in the civil minutes for the Continued Motion to Use Cash Collateral (Dckt. 16, DCN: SSA-2).

21. [15-90284-E-7](#) ANTONIO/LUCILA AMARAL
[15-9057](#) ADJ-1
MCGRANAHAN V. SALDANA

MOTION FOR ENTRY OF DEFAULT
JUDGMENT
5-24-16 [[24](#)]

Tentative Ruling: The Motion for Entry of Default Judgment 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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Defendant (Pro Se), parties requesting special notice, and Office of the United States Trustee on May 24, 2016. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

The Motion for Entry of Default Judgment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----.

The Motion for Entry of Default Judgment is granted.

Michael McGranahan, the Chapter 7 Trustee and Plaintiff, filed the instant Motion for Entry of Default Judgment against Rafael Saldana dba Saldana Bros ("Defendant"). Hay on May 24, 2016. Dckt. 24.

The Plaintiff filed the Complaint in the instant Adversary Proceeding on October 21, 201. Defendant was required to file an answer or other responsive pleading on or before April 9, 2016.

The Defendant failed to file an answer. The Clerk of the Court entered an order of entry of default of the Defendant on April 26, 2016. Dckt. 21.

The Plaintiff requests that the Motion be granted and that the court avoid the transfers to the Defendant pursuant to 11 U.S.C. § 547 and recovery of the same pursuant to 11 U.S.C. § 550.

COMPLAINT

The Complaint was filed on October 21, 2015. The Complaint asserts that between January 1, 2016 and March 2, 2015, Debtors made a series of five payments to the Defendant which altogether amounted to \$25,614.00 on account of an antecedent debt.

The Complaint asserts two causes of action:

1. To avoid Preference - 11 U.S.C. § 547
 - a. The Plaintiff argues that within the 90 day period prior to the Petition Date, the Debtors transferred to Defendant property, specifically a series of five checks, in the cumulative amount of \$25,614.00.
 - b. The Plaintiff argues that the transfer was for the benefit of the Defendant.
 - c. Plaintiff argues that the said transfer was for or on account of an antecedent debt owed by the Debtors to the Defendant.
 - d. Plaintiff argues that the said transfers were made while the Debtors were insolvent.
2. To Recover Transfer - 11 U.S.C. § 550
 - a. The Debtor is the initial transferee of the transfers or the entity for whose benefit the transfer was made, or for the immediate or mediate transferee of the initial transferee receiving such transfer.
 - b. Under 11 U.S.C. § 551(a) to the extent that a transfer is avoided under 11 U.S.C. § 547, Plaintiff may recover the property transferred or the value of the property transferred from the initial transferee of such transfer or the entity for whose benefit the transfer was made or any immediate or mediate transferee for such initial transfer.

The Plaintiff prays for:

1. For compensator damages in the sum of at least \$25,614.00;
2. For a judgment against the Defendant voiding the transfers to Defendant, preserving the same for the benefit of the estate, and for a money judgment against Defendant in an amount equal to the value of the avoided transfers, plus pre- and post-judgment interest at the legal rate.

3. For costs of suit herein incurred.

APPLICABLE LAW

As an initial point, Fed. R. Civ. P. 18 was not incorporated into the bankruptcy law and motion practice. Local Bankr. R. 9014-1(d)(1) provides "[e]xcept as otherwise provided in these rules, every application, motion, contested matter or other request for an order, shall be filed separately from any other request, except that relief in the alternative based on the same statute or rule may be filed in a single motion."

Next, Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. See *id.* at 775.

DISCUSSION

First Cause of Action

Pursuant to 11 U.S.C. § 547(b), the Trustee may avoid any transfer of an interest of the debtor in property made during the ninety days before the date of the filing of the petition.

Defendant is a sole proprietorship. The transfer was made within 90 days prior to March 25, 2015, the date of the commencement of Debtors' bankruptcy case. The transaction has the other hallmarks of preferential transfers as defined by 11 U.S.C. § 547, as Debtors were insolvent, and the transfer enabled Defendant to receive more than he would have received under Chapter 7 of the Bankruptcy Code if the transfer had not been made. The Debtor made five payments during the relevant time:

Date	Check	Amount
January 1, 2015	3987	\$7,854.00
January 1, 2015	3800	\$5,376.00
February 1, 2015	3869	\$4,384.00
February 17, 2015	Cashiers Check	\$4,574.00
March 2, 2016	Cashiers check	\$3,426.00

Thus, the transfer may be avoided by Plaintiff pursuant to 11 U.S.C. § 547.

Second Cause of Action

Trustee's Second Claim for Relief is brought under 11 U.S.C. § 550, which provides that to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of Title 11, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

Defendant was the initial transferee of the Transfer or entity for whose benefit the transfer was made. The transfer can be avoided, therefore, by the provisions of 11 U.S.C. § 550.

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's bankruptcy case. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding.

The court finds it necessary and proper for the entry of a default judgment against the Defendant.

Therefore, the court grants the default judgment in favor of Plaintiff against Defendant and voids the transfers to Defendant, preserving the same for

the benefit of the estate, and for a money judgment against Defendant in an amount equal to the value of the avoided transfers, \$25,614.00, plus pre- and post-judgment interest at the legal rate.

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

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

The Motion for Entry of Default Judgment filed by Plaintiff(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 Motion is granted. The court shall enter judgment voiding the transfers to Defendant, preserving the same for the benefit of the estate, and for a money judgment against Defendant in an amount equal to the value of the avoided transfers, \$25,614.00, plus pre- and post-judgment interest at the legal rate.

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgement shall provide that attorneys' fees and costs allow by the court shall be enforced as part of the judgment. A motion for attorneys' fees and costs bill, if any, shall be filed and served on or before July 15, 2016.

22. [12-92294-E-7](#) STEVE/JOYCE BUCKNER
MSN-1

MOTION TO AVOID LIEN OF
CITIBANK (SOUTH DAKOTA), N.A.
5-5-16 [[24](#)]

Final Ruling: No appearance at the June 16, 2016 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, Chapter 7 Trustee, Citibank (South Dakota), N.A., and Office of the United States Trustee on May 5, 2016. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Citibank (South Dakota), N.A. ("Creditor") against property of Steve Wayne Buckner and Joyce Ann Buckner ("Debtor") commonly known as 500 Bluefield Avenue, Turlock, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$14,062.06. An abstract of judgment was recorded with Stanislaus County on December 19, 2011, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$124,000.00 as of the date of the petition. The unavoidable consensual liens total \$165,798.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$1,000.00 on Schedule C.

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 Citibank (South Dakota), N.A., California Superior Court for Stanislaus County Case No. 657243, recorded on December 19, 2011, Document No. 2011-0103710-00 with the Stanislaus County Recorder, against the real property commonly known as 500 Bluefield Avenue, Turlock, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.