UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

September 24, 2014 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

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

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

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

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

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

1.	13-33804-D-7 BHS-2	RHONDA STIJAKOVICH-SANTILLI	OBJECTION TO HOMESTEAD EXEMPTION AND/OR MOTION FOR RELIEF FROM A FINAL ORDER ON ABANDONMENT OF THE REAL PROPERTY 8-18-14 [80]

Tentative ruling:

This is the trustee's objection to the debtor's claim of exemption of a $75,000 interest in the real property at 9817 Beckenham Drive, Granite Bay, California (the "Property"), and motion for relief from this court's final order granting the debtor's motion to compel abandonment of the Property. The debtor has filed opposition, and the trustee has filed a reply. For the following reasons, the objection will be overruled and the motion will be denied.

The meeting of creditors in this case was concluded on January 21, 2014. Thus, in the absence of fraud, the time for the trustee to object to the claim of exemptions expired on February 20, 2014. See Fed. R. Bankr. P. 4003(b)(1). The trustee asserts that the debtor fraudulently claimed a homestead exemption in the Property when, according to the trustee, she did not live there. If that were the

case, the trustee's objection would be timely. See Fed. R. Bankr. P. 4003(b)(2).

The trustee claims the debtor did not reside in the Property on the date this case was filed, October 25, 2013. Instead, he claims, he discovered when he received copies of the debtor's 2013 tax returns, on or about August 6, 2014,[1] that she had claimed the Property as a rental property for the entire year, with "zero personal days." Trustee's Obj., filed Aug. 18, 2014, at 2:20. Indeed, on the schedule of Supplemental Income and Loss filed with the debtor's federal tax return (which the trustee has filed as an exhibit), the debtor was required to list the number of "Fair Rental Days" and the number of "Personal Use Days" for the property; the debtor listed 365 "Fair Rental Days" and no "Personal Use Days." She did the same for her other two real properties. The trustee claims he had no way to verify the debtor's actual residence address because she uses a post office box for her mail, and used it for all the documents she provided to him. The trustee concludes from this that the "Debtor did not reside at the Subject Property on the date her Chapter 7 petition was filed and did not live there any time during 2013." Id. at 2:11-12.

In opposition to the objection, the debtor has filed her own declaration, in which she testifies she has been residing at the Property, which is her home, "continuously for all of 2012, 2013 and all of 2014 through the date of this declaration." Debtor's Decl., filed Sept. 9, 2014, at 2:1-3. She adds that during each of those years, she "[has] rented rooms in [her] Home to roommates in order to meet [her] income needs." Id. at 2:4-5. In addition to that evidence, the court considers the debtor's petition, on which she gave the address of the Property as her street address, and her Schedule I, on which she listed income from a "Room Mate," $3,400 per month, along with other income from real property (presumably, her other two properties), at $3,800 per month. On her Schedule J, the debtor listed her mortgage payment as $2,034, and separately listed, by address, two other mortgage payments – those for the debtor's other two properties.

In his reply, the trustee returns to the theme of the debtor's tax returns, on which she listed the number of "Fair Rental Days" for the property as 365 and listed no "Personal Use Days." The trustee submitted with his reply a declaration of CPA Michael Gabrielson, who testifies as follows:

> [The] assertion that the Subject Property was used in part as a residence is not supported by the treatment of the Beckenham property on the 2012 and 2013 tax returns. The Subject Property was treated as a 100% rental property during 2012 and 2013 with no allocation of operating expenses between business use as a rental property and alleged personal use as a residence. The tax returns represent to the tax authorities that [the] Subject Property was used exclusively as a business rental, since no portion of the mortgage interest and property taxes were reduced in recognition of alleged residential use[,] and depreciation expense was recognized on the entire tax basis of the Subject Property.

M. Gabrielson Decl., filed Sept. 16, 2014, at 2:16-23.

The problem with this testimony and this theory is that the question on this objection to exemption is not whether the debtor prepared her tax returns in accordance with applicable tax law and rules. It is whether the debtor resided in the Property on the date her petition was filed, October 25, 2013.[2] The debtor listed all three of her real properties on her tax returns with 365 "Fair Rental Days" and no "Personal Use Days." Those are the only real properties she owns, and

the trustee has never suggested she was also renting property from someone else as of the petition date. Thus, presumably, she was living in one of the three properties she owns; the trustee has given the court no reason to believe it was not the one in which she has claimed the homestead exemption.

The Ninth Circuit Bankruptcy Appellate Panel has recently summarized the law on the burden of proof on objections to exemptions as follows:

> Exemptions serve to protect and foster a debtor's fresh start from bankruptcy. A claimed exemption is presumptively valid. Once an exemption has been claimed, the objecting party has the burden of proving that the exemptions are not properly claimed. Initially, this means the objecting party has the burden of production and the burden of persuasion. If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to go forward with unequivocal evidence to demonstrate the exemption is proper. The burden of persuasion, however, always remains with the objecting party.

Neff v. DeNoce (In re Neff), 2014 Bankr. LEXIS 471, at *23 (9th Cir. BAP Feb. 4, 2014) (citations omitted; internal quotations omitted).

Here, the trustee's evidence goes only to the question of whether the debtor properly prepared her tax returns; the court finds that evidence to be insufficient to rebut the presumption that the debtor resided in the Property on the petition date. However, even if the trustee's evidence may be said to have overcome that presumption, the debtor has met her burden to produce evidence that she was living in the Property that day: she has testified unequivocally to that effect, thereby shifting the burden of proof back to the trustee, who, as the objecting party, always has the burden of persuasion.

