

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

June 18, 2015 at 10:30 a.m.

1.	<u>14-26919</u> -E-7	RODERICK ROBBINS	CONTINUED MOTION TO COMPEL
	SNM-2	Stephen Murphy	ABANDONMENT
			3-13-15 [<u>91</u>]

Final Ruling: No appearance at the June 18, 2015 hearing is required.

The Debtor having filed a "Withdrawal of Motion" for the pending Motion to Compel Abandonment of Real Property (Dckt. 107), the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Compel Abandonment of Real Property, and good cause appearing, **the court dismisses without prejudice the Debtors Motion to Compel Abandonment.**

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.

A Motion to Compel Abandonment having been filed by the Debtor, the Debtor having filed a Notice of Withdrawal, the Motion to Compel is dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is dismissed without prejudice.

June 18, 2015 at 10:30 a.m.

2. [14-29361](#)-E-7 WALTER SCHAEFER
DNL-9 Douglas Jacobs

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH BANK OF THE
WEST, RYAN BAUER AND ASHMAN
COMPANY AUCTIONEERS AND
APPRAISERS, INC.
5-28-15 [[138](#)]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 28, 2015. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

The Motion For Approval of Compromise is xxxxxxx.

Walter Schaefer commended this bankruptcy case on September 18, 2014, as a Chapter 13 case. On January 5, 2015, Bank of the West filed a motion to dismiss or convert the bankruptcy case. Dckt. 34. On February 1, 2015, the court filed the order granting the motion and converting the case to one under

Chapter 7. Dckt. 48. Kimberly Husted was appointed as the Chapter 7 trustee on February 2, 2015. Appointment of Interim Trustee, Dckt. 49.

The Trustee, requests that the court approve a compromise and settle competing claims and defenses with Bank of the West, Ryan Bauer, and Ashman Company Auctioneers and Appraiser, Inc. ("Settlors"). The claims and disputes to be resolved by the proposed settlement are interests in:

(1) equipment used by the Debtor in a sheet metal fabrication business, last known as Almanor Precision, that the Debtor operated.

Schaefer, on Schedule A, values the Real Property at \$800,000.00 subject to Bank of the West's secured claim in the amount of \$360,730.00.

Debtor's amended Schedule B identifies interests in the equipment used in the Debtor's sheet metal fabrication business including:

- A. five Amada CNC Turret Punch Presses,
- B. three Amada CNC Press Brakes,
- C. an Amada Sheer,
- D. an Amada Corner Notcher,
- E. two Diacro Press Breaks,
- F. three Hager Insertion Presses,
- G. Fedal and Kitamura CNC Machining Centers,
- H. a Miyano CNC Lathe,
- I. a HYDMECH Automatic Horizontal Band Saw,
- J. Bridgeport Mills,
- K. a Victor Lathe,
- L. Atlas Capo and Kaeser Air Compressors,
- M. Miller Welders,
- N. a Welding Department,
- O. a Paint Department,
- P. Trucks, Support Equipment, and
- Q. Perishable Taking

(the "Equipment"). The Debtor does not claim an exemption in any of the Property or Equipment.

The Trustee states that Bank of the West asserts a first lien against the Property and the Equipment in the amount of \$448,864.31 (almost \$100,000.00 greater than listed by Debtor on Schedule D). Though this case is now almost one-year old, Bank of the West has not filed a proof of claim.

Mr. Bauer asserts a second lien against the Equipment based on a settlement, documented by a Settlement Agreement (Exhibit O, Dckt. 142) ("Bauer Settlement Agreement") and Security Agreement (Dckt. L, *Id.*) with AMI Precision, Inc., dba Almanor Precision ("AMI") and Walter Schaefer (the debtor in this bankruptcy case) ("Schaefer") for an insured occupational injury in the amount of \$42,893.12. Schaefer executed the Settlement Agreement and Security Agreement in his individual capacity and as the representative of AMI.

FRAUDULENT PURPORTED SALE OF ESTATE ASSETS

The Trustee reports that on February 9, 2015, without court authority or consent of the Trustee, Bank of the West, or Mr. Bauer, AMI (with Schaefer as

its representative) purported to sell property of the bankruptcy estate consisting of the Equipment to Ashman Company Auctioneers and Appraiser, Inc. ("Ashman") for \$220,00.00 cash. Additionally AMI and Schaefer purported to permit Ashman to use the real property commonly known as 763 Main Street, Chester, California (the "Real Property"), which is property of the bankruptcy estate, to conduct a re-sale of the equipment which AMI purported to sell to Ashman.

On February 17, 2015, the Trustee states that the Ashman made a wire transfer of \$220,000.00 which AMI purported to sell Ashman to a bank account designated by Schaefer (whose account it was is not disclosed by the Trustee). Purportedly Schaefer used the \$220,000 to pay various obligations, some of which were scheduled and some of which have not been scheduled in this bankruptcy case. No list of the persons to whom this money was paid has been provided by the Trustee in connection with this Motion. The Trustee states that Bank of the West and Mr. Bauer were not paid.

On February 25, 2015, Ashman removed one of the Amada CNC Turret Punches and transferred it to Manufacturing Solutions for \$23,500.00. Ashman has retained the \$23,500.00 from the sale of this equipment which is property of the bankruptcy estate.

The Trustee states that she is in possession of the remaining property of the bankruptcy estate consisting of the Property and the Equipment, with the exception of the Punch that Ashman transferred to "resold"

Ashman Company Auctioneers and Appraiser, Inc. asserts claims against the Equipment (except the Punch), the \$220,000.00 which it wired into the bank account designated by Schaefer, and Schaefer personally, and transferees from Schaefer.

