UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

August 2, 2017 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

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1. 17-23905-D-7 RODNEY/KATHLEEN COCKRUM — MOTION FOR RELIEF FROM AUTOMATIC STAY
JHW-1 — 6-26-17 [22]
FORD MOTOR CREDIT COMPANY LLC VS.

DEBTORS DISMISSED:
06/30/2017

2. 15-20714-D-7 THOMAS/DOLORES ESPINOZA — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT
ICE-1 — 7-5-17 [24]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate.

Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.

3. 17-23616-D-7 GUSTAVO CEBALLOS — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 6-29-17 [11]
SANTANDER CONSUMER USA, INC.
VS.

Final ruling:

This matter is resolved without oral argument. This is Santander Consumer USA, Inc.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

4. 16-28018-D-7 TERRENCE/NANCIE HOFMANN — CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
CSR-3 — 5-19-17 [82]
JSM ENTERPRISES, INC. VS.

5. 16-28018-D-7 TERRENCE/NANCIE HOFMANN — MOTION FOR ENTRY OF DEFAULT JUDGMENT
17-1001 CSR-4 — 6-22-17 [33]
JSM ENTERPRISES, INC. V.
HOFMANN ET AL

Tentative ruling:

This is the plaintiff's motion for entry of a default judgment against the defendants in the amount of $1,359,469.92 plus pre-judgment interest of $96,181.86. The court is not prepared to consider the motion at this time for three reasons, but will continue the hearing to permit the moving party to address these issues.

First, the notice of hearing did not advise the defendants whether written opposition would be necessary, as required by LBR 9014-1(d)(4), and if so, of the deadline for filing and serving it and the consequences of failing to file timely written opposition, as required by the same rule. Second, the proof of service was

filed on June 27, 2017 and states that service was made on June 27, 2017, but bears a signature date of June 23, 2017. One or the other of those dates must be incorrect. Third, the motion states the moving party is requesting the debtors' discharge be denied pursuant to § 727(a)(4)(D) and (a)(2)(A) of the Code, whereas the relief sought in the complaint is limited to relief under § 523(a).

The court will continue the hearing and require the moving party to (1) file a corrected proof of service as to the original service of the moving papers; (2) file an amended motion and a notice of continued hearing to correct the defects in the originals described above; and (3) serve the amended motion and notice of continued hearing in accordance with the time limits of LBR 9014-1(f)(1) or (f)(2), as the moving party chooses. The moving party is not to file amended declarations or an amended memorandum of points and authorities. Amended declarations and an amended memorandum of points and authorities filed for the sole purpose of changing the hearing date would do nothing more than clutter the docket and, possibly, confuse the defendants.

The court will hear the matter.

6. 14-25820-D-11 INTERNATIONAL MANUFACTURING GROUP, INC. — MOTION FOR REMAND IWC-17-5-17 [11]
17-2109
JTS COMMUNITIES, INC. ET AL V.
ZB, N.A. ET AL

Tentative ruling:

This is the motion of the plaintiffs in this adversary proceeding to remand the action to the Sacramento County Superior Court, from which the action was removed by the defendants pursuant to 28 U.S.C. § 1452. The defendants have filed opposition and the plaintiffs have filed a reply. For the following reasons, the motion will be granted.

> **The removing part[ies] [here, the defendants] bear[] the burden of establishing federal jurisdiction. Ethridge v. Harbor House Rest., 861 F.2d 1389, 1393 (9th Cir. 1988). Furthermore, courts construe the removal statute strictly against removal. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (citations omitted). If there is any doubt as to the right of removal in the first instance, remand must be granted. See Gaus, 980 F.2d at 566.**

Winn v. Chrysler Group, LLC, 2009 U.S. Dist. LEXIS 119661, *5 (E.D. Cal. 2009).

The bankruptcy case in which this adversary proceeding is pending is a chapter 11 case in which a plan of liquidation was filed on October 12, 2016 and confirmed two and a half months later. A plan administrator was appointed pursuant to the plan. The plan administrator was not a party to the state court action before it was removed and is not a party to this adversary proceeding. Both the plaintiffs and the defendants in this adversary proceeding are, however, defendants in separate adversary proceedings brought by the then-chapter 11 trustee before the plan was confirmed and since maintained by the plan administrator. It is, in essence, based on these "connections" with the bankruptcy case that the defendants removed this action from the state court and now oppose remand. The defendants also rely, albeit

less so, on the pendency of the underlying bankruptcy case itself, the pendency of the related bankruptcy case of Deepal Wannakuwatte, the proofs of claim filed by the plaintiffs in the underlying case, and a putative class action recently filed against defendant ZB, N.A. in the district court for this district as "connections" supporting their position that this court has "related to" jurisdiction over the removed state court action.

