UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 28, 2018, at 10:30 a.m.

1.	**18-21107-E-11** **TBG-5**	**LAURELS MEDICAL SERVICES** **Stephan Brown**	**MOTION FOR APPROVAL OF STIPULATION WITH IRS FOR USE OF CASH COLLATERAL** **5-31-18 [85]**

Final Ruling: No appearance at the June 28, 2018 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's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on May 31, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Authority to Use Cash Collateral 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 respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Authority to Use Cash Collateral is denied without prejudice as moot.

Laurels Medical Services ("Debtor") moves for an order approving the use of cash collateral. The court converted this case to Chapter 7 at the June 14, 2018 hearing. Dckt. 103, 104. Debtor's case was converted to a proceeding under Chapter 7 by operation of law once the Notice of Conversion was filed on June 18, 2018. Dckt. 106.

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 Authority to Use Cash Collateral filed by Laurels Medical Services ("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 Authority to Use Cash Collateral is denied without prejudice as moot.

2. **17-25114-E-7** **HSIN-SHAWN SHENG** **MOTION FOR TURNOVER OF**
DNL-3 **Gary Fraley** **PROPERTY**
5-21-18 [82]

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, parties requesting special notice, and Office of the United States Trustee on May 21, 2018. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion for Turnover has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Turnover is granted.

Eric Nims, the Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 2769 Barrington Terrace Avenue, Fremont, California ("Property").

DEBTOR'S RESPONSE

Hsin-Shawn Cyndi Sheng ("Debtor") filed a Response on June 14, 2018. Dckt. 102. Additionally, Debtor has filed Objections to Claim #2, filed by Cach, LLC, and Claim #3, filed by Capital One Bank, N.A., which are scheduled to be heard on July 19, 2018. Debtor argues that if the objections are sustained, the amount of unsecured claims remaining will be $3,242.89. Debtor claims she has the ability to pay $3,242.89, plus all attorney fees and costs associated with this case, and the sale of the real property would be moot.

MOVANT'S SUPPLEMENTAL DECLARATION

Movant filed a Supplemental Declaration on June 20, 2018. Dckt. 104. Movant's declaration alleges that Debtor has utilized, and continues to utilize, rents received by tenants at the Property and is depositing said rents into her Chase Bank checking account. *Id*. Movant asserts that a demand for turnover of the estate's non-exempt interest in Debtor's Chase Bank checking account went ignored. *See* Exhibit A; Dckt. 105. Movant also asserts that two requests to allow inspection of the Property—on May 7 and 15, 2018—also went ignored. *See* Exhibits B and C; *id.*

REVIEW OF BANKRUPTCY CASE AND PROPERTY AT ISSUE

Debtor commenced this as a Chapter 13 case on August 2, 2017, in *pro se*. Petition, Dckt. 1. Counsel substituted in to represent Debtor on August 30, 2017, (Dckts. 27, 28) and a Notice of Conversion to Chapter 7 was filed on August 30, 2017 (Dckt. 30).

On Schedule A/B, Debtor lists owning the following real properties, which are property of the bankruptcy estate in this case (11 U.S.C. § 541(a)), as of the commencement of this bankruptcy case:

A. 2901 Corriente Way.....$830,000 FMV

B. 2769 Barrington Terrace.....$850,000 FMV

C. 8425 Vintage Park Dr.....$215,000 FMV

D. Vacant Lot (Partnership Interest).....$ 15,000 FMV (as amended, Dckt. 49)

E. Hyatt Resorts Timeshare.....$ 2,000 FMV (added, Dckt. 49)

F. Diamond Resorts Timeshare.....$ 1,000 FMV (added, Dckt. 49)

Dckt. 32 at 4–5.

Debtor also lists having $53,976.01 in checking and savings accounts, $20,000.00 cash, and $691,000.00 in a real Estate Investment Fund. *Id.* at 7, 9. Using the wildcard exemption, Debtor exempted $23,929.00 of the cash and checking and savings accounts. Schedule C, *Id.* at 11.

On Amended Schedule C (Dckt. 50), Debtor includes the following exemptions:

A. Barrington Terrace Property.....$1.00 (wildcard exemption)
B. Vintage Park Property.....$1.00 (wildcard exemption)
C. Vacant Land Partnership.....$1.00 (wildcard exemption)
D. Hyatt Timeshare.....$1.00 (wildcard exemption)
E. Diamond Resorts.....$1,000 (wildcard exemption)
F. Cash.....$20,000 (wildcard exemption)

On Schedule I, Debtor states that her rental property or business generates net monthly income of $3,550.00, with her other income consisting of $1,276.00 in Social Security Benefits. Dckt. 32. No schedule showing the gross income and expenses from the rentals or business is attached to Schedule I. It appears this information may be on Schedule J.

For expenses on Schedule J, Debtor states she has $11,171.91 in reasonable and necessary expenses for her family unit of one person. *Id.* at 25–26. These include various mortgage payments and maintenance for various properties.

On the Statement of Financial Affairs, Debtor first states that she has had no income from employment or operating a business for the current year and two prior years. Statement of Financial Affairs Question 4, *Id.* at 29. Debtor lists rental income of ranging from $66,000 to $88,000 per year as other, non-employment or non-business income for the current and two prior years. *Id.* at 30.

DISCUSSION

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

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

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

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

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

The Chapter 7 Trustee is seeking an order enforcing 11 U.S.C. § 541, expressly ordering Debtor to turn over the 2769 Barrington Terrace property and rental agreements. Additionally, the Chapter 13 Trustee asks for Debtor to provide a full accounting of all post-petition rents (property of the bankruptcy estate) generated from the Barrington Property (property of the bankruptcy estate).

Debtor's Response fails to acknowledge that a bankruptcy estate has been created and that, pursuant to Bankruptcy Code § 541(a)(1), the bankruptcy estate includes *all legal or equitable* interests of the debtor as of the commencement of the case. Rather, Debtor appears to exempt herself from federal law as enacted by Congress, assert that she can file Chapter 7 and ignore the law, and assert that Chapter 7 exists as her personal tool to use (and abuse) against others.

