UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 30, 2018 at 10:30 a.m.

1.	**17-20220-E-7** **HLG-7**	**WILLIAM/FAYE THOMAS** **Kristy Hernandez**	**CONTINUED OBJECTION TO CLAIM OF ROBERT S. PUTNAM, CLAIM NUMBER 12 HEARING** **4-26-18 [99]**

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

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

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

The Objection to Claim has not been set properly for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 12-1 of Robert Putnam is dismissed without prejudice.

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

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

NO PROOF OF SERVICE PROVIDED

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

CREDITOR'S RESPONSE AND AMENDMENT

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

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

Creditor does not address the untimeliness of his claim.

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

CHAPTER 13 TRUSTEE'S RESPONSE

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

OBJECTOR'S REPLY

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

Objector relies upon the following cases:

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

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

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

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

1. An attorney discharged by a client has a *quantum meruit* cause of action for the reasonable value of services rendered to the date of discharge, but such cause of action does not accrue until the occurrence of the stated contingency, *i.e.* recovery by the client either by settlement or judgment.

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

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

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

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

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

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

CREDITOR'S SUR-REPLY

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

JUNE 12, 2018 HEARING

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

JUNE 28, 2018 HEARING

At the hearing, the court continued the matter to 1:30 p.m. on July 17, 2018. Dckt. 169, 172.

JULY 17, 2018 HEARING

The court continued the matter to 10:30 a.m. on August 30, 2018. Dckt. 197.

NO ADDITIONAL PLEADINGS

The parties have filed no additional or supplemental pleadings since the prior hearing.

DISCUSSION

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

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

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

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

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

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

Issue of Standing of Debtor to File Objection to Claim

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

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

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

> [c] Objection by Debtor
>
> The debtor may be a party in interest with standing to object to a proof of claim. Particularly in chapter 12 and chapter 13 cases, the success of the debtor's plan may depend upon the debtor's being able to argue successfully that the debt asserted as a priority claim or a secured claim, which must often be paid in full, is excessive or invalid. Typically, the trustee in such cases does not view it as his or her role to object to particular claims except, perhaps, if they have been tardily filed.
>
> **In a chapter 7 case**, or a chapter 11 case in which the debtor is not in possession, **the debtor usually has no pecuniary interest that would justify objecting to a claim unless there could be a surplus after all claims are paid.** An individual debtor, however, in such a case may sometimes **have an interest in objecting to particular claims**. For example, the debtor may wish to object to an excessive dischargeable claim whose holder would **receive distributions that otherwise would be made to the holder of a nondischargeable claim**. To the extent that a nondischargeable claim is satisfied in some measure by a distribution, it is in the debtor's interest to maximize the distribution, thereby relieving the debtor from some or all of the claim of that creditor which would survive the bankruptcy case. The debtor also has an interest if there is any chance that a disallowance will yield a solvent estate that

would provide a return to the debtor. The same reasoning applies to equity holders of the debtor. Thus, a debtor may be afforded standing, in certain instances, to object to claims.

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

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

Dismissal of Objection

This Objection to Claim was filed by the then Chapter 13 Debtor on April 26, 2018. Dckt. 99. On May 24, 2018, Debtor voluntarily converted this case to one under Chapter 7. Dckt. 135.

As of the August 30, 2018, hearing, now ninety-eight days later, the Chapter 7 Trustee has not joined in or substituted in as the real party in interest (Fed. R. Civ. P. 25; Fed. R. Bankr. P. 7025, 9014) to prosecute this Objection to Claim. As the Chapter 13 noted in his Response filed on June 12, 2018, the case being converted to one under Chapter 7, an objection based on untimeliness may be moot.

On August 20, 2018, a notice of deadline for filing proofs of claim in this bankruptcy case, now that it has been converted to one under Chapter 7 , was issued. Dckt. 204. The deadline for filing proofs of claims in this case in now November 19, 2018. It appears that the Chapter 7 Trustee has concluded that the grounds for the objection, timeliness, has been rendered moot by the Chapter 7 Trustee determining that there are assets to be administered in this Chapter 7 case (Trustee's August 17, 2018 Notice of Assets Docket Entry Report).

A new deadline for filing proof of claim having been set, this Objection is Dismissed without prejudice as moot, the Chapter 7 Trustee having elected not to prosecute it as the real party in interest.

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

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

The Objection to Claim of Robert Putnam ("Creditor") filed in this case by William Thomas, Jr., and Faye Thomas, Chapter 13 Debtor, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 12-1 of Robert Putnam is Dismissed without prejudice.

2.	**17-20220-E-7** **HLG-8**	**WILLIAM/FAYE THOMAS** **Kristy Hernandez**	**CONTINUED MOTION TO COMPROMISE CONTROVERSY /APPROVE SETTLEMENT AGREEMENT WITH GLEN VAN DYKE** **5-4-18 [111]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on May 4, 2018. By the court's calculation, 32 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Approval of Compromise has not been properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Approval of Compromise is xxxxxxx.

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

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

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

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

Review of Litigation and Claims Settled

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

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

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

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

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

A. APS is the alter ego of Thomas.

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

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

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

E. Many contentions concerning the conduct of Prestholt.

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

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

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

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

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

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

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

INSUFFICIENT NOTICE OF MOTION

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

The court continued the hearing to allow the Chapter 7 Trustee who has taken over the estate to report. That continuance resolved the insufficient notice given by Debtor as the predecessor fiduciary of the bankruptcy estate.

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

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

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

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

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

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

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

CREDITOR'S OPPOSITION

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

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

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

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

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

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

MOVANT'S REPLY

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

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

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

JUNE 5, 2018 HEARING

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

JUNE 28, 2018 HEARING

At the hearing, the court continued the matter to 1:30 p.m. on July 17, 2018. Dckt. 170, 173.

JULY 17, 2018, HEARING

At the July 17, 2018, hearing, the court continued the matter to August 30, 2018, at 10:30 by prior order in accordance with a stipulation of the parties. Dckt. 185, 188, and 194.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

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

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

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

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

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

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

August 30, 2019 Hearing

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

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

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

The Motion to Approve Compromise filed by William Thomas and Faye Thomas, Chapter 13 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Approval of Compromise is **xxxxxxxxxxxxxx**.

3. 18-90030-E-11 FILBIN LAND & CATTLE CO., INC. CONTINUED STATUS CONFERENCE
Matthew Olson RE: VOLUNTARY PETITION
1-17-18 [1]

Thru #5

Debtor's Atty: Matthew Olson

Notes:
Continued from 7/19/18 (specially set time and date at the Sacramento Division Courthouse) to be heard in conjunction with other matters in this case.

[STJ-10] *Ex Parte* Application for Order Authorizing Employment of Broker (Braun International Real Estate) filed 7/23/18 [Dckt 240]; Order granting filed 7/24/18 [Dckt 245]

[STJ-11] Ex Parte Application for Order Authorizing Employment of Broker (Braun International Real Estate) [with respect to the "Remaining Property"] filed 8/22/18 [Dckt 272], Order [Dckt. 295];

AUGUST 30, 2018 STATUS CONFERENCE

The Debtor in Possession provided a Supplemental Case Status Conference Report. Dckt. 296. The Debtor in Possession intends to conclude a sale of a portion of the estate property (Motion set for hearing on August 30, 2018) that will substantially reduce the secured claims. The remaining real property is listed for sale. After concluding the sale, for which the final price is anticipated to be determined after a competitive auction in open court, Debtor in Possession will be able to proceed with a plan in this case.

The Debtor in Possession then addresses a point made by the court at a recent hearing. The monthly revenues generated in this case are only $7,000. The Debtor in Possession made the determination that professional assistance was necessary to generate the monthly operating report in this case.

An order authorizing the employment of such professional was entered by the court on May 18, 2018. The Motion requesting that authorization was filed on May 16, 2018. This was one hundred and nineteen (119) days after this Chapter 11 case was commenced.

It was not until late July (another seventy-four (74) days after the employment was authorized) that "draft" monthly operating reports were prepared by the professionals employed in May 2018. When those draft monthly operating reports were prepared (more than six months after the case was filed), they showed that the Debtor in Possession had been using cash collateral - without court authorization or the consent of the creditor holding the secured claim(s).

Finally, on August 23, 2018, the monthly operating reports for January through July 2018 were filed. A review of the Monthly Operating Report for July 2018 shows the following rent revenues and use of monies for the first seven months of this case:

Revenues

Rent.....$43,456

Expenses

Contract Labor (office and land).....($18,700)
Personal Property.....($ 5,025)
Insurance.....($ 3,919)
Real Property Taxes (accrued).....($ 7,965)
Utilities.....($ 4,544)
Office Supplies/Other.....($ 2,293)
Meals.....($ 762)
Transportation/Gas.....($ 877)
Uncategorized.....($ 873)
Repairs and Maintenance.....($ 2,343)

Total Expenses.....($47,301)

Profit/(Loss) From Operations.....($ 3,945)

Reorganization Expenses

Professional Fees.....($51,298)
U.S. Trustee Quarterly Fees.....($ 650)
US Trustee Quarterly Fees.....($ 650)

Dckt. 282.

