UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

June 16, 2022 at 10:30 a.m.

1.	**22-90056-E-7** **SR-2**	**PAUL/CHRISHANA GARTISER** **Shane Reich**	**MOTION TO AVOID LIEN OF CITIBANK, N.A.** **6-1-22 [22]**

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

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

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor and Office of the United States Trustee on June 1, 2022. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Citibank, N.A. ("Creditor") against property of the debtor, Paul J Gartiser and Chrishana D Gartiser ("Debtor") commonly known as 2839 Veneman Ave, Modesto, California 95356 ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $3,972.02. Exhibit 1, Dckt. 25. An abstract of judgment was recorded with Stanislaus County on October 15, 2020, that encumbers the Property. *Id*.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $499,950.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $528,991.67 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Schedule C. Dckt. 1.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Paul J Gartiser and Chrishana D Gartiser ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the judgment lien of Citibank, N.A., California Superior Court for Stanislaus County Case No. CV-20-000338, recorded on October 15, 2020, Document No. 2020-0080095-00, with the Stanislaus County Recorder, against the real property commonly known as 2839 Veneman Ave, Modesto, California 95356, 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.

2. **22-90056-E-7** **PAUL/CHRISHANA GARTISER** **MOTION TO AVOID LIEN OF FIRST NATIONAL BANK OF OMAHA**
SR-3 **Shane Reich** **6-2-22 [27]**

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

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

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditor, creditors, and Office of the United States Trustee on June 6, 2022. By the court's calculation, 10 days' notice was provided. 14 days' notice is required.

Under the facts and circumstances of this Motion, the court shortens the time to the 10 days given.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of First National Bank of Omaha, a National Banking Association ("Creditor") against property of the debtor, Paul J Gartiser and Chrishana D Gartiser ("Debtor") commonly known as 2839 Veneman Ave, Modesto, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $6,384.69. Exhibit 1, Dckt. 30. An abstract of judgment was recorded with Stanislaus County on November 16, 2022, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $499,950.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $528,991.67 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.14(b)(1) in the amount of $1.00 on Schedule C. Dckt. 1.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Paul J Gartiser and Chrishana D Gartiser("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the judgment lien of Paul J Gartiser and Chrishana D Gartiser, California Superior Court for Stanislaus County Case No. CV-19-007535, recorded on November 16 2020, Document No. 2020-0090119-00, with the Stanislaus County Recorder, against the real property commonly known as 2839 Veneman Ave, Modesto, 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.

3.	**22-90056-E-7** **SR-4**	**PAUL/CHRISHANA GARTISER** **Shane Reich**	**MOTION TO AVOID LIEN OF CAVALRY SPV I, LLC** **6-2-22 [32]**

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

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

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor and Office of the United States Trustee on June 2, 2022. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of CAVALRY SPV I, LLC ("Creditor") against property of the debtor, Paul J Gartiser and Chrishana D Gartiser ("Debtor") commonly known as 2839 Veneman Ave, Modesto, California 95356 ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $2,695.00. Exhibit 1, Dckt. 35. An abstract of judgment was recorded with Stanislaus County on November 22, 2021, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $499,950.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $528,991.67 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Schedule C. Dckt. 1.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Paul J Gartiser and Chrishana D Gartiser ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the judgment lien of CAVALRY SPV I, LLC, California Superior Court for Stanislaus County Case No. CV-20-003935, recorded on November 22, 2021, Document No. 2021-0108288, with the Stanislaus County Recorder, against the real property commonly known as 2839 Veneman Ave, Modesto, California 95356, 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.

4. **22-90056-E-7 SR-1** **PAUL/CHRISHANA GARTISER** **Shane Reich** **MOTION TO DELAY DISCHARGE AND/OR MOTION TO EXTEND TIME 5-31-22 [18]**

Final Ruling: No appearance at the June 16, 2022 Hearing is required.

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, and Office of the United States Trustee on May 31, 2022. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Deadline for Filing Reaffirmation Agreement and Delay in Entry of Discharge was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The Motion to Extend the Deadline for Filing Reaffirmation Agreement and Delay in Entry of Discharge is granted.

The Chapter 7 Debtors, Paul J Gartiser and Chrishana D Gartiser, ("Debtors") seek to extend deadlines for filing a reaffirmation agreement with Creditor Santander Consumer USA Inc. by sixteen or thirty days under Federal Rules of Bankruptcy Procedure 4008(a). Additionally, Debtors seek an extension for the Clerk to enter a discharge order pursuant to Federal Rules of Bankruptcy Procedure 4004(c)(1)(J). Debtors request is based on the following:

1. The time limit for reaffirming a debt expires on May 13, 2022 pursuant to Federal Rules of Bankruptcy Procedure 4008.

2. Debtors first 341 examination was schedules for March 31, 2022, but did not complete until April 14, 2022.

3. Debtors seek to reaffirm debt on their 2017 Nissan Frontier, which is necessary for their business.

4. Debtors provided Creditor a copy of their proposed reaffirmation agreement on May 31, 2022, however, it has not yet been filed with the court.

5. Federal Rules of Bankruptcy Procedure 4008 allows extensions to filing reaffirmation agreements at any time, however, pursuant to 11 U.S.C. § 524(c)(1), they need to be entered before discharge.

6. Federal Rules of Bankruptcy Procedure 4004(c)(1)(J) allows a discharge to be delayed where a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is pending.

DISCUSSION

Pursuant to 11 U.S.C. § 524(c)(1), a reaffirmation agreement is enforceable if it is made before the granting of a discharge. Pursuant to Federal Rules of Bankruptcy Procedure 4008(a), a reaffirmation agreement's deadline to be filed is sixty (60) days after the first date set for the meeting of creditors. Rule 4008(a) also allows the court at any time to enlarge the time to file a reaffirmation agreement.

Seeing Debtor is actively working to reaffirm the debt with Creditor, the court, acting in accordance with Rule 4008(a), allows the Debtor a thirty day extension to file their reaffirmation agreement. Debtor shall file their reaffirmation agreement by June 30, 2022.

As the motion to enlarge time to file the reaffirmation agreement has been granted, pursuant to Rule 4004(c)(1)(J) and 11 U.S.C. § 524(c)(1), discharge shall not be entered until after June 30, 2022.

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 Extend the Deadline for Filing Reaffirmation Agreement and Delay in Entry of Discharge filed by Paul J Gartiser and Chrishana D Gartiser, ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Extend the Deadline for Filing Reaffirmation Agreement and Delay in Entry of Discharge is granted, and Debtors are permitted to file their reaffirmation agreement with Santander Consumer USA Inc. no later than June 30, 2022.
>
> **IT IS FURTHER ORDERED** that pursuant to Rule 4004(c)(1)(J) and 11 U.S.C. § 524(c)(1), a discharge shall not be entered until after June 30, 2022.

5. **21-90409-E-7** **JOSHUA CATON**
SLC-1 **Thomas Hogan**

MOTION TO EMPLOY WEST AUCTIONS, INC. AS AUCTIONEER, AUTHORIZING SALE OF PROPERTY AT PUBLIC AUCTION AND AUTHORIZING PAYMENT OF AUCTIONEER FEES AND EXPENSES AND/OR MOTION FOR WAIVER OF 14 DAY STAY PERIOD
5-10-22 [35]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on May 10, 2022. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ, Pay Fees, and Sell Property at Auction is granted.

Sheri L. Carello ("Trustee") seeks to (1) employ West Auctions, Inc. ("Auctioneer") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330; (2) allow compensation to Auctioneer; (3) sell by public auction the bankruptcy estate's interest in 2019 PJ Trailer (the "Property"); and (4) waive the fourteen (14) day stay imposed by Federal Rules of Bankruptcy Procedure 6004(h). Pursuant to Local Bankruptcy Rule 9014-1(d)(5)(iii), these requests for relief may be joined in a single motion.

Employment of Auctioneer

Trustee argues that Auctioneer's appointment and retention is necessary to assist Trustee in liquidating the bankruptcy estate's interest in the Property.

Donna Bradshaw, Vice President of West Auctions, Inc., testifies that Auctioneer will sell by public auction the Property on their internet auction website from June 28, 2022 at 10:00 am to June 30,

2022 at 10:00 am. Donna Bradshaw testifies she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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 West Auctions, Inc. as Auctioneer for the Chapter 7 Estate on the terms and conditions set forth in the Motion and Declaration, Dckts. 35, 37. Approval of the commission 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.

Allowance of Professional Fees

Fees are requested for the sale of the Property, which will take place from June 28, 2022 to June 30, 2022. Applicant requests fees in the amount of 15% of the gross sale proceeds and costs no greater than $945.00.

Reasonable Fees

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

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant's services for the Estate will include holding an auction for the sale of the Property. The court finds the services will be beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Contingency Fee: Percentage of Sale

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in the marketing and sale of personal property described as a 2019 PJ Trailer, a Gasoline Ditch Witch Trencher, and a Bobcat Front Load Bucket 68-T ("Property"). The Property will be sold by public auction. Donna Bradshaw, Vice President of West Auctions, Inc., estimates the sale will generate between $8,400.00 to $10,900.00 of net monies (exclusive of these requested fees and costs) as recovery for Client.

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses not to exceed $945.00.

FEES AND COSTS & EXPENSES ALLOWED

Percentage Fees

The court finds that the fees computed on a percentage basis recovery for Client are reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees of fifteen (15) percent of the gross sale proceeds and reimbursement of costs and expenses no greater than $945.00. The Chapter 7 Trustee is authorized to pay from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court authorizes the Chapter 7 Trustee to pay 100% of the fees and 100% of the costs allowed by the court.

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

Fees	Fifteen (15) percent of the gross sale proceeds from the sale of the Property
Costs and Expenses	Up to $945.00

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

Approval of Sale of Property

The Bankruptcy Code permits Trustee to sell property of the estate or under the confirmed plan after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the personal property commonly known as a 2019 PJ Trailer, a Gasoline Ditch Witch Trencher, and a Bobcat Front Load Bucket 68-T ("Property"). Donna Bradshaw, Vice President of West Auctions, Inc., estimates the sale will generate between $8,400.00 to $10,900.00 of net monies (exclusive of these requested fees and costs) as recovery for Client. The Public Auction will be held from June 28, 2022 at 10:00 am to June 30, 2022 at 10:00 am on Auctioneer's website.

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: **xxxxxxx** .

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because auctioning the Property will provide a greater net return to the Estate than attempting to sell the item through a private sale.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because they do not anticipate any opposition to the Motion and seek to move forward immediately upon entry of the court's order approving the sale.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is granted.

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 Employ filed by Sheri L. Carello ("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 Trustee is authorized to employ West Auctions, Inc. as Auctioneer for Trustee for the sale of a 2019 PJ Trailer on the terms and conditions as set forth in Motion and Declaration, Dckts. 35, 37.
>
> **IT IS FURTHER ORDERED** that West Auctions, Inc. is allowed the following fees and expenses as a professional of the Estate:
>
> West Auctions, Inc., Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of fifteen (15) percent of the gross sale proceeds from the sale of the Property
>
> Expenses in the amount not to exceed an aggregate total of $945.00,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as the Auctioneer for the Chapter 7 Trustee

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

IT IS FURTHER ORDERED that the Trustee is authorized to sell pursuant to 11 U.S.C. § 363(b) the Property commonly known as a 2019 PJ Trailer, a Gasoline Ditch Witch Trencher, and a Bobcat Front Load Bucket 68-T ("Property"), on the following terms:

A. The Property shall be sold by Public Auction from June 28, 2022 at 10:00 am to June 30, 2022 at 10:00 am on Auctioneer's website.

B. The sale proceeds shall first be applied to closing costs, other customary and contractual costs and expenses incurred to effectuate the Auction.

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

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause.

6. **17-90729-E-7** **ADRIAN GARCIA** **MOTION TO AVOID LIEN OF CHASE**
SSH-1 **Simran Hundal** **MANHATTAN BANK, USA, N.A.**
5-4-22 [42]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and Office of the United States Trustee on May 4, 2022. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Chase Manhattan Bank, USA, N.A. ("Creditor") against property of the debtor, Adrian Garcia ("Debtor") commonly known as 3937 Clydesdale Lane, Riverbank, CA 95367 ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $8,819.05. Exhibit B, Dckt. 44. An abstract of judgment was recorded with Stanislaus County on May 27, 2016, that encumbers the Property. Exhibit D, Dckt. 44.

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of $239,700.00 as of the petition date. Exhibit A, Dckt. 44. The unavoidable consensual liens that total $225,268.74 as of the commencement of this case are stated on Debtor's Amended Schedule D. Exhibit B, Dckt. 44. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $15,000.00 on Amended Schedule C. Exhibit C, Dckt. 44.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Adrian Garcia ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Chase Manhattan Bank, USA, N.A., California Superior Court for Stanislaus County Case No. 313713, recorded on May 27, 2016, Document No. 2016-0039244-00, with the Stanislaus County Recorder, against the real property commonly known as 3937 Clydesdale Lane, Riverbank, CA 95367, 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.

7. 20-90435-E-7 CHARLES MACAWILE — **CONTINUED TRUSTEE'S FINAL REPORT**
David Johnston — **4-4-22 [253]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on May 12, 2022. By the court's calculation, 14 days' notice was provided. 28 days' notice is required.

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

The Objection to Trustee's Final Report is xxxxxxxxxx

Chapter 7 Debtor, Charles Collantes Macawile, Jr., ("Debtor"), filed this objection to Chapter 7 Trustee's, Gary Farrar, ("Trustee") Final Report filed on April 4, 2022 (Dckt. 253).

The grounds for Debtor's objection are:

1. The Final Report states an unsecured claim for $135,000.00 arising from a lawsuit in Stanislaus County which has been stayed due to the bankruptcy action since March 2, 2020.

2. Debtor states as there is no judgment, Mr. Omeregbee (state court Plaintiff) is not entitled any funds from the distribution.

3. Debtor requests the court order Trustee not distribute any funds to Mr. Omeregbee.

Debtor's Supplement to the Motion

Debtor filed a supplement to the Motion on April 25, 2022. Dckt. 266. Debtor further requests:

1. The disputed $135,000.00 be deposited with the Clerk of the Court pending further order.

2. Debtor has no other objections to other distributions, including the surplus to the Debtor.

Trustee's Response

Trustee filed a response on May 12, 2022 stating they agree with Debtor's solution. Dckt. 270. If Trustee were to insert himself in the state court dispute, it would reduce the amount available to pay other creditors. Trustee requests the court authorize:

A. Trustee to deposit the disputed $135,000.00 to the Court to be distributed based on the resolution of the state court action.

B. Trustee to make all other distributions his Final Report proposes.

C. Trustee be discharged.

D. For such other relief as is just and proper.

DISCUSSION

Pursuant to 11 U.S.C. § 704(a)(9), a Trustee is required to make a final report and file a final account of the administration of the estate with the court and United States Trustee. Federal Rules of Bankruptcy Procedure 5009 states a party has thirty (30) days after a Trustee files a final report to file an objection.

Here, the Final Report was filed on April 4, 2022. Dckt. 253. Debtor filed their objection on April 21, 2022. Dckt. 258. Therefore, they satisfied the procedural requirements of objection to Trustee's Final Report.

The Trustee's Suggested Resolution is Incomplete

The Trustee seeks to make disbursement to all other claims and administrative expenses, deposit the $135,000.00 with the Clerk of the Court, and then when the Debtor's Objection to Claim or the State Court litigation relating to the $135,000.00 claim is resolved, the court will then disburse the $135,000.00. This unfortunately leaves some questions that are not expressly addressed for which the following may resolve:

A. The Chapter 7 Trustee assigns to the Debtor all rights to object to the claim of Michael Omeregbee and to litigate the state court action, if such claim is to be determined there.

B. The Chapter 7 Trustee, Debtor, and Michael Omeregbee agree that the Trustee deposit the $135,000.00 with the court, which deposit shall be in the nature of an "interpleader" and the court shall disburse the monies to the prevailing party as determined in a final order on the Objection to Claim or a final judgment in the State Court Action.

C. The request for disbursement by Creditor Michael Omeregbee or Debtor, or both, shall be by noticed motion, which notice and motion are served on Gary Farrar, who at that time will be the former Trustee in this case.

D. The portion of the Chapter 7 Trustee's fees on the portion of the $135,000 and said amount shall also be deposited with the court. The Chapter 7 Trustee's fees shall be computed on any amount paid to Creditor Michael Omeregbee (11 U.S.C. § 362(a), prohibiting allowance of trustee fees on monies disbursed to the debtor).

E. Gary Farrar shall file an *ex parte* motion requesting the disbursement of the amount of Trustee's Fees computed on the monies disbursed to Creditor Michael Omeregbee as ordered by the court as provided above, which ex parte motion shall clearly show the computation of trustee fees in this case and the percentage (it appears it will be 3%).

F. The court's order for distribution of the additional Trustee's fees in this case shall be deemed to be a supplement to the Trustee's Final Report, and no supplement to the Trustee's Final Report is required.

JUNE 14, 2022 CONTINUED HEARING

At the continued hearing, **xxxxxxx**

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 Objection to Trustee's Final Report filed by Charles Collantes Macawile, Jr., ("Debtor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Trustee's Final Report xxxxxxxxxx

8. **20-90435-E-7 DCJ-3** | **CHARLES MACAWILE** **David Johnston** | **CONTINUED OBJECTION TO CLAIM OF MICHAEL OMEREGBEE, CLAIM NUMBER 14** **4-22-22 [261]**

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Chapter 7 Trustee, and Office of the United States Trustee on April 22, 2022. By the court's calculation, 34 days' notice was provided. 30 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(2).

The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Objection to Proof of Claim Number 14 of Michael Omeregbee is XXXXXXXXX

REVIEW OF OBJECTION

Charles Collantes Macawile, Jr., the Debtor, ("Objector") requests that the court disallow the claim of Michael Omeregbee ("Creditor"), Proof of Claim No. 14-1 ("Claim"), Official Registry of Claims

in this case. The Claim is asserted to be unsecured in the amount of $135,000.00. Objector asserts that the claim is not supported by any admissible evidence. Objector states no details beyond "Fraud/Conversion Civil Complaint" are provided in the proof of claim itself as to what Debtor obtained by fraud, what Debtor converted, how much of the $135,000.00 is based on fraud, and how much is based on conversion. Rather, Creditor provides a copy of the state court complaint.