Debtor contends that because she (though not obtaining authorization from the court or determination that she has standing to so do) is objecting to the claims of Cach, LLC (POC #2) and Capital One Bank (USA), N.A. (POC #3), she will not really owe any debt, so her desire to object to claims renders the bankruptcy laws moot.

The objection to Proof of Claim No. 2 is based on the statute of limitations. Dckt. 93. The same grounds are asserted for the Objection to Proof of Claim No. 3. Dckt. 97. These two claims total less than $8,500.00. As asserted by Debtor, other than the $25,000 secured claim for Debtor's Mercedes Benz, the remaining filed claims total $3,200.

The court notes that Debtor has chosen (or refused) to provide any testimony in opposition to this Motion, instead using the two paragraph arguments of her counsel as a shield between her and the Motion. Debtor's counsel ignores 11 U.S.C. § 541 and the obligations of the Chapter 7 Trustee to control, assemble, and manage all property of the bankruptcy estate. 11 U.S.C. §§ 704, 721.

As evidenced in Movant's Supplemental Declaration, Debtor has failed to respond to inquiries by the Chapter 7 Trustee, directly related to the Property, despite the clear language of § 542(a), requiring someone in possession of property of the estate to deliver such property, as well as documentation related to the property, to the Chapter 7 Trustee. Debtor's Response to the Motion for Turnover of Estate Property indicates either a failure to understand these sections of the Bankruptcy Code, or a refusal to comply.

Enforcement of Turnover Orders

Though the court does not anticipate there being any failure by Debtor to comply with the order of this court, the Ninth Circuit has reaffirmed a bankruptcy judge's power to issue corrective sanctions, including incarceration, to obtain a person's compliance with a court order. *Gharib v. Casey (In re Kenny*

G Enterprises, LLC), No. 16-55007, 16-55008, 2017 U.S. App. LEXIS 13731 (9th Cir. July 28, 2017). Though an unpublished decision, *Gharib* provides a good survey of the reported decisions addressing the use of corrective sanctions by an Article I bankruptcy judge. *Id.* at *2–5.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Turnover of Property filed by Eric Nims, 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 for Turnover of Property is granted.
>
> **IT IS FURTHER ORDERED** that Hsin-Shawn Cyndi Sheng ("Debtor") shall deliver on or before July 5, 2018, possession of the real property commonly known as 2769 Barrington Terrace Avenue, Fremont, California ("Property"), all post-petition rent monies or other proceeds of said Property, and the original leases, rental agreements, and other agreements relating to said Property.

3.	**17-20220-E-7** **HLG-7**	**WILLIAM/FAYE THOMAS** **Kristy Hernandez**	**CONTINUED OBJECTION TO CLAIM OF ROBERT S. PUTNAM, CLAIM NUMBER 12** **4-26-18 [99]**

No 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 Not Provided. No Proof of Service was filed for this Objection to Claim. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has not been set properly for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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 Proof of Claim Number 12-1 of Robert Putnam is xxxxxxx.

William Thomas, Jr., and Faye Thomas, Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of Robert Putnam ("Creditor"), Proof of Claim No. 12-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $118,156.92. Objector asserts that the Claim has not been timely filed. *See* FED. R. BANKR. P. 3002(c). The deadline for filing proofs of claim in this case is May 17, 2017. Notice of Bankruptcy Filing and Deadlines, Dckt. 9.

Additionally, Objector asserts that no debt is owed to Creditor for attorney services provided in state court because Creditor represented Affiliated Professional Services, Inc. ("APS"), not William Thomas, Jr., individually.

NO PROOF OF SERVICE PROVIDED

Unfortunately for Objector, no Proof of Service was filed with this Objection. The court does not have evidence that the necessary parties have been served with notice of the Objection. Nevertheless, both Creditor and David Cusick ("the Chapter 13 Trustee") have responded, indicating that the parties received notice with sufficient time to respond. Given the parties' responses, the court deems the notice provided to be sufficient.

CREDITOR'S RESPONSE AND AMENDMENT

Creditor filed a Response on May 2, 2018. Dckt. 107. Creditor argues that any proceeds recovered from the APS lawsuit would have been part of the bankruptcy estate in this case. As a result, Creditor stresses that any settlement in state court should have been approved in this court first.

Creditor "points the finger" at multiple attorneys, arguing that they colluded and committed fraud by knowing of this bankruptcy case and by choosing to settle the APS lawsuit anyway. Creditor also raises a point that he has raised before—that APS was the alter-ego of William Thomas, Jr., which would support Creditor's assertion that he has a claim in this case for legal service's provided on Objector's behalf.

Creditor does not address the untimeliness of his claim.

On May 23, 2018, Creditor filed an Amendment, removing a request that this bankruptcy case be dismissed and replacing it with a request that the Objection be overruled. Dckt. 133.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee filed a Response on May 17, 2018. Dckt. 130. The Chapter 13 Trustee notes that this case may be converted to Chapter 7, possibly making this matter moot. Additionally, he notes that Creditor has not complied with the local rules for a countermotion to dismiss this case.

OBJECTOR'S REPLY

Objector filed a Reply on May 29, 2018. Dckt. 145. Objector presents a handful of California cases for various propositions about an attorney not being able to collect on a contingency fee when the attorney's client does not recover funds from the lawsuit.

Objector relies upon the following cases:

A. *Kroff v. Larson*, 167 Cal. App. 3d 857, 861 (Cal. Ct. App. 1985)

1. When an attorney's lien is tied to the client's contingent recovery of money or property, the attorney cannot enforce the lien until the contingency occurs.

