

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**August 18, 2022 at 10:30 a.m.**

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1. [22-20786-E-7](#) **MELONIE ROBINSON** **MOTION TO AVOID LIEN OF UNIFUND**  
[CRG-1](#) **Carl Gustafson** **CCR, LLC**  
**7-6-22 [19]**  
**1 thru 3**

**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.

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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, Chapter 7 Trustee, Creditor, creditors, and Office of the United States Trustee on July 6, 2022. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Avoid Judicial Lien is <u>granted</u>.</b>
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This Motion requests an order avoiding the judicial lien of Unifund CCR, LLC A Limited Liability Company (“Creditor”) against property of the debtor, Melonie Ann Robinson (“Debtor”) commonly known as 218 Curtis Drive, Vallejo, California (“Property”).

A judgment was entered against Debtor in favor of Creditor in the amount of \$6,197.24. Exhibit A, Dckt. 22. An abstract of judgment was recorded with Solano County on August 10, 2021, that encumbers the Property. *Id.*

Pursuant to Debtor’s Amended Schedule A, the subject real property has an approximate value of \$580,000.00 as of the petition date. Dckt. 15.

### **Schedule D Shortcomings**

The court notes on Debtor’s original Schedule D, Dckt. 1, Debtor lists only the consensual lien of US Bank, \$330,317.00. Debtor, however, filed an Amended Schedule D, Dckt. 16, which no longer includes US Bank’s consensual lien. Rather, it lists just an additional consensual lien of California Housing Finance Agency for \$19,250.00. Since Docket 16 is an amended filing, it, in effect, removed US Bank’s consensual lien and added California Housing Finance Agency’s consensual lien. If Debtor intends to list US Bank’s consensual lien, as well as California Housing Finance Agency’s, they should file an amended schedule listing all liens encumbering the property. If Schedule D is not further amended, after application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there would be equity to support the judicial lien.

At the hearing, ~~XXXXXXXXXX~~

~~—————The unavoidable consensual liens that total \$349,567.00 as of the commencement of this case are stated on Debtor’s Second Amended Schedule D. Dckt. xx. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$300,000.00 on Schedule C. Dckt. 1.~~

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

### **~~ISSUANCE OF A COURT-DRAFTED ORDER~~**

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

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

~~—————The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Melonie Ann Robinson (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~—————**IT IS ORDERED** that the judgment lien of Unifund CCR, LLC A Limited Liability Company, California Superior Court for Solano County Case~~

2. [22-20786](#)-E-7 **MELONIE ROBINSON**  
[CRG-2](#) **Carl Gustafson**

**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.

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

**The Motion to Avoid Judicial Lien is granted.**

A judgment was entered against Debtor in favor of Creditor in the amount of \$3,617.71. Exhibit B, Dckt. 27. An abstract of judgment was recorded with Solano County on January 19, 2021, that encumbers the Property. *Id.*

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of \$580,000.00 as of the petition date. Dckt. 15.

### **Schedule D Shortcomings**

The court notes on Debtor's original Schedule D, Dckt. 1, Debtor lists only the consensual lien of US Bank, \$330,317.00. Debtor, however, filed an Amended Schedule D, Dckt. 16, which no longer includes US Bank's consensual lien. Rather, it lists an additional consensual lien of California Housing Finance Agency for \$19,250.00. Since Docket 16 is an amended filing, it, in effect, removed US Bank's consensual lien and added California Housing Finance Agency's consensual lien. If Debtor intends to list US Bank's consensual lien, as well as California Housing Finance Agency's, they should file an amended schedule listing all liens encumbering the property. If Schedule D is not further amended, after application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there would be equity to support the judicial lien.

At the hearing, ~~XXXXXXXXXX~~

~~————— The unavoidable consensual liens that total \$349,567.00 as of the commencement of this case are stated on Debtor's Second Amended Schedule D, Dckt. xx. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$300,000.00 on Schedule C, Dckt. 1.~~

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

### **ISSUANCE OF A COURT-DRAFTED ORDER**

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

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

~~————— The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed Melonie Ann Robinson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~————— **IT IS ORDERED** that the judgment lien of Unifund CCR, LLC A Limited Liability Company, California Superior Court for Solano County Case No. FCM169041, recorded on January 19, 2021, Document No. 202100005749, with the Solano County Recorder, against the real property commonly known as 218 Curtis Drive, Vallejo, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.—~~

**Tentative Ruling:** 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.

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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, Chapter 7 Trustee, Creditor, creditors, and Office of the United States Trustee on July 6, 2022. By the court’s calculation, 43 days’ notice was provided. 28 days’ notice is required.

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

<p><b>The Motion to Avoid Judicial Lien is granted.</b></p>
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This Motion requests an order avoiding the judicial lien of The Best Service Company, Inc. (“Creditor”) against property of the debtor, Melonie Ann Robinson (“Debtor”) commonly known as 218 Curtis Drive, Vallejo, California (“Property”).

A judgment was entered against Debtor in favor of Creditor in the amount of \$6,210.47. Exhibit C, Dckt. 32. An abstract of judgment was recorded with Solano County on August 15, 2019, that encumbers the Property. *Id.*

Pursuant to Debtor’s Amended Schedule A, the subject real property has an approximate value of \$580,000.00 as of the petition date. Dckt. 15.

#### **Schedule D Shortcomings**

The court notes on Debtor’s original Schedule D, Dckt. 1, Debtor lists only the consensual lien of US Bank, \$330,317.00. Debtor, however, filed an Amended Schedule D, Dckt. 16, which no

longer includes US Bank's consensual lien. Rather, it lists an additional consensual lien of California Housing Finance Agency for \$19,250.00. Since Docket 16 is an amended filing, it, in effect, removed US Bank's consensual lien and added California Housing Finance Agency's consensual lien. If Debtor intends to list US Bank's consensual lien, as well as California Housing Finance Agency's, they should file an amended schedule listing all liens encumbering the property. If Schedule D is not further amended, after application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there would be equity to support the judicial lien.

At the hearing, ~~XXXXXXXXXX~~

~~\_\_\_\_\_ The unavoidable consensual liens that total \$349,567.00 as of the commencement of this case are stated on Debtor's Second Amended Schedule D. Dekt. xx. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$300,000.00 on Schedule C. Dekt. 1.~~

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

#### ~~**ISSUANCE OF A COURT DRAFTED ORDER**~~

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

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

~~\_\_\_\_\_ The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Melonie Ann Robinson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing;~~

~~\_\_\_\_\_ **IT IS ORDERED** that the judgment lien of The Best Service Company, Inc., California Superior Court for Solano County Case No. FCM160022, recorded on August 15, 2019, Document No. 201900055087, with the Solano County Recorder, against the real property commonly known as 218 Curtis Drive, Vallejo, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.~~

**Tentative Ruling:** 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).**

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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 July 28, 2022. 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 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, -----

<p><b>The Motion to Sell Property is granted.</b></p>
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Kimberly J. Husted, the Chapter 7 Trustee, ("Movant") seeks an order approving the sale of real property, commonly known as 1342 Muscat Cir., Roseville, California ("Property"). Dckt. 175. Trustee makes additional requests, including overbids in increments of \$1,000.00 and an order authorizing:

1. Payments and closing costs in the amount of \$1,535.00 as an administrative expense to the Bankruptcy Estate, payable out of escrow, upon close of escrow, from proceeds of the sale.
2. Pay expenses incurred by Reed Block Realty, in connection with the preservation of the Property, in the amount of \$1,778.00 as an administrative expense. The Order Approving Employment of Reed Block Realty was entered on August 24, 2021. Dckt. 113.