The Status Report also discloses that the Debtor in Possession has engaged GDR Engineering, Inc. to prosecute the lot line adjustment necessary to conclude the sale of the property that is the subject of the August 30, 2018 hearing/auction.

At the Status Conference xxxxxxxxxxxxxxxxxxxxxxxxxxx

4. **18-90030-E-11 STJ-7** **FILBIN LAND & CATTLE CO., INC. Matthew Olson** **CONTINUED MOTION TO APPROVE SALE AGREEMENT AND BIDDING PROCEDURES**
6-21-18 [188]

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

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

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

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that a hearing will be held, and the hearing will be based upon submitted pleadings as well as argument at the hearing. Based upon language that there may submissions at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on June 21, 2018. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

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

This Matter was improperly noticed for hearing for August 30, 2018, the court having entered a final order thereon in its July 23, 2018 Order (Dckt. 238).

The Debtor in Possession filed two motions on June 21, 2018, which are:

Motion to Approve Sale Agreement and Bidding Procedure, for approximately 10 acres of property. DCN: STJ-7, Dckt. 188.

and

Motion to Approve Sale of the approximately 10 acres Free and Clear of Claims, Liens, Leases, and Interests. DCN STJ-8, Dckt. 194.

On July 23, 2018, the court entered it's now final order granting the motion and setting the breakup fee. Order, Dckt. 238. The court did not continue the hearing or set any matters for further proceedings. As set forth in the Civil Minutes the court rejected what it believed, and still believes, to be a nonsensical request that the court pre-approve the sales contract prior to the hearing on the motion to approval a sale on the terms set forth in the sales contract.

> "The Motion, in its prayer, appears to want to go further and have the court "approve" the sales agreement that is the subject of the Motion for Authorization to Sell the Property. The court is unsure how it can "approve" a contract for the sale of the Property and then conduct an open and fair auction of the Property. The court declines the opportunity to pre-approve a sale which is to be approved at the hearing on another motion to authorize the sale on the terms of the pre-approved contract to be approved."

Civil Minutes, Dckt. 235 at 4. Moving past nonsensical, the request could well be viewed as an effort by the Debtor in Possession and counsel for Debtor in Possession to mislead the court into issuing such an order, and then at the hearing on the Motion to Approve the Sale, contend that the court's hands are tied, the order approving the contract is final, and the estate is compelled to sell the property to some favored buyer.

On July 31, 2018, Counsel for the Debtor in Possession filed a pleading titled:

NOTICE OF CONTINUED HEARING AND SUPPLEMENT TO MOTION TO APPROVE SALE AGREEMENT AND BIDDING PROCEDURES

Notice, Dckt. 253. The Notice goes further to state that on August 30, 2018, the judge will conduct a conduct a hearing on the Motion to Sell Property. Though not identified, that Motion is DCN:8. The court did continue the hearing on the Motion to Sell Property, DCN:8 to August 30, 2018. Order, Dckt. 239.

The "Notice" goes further to state that it is also a "Supplement" to the Sale Motion (DCN:8) and then addresses a number of "clarifications."

It appears that when Counsel "grabbed" the caption form for the pleading, he erroneously used one for Motion DCN:7, when the notice of continued hearing should have been for the Motion to Sell, DCN:8.

The court removes the erroneous calendar entry and will treat the Supplement and all responses thereto as being made for the correct motion – the Motion to Sell, DCN:8, the hearing on which was continued to August 30, 2018.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Sales Agreement and Bidding Procedures filed by Filbin Land & Cattle Co., Inc., Debtor in Possession, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Noticed Continued hearing for the Motion to Approve Sales Agreement and Bidding Procedures is removed from the calendar, the Notice having been erroneously titled and the wrong Docket Control Number used, with the Supplemental Pleading and the extensive responses and replies thereto considered in determination of the Motion to Approve the Sale of Property, DCN: STJ-8, the hearing on which the court did continue to August 30, 2018 (Order, Dckt. 239.)

5. **18-90030-E-11 STJ-8** **FILBIN LAND & CATTLE CO., INC. Matthew Olson** **CONTINUED MOTION TO SELL FREE AND CLEAR OF LIENS 6-21-18 [194]**

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

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

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

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that a hearing will be held, and the hearing will be based upon submitted pleadings as well as argument at the hearing. Based upon language that there may submissions at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on June 21, 2018. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Filbin Land & Cattle Co., Inc., as the Debtor in Possession, ("Movant" or "Seller") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant seeks authorization to sell approximately ten acres of real property located at 4501, 4502, 4549, 4557, and 4561 Ingram Creek Road, Westley, California ("Property").

The proposed purchaser of the Property is Boyette Petroleum ("Buyer"), and the terms of the sale as stated in the Motion are:

a. The purchase price for Property shall be$2,565,000.00 and payable by Buyer to Seller in readily available funds at closing.

b. Purchase price to be increased by $100,000.00 for every 0.5 acres added to Property adjacent to Ingram Creek Road in excess of the contemplated 10 acres up to 11.6 acres.

c. Property contains a gas station facility, restaurant, graded areas, water well, and surrounding area adjacent to Interstate 5 and Ingram Creek Road. The exact boundaries of Property shall be mutually agreed to by Seller and Buyer.

d. Property will be transferred to Buyer free and clear of all mortgages, liens, encumbrances, claims, conditions and restrictions.

Review of Sale Agreement, Identification of Parties to the Contract, and Terms

The Sales Agreement with Boyette Petroleum is filed as Exhibit B in support of the Motion to Sell (DCN: STJ-8). Dckt. 192. The basic terms of the Agreement are:

A. The seller of the property is "Filbin Land & Cattle Co., Inc. Exhibit B, Dckt. 192 at 6 (the reference is the page number of the exhibit document, not the Agreement, as the Agreement pages are not numbered). The Agreement is signed by Jeffery Arambel, as President, of "Filbin Land & Cattle Co., Inc., a California Corporation. *Id.*, p. 14

B. The buyer is identified as "Stan Boyett & Sons, Inc, a California corporation and B & W Petroleum, a California general partnership, their successors or assignees (co1lectively, "Buyer").

C. The parties elect that adjudication of disputes concerning the Agreement is to be limited to the state court in Mariposa County, California. *Id.*, ¶ 11.J at 13. The bankruptcy court generally does not waive the exercise of its jurisdiction concerning property of the bankruptcy estate and orders authorizing such sales.

D. The sale includes personal property including equipment, machinery, supplies, hoses, and other tangible personal property on the real property. *Id.* ¶ 1.B., at 6. The Agreement says that an Exhibit C to the Agreement identifies the personal property on a bill of sale. Exhibit C is a blank bill of sale with no personal property identified.

E. The purchase price is $2,560,000. *Id.*, ¶ 2, at 6. The agreement includes the purchase of additional adjoining property for the additional payment of $100,000 for each .5 acres p to not more than 11.5 acres in total. *Id.*

F. Upon the buyer completing the due diligence review, $100,000 will be deposited into escrow, and be refundable until closing. *Id.*, ¶ 4, at 7.

G. Closing costs include buyer paying the Crestmont Development, LLC management fee of $135,000. *Id.* ¶ 4(C) at 7.

H. Break-up fee is $135,000. *Id.*, ¶ 4(F) at 8.

I. The seller warrants that it is a corporation duly organized and existing under the laws of the State of California. *Id.*, ¶ 5Bi at 8.

J. Seller further warrants that no further authorizations are required and the sale is duly authorized. *Id.*, ¶ 5Bii at 8.

K. The Agreement provides that the rights thereunder are not assignable without the written authorization of the other party. *Id.*, ¶ 11.F at 13.

Request For Sale Free and Clear

The Motion seeks to sell the Property free and clear of the following twelve specifically-identified liens:

- The Tax Collector of Stanislaus County;
- Dorothy Arnaud (individually, and as Co-Trustee of the Patrick H. and Margaret J. Filbin Trust UTA dated December 30, 1973);
- Helen Jacobson (individually, and as Co-Trustee of the Patrick H. and Margaret J. Filbin Trust UTA dated December 30, 1973);
- Garry DeWolf (individually, and as Trustee of the Estate of Jeanette DeWolf);
- Mary Etta Filbin (for the interest of Edward J. Filbin);
- James Filbin;
- Thomas Filbin;
- Fuel Source, Inc.;

- DK Stephens Enterprises; Precision Diesel; Rocky Fillippini; and
- Mark Potter on behalf of the Center for Disability.

For an order purporting to sell free and clear of a creditor's lien, that creditor whose lien or other property interest is to be effected must be served with the motion, notice, and supporting pleadings. Fed. R. Bankr. P. 7004, Fed. R. Bankr. P. 9014. A review of the Certificates of Service, Dckt. 200, 251, 252, 260, 261, and 263, show **xxxxxxxxxxxxxxxxxxxxxx**

The Motion states the following grounds upon which the requested relief for a sale free and clear is based:

"9. The statutory basis for this Motion is Section 363(f) of the Bankruptcy Code."