The court finds that those proceedings are not sufficient, either individually or in total, to support "related to" jurisdiction of the removed state court action. The plaintiffs' claims are all state law claims; there are no issues of bankruptcy law. Further, the claims are not asserted in any of the proceedings relied on by the defendants, listed above. The plan administrator's claims against the plaintiffs in the one adversary proceeding concern the relationship between the plaintiffs, on the one hand, and the debtor, its principal, and his Ponzi scheme, on the other, whereas the plan administrator's claims against defendant ZB, N.A. in the other – separate – adversary proceeding concern the relationship between the debtor, its principal, and the Ponzi scheme, on the one hand, and defendant ZB, N.A., on the other. (Two individual defendants in the removed state court action are not parties to either of the plan administrator's adversary proceedings.[1])

Although the plan administrator's complaints mention the letter of credit arrangements that are an element in the plaintiffs' allegations in the state court action, the plaintiffs' allegations against the defendants do not form any part of the allegations in either of the plan administrator's adversary proceedings. The "bad acts" the state court plaintiffs allege the defendants committed against them play virtually no role in the adversary proceedings and the liability, if any, of the defendants to the plaintiffs will not be adjudicated in those adversary proceedings.

Finally, the outcome of the state court action will have no impact on the interpretation, implementation, consummation, execution, or administration of the confirmed liquidating plan, as required for this court to exercise jurisdiction in this post-confirmation action.[2] The state court action could have been brought pre-confirmation; in fact, assuming without deciding the plaintiffs were aware of the claims, it could have been brought pre-petition. Its resolution has nothing to do with the confirmed plan in this case. Although, there is a common factual scenario at the heart of all the complaints – the Ponzi scheme perpetrated by the debtor's principal, "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section 1471(b). Judicial economy itself does not justify federal jurisdiction." Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984).

At most, a judgment in favor of the plaintiffs in the state court action, if collected, could possibly reduce the amount of their claims against the bankruptcy estate in this case and thereby increase the dividend to other creditors. The Ninth Circuit has rejected, albeit in dicta, the notion that this factor in itself creates post-confirmation "related to" jurisdiction. "We specifically note that in reaching this decision, we are not persuaded by the Appellees' argument that jurisdiction lies because the action could conceivably increase the recovery to the creditors." Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1194, n.1 (9th Cir. 2005). "As the other circuits have noted, such a rationale could endlessly stretch a bankruptcy court's jurisdiction." Id. At least three courts within the Ninth Circuit, relying in part on that statement, have held that the fact of a potential impact on the dividend to creditors is not sufficient to establish post-confirmation

"related to" jurisdiction. Calvert v. Berg (In re Consol. Meridian Funds), 511 B.R. 140, 146 (Bankr. W.D. Wash. 2014);[3] Heller Ehrman LLP v. Gregory Canyon Ltd. (In re Heller Ehrman LLP), 461 B.R. 606, 609-10 (Bankr. N.D. Cal. 2011); ML Servicing Co. v. Greenberg Traurig, LLP, 2011 U.S. Dist. LEXIS 85066, *7-8 (D. Ariz. 2011).[4]

A brief review of two cases in which the Ninth Circuit did find a "close nexus" supporting post-confirmation jurisdiction illustrates the difference from this case, where the only connection is a possible change in the dividend to creditors. In Pegasus Gold, the court found such a "close nexus" where a new entity formed pursuant to a confirmed chapter 11 plan to perform reclamation work at the debtor's mines for the State of Montana sued the state, alleging it had breached the plan and other agreements entered into in connection with the plan. The court found that resolution of the claims would likely require interpretation of the plan and the agreements and "could affect the implementation and execution of the Plan itself, which specifically called for the creation of [the new entity] and the transfer of debtor money to fund it." 394 F.3d at 1194.

And in Wilshire Courtyard v. Cal. Franchise Tax Bd. (In re Courtyard), 729 F.3d 1279 (9th Cir. 2013), post-confirmation, the former partners of the reorganized debtor reported cancellation of debt income on their tax returns and the Franchise Tax Board sought to assess unpaid income taxes on them, characterizing the transaction whereby the reorganized debtor was created and partnership debt was forgiven (via the plan) as a disguised sale and the partners' reported cancellation of debt income as capital gains. The court held that determination of the sale/non-sale attributes of the transaction "requires a close look at the economics of the transaction as detailed in the Plan and Confirmation Order" (729 F.3d at 1289 (citations omitted)), and added that resolution of the key issue would also involve an issue of bankruptcy law – "the distinctly federal question of whether 11 U.S.C. § 346 applies to non-debtor general partners of a debtor partnership that was dissolved as part of the reorganization." Id. at 1290.

The present case will not require interpretation or affect the implementation, execution, or administration of the confirmed plan. Instead, the case is more akin to in Battle Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124 (9th Cir. 2010), where, post-confirmation, the holder of a pre-petition right of first refusal sued in state court a reorganized debtor, his non-debtor partner, and the third party they had sold certain real property to – with bankruptcy court approval after the plan was confirmed, alleging they had breached its right of first refusal. The bankruptcy court granted the debtor's motion to reopen his case, but on appeal, the Ninth Circuit held that "the bankruptcy court did not retain 'related to' jurisdiction for this breach of contract action that could have existed entirely apart from the bankruptcy proceeding and did not necessarily depend upon resolution of a substantial question of bankruptcy law." 624 F.3d at 1135.