3. Payment of Commission to Trustee's and Buyer's real estate agents as an administrative expense, based on the purchase price of \$531,000.00, three percent (\$15,930) to Reed Block Realty as Trustee's agent and three percent (\$15,930) to Bennie D Bell of eXpRealty, as Buyer's agent.
4. Payment to U.S. Bank National Association, as trustee for RMTP Trust, by and through its servicer Rushmore Loan Management Services, \$335,232.96 plus interest at the rate of \$29.97 per diem from August 13, 2022 to the date of close of escrow payable out of escrow, upon close of escrow, from proceeds of the sale.
5. Payment pro rated and delinquent property taxes due and payment in connection with the Property in the amount of \$1,022.61 as an administrative expense payable out of escrow, upon close of escrow, from proceeds of the sale.
6. Payment to the City of Roseville and/or Placer County for outstanding utility charges in the approximate amount of \$350 as an administrative expense, payable out of escrow, upon close of escrow, from proceeds of the sale.
7. Payment to the City of Roseville for charges owed for Natural Hazard Zone Disclosure Report, smoke alarms, carbon monoxide detectors, and water heater bracing, in the approximate amount of \$99, payable out of escrow, upon close of escrow, from proceeds of the sale.
8. Payment to Placer County the County Documentary Tax in the approximate amount of \$292.05, payable out of escrow, upon close of escrow, from proceeds of the sale.

Pursuant to Local Bankruptcy Rule 9014-1(d)(5)(B)(ii), these requests for relief may be joined in a single motion.

The proposed purchaser of the Property is Andre Normal Jr., and the terms of the sale are:

- A. Purchase Price: \$531,000.00.
- B. Close of Escrow: Fifteen (15) days after filing of Court's order approving the sale.
- C. Warranties: The sale of the Property is "as-is" with all its faults and with no right of offset in price or reduction.
- D. Initial Deposit: \$1,000.
- E. Trustee shall pay: Escrow fees, closing costs, fees owed to City of Roseville, prorated and delinquent property taxes, fifty percent (50%) of any County transfer tax.

- F. Buyer shall pay: Fees and costs associated with issuance of an owner's title policy, fifty percent (50%) of any County transfer tax, all fees associated with Fidelity National Home Warranty.

## **CREDITOR U.S. BANK'S NONOPPOSITION**

U.S. Bank National Association, as trustee for RMTP Trust, filed a Nonopposition on August 5, 2022. Dckt. 182.

## **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: **XXXXXXXXXXXXXXXXXX**.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it allows approximately \$135,245.85 net proceeds to be recovered by the Estate.

## **Request for Waiver of Fourteen-Day Stay of Enforcement**

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because of the rapid accrual of interest on US Bank's claim and real property taxes. Additionally, the Property is currently vacant.

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

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

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

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

**IT IS ORDERED** that Kimberly J. Husted, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Andre Normal Jr. or nominee ("Buyer"), the Property commonly known as 1342 Muscat Cir., Roseville, California ("Property"), on the following terms:

- A. The Property shall be sold to Buyer for \$531,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit 6, Dckt. 179, 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. Payments and costs include:
1. Closing costs in the amount of \$1,535.00.
  2. Expenses incurred by Reed Block Realty, in connection with the preservation of the Property.
  3. Commission to Trustee's and Buyer's real estate agents as an administrative expense, Reed Block Realty as Trustee's agent and Bennie D Bell of eXpRealty, as Buyer's agent.
  4. U.S. Bank National Association, as trustee for RMTP Trust, by and through its servicer Rushmore Loan Management Services, the lien balance plus interest at the rate of \$29.97 per diem from August 13, 2022 to the date of close of escrow.
  5. Pro rated and delinquent property taxes due.
  6. Outstanding utility charges to the City of Roseville and/or Placer County.
  7. Outstanding charges owed for Natural Hazard Zone Disclosure Report, smoke alarms, carbon monoxide detectors, and water heater bracing payable to City of Roseville.
  8. County Documentary Tax payable to Placer County.
- C. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

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

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**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).**

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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 13 Trustee, on May 31, 2022. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Excuse Turnover and Confirm Exemption from Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 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. Opposition was filed.

**The Motion to Excuse Turnover and Confirm Exemption from Automatic Stay**  
**is XXXXXXXXXXXXXXXXXXXX**

## **JULY 28, 2022 HEARING**

The Receiver has recounted his view of a four year history of the State Court Action and the shortcoming of Debtor and her Family. Debtor has provided her view of the past four years, the inadequacy of her prior counsel, and her perceived unfairness of the State Court process.

As this court addressed with counsel for the Debtor, this bankruptcy case is not merely a way to derail the proper exercise of the Receiver's powers and fulfilling his obligations in the State Court Action. It could properly be a good faith, bona fide Chapter 13 reorganization with the Debtor, as the fiduciary of the bankruptcy estate and then the fiduciary plan administrator under a confirmed plan, to have the repairs and remediation completed, and then either sell the Properties if necessary.

The court presented the situation to Debtor and Debtor's counsel in a very base way - "It's Time to Put Up or Shut Up" in moving forward to reorganize in bankruptcy after the State Court Action having been around for four plus years and the Receiver ready to proceed. The "Put Up" is not only setting a prompt deadline to have the work done, but the "money in the bank" to pay for getting it promptly done.

The Debtor and Receiver have filed their respective Status Reports for the continued hearing on July 28, 2022. While the Receiver remains skeptical as to Debtor and her family's ability to prosecute the remediation, Debtor has now assemble \$30,000.00 of the projected \$46,000.00 in necessary funds to correct the violations. The cost is reported as being "only" \$46,000.00 because Richard Sanders, the General Contractor, ("General Contractor") is providing these services at a discounted rate. Additionally, Debtor's counsel reports that the additional \$16,000.00 can be assembled and deposited in the next two weeks.

As discussed at the hearing, the costs will likely be higher as it appears that a subcontractor who is licensed to install fire suppression systems (which General Contractor is not) for the structure.

Counsel for the Debtor reported having \$5,000.00 in his trust account and five \$5,000.00 cashier's checks issued by Wells Fargo Bank, N.A., with the checks made payable to the General Contractor. As the court noted at the hearing, the licensed professional General Contractor's employment will need to be authorized by the court and his fees authorized to be paid pursuant to 11 U.S.C. §§ 330, 331.

Additionally, the now \$30,000.00, plus the additional amounts to fund the repairs, shall not be in the form of cashier's checks sitting in Debtor's counsel's drawer (subject to possible aging out or cancellation), but will be deposited in a blocked account established by the Debtor, as the fiduciary of the bankruptcy estate, at Wells Fargo Bank, N.A.

The Contract is given a senior lien on the monies in the blocked account for the fees and expenses he is authorized to be paid by this court. The Receiver is given a second lien on the monies for costs and expenses in connection with this Bankruptcy Case in the event that Debtor and her family, or the General Contractor, default in performance of the repairs and other remediation to the Properties and the stay is modified to allow the Receiver to proceed in the State Court Action to address and remediate the violations.

The Parties are to conduct a joint inspection of the Properties, with at least the respective counsel and contractors, to identify any questions as to what repairs and remediation needs to be done.

Debtor will file a Motion for Authorization to Employ Richard Sanders as the licensed General Contractor to do the repairs and remediation, as well as obtain any necessary subcontractors. The Motion will be supported by the contract for the services to be rendered, which will include the benchmark dates for the various phases of the repairs, construction, and remediation which will be used by the court and Parties to track Debtor's performance of her obligations.

From what has been presented, the remaining repairs and remediation are necessary for City Ordinance Compliance confined to the property itself, and not a public harm (such as an oil spill, impairment of transit, or the like). These repairs and remediations are more in the nature of economic damages to be addressed and corrected for the private use of property – And Compliance With the Law.

The court having a \$30,000.00 cash fund to be shortly established and it soon being funded to \$46,000+, the remedy through a bankruptcy plan appears more proper and consistent with the Bankruptcy

Code. Additionally, it provides the Receiver the forum and ability to fulfill his obligations having been supported by the Superior Court, see that the remediation and repairs occur, and prevent the Debtor and her family viewing the bankruptcy reorganization as merely a license to do nothing.