OUTLINE OF PROPOSED SETTLEMENT

Trustee and Settlers now present a "Compromise" to be approved by this court. The Terms of the compromise to resolved the competing claims and disputes are set forth in the "Liquidation Agreement" filed as Exhibit H in support of the Motion, Dckt. 96 ("Compromise Agreement"). The compromises achieved by the Trustee are:

- A. Compromise with Bank of the West.
 - 1. Bank of the West shall be allowed a claim secured by a first lien against the Property and Equipment (except for the Punch) in the amount of \$448,864.31 plus interest thereon at the rate of \$39.78058 per day and reasonable attorney fees incurred after March 31, 2015. This is the full amount of the claim asserted by Bank of the West.
 - 2. This claim will be paid before any monies are disbursed to the estate.
- B. Compromise with Mr. Bauer

1. Mr. Bauer shall be allowed a claim secured by a second lien against the Shop and Equipment (except for the Punch) in the amount of \$42,893.12 plus interest thereon at the rate of \$2.99 per day and reasonable attorney fees incurred after March 31, 2015. This is the full amount of the claim asserted by Bauer.
2. This claim will be paid in full before any monies are disbursed to the estate.
3. In addition to the collateral listed in the Security Agreement, the Trustee appears to want to grant an additional mortgage or deed of trust against the "shop," which is the real property subject to the Bank of the West Deed of Trust. FN.1.

FN.1. The Compromise Agreement clearly defines the "shop" as the real property commonly known as 763 Main Street, Chester, California. The Compromise Agreement clearly states that Bauer will have a second lien secured by both the shop and the Equipment. The Bauer Settlement Agreement clearly states that the obligation of AMI will be secured (at best for Mr. Bauer) only by the "equipment" which is owned by Schaefer. Settlement Agreement ¶ 4(b), Exhibit O; Dckt. 142. The Bauer Security Agreement expressly states that only AMI grants a security interest to Mr. Bauer in the equipment. Security Agreement ¶ 2, Exhibit L; *Id.* The Trustee does not direct the court to any document or other basis for Mr. Bauer claiming, or the Trustee giving away, a lien against the Property (the real property defined in the Compromise and Motion as the "shop").

C. Compromise with Ashman

1. Ashman will be given an interest in 50% of the proceeds from the sale of the Property (the "shop") and the equipment after payment of the Bank of the West and Mr. Bauer claims provided for above.
2. Ashman will be given the 50% interest based on its contention that it is a "bona fide purchaser for value" of the Equipment, which is property of the bankruptcy estate, from AMI in a "sale" organized by Schaefer. The Motion does not assert any basis by which Ashman asserts that it was a purchaser of the Real Property which is property of the bankruptcy estate.
3. For its 50% interest, Ashman will receive 50% of the sales proceeds, up to a total amount of \$196,500, for its 50% interest distribution of the sales

D. Bank of the West, Mr. Bauer, and Ashman will assign to the Trustee all claims to recover the \$220,000.00 paid by Ashman to AMI which was disbursed by Schaefer.

E. The Trustee shall employ Ashman to liquidate the Equipment by auction.

- F. Releases shall be exchanged between the Trustee, Bank of the West, Mr. Bauer, and Ashman Company Auctioneers and Appraiser, Inc. in connection with the above claims.

DISCUSSION

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

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

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

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlers have granted a corresponding release for the Estate and provides for a system for disbursement following the sale of the Property and the Equipment.

REVIEW OF DISPUTES TO BE COMPROMISED

I. Bank of the West

Bank of the West has filed its Proof of Claim asserting a properly perfected security interest in the Equipment and a deed of trust against the Real Property. Bank of the West has not yet filed a Proof of Claim in this case. This is somewhat unusual in light of this case having been filed on September 18, 2014, and Bank of the West having a lien against property in which it appears everyone agrees the estate have a very large equity.

The Trustee has included copies of the security agreement ("BOTW SA") and deed of trust ("BOTW DOT") as exhibits to the present Motion. BOTW SA, Exhibit E, and BOTW DOT, Exhibit I; Dckt. 142. The only authentication of these Exhibits is the declaration of the Trustee (Dckt. 140) in which she states that she "understands" that the exhibits are documents upon which Bank of the West asserts a claim. The Trustee further testifies that through March 31, 2015, Bank of the West "estimates" that its claim is \$448,864.31.

Under the Compromise, Bank of the West will be paid the \$448,864.31, plus additional interest and attorneys' fees.

June 18, 2015 at 10:30 a.m.

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The court notes that Exhibit I, the BOTW DOT, has what appears to be a Plumas County Recorder's stamp bearing the date October 27, 1997. The BOTW DOT describes the property address as 763 Main Street, Chester, California (which is the address for the "shop" used in the Compromise). The BOTW DOT is not certified, so it is not a self authenticating document. Fed. R. Evid. 902(4). The court notes that a Financing Statement upon which it is asserted Bank of the West bases perfection of its security interest in the Equipment is filed as Exhibit H. Dckt. 142. While not certified or otherwise authenticated, the Financing Statement has a filed stamp in the upper right hand corner for October 30, 1997, by Bill Jones as the California Secretary of State. A Continuation Statement with the filed date of July 24, 2002 is filed as part of Exhibit H. *Id.*

A second continuation statement is provided as part of Exhibit H, which has the filed date of August 8, 2012, ten years after the other continuation statement filed by the Trustee in support of the Motion.

The court cannot identify what is being "compromised" with Bank of the West. The Trustee merely states that she will pay the claim in full from the sales proceeds. Possibly, the Compromise merely documents Bank of the West's agreement that the Trustee proceed with an auction of the Equipment and the sale of the Real Property. This does not appear to be a "compromise."

II. Mr. Bauer

As with Bank of the West, the "compromise" with Mr. Bauer is to pay him in full for his claim and acknowledge a perfected lien against the Equipment. The Trustee goes even further, seeking the court to authorize the granting of a new "second lien" against the Real Property to also secure Bauer's claim.

Mr. Bauer asserts a lien on the Equipment. See Proof of Claim No. 7, stating the collateral is "other" (not real property or vehicle). The documents attached to Proof of Claim No. 7 are the following:

- A. Promissory Note Dated October 31, 2013 (Also filed as Exhibit N, Dckt. 142) in support of the Motion. The Note sets forth the following:
 - 1. AMI promises to pay Mr. Bauer \$45,000.
 - 2. If there is a default in payments, AMI agrees to pay all reasonable costs and attorneys fees.
 - 3. The Note is signed by AMI, Schaefer executing it in his capacity as "Mgr."
- B. Security Agreement Dated April 15, 2013 ("Bauer Security Agreement") by AMI and Schaefer, and dated August 26, 2013 by Mr. Bauer. (Also filed as Exhibit L, Dckt. 142) in support of the Motion. The Bauer Security Agreement sets forth the following:
 - 1. The parties to the Bauer Security Agreement are:
 - a. AMI (who is identified as the "debtor" under the