Motion ¶ 9, Dckt. 194. No other grounds are stated for the relief requested.

In the prayer, the request for relief appears to be expanded, Movant seeking that the order be:

> 2. Approving and authorizing the Sale Property to be transferred to the buyer (Boyette or an overbidder) free and clear of all rights, claims, liens, leases and interests, specifically including the rights of all of the Respondents, such rights, claims, liens, leases and interests to re-attach to the proceeds of sale with the same nature, extent and validity as they had against the Sale Property"

Thus, this appears to request that the property be sold free and clear of liens and interests of person who were not provided notice of the motion, given notice that the Debtor in Possession was seeking to sell property free and clear of that person's property rights, or notice of the asserted legal basis as to why such sale could be ordered by the court.

Though not stated with particularity in the Motion, grounds are stated in the Points and Authorities, Dckt. 196. These are:

> "With respect to each creditor asserting a lien, claim, encumbrance, or interest, one or more of the standards set forth in sections 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. **Those** holders of liens, claims, encumbrances, or interests **who did not object** or who withdraw their objections to the sale or the Motion **can be deemed to have consented to the Motion and sale pursuant to section 363(f)(2)** of the Bankruptcy Code. Those holders of liens, claims, encumbrances, or interests who do object fall within one or more of the other subsections of Bankruptcy Code Section 363(f)."

Points and Authorities, p. 6:1-6; Dckt. 196 (emphasis added). No legal authority is cited for the proposition that silence is consent to the loss of the rights in the property.

The court notes that Congress uses the word "consent" in the context of the use and sale of property of the estate in 11 U.S.C. § 363(c)(2) [emphasis added] concerning cash collateral, stating:

> (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless–
>
> (A) each entity that has an interest in such cash collateral consents; or
>
> (B) **the court**, after notice and a hearing, **authorizes** such use, sale, or lease in accordance with the provisions of this section.

For purposes of 11 U.S.C. § 363(c)(2) the court merely authorizing the sale because it is not opposed is something different than **consent**. The court did not find Ninth Circuit Court of Appeal decisions addressing consent under 11 U.S.C. § 363(f)(2), however, in connection with interpreting the Commercial Code and contract law, the Circuit has stated:

> "In its ordinary meaning, a 'contract' is a legally enforceable bargain, formed by mutual consent and supported by consideration."). HN7 The mutual intention to be bound by an agreement is the sine qua non of legally enforceable contracts and recognition of this requirement is nearly universal. See Restatement (Second) of Contracts §§ 2, 17; Cal. Juris. 3d Contracts § 67 (HN8 "Mutual consent for a contract is determined under an objective standard applied to the outward manifestations or expressions of the parties . . . ."). . .
> . . .
> Thus, under federal common law—or, indeed, under any law of which we are aware—where the parties to a "contract" have not mutually consented to be bound by their agreement, they have not formed a true contract. "[M]utual consent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding." *Reigelsperger v. Siller*, 40 Cal. 4th 574, 53 Cal. Rptr. 3d 887, 150 P.3d 764, 767 (Cal. 2007) (internal quotation marks omitted); accord Restatement (Second) of Contracts § 2 cmt. b ("The phrase 'manifestation of intention' [or consent] adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention.")."

Casa Del Caffe Vergunano S.P.A. v. Italflavors San Diego, LLC, 816 F.3d 1208, 1212 (9th Cir. 2016).

Next, it is asserted that the sale may be free and clear of liens based on 11 U.S.C. § 363(f)(3) as follows:

> "First, the lien claims asserted by the Tax Collector and the Filbin Creditors may be subject to Section 363(f)(3), which applies **if the price at which such property is to be sold is greater than the aggregate value of all liens on such property**. Here, the liens encumber all of the Filbin Property, the Sale Property consists of only about 11% of the aggregate, but the Sale Price ($2.5 million) approximates the aggregate lien obligation (less than $2.7 million). **Any portion of the Filbin Debt which is not paid from the sale**

> **proceeds will be amply secured by the remaining real property collateral.** The objective of Section 363(f)(3) is therefore met here."

Id., p. 6:7-13 (emphasis added). No authority is cited for this argument.

For the third argument, the Debtor in Possession cites the court to *Pinnacle Res. At big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holdings II, LLC)*, 862 F.3d 1148, 1157 (9th Cir. 2018)for the proposition that if the rights could be foreclosed on, they can be sold free and clear of under applicable non-bankruptcy law.

> "Second, as recently interpreted by the Ninth Circuit, applicable **non-bankruptcy law permits** the sale of the Sale Property free and clear of all liens, claims, leases, encumbrances, and interests, **because all such rights could be eliminated in a foreclosure sale**. Specifically, the Ninth Circuit reasoned that a sale free and clear of a lease would divest the tenant of any right to continued occupancy, explaining that **"we see no reason to exclude the law governing foreclosure sales from the analogous language in section 363(f)(1)"** and reasoning that the statute evinced a "clear intent to protect lessees' rights outside of bankruptcy, not an intent to enhance them." *Pinnacle Res. At Big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holdings II, LLC)*, 862 F.3d. 1148, 1157 (9th Cir. 2017) ("Spanish Peaks"). Since the rights of a tenant – and all the other rights and interests of the Respondents – could be divested through a foreclosure sale, they can be the subject of a sale free and clear under Section 363(f)(1). And see, *Precision Indus. v. Qualitech Steel SBQ, LLC* 327 F.3d. 537 (7th Cir. 2003) (approving sale free and clear of lease)."

Id., p. 6 at 14-25 (emphasis added). The court notes that the cited opinion has been amended, *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions (In re Spanish Peaks Holdings II, LLC)*, 872 F.3d 892 (9th Cir. 2017). It does not appear that the changes are with respect to the sections relied upon by Movant.

On its face, it appears that Movant's contention is that so long as whatever interest is at issue could be foreclosed out under applicable non-bankruptcy law, then the sale may be approved pursuant to 11 U.S.C. § 362(f)(1). Thus, it appears that such a rule could render all of the other 11 U.S.C. § 363(f) grounds mere surplusage.

In Spanish Peaks, the Ninth Circuit was addressing the effect of a lease on the property being sold, when the trustee had not rejected the lease pursuant to 11 U.S.C. § 365. Specifically, the panel stated:

> "Under Montana law, a foreclosure sale to satisfy a mortgage terminates a subsequent lease on the mortgaged property. *See Ruby Valley Nat'l Bank v. Wells Fargo Delaware Trust Co.*, 2014 MT 16, 373 Mont. 374, 317 P.3d 174, 178 (Mont. 2014); *Williard v. Campbell*, 91 Mont. 493, 11 P.2d 782, 787 (Mont. 1932). SPH's bankruptcy proceeded, practically speaking, like a foreclosure sale—hardly surprising since its largest creditor was the holder of the note and mortgage on the property. Indeed, had SPH not declared bankruptcy, we can confidently say that there would have been an actual foreclosure sale. Such a sale would have

terminated the Pinnacle and Opticom leases. Section 363(f)(1) does not require an actual or anticipated foreclosure sale. It is satisfied if such a sale would be legally permissible."

Id., 900.

In so concluding, the Ninth Circuit panel noted that the mandatory provisions of 11 U.S.C. § 363(e) requires the providing adequate protection to anyone for their interest in property being used or sold - if such adequate protection is requested. *Id.*, 1156. Such adequate protection requires that the "indubitable equivalent" be provided to such creditor.

Thus, this ground appears to be one in which the sale could be ordered for all liens and encumbrances that could be foreclosed upon, with the effected creditor being entitled to the "indubitable equivalent" of its lien position. With the bankruptcy case filed, the Ninth Circuit Court of Appeals treats the trustee, debtor in possession, or Chapter 13 debtor as the ultimate foreclosing creditor for purposes of 11 U.S.C. § 363(f)(1).

The final ground is one in which a creditor could be compelled to accept a money satisfaction. 11 U.S.C. § 363(f)(5). It is asserted that notwithstanding the more restrictive reading of this provision by the Bankruptcy Appellate Panel in *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25, 46, 43 (BAP 9th Cir. 2008), it is asserted that *Clear Channel* does not survive the decision in *Spanish Peaks*. Spanish Peaks does not address what Congress intended in this provision and whether it means a creditor can be compelled to take nothing when it could be compelled to release its lien if the debt is paid. Though Spanish Peaks appears to subsume all other possible grounds under 11 U.S.C. § 363(f), that does not mean that it amends the plain language of 11 U.S.C. § 363(f)(5) stating that if the creditor can be compelled to take money, the court can order the sale free and clear to force the release of a lien.

There is at least one of the grounds which applies, that being 11 U.S.C. § 363(f)(1).