### **REVIEW OF MOTION AND PRIOR HEARINGS**

Gerard F. Keena II (“Movant-Receiver”) moves the court for an order confirming that the ongoing receivership for real properties commonly known as 1039 and 1049 Claire Ave, Sacramento, California (the “Properties”) deemed a public nuisance is excused from the automatic stay in effect in this case pursuant to 11 U.S.C. § 362(b)(4). Movant-Receiver also requests they should be excused from turnover under 11 U.S.C. § 543.

In the Motion, the grounds stated with particularity (Fed. R. Bankr. P. 9013) include the following (as summarized by the court unless shown in “quotation marks”):

- A. The Receiver was appointed in the State Court Action based on the properties being a public nuisance.
- B. The Properties were littered with trash and debris. There were numerous vehicles in various states of dismantling.
- C. The Properties appeared to be an automotive scrap yard.
- D. The Debtor was making hazardous, unpermitted construction and renovations on the Property.
- E. Debtor had excessive animals on the Properties in violation of local law, and appears to have been attempting to run a breeding business
- F. The Receiver was appointed “over a year ago”, but have been unable to “fully rehabilitate the Properties while the Properties are subject to the jurisdiction of the Bankruptcy Court.
- G. The current Bankruptcy Case was filed one week after the abandonment and the day before the hearing on the Receiver’s plan in the State Court Nuisance Action.
- H. The Trustee seeks to proceed to fulfill his duties in the State Court Nuisance Action.

Motion; Dckt. 12

In Movant-Receiver’s Memorandum of Points and Authorities (Dckt. 19), Movant-Receiver states the Properties will likely be sold subject to State Court approval to fund and carry about their abatement. Dckt. 19 at 14. Movant-Receiver can only abate the nuisances once they receive authorization from the State Court approving their proposed receivership plan, however, Movant-Receiver can only move forward with the State Court action if they are granted relief from the automatic stay. *Id.* at 15.

### **Prior Bankruptcy Case**

On June 29, 2021, Debtor Nadia Zhiry commenced a Chapter 7 bankruptcy. Case No. 21-22759. There, Movant-Receiver filed a Motion for relief from the automatic stay from real properties. *Id.*, Dckt. 67. Movant-Receiver's Motion was made pursuant to 11 U.S.C. § 362(b)(4) to continue the enforcement of a receivership order and abatement of a nuisance on the Properties. The Motion was granted on September 16, 2021. *Id.*, Order, Dckt. 67. The Movant-Receiver's Order granting relief in the prior case was entered seven months prior to the commencement of the Current Chapter 13 case.

Debtor received a discharge in the prior the Chapter 7 case on April 20, 2022. *Id.*, Dckt. 85. In the prior

This Chapter 13 Case was filed on May 25, 2022. The prior Chapter 7 Case has not yet been closed. A review of the Docket for the prior Chapter 7 Case discloses that on May 17, 2022 the court entered an order abandoning the Properties. *Id.*; Order, Dckt. 96. However, the Order does not state to whom the Properties have been abandoned.

### **Debtor's Opposition**

Debtor filed an opposition to this motion on June 7, 2022 (Dckt. 24). Debtor states the following to be disputed material facts:

1. The subject property is not in the same condition as the time of Receivership/Court Order on May 3, 2021.
2. There are not 13-24 vehicles on either property.
3. There are no illegal apartments on either property.
4. There are no cages nor kennels on either property.
5. The Receiver has rejected any plan to address the deficiencies and has opposed correction by the debtor.
6. The Receiver's Motion to exercise control of subject property.

Debtor states there is substantial equity in the property to remedy the issues at hand and that there is more than enough equity to pay claims by the Receiver and the City. Debtor also states the Movant is a person and not a governmental unit and therefore cannot take advantage of the police and regulatory exception. In support of the proposition that a State Court appointed receiver to address a public nuisance is a person and the provisions of 11 U.S.C. § 362(b)(4), Debtor cites to *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175 (5th Cir. 1986), (without quoting the decision or providing a pin cite) which states in relevant part:

This case presents the question of whether a debtor, who has filed a petition under Chapter 11 of the Bankruptcy Code, can be forced to comply with federal and state environmental laws designed to protect the public health and safety, before that debtor has filed its plan of reorganization.

...

We agree with the conclusion of the bankruptcy court and the district court that the automatic stay does not apply to the EPA's actions in this case. The EPA has the authority to enforce its regulatory power, that is, to require CORCO to comply with the federal and state environmental laws and regulations at issue in this case. The enforcement actions of the EPA in this case do not come within the ambit of § 362(a)(1) because they are actions to enforce police and regulatory powers, thus falling within the § 362(b)(4) exception to the automatic stay. The EPA's actions are not an attempt to enforce a money judgment, proscribed by § 362(b)(5), notwithstanding the fact that CORCO will be forced to expend funds in order to comply.

The exception from the automatic stay for proceedings to enforce police and regulatory powers is not, as appellants suggest, limited to those situations where "imminent and identifiable harm" to the public health and safety or "urgent public necessity" is shown. The words of §§ 362(b)(4) and 362(b)(5) allow for no such reading. The language of these exceptions is unambiguous -- it does not limit the exercise of police or regulatory powers to instances where there can be shown imminent and identifiable harm or urgent public necessity.

...

We turn now to the question of whether, under the facts of this case, the bankruptcy court abused its discretion in refusing to issue a stay of EPA proceedings under 11 U.S.C. § 105.

...

The district court agreed with the bankruptcy court's conclusion that CORCO had failed to establish the prerequisites for a § 105 stay, since "they concede they cannot prevail on the merits by their admissions that no Plan B has been filed and no groundwater monitoring system exists." 17Link to the text of the note Slip op. at 3.

*In re Commonwealth Oil Refining Co.*, 805 F.2d 1175 at 1171, 1183-1184, 1188, 1189.

With respect to the Receiver being a person, in the State Court Action, the Plaintiff is the City of Sacramento. Exhibit A, Order Appointing Receiver; Dckt. 14. The City obtained the appointment of a receiver to, under court supervision and providing Debtor with a forum to enforce her rights, to undertake the acts necessary to address the asserted nuisance.

Also, Debtor disputes the fact that the public nuisance is no longer at issue they believe the action should be dismissed. Additionally, Debtor states that a Chapter 13 Plan has been filed which seeks to remedy all issues through a comprehensive review plan that will allow the family to repair the home.<sup>FN.1.</sup>

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FN. 1. Neither in the Opposition or the Declaration in Support does Debtor address why Debtor is not in the State Court Action, demonstrating that there is no nuisance, that Debtor and Debtor's family has "seen the light," corrected some of the problems, and that the duties of a receiver to abate the nuisance will not be required, though the receiver could document Debtor and Debtor's family complying with the orders of the State Court to complete certain actions.  
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Evidence Presented in Opposition

Vera Zhiry, identified as the daughter of Debtor, provides her personal knowledge testimony (Fed. R. Evid. 601, 602) in a Declaration in Opposition to the Motion. Dec. Dckt. 25. In her Declaration, Vera Zhiry testifies (identified by paragraph number in the Declaration):

3. We have removed all the cars from the property.

The “we” is not identified, how this was accomplished is not explained, and where these cars have either been disposed of or relocated is not stated.

4. There are no illegal apartments on the property.

Vera Zhiry provides the court with her legal conclusion that there are no “illegal apartments” on the “property” (testifying in the singular). No information is provided as to what corrective acts were taken, whether they were done in compliance with a State Court order or violation notice from the City of Sacramento.

5. There are no Cages and there are no kennels on the property.

No explanation is given as to what happened to cages, kennels, and dogs on the property. How they were re-homed, or merely “temporarily relocated” and likely to return in short order.

No other evidence is provided in Opposition to the Motion.