Bauer Security Agreement)

- b. Schaefer, individually, and
 - c. Mr. Bauer (who is identified as the "secured party" under the Bauer Security Agreement).
- 2. The security interest is granted to secure AMI's obligation under the \$45,000 note.
 - 3. AMI, with the consent of Schaefer, individually, grants Mr. Bauer a security interest.
 - 4. AMI grants a security interest in the collateral defined in paragraph 4 of the security agreement.
 - 5. The obligations secured are the obligations of AMI to Mr. Bauer arising out of the \$45,000 note and the Bauer Security Agreement.
 - 6. AMI grants the security interest in:
 - a. "all goods, including without limitation, equipment, machinery, materials, furniture, furnishings, engines, appliances, fixtures, tools, parts of every kind and description, whether now owned or acquired by [AMI] after the date of this Agreement or delivered to the real property of [AMI], or in which [AMI] may now have or may after the date of this Agreement acquire an interest, and all additions, accessions, replacements, substitutions, and improvements to such goods and wherever located as specifically identified in Exhibit 1 attached hereto and incorporated herein by this reference." FN.2.

FN.2. While broad in the initial description, it appears that the grant of the security interest by AMI is limited to the items described on Exhibit 1 to the Bauer Security Agreement.

- 7. AMI makes the following representations and warranties:
 - a. At the time of executing the Bauer Security Agreement it is not the owner of, or have any right, title, and interest in any of the personal property for which it is purporting to grant a security interest. Bauer Security Agreement ¶ 5.1.
 - b. The lien granted by AMI and perfected by the filing of a UCC-1 Financing Statement is junior in priority to the lien granted Bank of the West. *Id.*, ¶ 5.5.

- c. Schaefer shall execute and deliver to Mr. Bauer a UCC-1 Financing Statement to allow Mr. Bauer to perfect a security interest in the collateral. *Id.*, ¶ 6.1.
 - d. AMI will execute, file, and record other documents as necessary to perfect, evidence, and continue Mr. Bauer's security interest in the collateral. *Id.*
 - e. AMI and Schaefer appoint Mr. Bauer as their attorney in fact to:
 - (1) Do any act that AMI is obligated to do to preserve, protect, or establish Mr. Bauer's lien. *Id.*, ¶ 7.
 - f. Events of Default include:
 - (1) Default in payment of the AMI obligation. *Id.*, ¶ 8.1(a).
 - (2) Any levy or proceeding against the Collateral or Schaefer or AMI's interest in the collateral. *Id.*, 8.1(c).
8. The Bauer Security Agreement is signed by:
- a. AMI, by Schaefer as "Owner/President;"
 - b. Schaefer, "individually;" and
 - c. Mr. Bauer.
- C. UCC Financing Statement, Filing Date December 23, 2013. (Also filed as Exhibit M, Dckt. 142, in support of the Motion.) The Financing Statement includes the following information:
- 1. The "debtor" is AMI, with the address of 763 Main Street, Chester, California.
 - 2. An "additional debtor" is Schaefer, with the address of 763 Main Street, Chester, California.
 - 3. The "secured party" is Mr. Bauer.
 - 4. The collateral description is the list of equipment which is attached to the Bauer Security Agreement.

In her Motion the Trustee asserts that the "compromise" with Mr. Bauer should be approved for the followings grounds (stated with particularity as required by Fed. R. Bank. P. 9013):

- A. It is in the best interests of the bankruptcy estate.

- B. While the trustee recognizes that the language in paragraph 2 of the Bauer Security Agreement is "ambiguous," the Trustee believes she is unlikely to prevail against Mr. Bauer's contention that the UCC Financing Statement, Security Agreement, and Bauer Settlement Agreement, taken as a whole, appear to demonstrate the parties intention for Mr. Bauer to have a "valid claim of lien."
- C. The Trustee believes that the equipment, in which Mr. Bauer asserts a lien, should be should prior to or with the Shop. Therefore, the "delay and inconvenience" associated with the estate asserting its rights would hinder the Trustee's ability to sell both the Real Property and the Equipment.
- D. By agreeing to pay Mr. Bauer on 100% of his claim, the Trustee intends to recover 50% of the value of the property after paying 100% of the Bank of the West Claim and 100% of Mr. Bauer's claim.
- E. The Trustee also believes that granting Mr. Bauer a post-petition lien against the Real Property "is in the best interests of the bankruptcy estate as it provides the Trustee the flexibility to administer the Equipment and the [Real Property] while avoiding the inequitable result of wiping out junior lienholders and litigation associated with such.

Lastly, the Trustee provides the "Settlement Agreement and Release of All Claims" ("Bauer Settlement Agreement") which the Trustee states provides that AMI must pay Mr. Bauer \$50,000.00, of which \$45,000.00 was to be provided for by a promissory note. The Bauer Settlement Agreement states that "The Promissory Note shall be secured by the equipment owned by WALT SCHAEFER and the parties agree to execute a Security Agreement and a UCC-1 Financing Statement to be filed with the Secretary of State relating to such equipment, which is listed on Exhibit 'A' hereto." *Id.* The Settlement is signed by the Schaefer individually and as president of AMI.

**Points and Authorities Cited to Court
In Support of Approving Compromise With
Mr. Bauer**

In providing the court with legal authorities and arguments upon which approving a "compromise" with Mr. Bauer is proper, the Trustee directs the court to the following:

- A. The Trustee cites *New West Fruit Corp. V. Coastal Berry Corp.*, 1 Cal.App. 4th 92, 98-100 (1991), for the proposition that in considering the intent of the parties and circumstances underlying the execution of the agreement, the court found that a valid security interest had been conveyed.
- B. The Trustee cites *In re Double G&T Dairy*, 2010 WL 9477481, *3-4 (Bankr. E.D. Cal. 2010), as a persuasive discussion of consideration of the "package of documents," taken together creating an enforceable security interest.

Therefore, based on the Note, Bauer Security Agreement, and Bauer Financing Statement, and the Bauer Settlement Agreement, the Trustee is warranted to "compromise" and agree to pay 100% of Mr. Bauer's claim as a secured claim ahead of the other creditors (except Bank of the West). This "compromise" to pay 100% of Mr. Bauer's claim is further supported by the Trustee's belief that this should be a surplus case.