The cases cited by the defendants miss the mark. First, the defendants' reliance on the Pacor test, adopted by the Ninth Circuit in In re Fietz, 852 F.2d 455, 457 (9th Cir. 1988) – whether the state court action "could conceivably have any effect on the estate being administered in bankruptcy" (id., citing Pacor,743 F.2d at 994) – is misplaced because it has expressly been modified for cases brought post-confirmation, where the narrower "close nexus" test applies. Wilshire Courtyard v. Cal. Franchise Tax Bd. (In re Courtyard), 729 F.3d 1279, 1287 (9th Cir. 2013), citing Pegasus Gold, 394 F.3d at 1194.

The defendants rely heavily on Boston Reg'l Med. Ctr., Inc. v. Reynolds (In re Boston Reg'l Med. Ctr., Inc.), 410 F.3d 100 (1st Cir. 2005), and ML Liquidating

Trust v. Mayer Hoffman McCann P.C. (In re Mortgs. Ltd.), 452 B.R. 776 (Bankr. D. Ariz. 2011), for their proposition that the Pacor test should apply in all cases involving a liquidating plan rather than a reorganization plan. That was not the holding of either of those cases. In those cases, the claims in question were brought by the trustee of a liquidating trust established pursuant to a confirmed plan and they were claims that had been property of the estate pre-confirmation.[5] The present case is not a case of claims being pursued by a plan-created liquidating trustee and the plaintiffs are not asserting claims the outcome of which could benefit (or harm) creditors as a whole. This is merely a case of one group of non-debtor parties suing another group of non-debtor parties on claims that were not property of the bankruptcy estate, could not have been asserted by the trustee, and could not be asserted by the plan administrator.

Similarly, in Pam Capital Funding, L.P. v. New NGC, Inc. (In re Kevco, Inc.), 309 B.R. 458 (Bankr. N.D. Tex. 2004), also cited by the defendants, the plaintiffs were bondholders of the debtor, pursuing what the court found to be virtually the same claims as those being pursued by the post-confirmation plan agent (309 B.R. at 466-68); that is, claims that were property of the estate. Id. at 465. Nothing of the sort is present here.[6]

Finally, Valley Health Sys. Ret. Plan v. Kirton (In re Valley Health Sys.), 584 Fed. Appx. 477 (9th Cir. 2014), is inapposite because in that case, the plaintiffs' post-confirmation state court mandamus petition was filed against the reorganized debtor itself (and others) and resolution would require a court to determine whether the debtor's chapter 9 plan enjoined the plaintiffs from bringing suit. No such factors are present here.

The court concludes it does not have subject matter jurisdiction of the removed state court action because the action is not "related to" the bankruptcy case or the plan. However, for the sake of completeness, the court will briefly address the issues of abstention and equitable remand, raised by the parties. First, the court cannot abstain because there is no pending state court action for the court to abstain from. "Abstention can exist only where there is a parallel proceeding in state court." Security Farms v. International Bhd. Of Teamsters, 124 F.3d 999, 1009 (9th Cir. 1997). Where a state court action has been removed to a federal court, the question becomes one of remand. Id. at 1010.[7] However, if the state court action had not been removed and if this court had determined it had "related to" jurisdiction of the dispute, the court would have found abstention to be mandatory, pursuant to 28 U.S.C. § 1334(c)(2). The action could not have been commenced in this court absent bankruptcy jurisdiction and the action was commenced, and can be timely adjudicated, in a state court of appropriate jurisdiction.

Finally, even if this court had "related to" jurisdiction of the removed state court action, the court would remand the action on equitable grounds. (The court may remand "on any equitable ground." 28 U.S.C. § 1452(b).) In this case, equitable factors weigh heavily in favor of remand, especially the presence of state law issues only and non-debtor parties only, the unlikelihood of any effect on the administration of the remaining assets of and claims against the estate, and the remoteness of the "nexus" between the state court action, on the one hand, and the plan and the bankruptcy case, on the other. See In re Cedar Funding, Inc., 419 B.R. at 820-21.[8]

The defendants' position that remand of the state court action might result in inconsistent results as between that action and the plan administrator's adversary proceedings does not outweigh the considerations in favor of remand. The defendants

suggest the state court action implicates the plaintiffs' good faith defense to the fraudulent transfer claims in the plan administrator's adversary proceeding against them and the defendants' in pari delicto defense to the fraudulent transfer claims against them in the other adversary proceeding. In light of the factors weighing in favor of remand, the possibility of inconsistent results carries little weight here.[9]

For the reasons stated, the court intends to grant the motion. The plaintiffs' request for attorney's fees under 28 U.S.C. § 1447(c) will be denied. The court will hear the matter.