As admitted by Objector, attached to Proof of Claim 14-1 is copy of the twenty-five (25) page state court complaint in which claims for Negligence, Elder Abuse, Unfair Business Practices, and Conversion. In the prayer at the end of the Complaint it states that the conversion damages are $65,000 and punitive damages of $1,000,000.00. No other dollar amounts for damages are identified in the prayer or with the Negligence, Elder Abuse, or Unfair Business Practices claims for relief. However, it is stated that for the unfair business practices claim for relief, Creditor seeks to recover "all funds paid to Defendant" along with attorney's fees and costs. For the Elder Abuse and Negligence the damages are stated to be "damages as stated below." This appears to incorporate the conversion damages and the unfair business practices damages (all monies paid to the Defendants in the State Court Action).

REUSED DOCKET CONTROL NUMBER

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. That 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).

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 evidence 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). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

The court notes Creditor has attached a copy of their twenty-six (26) page state court complaint which details their causes of actions for (1) negligence; (2) dependant adult abuse/neglect; (3) unfair business practices; and (4) conversion. Within the Complaint, Creditor details, well beyond a short and plain statement and with particularity, the four causes of actions against defendant. The Proof of Claim provides substantial evidence where a "reasonable mind might accept as adequate to support a conclusion." Creditor satisfies the requirements for a Proof of Claim.

Many arguments in Objector's objection appear to be denying allegations in the Complaint. Objector can then present evidence and legal authorities that counters the prima facie validity of the asserted

claim based on which is stated in Proof of Claim 14-1 and the twenty-six page State Court Complaint attached thereto.

The Objection to Claim states the following grounds upon which Objector alleges the claim should be disallowed in its entirety:

A. Proof of Claim 14-1 is not "supported by admissible evidence:

1. While making this introductory statement, it is then argued that Federal Rule of Bankruptcy Procedure 3001(a) requires a written statement setting forth creditor's claim. Objection, p. 2:11-16; Dckt. 261.

2. Objector then argues that the proof of claim must be filed under penalty of perjury. Since the Creditor's attorney signed it, and can't have actual knowledge, and the Proof of Claim form itself does not have written statement, then it must fail.

3. Objector asserts that the Complaint is not verified and therefore is not sufficient. Further, that Exhibit A to the Complaint (identifying the property converted) is not attached, so it is insufficient. It is also stated to be vague as to the damages requested. As the court could readily identified, there is only $60,000 in damages for conversion, Elder Abuse, and unfair business practices (which damages overlap) and $1,000,000.00 in punitive damages.

B. Objector then asserts the following counter facts to what is alleged in the Complaint:

1. Objector was a principal of the entity that owned the property where the residential facility in which Creditor alleges the misconduct was located. Objector was not an employee of the residential facility.

2. Creditor alleges that the conversion occurred in December 2015, but the residential facility was closed in April 2015 due to a fire at the residential facility.

3. Neither Objector nor his entity that owed the real property never operated the residential facility located on the real property.

4. Objector provides his Declaration under penalty of perjury testifying to the above facts that counter allegations in the Complaint.

Requirement for Proof of Claim

Other than citing to Federal Rules of Bankruptcy Procedure 3001 and 3007, Objector provides no analysis of those Rule, citations to cases, or citations and analysis from third party treatises. This court begins with Federal Rule of Bankruptcy Procedure 3001, which provides in pertinent part (emphasis added):

Rule 3001. Proof of Claim

(a) Form and Content. A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

(b) Who May Execute. A **proof of claim shall be executed by** the creditor or **the creditor's authorized agent** except as provided in Rules 3004 [proof of claim filed by trustee, debtor in possession] and 3005 [proof of claim filed by guarantor, surety, indorser, or other codebtor].

(c) **Supporting Information**.

(1) C**laim Based on a Writing**. Except for a claim governed by paragraph (3) of this subdivision, **when a claim**, or an interest in property of the debtor securing the claim, **is based on a writing, a copy of the writing shall be filed with the proof of claim**. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply. In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

While Objector argues that there needs to be a written statement of the grounds and evidence attached to a proof of claim, citing to Federal Rule of Bankruptcy Procedure 3001(a), that portion of the Rule clearly states:

> A **proof of claim is a written statement setting forth a creditor's claim**. A proof of claim shall conform substantially to the appropriate Official Form.

The proof of claim itself is "a written statement" which sets for the creditor's claim. Additionally, that the proof of claim that is a written statement setting forth a creditor's claim "SHALL conform to the . . . Official Form." It does not state, as alleged by Objection "Rule 3001(a) requires a "written statement setting forth a creditor's claim." This quote omits the critical language that "**a proof of claim** is a written statement

setting forth a creditor's claim." It does not state that in additional to the proof of claim, there must be an additional written statement.

As this is discussed in Collier on Bankruptcy:

> [1] Content of Claim
>
> Federal Rule of Bankruptcy Procedure 3001(a) sets out the required contents of a proof of claim. The Bankruptcy Code provides no guidance concerning what a proof of claim must contain1 and, therefore, Rule 3001 is the definitive authority concerning the contents. By making reference to the appropriate official form, Rule 3001 provides a description of a proof of claim. The proof must be in writing; set forth the creditor's claim; be executed by the creditor or an authorized agent; attach writings on which the claim, or an interest in the debtor's property that secures the claim, is based; and attach documents evidencing perfection of any security interest.

9 Collier on Bankruptcy P 3001.01 (16th 2022)

Other than attaching documents on which the claim is based (such as a note, contract, guarantee) or security interest is perfected (such as a deed of trust or UCC-1), there is nothing such as a detailed statement complying with Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008, with admissible testimony and documentary evidence to be included with the proof of claim.

Objector's assertion is a gross misstatement of Federal Rule of Bankruptcy Procedure 3001(a).

Testimony of Objector

The Objector (the Debtor) provides his testimony under penalty of perjury in support of the Objection to Claim. Declaration, Dckt. 263. The Declaration is made under penalty of perjury as required by 28 U.S.C. § 1746. With respect to objecting to Proof of Claim 14-1, Objector testifies (identified by paragraph number in the declaration, with emphasis added):

> 5. I am familiar with the Claim. Although it states in Section 8 that the basis of the claim is "Fraud/Conversion Civil Complaint" no further details are provided. **I have never obtained anything from the Claimant,** whether by fraud or by conversion or by any other means. I have no idea what I am accused of converting nor how the sum of $135,000.00 was calculated.
>
> 8. During the time period covered by the Complaint, **I was a principal of Change Enterprise, Inc., which owned the real property** where the Claimant was a resident. The Complaint alleges that the Claimant became a resident of Kiernan Village Assisted Living Facility (the "Facility") "circa June, 2011." (Complaint, ¶ 12.) The Complaint is unclear as to when the Claimant ceased to be a resident, but **the conversion of personal property is alleged to have occurred in December, 2015 (Complaint, ¶ 72.) and a fire caused the Facility to shut down in April, 2015.**

9. During the time in question, **neither I nor Change Enterprise, Inc., operated the Facility. I was not employed by any of the other defendants named in the Complaint**. The Facility was leased for many years, including the time period in issue, to RMC Homes, Inc., a completely unrelated entity. RMC Homes, Inc., operated the Facility, not me and not Change Enterprise, Inc.

Though the Declaration says little more than I didn't get anything from the Creditor, I did not work for the residence facility, and neither I nor any of my businesses operated the residence facility, it does provide factual testimony to counter the alleged conversion, Elder Abuse, unfair business practices, and negligence. It is the conversion which states the loss damages, the business relationship for the Elder Abuse negligence, and unfair business practices to recover the monies paid, and all of which are to support punitive damages. The testimony is that Objector got nothing from Creditor and did not operate the facilities where the alleged wrongs occurred.

At the June 16, 2022 Hearing,

At the hearing, **XXXXXXXXXXX**

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 Objection to Claim of Michael Omeregbee ("Creditor"), filed in this case by Charles Collantes Macawile, Jr., the Debtor, ("Objector") 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 Number 14 of Creditor is XXXXXXXXXXXX

9. **22-90041-E-11** **AREA X INC.** **MOTION TO SELL**
DCJ-2 **David Johnston** **5-12-22 [33]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on May 12, 2022. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion to Sell Property is xxxxxxx .

The Bankruptcy Code permits AREA X INC., the Debtor in Possession, ("Movant") to sell property of the estate or under the confirmed plan after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 1609 Rouse Avenue, Modesto, Stanislaus County, California, California ("Property").

The proposed purchaser of the Property is Adriot Farm Services Inc., ("Adriot") and the terms of the sale are:

A. Purchase price is $195,000.00. Payment to be made in cash.

B. Adriot is obligated to to obtain financing of $145,000.00 before completing its purchase.

C. Movant is obligated to convey clear title.

D. Adriot is purchasing the Property "as is" with a non-paying tenant included in the deal. The Property is in need of substantial repairs. The delinquent

rent due to Movant will remain an asset of the estate and will not be transferred to Adriot.

E. Movant is not obligated to pay any real estate commissions.

F. Movant will pay for the owner's policy of title insurance, documentary transfer tax, one-half of escrow charges, and miscellaneous nominal closing costs not to exceed, in total, $3,000.00.

G. Movant is obligated to pay delinquent real property taxes which total $2,675.00 with interest accruing.

H. Movant is obligated to pay the balance due to Jayco Premium Finance of California.

I. Movant seeks authority to sell the Property outside the ordinary course of business pursuant to 11 U.S.C. § 363(b)(1).

J. Movant and Adriot have agreed that the close of escrow will be no later than seven days after an order granting the Motion becomes final.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it allows the Debtor in Possession to recover approximately $5,000.00 in net proceeds.

June 16, 2022 Hearing
Nonexistent Purchaser Party to Sales Agreement

In the Motion, the Buyer is identified as Adroit Farm Services, Inc. Motion, p. 1:19-21; Dckt. 33. In his Declaration, the Debtor in Possession states under penalty of perjury that he has "negotiated a sale of [the Property] to Adroit Farm Services, Inc., a California Corporation. . . ." Declaration, ¶ 2; Dckt. 50.

However, the Purchase Agreement states that the buyer is Adroit FS, LLC. A search of the California Secretary of State's website for identification of corporations and limited liability companies disclosed that there are no entities with the words "Adroit FS" in its name. [Fn.1.]

FN. 1. https://bizfileonline.sos.ca.gov/search/business.

While the Motion identifies an entity that is shown as registered with the State of California, the Purchase Agreement is with a limited liability company which the Secretary of State reports is not registered with the State of California.

As presented to the court, it appears that the Purchase Agreement is with a nonexistent entity. Thus, it appears that granting the Motion would result in a nullity.

At the hearing, **xxxxxxx**

~~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 Sell Property filed by AREA X INC., 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 AREA X INC., the Debtor in Possession, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Adriot Farm Services Inc., or nominee ("Buyer"), the Property commonly known as 1609 Rouse Avenue, Modesto, Stanislaus County, California ("Property"), on the following terms:~~

~~A. The Property shall be sold to Buyer for $195,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 35, and as further provided in this Order.~~

~~B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.~~

~~C. Debtor in Possession is authorized to execute any and all documents reasonably necessary to effectuate the sale.~~

~~D. The Debtor in Possession shall hold the net sales proceeds in the client trust account of David Johnston, Esq., counsel for the Debtor in Possession, pending further order of the court.~~

10. 21-90378-E-11 MOBREWZ, LLC
David Johnston

CONTINUED APPROVAL OF CHAPTER 11 PLAN OF REORGANIZATION
11-16-21 [33]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor's Attorney, Chapter 11 Trustee, creditors, and Office of the United States Trustee on November 23, 2021. By the court's calculation, 51 days' notice was provided. The court issued an Order setting the hearing date for January 13, 2022. Order, Dckt. 34.

The Confirmation of Plan of Reorganization has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Confirmation of Plan of Reorganization is xxxxxxxx.

JUNE 16, 2022 HEARING

Upon review of the Minutes from the April 21, 2022 hearing, it appears that the court may have prematurely entered the order confirming the Modified Plan. Civ. Minutes 81. The Minutes and Order reflect that the final amended plan and a redline version were to be filed on or before May 6, 2022. Dckts. 81, 83. Thus, the court may have committed a clerical error in issuing the order, and that such is subject to a *sua sponte* vacating of the order.

In the Order continuing the hearing on confirmation to May 26, 2022, the court also ordered:

> Counsel for Debtor/Debtor in Possession shall, upon the timely [May 6, 2022, stated in the preceding paragraph in the order] filing of the Final Amended Plan and redline version, shall lodge with the court a proposed order confirming the Final Amended Plan, with a copy of said Plan attached as Addendum A to the confirmation order.

> The court will delay entry of the order confirming the Final Amended Plan for two weeks to allow parties in interest to review the Final Amended Plan and raise with the court any concerns that the final language is not drafted consistent with their understanding of the agreed to terms.

Order, Dckt. 83. No Amended Plan and redline version were filed by May 6, 2022. No redline version of the Amended Plan showing the changes was ever filed. No service of the Amended Plan and redline version has been documented on the Docket.

It may well be that the parties worked out the language, belatedly, and have agreed to the Amended Plan. It may be that they forgot to document agreeing and waiving service of the redline of the Amended Plan.

Rather than immediately vacating the order confirming and creating serious potential confusion, the court addresses this at the May 26, 2022 hearing.

REVIEW OF PLAN

The Debtor in Possession Plan Proponent has complied with the Service and Filing Requirements for Confirmation:

> November 23, 2021 Plan, Disclosure Statement, Disclosure Statement Order, and Ballot Mailed
>
> December 23, 2021 Last Day for Submitting Written Acceptances or Rejections
>
> December 23, 2021 Last Day to File Objections to Confirmation
>
> January 6, 2022 Last Day to File Replies to Objections, Tabulation of Ballots, Proof of Service

Tabulation of Ballots:

Class	Voting	Ballot Percentage Calculation	Claim Percentage Calculation
Class 1 (Unimpaired)	For: 0 Against: 0	100%	100%
Class 2 (Impaired)	For: 1 Against: 0	100%	100%
Class 3 (Unimpaired)	For: 0 Against: 0	100%	100%
Class 4 (Impaired)	For: 2 Against: 2	**50%**	70 %
Class 5 (Impaired)	For: 2 Against: 0	**75%**	100%

The Declaration of Bridgette Berry filed in support of confirmation provides evidence of compliance with the necessary elements for confirmation in 11 U.S.C. § 1129:

11 U.S.C. § 1129(a)

1. The plan complies with the applicable provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

   Evidence: Dckt. 48, pg. 1

2. The proponent of the plan complies with the applicable provisions of the Bankruptcy Code.

   Evidence: Dckt. 48, pg. 2

3. The plan has been proposed in good faith and not by any means forbidden by law.

   Evidence: Dckt. 48, pg. 2

4. Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

   Evidence: Dckt. 48, pg. 2

5. (A)(I) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the

debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

Evidence: Dckt. 48, pg. 2

7. With respect to each impaired class of claims or interests–

(A) each holder of a claim or interest of such class–

(I) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective dates of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701 et seq., on such date; or

(B) if section 1111(b)(2) of this title [11 U.S.C. § 1111(b)(2)] applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan an account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

Evidence: Dckt. 48, pg. 2 & 3

8. With respect to each class of claims or interests–

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

Evidence: Dckt. 48, pg. 2 & 3

9. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that–

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of the Bankruptcy Code, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

Evidence: Dckt. 48, pg. 3

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of the Bankruptcy Code, each holder of a claim of such class will receive–

(I) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

Evidence: Dckt. 48, pg. 3

(C) with respect to a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code, the holder of such claim will receive on account of such claim regular installment payments in cash–

(I) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim that would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

Evidence: Dckt. 48, pg. 3

10. If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

Evidence: Dckt. 48, pg. 3

11. Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

Evidence: Dckt. 48, pg. 3

12. All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

Evidence: Dckt. 48, pg. 3

13. The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title [11 U.S.C. § 1114], at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title [11 U.S.C. § 1114], at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

Evidence: Dckt. 48, pg. 3

14. If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first becomes payable after the date of the filing of the petition.

Evidence: Dckt. 48, pg. 3

15. In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan–

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

Evidence: Dckt. 48, pg. 3

16. All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

Evidence: Dckt. 48, pg. 3

11 U.S.C. § 1129(b)

1. Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Evidence: Dckt. 48, pg. 3

2. For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides–

(I) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (I) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

Evidence: Dckt. 48, pg. 3

(B) With respect to a class of unsecured claims–

(I) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class, will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

Evidence: Dckt. 48, pg. 3

(C) With respect to a class of interests–

(I) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed

liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

Evidence: Dckt. 48, pg. 3

DISCUSSION

Federal Rule of Bankruptcy Procedure 3020(b)(2) states:

The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

Creditor's Response

On December 14, 2021, Creditor, Korinn Berry, filed a Response to Debtor in Possession's Confirmation of Chapter 11 Plan. Dckt. 40. Creditor requests for an extension on the hearing to vote on a plan because Creditor has not had adequate time to seek out Bankruptcy Counsel. Creditor further states she was not consulted or included in the decision making process of this plan and has not received adequate time to review the books of the business. Creditor has a thirty-three percent (33.3%) equal ownership stake in the business. The other equal shares are thirty-three percent (33.3%) to Bridgette Berry (ex-wife) and thirty-three percent (33.3%) to Becky Berry (Bridgette's Mother).

Creditor's Opposition

On December 23, 2021, Creditors, Gustavo Navarro, Federico Ramirez, and Sylvia Navarro, Objected to Debtor in Possession's Confirmation of Chapter 11 Plan. Dckt. 45. Creditors hold Class 4, non-priority unsecured claims totaling $56,379.00. The Creditors object to the confirmation of this Plan because the Plan proposes to pay Creditors and other unsecured creditors at a thirty percent (30%) dividend over the next five years. Creditors further state there is no rational basis or reason why that number should not be one hundred percent (100%) if the business improves in the future. The Creditors further contend the Projected Post-Confirmation Cash Receipts, attached as Exhibit A, is not entirely accurate because it only provides for six months when it should provide for three or five years.