In first considering the ruling of the District Court of Appeal in *New Fruit West Corp.*, the court notes that the decision contains a discussion of the underlying Commercial Code sections upon which the decision is based. In her brief Trustee does not get to these basic provisions, but merely cites the court to *New Fruit West Corp.* as if it is a case on "all fours" with the present matter, requiring only a perfunctory nod of the head by the bankruptcy judge.

The issue in *New Fruit West Corp.* was whether the Commercial Code required that the debt secured be expressly identified, or if future advances were included based on the course of dealing of the parties. The Security Agreement in *New Fruit West Corp.* was part of a marketing agreement between New Fruit West Corp.'s predecessor in interest and Cooperativa La Paz. That agreement gave a security interest to "secure all obligations under this agreement." *Id.*, p. 95. The District Court of Appeal concluded that the Commercial Code did not require specific delineation of the debt secured, but requires that the parties intended to create a security interest and identifies the property subject to the security interest. The court in *New Fruit West Corp.* considered not only the statements of the parties but their course of dealing in providing advances. There was no dispute that it was Cooperativa La Paz who was granting the security interest in the collateral.

Here, while the Bauer Settlement Agreement, which is dated April 15, 2013 states that Walter Schaefer is to grant a security interest in equipment he owns, the Bauer Security Agreement has AMI grant a security interest in equipment which it does not own. Exhibit L, Dckt. 142. The Bauer Security Agreement was executed by Schaefer on April 15, 2015, but was not executed by Mr. Bauer until August 26, 2013. No evidence has been presented to the court on what transpired during the four months between the Bauer Security Agreement being executed and Mr. Bauer signing the Bauer Settlement Agreement.

The court in *In re Double G&T Dairy*, 2010 WL 9477481, *3-4 (Bankr. E.D. Cal. 2010), was faced with a similar issue concerning the description of the collateral that was the subject of the security agreement. In *Double G&T Dairy* the trustee asserted that the security agreement required that title to the equipment be transferred to the creditor before any security interest was created. The trustee therefore concluded that since Double G&T Dairy had not transferred title to creditor, then the creditor could have neither title to nor a security interest in the equipment. The court rejected this contention, concluding that the language of the agreement and the parties dealings demonstrated that the interests given by Double G&T Dairy to creditor created a security interest.

The Trustee asserts that since the Bauer Settlement Agreement states that Schaefer was to give a security interest and Schaefer consented to AMI granting a security interest in the equipment, then the Bauer Security Agreement should be read (corrected) to state that Schaefer granted a security interest to Mr. Bauer. If making this assertion, the Trustee does not discuss

(or possibly consider) the standing of the Trustee as a judgment lien creditor 11 U.S.C. § 544(a)(1) and (2).

III. Ashman

The third proposed "compromise" by the Trustee is with respect to claims asserted by Ashman for the \$220,000.00 it paid to Schaefer after the Trustee was appointed for the purported sale of the property of the estate to Ashman. With respect to Ashman's demand for \$220,000.00, the Trustee states the following in the Motion:

- A. Ashman asserts that Schaefer contacted Ashman, purportedly on behalf of Almanor Precision, (at some unstated time) prior to August 2014 concerning the possible auctioning of equipment by Ashman.
- B. Ashman inspected the equipment and conducted a UCC lien search.
- C. Ashman relied upon the statements by Schaefer that the equipment was owned only by Almanor Precision and not subject to any liens. (No reference is made to Ashman having conducted a UCC search for Schaefer or any investigation of Schaefer's business operations.)
- D. Rather than auctioning the equipment, in August 2014 Ashman prepared a letter agreement to purchase the equipment for itself for \$220,000.00. Exhibit Q, Dckt. 142.
- E. Ashman paid the \$220,000.00 by wiring money to a bank account (not identified in the motion) designated by Schaefer.
- F. Not until contacted by the Trustee was Ashman aware that the equipment was not owned by Almanor Precision, that the equipment was subject to liens, and that the equipment was property of this bankruptcy estate.
- G. Ashman contends that if it had known the above (and that Schaefer's representations were false), it would not have wired the \$220,000.00 into the bank account designated by Schaefer.
- H. Ashman argues that it is a "bona fide purchaser for value" of the equipment, and that it would be "inequitable" (apparently based on Schaefer's misrepresentations) for the bankruptcy estate to have the equipment without giving Ashman an interest in the equipment.
- I. The Trustee disputes Ashman's contention that it is a "bona fide purchaser."

Based on the above, the Trustee proposes to "compromise" Ashman's claim by splitting all sales proceeds after payment of the costs of sale, 100% of the Bank of the West claim, and 100% of Mr. Bauer's claim, with a maximum payment of \$196,500 (which is the \$220,000 paid by Ashman less what it receive for selling piece of equipment that has not been turned over to the Trustee). If paid the \$195,500 Ashman recovers the full \$220,000 it paid to AMI in its deal

make with Schaefer.

With respect to Ashman, the Trustee offers no legal analysis in the Points and Authorities addressing how Ashman has a claim against the bankruptcy estate for having been defrauded by Schaefer. The Trustee argues that by settling, and paying half the sale proceeds of up to \$196,500 to Ashman, the Trustee can keep for the estate \$37,500 of the \$220,000.00 that Ashman paid to Schaefer which the Trustee has recovered from the persons to whom Schaefer transferred Ashman's money.

It appears that the Trustee's decision to "compromise" and pay Ashman \$196,500.00 is that Ashman asserts it is a "bona fide purchaser for value" of the equipment and that such rights come ahead of the interests of the bankruptcy estate, as protected by the automatic stay, in the equipment from the fraudulent purported sale of the equipment by Schaefer to Ashman.

Though the Trustee has not provided the court with any legal authorities as to how Ashman acquired any interest in the equipment by the fraudulent misrepresentations by Schaefer, the court has conducted a quick, initial research on the issue. This begins with 4 Witkin Summary of California Law, which provides the following discussion (emphasis added):

"[§ 136] Good Faith Purchase.

(1) Power To Transfer. A person taking goods by any form of purchase **acquires all title that the transferor had or had power to transfer.** (U.C.C. 2403(1), and Official Comment 1; see U.C.C. 1201(31) ["purchase" includes any voluntary transaction creating a property interest, such as taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, or gift].) If the purchase is of a limited interest, the purchaser acquires rights only to the extent of that interest. (U.C.C. 2403(1).)