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1 The court is not persuaded by the defendants' contention that the plaintiffs included the individual defendants for the sole purpose of destroying federal diversity jurisdiction.

2 This is the "close nexus" test that applies in post-confirmation cases, as adopted by the Ninth Circuit in Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1194 (9th Cir. 2005), citing Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.), 372 F.3d 154, 166-67 (3rd Cir. 2004).

3 The court in Consol. Meridian found "related to" jurisdiction on a different ground – that the claim was specifically "considered by the bankruptcy court when confirming the plan" and "formed part of the calculus of the parties when negotiating the Plan and the pursuit of which is part of the Plan execution and/or implementation." Id. In that case, the claim at issue was the liquidating trustee's claim against the debtor's pre-petition accountants for professional negligence and misrepresentation.

4 The defendants cite several cases for their contrary theory that bankruptcy courts generally have "related to" jurisdiction where the outcome might affect the amount one or the other of the parties will receive as a creditor in the bankruptcy case. Those cases – Kaonohi Ohana, Ltd. v. Sutherland, 873 F.2d 1302, 1307 (9th Cir. 1989); In re Fietz, 852 F.2d 455, 457 (9th Cir. 1988); Nuveen Mun. Trust v. Withumsmith Brown, P.C., 692 F.3d 283, 297-98 (3rd Cir. 2012); and Omega Tool Corp. v. Alix Partners, LLP., 416 B.R. 315, 320 (E.D. Mich. 2009) – do not apply here because either (1) the case was decided before the Ninth Circuit, in Pegasus Gold, modified the Pacor test for post-confirmation matters (Fietz, Kaonohi Ohana); (2) there was no confirmed plan (Kaonohi Ohana); or (3) the case was decided strictly under the Pacor test, as adopted by the Sixth Circuit, without consideration of the post-confirmation distinction announced in Pegasus Gold (Omega Tool, 416 B.R. at 320-22) or under a modified version of the Pacor test that is not the test in the Ninth Circuit (Nuveen, 692 F.3d at 293-95).

5 Thus, in Boston Reg'l, the court held that "when a debtor (or a trustee acting to the debtor's behoof) commences litigation designed to marshal the debtor's assets for the benefit of its creditors pursuant to a liquidating plan of reorganization, the compass of related to jurisdiction persists undiminished after plan confirmation." 410 F.3d at 107. And in Mortgs. Ltd., the court held that "the scope of 'related to' bankruptcy jurisdiction should not change when a plan-created liquidating trust pursues a debtor cause of action." 452 B.R. at 786.

6 The "manipulation of the process" the Kevco court referred to, which the

defendants here contend is akin to the plaintiffs' filing of the state court action after plan confirmation, consisted of amending their complaint post-confirmation in an attempt to recast claims they had originally asserted long before confirmation. The plaintiffs here have done no such thing. Whether, for some reason, they delayed too long in filing their complaint is a matter for the state court.

7 **The factors to be considered for permissive abstention, under 28 U.S.C. § 1334(c)(1), are, however, similar to those to be considered for remand on equitable grounds, under 28 U.S.C. § 1452(b). See In re Tucson Estates, Inc., 912 F.2d 1162, 1166-67 (9th Cir. 1990); Nilsen v. Neilson (In re Cedar Funding, Inc.), 419 B.R. 807, 820-21, n.18 (9th Cir. BAP 2009).**

8 **Virtually the same factors would support permissive abstention, under 28 U.S.C. § 1334(c)(1). See In re Tucson Estates, Inc., 912 F.2d at 1166-67.**

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The risk of inconsistent determinations arises frequently in our judicial system, however. The exact same claims can and have been brought in multiple jurisdictions depending on the citizenship of the parties and the amount at issue. While courts have some flexibility in consolidating diverse actions in a single venue or before a single judge, they are not free to ignore jurisdictional limitations simply because it would promote uniformity. While avoiding inconsistent determinations and/or collateral challenges to a confirmed plan is a valid consideration when determining "related to" jurisdiction, it cannot dominate the analysis lest jurisdiction be expanded for reasons unrelated to the underlying bankruptcy or plan and therefore unauthorized by § 1334(b).

Consol. Meridian, 511 B.R. at 147.

7.	17-20731-D-11 TBG-2	CS360 TOWERS, LLC	CONTINUED MOTION TO USE CASH COLLATERAL 2-15-17 [12]

8.	16-20635-D-7 GMW-3	LISA GARCIA	MOTION TO COMPEL ABANDONMENT 7-5-17 [55]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the debtor's motion to compel the trustee to abandon property and the debtor has demonstrated the property to be abandoned is of inconsequential value to the estate. Accordingly, the motion will be granted and the property that is the subject of the motion will be deemed abandoned by minute order. No appearance is necessary.