#### Statement of Disputed Facts

Debtor has also provided a Statement of Disputed Facts as part of the Opposition. In looking at these “Disputed Facts,” they generally appear to be “Facts” within the province of the State Court Judge in whether that Judge’s receivership order should continue in force and effect, as well as whether the Receiver’s proposed plan in State Court should be ordered by the State Court Judge, or should Debtor’s plan of action be ordered (Debtor and Debtor’s family having demonstrated that they have corrected many of the “ills” that led to the appointment of the Receiver and that such “intervention” to complete the abatement of any nuisance is no longer necessary.

The fifth stated Material Disputed Fact is that, “The Receiver Has rejected any plan to address the Properties' deficiencies" with Debtor's Counsel, and has opposed ANY corrections by the Debtor.” Dckt. 26. The Receiver is not operating as an omnipotent sovereign, but only to the extent as authorized by the State Court Judge in the State Court Receivership Action. Debtor does not offer any explanation as to why Debtor and her family do not have the “access to justice” in the State Court Action by presenting any such disputes to the State Court Judge.

#### **APPLICABLE LAW**

##### **No Existence of Automatic Stay Under 11 U.S.C. § 362(b)(4)**

The court begins with considering the provisions of 11 U.S.C. § 362(b)(4) which excepts actions and proceedings from the automatic stay to enforce police or regulatory powers of a governmental unit. 3 COLLIER ON BANKRUPTCY ¶ 362.05[5] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). This includes

the enforcement of certain judgments other than money judgments, except those pursuant to § 362(a)(2). *Id.* at [5][a].

Legislative history indicates enforcing environmental laws is a permissive use of a governmental unit's police or regulatory powers. 3 Collier on Bankruptcy P 362.05 (16th 2022) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978)). Collier on Bankruptcy goes in detail with this approach:

In [*Penn Terra Ltd. v. Department of Environmental Resources*], the debtor had operated its coal mines in violation of state environmental protection laws. After the debtor commenced a bankruptcy case, the state Department of Environmental Resources sought an injunction directing the debtor to comply with a prebankruptcy consent order requiring it to clean up the environmental damage on its property. The debtor maintained that the action was stayed because it was in essence an attempt to enforce a money judgment. According to the debtor, because the action would require the debtor to spend money to remediate the environmental problems, the state was merely seeking to have the debtor finance the cleanup so the state would not have to do so. The court rejected that argument, finding that there is a difference between an equitable action to require or prevent particular behavior and a legal action to recover a money judgment. The court found that when the state sought an injunction requiring certain action, it was not seeking money, but rather was seeking performance.

On the other hand, in *Ohio v. Kovacs* the Supreme Court held that an action by the State of Ohio to require an individual debtor to clean up environmental damage was a “claim” and the debtor’s cleanup obligation was a “debt” that could be discharged in bankruptcy. The court found that the state did not expect the debtor to engage in the cleanup himself; rather it expected the debtor to expend funds to effect the cleanup. Since the debtor’s obligation could be satisfied by the payment of funds, the state’s action was a claim that could be discharged.

At first blush, *Kovacs* seems at odds with *Penn Terra*. After all, *Kovacs* found that a debtor’s cleanup obligation was a debt because the obligation could be satisfied by payment of money. *Penn Terra* found that an order requiring a cleanup was not a monetary judgment, even though presumably the order could be satisfied by the payment of money to finance a cleanup.

Yet it is important to remember the different contexts in which the cases arose. Clearly, if the debtor’s obligation can be satisfied by the payment of money, it is a claim under the definition of that term in section 101 and, therefore, is a dischargeable debt. Nevertheless, former section 362(b)(5), under which the case was decided, does not bar enforcement of a “claim”; instead, it bars enforcement of a money judgment. Thus, it would appear that the cases can be reconciled by recognizing that the state can enforce a judgment or order against the debtor requiring the expenditure of funds but that the debtor’s obligation may be discharged in bankruptcy and, in any event, the state may not enforce the obligation by requiring the debtor to pay money damages for breach of the obligation.

3 Collier on Bankruptcy P 362.05 (16th 2022) (distinguishing *Penn Terra, Ltd. v. Dep't of Env'tl. Res.*, 733 F.2d 267 (3d Cir. 1984) from *Ohio v. Kovacs*, 469 U.S. 274 (1985)).

Under the current provisions of 11 U.S.C. § 362(b)(4), the fact an action may have economic consequences on a debtor is not determinative. *In re Basinger*, No. 01-02386, 2002 Bankr. LEXIS 1925, at \*12 (Bankr. D. Idaho Jan. 31, 2002). Rather, two tests have been developed to determine whether the judgment will be enforced: the pecuniary purpose test and the public policy test.

Under the pecuniary purpose test, the court asks whether the governmental unit is acting pursuant to a matter of public safety and welfare rather than a governmental pecuniary interest. *Id.*; *In re Berg*, 230 F.3d 1165 (9th Cir. 2000); *In re First All. Mortg. Co.*, 264 B.R. 634 (C.D. Cal. 2001); See generally *PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

Under the public policy test, the court asks whether the government action is designed to effectuate public policy rather than to adjudicate private rights. *Id.*; *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9th Cir. 2005); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986). Actions that advantage a discrete and identifiable set of individuals would fail the public interest test. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005); *City & Cty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115 (9th Cir. 2006).

Prior cases have recognized environmental enforcement actions do not interfere with pecuniary purpose or public policy tests. *Basinger*, 2002 Bankr. LEXIS 1925, at \*29; *Dykes v. TD Dev., LLC*, No. HHD-CV206126173S, 2021 Conn. Super. LEXIS 2097, at \*7 ([T]he purpose of the County's wetland permitting laws, as well as the injunctive and enforcement proceedings pursuant thereto, are for the purpose of deterring the Debtor's ongoing environmental misconduct.); *In re Fernandez*, 22 Fla. L. Weekly Fed. B 367 (U.S. Bankr. S.D. Fla. 2010) ([P]laintiff, acting in her official capacity as commissioner of a governmental unit, is exercising her duty to protect the environment and Connecticut's natural resources . . . and . . . the public safety and welfare . . ."); *Diaz v. Tex. (In re Gandy)*, 327 B.R. 796, 805 (Bankr. S.D. Tex. 2005) ("The action meets the pecuniary interest test because the governmental units were pursuing a matter of public safety and welfare through injunctive relief rather than seeking a monetary award. . . . The action also satisfies the public policy test because the purpose of the proceeding is to further public policy instead of adjudicating private rights.").

The current enforcement action at issue was brought by the City of Sacramento under California Health and Safety Code. Memorandum of Points and Authorities, Dckt. 19 at 11:11-12. The Movant-Receiver was appointed to abate the nuisances in accordance with California Health and Safety Code § 17980.7. It is more than clear to this court that the city, as a governmental unit for purposes of 11 U.S.C. § 362(b)(4), is seeking to use enforce their police and regulatory power.

At the time the enforcement action commenced, Movant-Receiver describes the Properties in:

[D]eplorable condition, littered with trash, junk, and debris. Numerous vehicles in various states of dismantling lay about the Properties, as Debtor appears to be using ( or allowing her family members to use) the Properties as an unauthorized automotive scrap yard in violation of local zoning ordinances. Debtor has also continued with hazardous, unpermitted construction and renovations at the Properties. Finally, Debtor houses excessive animals in violation of local law in gross, inhumane conditions, in what appears to be attempts to breed them.

Motion, Dekt. 12 at 2:11-18. Movant-Receiver describes the Properties presently as continuing to deteriorate and become a greater hazard to the community. Additionally, Movant-Receiver states the action is to “abate the public nuisances for the health and safety of the community, not to preserve the private pecuniary interests of any creditors or government entity.” *Id.* at 2-3.

Similar to the environmental enforcement actions, here, the purpose of the nuisance enforcement action is clearly for the purpose of public safety, welfare, and policy, rather than a pecuniary purpose or adjudicating private rights. The enforcement action falls squarely into a governmental unit’s police and regulatory powers. The Properties as described are not only an eye sore, but were presented in the State Court Action to present grave public health and safety concerns that should be remedied. Therefore, the enforcement action is clearly excused from the automatic stay under 11 U.S.C. § 362(b)(4).