(2) Seller With Voidable Title. A seller with a voidable title has power to transfer a good title to a good faith purchaser for value. (See *infra*, §232.)

(3) Seller With Void Title. **A seller with a void title has no power to transfer a good title to a good faith purchaser for value. (See *infra*, §234.)"**

"[§ 229] General Principles (Sale by Person Not the Owner).

Title may be transferred by a person not the owner **where the owner, by his or her conduct, is precluded from denying the seller's authority to sell.** The same result is sometimes reached under the general equitable maxim stated in C.C. 3543: "Where one of two innocent persons must suffer by the act of a third, **he, by whose negligence it happened, must be the sufferer.**" (See *Conklin v. Benson* (1911) 159 C. 785, 793, 116 P. 34; *Democrat-Herald Publishing Co. v. Pettit* (1928) 94 C.A. 724, 727, 271 P. 910; *McKee v. Peterson* (1963) 214 C.A.2d 515,

523, 526, 29 C.R. 742; see also Rest.2d, Agency §175; 72 A.L.R.2d 342 [rights between assignee of conditional seller and subsequent buyer from conditional seller after repossession]; 67 Am.Jur.2d (2003 ed.), Sales §395 et seq.; 3 Summary (10th), Agency and Employment, §147.)...."

"[§ 232] General Principles (Seller with Voidable Title).

(1) Power To Transfer Good Title. **"A person with voidable title has power to transfer a good title to a good faith purchaser for value."** (U.C.C. 2403(1), and see Official Comment 1; on good faith purchaser for value, see U.C.C. 1201(19), (43); and see 3A Anderson 3d (2002 Rev. ed.), §2-403:49 et seq.; C.E.B., 1 UCC Sales and Leases, §12.6; 67 Am.Jur.2d (2003 ed.), Sales §403 et seq.; 17 A.L.R.3d 1010, 1123; cf. *Wendling Lumber Co. v. Glenwood Lumber Co.* (1908) 153 C. 411, 417, 95 P. 1029 [under former law, seller could treat sale induced by fraud as void until buyer transferred to bona fide purchaser].)

(2) Transactions Creating Voidable Title. The Commercial Code provides that a voidable title is created in a transferee when goods are delivered under a transaction of purchase even though: (a) the transferor [with title] was deceived as to the identity of the purchaser; (b) delivery [from a transferor with title] was in exchange for a check and the check is dishonored; (c) the transaction was agreed to be a "cash sale"; or (d) delivery [from the transferor] was procured through criminal fraud. (See U.C.C. 2403(1); 3A Anderson 3d (1995 Rev. ed.), §2-403:56 et seq.; 74 Harv. L. Rev. 1455 [face-to-face transaction involving mistake of identity].)"

The court understands the contention to be that Schaefer fraudulent misrepresented that the equipment was owned by Almanor Precision, in reliance of that fraud Ashman paid \$220,000.00 to Schaefer, and therefore, the estate should pay Ashman for the fraud committed by Almanor Precision acting through Schaefer.

The court does not understand the legal basis for the final link in the above "compromise" by the Trustee.

It is possible that grounds exist for Ashman to be paid from the monies of the estate, rather than having surplus estate assets (if they actually exist) turned over to Schaefer and having Ashman then chase Schaefer and the assets (possibly through as of now further undisclosed accounts located in Costa Rica or other foreign countries). But the Trustee does not advance such arguments or grounds.

Further, the Trustee has not provided a list of the persons who received the \$220,000.00 taken and disbursed by Schaefer, the actions being taken to recover the moneys, and what value, if any, there exists for the estate.

CONSIDERATION OF NON-COMPROMISES WITH

June 18, 2015 at 10:30 a.m.

- Page 14 of 27 -

BANK OF THE WEST AND MR. BAUER

Beginning with Bank of the West, there is no "compromise" for the court to approve. The pleadings reflect that all the Trustee is agreeing to pay 100% of the Bank of the West Claim. There is no dispute for the court to consider and rule on between the Trustee and Bank.

Jurisdiction was granted to the district courts and bankruptcy courts to the extent that issues arise under the Bankruptcy Code, in the bankruptcy case (such as administration of an asset), or relate to the (administration or outcome of a) bankruptcy case. 28 U.S.C. § 1334(a) and (b). Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy" as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

Sec. 2, Cl 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

There is no "case" or "controversy" between these parties to be determined by the court. At best, the trustee is seeking the comfort of obtaining an order saying that the court "covers" her paying this claim. The court does not issue such "comfort" or cover orders.

Moving to Mr. Bauer, again, the Trustee makes rumblings that she might have some dispute, but doesn't think that its worth raising, so she has decided to pay 100% of Mr. Bauer's claim. Again, the Trustee states there is no controversy for this court to decide, but she wants the "comfort" of an order "covering" her deciding to pay 100% of Mr. Bauer's claim.

Additionally, the Trustee also wants an order of this court to grant Mr. Bauer additional collateral by giving him a lien on the real property. The Trustee has failed to show any grounds under 11 U.S.C. § 364 for granting a lien to obtain credit or to just give away a lien to secure a debt of a non-debtor (AMI).

There is no basis for the court issuing an order providing the Trustee with "comfort" and "cover" for her to pay the claims as demanded by Bank of the West and Mr. Bauer.

CONSIDERATION OF COMPROMISE WITH ASHMAN

The Trustee seeks to have the court approve her agreement to split 50/50 with Ashman the proceeds from the sale of the equipment. The court

understands Ashman's claim against the estate to be that Schaefer, acting as the president of AMI, falsely represented that property of the bankruptcy estate was property of AMI. In reliance on those false representations, Ashman wired \$220,000.00 to an unidentified account for Schaefer. Ashman now asserts that it is the "bona fide purchaser of the equipment," but will settle with the Trustee if it is paid 50% of the proceeds from the sale of the equipment which is property of the bankruptcy estate, not AMI.

To the extent AMI believes it has an interest in the equipment which can be enforced against the estate, it has every incentive to cooperate in a sale of the property in a manner to maximize the sale proceeds. Even if it's a claim to be asserted against Schaefer and any surplus proceeds generated by the Trustee from property of the estate.