In response to the debtor's testimony, the trustee contends the documents filed with the debtor's declaration do not corroborate her testimony. With her declaration, the debtor submitted copies of a letter from the Social Security Administration, a DMV form, and several utility bills, all showing the address of the Property as the debtor's address. The trustee correctly observes that the dates of those documents post-date the date of the debtor's petition; thus, they do not constitute proof that she lived in the Property on the petition date. However, the argument is based on an incorrect allocation of the burdens of production and persuasion. The debtor's unequivocal testimony alone demonstrates that she was living in the Property on the petition date. The trustee's analysis of the debtor's tax returns is insufficient to cause the court to doubt her veracity as to that critical issue. The trustee's evidence is simply insufficient to persuade the court that she was not living in the Property on that date.

Finally, the trustee has asked the court to strike certain portions of a letter the debtor submitted with a declaration of her own CPA, Mark R. Green, concerning the debtor's tax returns. As with Mr. Gabrielson's declaration, the court finds Mr. Green's declaration and letter to be unpersuasive on the subject of the debtor's residence as of the petition date, and renders this decision with no reliance on Mr. Green's declaration or the letter. Thus, the trustee's request that the court strike portions of the letter is denied as unnecessary.

To conclude, the trustee has cited no authority for the proposition that a debtor who has a roommate living in her home, while the debtor also resides there,

is not entitled to a homestead exemption, and the court is aware of none. The trustee has also failed to refute the debtor's evidence that the Property was her residence at the time the case was filed. Thus, as the trustee has failed to demonstrate that the debtor fraudulently claimed the exemption, the objection will be overruled, and the court need not reach the other issues raised by the debtor's opposition. The trustee's motion for relief from the order on the abandonment motion depends on the proposition that, absent the homestead exemption, the Property would have equity for the estate. As the trustee has not succeeded in getting the homestead exemption disallowed, the motion will be denied.

The court will hear the matter.

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1 The debtor apparently had an extension to file her returns.

2 "The essential factors in determining residency for homestead purposes are physical occupancy of the property and the intent to live there." In re Dodge, 138 B.R. 602, 607 (Bankr. E.D. Cal. 1992), citing Ellsworth v. Marshall, 196 Cal. App. 2d 471, 474 (1961); see also McBeth v. Karr (In re Karr), 2006 Bankr. LEXIS 4801, at *11-12 (9th Cir. BAP 2006).

2.	11-38206-D-7 CJY-1	JOHN CONTRERAS	MOTION TO SUBSTITUTE ATTORNEY 8-20-14 [46]

3.	14-27906-D-7 NLG-1 SETERUS, INC. VS.	DEBRA MAY	MOTION FOR RELIEF FROM AUTOMATIC STAY 8-14-14 [14]

Final ruling:

This matter is resolved without oral argument. This is Seterus, Inc.'s motion for relief from automatic stay. The debtor has filed opposition that only objects to the waiver of FRBP 4001(a)(3). The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

4. 14-28006-D-7 TERESA JASTREM — AMENDED ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-27-14 [16]

Final ruling:

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

5. 12-40315-D-7 OLUSEGUN/YVONNE LERAMO — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-26-14 [231]

6. 14-27519-D-12 WW-5 LOEK VAN WARMERDAM — MOTION TO AVOID LIEN OF SAN JOAQUIN VALLEY HAY GROWERS ASSOCIATION AND OF AVOID LIEN OF GROWERS' AG SERVICE
8-15-14 [37]

Final ruling:

The hearing on this matter has been continued by stipulated order dated September 15, 2014 to October 22, 2014, at 10:00 a.m. No appearance is necessary on September 24, 2014.

7. 13-28020-D-7 HSM-7 ROGER/BONNIE TURNER — CONTINUED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
3-31-14 [54]

Tentative ruling:

This is the trustee's objection to the debtors' claim of exemption of certain annuities and 401(k) accounts: (1) an annuity described on the debtors' Schedule C as a "non qualified annuity," a portion of which is claimed as exempt under § 703.140(b)(5);[1] (2) a different annuity – described on Schedule C as a "qualified retirement annuity" – claimed as exempt under § 703.140(b)(10)(E); and (3) two 401(k) plans in Morgan Stanley accounts, claimed as exempt under § 703.140(b)(10)(E). Of the total value of the first annuity (the one claimed as exempt under the so-called wild-card), $50,252, the debtors have claimed only $6,886 in value as exempt. For the remaining three accounts (the second annuity and the two 401(k) plans), the debtors have claimed their full values as exempt. The hearing has been continued several times; however, as of this date, the debtors have filed no response. For the following reasons, the objection will be overruled.

The trustee testifies in support of the objection that the debtors' counsel has acknowledged that the non-qualified annuity cannot be exempted as a retirement asset, and that the value over and above the wild-card exemption will be turned over to the trustee. The trustee contends the debtors' exemption of $6,886 under the wild card should be disallowed until the non-exempt portion is turned over, together with a full accounting.[2] This appears to be another way of saying the debtors' wild-card exemption, which is otherwise allowable, should be surcharged until the debtors have turned over non-exempt assets, a result that appears contrary to the United States Supreme Court's recent decision in Law v. Siegel, 134 S. Ct. 1188, 1194-98 (March 4, 2014). Thus, the trustee's objection to that exemption will be overruled.