### **Movant-Receiver Not a Custodian Under 11 U.S.C. § 543**

Movant-Receiver additionally contends they are not a “custodian” under 11 U.S.C. § 543. 11 U.S.C. § 543 requires a custodian with knowledge of the commencement of a case to deliver to the trustee any property of the debtor held by or transferred to the custodian.

The Bankruptcy Code defines custodian as a receiver or trustee of any property of the debtor appointed in a case or proceeding not under this title, which Congress states as:

(11) The term “custodian” means—

(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;

(B) assignee under a general assignment for the benefit of the debtor’s creditors; or

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor’s creditors.

11 U.S.C. § 101(11). On its face, the first description in § 101(11)(A) uses the simple word “receiver.”

Congress provides in 11 U.S.C. § 543 for a “custodian” to turnover property of the bankruptcy estate in the custodian’s possession to the trustee (which would include a Chapter 13 debtor exercising the powers, duties, and responsibilities of a trustee) unless such custodian was excused by the court as provided in 11 U.S.C. § 543(d).

In reviewing the cases, a “clear weight of authority” and legislative history establish a custodian under § 101(11) “must be primarily concerned with the prepetition liquidation of a debtor’s property or the protection of creditor’s rights.” *MacMullin v. Poach*, No. CV-08-0768-PHX-FJM, 2009 U.S. Dist. LEXIS 19730, at \*5 (D. Ariz. Mar. 4, 2009). The cases and Legislative History cited in *MacMullin v. Poach* include: (1) *Cash Currency Exchange v. Shine (In re Cash Currency Exchange)*, 762 F.2d 542, 553 (7th Cir. 1985); (2) *In re Camdenton United Super, Inc.*, 140 B.R. 523, 525 (Bankr. W.D. Mo. 1992); (3) *In re Gold*

*Leaf Corp.*, 73 B.R. 146, 148 (Bankr. N.D. Fla. 1987); (4) *In re Kennise Diversified Corp.*, 34 B.R. 237, 244-45 (Bankr. S.D.N.Y. 1983); and H.R. No. 95-595, 95th Cong. 1st Sess. 310 (1977),

Paragraph (11) [enacted as (10)] defines “custodian.” There is no similar definition in current law. It is defined to facilitate drafting, and means a prepetition liquidator of the debtor's property, such as an assignee for the benefit of creditors, a receiver of the debtor's property, or administrator of the debtor's property. The definition of custodian to include a receiver or trustee is descriptive, and not meant to be limited to court officers with those titles. The definition is intended to include other officers of the court if their functions are substantially similar to those of a receiver or trustee.

Here, Movant-Receiver’s responsibilities are to correct the various violations of California’s Health and Safety Codes. Movant-Receiver’s actions are not aimed at pre-petition liquidation of debtor’s property nor preserving any creditors rights. *See In re Kennise Diversified Corp.*, 34 B.R. 237, 245 (Bankr. S.D.N.Y. 1983). It is clear to the court that Movant-Receiver is not a custodian under 11 U.S.C. § 543, and therefore, turnover of the Properties are not required.

### **Review of the Current Chapter 13 Bankruptcy Case**

Debtor commenced this Chapter 13 Bankruptcy Case on May 25, 2022. On June 8, 2022, Debtor filed her Schedules and Statement of Financial Affairs. Dckt. 28. In reviewing the Schedules, the court notes the following:

- A. The two Properties are stated to have values of \$750,000 and \$300,000. Schedule A/B, ¶¶ 1.1, 2.1; Dckt. 28.
- B. Debtor’s cash and bank account balances total \$300. *Id.*, ¶¶ 16, 17.
- C. Debtor’s total personal property value is stated to be \$6,900. *Id.*, ¶¶ 55-62.
- D. On Schedule C, Debtor claims a homestead exemption pursuant to California Code of Civil Procedure § 704.730 in two different properties, the 1049 Claire Ave, Sacramento, CA property, and the 1039 Clair Ave, Sacramento, CA property. Schedule C, § 2; *Id.*
- E. Debtor lists the two Properties as being cross-collateralized to secure two obligations to JPMorgan Chase Bank; the first in the amount of (\$173,244.94) and the second in the amount of (\$83,769.34), for total debt of (\$257,014.28) being secured by the two Properties. Schedule D, ¶ 2.2, 2.3; *Id.*
- F. On Schedule I Debtor states that she is disabled and her only income is Social Security benefits of \$505.57 a month. For her Non-Debtor Spouse, while stating that he is employed, no wage or business income is shown for him. The only income for the Non-Debtor Spouse is identified as “SSI” of \$1,000.00 a month.

Debtor’s aggregate household gross income is \$1,505.57 a month. Schedule I; *Id.* at 19-20.

G. On Schedule J, Debtor lists as reasonable and accurate monthly expenses of (\$1,005.57) for Debtor and her Non-Debtor Spouse. Schedule J; *Id.* at 21-22. The court notes these monthly expenses include:

1. Mortgage/Rental Expense.....\$0.00
2. Homeowner's Insurance.....\$0.00
3. Property Taxes.....\$0.00
4. Home maintenance and repair.....\$0.00
5. Clothing/Laundry.....(\$10) per month for household
6. Personal care products/services.....(\$10) per month for household
7. Medical/dental.....(\$20) per month for household
8. Transportation.....(\$100) (Debtor listing one vehicle on Schedule A/B)
9. Vehicle Insurance.....(\$50)

Debtor then concludes that Debtor's household has \$500.00 of monthly net income.

On the Statement of Financial Affairs Debtor states that neither Debtor nor Non-Debtor Spouse had any gross income from wages, commissions, or operating a business in 2022, 2021, and 2020. Statement of Financial Affairs, Question 4; *Id.*

Debtor lists having only Social Security income for both Debtor and Non-Debtor Spouse, which totals \$7,500 in 2022, \$18,200 in 2021, and \$18,000 in 2020. *Id.*, Question 5.

With respect to payments made within 90 days of filing bankruptcy, Debtor lists payments to JPMorgan Chase Bank, stating that the payments were made by her daughter. *Id.*, Question 6.

#### Chapter 13 Plan Filed

On June 8, 2022, Debtor filed her Chapter 13 Plan. Dckt. 29. Debtor seeks to apply her \$500 monthly net income to fund the Plan for 36 months. Plan, ¶¶ 2.01, 2.03. For Administrative Expenses, Debtor is to pay the Trustee's Fees and \$2,500 for her attorney's fees. *Id.*, ¶ 3.05.

The Plan provides for the following payments to creditors through the Chapter 13 Plan:

1. Class 1 Secured Claims.....\$0.00
2. Class 2 Secured Claims.....\$0.00
3. Class 3 Secured Claims Surrender.....None

4. Class 4 Secured Claims Paid Directly
  - a. JPMorgan Chase Bank to be paid \$1,500 and \$250 a month by Debtor's daughter.
5. Unsecured Priority Claims.....\$0.00
6. General Unsecured Claims, 100% Dividend.....\$61,464

To fund the payment of the \$61,464 in general unsecured claims, the Additional Provisions, § 7.01 and § 7.02 state that the Debtor's Adult Children shall purchase the "Subject Property" (not a defined term) within eighteen months (of some non-specified date), or in the alternative sell the Property (singular) to a third party.

It further provides that Debtor's children will fund all of the cleanup of some property, intending to have it done within 60 days of filing of the bankruptcy case (July 24, 2022), then have City inspections done, Debtor will obtain permits within six months to do the work for which the inspections are to be done, and Debtor will have all of the corrective work done within twelve months.