2. Accordingly, the lien is rendered unenforceable when the occurrence of the contingency is conclusively foreclosed.

B. *Fracasse v. Brent*, 6 Cal. 3d 784, 792 (Cal. 1972)

1. An attorney discharged by a client has a quantum meruit cause of action for the reasonable value of services rendered to the date of discharge, but such cause of action does not accrue until the

occurrence of the stated contingency, *i.e.* recovery by the client either by settlement or judgment.

C. *Lemmer v. Charney*, 195 Cal. App. 4th 99, 105 (Cal. Ct. App. 2011)

1. The law does not recognize a tort cause of action for damages by an attorney for the client's decision to abandon a lawsuit because that would constrain the client to keep his lawsuit alive just for his attorney's profit, despite his own fears and desire to abandon the case.

2. A third party cannot be held liable for encouraging the client to walk away from a lawsuit.

D. *Hall v. Orloff*, 49 Cal. App. 745, 749 (Cal. Ct. App. 1920)

1. A client's lawsuit is his own. He may drop it when he will.

2. Even an express agreement to pay damages for dropping it without his lawyer's consent would be against public policy and void.

CREDITOR'S SUR-REPLY

Creditor filed a Sur-Reply on June 4, 2018. Dckt. 149. Creditor takes issue with Objector's use of *Hall* for the provision that Objector could abandon the APS lawsuit because the lawsuit was not Objector's individually, it was APS's, and therefore, it was property of the bankruptcy estate according to Creditor. Creditor also presents additional case law that a debtor's legal claims are property of the bankruptcy estate. *See, e.g.*, *Smith v. Arthur Andersen, L.L.P.*, 421 F.3d 989, 1002 (9th Cir. 2005).

JUNE 12, 2018 HEARING

At the hearing, the court noted that the Chapter 7 Trustee had been appointed only recently, and the court continued the hearing to 10:30 a.m. on June 28, 2018, to allow the Chapter 7 Trustee time to conduct an initial investigation. Dckt. 162, 167.

DISCUSSION

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

The deadline for filing a proof of claim in this matter was May 17, 2017. Creditor's Proof of Claim was filed on May 30, 2017. No order granting relief for an untimely-filed proof of claim for Creditor has been issued by the court.

This is not the first time that Objector has raised an objection to Creditor's claim—it is the third time. The first time was in July 2017, which was withdrawn by Objector. *See* Dckt. 78. The second time was in December 2017. Dckt. 82. At the January 30, 2018 hearing, the parties agreed to dismissal of the objection without prejudice to allow the parties to address the various issues that have been raised by Creditor over the prior year. Dckt. 91. With the filing of the present Objection, it appears that the parties have not been able to resolve their dispute.

Additionally, at the January 30, 2018 hearing, the court discussed how Creditor was not listed on the Verification of Master Address List and was not sent the Notice of Bankruptcy or a copy of the Chapter 13 plan. *Id.*

On May 24, 2018, Debtor converted this case to one under Chapter 7. Dckt. 135. Hank Spacone has been appointed as the Interim Chapter 7 Trustee. Appointment, Dckt. 136. All property of the bankruptcy estate, including 100% of the shares of stock in APS, are under the exclusive control of the Chapter 7 Trustee. Schedule B, Dckt. 1 at 15; 11 U.S.C. §§ 541, 506.

At the June 5, 2018 hearing, the court continued a hearing on a motion to approve the state court settlement in the APS lawsuit to 10:30 a.m. on June 24, 2018. The court continued the hearing to allow the newly appointed Chapter 7 Trustee time to review the matters in this case.

While a "party in interest" able to object to a claim for purposes of 11 U.S.C. § 502 includes the debtor in the case, the primary and initial right to object to a claim resides in the Chapter 7 Trustee. Congress provides in 11 U.S.C. § 704(a)(5):

> § 704. Duties of trustee
>
> (a) The trustee shall–
>
> (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper; . . . .

While a debtor is a party in interest, and may be allowed to prosecute an objection to claim, it must be shown that the debtor has "standing," that there is actually a "claim or controversy" to be adjudicated.

> [c] Objection by Debtor
>
> The debtor may be a party in interest with standing to object to a proof of claim. Particularly in chapter 12 and chapter 13 cases, the success of the debtor's plan may depend upon the debtor's being able to argue successfully that the debt asserted as a priority claim or a secured claim, which must often be paid in full, is excessive or

> invalid. Typically, the trustee in such cases does not view it as his or her role to object to particular claims except, perhaps, if they have been tardily filed.
>
> **In a chapter 7 case**, or a chapter 11 case in which the debtor is not in possession, **the debtor usually has no pecuniary interest that would justify objecting to a claim unless there could be a surplus after all claims are paid.** An individual debtor, however, in such a case may sometimes **have an interest in objecting to particular claims**. For example, the debtor may wish to object to an excessive dischargeable claim whose holder would **receive distributions that otherwise would be made to the holder of a nondischargeable claim**. To the extent that a nondischargeable claim is satisfied in some measure by a distribution, it is in the debtor's interest to maximize the distribution, thereby relieving the debtor from some or all of the claim of that creditor which would survive the bankruptcy case. The debtor also has an interest if there is any chance that a disallowance will yield a solvent estate that would provide a return to the debtor. The same reasoning applies to equity holders of the debtor. Thus, a debtor may be afforded standing, in certain instances, to object to claims.

4 COLLIER ON BANKRUPTCY ¶ 502.02 (Alan N. Resnick & Henry H. Sommer eds. 16th ed.).

Here, Debtor has elected to convert the case to one under Chapter 7, whereby Debtor's standing based on how the claim affected the Plan and distributions under the Plan have evaporated.

At the hearing, the Chapter 7 Trustee reported **xxxxxxxxxxxxxxxxxx**.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Robert Putnam ("Creditor") filed in this case by William Thomas, Jr., and Faye Thomas, Chapter 13 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 12-1 of Robert Putnam is **xxxxxxxxxxxxxx**.