SUPPLEMENTAL MOTION AND BRIEF

Debtor in Possession filed a Supplemental Motion on July 31, 2018, and a Supplemental Supporting Brief on August 10, 2018. Dckt. 248, 255. In its Supplemental Motion, Debtor in Possession adds to its list of Respondents Shell Oil Company. Dckt. 248 at 3:3.

In its Supplemental Brief, Debtor in Possession asserts the following:

1. In connection with the July 19, 2018 hearing, the Court determined that the named Respondents had received due notice of the Motion. Civil Minutes, p. 2; Dkt #236. At the July 19, 2018 hearing, the Filbin DIP proposed that the Court defer ruling on the Motion with respect to the holders of the First Deed of Trust (Arnaud, Jacobson, DeWolf and the Filbins, collectively, the "Secured Creditors") and sought relief against all other Respondents to the Motion. The Court granted that relief. Civil Minutes, p. 8; Dkt #236; ("There is at least one of the grounds which applies, that being 11 U.S.C. §363(f)(1).")

2. In response to the Filbin DIP's request that the Court establish Bidding Procedures, the Court required the Debtor to engage a broker to market the Sale Property for overbids and ruled that overbids could be presented at the commencement of the Auction, which would be conducted by the Court at a hearing on August 30, 2018.

3. On July 20, 2018, the Debtor engaged Braun Real Estate International to act as its broker (the "Broker") for the purposes of soliciting overbids, which engagement was approved by a Court Order entered on July 24, 2018. Dkt #245.

4. In consultation with the Broker, Filbin DIP determined to require completely non-contingent bids at the auction. The Broker advised that the process of seeking to obtain a "flag" for a gasoline station can easily take 60 days, so the Filbin DIP determined to market the Sale Property explicitly on the basis that the buyer would not "succeed" to the current "Shell" brand on the gasoline station, and that any buyer would be responsible for addressing the transition from the "Shell" brand to any other brand.

5. The Filbin DIP also determined to make it clear that the only equipment or other property that would be transferred to the buyer would be restaurant property (owned by the Filbin DIP outright) and fixtures (with respect to the gasoline station and mini-mart). In order to implement these decisions, the Filbin DIP prepared a standard form of overbid contract, which the Broker circulated to prospective bidders (the "Standard Overbid Contract"); personal property is identified in Exhibit C. The Broker advised potential overbidders that absent the prior consent of Filbin DIP's counsel, all overbids must be accompanied by an executed Standard Overbid Contract.

6. The Broker has been aggressively marketed the Sale Property for overbids, satisfying the Court's requirement of a "well noticed, commercially reasonable marketing of the property auction." Civil Minutes, p. 8; Dkt #236. The Broker facilitated the Filbin DIP's receipt of an initial overbid in the amount of $2,750,000 (the "Initial Overbid"). It varied from the Standard Overbid Contract in only one respect: it is conditioned upon the sale actually being free and clear of the Fuel Source, Inc. lease (the "Lease"). (In the form and in the original Boyett Petroleum Sale Agreement, the Filbin DIP only committed to use "best efforts" to sell free of the lease.) All other prospective purchasers have indicated their interest in purchasing the Sale Property is conditioned on it being sold free and clear of the Fuel Source lease.

7. In subsequent email correspondence, the representative of Fuel Source, Inc. asserted the claim that any sale would be subject to its lease. The Debtor in Possession wrote to Fuel Source, Inc. to make it unmistakably clear that the Sale

Property would be sold free and clear of the Lease. That letter explicitly advised Fuel Source that the Filbin DIP would seek an Order of the Court requiring Fuel Source, Inc. to vacate and surrender the Sale Property in September 2018. To the extent the issue is seen as remaining open, it should be addressed and resolved at the outset of the hearing, since it will likely be the critical issue for the Auction, and if determined adversely to the Filbin DIP, will likely eliminate all overbids.

8. A sale free and clear of the Secured Creditors' lien is warranted under either 363(f)(1) or 363(f)(3) . " The Initial Overbid is for $2,750,000. According to the Secured Creditors, the aggregate of all liens encumbering the Sale property is only $2,795,596.83; see, Claim 10-1; assuming that the Secured Creditors' claims are not challenged. (The Filbin DIP has not completed its evaluation of the Secured Creditors' claims, and notes that the claim includes more than $200,000 of interest accrued at 18%.) It appears that if there is any overbid beyond the Initial Overbid, Section 363(f)(3) will be applicable. Since the Broker's Opinion of Value submitted herewith values the Remaining Property which constitutes the Secured Creditors' collateral at $9,399,000, a lien encumbering the Remaining Property for any remaining indebtedness to the Secured Creditors will clearly afford them the "indubitable equivalent" of their rights.

9. The Filbin DIP is unaware of any rights Shell might assert with respect to the Sale Property. Filbin DIP served a Supplemental Motion to Approve Sale Free and Clear of Claims, Liens, Leases and Interests, explicitly adding Shell as a Respondent; Dkt #248; on Shell's agents for service of process on July 31, 2018; Dkt #252. To the extent that Shell claims any rights with respect to the Sale Property, those claims are clearly the subject of a bona fide dispute. Thus, the sale can be effected free and clear of any claims asserted by Shell pursuant to Section 363(f)(4).

Debtor in Possession requests the court address the issues presented in the following order:

1. Whether the Property will be sold free and clear of the rights of Fuel Source, Inc. and Shell, since the former, at least, will have a substantial impact on the Auction;

2. The Auction, since it may moot issues respecting the Secure Creditors; and

3. whether the Property will be sold free and clear of the lien of the Secured Creditors; and

4. all other matters in this case set for hearing on August 30, 2018.

CONDITIONAL OBJECTION OF STADTLER TRUSTEES

Dan Stadtler and Carolyn Dilday, Successor Trustees Stadtler Trust, Stadtler FLP individually and as successor in interest to Cow Camp L.P. ("Stadtler Trustees") filed a conditional objection on August 20, 2018. Dckt. 267. Stadtler Trustees note that they have, through Debtor's broker, made an overbid offer of $2.7 million despite their present Objection.

In their Objection, Stadtler Trustees question whether Mr. Arambel individually has complete and sole ownership of all Filbin Land & Cattle Co. Inc. Stock. Stadtler Trustees request Arambel demonstrate from the minutes of Filbin Land & Cattle Co. Inc. that he holds all share interests. Absent this, Stadtler Trustees believe they retain an interest in Filbin Land & Cattle Co. Inc. and were not consulted beforehand about the present sale.

Stadtler Trustees assert further that Carolyn Dilday and Russell Dilday made an offer for the entire 94 acre portion of the Property, which was denied. Stadtler Trustees object on the basis that the Property should be sold as a whole, as it would command a higher sale price.

REPLY TO OPPOSITION OF STADTLER TRUSTEES

Debtor in Possession filed a Reply to Stadtler Trustee's Condition Objection on August 22, 2018. Dckt. 269. Debtor in Possession notes in his Reply that the List of Equity Security Holders identify stock ownership under penalty of perjury and the transactions which resulted in his ownership are now set forth in a Supplemental Declaration and accompanying exhibits. Debtor in Possession states that the Stadtler Trustees have provided mere unsworn speculation that some unidentified act might not have been "actually completely effectuated" without any supporting legal or factual support.

Debtor in Possession also points out that Stadtler Trustees have not provided any evidentiary basis for their argument that a better price could be achieved if the Property were sold as a whole.

"RENEWED" OBJECTION OF FILBIN TRUST CREDITORS

Creditors (1) Dorothy Arbaud, individually, and as Co-Trustee of the Patrick and Margaret Filbin Trust UTA, dated December 30,1973;(2)Helen Jacobson, individually, and as Co-Trustee of the Patrick and Margaret Filbin Trust UTA, dated December 30,1973; and (3) Deborah and Gary Dewolf (collectively "Filbin Trust Creditors") filed a Renewed Objection. Dckt. 289. FN.1. Filbin Trust Creditors assert that since the prior hearing, Debtor has still not provided any information to address Filbin Trust Creditors' concerns. Debtor still provides no clarity as to how the sale proceeds will be applied, or as to what effect the sale will have on a reorganization plan.

Filbin Trust Creditors add in their Renewed Objection concerns over whether Debtor owns all stock necessary to effectuate the proposed sale, whether steps have been taken to obtain necessary lot line adjustments, whether lot line adjustments are feasible for the property, and if the restaurant is ADA compliant. Filbin Trust Creditors also state that Debtor failed to inform Fuel Source, Inc. (Lessee of the Shell station involved in the potential sale and owner of several fixtures on the property) of the proposed

transaction until June 30, 2018; Debtor has not provided monthly operating reports since February; Debtor has had to repeatedly amend figures provided as to its assets and liabilities; and Debtor has failed to disclose the identities of overbidders.

Filbin Trust Creditors renews its conclusion that Debtor's Motion should be denied until sufficient detail is provided. Filbin Trust Creditors additionally request the appointment of a Chapter 11 Trustee due to Debtor's incompetence and dishonesty.