Looking back to the prior Chapter 7 Case, Debtor stated having only \$505.57 a month in Social Security income, and did not list any income information for her Non-Debtor Spouse. 21-22759; Schedule I; Dckt. 14 at 31-32. On the Statement of Financial Affairs Debtor stated that she was not married. *Id.*; Statement of Financial Affairs, Question 1; Dckt. 14 at 37. On Schedule J in the prior Chapter 7 Case, in 2021 Debtor stated under penalty of perjury that her household monthly expenses included:

1. Home maintenance.....(\$150)
2. Clothing/laundry.....(\$50)
3. Personal care products/services.....(\$75)
4. Transportation.....(\$150)

In the current Chapter 13 Case, Debtor states that now a year later, the above expenses are substantially lower. It is unclear how such conflicting statements under penalty of perjury can be made by Debtor.

It appears that a serious question exists as to whether Debtor has the financial, physical, and mental ability to engage in the property remediation, hiring the necessary construction professionals, obtaining permits, clearing inspections, and then marketing and selling the Properties in the an eighteen month period.

Debtor and her family has had the opportunity to address the problems with the Properties, deal with the City, then address them in the State Court Action, but could not do so. This raises concerns about the Debtor, her finances, and who has been (or has not been) looking out for Debtor. Debtor's current counsel likely has insights into that situation and any special needs his client may have, or which may need to be addressed.

## **JUNE 14, 2022 HEARING**

The court, after substantial advocacy and interaction between the court and respective counsel, the court determined that continuation of the hearing to allow for constructive discussion between the parties and counsel to occur. While the grounds stated by the Receiver have merit, there is the question of whether a good faith Chapter 13 Plan can be prosecuted, with the court exercising the exclusive federal court jurisdiction over property of the Bankruptcy Estate. 28 U.S.C. § 1334(e).

It is clear that over the past several years that the Debtor and her family have not managed the Properties, the situation, or the State Court Action well. Debtor's daughter was at the hearing and indicated that she laid the blame (the court's characterization) on their state court counsel. However, from what has been presented to the court, it appears that Debtor and Debtor's family continued in the use of the Properties inconsistent with not only the City ordinances, but in a manner to increase the violations which led to the State Court Action and the Receiver being appointed. This is part of what often is the redemptive process of bankruptcy.

Though if Debtor was appearing on her own the conclusion would likely be that the court allow the State Court Receiver to fulfill his duties and have the State Court Action Judge "run the show." However, there has been a significant change that may offer Debtor and her family a narrow opportunity to avoid a receivership sale of the Properties. Debtor has now engaged an experienced counsel who in the past has demonstrated an ability to get previously uncooperative, set in their way debtor clients in this type of situation to toe the line, follow the law, and properly address the issues and maximize their economic return in a bad situation.

The court discussed at the June 14, 2022 hearing, how Debtor and her family could comply with the law, address the violations on the Properties, and promptly market and sell the Properties through the federal bankruptcy process.

For the City of Sacramento and the people in Debtor's neighborhood, such would be done with tight federal court orders in place for prompt performance of the corrections and marketing and sale of the Properties. Rather than the bankruptcy process being a delay of the City having its ordinances enforced, the bankruptcy process would provide the City with tight orders to get things done or the Receiver will proceed in the State Court Action. As the court noted, Congress created the bankruptcy judgeships so that bankruptcy judges have only one focus – to address the bankruptcy and bankruptcy related matters in the cases before such judges. Bankruptcy judges are not distracted by other areas of the law (such as criminal, probate, family, immigration, and the like), but are there focused and ready to address any and all issues relating to the bankruptcy case.

It appearing that there may be the seed of a good faith, rapidly performed Chapter 13 Plan the court has continued the hearing. An orderly cleanup and sale through the bankruptcy process may allow Debtor to salvage more than if the property goes through a receivership sale.

## **JUNE 30, 2022 HEARING**

Debtor has filed a Status Report, asserting that communications with the City of Sacramento concerning this Property and what remains to be addressed has been impaired. Status Report; Dckt. 37. The Status Report does not address what Debtor and Debtor's family members have been doing to commit the monies necessary to address the asserted remaining cleanups and corrections, nor has the Debtor sought to

obtain authorization to employ a real estate broker (which broker could advise the Debtor of what improvements enhance the prompt sale value of the Property and which would be “lost value” for potential purchasers.

At the hearing, counsel for the Debtor expressed frustration, stating that the Receiver was telling the City of Sacramento to not communicate with Debtor and Debtor’s counsel. Counsel for the Receiver stated that he issued a letter Sunday (6/26/2022) stating that the City was to talk directly with Debtor and Debtor’s counsel. Further, that he sent a copy of the letter and communicated with the Bankruptcy counsel for the City to insure that there was no confusion on this issue.

The court continues the hearing, as agreed by the Parties to allow for the Debtor’s counsel to communicate with the City and the City to document for Debtor and Debtor’s counsel the corrections that need to be made so that the Debtor may promptly sell the Property at issue.

## **JULY 12, 2022 HEARING**

At the hearing, the Debtor and Debtor’s counsel expressed confusion on moving forward. Believing that counsel for the Receiver had instructed Debtor’s counsel and contractor not to contact the Building Department about the status of any permits and what would be required, no contractor is in place, has not inspected the property, and the scope of work to be done is not estimated. Debtor’s counsel stated that \$5,000 is being held in his trust account for having the contractor provide some initial work, but that would only begin after the court ordered that Debtor was in control of the Property.

As the court has previously stated, and re-stated at the July 12, 2022 hearing, this Debtor and her family must be moving forward to show that there is an ability to promptly address the deficiencies in the Property, has the monies in place to do the work, and is prepared to move forward if the court exercises the exclusive jurisdiction over the Property that is property of this bankruptcy estate.

The Receiver’s attorney stated that no such prohibition on contacting the Building Department and determining what permits would be required was made. It appears that there may have been some miscommunication between the attorneys.

Debtor must have in place a contractor and the scope of what needs to be done identified and a bid from the contractor to do the work. Debtor and her family must have the funding in place to pay for the work and to move promptly thereon. As each day passes and the real estate market cools (with interest rates rising), the potential sales price of the Property drops.

The court is mindful of the years of Debtor’s failure to address these issues. The reported (by the Receiver) of failure to comply with the injunction concerning the use of the Property. The failure of Debtor (who blames her prior attorney) to assert her rights and address these problems in the multiple years of the Receivership Action. Only now, with the Receiver seeking to get approval of his Plan to correct the problems and sell the Property is Debtor in this bankruptcy case.

This is the final continuance to a final hearing on the Motion. Debtor must show the court that her practices have changed, she and her family have the funds in place to do the necessary work, and that she, working with her counsel, have the contractor ready to go, the scope of the work determined (to the extent that it can be by the final hearing date), and manifest the clear ability to act herself much like a receiver:

- ◆ Fix The Deficiencies In the Property so That It May Be Sold;
- ◆ Determine What Repairs and Improvements Enhance the Value of the Property For Sale AS Compared to Just Removing Non-Code Compliant Structures; and
- ◆ Debtor is Ready To Move Forward To Promptly Sell The Property in a Commercially Reasonable Manner. <sup>FN.1.</sup>

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 FN. 1. In this Case Debtor's plan is to get the Property sold and maximize the recovery of the benefit of the Debtor and her bankruptcy estate, and not to rehabilitate the Property and retain it.  
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The City's Complaint relating to the assertion that Debtor's Property was a public nuisance and a danger to health and safety was filed in 2017. Debtor's default in that State Court Action was entered when she failed to response to the Complaint. Then, Debtor and the City entered in a Stipulation for a permanent injunction, requiring Debtor to cease and correct the Code violations. This Permanent Injunction was entered in October 2017. The terms of the Injunction are stated in the Minute Order filed as Exhibit filed with Exhibit A; Dckt. 91. The Receiver was then appointed May 3, 2021 by the Judge in the State Court Action. Order, Exhibit A; *Id.* In appointing the Receiver, the State Court Judge concluded that Debtor had not acted to abate the nuisance, that it would continue unless a receiver was appointed, and that the Receiver was to proceed with a plan correct the nuisance, whether such was rehabilitating or demolition of the violations that constituted the nuisance. (The forgoing is only a partial summary of the Receiver's powers and duties as ordered by the Superior Court Judge, which powers include the sale of the Property by the Receiver through the State Court Action.) <sup>FN.2.</sup>

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 FN. 2. The April 7, 2021 Minute Order attached to the Order Appointing the Receiver contains an extensive review of the history of the State Court Action and the violations on the Property constituting the nuisance.  
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The court has added further discussion of the issues and shortcomings to date of Debtor with respect to her seeking to wrench control of the Property from the Receiver, correct the deficiencies constituting the nuisance, pay any monies owed in the State Court Action, and market and sell the Property in a prompt, speedy commercially reasonable sale of the Property.