4. **17-20220-E-7** **WILLIAM/FAYE THOMAS** **CONTINUED MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH GLEN VAN DYKE**
HLG-8 **Kristy Hernandez** **5-4-18 [111]**

No 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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on May 4, 2018. By the court's calculation, 32 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Approval of Compromise has not been properly 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 Approval of Compromise is xxxxxxx.

William Thomas and Faye Thomas, Chapter 13 Debtor, ("Movant") (FN.1) requests that the court approve a settlement between Movant and Affiliated Professional Services, Inc., ("APS") on one side and Glen Allen Van Dyke, individually and doing business as Van Dyke Law Group, Salinger Van Dyke, a California general partnership, Dale Washington, Stuart Gregory, Mark G. Hildebrand, James C. Gordon, John M. Janacek, Veronica Janacek, William S. Douglas, Karen D. Douglas, Edward E. Sullivan, Robin L. Sullivan, Carol A. Martin, and Alex N. Ray ("Settlor"). The claims and disputes to be resolved by the proposed settlement arise from litigation in Superior Court in El Dorado County, entitled *Affiliated Professional Services, Inc. v. Glen Van Dyke et al.*

FN.1. In this ruling, the court refers to Debtor as "Movant" because it was Debtor who brought the Motion while serving in his fiduciary capacity over property of the bankruptcy estate and under the Plan. With the case being converted to Chapter 7, the Chapter 7 Trustee has replaced Debtor in that fiduciary

capacity for property of the bankruptcy estate. Going forward, it is the Chapter 7 Trustee who succeeds to the role of "movant" for future hearings.

On May 24, 2018, Debtor converted this case to one under Chapter 7. Dckt. 135. Hank Spacone has been appointed as the Interim Chapter 7 Trustee. Appointment, Dckt. 136. All property of the bankruptcy estate, including 100% of the shares of stock in Affiliated Professional Services, Inc., are under th exclusive control of the Chapter 7 Trustee. Schedule B, Dckt. 1 at 15; 11 U.S.C. §§ 541, 506.

Review of Litigation and Claims Settled

The Motion alleges that Debtor operated Debtor's business Affiliated Professional Services, Inc. ("APS"). Motion ¶ 1, Dckt. 111. APS filed state court litigation against Glen Van Dyke and other defendants. One of the state court defendants filed a counter claim against APS and named Debtor William Thomas personally as another defendant in the cross-complaint.

The Motion further alleges that the state court action was dismissed in August 2017 based on a written settlement agreement that "the parties" executed. The settlement agreement is stated to include a non-disclosure provision. It also included non-monetary cross-dismissals of all claims asserted.

Debtor seeks in the Motion approval of the 2017 settlement. This bankruptcy case having been filed in 2017, appears that any settlement, at least as to rights, interests, and claims against Debtor or which are property of the bankruptcy, must first be approved by the bankruptcy court. 11 U.S.C. § 541; FED. R. BANKR. P. 9019.

The Motion offers no explanation of the various claims and cross claims that are the subject of the cross-releases. The Motion does not explain how the interests and rights of APS, for which the bankruptcy estate is the sole shareholder (whether Debtor was exercising the fiduciary duties over property of the bankruptcy estate or now the Chapter 7 Trustee) were given up as part of obtaining releases against APS and Debtor personally for claims that must be adjudicated in this court.

Proof of Claim No. 9 was filed by Dale Washington on May 15, 2017. The Claim is for $129,000 and is for "Services Performed." Attachment 1 is a copy of the State Court Cross-Complaint against APS and Debtor William Thomas. The allegations in the Cross-Complaint include:

A. APS is the alter ego of Thomas.

B. Thomas used APS and its assets to pay Thomas's personal expenses.

C. Thomas was hired as an expert witness by Washington.

D. Thomas did not properly bill for the services provided.

E. Many contentions concerning the conduct of Prestholt.

F. Improper use of private information by Prestholt and Thomas.

G. Cause of Action for Fraud, based on Thomas/APS's billing practices.

H. Cause of Action under California Business and Professions Code §§ 17300 et seq. based on Thomas/APS's billing practices.

I. Cause of Action for Breach of Contract against Thomas/APS.

J. Cause of Action for Civil Extortion against Thomas/APS.

Gale Van Dyke filed Proof of Claim No. 10 in the amount of $129,000, which is based on "Services Performed." Attachment 1 to Proof of Claim No. 10 is Van Dyke's Cross-Complaint against APS. It asserts three causes of Action: (1) Fraud, (2) Breach of California Business and Professions Code §§ 17200 et seq., and (3) Intentional Breach of Contract. These appear to be based on the same grounds as asserted by Washington in Proof of Claim No. 9.

Proof of Claim No. 11 was filed by Van Dyke Law Group in the amount of $155,725.93, which is based on "Services Rendered." The Proof of Claim form is not signed and is purported to be filed by Creditor's attorney. Proof of Claim No. 11, p. 3.

INSUFFICIENT NOTICE OF MOTION

Movant provided thirty-two days' notice of this Motion. Federal Rule of Bankruptcy Procedure 2002(a)(3) requires a minimum of twenty-one days' notice of the hearing, and Local Bankruptcy Rule 9014-1(f)(1)(B) requires an additional fourteen days for parties to file written opposition. Those time periods do not run concurrently. Those two minimums total thirty-five days. Movant has provided three fewer days than the minimum.

The court continues the hearing to allow the Chapter 7 Trustee who has taken over the estate. This continuance resolves the insufficient notice given by Debtor as the predecessor fiduciary of the bankruptcy estate.

Movant and Settlor have resolved their litigation, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 115):

A. APS and Glen Allen Van Dyke shall file a notice of conditional settlement of state court action in Superior Court within five days of executing the settlement agreement;

B. Glen Allen Van Dyke and Dale Washington shall execute and file with the bankruptcy court withdrawals of their proofs of claim;

C. William Thomas shall provide written notice to the bankruptcy court that objections to the claims of Glen Allen Van Dyke and Dale Washington have been resolved;

D. APS shall provide written notice to the bankruptcy court that its motion for relief has been resolved;

E. Within five days of executing the settlement agreement, APS, Glen Allen Van Dyke, and Dale Washington shall execute requests for dismissal of the state court action in its entirety with prejudice; and

F. Movant and Settlor each grant the other a general release of claim.

CREDITOR'S OPPOSITION

Robert Putnam ("Creditor") filed an Opposition on May 14, 2018. Dckt. 123. Creditor argues that he filed a secured lien on any settlement or judgment issued in the state court action, but under the proposed settlement, he will not receive any payment on his claim.