FN.1. The court notes that this "renewed" Objection is filed with the Docket Control Number "STJ-7." Dckt. 289. The Objection appears to be in response to Debtor in Possession's Motion to Approve Sale Agreement, which was granted by this court on July 19, 2018. Order, Dckt. 235. The arguments within Filbin Trust Creditor's renewed Objection largely reassert arguments already considered under that motion. To the extent that those arguments apply to the present Motion, the court finds that Debtor in Possession has addressed the creditors' concerns with its supplemental pleadings, as discussed below. *See* Dckt. 297.

CONDITIONAL OBJECTION OF FILBIN, SECURED CREDITORS

Mary Ette Filbin, for the Estate of Edward J. Filbin, Thomas R. Filbin, and James Filbin ("Filbin Secured Creditors") filed a Conditional Objection to this Motion on August 23, 2018. Dckt. 287. Filbin Secured Creditors object on the following bases:

1. Whether Jeffrey Arambel has adequately demonstrated he has complete and sole ownership of Filbin Land & Cattle Co. Inc.

2. Debtor in Possession has not explained how a greater sales price will affect the proposed distribution to secured creditors.

3. Filbin Secured Creditors are concerned that any sale will be prolonged, thereby affecting Filbin Secured Creditor's rights with respect to a motion for relief from stay.

4. Filbin Secured Creditors are concerned that Stanislaus County has not been approached regarding the feasibility of a lot line adjustment.

5. Filbin Secured Creditors are concerned that there may not have been full disclosure of all existing or threatened claims or litigation against the Debtor in Possession relating to ownership and operation of its assets involved in the potential sale.

REPLY TO FILBIN CREDITORS' OBJECTION TO SALE

Debtor in Possession filed a Reply to Filbin Secured Creditors' Conditional Objection on August 27, 2018. Dckt. 297. The parts of the Reply addressing the present Motion, Debtor in Possession responds with the following arguments:

1. The aggregate of all liens encumbering the Sale Property may be as high as $2.81 million. It is

presently anticipated that the Auction on August 30th will yield a materially higher purchase price. Assuming that is the case, the sale can be approved free and clear of the Filbin Creditors' liens and claims pursuant to Section 363(f)(3).

2. The proceeds of the sale may constitute, in whole or in part, cash collateral, and that cash collateral is subject to the protections imposed by Section 363(c). Uncertainty about the manner in which the proceeds of sale will be disbursed is not, however, a permissible basis on which the sale can be challenged. Modest amounts for real property taxes and a reduced broker's commission are the only necessary disbursements in connection with the sale.

3. Nothing further need be decided now about the disbursement of the proceeds of sale. Filbin Creditors' cash collateral rights will attach to those proceeds. To the extent that portions of its claim are undisputed, Filbin DIP is likely to pay them out of escrow consistent with local practice. To the extent that portions of the claim are the subject of dispute; e.g., more than $200,000.00 of interest accruing at the rate of 18% despite the absence of any obvious usury exemption, disbursement may be deferred. Likewise, if the Filbin DIP believes that it can prevail in seeking to use a portion of the proceeds as cash collateral without the secured creditor's consent, it is free to seek an Order permitting it to do so.

4. The sale is premised upon a lot line adjustment (the "FLCC Lot Line") which would identify as a separate legal parcel the 10 acres which are the subject of the Initial Sale. Filbin DIP expects to obtain the FLCC Lot Line within approximately 60 days of the hearing.

5. Lot line adjustments such as the FLCC Lot Line are exempted from the strictures of Subdivision Map Act.

6. The only issues involved in the present case are whether a sufficient application has been submitted and whether the lot line adjustment would violate zoning or similar regulations. In this case, an adequate application will be submitted and no zoning regulations will be violated, so approval of the lot line adjustment is a foregone conclusion.

7. Filbin Creditors present no evidence in support of their contention that "at a minimum it will take a great deal of time" to obtain a lot line adjustment and the cited opinion says nothing of the sort. In fact, Stanislaus County's website suggests that lot line adjustments will be acted upon within 30 days of submission; Christofferson Dec.; Dkt #291; Exhibit B; although Filbin DIP's more cautious engineer currently suggests expecting a 60 day processing period.

8. The Filbin Creditors complain that there is no information presented with respect to a potential Plan of Reorganization. Of course, such information is not required by Section 363(f), and in the ordinary case it would not be expected. Interestingly, in this case two Plans have already been presented, and so there is not, in fact, much question about the likely reorganization path. Consistent with the prior Plans, it should be expected that all or a portion of the proceeds of the Initial Sale will be paid to Filbin Creditors, to satisfy or pay down their secured debt. To the extent that any portion of the secured debt is not paid from the proceeds of Initial Sale, it will be paid over time under the Plan.

9. Filbin DIP does not contemplate selling what it does not own. Filbin DIP owns and can sell the land and property affixed to or made a part of the land, such as underground gas tanks and above-ground gasoline pumps. Filbin DIP cannot sell readily movable property purchased by the tenant, such as its inventory of candy bars. (There may be bona fide disputes about what constitutes fixtures, such as with respect to installed shelving.) Filbin DIP proposes to announce at the outset of the Auction these limitations on the property that will be sold.

DISCUSSION

Debtor in Possession's arguments are well-taken. While both Filbin Secured Creditors and Stadtler Trustees question the ownership of Debtor in Possession, neither has presented evidence for the court to do the same. Arambel appears to be the sole owner of Debtor in Possession, and no evidence has been provided showing otherwise. Dckt. 270. The court cannot say there are no potential claims waiting in the wings, but there is no evidence herein giving cause for concern.

The Stadtler Trustees argue that a sale of the entire 97 acre property involved here should be considered, and not merely the 10 acres of the Property. However, no argument is made why the entire property need be sold except that it would command a higher sales price. This argument confuses the court where Stadtler Trustees have themselves presented an overbid offer of approximately $2.7 million, an amount within spitting-distance of the $2,795,596.83 asserted as necessary to pay off all liens. Dckt. 255. The court-approved broker's opinion as to the value of the remaining portion is $9,399,000. Dckt. 255. Stadtler Trustees do not explain why it would be reasonable to force the sale of this asset to cover what appear to be relatively *de minimis* amounts of debt, which it appears could easily be provided for through other means.

Filbin Secured Creditors are concerned over how a greater sale price will be treated, whether any possible sale will be prolonged and thereby prejudice their right to bring a motion for relief of stay, and whether lot line adjustments will be approved. Debtor in Possession has hired GDR Engineering, Inc., which is seeking a lot line adjustment and believes the process will take 30-60 days. Dckt. 298. Nothing suggests the sale will be unduly prolonged. Furthermore, the proceeds of the sale will be applied to pay-off or pay-down the secured debts owing, with payment through a plan in the event the entire amounts owed are not provided through sale. Dckt. 191.

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the purchase price is a fair and appropriate one, and closing a sale on this basis would benefit the creditors substantially. The Motion is granted pursuant to either 11 U.S.C. § 363(f)(3) or (f)(5).

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

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

The Motion to Sell Property filed by Filbin Land & Cattle Co., Inc., Debtor in Possession, Debtor in Possession, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Filbin Land & Cattle Co., Inc., Debtor in Possession, is authorized to sell pursuant to 11 U.S.C. § 363(b), (f)(1), (f)(3), and (f)(5)to Boyette Petroleum or nominee ("Buyer"), the Property commonly known as approximately 10 acres of real property located at 4501, 4502, 4549, 4557, and 4561 Ingram Creek Road, Westley, California ("Property"), on the following terms:

A. ~~The Property shall be sold to Buyer for $2,565,000.00, on the terms and conditions set forth in the Purchase and Sale Agreement, Exhibit B, Dckt. 192, and as further provided in this Order.~~

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

C. ~~The Property is sold free and clear of the liens of the Tax Collector of Stanislaus County; Dorothy Arnaud (individually, and as Co-Trustee of the Patrick H. and Margaret J. Filbin Trust UTA dated December 30, 1973); Helen Jacobson (individually, and as Co-Trustee of the Patrick~~

H. and Margaret J. Filbin Trust UTA dated December 30, 1973); Garry DeWolf (individually, and as Trustee of the Estate of Jeanette DeWolf); Mary Etta Filbin (for the interest of Edward J. Filbin); James Filbin; Thomas Filbin; Fuel Source, Inc.; DK Stephens Enterprises; Precision Diesel; Rocky Fillippini; and Mark Potter on behalf of the Center for Disability, pursuant to 11 U.S.C. § 363(f)(3) and (f)(5) with the liens of such creditor attaching to the proceeds. Debtor in Possession shall hold the sale proceeds; after payment of the closing costs, other secured claims, and amount provided in this order; pending further order of the court.

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

6.	**10-32967-E-7**	**GINA COOPER**	**MOTION FOR PREVAILING PARTY ATTORNEY'S FEES**
	MET-2	**David Ritzinger**	**MARY ELLEN TERRANELLA, PREVAILING PARTY** **7-24-18 [241]**

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

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

Sufficient Notice Not Provided. Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff (*pro se*), and Defendant's Attorney on July 26, 2018. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has not been properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Prevailing Party Attorney's Fees is denied.