Probability of Success

While the Trustee argues that it is "practical" to give Ashman 50% of the proceeds, the Trustee has not shown that giving up half the money is consistent with the probability of success for Ashman. No basis has been shown for Ashman asserting that it acquired title to the estate's property from AMI.

Difficulties in Collection

The Trustee states that this factor is neutral since it is a dispute involving the distribution of sale proceeds. The Trustee is correct, the estate has possession of its assets, the equipment and the Bankruptcy Code empowers the Trustee to sell the property, including selling the property free and clear of any interest which is in bona fide dispute (with the interest attachment to the proceeds).

Expense, Inconvenience and Delay of Continued Litigation

Trustee argues that litigation would result in significant costs in litigating the priority of interests of the parties. The Trustee estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. However, the Trustee does not show that it is \$198,500 of expenses. The Trustee does not direct the court to any applicable law which provides Ashman with a colorable claim against the Trustee and bankruptcy estate.

Paramount Interest of Creditors

Trustee argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation. If the Trustee is correct that this is a surplus estate, even when paying all of these claims in full, then there is no effect on creditors. If not a surplus estate, giving away \$196,500 to Ashman is clearly against the interests of creditors.

CONSIDERATION OF ADDITIONAL OFFERS

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

offers in open court. At the hearing -----.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court cannot determine that the compromise is in the best interest of the creditors and the Estate. The motion is ~~xxxxxxxxxx~~.

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

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

The Motion to Approve Compromise filed by Kimberly Husted, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Approve Compromise is ~~xxxxxxxxxxxxxxxx~~.

3. [14-29361](#)-E-7 WALTER SCHAEFER
DNL-4 Douglas Jacobs

CONTINUED MOTION TO SELL AND/OR
MOTION TO EMPLOY ASHMAN COMPANY
AUCTIONEERS AND APPRAISERS, INC.
AS AUCTIONEER(S)
4-30-15 [[107](#)]

No Tentative Ruling: The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 30, 2015. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

<p>The Motion to Employ Auctioneer and Sell Property is xxxxxxx.</p>

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

- A. four Amada CNC Turret Punch Presses,
- B. three Amada CNC Press Brakes,
- C. an Amada Sheer,
- D. an Amada Corner Notcher,
- E. two Diacro Press Breaks,
- F. three Hager Insertion Presses,
- G. Fedal and Kitamura CNC Machining Centers,

H. a Miyano CNC Lathe,
I. a HYDMECH Automatic Horizontal Band Saw,
J. Bridgeport Mills,
K. a Victor Lathe,
L. Atlas Capo and Kaeser Air Compressors,
M. Miller Welders,
N. a Welding Department,
O. a Paint Department,
P. Trucks,
Q. Support Equipment, and
R. Perishable Tooling

The Movant proposes selling the Property at auction to be conducted by Ashman Company Auctioneers and Appraisers, Inc. ("Ashman").

The Movant also seeks authorization to employ Ashman as auctioneer pursuant to 11 U.S.C. § 327.

The Trustee states that Bank of the West asserts a first lien against the Property and the Equipment in the amount of \$448,864.31 (almost \$100,000.00 greater than listed by Debtor on Schedule D).

Mr. Bauer asserts a second lien against the Equipment based on a settlement with the Debtor on an insured occupational injury in the amount of \$42,893.12.

The Trustee reports that on February 9, 2015, without court authority or consent of the Trustee, Bank of the West, or Mr. Bauer, the Debtor agreed to sell the equipment to Ashman Company Auctioneers and Appraiser, Inc. for \$220,00.00 and permit Ashman Company Auctioneers and Appraiser, Inc. to use the Property to conduct an in place auction.

On February 17, 2015, the Trustee states that the Debtor received from Ashman Company Auctioneers and Appraiser, Inc. a \$220,000.00 wire transfer and used the funds to pay scheduled and unscheduled obligation other than the obligations of Bank of the West and Mr. Bauer.

On February 25, 2015, Ashman Company Auctioneers and Appraiser, Inc. removed one of the Amada CNC Turret Punches and sold it to Manufacturing Solutions for \$23,500.00. The Trustee states that she is in possession of the Property and the Equipment, with the exception of the Punch.

Ashman Company Auctioneers and Appraiser, Inc. asserts claims against the Equipment (except the Punch), the \$220,000.00, the Debtor and his transferees.

JUNE 4, 2015 HEARING

At the hearing, the court continued the hearing to 10:30 p.m. on June 18, 2015. Dckt. 152. The court further ordered the following:

IT IS FURTHER ORDERED that on or before June 11, 2015, Ryan Ashman, Ashman Company Auctioneers & Appraisers, Inc. shall file and serve any supplemental declarations, if any, they deem appropriate in the court determining whether the auction company can satisfy the disinterestedness standard for

11 U.S.C. § 327. (Supplemental pleadings are not being required by the court.)

IT IS FURTHER ORDERED that the Trustee shall be prepared to provide the court and parties in interest at the June 18, 2015 hearing with a short status report concerning the conduct of the Debtor, whether the Trustee is investigating the conduct and reporting to the property agencies and departments, the status of monies paid to creditors by Debtor other than as authorized by the Bankruptcy Code, and the anticipated outcome of the case for creditors.

Id.

RYAN ASHMAN DECLARATION

Ryan Ashman, licensed auctioneer and President of Ashman Company Auctioneers & Appraisers, Inc., filed a supplemental declaration on June 11, 2015. Dckt. 155. Mr. Ashman states that he was the representative that dealt with the Debtor when Ashman Auctioneers entered into the transaction with Almanor Precision, Inc. ("AMI") "Mr. Ashman asserts that it was represented that the property was owned by AMI. Mr. Ashman states that there was absolutely no reference or indication of bankruptcy in his dealings with the Debtor on behalf of AMI.

Mr. Ashman asserts that until after Ashman Auctioneers wired the she \$220,000.00 to the bank account designated by the Debtor, Mr. Ashman was unaware that the equipment was: (1) owned by others than AMI; (2) was owned or claimed to be owned by Walter Schaefer individually; and (3) that Debtor had filed bankruptcy. Mr. Ashman states the he only became aware of the Debtor's bankruptcy after being contacted by Trustee's counsel. After that contact, Mr. Ashman referred the matter to Ashman Auctioneers' counsel.