The court has copied and pasted below the text added for the July 12, 2022 hearing from the Civil Minutes below for the convenience of the Parties and their counsel.

At the hearing, the Debtor and Debtor's counsel expressed confusion on moving forward. Believing that counsel for the Receiver had instructed Debtor's counsel and contractor not to contact the Building Department about the status of any permits and what would be required, no contractor is in place, has not inspected the property, and the scope of work to be done is not estimated. Debtor's counsel stated that \$5,000 is being held in his trust account for having the contractor provide some initial work, but that would only begin after the court ordered that Debtor was in control of the Property.

As the court has previously stated, and re-stated at the July 12, 2022 hearing, this Debtor and her family must be moving forward to show that there is an ability to promptly address the deficiencies in the Property, has the monies in place to do the work, and is prepared to move forward if the court exercises the exclusive jurisdiction over the Property that is property of this bankruptcy estate.

The Receiver's attorney stated that no such prohibition on contacting the Building Department and determining what permits would be required was made. It appears that there may have been some miscommunication between the attorneys.

Debtor must have in place a contractor and the scope of what needs to be done identified and a bid from the contractor to do the work. Debtor and her family must have the funding in place to pay for the work and to move promptly thereon. As each day passes and the real estate market cools (with interest rates rising), the potential sales price of the Property drops.

The court is mindful of the years of Debtor's failure to address these issues. The reported (by the Receiver) of failure to comply with the injunction concerning the use of the Property. The failure of Debtor (who blames her prior attorney) to assert her rights and address these problems in the multiple years of the Receivership Action. Only now, with the Receipt seeking to get approval of his Plan to correct the problems and sell the Property is Debtor in this bankruptcy case.

This is the final continuance to a final hearing on the Motion. Debtor must show the court that her practices have changed, she and her family have the funds in place to do the necessary work, and that she, working with her counsel, have the contractor ready to go, the scope of the work determined (to the extent that it can be by the final hearing date), and manifest the clear ability to act herself much like a receiver:

- ◆ Fix The Deficiencies In the Property so That It May Be Sold;
- ◆ Determine What Repairs and Improvements Enhance the Value of the Property For Sale AS Compared to Just Removing Non-Code Compliant Structures; and
- ◆ Debtor is Ready To Move Forward To Promptly Sell The Property in a Commercially Reasonable Manner. <sup>FN.1.</sup>

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FN. 1. In this Case Debtor's plan is to get the Property sold and maximize the recovery of the benefit of the Debtor and her bankruptcy estate, and not to rehabilitate the Property and retain it.  
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The City's Complaint relating to the assertion that Debtor's Property was a public nuisance and a danger to health and safety was filed in 2017. Debtor's default in that State Court Action was entered when she failed to response to the

Complaint. Then, Debtor and the City entered in a Stipulation for a permanent injunction, requiring Debtor to cease and correct the Code violations. This Permanent Injunction was entered in October 2017. The terms of the Injunction are stated in the Minute Order filed as Exhibit filed with Exhibit A; Dckt. 91. The Receiver was then appointed May 3, 2021 by the Judge in the State Court Action. Order, Exhibit A; *Id.* In appointing the Receiver, the State Court Judge concluded that Debtor had not acted to abate the nuisance, that it would continue unless a receiver was appointed, and that the Receiver was to proceed with a plan correct the nuisance, whether such was rehabilitating or demolition of the violations that constituted the nuisance. (The forgoing is only a partial summary of the Receiver's powers and duties as ordered by the Superior Court Judge, which powers include the sale of the Property by the Receiver through the State Court Action.) <sup>FN.2.</sup>

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FN. 2. The April 7, 2021 Minute Order attached to the Order Appointing the Receiver contains an extensive review of the history of the State Court Action and the violations on the Property constituting the nuisance.  
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### **July 28, 2022 Hearing**

The hearing on the Motion to Excuse Turnover and Confirm Exemption from Automatic Stay is continued to 10:30 a.m. on August 18, 2022 (specially set day and time). This will afford the Parties to further inspect the Property, the Debtor fund the blocked account for the monies needed to make the repairs, and a Motion to Employ a Professional, the General Contractor, to be filed and set for hearing on August 18, 2022.

### **August 18, 2022 Hearing**

At the hearing, **XXXXXXXXXXXX**

**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 Excuse Turnover and Confirm Exemption from Automatic Stay filed by Gerard F. Keena II ("Movant-Receiver") 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 Excuse Turnover and Confirm Exemption from Automatic Stay is **XXXXXXXXXXXXXX**.

**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).**

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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 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2022. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 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, -----.

<p><b>The Motion to Employ is <span style="color: red;">XXXXXXX</span> .</b></p>
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Nadia Zhiry ("Debtor") seeks to employ Richard Sanders of R. & S. Contractor, LLC. ("Contractor") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Contractor to assist Debtor in making repairs to Debtor's properties commonly known as 1039 and 1049 Claire Ave., Sacramento, California (collectively "Properties").

Debtor argues that Contractor's appointment and retention is necessary to assist in repairing and remediating the Properties in order for Debtor to receive a discharge and satisfy the requests of the Receiver and City of Sacramento.

Richard Sanders, a licensed General Contractor of R. & S. Contractor, LLC., testifies that he has personally inspected the Properties, submitted applications and forms to the City of Sacramento for various permits for the Properties, and estimates the cost to complete the work on the Properties as \$45,000.00. Richard Sanders testifies he and the company do not represent or hold any interest adverse to Debtor or to

the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

### **Opposition of the State Court Receiver**

Gerard R. Keena II, the State Court Receiver, has filed his Opposition to the Motion to Employ. The Opposition grounds include (as summarized by the court unless shown in "quotation marks"):

- A. The estimate does not include costs to "render an accessory dwelling unit code compliant when the entire structure was built without permits." Opposition, § 1, ¶ 1; Dckt. 89.
- B. The estimate does not include the costs to bring water and sewer to one of the buildings at the subject property. *Id.*, ¶ 2.
- C. The Contractor is not legally permitted to perform the work necessary to install the code required fire suppression system to the Properties. *Id.*, ¶ 3.

The Receiver asserts that the costs of the remedial work will be triple the Contractor's estimate. Further, that the Receiver believes that the Contractor stating he will do this remedial work in addition to his other contracting work is unrealistic.

### **Copy of Contract Not Provided As An Exhibit**

Debtor has not provided the court with a copy of the contract between the Chapter 13 Debtor and the Contractor. As this juncture, the court does not have a contract and terms to reference. The court does not believe that it should just provide a blanket authorization, with the terms of the contract authorized to be filled in later.

Contractors Declaration includes amounts and estimates. Dckt. 78.

At the hearing, **XXXXXXX**

~~————— Taking into account all of the relevant factors in connection with the employment and compensation of Contractor, considering the declaration demonstrating Contractor does not hold an adverse~~

~~interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Richard Sanders of R. & S. Contractor, LLC. as Contractor for the Chapter 13 Estate on the terms and conditions set forth in the Motion and Declaration, Dckts. 76, 78. Approval of the fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.~~

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

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

~~The Motion to Employ filed by Nadia Zhiry (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion to Employ is granted, and Debtor is authorized to employ Richard Sanders of R. & S. Contractor, LLC. as Contractor for Debtor on the terms and conditions as set forth in the Motion and Declaration, Dckts. 76, 78.~~

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

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

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

**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.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on July 15, 2022. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, 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 Objection.