Debtor in Possession's Response

On January 6, 2022, Debtor in Possession filed Bridgette Berry's, the responsible representative of the Debtor in Possession, Declaration In Support of the Chapter 11 Plan. Dckt. 48. In the Declaration Debtor addresses the concerns raised by both Creditors in Paragraphs 20 and 21.

Addressing the first Creditor, Korinn Berry, Debtor states she disagrees with Creditor's accusation Creditor has been denied access to financial records. However, Debtor in Possession is not

opposed to a continuance and has provided Creditor with the log in information for Quick Books to review financial information.

Addressing the other Creditors, Gustavo Navarro, Federico Ramirez, and Sylvia Navarro, concerns, Debtor stipulates she has prepared five year projections but has not had the ability to review with the Debtor's attorney. Granting the continuance requested by Korinn Berry will allow for such review to take place. Debtor further states specific repairs to the kitchen must be completed in order for the business to sell coffee. Additionally, the present plan is to sell pre-packaged snacks with basic coffee in addition to the rotation food trucks which come to the taproom.

Further, marketing is extremely expensive because the last Yelp advertising cost was $600.00, which only generated twenty (20) hits on the business's Yelp page. The Debtor clarifies the confusion revolving around the three different addresses for the business. One address is for the cold storage to store the beer, another for the taproom to sell the beer, and the last one is where the brewing process takes place. Lastly, Debtor does intend to substantially increase the dividend on Class 4 claims and will know the payment schedule and dividend within the next week.

Continuance

The Subchapter V Trustee stated that Korinn Berry's correspondence to the court is in the nature of an alternative plan. Counsel for Creditors Ramirez and Navarro, said that they are reviewing a proposed 60% dividend.

At the hearing, the parties agreed to a continuance to allow for discovery and further discussions. The hearing is continued to 2:00 p.m. on March 10, 2022.

MARCH 10, 2022 HEARING

As of the court's March 7, 2022 review of the Docket, nothing further had been filed by the Debtor/Debtor in Possession or other party in interest. The court addressed the evidence presented and issues raised. The parties discussed increasing the dividend to creditors holding general unsecured claims to sixty percent (60%) from thirty percent (30%). Korinn Berry expressed her concerns in the case, but has not obtained bankruptcy counsel and has not yet filed an objection to confirmation.

APRIL 8, 2022 CREDITOR REPLY

On April 8, 2022, Creditor Korinn Berry filed a reply stating that she would be willing to agree to confirmation of Plan if it contained the following amendment (which Korinn Berry states she believes are very reasonable):

1. Creditor Korinn is willing to contribute $10,000.00 to the reorganization, if the other two partners each contribute an additional $10,000.00.

2. Creditor Korinn does not agree with the terms of the Plan to have ownership of the reorganized Debtor to be 50/50 and be owned by Beck Berry and Bridgette Berry.

3. For the SBA Loan, Creditor Korrin states that all three of the pre-petition shareholders have liens on their homes to secure that claim.

Dckt. 23. Creditor Berry then states that she "leaves it to the judge" to determine whether such amendments are proper, indicating that there is no agreement for any of the amendments.

APRIL 21, 2022 HEARING

At the hearing, the Debtor/Debtor in Possession reported that an agreement has been with the major creditors holding general unsecured claims to: (1) increase the minimum dividend on all general unsecured claims to at least 60% (from the 30% in the proposed plan), (2) for there to be an annual status review of the business under the Plan, and (3) increases in the dividend above 60% based on an agreed formula/factors based on the business operations.

These terms will be put in a Final Amended Plan which will be filed with the court, along with a redline version, and served on parties in interest.

In looking at the file the court notes that the following monthly operating reports were filed by the Debtor/Debtor in Possession:

1. December 2021 Monthly Operating Report (Dckt. 75) – Due January 14, 2022

    a. Filed.....April 13, 2022

    b. Net Cash Flow for Month.....($1,906)

    c. Professional Fees Paid since filing the case.....$1,625

2. January 2022 Monthly Operating Report (Dckt. 73) --Due February 14, 2022

    a. Filed.....April 13, 2022

    b. Net Cash Flow for Month.....$138

    c. Professional Fees Paid since filing the case.....$2,025

3. February 2022 Monthly Operating Report (Dckt. 74) – Due March 14, 2022

    a. Filed.....April 13, 2022

    b. Net Cash Flow for Month.....$2,414.00

    c. Professional Fees Paid since filing the case.....$2,025

4. March 2022 Monthly Operating Report (Dckt. 76) – Due April 14, 2022

    a. Filed.....April 13, 2022

    b. Net Cash Flow for Month.....$719.00

c. Professional Fees Paid since filing the case.....$2,525

With respect to the Professional Fees paid in the amount of $2,525 since this case was filed, the information on the Monthly Profit and Loss Statement with each Monthly Operating Report identifies them as:

1. December 2021 (Dckt. 75 at 5)

   a. Legal & Professional Services.....$300.00

   b. On the Debtor/Debtor in Possession disbursement register the payment is for

      (1) Priest Amistadi CPA Services, $300. (Dckt. 75 at 6).

2. January 2022 (Dckt. 73 at 5)

   a. Legal & Professional Services.....$400.00

   b. On the Debtor/Debtor in Possession disbursement register the payment is for

      (1) Priest Amistadi CPA Services, $500. (Dckt. 73 at 9).

3. February 2022 (Dckt. 74 at 5)

   a. Legal & Professional Services.....$0.00

4. March 2022 (Dckt. 76 at 5)

   a. Legal & Professional Services.....$500.00

   b. On the Debtor disbursement register the payment is for

      (1) Priest Amistadi CPA Services, $500. (Dckt. 76 at 7).

The above payments to the CPA accounts for $1,200 of the $2,525 in professional fees paid.

The Debtor/Debtor in Possession earlier filed set of four Monthly Operating Reports filed in January 2022, the Legal & Professional Fees paid are identified as:

1. August 2021 Monthly Operating Report filed on January 11, 2022

   a. $750.00 (Dckt. 51 at 12,10); LZC LegalZoom.com

2. September 2021 Monthly Operating Report filed on January 11, 2022

   a. $200.00 (Dckt. 52 at 14, 8); Priest Amistadi CPA Services.

3. October 2021 Monthly Operating Report filed on January 11, 2022

   a. $375.00 (Dckt. 53 at 11, 9); Priest Amistadi CPA Services.

4. November 2021 Monthly Operating Report filed on January 11, 2022

   a. None (Dckt. 54).

In reviewing the file in this case, the court cannot find an order authorizing the employment of the CPA or order authorizing the payment of fees. It is not clear from the Monthly Operating Report why LZC LegalZoom.com was paid $750.00 on August 25, 2021, seven days after this bankruptcy case was filed.

At the hearing, no opposition was presented. Korrin Berry, a pre-bankruptcy one-third interest holder in the pre-petition Debtor and former spouse of the managing member of the Debtor (who will be a 50% interest holder, along with the former spouses mother in the Reorganized Debtor) submitted an alternative proposal for a plan (Dckt. 72), for which no support by the Debtor/Debtor in Possession or creditors was stated.

At the hearing, the court addressed with counsel for the Debtor/Debtor in Possession, with the managing member and her mother present in court, the shortcomings of the Responsible Representative and counsel for the Debtor/Debtor in Possession is allowing for the payment of professionals without court order authorizing the employment or authorizing the payment of fees. Counsel for the Debtor/Debtor in Possession offered that the U.S. Trustee has stated that such was proper. The Assistant U.S. Trustee quickly responded that no such interpretation was ever stated by the U.S. Trustee and directed the court to specific statutory provisions which were violated and dictated the opposition of what counsel for the Debtor/Debtor in Possession asserted.

The court addressed with counsel for the Debtor/Debtor in Possession, with the members of the Reorganized Debtor present, the fiduciary duties of plan administrators and their offices, agents, managing members and representatives in the performance of a confirmed bankruptcy plan. In performing the plan, they could not use that position to improperly seek to damage the interests of another, such as a former space, as part of marital dissolution proceedings.

Upon the consideration of the evidence, the updated tabulation of ballots showing that all impaired classes of claims has accepted the Plan as amended (Dckt. 78), the amendments stated in the supplemental pleading filed on April 21, 2022 at 1:43 p.m. (shortly before commencing the 2:00 p.m. confirmation hearing on April 21, 2022); the court determines that the Plan as proposed and accepted by all creditor classes with impaired complies with the requirements of 11 U.S.C. § 1129(a) and is confirmed pursuant to 11 U.S.C. § 1191(a).

April 25, 2022 Court Order

On April 25, 2022, the court issued a ruling on the Confirmation of Plan of Reorganization and stated the Counsel for Debtor/Debtor in Possession shall lodge with the court a proposed order confirming the Final Amended Plan with a copy of said Plan attached as Addendum A to the confirmation order. Dckt. 83. The court would then delay entry of the order confirming for two weeks to allow parties to review the Plan and address any concerns with the court.

May 19, 2022 Court Order Confirming Plan

On May 19, 2022, the court entered an order confirming the Plan filed on November 16, 2021 as Modified on April 19, 2022. Dckt. 86. As the Plan is confirmed, this hearing is taken off calendar.

June 16, 2022

At the hearing xxxxxxxxxxxxxx

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 Confirm the Chapter 11 Plan filed by MoBrewz, LLC ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Plan of Reorganization is xxxxxxxxxxx.

11. **20-90210-E-11** **JOHN YAP/IRENE LOKE** **MOTION FOR ENTRY OF DEFAULT**
21-9016 **Arasto Farsad** **JUDGMENT**
AF-1 **5-4-22 [23]**

YAP ET AL V. PNC FINANCIAL SERVICES GROUP, INC. ET AL

APPEARANCES OF NANCY WENG, ESQ. AND ARASTO FARSAD, ESQ., BOTH COUNSEL FOR PLAINTIFF-DEBTORS REQUIRED FOR THE JUNE 16, 2022 HEARING

TELEPHONIC APPEARANCES PERMITTED FOR THE JUNE 16, 2022 HEARING

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendants, creditors, and Office of the United States Trustee on May 4, 2022. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Default Judgment is granted.

John Hst Yap and Irene Laiwah Loke ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on May 4, 2022. Dckt. 23. Plaintiff-Debtor seeks an entry of default judgment against PNC Financial Services Group, Inc. ("PNC"), and Dreambuilder Investments, LLC ("Dreambuilder") (collectively "Defendants") in the instant Adversary Proceeding No. 21-09016.

The instant Adversary Proceeding was commenced on December 13, 2022. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on December 13, 2022. Dckt. 3. The complaint and summons were properly served on Defendants. Dckt. 8.

Defendants failed to file a timely answer or response or request for an extension of time. Default was entered against Defendants pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on February 17, 2022. Dckt. 15, 16.

REVIEW OF COMPLAINT

Plaintiff-Debtor filed a complaint for injunctive relief against Defendants. The Complaint contains the following general allegations as summarized by the court:

A. Plaintiff-Debtor owns real property commonly known as 1106 Lovell Avenue, Campbell, CA 95008 ("Property").

B. As of March 17, 2020, the date of filing of the Chapter 11 bankruptcy case, the Property had a fair market value of $900,000.00. Exhibit A, Dckt. 6.

C. As of March 17, 2020, the Property is encumbered by a Second Deed of Trust in the amount of $149,950.00 in favor of either PNC or Dreambuilder. Dreambuilder claims to have bought and to currently hold the Second Deed of Trust, but Plaintiff-Debtor has not found any record within the lien's title chain indicating this assignment.

D. Plaintiff-Debtor filed a Motion to Value Collateral and Secured Claim regarding the property, which was granted April 25, 2022. The secured claim was determined to be in the amount of $0.00, and the balance of the claim to be a general unsecured claim.

E. Plaintiff-Debtor completed all Plan payments in July, 2021. Defendants have received the full five (5) percent they were entitled under the confirmed Plan as general unsecured claimants.

Claim for Relief — Reconveyance

Plaintiff-Debtor alleges the following for their Cause of Action:

A. On May 7, 2007, Plaintiff-Debtor executed and delivered to National City Bank a Second Deed of Trust in the amount of $154,950.00.

B. As of 2009, National City Bank had fully merged with a subsidiary of Defendant PNC Financial Services Group, Inc. ("PNC").

C. Defendant Dreambuilder Investment, LLC ("Dreambuilder") claims to have bought out and hold current ownership of the Second Deed of Trust, but Plaintiff-Debtor has found no title record of any actual assignment of the Second Deed of Trust to Dreambuilder.

D. As of July, 2021, Plaintiff-Debtor has completed their Chapter 11 Plan.

E. Seventy-five (75) days having passed after the satisfaction of the Deed of Trust by completion of plan payments in Case No. 20-90210, Defendants have failed to reconvey the Second Deed of Trust.

Prayer

Plaintiff-Debtor requests the following relief in the Complaint's prayer:

A. Deem the Second Deed of Trust recorded with Defendants to be wholly unsecured and therefore discharged under Plaintiff-Debtor's Chapter 11 case;

B. Find that the Second Deed of Trust recorded with Defendants has no further force and effect as a secured lien on Plaintiff-Debtor's Property;

C. Execute a substitution of trustee, pursuant to Cal. Civ. Code § 2941(b)(3), authorizing a title insurance company to prepare and record a release of the obligation. Although Plaintiff-Debtor cites Cal. Civ. Code § 2941(b)(2) in their Prayer, the court believes by the language of their request that they intended to cite § 2941(b)(3) instead.

D. For such other relief as the court deems just and proper.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (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.*

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. 3d 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, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that 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. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Debtor'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-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

Review of Minimum Pleading Requirements for a Motion

Federal Rule of Civil Procedure 7(b) states,

"(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). The same "state with particularity" requirement is included in Federal Rule of Bankruptcy Procedure 9013 for all motions in the bankruptcy case itself.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic

stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

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

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

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

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

Grounds Stated in Motion

Movant has not provided any grounds, merely unsupported conclusions of law. The insufficient statement made by Movant is:

A. "As proof that the Plaintiffs are entitled to the relief requested in the Complaint, Plaintiffs rely on the Complaint and documents attached hereto." Motion, Dckt. 23 at 2 ¶ 7.

That "ground" is merely a conclusion of law by Movant. Presumably, Movant believed that the court would make those conclusions, but the "grounds" cannot merely state the anticipated conclusions.

Movant is reminded that "[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." LOCAL BANKR. R. 1001-1(g) (emphasis added).

The Motion states that grounds are found in:

A. Complaint;
B. Documents attached;

The court generally declines an opportunity to do associate attorney work and assemble motions for parties. It may be that Movant believes that the Points and Authorities is "really" the motion and should be substituted by the court for the Motion. That belief fails for multiple reasons. One is that under Local Bankruptcy Rule 9014-1(d)(4), a motion and a memorandum of points and authorities are separate documents.

Though the court has not waived the application of the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure adopted by the United States Supreme Court, under the facts and circumstances of this Adversary Proceeding, the court can address the shortcomings of counsel in ignoring the requirements of the United States Supreme Court as addressed below.

Reconveyance

Plaintiff-Debtor seeks the court's April 25, 2022 order is a real, enforceable order and that it really means that Defendants's secured claim has a value of $0.00 (now that the Plan has been completed), and therefore, there is no debt for the Deed of Trust to secure.

On March 17, 2020, Plaintiff-Debtor filed a chapter 11 bankruptcy case. As of that date, the Property included among its liens a Second Deed of Trust in favor of either PNC Financial Services, Inc. ("PNC") or Dreambuilder Investment, LLC ("Dreambuilder"). PNC appears to have inherited the lien from its original holder National City Bank upon the merger of National City Bank and a subsidiary of PNC. Dreambuilder claims to have bought and to currently hold ownership of the Second Deed of Trust, but Plaintiff-Debtor has been unable to find title record of such an assignment. Due to this confusion, Plaintiff-Debtor has consistently prosecuted this Adversary Proceeding against both PNC and Dreambuilder (collectively "Defendants") simultaneously.

Plaintiff states Chapter 11 Plan payments were completed, which required Defendants to reconvey the Second Deed of Trust. The court notes the hearing on Plaintiff-Debtor's Application for Final Decree and Discharge is set to be heard in conjunction with this Motion. Case No. 20-90210, Dckt. 257.

Here, it appears that Plaintiff-Debtor was entitled to full reconveyance of the Second Deed of Trust on the Property. Upon completion of a chapter 11 plan, its terms becoming the final, modified contract between Plaintiff-Debtor, Defendants, and creditors. *Hillis Motors v. Hawaii Automobile Dealers Association* (*In re Hillis Motors*)*, 997 F.2d 581, 588* (9th Cir. 1993) (a confirmed chapter 11 reorganization plan resembles a consent decree and should be construed basically as a contract). Therefore, there remains no obligation that is secured by the Second Deed of Trust, and the Second Deed of Trust is void as a matter of law.[F.N. 1.] The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the chapter 11 plan. *Martin v. Citi Financial Servs., Inc.* (*In re Martin*), 491 B.R. 122, 127-30 (Bankr. E.D. Cal. 2013) (discussing chapter 13 plans, but equally applicable to chapter 11 plans).

FN.1. 4 B.E. WITKIN ET AL., WITKIN SUMMARY OF CALIFORNIA LAW § 117 (10TH ED. 2005) (CITING CAL. CIV. CODE § 2939 ET SEQ.; RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4; 4 POWELL § 37.33; 2 C.E.B., MORTGAGE AND DEED OF TRUST PRACTICE § 8.84 (3D ED.); 13 AM.JUR. LEGAL FORMS § 179:511 (2D ED.)).

In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on the beneficiary under the Deed of Trust (Defendants in this Adversary Proceeding) to reconvey the Deed of Trust when the obligation secured has been satisfied. The Chapter 11 Plan having been completed, and Defendants having been paid the full amount of their "stripped" claim as finally determined pursuant to 11 U.S.C. § 506(a), and the confirmed Plan having been completed, that obligation has been satisfied.

California Civil Code § 2941(b)(1) requires that within thirty (30) days of the obligation secured by a deed of trust having been satisfied, the beneficiary shall deliver to the trustee under the Deed of Trust an executed request for reconveyance and supporting documents. The trustee under the Deed of Trust then has twenty-one (21) days from receipt of the request for reconveyance to reconvey the Deed of Trust. Cal. Civ. Code § 2941(b)(1)(A). The trustee under the Deed of Trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property—here, Plaintiff-Debtor. Cal. Civ. Code § 2941(b)(1)(B)(ii).