Mary Ellen Terranella ("Movant"), the respondent in the two Contested Matters brought by Gina Cooper ("Debtor"), moves for prevailing party attorney's fees pursuant to Federal rule of Bankruptcy Procedure 7054, Federal Rule of Civil Procedure 54, and California Code of Civil Procedure section 1717. Dckt. 241.

Movant asserts she is entitled to attorney's fees after being a prevailing party in the following Contested Matters:

(1) a combined Motion for Sanctions for Violation of the Discharge Injunction and Motion for Temporary Restraining Order, and

(2) a combined Application for Sanctions for Violation of the Discharge Injunction and Motion for Contempt. *See* Dckt. 197, 222.

Movant in her Declaration and supporting Exhibit B asserts she is entitled to $10,885.00 in attorney's fees, representing 31.1 hours of Movant's labor. Dckt. 244, 245.

Movant's alleged contractual basis is asserted to be the following provision included in her September 4, 2009, Fee Agreement entered into between Movant and Debtor:

> "In the event of an action at law or in equity between the parties hereto *to enforce any of the provisions hereunder*, the unsuccessful party to such litigation shall pay the successful party all costs and expenses, including reasonable attorney's fees, *incurred therein* by such successful party; and if successful party shall recover a judgment in any such action or proceeding, such costs, expenses and counsel fees shall be included in and as part of such judgment."

Dckt. 243 at 3:13.5-16.5 (emphasis added).

BACKGROUND

Debtor received her discharge in this bankruptcy case on August 26, 2010. Discharge Order, Dckt. 53. From the court's review of the Docket, several competing contested matters were prosecuted by the Debtor and the Chapter 7 Trustee after the entry of the discharge concerning the estate's asserted interests in a limited partnership as property of the Chapter 7 Bankruptcy Estate. Those disputes were ultimately resolved by a Stipulation between the Chapter 7 Trustee (represented by J. Russell Cunningham), the Debtor (represented by Movant), and Orchard Crossing Apartments, LP (the limited partnership) and Orchard Crossing Apartments, Inc. (the general partner) (represented by Pamela Jackson, Esq.). Settlement Agreement, Exhibit A; Dckt. 148. Debtor's Chapter 7 case was closed on August 5. 2013.

Reopening of the Bankruptcy Case

On April 30 2018, this bankruptcy case was reopened at the request of Debtor. Order, Dckt. 196. That same day, Debtor filed a motion to have Mary Ellen Terranella, Esq., Terry A. Duree, Esq., and Bret A. Yaple, Esq., and each of them held in contempt for violation of the discharge injunction. Motion, Dckt. 197. The allegations upon which the asserted violation of the discharge injunction is based center on state court litigation commenced by Movant, as the plaintiff, represented by Messrs. Duree and Yaple, asserting rights for payment of attorney's fees for legal services rendered in connection with the bankruptcy case. The state court action asserts claims based on contract and "common counts" (which are not specified) in the state court complaint. Exhibit A to Debtor Declaration, Dckt. 10.

At the May 15, 2018 Status Conference for the Motion for Sanctions and Injunction, the parties narrowed issues down to Debtor's contention that the pre-petition contract between Movant and Debtor was not enforceable for additional post-petition services rendered by Movant in the bankruptcy case. If not enforceable, because of the discharge, Debtor asserts that any obligation for the post-petition services are subject to the two-year statute of limitations for an oral contract or *quantum meruit* claim. Debtor then dismissed the Motion for Sanctions and Injunction by oral motion, and the second motion was filed.

Debtor filed her second Motion for Contempt and Sanctions for Violation of the Discharge Injunction. This court determined that the discharge granted Debtor in her Chapter 7 case did not include a discharge of the fees for the post-petition services provided Debtor by Movant. Civil Minutes, Dckt. 239. Further, that the discharge did not "destroy" the pre-petition contract between Movant and Debtor for legal services to be provided.

While not destroyed, the court noted that it could not be determined in this proceeding whether Debtor and Movant agreed to Movant providing post-petition services under the terms of the pre-petition writing, or whether Movant and Debtor went forward on a handshake and oral agreement.

> "For the state court litigation, the $64,000 question is whether Debtor and Ms. Terranella agreed post-petition for Ms. Terranella to provide new, post-petition services under the terms and conditions of the existing pre-petition attorney-client contract—did Debtor and Ms. Terranella elect to adopt that contract as the written agreement for the future post-petition services or did Debtor and Ms. Terranella elect to go forward on their handshake and Debtor's oral word that she would pay. That is not an issue for this court to determine, but a post-petition contract question for the state court."

Id. at 9.

DEBTOR'S OPPOSITION

Debtor filed an Opposition to this Motion on August 15, 2018. Dckt. 247. In summary, Debtor asserts the Motion should be denied because (1) Movant represented herself in *propia persona* and is not entitled to recovery of attorney's fees, and (2) Movant was not a prevailing party because there was no final judgement.

MOVANT'S REPLY

Movant filed a Reply to Debtor's Opposition on August 23, 2018. Dckt. 249. Debtor responds to Debtor arguing (1) no final judgement is required to be a prevailing party for purposes of recovering attorney's fees; (2) Movant is entitled to attorney's fees because an award is not dependant on an obligation to pay fees, because the facts of *Trope v. Katz* are inapplicable here, because Movant represented Messrs. Duree and Yaple in addition to herself, and because Movant hired a professional firm to assist with research; and (3) the court has inherent power to grant sanctions for Debtor's refusal to abandon her "baseless position."

DEBTOR'S RESPONSE TO MOVANT'S REPLY

Debtor filed a Response to Movant's Reply on August 24, 2018. Dckt. 251. Debtor repeats that Movant is not entitled to attorney's fees as no exception to *Trop v. Katz* applies, and (2) sanctions should not be granted against Debtor because Debtor did not know based on Movant's motion that it was only seeking post-petition debts.

APPLICABLE LAW

STATUTORY BASIS FOR ATTORNEY'S FEES

The court begins with the Federal Rules of Civil and Bankruptcy Procedure and then State law as set forth in the California Code of Civil Procedure and the California Civil Code.

Federal Rule of Bankruptcy Procedure 7054 provides that Federal Rule of Civil Procedure 54(d)(1)(A)-(C) and (E) apply for the award of attorney's fees in adversary proceedings, which is then incorporated into contested matter litigation by Federal Rule of Bankruptcy Procedure 9014(c). Federal Rule of Civil Procedure 54(d)(1) provides in pertinent part that attorney's fees are requested by post-judgment (order) motion, with (D) providing an exception when the attorney's fees are sought as sanctions for violating the Federal Rules of Civil (or Bankruptcy) Procedure. The Rule does not create a statutory basis for fees.

California fills in the substantive law for the obligation of one party to pay the attorney's fees of another. Except when provided for by statute (none alleged here), the right to recover attorney's fees is left to as set forth in the agreement of the parties. *Cal. Civ. Proc. Code* § 1021. 7 Witkin, Cal. Proc. 5th Judgment § 149, describing California's version of the "American Rule" that each party bears its own attorney's fees unless otherwise agreed.

California Civil Code § 1717(a) provides that in any action on a contract, the prevailing party shall be awarded attorney's fees incurred in enforcing the contract.

Recovery on "Action on a Contract"

For purposes of California Code of Civil Procedure section 1717, an "action on contract" is found where the action is brought to enforce the provisions of the contract. *City of Emeryville v. Robinson*, 621 F.3d 1251, 1267 (9th Cir. 2010). Under California law, "action on a contract" is liberally construed. *In re Penrod*, 802 F.3d 1084, 1087 (9th Cir. 2015)(*citing In re Tobacco Cases I*, 193 Cal. App.4th 1591 (2011).) In determining whether an action is "on the contract" under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action. *In re Tobacco Cases I*, 193 Cal. App.4th 1591, 1601–02 (2011).

Attorney's Fees for an Attorney Litigating Propia Persona

In *Trope v. Katz*, 11 Cal. 4th 274, 280 (1995), the court found "[b]y its terms, [California Code of Civil Procedure] section 1717 applies only to contracts specifically providing that attorney fees "which are incurred to enforce that contract" shall be awarded to one of the parties or to the prevailing party." *Trope v. Katz*, 11 Cal. 4th 274, 280 (1995). Litigants in *propia persona* do not become liable for fees, and therefore do not "incur" them. *Id.* Furthermore, the term "attorney's fees" in its plaining meaning means the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. *Id.*

Movant asserts that the ruling in *Katz* is not applicable here for several reasons. First, Movant cites the court to *Lolley v. Campbell*, 28 Cal. 4th 367,373 (2002) for the proposition that the award of attorney's fees need not be contingent on an obligation to pay counsel. In *Lolley* the obligation to pay attorney's fees was based on statute. In that case, the Labor Commission represented the indigent employee who was seeking to have employment law rights enforced. The California Supreme Court than addressed the policies underlying fee shifting statutes and the ability of consumers to engage lawyers to represent them, with the lawyers agreeing to be paid only from the fees awarded and recovered under the fee shifting statutes.