As for the allegedly "qualified" annuity, the trustee testifies that the debtors' counsel agreed in writing, as early as February of this year, that the debtors would support their claim of exemption with additional information and/or documents, and that the debtors understood that, if that annuity turned out to be "non-qualified," they would have to turn it over. Despite these assurances, the debtors have failed to supply any additional information or documentation. Thus, according to the trustee, "[b]ecause the Debtors have agreed to provide additional information, and have acknowledged that both annuity contracts may be subject to turnover, the exemption covering the Qualified Annuity should be denied at this time, pending the Debtors' production of additional materials." Trustee's Obj., filed March 31, 2014 ("Obj."), at 3:10-13.

This contention represents a misunderstanding of the burden of proof on objections to exemptions. The Ninth Circuit Bankruptcy Appellate Panel has recently summarized the law on this issue as follows:

> Exemptions serve to protect and foster a debtor's fresh start from bankruptcy. A claimed exemption is presumptively valid. Once an exemption has been claimed, the objecting party has the burden of proving that the exemptions are not properly claimed. Initially, this means the objecting party has the burden of production and the burden of persuasion. If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to go forward with unequivocal evidence to demonstrate the exemption is proper. The burden of persuasion, however, always remains with the objecting party.

Neff v. DeNoce (In re Neff), 2014 Bankr. LEXIS 471, at *23 (9th Cir. BAP Feb. 4, 2014) (citations omitted; internal quotations omitted). Here, the trustee claims only that the debtors' counsel suggested at one point that the allegedly "qualified" annuity might not be "qualified," and that if it were not, the debtors understood they would have to turn it over. This is not evidence; it is speculation on the part of the debtors' counsel. It is insufficient to meet the trustee's burden of rebutting the presumption that the claim of exemption is valid.

The same is true for the trustee's objection to the debtors' claims of exemption of the 401(k) plans. The trustee's only argument is that the amounts of the various annuities and 401(k) plans are unclear. He claims to have reviewed documentation indicating that one or both of the annuities are included in the amount listed by the debtors as the balance of the larger 401(k) plan, and indicating that the amount listed for the smaller 401(k) plan may actually be included in the amount listed for the larger 401(k) plan. The trustee adds that the account statements produced by the debtors and the limited documentation he has

received directly from Morgan Stanley "[do] not fully answer the Trustee's concerns and questions." Obj. at 3:27. Thus, in the trustee's view, "[u]ntil the above issues concerning the two annuity contracts are resolved, the exemptions covering the Morgan Stanley 401(k) accounts should be denied to the extent that the scheduled and exempted balances include the annuity contracts." Id. at 3:28-4:2.

These are questions concerning the actual balances in the various accounts; they do not constitute evidence sufficient to overcome the presumption that the claims of exemption themselves are valid. As such, the objection will be overruled.

The court will hear the matter.

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1 All statutory references are to the California Code of Civil Procedure.

2 That is the trustee's sole objection to the debtors' claim of exemption of $6,886 in value in the non-qualified annuity.

8.	14-28238-D-7 DVD-1	KEVIN/ERNESTINA WATT	MOTION TO COMPEL ABANDONMENT 8-22-14 [9]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the debtors' motion to compel the trustee to abandon their sole proprietorship business dba "Woodlake Chiropractic Center" and the debtors have demonstrated the property to be abandoned is of inconsequential value to the estate. Accordingly, the motion will be granted and the business assets used in the sole proprietorship dba "Woodlake Chiropractic Center" will be deemed abandoned. Moving party is to submit an appropriate order. No appearance is necessary.

9.	12-39040-D-7 HCS-1	JUDITH FOSTER	MOTION TO SELL AND/OR MOTION FOR COMPENSATION FOR KELLER WILLIAMS REALTY, REALTOR(S) 8-27-14 [31]

Tentative ruling:

This is the trustee's motion to approve a sale of certain real property. For the following reasons, the motion will be denied.

First, except for the debtor, the debtor's attorney, the United States Trustee, the IRS, and counsel who has requested special notice in this case, the moving party served only the notice of hearing, and not the motion itself or the supporting documents. Where the notice of hearing is the only document served on creditors, the notice must sufficiently describe the nature of the relief being requested and set forth the essential facts necessary for a party to determine whether to oppose the motion. LBR 9014-1(d)(4). Here, the notice of hearing informed creditors only that the trustee seeks to sell certain real property (the address is given) for $375,000, and authorization to pay a 6% real estate commission to his realtor (who is named). The notice does not inform creditors of the name of the prospective purchaser, the names of the several holders of liens against the property or the amounts owed on those liens, or the fact that, in addition to the $375,000 purchase

price, the prospective purchaser is to pay a buyer's premium of $18,500, an additional $46,186 "contribution to liens," and additional specified amounts for costs of sale and property taxes. It does not inform creditors that the sale will be a short sale. Thus, the notice omits pertinent information as to the nature of the relief requested, and does not provide sufficient information to enable to a party to determine whether to oppose the motion. Further, although the notice states that the sale is subject to overbidding at the hearing, giving as it does only the "base" purchase price of $375,000, it does not provide sufficient information to enable parties-in-interest or others to determine whether to attempt an overbid.

Second, Citibank (South Dakota) N.A. is listed in the motion as holding a $16,124 judgment lien against the property; thus, it is party who is "directly affected by the requested relief," and in accordance with LBR 9014-1(d)(4), should have been served with the motion and supporting papers. However, it was served with the notice of hearing only. Finally, the county tax collector, who is listed in the motion as being owed back taxes, was not served at all.

As a result of these service and notice defects, the court intends to deny the motion. The court will hear the matter.