9. 10-42050-D-7 VINCENT/MALANIE SINGH
GJH-19

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH CLASS J, K, AND L CONTROVERSIES
6-30-17 [991]

10. 17-21454-D-7 ELLEN DIAL
GAR-1

MOTION TO AVOID LIEN OF FIRST SELECT, INC., AND BROOKE MEWES
6-28-17 [20]

Final ruling:

This is the debtor's motion to avoid a judicial lien held by Brooke Mewes and an alleged judicial lien held by First Select, Inc. ("First Select"). The motion will be denied for the following reasons. First, the moving party failed to serve First Select in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving party served First Select only through the attorneys who obtained a writ of execution on a judgment entered in a state court action brought against the debtor by First Select, whereas there is no evidence those attorneys were authorized to receive service of process on behalf of First Select in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004(b)(3) and 9014(b). See In re Villar, 317 B.R. 88, 93 (9th Cir. BAP 2004).

Second, there is no evidence First Select has a judicial lien, or any lien, on the real property that is the subject of the debtor's motion. Filed as exhibits are (1) a writ of execution issued in a state court action in which First Select is named as the plaintiff, but which names Credigy Receivables, Inc., as the assignee of record of the judgment creditor; and (2) a notice of levy under a writ of execution describing "Tri Counties Bank" (presumably, a bank account of the debtor at Tri Counties Bank) as "the property to be levied upon."[1] That is, the notice of levy does not reference the real property as to which the debtor claims the lien impairs her exemption. There is no evidence either the writ of execution or the notice of levy was recorded with the County Recorder in the county where the real property is located. Thus, there is no evidence either document created a lien on the real property and there is no judicial lien here to be avoided. See Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (9th Cir. BAP 2003), quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992).

Finally, application of the formula in § 522(f)(2)(A) yields the conclusion that there is sufficient equity in the real property over and above the amount owed on the deed of trust plus the amount of the debtor's exemption claim to secure the lien of Brooke Mewes, and thus, the lien does not impair the debtor's exemption. The sum of (a) Brooke Mewes' lien; (b) the amount due on the deed of trust; and (c) the amount of the debtor's claim of exemption in the property is $215,031, whereas the debtor testifies the value of the property is $250,000. Thus, the sum of the liens and the amount of the exemption does not exceed to any extent the value the debtor's interest in the property would have in the absence of any liens, and the lien is not subject to avoidance.

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

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1 According to her Schedule B, the debtor had no funds on deposit with Tri Counties Bank as of the petition date.

11. 17-23155-D-7 TINA BORTOLI — MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A. 6-22-17 [12]

Final ruling:

This is the debtor's motion to avoid a judicial lien held by Capital One Bank (USA), N.A. The motion will be denied for the following reasons: (1) the moving papers do not include a docket control number, as required by LBR 9014-1(c); and (2) the amended notice of motion does not advise the potential respondent of whether written opposition must be filed, and if so, when, and does not advise of the consequences of failing to file timely written opposition (if written opposition is to be required), as required by LBR 9014-1(d)(4).

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

12. 17-23059-D-7 PEMBROKE GOCHNAUER — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1
WELLS FARGO BANK, N.A. VS. 6-22-17 [25]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtor's Statement of Intentions indicates he will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

13. 16-25460-D-7 GABRIEL/CHRISTINA PAULL — MOTION TO EMPLOY REMAX EXECUTIVE OF MODESTO AS BROKER(S)
SSA-3 6-30-17 [32]

Final ruling:

This is the trustee's application to employ a real estate broker. On July 21, 2017, the trustee filed a purported withdrawal of the application. The purported withdrawal was ineffective. Because opposition had been filed, the trustee did not have the right to unilaterally withdraw the application. Fed. R. Civ. P. 41(a), incorporated herein by Fed. R. Bankr. P. 7041 and 9014(c). The court deduces from the purported withdrawal, however, that the trustee does not wish to contest the United States Trustee's opposition to the application. As a result, the application will be denied by minute order. No appearance is necessary.

14. 17-23761-D-7 PETER/MELINDA POWERS — MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
6-2-17 [5]

15. 15-29890-D-7 GRAIL SEMICONDUCTOR — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH SHERI L. CARELLO, NIRO LAW, LTD, PROBATE ESTATE OF RAYMOND P. NIRO, SR., AND JLN PROPERTIES, LLC
DNL-21
7-5-17 [742]

Tentative ruling:

This is the trustee's motion to approve a compromise with Niro Law, Ltd. (the "Niro Firm"); the probate estate of Raymond P. Niro, Sr. (the "Niro Estate"); individual former shareholders of the Niro Firm and other affiliated individuals; and JLN Properties, LLC ("JLN") (collectively, the "Niro Parties"). Mishcon De Reya New York, LLP ("Mishcon") has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted.

"The law favors compromise and not litigation for its own sake, and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed." In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). "Rather than an exhaustive investigation or a mini-trial on the merits, the bankruptcy court need only find that the settlement was negotiated in good faith and is reasonable, fair and equitable." Spirtos v. Ray (In re Spirtos), 2006 Bankr. LEXIS 4894 at *32 (9th Cir. BAP 2006). The court's "proper role is 'to canvas the issues and see whether the settlement falls below the lowest point in the range of reasonableness.'" Id., quoting In re Pacific Gas & Elec. Co., 304 B.R. 395, 417 (Bankr. N.D. Cal. 2004).