The Supreme Court notes its holding in *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084 (2000), concluding that a party that had paid in-house counsel to represent it in the action could recover the reasonable costs and expenses for the legal services provided for by the paid in-house legal counsel. *Lolly v. Campbell*, 28 Cal. 4th at 374. In rejecting the contention that statutory attorney's fees would not be owed if the party used paid in-house counsel, the Supreme Court stated:

> "We specifically rejected the contention of the defendant, essentially repeated by Campbell herein, that attorney fees "incurred" means only fees a litigant actually pays or becomes liable to pay from his own assets. (*Id.* at p. 1097.) Instead, we focused on the fact that the client in Drexler **was seeking statutory fees to pay for legal services provided pursuant to an attorney-client relationship**. (*Ibid.*; see also *Rosenaur v. Scherer* (2001) 88 Cal. App. 4th 260, 283, 105 Cal. Rptr. 2d 674.)"

Id. In *Lolley* the California Supreme Court repeatedly discusses its rulings with respect to fee shifting statutes. As discussed by the Supreme Court, fee shifting statutes are generally enacted to provide for the recovery of attorney's fees by those least able to afford them or finance litigation to enforce their rights. These include the indigent employee at issue in Lolley, as well as the statutory attorney's fees provisions found in the California Rosenthal Fair Debt Collection Practices (Rosenthal) Act (Cal. Civ. § 1788.30(c)), the California Consumer Credit Reporting Agencies Act (Cal. Civ. § 1785.31(d)), the Federal Fair Debt Collection Practices Act (15 U.S.C. § 1692k(a)(3)), and the Federal Fair Credit Reporting Act (15 U.S.C. § 1681o(b) and § 1681n(a)(3)), to name a few. The court in *Lolley* was very clear that it was not stating a rule that anybody could claim a right to attorney's fees, without there being any obligation to pay attorney's fees.

> "As the above-cited cases reveal, fee-shifting provisions similar to the one herein have been held to authorize an award of reasonable attorney fees to publicly as well as privately funded legal services providers. As we observed in *Folsom v. Butte County Assn. of Governments*, *supra*, 32 Cal. 3d at page 683: "**Whether we focus on enabling suits by those otherwise unable to pursue the litigation, or deterring misconduct**, an **award to lawyers who have vindicated an important interest** achieves the desired result whether they worked for a private firm or a legal services organization." Thus, for example, *In re Marriage of Ward*, supra, 3 Cal. App. 4th 618, **authorized an award of statutory attorney fees to a legal services organization** that was partially funded by state and federal grants and court-awarded attorney fees. The Court of Appeal stressed that such fee awards afford indigent clients of publicly funded counsel the same leverage and protection available to clients of private counsel, and avoid a potential windfall to the losing party. (Id. at pp.

625-626). " '[A] realization that **the opposing party, although poor, has access to an attorney and that an attorney's fee may be awarded deters noncompliance with the law and encourages settlements.'** " (Id. at p. 625.) Fee awards to publicly funded attorneys also serve the taxpayer's " 'interest in recovering where possible a portion of the costs' " of the legal services provided at no charge to an indigent client. (Ibid.(2c))"

Lolley v. Campbell, 28 Cal. 4th at 375.

In distinguishing the statutory attorney's fee basis in interpreting the word "incurred," the Supreme Court made it clear that it was not opening the door to attorney's engaging in *pro se* self-representation on contract disputes dropping huge demands for attorney's fees that no one was obligated to pay for all of the "business opportunities" that attorney "lost" because he or she could not work on cases for paying clients.

> "We held in *Trope* that **an attorney who appears in propria persona in an action to enforce a contract could not recover attorney fees under Civil Code section 1717**, which provides for an award of reasonable attorney fees "incurred" by the prevailing party in certain actions. We stated: "To 'incur' a fee, of course, is to 'become liable' for it [citation], i.e., to become obligated to pay [***578] it. **It follows that an attorney litigating in propria persona cannot be said to 'incur' compensation for his time and his lost business opportunities." (** *Trope v. Katz, supra*, 11 Cal. 4th 274, 280.) We also examined the word "fee" and concluded that "the usual and ordinary meaning of the words 'attorney's fees,' both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation." (Ibid.) **This language, however, was not intended to resolve issues** [fee shifting statutes to serve a public purpose]**, such as the one presented here, that were not raised in *Trope*.**"

Id. at 377. *See also*, *Gorman v. Tassajara Development Corp.*, 178 Cal. App. 4th 44, 93 (2009) stating:

> "It is settled that Gorman, the client, would not be able to recover contractual attorney fees had he been represented by Gorman, a sole practitioner. It is also settled that, if the Gorman firm had represented itself in litigation, it would not be able to recover for its own attorney fees. In *Trope v. Katz* (1995) 11 Cal.4th 274, 45 Cal.Rptr.2d 241, 902 P.2d 259 (Trope), the California Supreme Court considered "whether an attorney who chooses to litigate in *propria persona* rather than retain another attorney to represent him in an action to enforce a contract containing an attorney fee provision can nevertheless recover 'reasonable attorney's fees' under Civil Code section 1717 ... as compensation for the time and effort expended and the professional business opportunities lost as a result." (Id. at p. 277, 45 Cal.Rptr.2d 241, 902 P.2d 259.) The court's answer was "no" for the following reasons. "[T]he usual and ordinary meaning of the words 'attorney's fees,' both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation." (*Id*. at p. 280, 45 Cal.Rptr.2d 241, 902 P.2d 259.)"

Movant's contention are not persuasive and run contrary to well established California law as enunciated, and repeated, by the California Supreme Court. Movant cannot be awarded "legal fees" for representing herself in these Contested Matters.

Contention Raised in Reply That Movant Represents Others

In her Motion, Movant clearly requests attorney's fees for herself, as the prevailing party for the Motions brought against Movant. Motion, p. 1:22-24. Throughout the Motion reference is made just to the Movant, nobody else. The "Billing Records" filed as Exhibit B do not list any client, do not identify any case, and do not appear to be generated as part of an attorney's billing system for "clients." Rather, it is a lists of dates, activities, hours, rates and totals. Dckt. 245.

In the Reply it is now stated that Movant represented not only her interests, but the "interests" of "Messrs. Duree and Yaple" in the contested matter. Reply, p. 4:7-8. Given that an attorney's tools of the trade are words, the court first notes that Movant does not say that she represents Duree or Yaple, that Duree or Yaple have hired her, or that she has an attorney client relationship (where Movant is the attorney and Duree and Yaple are the clients) with Mr. Duree or Mr. Yaple. Rather, that by advancing her personal interests, the interests of Duree and Yaple are advanced.

In looking at the earlier pleadings filed, as with the ones in this contested matter, Movant does not identify in the upper left hand corner the name of the person she is representing. In the Opposition to the Motion for Contempt filed on July 5, 2018, Movant clearly states that "Respondent, MARY ELLEN TERRANELLA, hereby opposes . . . " Opposition, p. 1:21, Dckt. 231. In the prayer, it states that Respondent [Mary Ellen Terranella, the Movant] requests that the Motion for Sanctions be overruled.

Clearly, Movant is representing herself, and only herself. She has not appeared as counsel for anyone else in this, or the prior Contested Matter. Merely contending that she has involuntary clients, who have not entered into any attorney-client relationship (where Movant is the attorney), does not an attorney-client relationship make.

This contention, as with the improper request for sanctions in the reply, is not credible and is not valid. Movant is merely appearing for herself, in *pro se*.

NO RECOVERY OF NONEXISTENT ATTORNEY'S FEES FOR PRO SE MOVANT

First, the issues herein presented fall squarely within the ambits of *Katz*. Movant is seeking attorney's fees pursuant to California Code of Civil Procedure section 1717, which itself relies on the alleged agreement providing for such fees. Dckt. 241. Movant's alleged contractual basis provides " the unsuccessful party to such litigation shall pay the successful party all costs and expenses, including reasonable attorney's fees, *incurred therein* by such successful party." Dckt. 243 at 3:13.5-16.5 (emphasis added).

Movant belatedly throwing in her Reply to Debtor's Opposition that she is entitled to fees because acting to protect her interests benefitted the interests of others (Dckt. 249 at 4:7-10) does not create a

fiduciary, attorney-client relationship in which she was appearing as counsel for others. Further, her stating that she hired a professional legal research firm to assist in researching the issues in this proceeding (Dckt. 249 at 5:16-18) does not make her the attorney for the "professional legal research firm." That "professional legal research firm" is not Movant's attorney of record in the Contested Matters.