Mr. Ashman argues that if the compromise is approved, Ashman Auctioneers would not be in a conflicting position with the Trustee or the Debtor's estate because Ashman Auctioneers will be required to comply with laws governing auctioneers and will be required to comply with court order, with supervision by the Trustee. Mr. Ashman states that no funds will be received without the court's approval. Mr. Ashman asserts that it is in Ashman Auctioneers' interests and those of the Trustee and the estate, to maximize the prices received at the proposed auction.

MARY CHEEK DECLARATION

Mary Cheek, certified public accountant, filed a supplemental declaration on June 11, 2015. Dckt. 156. Ms. Cheek is the accountant for Debtor and AMI. Ms. Cheek states that she prepared the 2011, 2012, and 2013 income tax returns for both. Ms. Cheek represents that the Debtor stated he owned the equipment used by AMI. As such, the equipment was included in the Debtor's individual income tax returns as asserts on his Schedule C and claimed the depreciation for the equipment. Ms. Cheek further states that Debtor claims ownership of the real property where the shop sits and also claimed deprecation in it.

TRUSTEE'S DECLARATION

The Trustee filed a declaration on June 11, 2015. Dckt. 157. The Trustee provides a history of the interconnectedness of the corporations and the Debtor as well as the Commercial Security Agreement signed by the Debtor in connection with his loan with Bank of the West. The Trustee asserts that the Commercial Security Agreement and other documents show that the equipment or the right to buy the equipment was distributed by AMI to the Debtor in connection with the Bank of the West loan.

The Trustee asserts that this conclusion is further supported by: (1) a January 5, 2010 bankruptcy Schedule B signed by the Debtor on behalf of AMI in the AMI corporate bankruptcy case (No. 10-20129) does not list the equipment as an asset of AMI (Dckt. 158, Exhibit E); (2) a September 23, 2010 Schedule of Assets and Debts signed by the Debtor in connection with the Debtor's marital dissolution (Dckt. 158, Exhibit F) in which he states he owns the equipment; (3) an April 15, 2013 Security Agreement signed by the Debtor in his individual capacity, consenting to the granting of a security interest by AMI to secure the claim of Ryan Bauer; (4) the Debtor's March 6, 2015 Amended Schedule B; (5) A Schedule L Balance Sheet in the AMI 2013 federal tax return (Dckt. 158, Exhibit G) which does not list ownership of equipment; and (6) the Debtor's Schedule C and E in the Debtor's 2013 tax returns (Dckt. 158, Exhibit B) which lists ownership of equipment which the Debtor would rent to others.

The Trustee asserts that Mr. Ashman's knowledge of Bank of the West's and Ryan Bauer's security interest in the equipment, the Debtor has acknowledged that he never told anyone at Ashman of Bank of the West's and Ryan Bauer's claims, as shown in the attached excerpt of the Debtor's 2004 Examination. Dckt. 158, Exhibit H.

EMPLOYMENT OF ASHMAN COMPANY AUCTIONEERS AND APPRAISER, INC.

The court first addresses the Movant's request for the employment of Ashman as the auctioneer. As discussed at the hearing on the Motion to Approve the Liquidation Agreement, the Debtor, without court authority, purported to have AMI sell equipment which is property of the bankruptcy estate (protected by the automatic stay) to Ashman.

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.

Here, the AMI and Ashman entered into an authorized sale of property. As the court noted previously, the court is unsure if the property purporting to be sold by the estate is actually property of the Debtor's estate or whether

it is property held by the Debtor's company AMI Precision, Inc. While the Trustee notes that there was a post-petition purchase of equipment by Ashman, the Trustee states that she "believes that Ashman's interests are not adverse to the bankruptcy estate in that it has an interest in liquidating the Equipment for the highest possible price." Dckt. 107. However, the mere fact that the interests may align for purposes of selling the property at the highest price does not equate to Ashman being a disinterested party. The underlying issues of whether the Property is actually assets of the estate and whether Ashman's purchase of equipment from the Debtor is valid are still unresolved.

The declaration of Ryan Ashman, in support for the employment, does not provide any justification or explanation as to Ashman being a disinterested party for purposes of 11 U.S.C. § 327. Dckt. 109. The Declaration merely notes the post-petition sale but that no conflicts exist. In fact, Mr. Ashman states under penalty of perjury:

"7. I have caused a conflicts check to be conducted to determine whether any conflicts of interest exist in this case between Special Counsel and interested parties. The names checked include the names of the Debtor, United States Trustee, and the names of all of the persons or entities listed on the creditors' mailing matrix.

8. Ashman has a connection to the bankruptcy estate by its post-petition purchase of the Equipment from the Debtor, which resulted in a liquidation agreement which I understand has been submitted for the Court's approval.

9. Other than the connection noted above, Ashman has no connections to the bankruptcy estate. Except as set forth above, no members of Ashman have connections with the Debtor, creditors, or any party in interest, their respective attorneys, accountants, or the U.S. Trustee, or any employee of the U.S. Trustee."

While Mr. Ashman lightly passes over a competing, adversarial ownership claim to the property which the Trustee asserts is property of the estate, the court does not, and cannot, just "let it slide." The court has not approved any settlement between Mr. Ashman's company and the Trustee. As of the prior hearing, the court had not been shown a basis by the Trustee for Ashman Company Auctioneers & Appraisers, Inc. to be asserting that a fraudulent bill of sale issued by the Debtor transferred any interest to property of the bankruptcy estate. Possibly when the new motion is filed and evidence is presented to the court, then some issues may exist whereby the court can approve a resolution of the dispute, fix everyone's interests so that there is not a conflict, and the auction company can work as a fiduciary of the bankruptcy estate and trustee.

Mr. Ashman's supplemental declaration does not clarify how Ashman Company Auctioneers & Appraisers, Inc. is not disinterested as required by 11 U.S.C. § 327. Mr. Ashman's declaration instead merely states that because the interests of the estate and Ashman Company Auctioneers & Appraisers, Inc. alleging that there is not a conflict of interest. Further, Mr. Ashman argues that because the court will still have to approve any fees, that there is no

conflict. This not evidence that, for purposes of 11 U.S.C. § 327, that Ashman Company Auctioneers & Appraisers, Inc. are disinterested. There is, admittedly, a "heavily disputed" conflict between Ashman Company Auctioneers & Appraisers, Inc. and the Trustee over what interests Ashman Company Auctioneers & Appraisers, Inc. may have, if any, in the equipment. However, Mr. Ashman's declaration merely states that if the underlying compromise is approve, there is no conflict.

