

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus  
Bankruptcy Judge  
Sacramento, California

September 25, 2017 at 10:00 a.m.

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1. 17-25004-A-11 SARINA BRYSON STATUS CONFERENCE  
7-31-17 [1]

**Tentative Ruling:** None.

2. 17-25004-A-11 SARINA BRYSON MOTION TO  
MRL-3 APPROVE COMPENSATION OF DEBTOR'S  
ATTORNEY  
8-13-17 [23]

**Final Ruling:** This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

Liviakis Law Firm, P.C., counsel for the debtor in possession, has filed a first interim motion for approval of compensation. The requested compensation consists of \$11,400 in fees and \$0.00 in expenses. The services cover the period from July 31, 2017 through plan confirmation, case closure, conversion, or dismissal. The court approved the movant's employment as the chapter 11 debtor's attorney on September 12, 2017. The requested compensation is based on a flat fee arrangement, providing a total compensation to the movant in the amount of \$11,400.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses."

The movant's services will include, without limitation:

(1) analyzing estate asset issues, (2) preparing for and attending the IDI and meeting of creditors, (3) communicating with the United States Trustee, (4) preparing and reviewing pleadings and documents, (5) attending court hearings, (6) preparing, filing, and prosecuting various chapter 11 administrative motions, (7) responding to stay relief motions, (8) responding to motions to dismiss, convert, or appoint a trustee, (9) preparing a chapter 11 plan and disclosure statement, (10) communicating with various parties about plan confirmation, (11) reviewing and analyzing proofs of claim, (12) communicating

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with the debtor about various issues, and (13) preparing and filing employment and compensation motions.

The court concludes that the compensation is for actual and necessary services to be rendered in the administration of the debtor's bankruptcy estate. The requested compensation will be approved, subject to a final approval upon a further motion by the movant.

3. 17-23205-A-12 DANNY SMITH AND SUSAN MOTION TO  
JPJ-1 KELLOGG DISMISS CASE  
8-16-17 [21]

**Tentative Ruling:** The motion will be granted and the case will be dismissed.

The chapter 12 trustee moves for dismissal, pointing out that the debtors have violated 11 U.S.C. § 1221 for not having filed a plan within 90 days of the petition date.

11 U.S.C. § 1221 provides: "*The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.*"

This case was filed on May 10, 2017. The 90-day plan filing deadline ended on August 10, 2017. The debtors had not filed a plan by that date. The debtors also did not ask the court to extend the deadline, prior to its expiration.

Given the debtors' breach of the 90-day plan filing deadline, cause for dismissal exists. The motion will be granted and the case will be dismissed.

4. 13-35308-A-7 DOROTHY PARENT MOTION TO  
15-2229 LB-14 COMPEL  
FUKUSHIMA V. SWENDEMAN 7-24-17 [147]

**Tentative Ruling:** The motion will be denied.

The defendant, Cynthia Swendeman, individually and as trustee for the Robert E. Swendeman and Dorothy B. Swendeman 2004 Trust Dated April, 28 1994, seeks to compel a second deposition of the plaintiff, Alan Fukushima, who is the trustee in the underlying bankruptcy case.

The plaintiff filed this proceeding on November 30, 2015, seeking to avoid Dorothy Swendeman's judicial lien on a real property of the estate. Pursuant to a motion by the plaintiff, the court granted summary judgment on November 14, 2016, avoiding the subject judicial lien. Dockets 72 & 74.

On December 16, 2016, Dorothy Swendeman's counsel filed a notice of death of Dorothy Swendeman, informing all parties in interest that Dorothy Swendeman passed away. Docket 96.

On January 30, 2017, the court granted the plaintiff's Fed. R. Civ. P. 25 motion, substituting Cynthia Swendeman in the place of her deceased mother Dorothy Swendeman. Dockets 116 & 119. On February 13, 2017, the plaintiff filed an amended complaint, adding Cynthia Swendeman, both in her personal capacity and as trustee of a Swendeman family trust, as a defendant. Docket 120. This amended complaint was identical to the prior complaint, except for the substitution of Dorothy Swendeman with Cynthia Swendeman (in both individual and trust representative capacity) and the omission of a "cloud on

title claim" as to which the court did not grant summary judgment on November 14, 2016. Docket 161 at 2.

The plaintiff filed another motion for summary judgment on July 10, 2017, seeking determination that Cynthia Swendeman is a proper successor in interest to Dorothy Swendeman.