Creditor argues that Movant has "used a property right worth hundreds of thousands of dollars to APS for his own personal benefit." *Id.* at 4. Creditor argues that all of Movant's creditors have lost an opportunity to recover against any of their claims. *Id.*

Creditor alleges that the proposed settlement "is the product of fraud and collusion warranting further investigation in that all parties to the settlement agreement knew or should have known that approval of the settlement was required by" the bankruptcy court before proceeding to dismiss the state court action. *Id.* at 5.

Creditor states that he requested to be included in settlement negotiations in state court but was deliberately excluded. Creditor argues that Movant cannot show how the settlement is fair and equitable, going so far as to argue that the factors considered by the court favor not approving the settlement.

Creditor argues that litigation would have been successful in state court, should not have been expensive, would not have involved difficulty collecting against a judgment, would not have been inconvenient to try (because Creditor offered to try the case for the parties), and does not benefit creditors in this case because the settlement involves no money.

Creditor filed an Amendment to the Opposition on May 21, 2018, to remove a request that the bankruptcy case be dismissed and replace it with a request that the Motion be denied. Dckt. 131.

MOVANT'S REPLY

Movant filed a Reply on May 29, 2018. Dckt. 141. Movant argues that APS was entitled to rely on the advice of its state court counsel at the time it decided to settle the lawsuit and that Creditor has no

ground to assert that there should have been money involved because he was not the attorney of record at the time of settling.

Movant refutes allegations of collusion by arguing that "[t]here are no facts that support [Creditor's] accusations." *Id.* at 2. Instead, Movant argues that the Chapter 13 Trustee in this case was provided with detailed financial records that do not hint at hidden assets or irregularities in line with a scheme.

JUNE 5, 2018 HEARING

At the hearing, the court noted that the Chapter 7 Trustee had not expressed an opinion about the proposed settlement now that the case had been converted, and the court continued the hearing to 10:30 a.m. on June 28, 2018 for the Chapter 7 Trustee to review and report to the court. Dckt. 160.

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 Constr.)*, 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 Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (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); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant (Debtor who has now been replaced by the Chapter 7 Trustee) argues that the four factors have been met without addressing each one specifically. Instead, Movant relies upon Paragraph 11 of the Declaration of Anthony Fritz. That section of the Declaration sets forth seven grounds for why the settlement is in Movant's best interest.

First, he argues that given more than $420,000.00 in proofs of claim filed, any proceeds from the state court action would have been cannibalized, in addition to projected considerable attorney's fees for litigation. Mr. Fritz questioned whether Movant or the Chapter 13 Trustee would receive any net financial benefit from litigation.

Second, Mr. Fritz was concerned that APS would not be paid for expert services provided in a prior lawsuit given a related appellate court decision. Third, Mr. Fritz was concerned that there as no record of an agreement signed by Dale Washington to pay APS for its services.

Fourth, Mr. Fritz anticipated meritorious defenses from Glen Allen Van Dyke and Dale Washington based on his review of California precedent. Fifth, Mr. Fritz was concerned that naming Glen Allen Van Dyke's homeowner clients would expose APS and Movant to litigation for malicious prosecution, which would include a significant risk of liability.

Sixth, the state court complaint was subject to mandatory dismissal if not brought to trial by September 2017, and as of July 2017, it had not been set for trial. While Mr. Fritz had drafted a motion to extend the period in state court to set the matter for trial, he was concerned that the parties would not reach trial under the extended period that the court would set. Seventh, based on prior discussions and proposed settlements with Settlor, Mr. Fritz concluded that Settlor would not be willing to pay any amount to settle the state court action, let alone an amount large enough to pay APS's debts.

Chapter 7 Trustee's Position

At the hearing, the Chapter 7 Trustee reported **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 Approve Compromise filed by William Thomas and Faye Thomas, Chapter 13 Debtor, ("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 for Approval of Compromise is **xxxxxxxxxxxxxx**.

5. **17-20220-E-7** **WILLIAM/FAYE THOMAS** **CONTINUED MOTION FOR EXAMINATION AND FOR PRODUCTION OF DOCUMENTS**
RSP-1 **Kristy Hernandez** **4-19-18 [96]**

No 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. FN.1.

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that Movant will request an order at the hearing. Based upon language that there will be discussion at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). 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).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, former Chapter 13 Trustee, and Office of the United States Trustee on April 19, 2018. By the court's calculation, 54 days' notice was provided. 14 days' notice is required.

The Motion to Compel 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 Compel is xxxxxxxxxxxxxx.

Robert Putnam, a creditor with an unsecured claim, ("Movant") requests that the court order William Thomas, Jr., ("Co-Debtor") to appear at a 2004 Examination and to produce documents ten days before the examination.

DEBTOR'S OBJECTION

William Thomas, Jr., and Faye Thomas ("Debtor") filed an Objection on May 29, 2018. Dckt. 143. Debtor asserts that the Motion may become moot because of a pending motion to approve state court settlement and because of an objection to Movant's claim. Envisioning that the court will grant the motion and sustain the objection, Debtor argues that this Motion would then be an "improper harassment" by Movant. *Id.* at 3:4.

JUNE 12, 2018 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on June 26, 2018, to be heard in conjunction with related matters. Dckt. 163.

APPLICABLE LAW

The Federal Rules of Civil Procedure are incorporated into bankruptcy proceedings in large part. This is true with respect to the discovery provisions (whether in an adversary proceeding or contested matter). Here, Federal Rule of Civil Procedure 37 and incorporating Federal Rule of Bankruptcy Procedure 7037 are cited in the motion as the basis for the relief requested.