What is clear is that Ashman has been the subject of some highly improper dealings by the Debtor after the conversion of this case and appointment of the Trustee. In substance, the Debtor used AMI to try and steal property of the estate by having AMI sell it to Ashman. Ashman is out of pocket \$220,000.00 in monies it wired to AMI at the Debtor's instruction (in his capacity as an officer and representative of AMI).

As the court has addressed in the related motion to approve what the Trustee styles as a "compromise" with Ashman, the Trustee has failed to provide the court with a colorable claim to be so compromised on the terms proposed - splitting the net sales proceeds of the equipment and the Real Property with Ashman.

It appears that Ashman has every incentive to work with the Trustee and auction the equipment for the highest value possible. Either Ashman will prosecute an action against the estate claiming an interest in the equipment proceeds in excess of the pre-petition liens, will find a possible theory by which the Trustee can obtain authorization to "compromise" claims with Ashman, or Ashman may prosecute an action (presumably in this court) concerning this property of the estate and the conduct of Debtor and AMI in trying to fraudulently sell property of the bankruptcy estate to obtain any surplus monies of the estate before the Trustee disburses it to the Debtor.

While there may be some "dispute" between Ashman and the Trustee over Ashman believing that it is inequitable for the Trustee to not pay him for the Debtor's post-conversion misrepresentations as to the ownership of the equipments and getting Ashman to wire \$220,000.00 to AMI, that does not create a disqualifying conflict for Ashman to work with the Trustee to auction the equipment and generate the fair market value sales of the equipment. The harm caused by Debtor should not work further damage by depriving Ashman from providing its services and earning a fair commission for conducting an auction for the Trustee.

AUTHORIZATION TO SELL PROPERTY

The Trustee has provided the court with evidence that the equipment is property of the bankruptcy estate. The Trustee seeks to sell the equipment through an auction using Ashman. Not withstanding the very unusual circumstances, Ashman appears to have an extraordinary incentive to maximize the returns from the auction sale.

The court grants the motion and authorizes the Trustee to sell the equipment by auction, that the Trustee is:

- a. Authorized to employ Ashman Company Auctioneers and Appraisers, Inc. as the auctioneer for the Trustee;

- b. The employment of Ashman Company Auctioneers and Appraisers, Inc. is on the terms and conditions set forth in Letter Employment Agreement filed as Exhibit A in support of the Motion (Dckt. 111);
- c. The fees paid Ashman Company Auctioneers and Appraisers shall be in the form of a Buyer's Premium, which shall not exceed 12%, that will be paid directly to Ashman Auctioneers and Appraisers directly by the buyer and not by the Trustee.
- d. Ashman Auctioneers and Appraisers shall also be reimbursed for actual and necessary expenses, which shall not exceed \$15,000.00, for advertising, labor, and out of pocket expenses relating to the sale of the equipment, including preparation of the equipment for the sale, by auction for the Trustee. The Trustee is authorized to pay these expenses from the auction proceeds from the sale of the equipment.
- e. The Trustee may also pay the expense, not to exceed 3% of the gross sales price, to Bidspotter.com for any equipment sold through the Bidspotter.com website.
- f. The court allows the commission and expense compensation as part of the order authorizing the employment and sale, with no further motion or order required for the payment of such fees and expenses. The allowance of compensation is subject to the provisions of 11 U.S.C. § 328.

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

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

The Motion to Sell Property filed by Kimberly Husted, the Chapter 7 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that xxxxx

4. [14-29284-E-7](#) CHARLES MILLS
LBG-5 Lucas Garcia

CONTINUED MOTION TO EMPLOY LUKE
GARCIA AS ATTORNEY
10-9-14 [[46](#)]

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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on parties requesting special notice on October 8, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

The Motion to Employ is denied without prejudice

The Debtor-in-Possession, Charles Mills, seeks to employ counsel Luke Garcia, pursuant to Local Bankruptcy Rule 9014-1(f)(2) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of counsel to assist the Debtor-in-Possession and provide services associated with legal representation of the Debtor-in-Possession .

The Debtor-in-Possession argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present financial affairs of both the Debtor-in-Possession and Debtor-in-Possession's estate.

Luke Garcia testifies that he is representing the Debtor-in-Possession and the estate. Mr. Garcia testifies he and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

OCTOBER 23, 2014 HEARING

The court continued the hearing to 10:30 a.m. on December 11, 2014 to allow Debtor's Attorney to file and serve the supplemental declaration and the continued Notice of Hearing on all interested parties.

DEBTOR'S ATTORNEY SUPPLEMENTAL DECLARATION

On October 28, 2014, Lucas Garcia, Debtor's Attorney, filed a supplemental declaration and attached the Attorney-Client Retainer Agreement, which outlined the scope of representation, costs, and other necessary information on the representation. Dckt. 76 and 77.

DECEMBER 4, 2014 ORDER

On December 4, 2014, the court issued an order continuing the hearing on the Motion to 2:30 p.m. on December 18, 2014. Dckt 103. The court continued the hearing to accommodate the Debtor-in-Possession's unilateral extension of the closing date of the sale of the Rua Esperanza Property.

DECEMBER 18, 2015 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on June 18, 2015. The court further ordered that if counsel wants to pursue the employment authorization, he shall file and set for hearing a motion for the attorneys' fees requested. The court continues this hearing so as not creating an otherwise unnecessary legal issue concerning retroactive employment.

DISCUSSION

Since the court continued the hearing, counsel has not filed any supplemental papers in support of employment.

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.

Unfortunately, the court cannot find that employment of this counsel is proper in this case. Though having a very valuable asset and getting the court to rush through a sale order, nothing is happening. The Debtor in Possession has failed to do the most basic things in Chapter 11, with no Monthly Operating Reports having been filed.

The court having converted the case to one under Chapter 7, counsel and the Debtor may elect to have counsel continue with the representation. However, counsel has not filed any supplemental papers to justify the employment of counsel.

In light of counsel having approximately six months to file supplemental papers in support of this Motion yet failing to do so, the Motion is denied without prejudice.

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

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

The Motion to Employ filed by the 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 Motion is denied without prejudice.