Although the bankruptcy court has "great latitude in approving compromise agreements," it may approve a compromise only if it is "fair and equitable." In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988), citing A & C Properties, 784 F.2d at 1381. In making this determination, the court must consider:

> **(a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.**

Id. "Each factor need not be treated in a vacuum; rather, the factors should be considered as a whole to determine whether the settlement compares favorably with

the expected rewards of litigation." Greif & Co. v. Shapiro (In re Western Funding Inc.), 550 B.R. 841, 851 (9th Cir. BAP 2016). The proponent of the compromise – here, the trustee – has the burden of persuasion. A & C Properties, 784 F.2d at 1381.

The Niro Firm represented the debtor in pre-petition litigation against Mitsubishi Electric & Electronics USA, Inc. ("Mitsubishi") that concluded with a $55 million settlement, the proceeds of which were delivered by Mitsubishi to the Niro Firm and immediately disbursed by the Niro Firm to itself and other creditors of the debtor. The trustee's motion describes a host of claims against the Niro Firm having a face value, it can fairly be said, significantly in excess of the $1.35 million the trustee would receive under the compromise. However, the sheer number and complexity of the disputes that would affect the prosecution of the estate's claims against the Niro Parties, together with the trustee's thorough analysis of the Woodson factors as applied to the claims, the fact that the settlement was reached after the parties participated in a two-day mediation with an experienced, highly-respected retired bankruptcy judge, and the prospect of serious challenges to the collection of any judgment, persuades the court the compromise easily meets the fair and equitable test.

The court agrees with the trustee that "[t]he issues [that would be involved in litigation against the Niro Parties] are heavily disputed, factually and legally complicated, and subject to stark dispute." Trustee's Motion, DN 742 ("Mot."), at 13:8-10. With respect to the Niro Firm's distribution of the Mitsubishi settlement proceeds, the trustee charges the firm with overpaying some creditors and underpaying others, in some cases, based on the firm's own self-interest, and of improperly paying itself almost $5 million more than it was entitled to. She also claims the firm improperly advised the debtor with respect to obtaining litigation financing and advised the debtor to settle with Mitsubishi for too low a figure, possibly based on the firm's own financial difficulties at the time.

The court is aware from the trustee's litigation against Donald Stern that there were a number of directors on the debtor's board leading up to and at the time of the Mitsubishi settlement and that there was serious contention among them.[1] One of the key players at the time the distributions were made, Raymond Niro, has died. The trustee states the Niro Firm would challenge the credibility of one of the trustee's key witnesses, Ron Hofer, and would offer testimony of several of its attorney members that would contradict the testimony of another of the trustee's key witnesses, retired California state court Judge Gilbert. The trustee also outlines several legal arguments the Niro Parties would make that raise material doubts about the likelihood the trustee would prevail on the merits.

Overarching all of the substantive issues are the forum selection and dispute resolution clauses in the fee agreement between the debtor and the Niro Firm (amended twice), which themselves might require litigation, quite possibly in Illinois. And as to the legal malpractice claims, the trustee would need to conduct, in essence, a trial within a trial, whether the case were tried under Illinois or California law. See Goldfine v. Barack, 2014 IL 116362, ¶ 24 (2014); Namikas v. Miller, 225 Cal. App. 4th 1574, 1582 (2014). Thus, she would need to hire experts on patent issues, as well as patent attorneys, along with attorneys and experts on legal malpractice. All of the issues the court sees in the trustee's claims against the Niro Parties are certain to be highly fact-intensive and require extensive resources to litigate. In short, based on the above, the court concludes that litigation would be time-consuming, complex, very costly, and certainly

inconvenient, possibly requiring attorneys and witnesses to travel to Chicago for what could possibly become a trial within a trial.

Further, the court is persuaded that if the trustee obtained a judgment, she would face serious hurdles in collecting. The Niro Estate faces disputes over the value of, liens against, and homestead exemption claim in real property that is its primary asset, and the claims against the estate are apparently far greater than the value of its assets, even if the lien against the real property were determined to be invalid. The trustee refers to speculation by some creditors about "lavish riches" hidden by the Niro Firm's principal, now deceased, but no one has offered any specifics. The Niro Firm is no longer in operation, but instead, faces third party lawsuits in Illinois and California arising from its representation of the debtor against Mitsubishi. The trustee suggests the firm's remaining assets will likely be consumed in litigation, and if the trustee were successful in her litigation against the firm, she would have to compete with successful plaintiffs in the other lawsuits for limited resources, if any. The trustee believes the Niro Firm is insolvent, which would "limit[] ultimate recovery to the personal assets of former law firm principals who heavily dispute and will vigorously defend against allegations that could jeopardize their future eligibility to practice law." Mot. at 3:13-15. In addition, reaching the personal assets of the Niro Firm's principals would, as the trustee contends, involve both factual and legal challenges.