Federal Rule of Civil Procedure 37(a) establishes the procedure for obtaining an order from the court to compel a party to respond to discovery. When requested and the court issues such an order, the requesting party is entitled to recover the costs and expenses in prosecution of such a motion. FED. R. CIV. P. 37(a)(5).

"Meet and Confer" Requirement

Federal Rule of Civil Procedure 37(a)(1) requires that the motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." FN.2.

FN.2. Both the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure are mentioned several times in the court's ruling. A Federal Rule of Civil Procedure will be referred to as "Rule," and a Federal Rule of Bankruptcy Procedure will be referred to as "Bankruptcy Rule."

The certification requirement of Rule 37(a)(1) was described in *Shuffle Master, Inc. v. Progressive Games, Inc.* as comprising two elements:

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

> confer. Each of these two subcomponents must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

170 F.R.D. 166, 170 (D. Nev. 1996); *see also Triad Commer. Captive Co. v. Carmel (In re GTI Capital Holdings, LLC)*, No. AZ-09-1053-JuMKD, 2009 Bankr. LEXIS 4539, at *26–27 (B.A.P. 9th Cir. Aug. 20, 2009); *Sanchez v. Wash. Mutual Bank (In re Sanchez)*, No. 06-2251-D, 2008 Bankr. LEXIS 4239, at *2–3 (Bankr. E.D. Cal. Sept. 8, 2008). The court went further, stating that "a moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" *Shuffle Master, Inc.*, 170 F.R.D. at 171; *see also Triad Commer. Captive Co.*, 2009 Bankr. LEXIS 4539, at *27; *Sanchez*, 2008 Bankr. LEXIS 4239, at *3.

Rule 37 also requires that the moving party must have conferred in good faith or attempted to confer with the opposing party regarding the discovery dispute. *Shuffle Master, Inc.*, 170 F.R.D. at 171. The court in *Shuffle Master* noted that good faith "cannot be shown merely through the perfunctory parroting of statutory language . . . to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means." *Id.*; *see also Sanchez*, 2008 Bankr. LEXIS 4239, at *3–4. The movant must show good faith and the party need actually attempt a meeting or conference. *Shuffle Master, Inc.*, 170 F.R.D. at 171. Courts have found that "conferment" requirement entails "two-way communication, communication which is necessary to genuinely discuss any discovery issues and to avoid judicial recourse." *Compass Bank v. Shamgochian*, 287 F.R.D. 397, 398–99 (S.D. Tex. 2012).

The "meet and confer" requirement is not satisfied by mailing a letter from one party's counsel to another party's counsel. *See Leimbach v. Lane (In re Lane)*, 302 B.R. 75, 78–79 (Bankr. D. Idaho 2003). The requirement of filing "a certificate cannot be satisfied by including with the motion copies of correspondence that discuss the discovery at issue. . . . The Court is unwilling to decipher letters between counsel to conclude that the requirement has been met." *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001).

DISCUSSION

The court first considers whether Movant has satisfied the "meet and confer" requirement of Rule 37(a). Movant does not provide any information about his attempts to meet and confer with Co-Debtor. The court's prior civil minutes related to Co-Debtor's objection to Movant's claim indicate that the parties want to discuss the dispute outside of court, but no party has provided information about how those discussions, if they happened, have proceeded.

At the hearing, **xxxxxxxxxxxxxxx**.

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 Compel filed by Robert Putnam, a creditor with an unsecured claim, ("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 Compel is **xxxxxxxxxxx**.

6.	**16-25321-E-7** **DNL-3**	**JAY COHEN** **Steele Lanphier**	**MOTION FOR TURNOVER OF PROPERTY** **6-13-18 [174]**

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, creditors, parties requesting special notice, and Office of the United States Trustee on June 13, 2018. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion for Turnover 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 for Turnover is granted.

Michael Hopper, the Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 9029 Boise Court, Sacramento, California ("Property").

DISCUSSION

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

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

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

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

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

No opposition has been filed to this Motion by Debtor or any other party in interest.

Enforcement of Turnover Orders

Though the court does not anticipate there being any failure by Debtor to comply with the order of this court, the Ninth Circuit has reaffirmed a bankruptcy judge's power to issue corrective sanctions, including incarceration, to obtain a person's compliance with a court order. *Gharib v. Casey (In re Kenny G Enterprises, LLC)*, No. 16-55007, 16-55008, 2017 U.S. App. LEXIS 13731 (9th Cir. July 28, 2017). Though an unpublished decision, *Gharib* provides a good survey of the reported decisions addressing the use of corrective sanctions by an Article I bankruptcy judge. *Id.* at *2–5.

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

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

The Motion for Turnover of Property filed by Michael Hopper, 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 for Turnover of Property is granted.

IT IS FURTHER ORDERED that Jay Cohen ("Debtor"), and each of them, shall deliver on or before **July 12, 2018**, possession of the real property commonly known as 9029 Boise Court, Sacramento, California ("Property"), with all of their personal property, personal property of any other persons that Debtor, and each of them, allowed access to the Property; and any other person or persons that Debtor, and each of them, allowed access to the Property removed from the Property.

7. 18-90030-E-11 FILBIN LAND & CATTLE CO., INC. Michael St. James

STATUS CONFERENCE RE: VOLUNTARY PETITION 1-17-18 [1]

Final Ruling: No appearance at the June 28, 2018 status conference is required.

Debtor's in Possession Atty: Michael St. James

The Status Conference is continued to 10:30 a.m. on July 12, 2018, specially set to be heard in conjunction with Debtor in Possession's Motion to Sell Property.