Here, Plaintiff-Debtor completed the Plan in July, 2021. To date, Defendants have not reconveyed the Second Deed of Trust as required by Cal. Civ. Code § 2941 within thirty (30) days of the obligation being satisfied (here being the completion of the Plan).

Additional Relief Requested in the Complaint

As directed by Plaintiff-Debtor and their counsel, the court canvassed the Complaint to see what relief was requested and then to state that for Plaintiff-Debtor (which relief is required to be stated with particularity in the Motion; Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007).

The Complaint requests, in addition to requesting the court enter a judgment that the lien at issue is void and of no force and effect, the court also appoint someone to issue a reconveyance of the deed of trust. This request is identified as being made pursuant to California Civil Code § 2941.

California Civil Code § 2941 includes provisions for (1) the beneficiary under the deed of trust or (2) a title insurance company to prepare and record a reconveyance of the deed of trust. In the Complaint, Plaintiff-Debtor cites to California Civil Code § 2934(a) as the statutory basis for the court to:

[e]xecute and acknowledge a substitution of trustee and issuance of full

reconveyance, thereby authorizing a title insurance company to prepare and record a release of the obligation.

Complaint, Prayer ¶ c., p. 5:22-24; Dckt. 1.

The court notes there is no California Civil Code § 2934, paragraph (a). The text of California Civil Code § 2934 provides

> § 2934. Recording of assignment or subordination instrument as constructive notice of contents.
>
> Any assignment of a mortgage and any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons; and any instrument by which any mortgage or deed of trust of, lien upon or interest in real property (or by which any mortgage of, lien upon or interest in personal property a document evidencing or creating which is required or permitted by law to be recorded), is subordinated or waived as to priority may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof, to all persons.

This statute does not provide any basis for the relief requested (asking the court to execute and then acknowledge a substitution of trustee, and then authorize (instruct) the title company to record the court's reconveyance of the deed of trust.

However, the court has identified California Civil Code § 2034a, which provides:

> § 2934a. Substitution of trustee under trust deed
> (a)
>
> (1) The trustee under a trust deed upon real property or an estate for years given to secure an obligation to pay money and conferring no other duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by either of the following:
>
> > (A) All of the beneficiaries under the trust deed, or their successors in interest, and the substitution shall be effective notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968.
> >
> > (B) The holders of more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or of any affiliate of that licensed real estate broker.

(2) A substitution executed pursuant to subparagraph (B) of paragraph (1) is not effective unless all the parties signing the substitution sign, under penalty of perjury, a separate written document stating the following:

(A) The substitution has been signed pursuant to subparagraph (B) of paragraph (1).

(B) None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of the obligation secured by the deed of trust.

(C) The undersigned together hold more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction.

(D) Notice of the substitution was sent by certified mail, postage prepaid, with return receipt requested to each holder of an interest in the obligation secured by the deed of trust who has not joined in the execution of the substitution or the separate document.

The separate document shall be attached to the substitution and recorded in the office of the county recorder of each county in which the real property described in the deed of trust is located. Once the document is recorded, it shall constitute conclusive evidence of compliance with the requirements of this paragraph in favor of substituted trustees acting pursuant to this section, subsequent assignees of the obligation secured by the deed of trust and subsequent bona fide purchasers or encumbrancers for value of the real property described therein.

(3) For purposes of this section, "affiliate of the licensed real estate broker" includes any person as defined in Section 25013 of the Corporations Code that is controlled by, or is under common control with, or who controls, a licensed real estate broker. "Control" means the possession, direct or indirect, of the power to direct or cause the direction of management and policies.

(4) The substitution shall contain the date of recordation of the trust deed, the name of the trustor, the book and page or instrument number where the trust deed is recorded, and the name of the new trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust. A substitution may be accomplished, with respect to multiple deeds of trust that are recorded in the same county in which the substitution is being recorded and that all have the same trustee and beneficiary or beneficiaries, by recording a single document, complying with the requirements of this section, substituting trustees for all those deeds of trust.

(b)
If the substitution is executed, but not recorded, prior to or concurrently with the recording of the notice of default, the beneficiary or beneficiaries or their authorized agents shall mail notice of the substitution before or concurrently with the recording thereof, in the manner provided in Section 2924b, to all persons to whom a copy of the notice of default would be required to be mailed by Section 2924b. An affidavit shall be attached to the substitution that notice has been given to those persons, as required by this subdivision.

(c)
If the substitution is effected after a notice of default has been recorded but prior to the recording of the notice of sale, the beneficiary or beneficiaries or their authorized agents shall mail a copy of the substitution, before, or concurrently with, the recording thereof, as provided in Section 2924b, to the trustee then of record and to all persons to whom a copy of the notice of default would be required to be mailed by Section 2924b. An affidavit shall be attached to the substitution that notice has been given to those persons, as required by this subdivision.

(d)

(1) A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents. A trustee under a recorded substitution is not required to accept the substitution, and may either resign or refuse to accept appointment as trustee pursuant to this subdivision.

(2)

(A) A trustee named in a recorded substitution of trustee may resign or refuse to accept appointment as trustee at that trustee's own election without the consent of the beneficiary or beneficiaries or their authorized agents. The trustee shall give prompt written notice of that resignation or refusal to accept appointment as trustee to the beneficiary or beneficiaries or their authorized agents by doing both of the following:

(i) Depositing or causing to be deposited in the United States mail an envelope containing a notice of resignation of trustee, sent by registered or certified mail with postage prepaid, to all beneficiaries or their authorized agents at the address shown on the last-recorded substitution of trustee for that real property or estate for years in that county.

(ii) Recording the notice of resignation of trustee, mailed in the manner described in clause (i), in each county in which the substitution of trustee under which the trustee was appointed is recorded. An affidavit

stating that notice has been mailed to all beneficiaries and their authorized agents in the manner provided in clause (i) shall be attached to the recorded notice of resignation of trustee.

(B) The resignation of the trustee or refusal to accept appointment as trustee pursuant to this subdivision shall become effective upon the recording of the notice of resignation of trustee in each county in which the substitution of trustee under which the trustee was appointed is recorded.

(C) The resignation of the trustee or refusal to accept appointment as trustee pursuant to this subdivision does not affect the validity of the mortgage or deed of trust, except that no action required to be performed by the trustee under this chapter or under the mortgage or deed of trust may be taken until a substituted trustee is appointed pursuant to this section. If a trustee is not designated in the deed of trust, or upon the resignation, incapacity, disability, absence or death of the trustee, or the election of the beneficiary or beneficiaries to replace the trustee, the beneficiary or beneficiaries or their authorized agents shall appoint a trustee or a successor trustee.

(D) A notice of resignation of trustee mailed and recorded pursuant to this paragraph shall set forth the intention of the trustee to resign or refuse appointment as trustee and the recording date and instrument number of the recorded substitution of trustee under which the trustee was appointed.

(E) A notice of resignation of trustee mailed and recorded pursuant to this paragraph shall contain an address at which the trustee and any successor in interest will be available for service of process for at least five years after the date that the notice of resignation is recorded.

(F) For at least five years after a notice of resignation of trustee is mailed and recorded pursuant to this paragraph, the trustee and any successor in interest to that trustee shall retain and preserve every writing, as that term is defined in Section 250 of the Evidence Code, relating to the trust deed or estate for years under which the trustee was appointed.

(3) For purposes of this section, paragraph (2) sets forth the exclusive procedure for a trustee to either resign or refuse to accept appointment as trustee.

(4) Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee or their authorized agents to act

> pursuant to this section, unless prompt written notice of resignation of trustee has been given in accordance with the procedures set forth in paragraph (2).
>
> (e)
> Notwithstanding any provision of this section or any provision in any deed of trust, unless a new notice of sale containing the name, street address, and telephone number of the substituted trustee is given pursuant to Section 2924f after execution of the substitution, any sale conducted by the substituted trustee shall be void.

The Complaint, the document which the court was directed to read to determine the relief sought by Plaintiff-Debtor and then the court state what relief Plaintiff-Debtor was seeking does not identify what subsection of California Civil Code § 2934a is the basis for such relief. In Plaintiff-Debtor's Points and Authorities (Dckt. 27) contains a voluminous discussion of the application of 11 U.S.C. § 506(a) and the completion of a Chapter 13 Plan with respect to a claimed determined to have a $0.00 value as a secured claim, but nothing on this § 2934a relief.

Using judicial time and resources to wade through the long and voluminous text of California Civil Code § 2934a, the court cannot identify any provision for a judge "to execute and acknowledge a substitution of trustee" and then for the judge to "issue a full reconveyance" of the deed of trust, and then the court to "authorize" a title company to "prepare and record a release of the obligation." Complaint, Prayer, ¶ c; Dckt. 1.

It appears that this requested relief, which the court was instructed to uncover, is without merit.

The court is issuing a judgment determining that the deed of trust is void and of no force and effect – which is a judgment quieting title to the property (which is requested in ¶ b. of the Prayer in the Complaint). It appears that Plaintiff-Debtor does not intend to record the judgment quieting title.

At the hearing, the attorneys for Plaintiff-Debtor explained, **xxxxxxx**

CONCLUSION

Applying these factors, the court finds that the Second Deed of Trust is void, Plaintiff-Debtor having completed the Chapter 11 Plan and Defendants having been paid the amount, $0.00, determined by the court to be the value of Defendants's secured claim, and the Property is held free of such purported interests thereunder. The continued existence of record of the Second Deed of Trust will cloud title and restrict Plaintiff-Debtor's full and unfettered use of the real property and any interests therein.

The court finds that the Complaint is sufficient, and the requests for relief requested therein are meritorious. The court has not been shown that there is or may be any dispute concerning material facts. Defendants have not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff-Debtor's bankruptcy case regarding the motion to value Defendants's secured claim to have a value of $0.00 or regarding confirmation of the Chapter 11 Plan.

Further, there is no evidence of excusable neglect by Defendants. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendants have been

given several opportunities to respond, and there is no indication that Defendants have a meritorious defense or disputes Plaintiff-Debtor's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against Defendants.

RULING

The court grants the default judgment in favor of Plaintiff-Debtor and against Defendants PNC Financial Services Group, Inc. and Dreambuilder Investments, LLC, and holds that the Deed of Trust is void.

DEFICIENT MOTION PLEADING

Nancy Weng, Esq. and Arasto Farsad, Esq., attorneys for Plaintiff-Debtors in this Adversary Proceeding have appeared in this court for a number of years. They are very experienced in federal Bankruptcy Law and Rules of Procedure, as well as the court requiring that attorneys and parties comply with the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure adopted by the United States Supreme Court. Such Rules are not mere "suggestions" or "optional at the discretion of counsel," but requirements imposed by the United States Supreme Court.

As addressed above, Federal Rule of Civil Procedure 7(b), which is incorporated into Federal Rule of Bankruptcy Procedure 7007, clearly and expressly states as follows (emphasis and text "theatrics" added):

> (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.

As noted above, this is a stricter standard from merely a " short and plain statement of the claim showing that the pleader is entitled to relief" as required for a complaint in Federal Rule of Civil Procedure 8(a), which is incorporated into Federal Rule of Bankruptcy Procedure 7008. Even for a "short and plan statement" showing why the plaintiff is entitled to the relief requested in the Complaint, the United States Supreme Court has required

> [a] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) . . . Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice

> and Procedure § 1216, pp 235-236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"),3 on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g., Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atl. Corp. v. Twombly, 550 U.S. at 555-556.

Here, Plaintiff-Debtors' two experienced attorneys have assigned to the court the task of reading Complaint and documents attached there as "proof" of the right to the relief requested in the Complaint. The Complaint is not "proof" of what is alleged therein, but only what is alleged therein.

In substance, Plaintiff-Debtors' two attorney have assigned to the court the responsibility of representing Plaintiff-Debtor, assembling the best set of grounds that the court can for Plaintiff-Debtor's, then state such to advocate for Plaintiff-Debtors, and then grant the court's own "motion" stating with particularity the grounds upon which relief may properly be sought in the Motion for Entry of Default Judgment.

The court saw several different ways to address this improper assignment of work to the court. First, it could have denied the Motion, with prejudice, and required the Plaintiff-Debtor's to seek a judgment through an evidentiary hearing so that the testimony and evidence could be properly presented.

The court could issue orders to show cause, conduct evidentiary hearings for the two attorneys in the Modesto Courthouse and after such determine the proper amount of corrective sanctions so that the attorneys follow the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure enacted by the United States Supreme Court.

Before determining how to proceed, the court provides an opportunity for Debtor's two experienced attorneys to address the requirements of Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 and how the Motion before the court complies with the requirements enacted by the United States Supreme Court in those Rules.

At the hearing, **xxxxxxx**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by John Hst Yap and Irene Laiwah Loke ("Plaintiff-Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that the Second Deed of Trust, and any interest, lien or encumbrance pursuant thereto, held by PNC Financial Services Group, Inc. or Dreambuilder Investments, LLC ("Defendants") against the real property commonly known as 1106 Lovell Avenue, Campbell, CA 95008, APN 406-07-019, with the County Recorder for Santa Clara County, California, is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that Defendants have no interest in the real property pursuant to the Second Deed of Trust.
>
> **IT IS FURTHER ORDERED** that the Judgment shall state that the debt associated with the Second Deed of Trust has been discharged pursuant to Federal Rules of Bankruptcy Procedure § 4007(a) and (b).
>
> Counsel for Plaintiff-Debtor shall prepare and lodge with the court a proposed judgment consistent with this Order.
>
> Attorney's fees and costs, if any, shall be requested as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

12. **20-90210-E-11** **JOHN YAP/ IRENE LOKE** **CONTINUED STATUS CONFERENCE RE:**
21-9016 **Arasto Farsad** **COMPLAINT**
CAE-1 **12-10-21 [1]**

YAP ET AL V. PNC FINANCIAL SERVICES GROUP, INC. ET AL

Plaintiff's Atty: Arasto Farsad, Nancy W. Weng
Defendant's Atty: unknown

Adv. Filed: 12/10/21
Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property

Notes:
Continued from 5/26/22 to be conducted in conjunction with the hearing on the Motion for Entry of Default Judgment.

The Status Conference is continued to 2:00 p.m. on xxxxxxx , 2022, ~~for adversary proceeding management, the court having granted the Plaintiff-Debtors' Motion for Entry of Default Judgment~~

13. **10-90281-E-7** **LORRAINE/GARY ERWIN** **MOTION FOR ENTRY OF DEFAULT JUDGMENT**
21-9005 **Martha Passalaqua**
5-3-22 [51]

ERWIN ET AL V. U.S. BANK, NATIONAL ASSOCIATION ET AL

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor, Defendant, Chapter 7 Trustee, and Office of the United States Trustee on May 13, 2022. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Default Judgment is denied without prejudice.

Lorraine Dennise Erwin and Gary Richard Erwin ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on May 3, 2022. Dckt. 51. Plaintiff-Debtor seeks an entry of default judgment against U.S. Bank, N.A. and Saxon Mortgage Services, Inc. ("Defendants") in the instant Adversary Proceeding No. 21-09005.

The instant Adversary Proceeding was commenced on May 24, 2021. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on May 24, 2021. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 13.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on August 13, 2021. Dckt. 18.

NO DOCKET CONTROL NUMBER

Movant is reminded that the Local Bankruptcy Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. That is not correct. The court will consider the motion, but counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

REVIEW OF COMPLAINT

Plaintiff-Debtor filed a complaint for injunctive relief against Defendant. Dckt. 1 The Complaint contains the following general allegations as summarized by the court:

A. Plaintiff-Debtor Lorraine Dennise Erwin and Gary Richard Erwin are joint legal owners of subject property: 1320 Oak Leaf Cir. Oakdale, CA 95361 ("The Property"). Id. at ¶ 1, 2.

B. Plaintiff-Debtor purchased the Property and obtained fee simple title by a grant dated October
27, 2004. Id. at ¶ 12.

C. One of the purchase money mortgages held by Defendants U.S. Bank, N.A. and U.S. Bancorp, serviced formerly by Defendant Saxon, is a second mortgage to Plaintiff-Debtor to secure the Property. Id. at ¶ 13.

D. The obligation is evidenced by a Note and secured by Deed of Trust. Id.

E. The Deed of Trust exists on official records of the government as a recorded lien (the Lien) and cloud of title on the Property. Id.

F. The Lien presents a current and permanent cloud of title, reducing the value and utility of the Property. Id. at ¶ 14.

G. Plaintiff-Debtor's filed a Chapter 13 bankruptcy on January 28, 2010. Id. at ¶ 16.

H. Defendant Saxon filed a Proof of Claim on behalf of Defendant U.S. Bank, N.A. as their registered agent and servicer. Id.

I. The Chapter 13 filing was converted to a Chapter 7 case and the Plaintiff-Debtor was discharged. Id.

J. Plaintiff-Debtor received a personal injury settlement to which the court re-opened the bankruptcy proceeding to disburse the new assets to creditors. Id.

K. Defendants U.S. Bank, N.A. and U.S. Bancorp cannot locate the corporate records and accounts relating to the Property and Lien. Id. at ¶ 20.

L. Defendant Saxon went out of business, so communication with them has also been

unsuccessful. Id. at ¶ 19.

First Claim for Relief - Quiet Title

Plaintiff-Debtor alleges the following for the First Cause of Action:

A. Cause of Action for Quiet Title - Plaintiff-Debtors seek quiet title by adverse possession regarding the Lien on the Property as of the date of filing the complaint. Complaint, Dckt. 1 at ¶ 23.

As analyzed in the court's prior denial of Plaintiff-Debtor's first motion for default judgment, adverse possession is not the proper legal theory to a deed of trust beneficiary or mortgagee prior to that beneficiary or mortgagee having the right to be in possession of the property claiming quiet title. Civil Minutes, p. 5-8,

In the current Motion, Plaintiff-Debtor does not mention adverse possession. Additionally, at the hearing on the prior motion for default judgment, Counsel for Plaintiff-Debtor seemed unaware of this legal argument. It appears to the court that the mention of adverse possession in Plaintiff-Debtor's Complaint was an inadvertent error.