Movant's pleadings clearly state that she was appearing in pro se, for herself, and did not appear as counsel for any other person. Movant provides a detailed billing analysis which does not include any work or costs of an outside firm. Exhibit B, Dckt. 245. Under the holding of *Katz*, an attorney representing herself in propia persona is not entitled to attorney's fees under California Code of Civil Procedure section 1717. Therefore, Movant is not entitled to attorney's fees.

Second, the court must review the Contract itself. If Movant were represented by an attorney and Movant sought to recover the legal fees of the attorney representing her, we look at the contract upon which she bases her claim. The Attorney-Client Engagement Agreement, filed as Exhibit A, describes the scope of the services to be provided as follows:

> "We [Movant and Debtor] have heretofore engaged in discussions concerning our responsibilities for the administration of your Chapter 7 case, and I have advised you that my services will include the initial conferences with you concerning the filing, preparation of the petition, statement of affairs and schedules of assets and liabilities, consultations with you regarding sales of exempt and non-exempt assets, appearance at the meeting of creditors, and such other matters as corresponding with your creditors and attorneys for creditors.
>
> The retainer you have paid or agreed to pay covers only these core bankruptcy matters and you understand that we have not agreed for the fee paid to represent you in any outside matters, such as divorce law, landlord tenant law, civil litigation, and workers comp law or any other legal matter."

Engagement Letter, p. 1; Exhibit A, Dckt. 245. The agreed representation appears to apply only to the "core" matters outlined in the first paragraph above.

The Engagement Letter then proceeds to describe other core matters relating to the administration of the bankruptcy case for which Movant will be entitled to an additional fee. *Id.*, pp. 2-4. For the fight in which Movant represented Debtor in the bankruptcy case that the fees at issue in the state court proceeding relate, the additional services paragraph "Contested Matters" may apply. The Engagement Letter states that such "contested actions are rare in a Chapter 7 proceeding," and that if such representation is required, Movant "will immediately contact you [Debtor} and obtain specific authorization to take whatever action we deem proper." *Id.*, p. 3.

The contractual basis asserted for legal fees is stated to be:

> "In the event of an **action at law** or in equity between parties hereto **to enforce any of the provisions hereunder**, the unsuccessful party to such litigation shall pay the successful party all costs and expenses, including reasonable attorneys fees, incurred therein

by such successful party; and if successful party shall recover a judgment in any such action or proceeding, such costs, expenses and counsel fees shall be included in and as part of such judgment."

Id., p. 5 (emphasis added).

The Contested Matters in this court were assertions that Movant had violated the discharge injunction in attempting to enforce her right to be paid for post-petition services rendered. The Debtor was not seeking to enforce any provision in the Engagement Agreement, though the Motion for Contempt was part of the defense she asserted in the State Court Action. Movant's defense of the contempt proceeding relating to the discharge arising under 11 U.S.C. § 524 was not an action to enforce the agreement, but to save Movant from sanctions.

The attorney's fee provision does not include bankruptcy court sanction litigation. Movant in her pleadings does not address how defending herself to the Motion for Sanctions is an action to enforce the Engagement Agreement. Her State Court Action is the pending proceeding in which she is seeking to enforce the Agreement.

The court could envision arguments that an advocate for Movant could create in trying to make the defense to the Contempt Motion to be part of enforcing the Engagement Agreement. However, no such arguments have been advocated and the court is not the proper participant in the judicial process to do that for Movant who has only herself for a client.

Additionally, in denying Debtor's motions for sanctions and contempt, the court has already indicated its uncertainty as to whether there is any written or oral contract here. Dckt 239, 240. California Code of Civil Procedure section 1717 permits an award of attorney's fees where there is a contractual basis. Without evidence as to a valid contract, this court cannot grant attorney's fees. Here, Movant has not presented evidence of the Engagement Agreement being the written contract upon which the services were rendered. That issue has been, and continues to be, ignored by the Parties. (Movant in advocating her position and Debtor in affirmatively and truthfully stating whether she sought, requested, and obtained the extensive post-petition services of Movant–the court recalls and it appears Debtor's statements under penalty of perjury and arguments of counsel dismissing Movant's request for payment and asserting that another attorney did the work were clearly false based upon the clear evidence of Movant being Debtor's attorney in all of post-petition proceedings at issue in Movant's State Court Action.)

SANCTIONS

Movant makes a belated request for sanctions in its Reply to Debtor's Opposition filed August 23, 2018, approximately 7 days before this hearing. Dckt. 249. *Federal Rule of Bankruptcy Procedure* 9011(c) provides for sanctions where a nonmeritorious claim has been brought by a party in a bankruptcy proceeding. That provision also sets out specific notice requirements on any motion for sanctions. *Fed. R. Banker. P.* 9011(c)(1)(A).

Movant has not filed a separate Motion asserting whatever rights she may believe she has for sanctions against Debtor. Movant has filed a prevailing party attorney's fee motion, and Movant is not permitted to join multiple claims for different types of relief into one Motion. Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allowing for the joinder of any and all claims for relief in one complaint are not incorporated into contested matter (motion and application) practice under Federal Rule of Bankruptcy Procedure 9014(c).

More egregiously, Movant merely tries to slip it in seven days before the hearing, affording Debtor no opportunity to respond. Movant ignores the law and motion practice rules in this District, L.B.R. 9014-1(f)(1) and (f)(2), which have specified notice requirements and opposition time period.

Throwing in the "after hours request" for relief is not consistent with good faith practice in federal court. Just as Debtor's original motion was not properly presented and improperly requested relief through a motion, Movant appears to have devolved into the same litigation game strategy as Debtor and Debtor's counsel.

Any request for sanctions is not properly presented and is denied without prejudice.

FINAL JUDGEMENT ALLEGATION

The Law seems fairly clear that no final judgement is required for the court to determine the prevailing party. *Cal. Civ. Code* § 1717(b)(1). Debtor withdrew its initial contempt motions. Dckt. 217. Further, the court denied the second Motion for Sanctions filed by Debtor. Order, Dckt. 240. The Motion was not denied without prejudice, but DENIED. That is a final adjudication of the request for sanctions based upon Movant seeking to recover post-petition attorney's fees from Debtor based on the services being provided, by agreement of the parties, on the pre-petition contract terms. Movant was and is the prevailing party on the issue of contempt as asserted by Debtor in the Motions for Contempt DPR-1 and DPR-2.

CONCLUSION

Based on the foregoing analysis, Movant is not entitled to attorney's fees.

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

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

The Motion for Prevailing Party Attorney's Fees and Costs filed by Mary Ellen Terranella ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.

7.	**12-92190-E-7** **BSH-2**	**RALPH/CAROLYN MCKEE** **Brian Haddix**	**MOTION TO AVOID LIEN OF MAIN STREET ACQUISITION CORP. O.S.T. 8-16-18 [28]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on August 16, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted and the judicial lien of Main Street Acquisition Corp is avoided pursuant to 11 U.S.C. § 522(f).

This Motion requests an order avoiding the judicial lien of Main Street Acquisition Corp.("Creditor") against property of Ralph E. McKee and Carolyn McKee ("Debtor") commonly known as 836 East A Str, Oakdale, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $9,629.08. An abstract of judgment was recorded with Stanislaus County on October 19, 2011, that encumbers the Property.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $108,000.00 as of the petition date. Dckt. 12. The unavoidable consensual liens that total $124,691.00 (including a First deed of Trustee in the amount of $58,439.00 and a Second Deed of Trust in the amount of $66,252.00) as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 12. Debtor has claimed an

exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 45.

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 (not a minute 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 Ralph E. McKee and Carolyn McKee ("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 Main Street Acquisition Corp., California Superior Court for Stanislaus County Case No. 651017, recorded on October 19, 2011, Document No. 2011-0093331-00, with the Stanislaus County Recorder, against the real property commonly known as 836 East A Str, Oakdale, 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.

8.	**12-92190-E-7** **BSH-3**	**RALPH/CAROLYN MCKEE** **Brian Haddix**	**MOTION TO AVOID LIEN OF MIDLAND FUNDING, LLC O.S.T. 8-16-18 [33]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on August 16, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted and the judicial lien of Midland Funding, LLC is avoided pursuant to 11 U.S.C. § 522(f).

This Motion requests an order avoiding the judicial lien of Midland Funding, LLC ("Creditor") against property of Ralph E. McKee and Carolyn McKee ("Debtor") commonly known as 836 East A Str, Oakdale, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $12,522.00. An abstract of judgment was recorded with Stanislaus County on January 30, 2012, that encumbers the Property.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $108,000.00 as of the petition date. Dckt. 12. The unavoidable consensual liens that total $124,691.00 (including a First deed of Trustee in the amount of $58,439.00 and a Second Deed of Trust in the amount of $66,252.00) as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 12. Debtor has claimed an

exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 45.

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 (not a minute 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 Ralph E. McKee and Carolyn McKee ("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 Midland Funding, LLC, California Superior Court for Stanislaus County Case No. 669269, recorded on January 30, 2012, Document No. 2012-0007831-00, with the Stanislaus County Recorder, against the real property commonly known as 836 East A Str, Oakdale, 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.