10.	14-27340-D-7 JM-1	EDWARD/LORI ADAMS	MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), NA 7-23-14 [14]

11.	14-25148-D-11 MF-12	HENRY TOSTA	MOTION TO SELL FREE AND CLEAR OF LIENS 8-27-14 [174]

12. 14-28255-D-7 ZACHARY WRIGHT
MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
8-13-14 [5]

13. 13-26559-D-7 BRIAN MCGLONE
BHS-1
MOTION TO EMPLOY BARRY H. SPITZER AS ATTORNEY(S) AND/OR MOTION FOR COMPENSATION FOR BARRY H. SPITZER, TRUSTEE'S ATTORNEY(S)
8-25-14 [39]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the flat fee requested of $1,750 is reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion and approve a flat fee of $1,750. Moving party is to submit an appropriate order. No appearance is necessary.

14. 13-26559-D-7 BRIAN MCGLONE
BHS-2
MOTION TO SELL
8-25-14 [45]

15. 13-34659-D-7 GERARDO CHAVEZ
SSA-2
MOTION FOR TURNOVER OF PROPERTY
8-21-14 [20]

Tentative ruling:

This is the trustee's motion to compel the debtor and his brother, Antonio Chavez, to turn over records and property alleged to be in the custody and under the control of the debtor and his brother, and for the remittance of future payments under a certain promissory note (the "note"). The trustee seeks turnover of all monies collected under the note, at $2,348.99 per month, from the petition date, November 15, 2013, to the date of the motion, August 20, 2014, and an order

requiring the turnover of all future payments under the note. The trustee also seeks turnover of complete copies of all documents and records pertaining to a buy-sell agreement between the debtor and his brother, Antonio Chavez, on the one hand, and Martin Mercado Mora and Juan Saavedra, on the other hand. The debtor has filed on his own behalf an objection to the motion.

The court has two preliminary concerns about the motion. First, there is no evidence of service on the debtor's brother, Antonio Chavez. Thus, the court is not prepared to consider the motion as against that individual, and not prepared to issue any order against him.

Second, the debtor's objection to the motion was signed by him as a pro se debtor, whereas his attorney of record in this case is Anthony Hughes. Mr. Hughes did not sign the objection. On September 10, 2014, the debtor filed a document entitled Substitution of Attorney, by which he purported to ask the court to remove C. Anthony Hughes as his attorney of record and to substitute the debtor as a pro se debtor. The document appears to bear the debtor's signature and the signature of Mr. Hughes, purporting to "consent" to the substitution. Attached to the document is a proposed Order Approving Substitution of Attorney. On September 11, 2014, the court issued an order pointing out that Mr. Hughes had not followed the proper procedure (as discussed below), and remains the debtor's attorney of record for all purposes.

This case was commenced by Mr. Hughes as the debtor's attorney. "Unless otherwise provided herein, an attorney who has appeared may not withdraw leaving the client in propria persona without leave of court upon noticed motion and notice to the client and all other parties who have appeared." LBR 2017-1(e). There is no other provision of the local rules that would allow Mr. Hughes to "substitute out" and the debtor to "substitute in" pro se; thus, the "unless otherwise provided" language in the rule is inapplicable. The rule leaves Mr. Hughes in the situation of being required to seek to withdraw, leaving the debtor in pro se, only by way of a noticed motion.[1]

As Mr. Hughes has filed no such motion, he remains the debtor's attorney of record, and the court is inclined not to consider the debtor's objection to the motion, filed by the debtor pro se, rather than by Mr. Hughes as his attorney. If Mr. Hughes appears at the hearing to represent the debtor, the court will hear the matter. If he does not, the court intends to continue the hearing, and will require Mr. Hughes to appear at the continued hearing. The court will hear the matter.

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1 To the extent, if any, Mr. Hughes believes a motion is not necessary when the client has signed a substitution of attorneys, as here, he should read LBR 2017-1(h), which governs substitutions of attorneys, and which provides that "[a]n attorney who has appeared in an action may substitute another attorney and thereby withdraw from the action by submitting a substitution of attorneys . . . ." (Emphasis added.) There is no provision in the rules for a substitution of attorneys whereby a debtor purports to substitute into the case pro se.

16. 09-29162-D-11 SK FOODS, L.P.
MAS-6

MOTION FOR COMPENSATION BY THE LAW OFFICE OF SERLIN & WHITEFORD, LLP FOR MARK A. SERLIN, SPECIAL COUNSEL(S)
8-22-14 [5141]

Tentative ruling:

This is the third interim application for approval of fees and reimbursement of expenses filed by The Law Office of Serlin and Whiteford, LLP for services rendered to the receiver. As this case is not complete, the court is unable to make the various determinations that are necessary under 11 U.S.C. paragraph 330 for final award of compensation. Accordingly, at this time the court will approve an interim award at the percentage that prior fee applications for this applicant were allowed. This interim award is subject to final approval and the court will consider any and all objection to the interim award at the time the court considers applicant's final fee request. The court will hearing the matter.