Federal Rules of Civil Procedure Rule 8(a)(2) as incorporated into Federal Rules of Bankruptcy Procedure7008 does not require plaintiffs to state in their complaint any specific legal theories justifying the relief sought. *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). Thus, mere failure to indicate the exact law upon which the claim is based is not fatal to granting later relief upon that law. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014). Therefore, although Plaintiff-Debtor inadvertently stated their legal grounds for relief was adverse possession, this is not dispositive of Plaintiff-Debtor's Motion.

Prayer

Plaintiff-Debtor requests the following relief in the Complaint's prayer:

A. Plaintiff-Debtor's title in and to the Property be quieted, Plaintiff-Debtors are the owners in fee simple, Defendants have no interest in the property adverse to the Plaintiff-Debtors, including the Lien.

Review of Prior Denied
Motion for Entry of Default Judgment
Dckt. 23

Plaintiff-Debtor filed a Motion for Entry of Default Judgment on September 9, 2021. Dckt. 23. The court denied Plaintiff-Debtor's Motion for Entry of Default Judgment (Order, Dckt. 44) while addressing the following procedural and substantive concerns (Civil Minutes, Dckt. 43):

Possible Deficient Service of Subpoena

Attached to the Complaint is a Summons issued by Jeffrey P. Allsteadt, Clerk of the Bankruptcy Court. Mr. Allsteadt is the Clerk of the Bankruptcy Court for the Northern District of Illinois. https://www.ilnb.uscourts.gov/. The Certificates

of Service, Dckts. 6-7, state that "service of this summons" was made by the person signing the Certificate. No copy is attached and it is not clear which Summons, the Northern District of Illinois or the Eastern District of California was served.

Well Pleaded Facts in Complaint

As summarized above, Plaintiff-Debtor purchased the property that is encumbered by the Deed of Trust. Plaintiff-Debtor purchased the property with the obligation secured by the Deed of Trust at issue, with the money obtained through the loan secured by the Deed of Trust.

Without regard to the validity of the Deed of Trust, Plaintiff-Debtor disputes the Deed of Trust because it encumbers his Property to secure the loan Plaintiff-Debtor obtained to purchase the Property.

Plaintiff-Debtor has attempted to locate the owner of the obligation to pay the debt secured by the Deed of Trust, but has been unable to find anyone to take his money.

Plaintiff-Debtor asserts that the court should "quiet title" based on adverse possession of the Property owned by Plaintiff-Debtor.

What these well pleaded facts appear to state is that Plaintiff-Debtor admits he owes the obligation secured by the Deed of Trust, but is unable to pay the undisputed obligation because there is no one to take his money.

Lost Note

Additionally, the Plaintiff-Debtor suggests that a valid Note secured by a Deed of Trust, existing on official government records, and properly recorded, can become invalid simply due to the holder not being able to locate the Note. A question then exists as to whether an individual can clear debt because a note is "lost." The Plaintiff-Debtor has again failed to provide any grounds to support such a conclusion. The court declines to conduct legal research on Plaintiff-Debtor's behalf to support their arguments.

Further, in the Complaint no claim is asserted seeking relief based on a "Lost Note."

Movant has not provided any legal grounds for relief requested in the Complaint.

Plaintiff-Debtor attempted to address the above deficiencies by filing Supplemental Pleadings and Exhibits (Dckts. 33-41). Plaintiff-Debtor ultimately accepted the denial of the Motion without prejudice and the court denied the Motion on November 19, 2021. Dckt. 44.

REVIEW OF CURRENT
MOTION FOR DEFAULT JUDGMENT

Resolving Court's Prior Concerns

In the pending Motion for Entry of Default Judgment, Plaintiff-Debtor addresses some of the court's above concerns.

Subpoena to Defendant U.S. Bank, N.A.

Plaintiff-Debtor states Defendant U.S. Bank, N.A. has been served two subpoenas: a Federal Rules of Bankruptcy Procedure 2004 Examination subpoena and a general subpoena issued in and through the adversary action. Plaintiff-Debtor also states that Defendant U.S. Bank, N.A. has responded to the subpoena affirmatively with a "no records" Declaration. Exhibit C. Dckt. 53.

Plaintiff-Debtor states what is lost is not the note or lien, but the lienholder itself, and any proof the lienholder, Defendant U.S. Bank, N.A., that the unsecured claim is legitimate and should not be dismissed.

Subpoena to Saxon

Plaintiff-Debtor also served a subpoena to Ocwen Financial, Inc., who acquired Saxon, the former loan servicer. Ocwen Financial, Inc., through a good faith and diligent search, was unable to locate the Saxon loan. Exhibit F, Dckt. 53.

Published Quiet Title

Plaintiff-Debtor published their quiet title complaint for thirty (30) days in "The Oakdale Leader," located in Stanislaus County, where the Property is also located, for a period of four (4) weeks. Exhibit G, Dckt. 53. Particularly, notice was published for weeks beginning February 23, 2022, March 2, 2022, March 9, 2022, and March 16, 2022. Exhibit H. Dckt. 53.

Upon review of Plaintiff-Debtor's exhibits, Dckt. 53, it appears Plaintiff-Debtor issued subpoenas from the proper district, Eastern District of California, and published notice in the Oakdale Leader for the weeks of February 23, March 2, March 9, and March 16, 2022.

Grounds for Entry of Default Judgment

Plaintiff-Debtor states the following grounds for entry of default judgment:

1. Proper service was effectuated. Motion, Dckt. 51 at 12 ¶ 10.

2. Defendant U.S. Bank, N.A. has not filed a responsive pleading nor have they been granted any time extensions from the court or Plaintiff-Debtor to file a responsive pleading. *Id.* ¶¶ 12-13.

3. Since Defendant U.S. Bank, N.A. has failed to plead or defend this action, Plaintiff-Debtors are entitled to judgment by default. *Id.* ¶ 15.

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. 3d 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, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that 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. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

Plaintiff-Debtor states *Eitel* Factors weigh in favor of Entry of Default Judgment against Defendant U.S. Bank, N.A. Motion, Dckt. 51 at 13-19. As for grounds (1); (4)-(7), Plaintiff-Debtor states:

(1) Possibility of Prejudice - A plaintiff is prejudiced if the plaintiff would be "without other recourse for recovery" because the defendant failed to appear or defend against the suit. *PepsiCo,* 238 F. Supp. 2d at 1177; *see also Phillip Morris USA, Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003)." Plaintiff-Debtor states, given the failure of Defendant U.S. Bank, N.A. to defend this suit, the Plaintiff-Debtor would be prejudiced if denied a remedy. Motion, Dckt. 51 at 14:8-9.

(4) Sum of Money - The sum of money at stake is significant because of the clouded title to the real property. *Id.* at 16:5-7.

(5) Possibility of Dispute of Material Fact - Defendant had, at one time held a valid second position mortgage lien on the Subject Property. However, the Defendant has not filed an answer, response, or opposition in this adversary proceeding after being served multiple notices and subpoenas. For this reason, there likely will be no dispute of material fact in this case. *Id.* at 16:8-12.

(6) Excusable Neglect - Defendant U.S. Bank, N.A. have been served multiple documents relating to this adversary proceeding and have responded to Plaintiff-Debtor affirmatively stating they do not have records regarding the Erwins and have stated they do not believe there is response or appearance required on their part. *Id.* at 17-18; Exhibit D, Dckt. 53.

(7) Policy Reasons for Judgment on Merits - Plaintiff-Debtor states, "'although federal policy favors decisions on the merits, Rule 55(b)(2) permits entry of default judgment in situations such as this where defendants refuse to litigate.' *J & J Sports Prods, Inc. v. Concepcion*, No. 10- CV-05092, 2011 U.S. Dist. LEXIS 60607, at *5, 2011 WL 2220101 (N.D. Cal. June 7, 2011)." *Id.* at 18:11-14. Defendant has not filed any answer, response, or opposition in this adversary proceeding. Plaintiff-Debtor states Defendant has not litigated this case and entry of default judgment is appropriate.

Before entering a default judgment, the court has an independent duty to determine the sufficiency of Plaintiff-Debtor's claim. *Id.* at 662. This is established in the second and third *Eitel* Factors. 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-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

(2) Substantive Merits and (3) Sufficiency of Claim

Grounds Stated in Complaint

When reviewing pleaded and substantive claims in Plaintiff-Debtor's Complaint, the court looks to whether Plaintiff-Debtor has stated any legal grounds or authority. Plaintiff-Debtor states the following in their Cause of Action for Quiet Title:

22. The Court has inherent plenary powers to grant equitable relief concerning the matters set forth above.

23. Plaintiffs seek to quiet title by adverse possession [sic] regarding the Subject Lien on the Subject Property as of the date of filing of this complaint. Plaintiffs claim superior claim over and above USBNA and/or USB and its/their Subject Lien.

Complaint, Dckt. 1 at 7.

Plaintiff-Debtor states no legal grounds or authority, rather, simply states the court has equitable powers to grant relief. Plaintiff-Debtor does not include why or how the court can waive its "equitable wand" and grant relief.

Federal Rules of Civil Procedure Rule 8(a)(2) as incorporated into Federal Rules of Bankruptcy Procedure7008 does not require plaintiffs to state in their complaint any specific legal theories justifying the relief sought. *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). Thus, mere failure to indicate the exact law upon which the claim is based is not fatal to granting later relief upon that law. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014).

Grounds Stated in Motion

Federal Rules of Civil Procedure 7(a), as incorporated in Federal Rules of Bankruptcy Procedure 7007, requires that the motion itself state the grounds with particularity upon which the relief, which must

be stated with particularity in the motion as well, is based. The court looks to the current Motion for grounds that would entitle them to relief. Plaintiff-Debtor states the following grounds for supporting the substantive merits and sufficiency of their claim:

> [W]hat is "lost" is not the actual note or lien, but the lienholder, itself.

Motion, Dckt. 51 at 5:18.

> There must be some form of relief available to the Plaintiffs under these facts. There are others similarly situated to be sure. Yet, existing California state law does not seem to specifically embrace the unique facts of this case and the relief sought.

Id. at 5:21-23.

> The present Complaint is one for Quiet Title – an equitable remedy based on the plenary powers of the Court, and the Court's express powers under the Bankruptcy Code, to remove claims and liens which are unsupported and/or cannot be prove-upon by the claimholder, here, USBNA as respects its Unsecured Claim.

Id. at 15:1-4.

> The Debtors' Verified Complaint, incorporated herein by this reference, does the following: (1) pleads with particularity the present issue complained of with respect to the Subject Property and the Subject Lien; (2) properly identified the correct parties who have and/or may have an interest in the Subject Property; (3) as respects U.S. BANCORP and USBNA, secured valid service under both FRCP Rule 4(h) and FRBP Rule 7004, so as to give this Court personal jurisdiction over these Parties, including USBNA; and (4) pleads with particularity all necessary claims and elements to support the Causes of Action contained within the Verified Complaint and request to judicially quiet title to the Subject Property.

Id. at 15:17-24.

> Debtors state and plead substantive claims in their Verified Complaint, and those claims are meritorious. The Complaint is sufficient to support a judgment.

Id. at 16:1-3.

As stated in the court's review of the Complaint, Plaintiff-Debtor does not plead any proper legal grounds in their Complaint. Therefore, the court does not find, as Plaintiff-Debtor suggests, that their Complaint "pleads with particularity all necessary claims and elements to support the Causes of Actions . . . ." No legal grounds for granting Plaintiff-Debtor relief have been provided.

The court, therefore, will look to state law to determine whether there is a basis for quiet title when a debtor cannot locate their creditor.

California Law Regarding "Missing" Creditors

Statutory Procedure When Beneficiary Not Located

California statutory law does address this type of situation where a creditor has gone missing. California Civil Code § 2941.7 provides (emphasis added):

> [W]henever a specified balance, including principal and interest, remains due and the mortgagor or trustor . . . **cannot,** after diligent search, **locate the then mortgagee or beneficiary of record**, the lien of any mortgage or deed of trust shall be released when the mortgagor or trustor . . . records or causes to be recorded, in the office of the county recorder of the county in which the encumbered property is located, a **corporate bond accompanied by a declaration, as specified in subdivision (b), and with respect to a deed of trust, a reconveyance as hereinafter provided.**

Section 2941.7 provides various procedural requirements the bond must meet. Under subdivision (3), with respect to a deed of trust, after thirty days following the recording of the corporate bond and delivery to the trustee of the usual reconveyance fees plus costs and demands for reconveyance, the trustee shall execute a reconveyance in the same form as if the beneficiary had delivered to the trustee a proper request of reconveyance. Additionally, upon recording of a reconveyance, interest shall no longer accrue to any balance remaining due. With respect to the remaining balance, § 2941.7 provides:

> The sum of any specified balance, including principal and interest, which remains due and which is remitted to any issuer of a corporate bond in conjunction with the issuance of a bond pursuant to this section shall, if unclaimed, escheat to the state after three years pursuant to the Unclaimed Property Law. From the date of escheat the issuer of the bond shall be relieved of any liability to pay to the beneficiary or his or her heirs or other successors in interest the escheated funds and the sole remedy shall be a claim for property paid or delivered to the Controller pursuant to the Unclaimed Property Law.

Pursuant to California Civil Code § 2941.7, California Law provides a clear avenue for handling situations like the one at hand, when there is a lost beneficiary (creditor). As such, so long as Plaintiff-Debtor follows the procedural requirements of § 2941.7, the deed of trust should be able to be reconveyed to Plaintiff-Debtor.

Alternatives to Statutory Procedure

In the Miller and Starr California Real Property Law Treatise possible alternatives to the above statutory procedure are discussed, stating when a beneficiary cannot be located or refuses to execute the reconveyance, other procedures may be used, even if not authorized by statute, to "bond around or record declarations and obtain a reconveyance." § 13:144. Reconveyance when beneficiary cannot be located—Miller and Starr, Summary of alternatives, 5 Cal. Real Est. § 13:144 (4th ed.) California Civil Code § 2941.7(e) provides:

> This section shall not be deemed to create an exclusive procedure for the issuance of reconveyances and the issuance of bonds and declarations to release the lien of a mortgage and shall not affect any other procedures, whether or not such procedures are set forth in statute, for the issuance of reconveyances and the issuance of bonds and declarations to release the lien of a mortgage.

No alternative procedure law has been presented to the court by Plaintiff-Debtor.

Ancient Deeds

Additionally, the court notes, under California Civil Code § 882.020, unless a deed of trust expires earlier pursuant California Civil Code § 2911, a lien expires ten (10) years after its final maturity date, or, if no final maturity date, sixty years(60) after the instrument was recorded. This is addressed in the recent California Fifth Circuit Court of Appeal Decision, *Robin v. Crowell*, 55 Cal. App. 5th 727, 749-750 (5th DCA 2020), which states in pertinent part (emphasis added):

> 2. Nonjudicial Foreclosure
>
> Historically, a judicial foreclosure action under a deed of trust was barred when the statute of limitations had run on the underlying obligation and the lien was extinguished. Prior to 1982, however, "the power of sale under a deed of trust was not barred, or 'never outlaws.'" *(Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707 (Miller); *see Ung, supra*, 135 Cal.App.4th at p. 193.) The **power of sale could be exercised by the trustee in a nonjudicial foreclosure even after the statute of limitations barred judicial foreclosure**. (*Ung, supra*, at p. 193.) "Retention of the right to nonjudicial enforcement was justified by the equitable principle that 'courts will not help the debtor to recover … encumbered property unless he pays his debt.'" (*Ibid.*) Additionally, it was supported because **California applied a title theory, rather than a lien theory, to deeds of trust**. (*Id.* at pp. 195–196.) Title was conveyed to the trustee, who retained it until the debt was satisfied or the property was sold to enforce payment. *(Hohn v. Riverside County Flood Control & Water Conservation Dist.* (1964) 228 Cal.App.2d 605, 611(Hohn).) **Civil Code section 2911** provided that a "lien" was extinguished by the expiration of the statute of limitations, and courts held that provision **did not apply to the power of sale exercisable by the trustee who held title to the property**. (*Ung, supra*, at pp. 195–196.) In contrast, because a mortgage did not convey title to a trustee, but merely created a lien on the property, expiration of the limitations period and extinguishment of the lien under Civil Code section 2911 barred both a judicial action to foreclose or collect the debt and a nonjudicial foreclosure sale, if the mortgage included a power of sale. (*Bayer v. Hoagland* (1928) 95 Cal.App. 403, 411.)
>
> **In 1982, the Legislature abolished the rule that the power of sale in a trust deed "'never outlaws.'"** (*Slintak v. Buckeye Retirement Co., L.L.C., Ltd.* (2006) 139 Cal.App.4th 575, 584.) It enacted the **Marketable Record Title Act (Civ. Code, §§ 880.020–887.090**; the Act), which was designed "to make real property more freely alienable and marketable" and "to simplify and facilitate real property title transactions by enabling persons to determine the status and security of recorded real property titles from an examination of recent records." *(Miller, supra*, 26 Cal.App.4th at pp. 1707–1708.) **The Act limited the time period for exercising a power of sale under a deed of trust**. (Miller, at p. 1708.) It provides: "Unless the lien of a … deed of trust … has earlier expired pursuant to Section 2911, **the lien expires at, and is not enforceable by action for foreclosure commenced, power of sale exercised, or any other means asserted after, the later of" 10 years after the maturity date of the secured debt**, if that date is ascertainable from the recorded

> evidence of indebtedness, or **60 years after recordation of the instrument that created the security interest**, if the maturity date is not ascertainable from the record. (Civ. Code, § 882.020, subd. (a).)
>
> **Civil Code section 2911 has been interpreted to extinguish only** the lien of the deed of trust, i.e., **the security interest enforceable through judicial foreclosure, and not the power of sale**. (*Ung, supra*, 135 Cal.App.4th at p. 196.) Consequently, the phrase "[u]nless the lien of a … deed of trust … has **earlier expired pursuant to Section 2911**" (*Miller, supra*, 26 Cal.App.4th at p. 1708) **refers to the expiration of the statute of limitations on a judicial action to enforce the lien**. The effect of **Civil Code section 882.020** is to (1) **limit the time within which the trustee can exercise of the power of sale, which is unaffected by Civil Code section 2911**, and (2) set an outside limit on the time to bring a judicial action, in the event the basic statutory limitations period has been extended or tolled (such as, by waiver, agreement of the parties, partial payment, or the defendant's absence from the state) and Civil Code section 2911 has not yet barred a judicial action. (See Legis. Com. com., Deering's Ann. Civ. Code (2005 ed.) foll. § 882.020, p. 102; §§ 351, 360, 360.5.)