*"Nevertheless, the court will grant this motion in part, determining that Cynthia Swendeman is a successor in interest, both in her individual and representative capacities, to Dorothy Swendeman. Mr. Blunt, former counsel for Dorothy Swendeman and present counsel for Cynthia Swendeman, admitted this on the record at the August 7 hearing on this motion."*

Docket 161; see also Docket 163 at 3:55-4:10.

The court also refused to relitigate any of the issues litigated in connection with the prior summary judgment motion.

*"The motion will be denied to the extent it seeks to re-adjudicate the plaintiff's prior summary judgment motion. That motion was filed on October 7, 2016 and heard on November 14, 2016. The order on the motion was entered on November 17, 2016. Dockets 53, 72, 74. That motion has been already adjudicated. The court entered an order granting it in part. Dockets 72 & 74. When the court granted the plaintiff's Rule 25 motion, substituting Cynthia Swendeman in the place of her deceased mother Dorothy Swendeman, Cynthia Swendeman became a defendant in this proceeding subject to any prior adjudications against Dorothy Swendeman. There is no need to relitigate what was already litigated with respect to Dorothy Swendeman."*

Docket 161 at 1-2.

This motion was filed on July 24, 2017.

The motion will be denied. First, the discovery cut-off in this case was on November 30, 2016. Docket 50. The court has not authorized an extension of that discovery deadline.

Second, the court granted in part the plaintiff's summary judgment motion on November 14, 2016, resolving all currently pending causes of action as pleaded in the amended complaint. There is then no reason to reopen discovery.

Third, the court did not readjudicate, in connection with the plaintiff's second summary judgment motion, the claims as to which it had granted summary judgment in connection with the plaintiff's first summary judgment motion. Although after granting summary judgment the court authorized the substitution of Dorothy Swendeman with Cynthia Swendeman, there is no legal authority permitting the successor in interest to the deceased defendant to relitigate issues or claims already adjudicated by the court prior to the substitution. Docket 161 at 1-2.

Fourth, even if the court were to ignore the foregoing, the defendant's reasons for seeking another deposition of the plaintiff make little or no sense.

The defendant's quest for evidence in support of a counterclaim makes no sense because Cynthia Swendeman filed her answer to the second amended complaint on March 20, 2017, without asserting any counterclaims. Docket 126. The court has not been given a reason for not filing the counterclaim with the answer to the plaintiff's first amended complaint. Docket 28.

Moreover, the basis for the counterclaim has nothing to do with the judicial lien that is at issue in this adversary proceeding. The lien here is on a real property and it involves a recorded abstract of judgment. The lien underlying the counterclaim allegedly involves a JL-1 statement filed with the California Secretary of State, purportedly creating a security interest in the proceeds from a securities litigation.

To the extent there is any merit to the defendant's counterclaim, the defendant may be able to assert such a claim in another proceeding.

Further discovery, much less another deposition of the plaintiff, would be unhelpful also as to whether Cynthia Swendeman is a proper successor in interest party to Dorothy Swendeman. At the August 7, 2017 hearing on the plaintiff's second summary judgment motion, the defendant's counsel, Laurence Blunt, admitted on the record that Cynthia Swendeman is a proper successor in interest party, both in individual and representative capacity, to Dorothy Swendeman here. Docket 161; Docket 163 at 3:55-4:10.

The defendant has also had plenty of opportunity to conduct discovery as to her affirmative defenses. Just because Cynthia Swendeman was substituted in the place of Dorothy Swendeman, the defendant is not entitled to reassert or relitigate the affirmative defenses originally listed in the initial answer, to the first amended complaint. The causes of action did not change when Cynthia Swendeman was substituted in the place of Dorothy Swendeman. The plaintiff only dropped the cloud on title claim. The other two claims in the second amended complaint were identical to the same claims in the first amended complaint. Once again, the court will not permit relitigation of those claims. The court granted summary judgment as to those claims back in November 2016.

5.	16-25749-A-7	ROBERT GARZA AND MARIA	MOTION FOR
	DNL-3	HERRERA	TURNOVER OF PROPERTY
			8-2-17 [68]

**Tentative Ruling:** The motion will be dismissed without prejudice.

The trustee requests turnover of real property in Dixon, California, in order to market and sell it.

But, the debtors have committed to cooperate with the trustee and the trustee is willing to allow the debtors to stay in the property, provided they are willing to cooperate with the ultimate vacation of the property upon sale, without seeking an advance on their exemption claim. Subject to hearing from the debtors, the court is inclined to dismiss the motion without prejudice.