17. 13-27362-D-7 PATRICIA GARCIA
13-2280
TRAVELERS EXPRESS COMPANY, INC. V. GARCIA

ORDER TO SHOW CAUSE
8-28-14 [35]

18. 13-35066-D-7 JOAN POTTERTON
DMB-5

MOTION FOR COMPENSATION BY THE LAW OFFICE OF COWAN AND BRADY FOR DAVID M. BRADY, TRUSTEE'S ATTORNEY(S)
8-19-14 [49]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

19. 14-26469-D-7 GERARDO CHAVEZ
KAZ-1
DEUTSCHE BANK NATIONAL TRUST COMPANY VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-21-14 [44]

Final ruling:

This matter is resolved without oral argument. This is Deutsche Bank National Trust Company's motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

20. 08-90575-D-11 CHATEAUX FRAMING, INC. ORDER TO SHOW CAUSE
8-27-14 [78]

21. 10-36676-D-7 SUNDANCE SELF-STORAGE-EL DORADO LP OBJECTION TO CLAIM OF ANDREA BROWN, DBA BRYDEN PROPERTY MANAGEMENT, CLAIM NUMBER 9
TAA-1
8-7-14 [569]

Tentative ruling:

This is the trustee's objection to the claim of Andrea Brown, dba Bryden Property Management (the "Claimant"). The court is not prepared to consider the objection at this time because, although the trustee served the Claimant at the address on her proof of claim, he failed to also serve her at the different address listed on the debtor's amended Schedules G, filed September 23, 2010 and August 19, 2011, as required by LBR 3007-1(c).

As a result of this service defect, the court intends to overrule the objection. In the alternative, the court will continue the hearing to allow the trustee to file a notice of continued hearing and to serve it, along with the objection and exhibit, on the Claimant at the address listed on the amended Schedules G. The court will hear the matter.

22. 12-40778-D-7 LILLY ALFONSO MOTION FOR COMPENSATION
CWC-6 TRUSTEE'S ATTORNEY(S)
8-20-14 [80]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

23. 14-24578-D-7 VICTOR CAMACHO OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
PA-2
8-14-14 [24]

Tentative ruling:

This is the trustee's objection to the debtor's claim of exemptions. The debtor has filed opposition. For the following reasons, the objection will be sustained. The debtor claims the following funds in a bank account as exempt under the following statutes:

$ 567.56	CCP § 703.140(b)(10)(B)[1]
$ 33,442.00	CCP § 703.140(b)(10)(C)
$ 2,079.00	CCP § 703.140(b)(10)(A)

The debtor explained on his Schedules B and C that the $33,442 was a one-time worker's compensation payment and the $2,079 was an SSI disability payment. He did not state the source of the $567.56. The trustee objected that the debtor had failed to provide any evidence that the funds in the account were derived from the sources authorized as exempt under the subsections under which the debtor claimed them.

In opposition, the debtor has provided his declaration authenticating a Benefit Statement showing that, on April 25, 2014, the United States Department of Labor, Division of Federal Employees' Compensation, issued him a check for $33,443.29 on account of an injury that occurred on August 6, 2010. The debtor testifies this was a worker's compensation payment, and indeed, the Benefit Statement refers to the OWCP, which the court takes judicial notice stands for the United States Department of Labor, Office of Workers' Compensation Programs.[2] This evidence is sufficient to demonstrate that the source of the $33,442 claimed as exempt was a worker's compensation payment.

However, CCP § 703.140(b)(10)(C), under which the payment is claimed as exempt, does not cover worker's compensation payments; it covers disability, illness, and unemployment benefits. The Legislature knew how to designate worker's compensation payments for exemption purposes (see CCP § 704.160); it did not do so in § 703.140(b)(10)(C). Accordingly, the trustee's objection will be sustained, and this claim of exemption will be disallowed.

Next, the debtor's declaration authenticates a copy of a Notice of Award dated April 27, 2014 from the Social Security Administration - Retirement, Survivors and Disability Insurance, advising the debtor that he is entitled to monthly disability benefits, and would receive $2,079 around May 3, 2014. The debtor testifies he received this "social security disability deposit" of $2,079 on April 24, 2014. Section 703.140(b)(10)(A), under which the debtor claims as exempt what he characterizes as an "SSI disability deposit," allows the exemption of social security benefits, unemployment compensation, and local public assistance benefits; it does not refer to disability benefits. Here, as with the worker's compensation payment, the Legislature knew how to designate disability benefits for exemption purposes (see CCP § 703.140(b)(10)(C)); it did not do so in § 703.140(b)(10)(A).

True, "SSI" sounds like social security income; it is not. It is supplemental security income, designed to "assure a minimum level of income to people who are aged, blind, or disabled and who have limited income and resources."[3] Although the program is administered by the Social Security Administration,[4] it is funded by general tax revenues, not social security taxes.[5] The court concludes that although the debtor's SSI disability benefit might be claimed as exempt under some other statute, it is not properly claimed as exempt under § 703.140(b)(10)(A). Accordingly, the trustee's objection will be sustained, and this claim of exemption will be disallowed.

Finally, debtor testifies the ending balance in the bank account as of April 22, 2014 (eight days prior to his bankruptcy filing) was $566.27,[6] which, he claims, must have come from his veterans' benefits, "because [his] sole sources of

income from Jan. 2014 to 4/22/2014 were civilian payment and veteran payment." Debtor's Decl., filed Sept. 10, 2014, at 2:4-5. That testimony is insufficient because it fails to identify the $566.27 as derived solely from veterans' benefits, which are the only type of asset allowed to be exempted under § 703.140(b)(10)(B). The debtor does not state what he means by "civilian payment"; thus, the court cannot conclude based on the record that the $566.27, if it came from a "civilian payment," was necessarily derived from a veterans' benefit. Accordingly, the trustee's objection will be sustained, and this claim of exemption will be disallowed.

The court will hear the matter.

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1 All statutory references are to the California Code of Civil Procedure.

2 See *About OWCP*, http://www.dol.gov/owcp/ (last visited Sept. 11, 2014).

3 See *Social Security Handbook*, § 2102.1, http://www.socialsecurity.gov/OP_Home/handbook/handbook.21/handbook-2102.html (last visited Sept. 11, 2014).