Plaintiff-Debtor provides a copy of the Deed of Trust at issue as part of multi-document Exhibit A to the Complaint. Dckt. 1. Here, the Deed of Trust states the balance is due and payable on June 1, 2021. Exhibit A, Dckt. 1. Therefore, the Deed of Trust at issue in this Adversary Proceeding "expires at, and is not enforceable by action for foreclosure commended, power of sale exercised, or any other means assert thereafter" (Cal. Civ. § 882.020(a)) June 1, 2031, which is ten (10) years after the June 1, 2021 maturity date.

RULING

Again, Plaintiff-Debtor's state what is lost is not the actual note or lien, but the lienholder itself. Motion, Dckt. 51 at 5:18. "[T]here must be some form of relief available to the Plaintiffs under these facts" and that California state law "does not seem to specifically embrace the unique facts of this case and the relief sought." *Id.* Plaintiff-Debtor believes this court has the power to grant the relief requested, canceling the Deed of Trust. *Id.*

From the court's review of applicable California law, there is adequate state law to guide Plaintiff-Debtor and their Counsel through the situation at hand. Plaintiff-Debtor may be able to use the provisions under California Civil Code § 2947.7 to have the deed of trust reconveyed now (posting the bond that will then escheat to the State of California if the "creditor" does not make demand thereon) or they can wait nine (9) years until the statute of limitations runs and the lien expires, and then bring an action in State Court to clear title. Both of these options appear to give Plaintiff-Debtor what they seek, transferring title back to Plaintiff-Debtor from the lost lienholder and terminating the Deed of Trust. *Id.* at 5:18.

As Plaintiff-Debtor has failed to provide legal grounds for why this court can cancel a Deed of Trust due to a lost lienholder through a quiet title action, and there are adequate state law grounds for reconveying title back to Plaintiff-Debtor, the court denies Plaintiff-Debtor's Motion.

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 Lorraine Dennise Erwin and Gary Richard Erwin ("Plaintiff-Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion for Entry of Default Judgment is denied.

14. **10-90281-E-7** **LORRAINE/GARY ERWIN** **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
21-9005 **Martha Passalaqua** **5-24-21 [1]**
CAE-1

ERWIN ET AL V. U.S. BANK, NATIONAL ASSOCIATION ET AL

Plaintiff's Atty: Darren Marcus Salvin
Defendant's Atty: unknown

Adv. Filed: 5/24/21
Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property

Notes:
Continued from 5/4/22 to be heard in conjunction with the Motion for Entry of Default Judgment

The Status Conference is continued to 2:00 p.m. on xxxxxxx , 2021

JUNE 16, 2022 STATUS CONFERENCE

xxxxxxx

MAY 4, 2022 STATUS CONFERENCE

No Updated Status Report has been filed by Plaintiff-Debtor Lorraine and Gary Erwin. Since the November 19, 2021 Order on Motion for Entry of Default Judgment and the Civil Minutes stating the court ruling, nothing further has been filed but five (5) Certificates of Service of Subpoena for:

1. Subpoena to Produce Documents serve on U.S. Bank, N.A., c/o Thurlin Roberts at a Cincinnati, Ohio address for U.S. Bank National Association. Dckt. 45.

2. Subpoena to Produce Documents serve on Ocwen Financial Corporation, via registered agent, at a Tallahassee, Florida address for a service company. Dckt. 46.

3. Subpoena for 2004 Examination Production of Documents of U.S. Bank, N.A.; Dckt. 47.

4. Subpoena for 2004 Examination Oral Deposition of U.S. Bank, N.A.; Dckt. 48.

5. Subpoena for 2004 Examination Production of Documents of Ocwen Financial Corporation; Dckt. 49.

At the Status Conference, counsel for Plaintiff-Debtor reported that the Motion for Entry of Default has been filed and requested that the Status Conference be continued to the same date and time.

FEBRUARY 9, 2022, STATUS CONFERENCE

The Civil Minutes stating the findings of fact and conclusions of from the court's denial of Plaintiff's Motion for Entry of Default Judgment was filed on November 18, 2021. Dckt. 43. The Status Conference was continued to February 9, 2022, in light of some of the unique discovery to be conducted.

At the Status Conference, Plaintiff-Debtor reported that a 2004 Examination of Defendant, as well as Ocwen Financial is planned. Additionally, Ocwen is investigation further and if documents can be located, Ocwen will document the release of the lien.

Counsel for Plaintiff also addressed documenting the public record of the lien, the beneficiary of the lien, and the reliance thereon in obtaining a judgment in this Adversary Proceeding if such judgment is necessary to clear title to the Property.

SUMMARY OF COMPLAINT

The Complaint filed by Lorraine and Gary Irwin ("Plaintiff-Debtor"), Dckt. 1, asserts claims to quiet title based on Adverse Possession of the real property commonly known as for 1320 Oak Leaf Circle, Oakdale, California. The liens which are the subject of this quiet title action are liens for loans obtained by Plaintiff-Debtor.

The Certificates of Service state the following persons have been served by mail:

Saxon Mortgage Services, Inc.
4700 Mercantile Dr.
Fort Worth, Texas 76137

Dckt. 6.

Personal service on U.S. Bank, N.A. by serving its registered agent:

Gabriela Sanchez
CT Corporation
818 W. 7th Street, Suite 930
Los Angeles, CA 90017

Dckt. 7.

Service by U.S. Mail on U.S. Bank, N.A., upon receiving notice from CT Corporation that it was not the agent for service of process for the Bank:

U.S. Bank, National Association
425 Walnut Street, Floor 14
Cincinnati, OH 45202

Dckt. 9.

The Federal Rules of Bankruptcy Procedure, Rule 7004, provides for service on federally insured financial institutions and corporations as follows:

> (b) Service by first class mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:
> . . .
>
> > (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant
>
> . . .
> (h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—
>
> > (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> >
> > (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

As stated Plaintiff-Debtor, the California Secretary of State reports that Saxon Mortgage Services, Inc. has surrendered its corporate status in California. [Fn.1.]

For U.S. Bank, National Association, the FDIC website lists it main office address as 425 Walnut Street, Cincinnati, OH 45202. [Fn.2.] That is the address used by Plaintiff-Debtor, but it is not addressed to an officer or "Attn: Officer for Service of Process."

FN. 1. https://businesssearch.sos.ca.gov/CBS/Detail

FN. 2. https://banks.data.fdic.gov/bankfind-suite/bankfind?activeStatus=0%20OR%201&branchOffices=true&name=U.S.%20BANK%20NATIONAL%20ASSOCIATION&pageNumber=1&resultLimit=25

At the Status Conference, counsel for Plaintiff-Debtor reports that proof of serve on US Bank, N.A. has been documented and that Plaintiff-Debtor will proceed with having the default entered and motion for entry of default judgment filed and set for hearing.

15. 21-90484-E-11 TWISTED OAK WINERY, LLC
Brian Haddix

CONTINUED APPROVAL OF AMENDED CHAPTER 11 PLAN OF REORGANIZATION
2-28-22 [72]

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

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

Though Oppositions have been filed, the court cannot locate a Certificate of Service having been filed by the Debtor/Debtor in Possession documenting service having been made by the Debtor/Debtor in Possession .

At the hearing, Counsel for the Debtor/Debtor in Possession reported that this was a clerical error which would be shortly corrected. The court authorized the late filing of the Certificate of Service.

The Plan of Reorganization is xxxxxxxxxxx.

The Plan Proponent's Counsel reported that the following Service and Filing Requirements for Confirmation were complied with:

March 4, 2022 Plan to be served along with a copy of the February 28, 2022 court Order Setting Hearing and Related Deadlines (Dckt. 73), a ballot for voting, a copy of a notice confirmation hearing on the trustee, United States Trustee, and all creditors and other parties in interest.

Within Three Days of the above service, a certificate of service shall be filed demonstrating compliance. No such Proof of Service has been filed.

April 4, 2022 Last Day to File Objections to Confirmation

April 14, 2022 Last Day to File Replies to Objections, Tabulation of Ballots, Proof of Service

and that a Certificate of Service will be filed, it's omission arising from a clerical error when it was being uploaded.

Treatment of Claims

Creditor/Class	Treatment

Class 1: None	**Claim Amount**	
	Impairment	Not Impaired. Debtor does not anticipate any Priority Claims.
	If there is a Priority Claim allowed, Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan or the date which such claim is allowed by a final non-appealable order.	
Class 2: Mechanics Bank	**Claim Amount**	$2,540,119.29
	Impairment	Class 2 is impaired. Mechanics Bank shall retain its security interest according to the instruments and statutes creating same. Mechanics Bank's principal shall be paid in full with interest of 4.50% per annum on 25 years amortization with a January 1, 2033 maturity date. Interest and principal payments are $10,577 per month, commencing October 1, 2022 for 123 months and then a balloon payment for the remaining balance due on January 1, 2033. Mechanics Bank's pre-petition interest shall be paid in full with 0% interest per annum in the amount of $1,000 per month, commencing October 1, 2022, then a balloon payment for the remaining balance due on January 1, 2033.
Class 3: U.S. Small Business Administration	**Claim Amount**	$157,119.86
	Impairment	Class 3 is unimpaired by the plan.
Class 4: Non-Insider Non-Priority Unsecured Claims, Stange/Metate	**Claim Amount**	

	Impairment	Class 4 is unimpaired by the plan. Creditor Stange/Metete is the only creditor in Class 4 and their claim is disputed. If Stange/Metete has an allowed claim, they are to be paid as follows: Stange/Mesete's claim must first be offset against any claim or recovery of Debtor. If there is no recovery of Debtor, in equal installments beginning July 1, 2022 for a period of six (6) months.
Class 5: Insider Non-Priority Unsecured Claims	**Claim Amount**	
	Impairment	Class 5 is unimpaired by the plan. Class 5 will only be paid if all other allowed claims have been paid in full on such terms Debtor and class 5 agree on.
Class 6: Equity Interests	**Claim Amount**	
	Impairment	Equity Holders are unimpaired and retain current membership interest in Debtor.

Debtor states in their plan there are no known Priority Claims. However, the Internal Revenue Service has filed a priority claim in the amount of $2,016.45 unsecured priority claims and $200.00 in unsecured general claims. This is estimated as returns for numerous tax periods have not been filed: December 2019; September 30, 2021; and December 31, 2021. See Proof of Claim 3-1.

Creditor's Objection

February 28, 2022, Creditor Mechanics Bank filed an Objection to Confirmation (Dckt. 74) stating:

1. Debtor did not obtain an Order extending the time to confirm a Small Business Plan outside of forty-five days.

2. The case should be converted the Chapter 7 liquidation.

3. The Second Amended Plan is not fair and equitable because:

a. The Note and Commercial Guaranties are in almost three (3) years of default.

b. Debtor's sole manager receives $10,000.00 per month in rent from Debtor but Creditor has not received anything in almost three (3) years.

c. The Debtor has filed a series of proposed plans.

d. The plan forces Creditor to accept an interest rate of 3.75% which is far below the current lending market.

e. The Plan is devoid of any reference to Debtor's principals and Guarantors of the Note and ability to contribute to the Plan.

f. The Plan continues to use Creditor's cash collateral over Creditor's objection when Debtor has made no monthly adequate protection payments to Creditor.

Dckt. 74.

United States Trustee's Objection

The United States Trustee filed an objection on April 4, 2022 (Dckt. 85) stating:

1. The Plan improperly terminates Trustee's duties if it is confirmed non-consensually. Trustee states the court should not confirm the Plan unless it is amended to remove any such language.

2. The Debtor has not filed a proof of service evidencing compliance with the proof of service requirement under Federal Rules of Bankruptcy Procedure 2002(b).

Creditor's Supplemental Objection

Creditor Mechanics Bank filed a supplemental objection on April 14, 2022 "confirming its objection" as set forth in its previous objection under Docket No. 74. Dckt. 87.

DISCUSSION

Federal Rule of Bankruptcy Procedure 3020(b)(2) states:

> The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

Here, there has been no notice of hearing as required by the court's February 28, 2022 Order. Dckt. 73. There has been no certificate of service evidencing a copy of the Third Amended Subchapter V Plan, a ballot for voting on the Subchapter V Plan, and a copy of a notice of confirmation hearing on the case trustee, or standing trustee, the United States Trustee, and all creditors and other parties of interest has been served. Additionally, there has been no copies of ballots or ballot tabulation filed with the court at least seven (7) days prior to the hearing, as required by the February 28, 2022 Order.

At the Status Conference, counsel for Debtor/Debtor in Possession believes that all of the outstanding issues could be resolved, but as discussed below, the concerns of Mechanics Bank as to adequate protection may required a ruling by the court.

The service documentation is being corrected. The Debtor/Debtor in Possession amends the Plan to remove the section which provides for the discharge of the Subchapter V Trustee even if it is not a consensual confirmation of the Plan.

With respect to Mechanics Bank objections, an issue exists as to the Bank's collateral, the Debtor/Debtor in Possession will confirm that there are no rents being generated and the extent to which there are any grapes on the property encumbered by the Bank's Deed of Trust and Agricultural Lien (as they are perfected) which are used in the wine making process or sold. The court will consider the use of such collateral and how it impacts the Bank's Adequate Protection.

Mechanics Bank objected to there being a 3.5% interest rate for its secured claim, stating that under the Till analysis, that is the current prime rate, and there are no upward adjustments for the risk it is facing over the ten year repayment period under the Plan.

In the Third Amended Plan, the interest rate has been increase to 4.5%. The court will consider any additional "risk" adjustment necessary in light of the Bank's adequate protection, limitations thereto, time period for payment, and other factors.

Mechanics Bank complains that it wasn't paid for three years prior to the bankruptcy case being filed and has not been paid since this case was filed on October 4, 2021. Additionally, a principal of the Debtor has been paid $10,000 a month in rent from Debtor, and that is fair and equitable.

Counsel for the Debtor/Debtor in Possession reported that such rent was for a tasting room formerly used by Debtor and that such rent has been terminated.

Adequate Protection Factors

The U.S. Supreme Court addressed the principle of bankruptcy adequate protection in *United Saving Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 370, in the context of relief from the automatic stay, referencing the statutory definition in 11 U.S.C. § 361 which provides:

> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
>
> (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

The Supreme Court's discussion of the interests to be adequately protected, the Court concluded, "The language in those other provisions, and the substantive dispositions that they effect, persuade us that the "interest in property" protected by § 362(d)(1) does not include a secured party's right to immediate foreclosure."

In considering the statutory definition for a secured claim stated in 11 U.S.C. § 506, the court concluded that for a creditor with an undersecured claim, adequate protection did not include granting them interest for the time value of their claim. This was in context of a pre-confirmation period, but underscores that while having a secured claim gives the creditor an enhanced position in a bankruptcy case, it is not a ticket to unlimited profits.

For confirmation of bankruptcy plans and the treatment of a secured claim in which the plan terms modify the original contract (such as changing the interest rate and payment terms), the U.S. Supreme Court address this issue in *Till v. SCS Credit Corporation*, 541 U.S. 465 (2004). Mechanics Bank does not cite to this case and the *Till* factor in its opposition to confirmation, Dckt. 74, but instead discusses the terms for making a new loan today. At the April 22, 2022 hearing, counsel for Mechanics Bank did mention Till, stating that a 1% point increase of the interest to 4.5% did not adequately protect/compensate Mechanics Bank for the extraordinary risk it face in the payments of its claim over the next ten years. The court addresses below the extraordinary risk facts identify by Mechanics Bank.

Mechanics Bank filed Proof of Claim 2-1 on December 13, 2021. As the court noted at the April 21, 2022, it appears that Mechanics Bank has provided accurate and truthful information in this Proof of Claim consistent with it being made under penalty of perjury (and subject to the civil and criminal penalties for filing a fraudulent claim). Key information provided in Proof of Claim 2-1 and the attachments thereto include the following:

A. The amount of the claim is ($2,540,119.29), which claim amount includes ($15,889.76) in foreclosure fees and costs, plus further interest, fees, and costs. POC ¶ 7.

   1. In the Declaration filed with the opposition, it is stated that the interest rate floor for the claim is 7.25%, and there is an additional 5.00% interest added when the obligation is in default. Thus, it appears that Merchants Bank has been adding 12.25% in interest to this claim in the past three years it is asserted to have been in default. Dec. ¶¶ 8, 12,

B. The Claim is secured by real estate, which Mechanics Bank states has a value of $4,641,208.000. POC ¶ 9. This is the same value as stated by Debtor on Schedule A/B. Dckt. 1 at 55.

1. With a value of $4,641,208 and a claim of ($2,540,119.29), Mechanics Bank states that its claim is fully secured and it has no unsecured claim. POC ¶ 9.

2. Using these values, there is a $2,101,088 equity cushion in the real estate protecting Merchants Bank in excess of ($2,540,119.29) claim. This is an equity cushion of 82.7% of the amount of the Claim.

In the Opposition, Mechanics Bank asserts that it is not fair and equitable for the interest rate to be set for the present value repayment under Till, but that it should be based on the current lending rate. Opposition, ¶ a, p. 3; Dckt. 74.

Mechanics Bank's Senior Vice President states in her declaration, verbatim of what is stated in the Opposition, her belief and legal opinion that the proposed plan treatment is not "fair and equitable" as stated in 11 U.S.C. § 1129(b)(2)(A), with said Senior Vice President expressly citing to that Code section in stating her legal conclusion, and testifying under penalty of perjury:

> 12. The Debtor's Second Amended Plan is far from "fair and equitable" as required under Bankruptcy Code§ 1129(b)(2)(A):
>
> a. The Plan is not fair and equitable when it forces Mechanics Bank to accept an interest rate (3. 75% per annum) which is far below that which the Debtor could obtain in the current lending market. The interest rate in today's lending market for a $2.5 million to a borrower such as Debtor is nine percent (9.0%) per annum. Moreover, under the terms of the Note, there is an interest rate floor of 7.250% per annum. In addition, the Note provides that in the Event of Default, the interest rate increases by 5.0% per annum, The Debtor ignores these contractually-agreed-upon terms between third parties and attempts to force a non-market rate of interest of 3.75% per annum in the Plan; . . .