6.	17-23853-A-7	ELIZABETH SETTLES	MOTION FOR
	AP-1		RELIEF FROM AUTOMATIC STAY
	LIVE OAK BANKING COMPANY VS.		8-23-17 [37]

**Final Ruling:** This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the trustee, to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The movant, Live Oak Banking Company, seeks relief from the automatic stay as to a real property in Santa Fe, New Mexico. The property has a value of \$425,000 and it is encumbered by a sole claim of approximately \$1,126,477. The movant's deed is in first priority position and secures a claim of approximately \$1,126,477.

The court concludes that there is no equity in the property and there is no evidence that it is necessary to a reorganization or that the trustee can administer it for the benefit of creditors. The court also notes that the debtor voluntarily converted the case from a chapter 11 to one under chapter 7 on September 12, 2017. Docket 48. In her motion to convert, the debtor acknowledged that it would not be feasible to prevent foreclosures of her real properties. Docket 44 at 2-3.

Thus, the motion will be granted pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

7.	17-23853-A-7    ELIZABETH SETTLES TRO-1 UNITED COMMUNITY BANK VS.	MOTION FOR RELIEF FROM AUTOMATIC STAY 8-11-17 [26]
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**Final Ruling:** This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the trustee, to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The movant, United Community Bank, seeks relief from the automatic stay as to a real property in Auburn, California. The property has a value of \$767,000 and it is encumbered by claims totaling approximately \$1,242,897. The movant's

deed is in second priority position and secures a claim of approximately \$1,209,387.

The court concludes that there is no equity in the property and there is no evidence that it is necessary to a reorganization or that the trustee can administer it for the benefit of creditors. The court also notes that the debtor voluntarily converted the case from a chapter 11 to one under chapter 7 on September 12, 2017. Docket 48. In her motion to convert, the debtor acknowledged that it would not be feasible to prevent foreclosure of the subject property. Docket 44 at 2-3.

Thus, the motion will be granted pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

8.	16-22654-A-7    MARC LIM	MOTION FOR
	16-2202            RJR-1	SUBSTITUTION OF PROPER PARTY
	CHICK'S PRODUCE, INC. ET AL V.	FOLLOWING DEATH OF MARC YOUNG LIM
	LIM	5-12-17 [31]

**Tentative Ruling:**    The motion will be granted in part.

The plaintiffs, Chick's Produce, Inc. and Del Fresh Produce, Inc., move to substitute in the place of the now deceased defendant, Marc Lim, Christian Lim and Cameron Lim as real parties in interest defendants, pursuant Fed. R. Civ. P. 25, as made applicable here via Fed. R. Bankr. P. 7025.

*Under Fed. R. Civ. P. 25(a)(1), "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed."*

Preliminarily, this motion has been filed within the 90-day deadline of Rule 25(a)(1). The notice of death as to the defendant was filed by his counsel on April 4, 2017. Case No. 16-22654, Docket 139. This motion was filed on May 12, 2017.

Now that the court has evidence that Christian Lim and Cameron Lim are surviving children of Marc Lim, the court will substitute them in the place of Marc Lim.

However, the court will add Paige Lim to the substitution, as she is also a surviving child of Marc Lim. Christian Lim, Cameron Lim, and Paige Lim are all successors in interest to Marc Lim due to the fact that they are the surviving children or issue of Marc Lim and, under California intestacy law, they are beneficiaries of his estate. Marc Lim did not have a spouse and so his children are the primary beneficiaries of his estate. See Cal. Prob. Code § 6402 (prescribing intestacy distributions in the event the decedent is not survived by a spouse).

There is no evidence of a will disinheriting any of Marc Lim's children as beneficiaries of his estate. See Cal. Prob. Code § 6400 (making the scope of intestacy distributions subject to the existence and scope of a will).

Finally, the court is substituting Marc Lim's children as parties to this litigation solely due to their status as his children and primary beneficiaries of his estate. Torres v. Bayer Corp. (In re Baycol Prods. Litig.), 616 F.3d 778, 784-85 (8th Cir. 2010) (emphasizing that the "successor" under Rule 25(a)(1) is 1) the primary beneficiary of an already distributed estate, 2) the executor of the decedent's estate as named in a will, even if the will is not probated, 3) the primary beneficiary of an unprobated intestate estate which need not be probated).