4 See id. at § 2101.

5 See *Supplemental Security Income Home Page - 2014 Edition*, http://www.ssa.gov/ssi/ (last visited Sept. 11, 2014).

6 Apparently, these are the funds the debtor was referring to on his Schedule C, where he listed the amount as $567.56.

24. 14-25478-D-7 BANDIA HENRY — MOTION FOR RELIEF FROM AUTOMATIC STAY
PPR-1
BANK OF AMERICA, N.A. VS. — 8-18-14 [16]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received her discharge on September 12, 2014 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

25. 13-32579-D-7 BRIAN/MICHELLE GONSALVES — MOTION FOR RELIEF FROM AUTOMATIC STAY
PD-1
ELIZON MASTER PARTICIPATION TRUST I, U.S. BANK TRUST N.A. VS. — 8-22-14 [19]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtors received their discharge on January 13, 2014 and, as a result, the stay is no longer in effect as to the debtors (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtors as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

26. 11-22685-D-7 MTK-1 — BLUE RIBBON STAIRS, INC. — MOTION FOR RELIEF FROM AUTOMATIC STAY
8-28-14 [1202]

MAYA, LLC VS.

27. 13-33590-D-7 SLC-4 — PAUL/DEBORAH ANN PULLIN — MOTION FOR COMPENSATION FOR WEST AUCTIONS, INC., AUCTIONEER(S)
8-26-14 [35]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for compensation and reimbursement of expenses for West Auctions, Inc. totaling $2,762.12 is supported by the record. As such the court will grant the motion for compensation and reimbursement of expenses for West Auctions, Inc. totaling $2,762.12 by minute order. No appearance is necessary.

28. 13-30496-D-7 JRR-3 — EDWARD/LORRAINE KURATA — CONTINUED MOTION FOR COMPENSATION FOR JOHN R. ROBERTS, CHAPTER 7 TRUSTEE(S)
7-31-14 [79]

Tentative ruling:

In this motion for compensation, the trustee seeks an award of $54,477.64, which includes a fee of $54,071.25 and $406.39 in costs. For the following reasons, the motion will be granted in part.

The requested fee, $54,071.25, is computed based on the maximum percentages allowed to a trustee pursuant to § 326(a) of the Bankruptcy Code. Thus, the analysis begins with the amount of disbursements made and to be made by the trustee. In this case, the trustee liquidated two major assets and a few minor ones. First, he sold the debtors' residence for $800,000. There were no deeds of trust against the property, but it was encumbered by state and federal tax liens in the amounts of $302,041 and $918,737, respectively, for a total of $1,220,778. Through negotiations with the Franchise Tax Board ("FTB"), whose lien was in first position, and the IRS, in second position, the trustee "carved out" from the sale proceeds $32,500 – $15,000 from the FTB and $17,500 from the IRS. Thus, the FTB was paid $287,041 (the amount of its lien minus the $15,000), and the IRS was paid $411,085, reducing its secured claim to $507,652. The trustee also paid $48,000 in real estate commissions on the sale, $15,838 in property taxes, and $5,494 in costs of sale.

The trustee collected an additional $225,000 through a compromise of the amount due on a promissory note payable to a corporation owned by the debtors, and $2,375 from the debtors for the non-exempt portions of their vehicles and other assets. Thus, the requested trustee's fee of $54,071 is computed based on distributions totaling in excess of $1,000,000. If, instead, the trustee's fee were at the maximum amounts allowable under § 326(a), but computed based only on the disbursements of the $225,000 collected on the promissory note and the $2,375 collected from the debtors, the fee would be $14,618. Thus, of the fee requested, the lion's share, $39,453, is based on the disbursements made out of the escrow on the sale of the debtors' residence, where the trustee "carved out" a $32,500 recovery "for the estate."[1]

From the $225,000 from the compromise of the promissory note, and the $2,375 from the debtors, a total of $227,375, the trustee has paid $407 in bank fees and bond premiums.[2] He proposes to make an additional payment to the IRS, $204,447 on its secured claim,[3] accountant's fees of $542, and additional costs of $406, leaving a balance of $21,573 to go toward the trustee's requested fee.[4] The balance of the trustee's fee, $32,498, would come from the $32,500 carved out of the proceeds of the debtors' residence. In other words, virtually the entire amount of the carve-out, $32,500, would go to the trustee's fee. There will be no dividend to general unsecured creditors.[5]

The trustee must have been aware at the time he sold the residence that this would be the result of the sale. The IRS filed its proof of claim, showing its $918,737 secured claim, on September 13, 2013, and the FTB filed its proof of claim, showing its $302,041 secured claim, on September 16, 2013. The trustee filed his stipulation with the IRS for the "carve-out" of the $17,500 on September 30, 2013, and his stipulation with the FTB for the carve-out of the $15,000 on October 1, 2013. In the stipulations, the trustee referred to the IRS's and FTB's secured claims by amount; thus, he was aware of them.[6] The trustee filed his motion to approve the sale of the residence on October 15, 2013. At that time, if he did the math, he must have known that the $32,500 in carve-outs would not be sufficient to pay his trustee's fee, if he based that fee on the maximum amounts allowed by § 326(a), as he has now done. Thus, he must have known that, not only would there be nothing left over for general unsecured creditors, but that the sale would result in a shortfall in the trustee's fee that would need to be made up from other funds of the estate, funds that would otherwise be available for creditors.