Notes:
Continued from 2/15/18

[STJ-1] Application for Order Authorizing Employment of Counsel (St. James Law, P.C.) filed 2/27/18 [Dckt 83]; Order denying filed 3/2/18 [Dckt 95]

[MF-8] Application for Authority to Employ MacDonald Fernandez LLP as Special Counsel for Debtor-in-Possession filed 2/28/18 [Dckt 91]; *Amended* Application filed 3/2/18 [Dckt 98]; Order granting filed 4/6/18 [Dckt 129]

[STJ-2] Renewed Application for Order Authorizing Employment of Counsel (St. James Law, P.C.) filed 3/51/8 [Dckt 101]; Order granting filed 3/22/18 [Dckt 126]

[MF-6] Order granting motion to employ Charles Doyle of Business Debt Solutions, Inc. dba Business Capital as broker for Debtor in Possession filed 3/30/18 [Dckt 127]

[STJ-3] Motion to Set Reorganization Schedule and to Find Compliance with Code filed 4/10/18 [Dckt 130]; Order denying filed 5/9/18 [Dckt 156]

[STJ-3] Initial Plan of Reorganization filed 4/10/18 [Dckt 135]

[MF-9] Application for Authority to Employ Judith G. Callaway, CPA as Accountant for Debtor in Possession filed 5/3/18 [Dckt 148]; Order granting filed 6/5/18[Dckt 178]

[STJ-4] *Ex Parte* Application for Order Setting Hearing on Disclosure Statement filed 5/9/18 [Dckt 155]; Order granting filed 5/9/18 [Dckt 157]

[MF-10] *Ex Parte* Application for Authority to Employ Arch & Beam Global, LLC as Financial Advisor for Debtor in Possession filed 5/16/18 [Dckt 161]; Order granting filed 5/18/18 [Dckt 174]

[STJ-5] Disclosure Statement (To Accompany Plan of Reorganization Dated May 17, 2018) filed 5/17/18 [Dckt 165]; set for hearing 6/28/18 at 10:30 a.m.

[STJ-5] Plan of Reorganization Dated May 17, 2018 filed 5/17/18 [Dckt 166]

Case Status Conference Report filed 6/21/18 [Dckt 197]

JUNE 28, 2018 STATUS CONFERENCE

Debtor in Possession filed a Status Conference Report on June 21, 2018. Dckt. 197. While prosecuting a sale of the property, there was a misunderstanding as to the closing deadline. This has caused the time period in which the sale is "pending" to be extended beyond what Debtor in Possession anticipated in preparing the plan and disclosure statement in this case. This has caused Debtor in Possession to withdraw the pending motion to approve the disclosure statement.

Debtor in Possession reports that it will pursue discussions with creditors over the plan that can be proposed.

There is pending on the court's July 12, 2018 calendar the motions to sell, which if approved, Debtor anticipates being the cornerstones of a Plan in this case.

All other related matters having been removed from the June 28, 2018 calendar and there being pending key motions on July 12, 2018, the court continues the Status Conference to that time and date.

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 court having reviewed the file and Debtor in Possession's Status Report for the June 28, 2018 Status Conference, all other matters having been withdrawn for

that date, there being the hearing on motions having a substantial impact on the prosecution of this case set for 10:30 a.m. on July 12, 2018, and good cause appearing,

IT IS ORDERED that the Chapter 11 Status Conference is continued to 10:30 a.m. on July 12, 2018, specially set to be heard in conjunction with the pending motion to sell property of the estate. The Status Conference will be conducted in the Modesto Courthouse.

8.	**18-90030-E-11 STJ-5**	**FILBIN LAND & CATTLE CO., INC. Michael St. James**	**APPROVAL OF CHAPTER 11 DISCLOSURE STATEMENT FILED BY DEBTOR 5-17-18 [165]**

Final Ruling: No appearance at the June 28, 2018 hearing is required.

The Motion for Approval of Disclosure Statement is dismissed without prejudice.

Filbin Land & Cattle Co., Inc., ("Debtor in Possession") having filed a "Notice of Cancellation," which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on June 21, 2018, Dckt. 183; no prejudice to the responding party appearing by the dismissal of the Motion; Debtor in Possession having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the oppositions filed by creditors; the Ex Parte Motion is granted, Debtor in Possession's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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 Approval of Disclosure Statement filed by Filbin Land & Cattle Co., Inc., ("Debtor in Possession") having been presented to the court, Debtor in Possession having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 183, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Approval of Disclosure Statement is dismissed without prejudice.

9. **16-27854-E-11** **GARY STEINGROOT**
TBG-9 **Stephan Brown**

MOTION TO SELL FREE AND CLEAR OF LIENS AND/OR MOTION FOR COMPENSATION FOR BETTER HOMES AND GARDENS REAL ESTATE, BROKER(S)
6-7-18 [182]

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 in Possession, creditors, parties requesting special notice, and Office of the United States Trustee on June 7, 2018. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

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

The Bankruptcy Code permits Gary Steingroot, Debtor in Possession, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the real property commonly known as 1055 Hutley Way, Granite Bay, California ("Property").

The proposed purchasers of the Property are Randall Van Dusen and Lori Van Dusen, and the terms of the sale are:

A. Selling price of $710,000, subject to overbidding through conclusion of the hearing, payable as follows:

1) Initial deposit of $8,000 by personal check.

2) Down payment of $138,800.

3) Balance of $563,200 to paid through loan.

B. Buyer and Movant shall split escrow fees and title insurance evenly.

C. Movant shall pay any City and County transfer taxes or fees, any Homeowner's Association transfer fees, and fees to prepare Homeowner's Association documents.

D. Buyer shall pay $450 for one-year home warranty plan.

E. Escrow to close on or before June 29, 2018. Decl. ¶ 5; Dckt. 184.

The Motion seeks to sell the Property free and clear of the lien of Capital One ("Creditor"). The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

> "(f) The trustee[, debtor in possession, or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f)(1)–(5).