The court rejects the movant's contention that because Christian Lim and Cameron Lim are the beneficiaries of life insurance policies they are successors in interest to Marc Lim. A successor in interest is someone who is a beneficiary to the estate of the deceased. See Baycol at 784-85. There is no necessary relationship between being the beneficiary to a life insurance policy and being the beneficiary to the estate of the deceased.

The motion will be granted in part.

9.	17-22481-A-7	WILLIAM LANDES	MOTION TO
	17-2139	DBJ-1	STAY
	LANDES V. LANDES		8-24-17 [10]

**Tentative Ruling:** The motion will be granted.

The defendant/debtor moves to stay prosecution of this adversary proceeding which seeks a determination of the dischargeability of certain debts allegedly owed by the debtor to the plaintiff, the debtor's ex-wife. The adversary complaint seeks relief under 11 U.S.C. § 523(a)(4), (a)(5), (a)(6) and (a)(15). The issues raised in the complaint concern community property, domestic support obligations, and money owed to plaintiff due to on-going divorce proceedings. On July 3, 2017, this court entered an order modifying the automatic stay in this matter to allow the plaintiff to conduct discovery of these and other issues in the pending state court divorce proceeding. See Docket 43, Case No. 17-22481.

The issues raised by the adversary proceeding involve issues that are currently being litigated in state court. Given this overlap, there is cause to stay this adversary proceeding until resolution of the state court action to avoid duplicious discovery and to promote the interests of justice and economy.

The plaintiff has filed a conditional objection to the motion contending that the state court divorce proceeding is still subject to the automatic stay insofar as characterization of the debtor's property (as community or separate property) and division and disposition of the same. See Docket 15 at 1. To address these concerns, the court is willing to modify the automatic stay

pursuant to 11 U.S.C. § 362(d)(1) to permit the state court to determine the character of the property at issue in the divorce and to allow the plaintiff to liquidate her claims in state court. However, neither party may enforce a state court judgment pending a judgment in this adversary proceeding.

Further prosecution of this adversary proceeding will be stayed pending resolution of the related state court divorce case. The parties shall file a status report every 90 days advising the court of status divorce proceeding. The first status report shall be filed no later than October 16, 2017.

10. 16-21585-A-11 AIAD/HODA SAMUEL  
FWP-30

MOTION TO  
SELL AND TO APPROVE COMPENSATION  
FOR AUCTIONEER  
9-1-17 [911]

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the trustee, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the debtor, the United States Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The chapter 11 trustee requests authority to sell personal property located at the shopping center at 944, 946, and 970-998 Oak Lane, Rio Linda, California at an auction. The property includes inventory from the debtors' former 98 Cent Store consisting of general "dime store" type merchandise, kitchen equipment from grocery store operations, construction materials, office equipment, shelving, refrigeration units, and a grocery store garbage bailer. The debtors did not list an interest in machinery, fixtures, equipment, tools of the trade, or inventory in their Schedule B. The trustee has reached out the debtors to inquire whether the debtors would purchase the property. The debtors have not responded to that inquiry. Therefore, the trustee does not believe that the debtors have any interest in retaining the property. The auctioneer, Tranzon Asset Strategies, estimates the value of the property at \$20,000-\$30,000.

Tranzon will conduct an auction by public online auction following a period of advertising, which will include newspaper and internet advertisements, e-mail distributions, telemarketing, and a toll-free auction hotline. The sale is anticipated to occur on September 28, 2017. Tranzon's employment by the estate was approved by the court in an order entered on September 6, 2017. See Docket No. 917.

As discussed in the employment application, Tranzon will be compensated through a "Buyer's Premium" of 15% on all items sold live to be paid by the ultimate buyer(s) of the property, and not through sale proceeds. See Docket No. 906. The trustee is seeking to pay the Tranzon's expenses for labor (not to exceed \$4,500), marketing (not to exceed \$2,500), and other miscellaneous expenses out of the sale proceeds. Id.

The Trustee believes that the sale of the personal property is necessary and beneficial to the estate, as such sale will bring funds to the estate, and the



property's removal is necessary to facilitate the trustee's repairs to the Rio Linda Center in preparation for sale of the real property.

11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business. The sale will generate some proceeds for distribution to creditors of the estate and will facilitate the sale of the Rio Linda Center. Hence, the sale will be approved pursuant to section 363(b), as it is in the best interests of the creditors and the estate.

The court will approve payment of Tranzon's expenses for labor (not to exceed \$4,500), marketing (not to exceed \$2,500), and other miscellaneous expenses out of the sale proceeds. The motion will be granted.