It is apparently the trustee's position that he should be compensated because his sale of the property benefitted the FTB and the IRS:

> I am entitled to my full compensation pursuant to 11 U.S.C. § 326(a) as moneys disbursed were to holders of secured claims. The fee is reasonable and no extraordinary circumstances exist that would necessitate the reduction of the fee. 11 U.S.C. § 330(7). [¶] I believe that based on my experience as a seasoned trustee, this case which on its face appeared to be a no asset case, was administered as an asset case which will provide a significant dividend to creditors.

J. Roberts Decl., filed July 31, 2014, at 2:8-14. The court recognizes that § 326(a) permits the maximum percentages to be applied to disbursements made to secured creditors. However, neither that Code section nor § 330(a)(7) mandates that result. A different department of this court has recently answered in the affirmative the question "whether other subsections of § 330, including the § 330(a)(2) power to award 'less than the amount of compensation that is requested,'

retain vitality in view of the § 330(a)(7) 'commission' provision." In re Scoggins, No. 12-42158-C-7, 2014 Bankr. LEXIS 3857, at *1 (Bankr. E.D. Cal. Sept. 8, 2014). The court also held that "whether the fee is 'unreasonably disproportionate' is important to the analysis of § 330(a)(2) fee reductions under any standard, including 'extraordinary' circumstances." Id. at *2. Finally, "a distribution to unsecured priority and general claims that is less than the trustee's fee is not 'meaningful' and is disproportionate and presents an 'extraordinary' circumstance." Id.

Here, because of the size of the IRS's secured claim, there will in no circumstances be any distribution to priority or general unsecured claims. To the extent the trustee claims he benefitted the IRS and the FTB by selling the property, the court would find the argument easier to credit if there had been a deed of trust ahead of the FTB's tax lien whose beneficiary might have foreclosed and wiped out the FTB and the IRS. But there was no deed of trust: the debtors owned the property free and clear but for $15,838 in property taxes and the tax liens. The court has difficulty believing the FTB and the IRS would have allowed the property to go to a tax sale for $15,838, and no basis on which to conclude the FTB was intending to foreclose on its tax lien and wipe out the IRS [7] or that the IRS would not have stepped in and made an arrangement with the FTB acceptable to both of them. In short, there appears to have been no basis for the sale of the property by the trustee other than to benefit the trustee.[8] The court easily concludes that the primary beneficiary of the trustee's administration of the debtors' residence was the trustee.

In these circumstances, there was no meaningful return to priority or general unsecured creditors from the sale of the debtors' residence; in fact, there was no return at all. To the extent the trustee may be said to have achieved a return to the FTB and the IRS on their secured claims, the court has no reason to suppose they would not have received the same amounts or more had the IRS foreclosed and sold the property. The sale achieved no return to general unsecured creditors; in fact, the only party to benefit from the carve-outs was the trustee.

On the other hand, the collection of $225,000 from the compromise and of $2,375 from the debtors did result in funds being made available for the IRS that it otherwise might well have had difficulty in collecting. The promissory note was payable by the parents of debtor Lorraine Kurata to a corporation of which the debtors own 100%, EMK Investments, Inc. By its terms, the note was not all due and payable until after the death of both of Lorraine Kurata's parents. (They were 80 and 78 years old, respectively, when the trustee obtained approval of the compromise, in January of this year.) The debtors listed their ownership interest in EMK as having a value of $0, showing liabilities of EMK as including unpaid loans by the debtors totaling $728,015. In his motion to approve the compromise, the trustee indicated he had tried to market the note, and found there could be several problems, including possible invalidity of the deed of trust securing the note and possible collectibility problems in the event the rest of the parents' assets are in their family trust and not reachable. The trustee was able to collect from Lorraine Kurata's parents $225,000 on a note having a then balance of approximately $485,000.

The court concludes that the trustee's fee on the recovery of the $225,000 and the $2,375 collected from the debtors on account of excess equity in vehicles and other assets is not disproportionate to the result achieved for the IRS, and the trustee's fee on the disbursements of those amounts, a total of $14,618, which is computed based on the maximum percentages allowed by § 326(a), will be approved, along with the trustee's costs of $406.39, for a total of $15,024.39.

The court will hear the matter.

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1 See Trustee's Compensation Motion, filed July 31, 2014, at 2:6-7 ["the bankruptcy estate received the sum of $32,500.00 from the sale."].

2 See Trustee's Final Report, filed June 25, 2014 ("Final Report"), at 6-7.

3 According to the IRS's proof of claim, it recorded a notice of federal tax lien in 2012 in the county where the debtors resided, thereby creating a lien on all of their real and personal property. See 26 U.S.C. § 6323(f)(1)(A)(ii); Cal. Code Civ. Proc. § 2101(c)(4).

4 The $21,573 would be sufficient to cover the trustee's fee on the $225,000 compromise payment and the $2,375 received from the debtors, a total fee of $14,618 at the maximum percentages allowed by § 326(a). The remainder of the compromise payment and the funds received from the debtors, $6,955, would be applied to the trustee's fee on the sale of the debtors' residence.

5 See Final Report, at 11.

6 In the stipulations, the trustee referred to the $17,500 and $15,000 as the penalty portions of the liens, citing §§ 724(a) and 726(a)(4), under which a chapter 7 trustee may avoid a lien that secures a penalty. However, both the IRS's proof of claim and the FTB's proof of claim listed the penalty portion of their secured claims as $0.00.

7 Given the value of the property in last year's market, $800,000, the FTB had an equity cushion of almost $500,000 over and above the amount due on its lien.