For this Motion, Movant argues that it has a bona fide dispute with Creditor about the validity of its lien, but the Motion and pleadings do not go into more detail. Creditor has not filed a claim in this case. A review of Amended Schedule E shows Creditor listed with a claim amount of $0.00 and a description that the claim is outside of the statute of limitations. Dckt. 30. No claim objection has been filed.

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: xxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the proposed purchase price of Property exceeds the most recent listing price of $699,000. Dckt. 182. Movant and Broker have not received higher or otherwise better offers for Property. Decl. ¶ 3; Dckt. 186. Movant estimates that the Estate will receive net proceeds of $194,661.38 after deducting Suntrust Mortgage [$477,00.00] and estimated costs of sale, including brokers' fees [$35,500.00]. Decl. ¶ 4; Dckt. 186.

Movant has estimated that a 5 percent broker's commission from the sale of the Property will equal approximately $35,500.00. Dckt. 46. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker a 5 percent commission. Dckt. 49.

Insufficient Grounds for Selling Free and Clear of "Capital One" Encumbrance

The party named as having the lien or encumbrance from which a sale free and clear is sought is "Capital One." The letter presented as Exhibit C, is from Elizabeth Bleier of the Patenaude & Felix, APC law firm. Dckt. 187. It states that there is a "Total Release of Lien" that was authorized to be recorded by Old Republic Title. That letter is dated February 19, 2018. More than four months have passed since the Total Release of Lien has been sent to be "immediately recorded." No copy of such Total Release of Lien is provided with this exhibit.

The "Creditor" identified in the letter is "Capital One Bank, USA." That is not the person named in the Motion—some entity named "Capital One." A review of the California Secretary of State website for corporations and limited liability companies identifies thirty-two (32) corporations and fifteen (15) limited liability companies with the words "Capital One" in their names. There is no entity with just the name "Capital One."

The Motion, seeking to alter the property rights of "Capital One," was served on the "Capital One" creditor at the following address:

> Capital One
> PO Box 30285
> Salt Lake City, UT 84130-0285

Cert. of Serv., Dckt. 188.

Service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92–93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal

Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

Even more significantly, the court has no idea whether the "Capital One" at the Salt Lake City post office box is the person whose property rights are being altered. The "Total Release of Lien" letter (Exhibit C, Dckt. 187) says it is sent for "Creditor" Capital One Bank (USA), N.A. The FDIC website identifies Capital One Bank (USA), N.A. as a federally insured financial institution. FN.1. The headquarters for this federally insured financial institution is shown to be in Glen Allen, Virginia. A Google search of the internet for the post office box leads to the Capital One Bank (USA), N.A. website. This is listed an a general correspondence (expressly stating "Not a Payment Address"). FN.2. This is identified as a contact address for personal credit cards, not judgments or service of process.

FN.1. https://research.fdic.gov/bankfind/detail.html?bank=33954&name=Capital%20One%20Bank%20(USA)%2C%20National%20Association&searchName=capital%20one&searchFdic=&city=&state=&zip=&address=&searchWithin=&activeFlag=&searchByTradename=false&tabId=2.

FN.2. https://www.capitalone.com/contact/credit-cards/

In Federal Rule of Bankruptcy Procedure 7004(h), Congress inserted a special service requirement for federally insured financial institutions. Though they may be served by mail (incorporated by Federal Rule of Bankruptcy Procedure 9014 into contested matter practice), certified mail is required. Federal Rule of Bankruptcy Procedure 7004(h) [emphasis added] specifies:

> (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.

The request to order the sale and free of the property rights and interests of "Capital One" 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 Sell Property filed by Gary Steingroot, 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 Gary Steingroot, Debtor in Possession, is authorized to sell pursuant to 11 U.S.C. § 363(b) and (f)(3) and (4) to Randall Van Dusen and Lori Van Dusen ("Buyer"), the Property commonly known as 1055 Hutley Way, Granite Bay, California ("Property"), on the following terms:
>
> A. The Property shall be sold to Buyer for $710,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 185, 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. Exhibit B, Dckt. 187.
>
> C. Movant is authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> D. Movant is authorized to pay a real estate broker's commission in an amount equal to 5 percent of the actual purchase price upon consummation of the sale. The 5 percent commission shall be paid to Movant's real estate broker, Better Homes & Gardens Real Estate R.P.

10. 17-25576-E-11 MRL-5 | **KEVIN KENNEDY** Mikalah Liviakis | **MOTION TO CONVERT CASE TO CHAPTER 7** 5-1-18 [73]

Final Ruling: No appearance at the June 28, 2018 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 in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on May 1, 2018. By the court's calculation, 58 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen-days' notice for written opposition).

The Motion to Convert 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 Convert the Chapter 11 Bankruptcy Case to a Case under Chapter 7 is granted, and the case is converted to one under Chapter 7.

This Motion to Convert the Chapter 11 bankruptcy case of Kevin Kennedy has been filed by Kevin Kennedy ("Movant"). Movant asserts that the case should be converted because Movant is presently unable to reasonably settle the Internal Revenue Services ("IRS") and Department of Education ("DOE") claims.

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

DISCUSSION

Movant commenced his Chapter 11 case on August 23, 2017. Movant owes approximately $113,414 to the DOE and approximately $272,416 to the IRS. On or about March 12, 2018, the DOE and IRS filed a joint objection to the Chapter 11 plan of reorganization because the plan does not meet the requirements of Section 1129(a) & (b). Due to the objection filed by the DOE and IRS, Movant is unable to confirm his Chapter 11 plan and to establish a payment plan to repay his creditors. Movant seeks to convert his Chapter 11 case to reduce his debt totals and allow him to pursue further debt reorganization.

Movant has established that he cannot proceed successfully in this case and would prefer to proceed in Chapter 7. Cause exists to convert this case pursuant to 11 U.S.C. § 1112(b). The Motion is granted, and the case is converted to a case under Chapter 7.

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 Convert the Chapter 11 case filed by Kevin Kennedy ("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 Convert is granted , and the case is converted to a proceeding under Chapter 7 of Title 11, United States Code.