The court also finds it significant, and gives substantial weight to, the fact that the settlement was only reached after a two-day mediation session with a highly-respected, retired bankruptcy judge. The court is familiar with and has a good understanding of this type of mediation process. The court is also aware that virtually all of the factors discussed in this tentative are in play, analyzed and thoroughly considered in this type of mediation. In fact, the parties often provide the mediator with certain confidential information regarding the particular strengths and weaknesses of their case that never make it to public record. Again, that the settlement was only reached after a two-day mediation is significant.

Given all of these considerations, the court is persuaded the compromise is in the paramount interest of creditors and compares favorably with the likely rewards of litigation. The court must, however, give proper deference to the views of creditors. First, the court finds it significant, although not dispositive, that Mishcon is the only creditor that has expressed any views on the compromise. Mishcon's first issue is with the quality and extent of the trustee's evidence of the Niro Parties' financial condition. In reply, the trustee testifies to the written sworn financial disclosures from the Niro Parties she reviewed, as well as information from other sources related to "massive sanctions awards" and litigation against the Niro Firm. The trustee employed special counsel over a year ago expressly to investigate the claims against the Niro Parties, including their merits, the range of a likely recovery, estimates of costs and fees involved in their prosecution, and forum issues. The court is satisfied the trustee and her general and special counsel have conducted a sufficiently thorough investigation to support their conclusion as to collectibility. The trustee acknowledges she did not review personal financial information about the individuals being released (presumably, the remaining principals of the Niro Firm and the heirs of Raymond Niro). However, the court does not believe the likelihood of the trustee obtaining a judgment against those individuals is such as to require such an undertaking, especially considering the additional time and expense such an undertaking would require, combined with the other factors discussed above.

Mishcon also contends that, whereas the trustee referred to only one law firm

that has declined to represent her against the Niro Parties on a contingency basis, there are numerous competent law firms that would take the case on contingency. The argument is, in the court's view, a red herring, perhaps unnecessarily raised by the trustee's reference to having consulted one law firm. It is notable that the firm that declined to represent the trustee is the firm that has been the trustee's special counsel employed to investigate the claims; that is, the firm that likely understands the claims better than anyone on the estate's side. Further, the trustee testifies in reply to the opposition she consulted an attorney who is well known in Sacramento for prosecuting legal malpractice claims, who declined the representation. In any event, the possibility that there are dozens, even hundreds, of firms that would take the case on contingency does not in itself mean the claims have significant value, especially when viewed in light of the truly significant nature and extent of the factors weighing in favor of the compromise.

Third, Mishcon suggests the trustee did not sufficiently consider the possibility the entire amount the Niro Firm disbursed to itself from the Mitsubishi settlement proceeds, $21.45 million, would be recoverable as a preference. (The trustee has taken issue only with a $4.95 million portion of that disbursement, representing a 9% penalty the Niro Firm imposed for the debtor's failure to keep up with litigation expenses.) The trustee has responded with her own analysis of the law on the subject and it is clear there are disputed legal issues here. However, the trustee and her general and special counsel have long been aware of the $21.45 million disbursement and the court concludes the possibility of a preference claim was taken into account in this compromise. In any event, the court is not required to rule on disputed issues of law or fact, but only to canvas the issues. Burton v. Ulrich (In re Schmitt), 215 B.R. 417, 423 (9th Cir. BAP 1997). The court is confident that with experienced bankruptcy counsel as both general and special counsel, the trustee gave this issue sufficient consideration in her analysis of the compromise. And importantly, for the reasons already stated collectability is certainly in plan.

Finally, citing In re Mickey Thompson Entm't Group, Inc., 292 B.R. 415, 421-22 (9th Cir. BAP 2003), Mishcon argues the motion should have been pitched up as a motion to approve a sale as well as a compromise, and suggests that "given the tens of millions of dollars at stake – a price higher than $1.35 million can easily be obtained." Mishcon's Opposition, DN 784, at 9:15-16. The trustee responds, quite logically, that no one has come forward to date; she also cites "[t]he general rule in Illinois (and also in California) . . . that it is contrary to public policy to voluntarily assign a legal malpractice claim to another." Trustee's Reply, DN 791, at 6:4-5 (citations omitted). Neither party has cited any authority concerning the sale of legal malpractice claims that are assets of a bankruptcy estate. In this instance, the court finds most important the policy underlying compromises in bankruptcy cases. "The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims." A & C Properties, 784 F.2d at 1380-81. Here, the court concludes that all four of the relevant factors weigh in favor of the compromise, that the compromise is therefore fair and equitable, and that it will likely enhance the return to creditors. Accordingly, the court intends to approve the compromise, but will hear from Mishcon as to whether it is interested in purchasing the estate's claims for more than the compromise amount or knows of someone who is.

The court will hear the matter.