8 Giving the trustee the benefit of the doubt, the FTB probably benefitted not at all from giving up the $15,000 carve-out, as it would likely have spent less than that in foreclosing on the property. It might be said the IRS benefitted to some extent from the FTB's agreement to the $15,000 carve-out, in that the property was sold, thereby eliminating the slim possibility the FTB would have foreclosed and wiped out the IRS. However, neither the FTB nor the IRS benefitted at all from the $17,500 carve-out agreed to by the IRS. The FTB was paid the full amount of its lien claim out of escrow, less its own $15,000 carve-out; as for the $17,500, but for the trustee's fee, it would go back to the IRS on account of the balance of its secured claim, having passed through the estate with no apparent purpose other than enabling the trustee to say that "the bankruptcy estate received the sum of $32,500.00 from the sale."

29.	14-25998-D-7 SSA-2	HENRY TRAN	MOTION TO SELL 8-20-14 [20]

30. 13-21199-D-7 JAMES SCOTT
KAZ-1
THE BANK OF NEW YORK TRUST COMPANY, N.A. VS.

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
7-17-14 [253]

31. 14-27519-D-12 LOEK VAN WARMERDAM
WW-6

MOTION FOR COMPENSATION FOR RILEY C. WALTER, DEBTOR'S ATTORNEY(S)
9-3-14 [59]

Tentative ruling:

This is the application of Walter & Wilhelm Law Group ("Counsel") for a first interim allowance of compensation as counsel for the debtor. The application was noticed pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

First, Counsel's time records include several instances where Counsel has "lumped" several tasks into a single time entry, with no breakdown of the time spent on each particular task. This prevents the court from effectively assessing whether the time spent on a particular task was reasonable. Thus, the practice of lumping "is universally disapproved by bankruptcy courts . . . ." In re Staggie, 255 B.R. 48, 55 (Bankr. D. Idaho 2000) (citation omitted).

In addition, it appears a considerable amount of time was billed by Counsel's paralegal for services that were secretarial in nature, and thus, not compensable. See Sousa v. Miguel, 32 F.3d 1370, 1374 (9th Cir. 1994). For example, on July 22, 2014, Counsel billed $975 for 6.5 hours of paralegal time spent on the following, among other things: updating calendar entries, gathering and tagging documents for attorney signature, receiving attorney signatures and compiling documents, conferring with the file room regarding filing documents, and preparing a service list. (It is impossible to determine the actual time spent on these tasks because they are lumped together with other services that appear to be compensable.) The same day, Counsel billed another 0.7 hours for the paralegal's time spent attaching conformed copies of the petition to notices of stay, making copies, serving parties, and arranging for filing of notices of stay in state court. The next day, Counsel billed another $420 for 2.8 hours of paralegal time spent filing the case, noticing all litigating parties and attorneys of the case, checking PACER regarding a conformed copy of the petition, and faxing a letter. And on August 13, 2014, Counsel billed for the paralegal's time spent arranging for filing and service of a motion, and calendaring the hearing.

Finally, although the application identifies the paralegal by name, it fails to provide any information regarding her education, experience, and qualifications, so

as to justify a billing rate of $150 per hour for her services, which is on the high side for a paralegal in this district.

As indicated above, the court will entertain opposition, if any, at the hearing. However, at this time the court will not approve the above items for services apparently rendered for secretarial time. Further, Counsel should understand that any fees awarded at this time on an interim basis will be revisited when an application for final compensation is filed, and on a go-forward basis, Counsel should seek to avoid these problematic billing practices.

The court will hear the matter.

32.	14-27448-D-7 SW-1 WELLS FARGO BANK, N.A. VS.	AARON BAER	MOTION FOR RELIEF FROM AUTOMATIC STAY 9-9-14 [10]

33.	12-24884-D-7 MSM-2 **Final ruling:**	RAMON/MARILOU ARROYO	MOTION TO AVOID LIEN OF FIA CARD SERVICES, N.A. 8-29-14 [36]

This is the debtors' motion to avoid a judicial lien held by FIA Card Services, N.A. ("FIA"), which is an FDIC-insured institution. The motion will be denied because the moving parties failed to serve FIA in strict compliance with Fed. R. Bankr. P. 7004(h), as required by Fed. R. Bankr. P. 9014(b).

An earlier motion for the same relief was denied because the moving parties served FIA to the attention of an officer, managing or general agent, or person authorized to receive service of process, whereas the rule requires that service on an FDIC-insured institution, such as FIA, be to the attention of an officer, and only an officer. As the court explained in its ruling on that motion, this distinction is important. For a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution, the applicable rule requires service to the attention of an officer, managing or general agent, or agent for service of process (see Fed. R. Bankr. P. 7004(b)(3)), whereas for an FDIC-insured institution, the rule requires service to the attention of an officer. Fed. R. Bankr. P. 7004(h). If service on an FDIC-insured institution to the attention of an officer, managing or general agent, or person authorized to receive service of process were appropriate, the distinction in the manner of service, as between the two rules, would be superfluous.

This time, the moving parties served FIA to the attention of an "Officer authorized to receive service of process." That is not a term authorized by Rule 7004(h). The rule is plain and simple; compliance should be also.

As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

34. 14-28599-D-7 JAMES SCOTT ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
9-8-14 [12]

Final ruling:

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

35. 14-25820-D-11 INTERNATIONAL MOTION TO EMPLOY BUSINESS TEAM
FWP-12 MANUFACTURING GROUP, INC. AS BROKER(S) O.S.T.
9-17-14 [239]

This matter will not be called before 10:30 a.m.