<b>The Objection to Confirmation of Plan is <span style="color: red;">XXXXXXX</span></b>
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The Chapter 13 Trustee, David Cusick ("Trustee") opposes confirmation of the Plan on the basis that:

- A. Infeasible Plan
- B. Delinquency
- C. Not Best Effort

#### **Trustee's Status Report**

On August 9, 2022, Trustee filed a Status Report (Dckt. 84) indicating:

- 1. Debtor remains delinquent \$500.
- 2. Debtor appeared at the continued First Meeting of Creditors and the Meeting has been continued to October 13, 2022.

3. Trustee does not believe Debtor knows enough about their finances to accurately testify to matters pertaining to the real properties.
4. The Plan does not provide for the claim of Gerard F. Keena II, Receiver, which was filed as secured and priority.

### **Debtor's Reply**

On August 9, 2022, Debtor filed a reply (Dckt. 86) stating:

- A. Debtor's daughter, Vera Zhiry, makes the \$500 Plan payment and Debtor's other daughter, Lubyia Iyzoshuk, pays the mortgage payments.
- B. Debtor "intends to be current" on Plan payments.
- C. Lubyia is current on the mortgage payments.
- D. The Motion to Approve Contractor is pending.
- E. Debtor's Counsel has received cashier's checks and obtained releases from Richard Sanders, the Contractor. Bank of Marin is creating a blocked account as ordered by the court.
- F. Debtor has worked with the City, the general contractor, the Receiver's project manager and managing director, and discussed the scope of work necessary to abate the properties.

### **AUGUST 9, 2022 UPDATES AND SUPPLEMENTAL PLEADINGS**

On August 8, 2022, the Chapter 13 Trustee filed an updated Status Report. Dckt. 84. The Trustee reports that the Debtor has made one \$500.00 plan payment and is delinquent \$500.00. The court notes that the Plan as proposed does not adequately address the Debtor's actual "plan" to fund, promptly make repairs to, and resolve all outstanding issues with the State Court Receiver. An amended plan will be necessary.

The Trustee also states that the First Meeting of Creditors could not be concluded because Debtor lacked knowledge of her finances as they relate to the Claire Avenue Properties. The First Meeting has been continued for Debtor to assemble the information for financing of the repairs, payment of taxes and insurance, and prosecution of a plan in this case.

On August 9, 2022, the Debtor filed her Reply to the Trustee's Objection to Confirmation, stating the following points:

- A. It is the Debtor's daughter, Vera Zhiry, who is to make the \$500.00 a month plan payment and Lubyia Iyzoshuk who is to make the monthly house payments.
- B. It is Debtor's intention to be current on the Plan payments as of August 15, 2022.

- C. Debtor's daughter, Luby Iyzoshuk, is the person who is the primary obligor on the two notes secured by the Claire Avenue Properties.
- D. A Motion has been filed to employ Richard Sanders, as the contractor, to do the necessary repairs. The hearing on the Motion is set for August 18, 2022, to be heard in conjunction with the hearing of the Receiver's Motion to allow him to take control of the Claire Avenue Properties.
- E. Debtor has obtained the cashier's checks for funds to be used for funding of the remedial work on the property and they are being deposited in a blocked account at the Bank of Marin.
- F. The Receiver, Receiver's Counsel, Receiver's Project Manager, Debtor's Contractor, Debtor's counsel, and the City's Building Inspector met on August 1, 2022, to discuss the scope of work to remediate the problems on the Claire Avenue Properties.
- G. The Reply includes a more detailed scope of work for remediation of the problems on the Properties.

Dckt. 86.

## DISCUSSION

Trustee's objections are well-taken.

### Infeasible Plan

Trustee alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). The plan calls for the mortgages due to JP Morgan Chase Bank to be paid as Class 4 by "Debtor's Daughter." Dckt. 29 at 4. Debtor does not name the daughter, nor provide any proof these payments have been paid by the daughter, and will be paid by the daughter.

According to the Trustee's best calculation with the available information it will take over 134 months to complete the Plan.

Trustee further alleges that Debtor's budget is unrealistic. Trustee cites Debtor's Schedule I. Upon the court's review, Debtor lists their husband as a dependent. Additionally, Debtor lists the following expenses:

Electricity, heat, natural gas.....	\$200.57
Water, sewer, garbage collection.....	\$140.00
Telephone, cell phone, Internet, satellite, and cable services.....	\$50.00
Food and housekeeping supplies.....	\$400.00
Clothing, laundry, and dry cleaning.....	\$10.00
Personal care products and services.....	\$20.00
Medical and dental expenses.....	\$25.00
Transportation. Include gas, maintenance, bus or train.....	\$100.00

Entertainment, clubs, recreation, newspapers, magazines, and books..\$10.00  
Vehicle insurance.....\$50.00

The court agrees with Trustee. The above budget appears particularly low for two individuals.

### **Delinquency**

Debtor is \$500.00 delinquent in plan payments, which represents one month of the \$500.00 plan payment. Before the hearing, another plan payment will be due. According to Trustee, the Plan in § 2.01 calls for payments to be received by Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Not Best Effort**

Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The Plan, (DN 29) proposes payments of \$500.00 per month for 36 months, which includes an "Additional Provision" to §7.01 of either the "ADULT CHILDREN" purchasing the "SUBJECT PROPERTY" or Debtor selling the "SUBJECT PROPERTY" within 18 months. The plan is dated June 8, 2022. The "ADULT CHILDREN" are not identified. The "SUBJECT PROPERTY" is not identified where Debtor shows on Schedule A/B they have ownership of two different real properties: 1049 Claire Ave and 1039 Claire Ave. Dckt. 28 at 3-4. Debtor does not identify what sale price is expected, so Trustee cannot determine if sufficient proceeds would be generated from the plan to pay claims. Debtor has no requirement in the plan to attempt to list and sell the property as early as possible, so that Debtor would not default under this provision if they did nothing for 17 months, which is unreasonable. Thus, the court may not approve the Plan.

# FINAL RULINGS

8. [22-20859-E-7](#) [FF-1](#) LISA NUNEZ-SANDOVAL/  
AARON SANDOVAL  
Gary Fraley MOTION TO AVOID LIEN OF  
AMERICAN CONTRACTORS  
INDEMNITY COMPANY  
7-11-22 [\[39\]](#)

**Final Ruling:** No appearance at the August 18, 2022 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, and Office of the United States Trustee on June 11, 2022. By the court's calculation, 68 days' notice was provided. 28 days' notice is required.

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

**The Motion to Avoid Judicial Lien is granted.**

This Motion requests an order avoiding the judicial lien of American Contractors Indemnity Company ("Creditor") against property of the debtor, Lisa Marie Nunez-Sandoval and Aaron Dean Sandoval ("Debtor") commonly known as 2021 Riesling Way, Placerville, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$23,387.71. Exhibit A, Dckt. 41. An abstract of judgment was recorded with El Dorado County on August 1, 2018, that encumbers the Property. *Id.*

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of \$440,000.00 as of the petition date. Dckt. 13. The unavoidable consensual liens that total \$286,271.41 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 44. Debtor has

claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$626,400.00 on Amended Schedule C. Dckt. 44.

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

#### **ISSUANCE OF A COURT-DRAFTED ORDER**

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Lisa Marie Nunez-Sandoval and Aaron Dean Sandoval ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the judgment lien of American Contractors Indemnity Company, California Superior Court for Los Angeles County Case No. 13K18037, recorded on August 1, 2018, Document No. 2018-0029815-00, with the El Dorado County Recorder, against the real property commonly known as 2021 Riesling Way, Placerville, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.