With respect to the $2,101,088 equity cushion not providing adequate protection, the Senior Vice President provides no testimony.

In the Opposition, the assertion that Mechanics Bank's secured claim is not adequately protected is only referenced (using the words "adequate protection") in the following context:

> d. The Plan is not fair and equitable when the Debtor continues to use Mechanics Bank's cash collateral over Mechanics Bank's objection. The Debtor has made no monthly adequate protection payments to Mechanics Bank.

Opposition, ¶ d, p. 4; Dckt. 74.

In reviewing the Opposition as written, the general proposition presented appears not to be whether the bankruptcy plan properly provides for the repayment of the secured claim as permitted under the Bankruptcy Code, but that Mechanics Bank should be paid more than its claim for the Debtor to atone for past financial sins.

In the Opposition, as repeated verbatim in the Senior Vice President's Declaration, Mechanics Bank appears shocked that after apparently extensive negotiations to try and modify the repayment of the debt outside of bankruptcy, when Mechanics Bank went to foreclose the Debtor filed Chapter 11 to force repayment terms on Mechanics Bank as permitted under the Bankruptcy Code (recognizing that Mechanics Bank raises some issues of whether the proposed repayment is "fair and equitable" as required under the Bankruptcy Code).

Beginning with the Bankruptcy Code and treatment of secured claims under a bankruptcy plan, 11 U.S.C. § 1129(b)(1), (2), as applicable to the proposed plan treatment for the Mechanics Bank secured claim, provides that if the creditor does not agree to the plan treatment for the secured claim:

> (b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) [acceptance of plan by the class of claims] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
>
> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides--
>
> (I) (I) that the **holders of such claims retain the liens securing such claims**, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim **deferred cash payments totaling at least the allowed amount of such claim**, of a value, as of the effective date of the plan, **of at least the value of such holder's interest in the estate's interest in such property**;
>
> . . .
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

The Plan provides for Mechanics Bank retaining its lien, which will be clarified to the extent that any of its collateral is being used so that the court may determine whether it is receiving the "indubitable equivalent" of its oversecured claim.

In *Till*, the U.S. Supreme Court was wrestling with the appropriate amount of interest under the Chapter 13 plan to be paid the creditor with the secured claim so that it would receive at least the allowed amount of its claim as of confirmation (commonly considered a present value calculation). The discussion by the Supreme Court includes expressly rejecting the creditor's contention that the interest was to be set at what the creditor could make new loans at if it could get paid in one lump sum on confirmation. *Till v.*

SCS Credit Corp., 541 U.S. 465, 471 (2004). In determining the correct interest rate for a cramdown (non creditor agreed plan term) payment in the bankruptcy plan, the Supreme Court adopted the "formula approach," states as follows:

> The formula approach has none of these defects. Taking its cue from ordinary lending practices, the approach begins by looking to the **national prime rate, reported daily in the press**, which reflects the financial market's estimate of **the amount a commercial bank should charge a creditworthy commercial borrower to compensate** for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a **greater risk of nonpayment** than solvent commercial borrowers, **the approach then requires a bankruptcy court to adjust the prime rate accordingly**. The appropriate size of that risk adjustment depends, of course, on **such factors as** the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment. Some of this evidence will be included in the debtor's bankruptcy filings, however, so the debtor and creditors may not incur significant additional expense. Moreover, **starting from a concededly low estimate and adjusting upward places the evidentiary burden squarely on the creditors**, who are likely to have readier access to any information absent from the debtor's filing (such as evidence about the "liquidity of the collateral market," post, at 1973 (SCALIA, J., dissenting)). **Finally, many of the factors relevant to the adjustment fall squarely within the bankruptcy court's area of expertise.**
>
> Thus, unlike the coerced loan, presumptive contract rate, and cost of funds approaches, the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings. Moreover, the **resulting "prime-plus" rate of interest depends only on the state of financial markets, the circumstances of the bankruptcy estate**, and the characteristics of the loan, **not on the creditor's circumstances or its prior interactions with the debtor.** For these reasons, the prime-plus or formula rate best comports with the purposes of the Bankruptcy Code.

Id., 478-480 (emphasis added).

The Supreme Court did not establish a scale for the above prime rate adjustment, but noted that such adjustments range between 1% and 3%. *Id*., 480. The interest rate adjustment is to be for minor amounts of risk, with the Supreme Court further stating,

> Together with the cramdown provision, this requirement obligates the court to select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan. If the court determines that the likelihood of default is so high as to necessitate an "eye-popping" interest rate, 301 F.3d, at 593 (Rovner, J., dissenting), the plan probably should not be confirmed.

Id., 480-481.

Consideration of Interest Rate For
Mechanics Bank Secured Claim

Beginning with the proposed Plan treatment, the basic terms are:

1. Amount of Secured Claim.....($2,540,119.29) [to be adjusted for interest and other accrued amounts since filing to confirmation]

2. Repayment of the non-pre-petition accrued interest of the ($2,540,119.29) will be:

    a. Claim amortized over 25 years at 4.5% interest per annum;

    b. With monthly payments of $10,557 commencing October 1, 2022 and continuing for 123 months; and

    c. A balloon payment of the remaining balance on January 1, 2033. This portion of the claim to be paid is (see the following) projected to be ($1,899,000), and with monthly payments of $10,557 applied to that principal amount and the interest at 4.5%, the remaining balance to be paid is projected to be ($1,363,581). That would be a 28.2% reduction of the principal amount of the secured claim through the monthly payments.

Using the Microsoft Loan Amortization Calculator, with an interest rate of 4.5% and a 25 year amortization, the portion of the secured claim to be paid as provided above would be ($1,899,000), leaving ($641,119) to be paid as provided below.

3. The pre-petition interest arrearage portion of the claim, ($641,119) as computed above, will be paid at the rate of $1,000.00 a month, commencing October 1, 2022, and continuing for 123 months, and

    a. The a balloon payment for remaining balance to be paid in full January 1, 2033, which remaining balance is computed to be ($518,119), which is a 19.1% reduction in this portion of the claim through the monthly payments.

While the claim is not fully amortized over the 123 months when the balloon payment comes due, neither is it fully amortized over the twenty-five (25) years.

<u>Interest Rate, Proper Calculation</u>

In the Plan now before the court, Debtor provides a 1% point bump to the 3.5% current prime rate. (There was no dispute at the April 21, 2022 hearing as to the current prime rate.) In the Opposition, and as stated verbatim in the Declaration by Mechanics Bank Senior Vice President, Mechanics Bank argues for an the prime interest rate, with modest adjustments, that a commercial bank should charge a creditworthy commercial borrower which has built into it the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default, as the U.S. Supreme Court requires in *Till*, but instead advocates for an

interest rate made to a debtor, driven to bankruptcy, having a property with an almost 100% equity cushion and facing imminent foreclosure. The U.S. Supreme Court expressly rejected this distressed borrow interest rate computation, with its comments including:

> These considerations lead us to reject the coerced loan, presumptive contract rate, and cost of funds approaches. Each of these approaches is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value. For example, **the coerced loan approach** requires bankruptcy courts to consider evidence about the market for comparable loans to similar (though nonbankrupt) debtors—an inquiry far removed from such courts' usual task of evaluating debtors' financial circumstances and the feasibility of their debt adjustment plans. In addition, **the approach overcompensates creditors** because the market lending rate must be high enough to cover factors, like lenders' transaction costs and overall profits, that are no longer relevant in the context of court—administered and court—supervised cramdown loans.
>
> . . .
>
> The **cost of funds approach**, too, is improperly aimed. Although it rightly disregards the now-irrelevant terms of the parties' original contract, it mistakenly focuses on the creditworthiness of the creditor rather than the debtor. In addition, the approach has many of the other flaws of the coerced loan and presumptive contract rate approaches. For example, like the presumptive contract rate approach, the cost of funds approach imposes a significant evidentiary burden, as a debtor seeking to rebut a creditor's asserted cost of borrowing must introduce expert testimony about the creditor's financial condition. Also, under this approach, a creditworthy lender with a low cost of borrowing may obtain a lower cramdown rate than a financially unsound, fly-by-night lender.

Till v. SCS Credit Corp., 541 U.S. at 477-478 (emphasis added).

Mechanics Bank does not assert that the Plan is not feasible and that Mechanics Bank does not stand a likelihood of being paid, just that it's interest rate should be higher because if the Debtor were forced to go to the marketplace with a pending foreclosure hanging around its neck, the lenders could extract a higher interest rate than what is permitted under the Bankruptcy Code.

Mechanics Bank also argues that interest rates will go up in the future (as everyone, including lenders currently setting the prime interest rate at 3.5% know from the news), thus Mechanics Bank is entitled to an enhancement over the prime rate. In making such argument, Mechanics Bank is contradicting the U.S. Supreme Court which states that such "opportunity costs" are included in the prime rate.

At the April 21, 2022 hearing, Mechanics Bank added the additional argument that as interest rates go up, the value of real estate declines. While stating it in a apocalyptic, Great Recession category, nothing has been presented to the court that current lending, consumer and commercial, has approached the wild, liar loans, negatively amortizing, continually rolling over and refinancing loans that business could not pay, and the like which was seen for the Great Recession, the Dot Com Bubble Burst, the drop in the early 1990's, and the lending implosion of domestic and foreign loans in the early 1980's.

Rather, it appears that there will be a "more normal" drop in real estate prices (which from their meteoric high with the historically low sub-3% interest rates recently seen) based on how much the monthly payment is and the ability to repay the loan from the business operation. As interest rates go up, the borrow can afford to borrow less principle for the purchase as the amount of interest it has to pay increases.

The court, using the Microsoft Excel Loan Amortization Program has generated several examples below, assuming a 10% down payment, amortization over 25 years, and upward adjusted interest rates to show monthly loan payment projections.

Projected Property Value	**Less 10% For Amount Financed**	**Interest Rate**	**Monthly Payment For Adjusted Interest Rate**	**Projected Equity Cushion for $2,540,119 Secured Claim**	
				Dollar Amount	Percentage
$4,641,208*	$4,117,087	3.50%	$22,884.00	$2,101,089	45%
$4,905,000	$4,145,000	4.00%	$22,918.00	$2,364,881	48%
$4,333,333	$3,900,000	5.00%	$22,799.00	$1,793,214	41%
$3,944,444	$3,550,000	6.00%	$22,872.00	$1,404,325	36%
$3,583,333	$3,225,000	7.00%	$22,794.00	$1,043,214	29%
$3,288,888	$2,960,000	8.00%	$22,846.00	$748,769	23%
$3,027,777	$2,725,000	9.00%	$22,868.00	$487,658	16%
$2,788,889	$2,510,000	10.00%	$22,898.00	$248,770	9%

* Agreed current value of the property securing Mechanics Bank claim.

In looking at possible prime interest rate increases, if the interest rate increases to 8% (a 128% increase over the current prime rate), there would still be a 23% equity cushion (without taking into account reductions in the amount of the claim for payments made under the Plan). Even if the prime rate were to climb to 10%, there is still a substantial equity cushion.

Given that Mechanics Bank has made a wise choice of collateral, there does not appear to be a risk of lack of adequate protection in a decrease in the value of its collateral.

The proposal of 4.5% interest by the Debtor/Debtor in Possession is at the low end of the range envisioned by the U.S. Supreme Court. However, given the substantial equity cushion, there should be little for Mechanics Bank to do then collect the monies coming in or exercising its rights in the event of default.

The proposed Plan provides that in the event of a default:

> If Debtor defaults in a payment or covenant under the Plan, Debtor shall cure the default, without consequence, within 30 days of the date of default.

> The 30-day cure period will begin upon receipt by the Debtor and its attorney of a notice of such default. If the Debtor fails to cure the default within the 30-day period, the affected creditor or party will be free to enforce its rights and collect its claim, as modified by the Plan.

Proposed Plan, ¶ 10.02; Dckt. 72. Within 30 days of Mechanics Bank notifying the Debtor, as the Plan Administrator, of the default, either the default will be cured or Mechanics Bank is free (without further order of the court, to enforce its rights. There is little risk or roadblocks in connection with enforcing Mechanics Bank's rights in the event of a default.

The court continues the hearing to allow for the filing of supplemental pleadings.

Status of Case

The court notes no supplemental pleadings have been filed since the prior court order.

June 16, 2022

At the hearing xxxxxxxxxxxxx

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 Confirm the Chapter 11 Subchapter V Plan filed by Twisted Oak Winery, LLC ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm is xxxxxxxxxxxxxxx

16. 21-90484-E-11 BSH-6 — TWISTED OAK WINERY, LLC, Brian Haddix — CONTINUED OBJECTION TO CLAIM OF MECHANICS BANK, CLAIM NUMBER 2, 4-26-22 [97]

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Subchapter V Trustee, and Office of the United States Trustee on April 26, 2022. By the court's calculation, 30 days' notice was provided. 30 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(2).

The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(2). Debtor, creditors, the Subchapter V Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Objection to Proof of Claim Number 2-1 is xxxxxxxxxxxx

Additionally, as addressed below, the court has identified what appear to be some very significant legal and evidentiary issues (and short comings) in connection with this and related proceedings. The continuance may allow the parties and their counsel to meet and confer in good faith, identify any "miscommunications" and prepare a stipulation that resolves some, if not all, of their disputes.

Other than a joint stipulation, the court does not authorize the filing of any further pleadings in this contested matter without further order of the court following the continued hearing.

REVIEW OF PLAN CONFIRMATION

Twisted Oak Winery, LLC, Debtor/Debtor in Possession, ("Objector") requests that the court disallow the claim of Mechanics Bank ("Creditor"), Proof of Claim No. 2-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $2,540,119.29. Objector asserts that Creditor does not have an interest in Debtor's personal property because the Deed of Trust expressly contemplates a separate UCC security interest which as never perfected. Additionally, the Proof of Claim fails to comply with Federal Rules of Bankruptcy Procedure 3001(c)(1) because the UCC security interest is not attached to the Proof of Claim. Objector seeks to "expunge" the Proof of Claim to the extent that it is unenforceable against any alleged UCC security interest in personal property.

Objector also seeks attorney's fees for bringing this objection.

Creditor's Response

Creditor filed a response (Dckt. 109) on May 13, 2022 stating that California Civil Code § 2938(b) provides perfection of a security interest is made by recording a Deed of Trust. Creditor states there is no requirement to file a UCC Financial Statement when a deed of trust is properly recorded.

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 evidence 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). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Upon the court's review of California Civil Code § 2938(b), an assignment in leases, rents, issues, or profits of real property is (emphasis added):

> fully perfected as of the time of recordation with the same force and effect as any other duly recorded conveyance of an interest in real property, notwithstanding a **provision of the assignment or a provision of law that would otherwise preclude or defer enforcement of the rights granted** the assignee under the assignment until the occurrence of a subsequent event, including, but not limited to, a subsequent default of the assignor, or the assignee's obtaining possession of the real property or the appointment of a receiver.

Here, Debtor/Debtor in Possession implies there is a provision in the Deed of Trust in which there is required to be a separate UCC security interest. Upon review of the Deed of Trust, the language provides, "Grantor authorizes Lender to file a UCC financing statement, or alternatively, a copy of this Agreement to perfect Lender's security interest." Deed of Trust, Exhibit B, Dckt. 100 at 38. This appears to be the only language referencing any financing statement. Additionally, it appears that "this Agreement," the Deed of Trust, was sufficient to perfect the security interest. Therefore, it appears a UCC filing was not required.

The court has reviewed the copy of the Deed of Trust that secures Creditor's Claim which is attached to Proof of Claim 2-1. With respect to the scope of the security interest, it states (the court reformatting the sentence so that each item of collateral can be cleanly identified:

> CONVEYANCE AND GRANT. For valuable consideration, Trustor irrevocably grants, transfers and assigns to Trustee in trust, with power of sale, for the benefit of

Lender as Beneficiary. all of Trustor's right, title, and interest in and to the following described

real property,

together with

all existing or subsequently erected or affixed buildings, improvements and fixtures;

all easements, rights of way, and appurtenances;

all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights);

and

all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters,

With respect to such security interest covered by a deed of trust, the following excerpt from Miller & Starr provides an overview of the property interests that are lienable under a mortgage or deed of trust (footnote references removed and emphasis added):

§ 13:18. Property interests that are lienable

Generally. Any interest in real property that is transferable may serve as the security for a deed of trust. Only the property interest of the trustor can be subjected to the lien, but this interest need not be the complete fee title. A security interest can be given by the owner on property adversely possessed by another. The lien of a deed of trust also can attach to the separate interest of a tenant in common or joint tenant.

Miller and Starr California Real Estate, 5 Cal. Real Estate § 13.18 (4th ed.)

Lien on appurtenances, fixtures, easements and water rights. As with any conveyance of land, a deed of trust includes any appurtenance that passes with the land, whether or not it is specifically mentioned in the legal description. **Thus, the lien of a deed of trust attaches to all appurtenant easements, even though they are not specifically referenced in the deed of trust.** On a foreclosure sale, the purchaser receives the title to both the property described in the deed of trust and all of the easements appurtenant to that property. **The same principle applies to water rights appurtenant to the land described in the deed of trust.**

Lien on an easement, whether express or implied. The lien of a deed of trust can be imposed on an easement, whether the easement is express or implied. When the deed of trust describes the dominant tenement as security and also describes an appurtenant easement across another parcel of property owned by the trustor, the lien attaches to the easement, even though the trustor could not have an easement across his or her own property.

Id.