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1 The trustee refers to "the deep animosity developed from the bitter fights that surrounded the Debtor's demise." Mot. at 14:8-9. She also notes that "[n]early all of the key witnesses have a personal stake in the outcome of any contested litigation and could be viewed as biased." Id. at 14:5-6.

16. 15-29890-D-7 GRAIL SEMICONDUCTOR
MPD-1
WILLIS E. HIGGINS, ET AL.,
VS.

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ORDER THE AUTOMATIC STAY DOES NOT APPLY
3-1-17 [579]

17. 17-23905-D-7 RODNEY/KATHLEEN COCKRUM
GMW-1

MOTION TO SET ASIDE DISMISSAL OF CASE
7-11-17 [32]

DEBTOR DISMISSED:
06/30/2017
JOINT DEBTOR DISMISSED:
06/30/2017

Tentative ruling:

This is the debtors' motion to vacate the dismissal of this case. The motion was brought pursuant to LBR 9014-1(f)(2); thus, ordinarily, the court would entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

The moving parties failed to serve the State Board of Equalization, which they scheduled as holding a priority claim for $26,149, apparently at all, and if they did serve the Board, they failed to serve it at its address on the Roster of Governmental Agencies, as required by LBR 2002-1(b). In addition, they failed to serve Citibank, scheduled as holding a general unsecured claim for $60,820, apparently at all, and if they did serve Citibank, they served it at an incorrect address. The debtors utilized the PACER matrix for service of the notice of hearing, and in doing so, they crossed out the names and addresses of the Board and Citibank designated on the matrix as the "preferred mailing address (p)," which indicates they failed to serve those two creditors at those addresses.

It is possible the moving parties intended to indicate they served those two creditors at the addresses in the debtors' schedules, which are listed on the PACER matrix under the following words: "The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed. R. Bank. P. 2002(g)(4)." Thus, the PACER matrix itself expressly states that the creditors listed were not served at the addresses listed below those words. And since the moving parties crossed out the names and addresses above those words, the proof of service, as written, fails to demonstrate service on those two creditors at all. In the event the moving parties served those two creditors at the addresses

below those words, they disregarded the cited code section and bankruptcy rule.

Based on the above service defects, the court intends to deny the motion. Alternatively, if the debtors' counsel files a corrected proof of service showing proper service on the creditors referenced above, the court will consider the motion.

For the reasons stated, the motion will be denied. The court will hear the matter.

18.	17-23132-D-7	RENEE LARUE	ORDER TO SHOW CAUSE - FAILURE TO PAY FEES 7-7-17 [27]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

19.	15-24747-D-7 EAS-3	RAYMOND POQUETTE	MOTION BY EDWARD A. SMITH TO WITHDRAW AS ATTORNEY 7-16-17 [108]

20.	17-21465-D-11	BELINDA SMITH	ORDER TO SHOW CAUSE - FAILURE TO PAY FEES 7-10-17 [68]

Final ruling:

This case was dismissed on July 19, 2017. As a result the order to show cause will be removed from calendar as moot. No appearance is necessary.

21.	17-23167-D-7 GR-1	WILLOUGHBY ARNESON	TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS 6-14-17 [13]

22.	16-23480-D-7 DNL-2	MARISSA MAULDIN	MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH RICKEY D. MAULDIN AND DEBORAH L. MAULDIN 7-10-17 [25]
23.	15-29890-D-7 DNL-24	GRAIL SEMICONDUCTOR	MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH & CUNNINGHAM FOR J. RUSSELL CUNNINGHAM, TRUSTEE'S ATTORNEY(S) 7-12-17 [754]
24.	15-29890-D-7 DNL-25	GRAIL SEMICONDUCTOR	MOTION FOR COMPENSATION FOR SUNNY HATHIRAMANI, SPECIAL COUNSEL 7-12-17 [759]
25.	15-29890-D-7 DNL-28	GRAIL SEMICONDUCTOR	MOTION FOR COMPENSATION FOR BACHECKI, CROM & CO., LLP, ACCOUNTANT(S) 7-12-17 [774]

26.	15-29890-D-7 DMC-2	GRAIL SEMICONDUCTOR	MOTION FOR COMPENSATION FOR CHRISTOPHER D. SULLIVAN, SPECIAL COUNSEL 7-12-17 [780]
27.	15-29890-D-7 DNL-29	GRAIL SEMICONDUCTOR	MOTION TO EMPLOY CHRISTOPHER SULLIVAN AS SPECIAL COUNSEL 7-12-17 [769]
28.	17-22091-D-7 EGS-1 GUILD MORTGAGE COMPANY VS.	ANNETTE JOHNSON	MOTION FOR RELIEF FROM AUTOMATIC STAY 7-17-17 [17]

Final ruling:

The matter is resolved without oral argument. This motion was noticed under LBR 9014-1(f)(2). However, the debtor received her discharge on July 25, 2017 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court finds a hearing is not necessary as to the trustee because the trustee has filed a Report of No Assets and will grant relief from stay as to the trustee and the estate by minute order. There will be no further relief afforded. No appearance is necessary.