> **Lien of a deed of trust includes personal property that has become a fixture.** A deed of trust that encumbers real property also encumbers fixtures that have become a part of the realty. A fixture is an appurtenance to land and passes with a transfer of the land without express reference. **Between the parties to the deed of trust, personal property that becomes affixed to the land in such a manner as to become a fixture is collateral for the lien of the deed of trust in the same manner as any other permanent improvement placed on the property, even if the fixture is attached after the execution of the deed of trust.**
>
> **Lien of a deed of trust may also include personal property that is not a fixture.** The lien of a deed of trust on real property does not include a lien on personal property that is not a fixture unless it expressly provides for a lien on personal property. **Under current law, this means that the deed of trust must satisfy the requirements of the Uniform Commercial Code to create a security interest in the collateral**; these requirements are not difficult to achieve and essentially require that the security agreement satisfy the requirements for formation of a contract, describe the collateral and the obligation secured, and be agreed to by the debtor. A mortgage or **deed of trust that expressly includes a security interest in personal property items that are not fixtures** creates an enforceable security interest between the parties, but it is not perfected against other creditors of the trustor unless it is also sufficient as a **financing statement and is filed in the manner required to perfect a security interest in personal property. Usually this means that the beneficiary must file a UCC-1 financing statement** in the appropriate state office, in addition to recording the deed of trust in the local recorder's office.
>
> Deed of trust must actually describe the personal property collateral. In order for a deed of trust to operate as a security agreement that creates a UCC security interest in particular personal property, it must actually describe the personal property that is intended as additional collateral in addition to the real property security.

Id. § 13:20.

> § 13:60. Assignments of rents—In general
>
> Assignment of rents may be contained in the deed of trust or a separate instrument. **Whether contained in a separate recorded instrument executed by the trustor as assignor, or included as part of the mortgage or deed of trust, an assignment of rents is enforceable by the beneficiary-assignee.** Most printed forms and institutional deeds of trust include an assignment of rents, but an absolute deed taken as a mortgage or other hidden security transaction will not include an assignment. Also, occasionally the parties by intention or inadvertence will omit the assignment of rents from the security instrument. In the absence of an assignment of rents, the mortgagee or beneficiary has no right to possession or to collect the rents merely by virtue of a mortgage or deed of trust.

Assignment creates immediate, perfected security interest. A written assignment of an interest in leases, rents, issues, or profits of real property made in connection with an obligation secured by real property, upon execution and delivery by the assignor, is effective to create a present security interest in existing and future leases, rents, issues, or profits of that real property. This is so irrespective of whether the assignment is denoted as absolute, absolute conditioned upon default, additional security for an obligation, or otherwise.

"Rents" defined. For purposes of the statute, "**leases, rents, issues, and profits of real property" includes the cash proceeds thereof, and "cash proceeds" means "cash, checks, deposit accounts, and the like.**"

Comment:
Revenue or receipts from a business operated on the property is not "rents" and is subject to the Commercial Code rather than the assignment of rents statute.

§ 13:60. Assignments of rents—In general, 5 Cal. Real Est. § 13:60 (4th ed.)

Value of Secured Claim

In connection with this Objection to Claim and it's Opposition to Debtor/Debtor in Possession's Subchapter V Plan, while originally stating under penalty of perjury that its collateral had a value of $4,641,208 (Proof of Claim 2-1, Part 2, § 9), Creditor now admits that its collateral has a value of only ($2,226,400 and that such value must be considered as the value of its collateral in this bankruptcy case. Supp. Opposition, ¶ e, Dckt. 109; Dec. Nicola Merrifield-Olivia, Sr. V.P. Mechanics Bank, ¶ e, Dckt. 110. In light of Creditor arguing for the higher interest rate and advancing an asserted "As Is" and "Liquidation Value," the court accepts Creditor's assertion of these lower values, and taking the lowest, as the admission as to value by Creditor.

June 16, 2022

At the hearing xxxxxxxxxxxxx

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 Objection to Claim of Mechanics Bank ("Creditor"), filed in this case by Twisted Oak Winery, LLC, Debtor/Debtor in Possession, ("Objector") 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 2-1 of Creditor is xxxxxxxxxxxxxx

17. **21-90484-E-11 CAE-1** **TWISTED OAK WINERY, LLC**
Brain Haddix

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
10-4-21 [1]

Debtor's Atty: Brian Haddix

Notes:
Continued from 5/26/22 to be heard in conjunction with other matters on the calendar.

The Status Conference is continued to 2:00 p.m. on xxxxxxx

FINAL RULINGS

18. **20-90210-E-11 AF-11** **JOHN YAP/IRENE LOKE** **Arasto Farsad** **MOTION FOR ENTRY OF DISCHARGE AND/OR MOTION FOR FINAL DECREE 4-27-22 [257]**

Final Ruling: No appearance at the June 16 2022 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on April 27, 2022. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Discharge is granted.

The Motion for Final Decree and Discharge has been filed by Irene Laiwah Loke and John Hst Yap ("Debtor in Possession"). Debtor further clarified in a Declaration filed May 31, 2022 that they are seeking only a discharge, due to their pending adversary proceeding, and not also a final decree as originally requested. Dckt. 264.

11 U.S.C. § 1141(d)(5)(A) permits the court's discharge of debts provided for in a plan when all payments have been made.

Debtor in Possession's Declaration (Dckt. 259) certifies that Debtor in Possession:

A. has completed the plan payments;

B. does not have any delinquent domestic support obligations;

C. has completed a financial management course and filed the certificate with the court;

D. has not received a discharge in a case under Chapter 7, 11, or 12 during the four-year period prior to filing of this case or a discharge under a Chapter 13 case during the two-year period prior to filing of this case;

E. is not subject to the provisions of 11 U.S.C. § 522(q)(1); and

F. is not a party to a pending proceeding which implicates 11 U.S.C. § 522(q)(1).

There being no objection, Debtor in Possession is entitled to a discharge.

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

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

The Motion for Entry of Discharge filed by Irene Laiwah Loke and John Hst Yap ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and the court shall enter the discharge for Irene Laiwah Loke and John Hst Yap in this case.

19. **20-90327-E-7** **PHILIP/DALLIA ENGLE** **CONTINUED MOTION FOR ENTRY OF JUDGMENT IN ADVERSARY PROCEEDING**
21-9007 **Gurjeet Rai**
SSA-3
5-2-22 [47]

MCGRANAHAN V. ENGLE ET AL

Final Ruling: No appearance at the June 16, 2022 Hearing is required.

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Trustee, Defendant-Debtor's, Defendants Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on May 2, 2022. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

The Motion for Entry of Judgment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The court having granted the Motion Joint Motion for Entry of Judgment (Order issued June 14, 2022), this Matter has been removed from the Calendar.

The court has identified several issues requiring clarification as to the judgment to be entered as discussed below. With the continuance, the Parties have the opportunity to file a supplemental joint pleading to clarify such issues and to insure that the judgment entered is what they sought.

Upon the filing of a supplemental pleading, the parties shall also lodge with the court a proposed order granting the Motion and a proposed judgment. That will trigger the court's review of the supplemental pleading, and if the court has no further questions, the court may then enter the order and judgment prior to the scheduled hearing, and remove that matter from the calendar.

REVIEW OF MOTION

Michael D. McGranahan, Chapter 7 Trustee, ("Plaintiff-Trustee") filed the instant adversary proceeding on June 22, 2021, against Debtor Philip Scott Engle and Dallia Desamito Engle, United States Internal Revenue Service ("IRS"), and California Franchise Tax Board, collectively "Defendants".

Plaintiff-Trustee's Complaint alleges they completed the court approved sale of Defendant-Debtor's residence at 5119 Curtis Street, Salida (the "Property") "free and clear of liens and interests" on May 20, 2021. Plaintiff-Trustee now holds the net proceeds of the sale in the amount of $327,404.47.

Plaintiff-Trustee states grounds for the claims asserted in the Complaint, which include:

1. The IRS recorded a lien against the property which Plaintiff-Trustee claims is avoidable pursuant to 11 U.S.C. § 724(a). Complaint at 4:5, Dckt. 1.

2. The Franchise Tax Board recorded a lien against the Property which is avoidable pursuant to 11 U.S.C. § 724(a). *Id.* at 5:4-5.

3. Plaintiff-Trustee is entitled to proceeds from sale for the portion of the tax respective priority tax claims that encumber the Property sold. *Id.* at 5:23-28.

4. Plaintiff-Trustee claims all Defendants dispute Plaintiff-Trustee's right for payment from sale proceeds.

Plaintiff-Trustee seeks a judgment (stated to be an "order" in the complaint from this Adversary Proceeding) avoiding Tax Liens of the Defendants IRS and Franchise Tax Board and preserving it in favor of the bankruptcy estate pursuant to 11 U.S.C. § 724(a) and 551, for adjudication and declaratory relief determining Plaintiff-Trustee's claim and legal rights from the sale proceeds, for costs of suit, and for other and further relief as allowable by law.

Defendant-Debtor's Answer

Defendant-Debtor filed an Answer on July 20, 2021 stating they are requesting accounting of all costs and fees and their homestead exemption come before any costs and fees. Dckt. 8.

Defendant-Debtor filed an Amended Answer on August 12, 2021 (Dckt. 13) admitting much of the allegations but arguing Plaintiff-Trustee failed to mitigate damages by not abiding by Defendant-Debtor's previous request to sell the property and pay off taxing agencies. Additionally, Defendant-Debtor states they are entitled to a homestead exemption of $175,000.00, pursuant to California Code of Civil Procedure § 704.730(a)(3)(A), which shall come before any fees and costs, and that they are entitled to accounting of all fees and costs to determine the reasonableness.

Defendant-IRS's Answer

On August 26, 2021, Defendant IRS filed an Answer (Dckt. 17) denies that the tax liens and secure tax assessments can be avoided pursuant to 11 U.S.C. §§ 724(a), 726(a)(4). Additionally, Defendant-IRS states they lack information as to whether Plaintiff-Trustee is entitled to reasonable fees and costs from the sale proceeds.

Defendant-FTB's Answer

Defendant-FTB filed an Answer on October 14, 2021. Dckt. 24. Defendant-FTB argues that the allegations regarding the tax liens constitute legal conclusions which does not require admission or denial. Therefore, Defendant-FTB denies the allegations. Defendant-FTB denies that Plaintiff-Trustee is entitled to payment of fees and costs from sales proceeds.

Settlement with Defendants IRS and FTB

Plaintiff-Trustee has resolved and paid the resulting claims of Defendants IRS and FTB. Motion at 3, Dckt. 47. Plaintiff-Trustee has dismissed these Defendants as parties in the present adversary.

The remaining parties in the adversary are Plaintiff-Trustee and Defendant-Debtor.

Joint Motion for Entry of Judgment

Plaintiff-Trustee and Defendant-Debtor brings this Joint Motion stipulating to the following relief to be granted in this Adversary Proceeding:

I. The Parties seek entry of judgment "stipulating and agreeing" to be bound by the terms and conditions of the court approved settlement agreements between Plaintiff-Trustee and Defendants IRS and FTB.

II. The Parties stipulate the bankruptcy court may enter any other orders sufficient and necessary to carry out the terms and conditions of the present Motion.

III. The Parties execute and present the Motion by the joint-signing of the Motion.

With respect to this requested relief, it is unclear what a judgment would be stipulating and agreeing to. It is the Trustee and Defendant-Debtor who are agreeing and stipulating. It appears that the judgment they are agreeing to is one that would state something like:

> **IT IS ORDERED, ADJUDGED, AND DECREED** that Plaintiff-Trustee Michael D. McGranahan and Philip Engle and Dallia Engle, and each of them, Defendant-Debtors, are each bound by the terms of the Stipulation approved by the court between Plaintiff-Trustee Michael McGranahan, the Internal Revenue Service, and the California Franchise Tax Board, and each of them (20-90327; Order and Stipulation, Dckts. 143, 128 (Exhibit 1).
>
> **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the court shall enter supplemental orders for the enforcement of this judgment, which orders shall be requested by noticed motion or joint *ex parte* motion filed in this Adversary Proceeding.

With the continuance of this hearing, the Parties have the opportunity to refine the relief they are requesting, file supplemental pleadings, and lodge with the court a proposed order granting the motion and a proposed judgment.

June 3, 2022 Supplemental Joint Statement

On June 3, 2022, Plaintiff-Trustee and Debtor-Defendants filed a Supplemental Statement in Support of the Joint Motion for Entry of Judgment. Dckt. 55. The parties state:

1. The joint motion is consistent with the previous approve stipulations between Trustee and Defendants IRS and FTB.

2. The stipulations provide expenses shall be paid from the proceeds of the estate's sale of Defendant-Debtors' real property.

3. The parties to this joint motion stipulate the court's entry of judgmentto contain provisions for the court to enter supplemental orders for the enforcement of judgment which shall be requested by noticed motion or joint ex parte motion filed in the adversary.

Additionally, the parties submitted a proposed order attached as Exhibit 1. Dckt. 56.

The Parties having clarified the relief and provided a proposed judgment, this Motion is granted.

20. **19-90464-E-7** **RICHARD RICKS** **MOTION FOR COMPENSATION FOR**
JES-2 **Pro Se** **JAMES E. SALVEN, ACCOUNTANT(S)**
5-6-22 [199]

Final Ruling: No appearance at the June 16, 2022 Hearing is required.

Local Rule 9014-1(f)(1) Motion—No Hearing Required.

Sufficient 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 6, 2022. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

James Salven, the Accountant ("Applicant") for Irma Edmonds, the Chapter 7 ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period December 3, 2022, through April 9, 2022. The order of the court approving employment of Applicant was entered on December 3, 2021. Dckt. 151. Applicant requests fees in the amount of $1,848.00 and costs in the amount of $137.87.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant's services for the Estate include analyzing, preparing, and finalizing tax returns. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 6.6 hours in this category. Applicant analyzed, prepared, and finalized tax returns.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
James Salven	6.6	$280.00	$1,848.00
Total Fees for Period of Application			$1,848.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $137.87 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copies	$0.20	$27.40
Envelopes	$0.25	$1.25
Lacrete Tax Proc.		$86.00
Serve Fee App.	$1.29	$23.22
Total Costs Requested in Application		$137.87

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $1,848.00 are approved pursuant to 11 U.S.C. § 330, and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Costs & Expenses

First and Final Costs in the amount of $137.87 pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

The court authorizes the Chapter 7 Trustee to pay 100% of the fees and 100% of the costs allowed by the court.

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

Fees	$1,848.00
Costs and Expenses	$137.87

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

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

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

The Motion for Allowance of Fees and Expenses filed by James Salven ("Applicant"), Accountant for Irma Edmonds, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

James Salven, Professional employed by the Chapter 7 Trustee

Fees in the amount of $1,848.00
Expenses in the amount of $137.87,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

21.	**22-90083-E-7** **TPH-1**	**JOSHUA/NANCY LEDFORD** **Thomas Hogan**	**CONTINUED MOTION TO AVOID LIEN OF STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.** **3-21-22 [10]**

Final Ruling: No appearance at the June 16, 2022 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, and Office of the United States Trustee on March 21, 2022 By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted

This Motion requests an order avoiding the judicial lien of State Farm Mutual Automobile Insurance Co., ("Creditor") against property of the debtor, Joshua Dale Ledford and Nancy Ledford ("Debtor") commonly known as 3231 Martel Ave, Riverbank, California 95367("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $416,959.65. Exhibit 5, Dckt. 13. An abstract of judgment was recorded with Stanislaus County on August 7, 2018, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $515,000.00 as of the petition date. Dckt. 1. The unavoidable senior consensual liens that total $193,512.00

as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. There is also the senior judgment lien of State Farm Insurance for a judgment debt of ($416,959.65). *Id*.

On Schedule C filed by Debtor in this case, Debtor claims an exemption of $1.00 in the Property pursuant to California Code of Civil Procedure § 704.730.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is $321,487.00 in equity to support the judicial lien.

Value of Real Property.....$515,000.00
Unavoidable Consensual Liens.....($193,512.00)
Homestead Exemption.....($ 1.00)

==========

Value in Property for Creditor's Judgment Lien.....$321,487.00

Under the formula, the Debtor could only claim an exemption in the value of the Property that is in excess of the senior consensual lien. Debtor has chosen to claim an exemption of $1.00, as stated on Schedule C. That leaves $321,487.00 of value for Creditor's lien.

Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided in excess of $321,487.00 subject to 11 U.S.C. § 349(b)(1)(B).

Amended Schedule C

On May 10, 2022 Debtor's Attorney filed an amended Schedule C. Dckt. 18. The amended Schedule C shows an exemption amount of $322,000.00.

Supplement to Motion to Avoid Judicial Lien

On May 16, 2022 Debtor's Attorney filed a Supplement to Motion to Avoid Judicial Lien. Dckt. 21. Debtor's Attorney states the value in Property for Creditor's Judicable Lien is zero ($0) and has attached evidence of the amount of homestead exemption.

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

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

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

IT IS ORDERED that the judgment lien of State Farm Mutual Automobile Insurance Co., California Superior Court for Stanislaus County Case No. MSC10-02213, recorded on August 7, 2018, Document No. 2018-0054200-00, with the Stanislaus County Recorder, against the real property commonly known as 3231 Martel Avenue, Riverbank, 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.

22. **17-90494-E-7** **DALJEET MANN** **MOTION FOR COMPENSATION FOR**
JES-2 **Pro Se** **JAMES SALVEN, ACCOUNTANT(S)**
5-4-22 [187]

Final Ruling: No appearance at the June 16, 2022 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 4, 2022. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

James Salven, the Accountant ("Applicant") for Irma Edmonds, the Chapter 7 ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period November, 2018, through April, 2022. The order of the court approving employment of Applicant was entered on November, 2022. Dckt. 190. Applicant requests fees in the amount of $3,836.00 and costs in the amount of $374.25.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

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

A review of the application shows that Applicant's services for the Estate include accounting and tax preparation. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Tax Issues: Applicant spent 10.7 hours in this category. Applicant exchanged emails and personal communications with trustee and counsel regarding transfers of property, tax effects of various estate actions, input tax data, reviewed tax data, processed and finalized tax returns, and wrote determination letters and transmittal letters.

Fee/Employment Applications: prepared, filed, and served fee and employment applications.

Conflict Check: conflict review and preparation of employment application.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
James Salven	13.7	$280.00	$3,836.00
Total Fees for Period of Application			$3,836.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $374.25 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copies	$0.15	$27.90
Envelopes	$0.20	$1.00
Lacerte Tax Proc.	$197.00	$197.00
Serve Fee App	$1.29	$148.35
Total Costs Requested in Application		$374.25

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $3,836.00 are approved pursuant to 11 U.S.C. § 330, and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $374.25 pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$3,836.00
Costs and Expenses	$374.25

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by James Salven ("Applicant"), Accountant for Irma Edmonds, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

James Salven , Professional employed by the Chapter 7 Trustee

Fees in the amount of $3,836.00
Expenses in the amount of $374.25

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as Accountant for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.