UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

October 1, 2020 at 10:30 a.m.

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1. 20-90562-E-7 **KARA BARRON** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se **9-10-20 [23]**

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*), and Chapter 7 Trustee as stated on the Certificate of Service on September 12, 2020. The court computes that 19 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on August 18, 2020.

The Order to Show Cause is sustained, and the case is dismissed.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $335.00.

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 Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

2. 20-90563-E-7 KEITH MINNIS
Pro Se

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
9-10-20 [23]

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*), and Chapter 7 Trustee as stated on the Certificate of Service on September 12, 2020. The court computes that 19 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on August 18, 2020.

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The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $335.00.

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 Order to Show Cause 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 Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

3. **20-90210-E-11 AF-7** | **JOHN YAP AND IRENE LOKE** **Arasto Farsad** | **CONTINUED MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON AND/OR MOTION TO VALUE COLLATERAL OF FIRST HORIZON HOME LOAN CORPORATION 7-17-20 [104]**

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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on July 17, 2020. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of:

(1) The Bank of New York Mellon, as Trustee for First Horizon Alternative Mortgage Securities Trust 2005-AA8, with the secured claim valued at $261,900.00; and

(2) First Horizon Loan Corporation, with the secured claim valued at $0.00

is granted.

The Motion to Value filed by John Hst Yap and Irene Laiwah Loke ("Debtor") to value the secured claim of The Bank of New York Mellon, as Trustee for First Horizon Alternative Mortgage Securities Trust 2005-AA8 ("BNYM, Trustee"), and First Horizon Home Loan Corporation ("FHHLC") is accompanied by Debtor's declaration. Declaration, Dckt. 106. Debtor is the owner of the subject real property commonly known as 1032 Deena Way, Fallon, Nevada ("Property"). Debtor seeks to value the Property at a fair market value of $261,900 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor have two mortgages / deeds of trusts against the Property. The first deed of trust secures an obligation owed to BNYM, Trustee, which note was in the original in the amount of $178,800.00. This obligation is currently serviced by Nationstar Mortgage LLC d/b/a Mr. Cooper. At the time of the filing, BNYM, Trustee's claim for the first deed of trust was approximately $341,860.00.

Debtor's second deed of trust secures an obligation owed to FHHLC in the amount of $44,700.00. Debtors believe that the balance on the second deed of trust is at least $44,700.00 as they cannot recall making any payments on the second deed of trust. According to Debtor, the second deed of trust went dormant as soon as the subject transaction closed. Debtor also argues that they have not received any correspondence from FHHLC or any other party claiming to currently own or service the second deed of trust.

APPLICABLE LAW

The valuation of property that secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2 (case or controversy requirement for the parties seeking relief from a federal court).

DISCUSSION

On August 12, 2020, Debtor in Possession and BNYM, Trustee filed a Stipulation to continue the hearing on Debtor's motion from August 27, 2020 to October 1, 2020. Dckt. 121.

On September 18, 2020 Creditor BNYM, Trustee and Debtor in Possession filed a Joint Stipulation regarding the value of the Property. Dckt. 130. The parties stipulate as follows:

1. The market value of the Property for purposes of the Chapter 11 bankruptcy case only shall be $261,900.

2. This Stipulation and agreed value does not modify Creditor BNYM, Trustee's claim and shall not be modified until the Debtor's Chapter 11 Plan is confirmed.

3. Creditor BNYM, Trustee retains the right to make an 11 U.S.C. section 1111(b) election so that its claim may be treated as fully secured under Debtor's Chapter 11 Plan and/or object to Debtor's Plan.

4. Nothing within the stipulation shall be deemed to modify or limit Creditor BNYM's rights under 11 U.S.C. sections 363(b), (f), or (k), or section 1129(b)(2)(A)(ii).

5. Parties agree that Debtor in Possession will not propose a Chapter 11 Plan, or any amendment or modification to the Plan that modifies the value agreed to without Creditor BNYM's express written consent or a motion by noticed hearing.

6. Parties agree that Debtor in Possession's Motion is resolved as to Creditor BNYM, and that upon entry of an order on this stipulation, the hearing on Debtor in Possession's Motion scheduled for October 1, 2020 may be taken off the calendar.

If the court were to grant the relief requested in the Motion, the court would merely make a determination as to the value of the collateral and would not determine the value of the secured claim pursuant to 11 U.S.C. § 506(a).

Further, it appears that the Parties are attempting to obtain a partial "confirmation" order in which this court secretly confirms a plan term that will be binding on all other parties in interest. No legal authority has been provided for such serial, piecemeal, ex parte confirmation of portions of a Chapter 11 plan.

As to both of the above, the court does not believe and does not infer that there has been an intentional effort to seek inappropriate relief. As to the first, it is a stumbling on shorthand terms used by various counsel and judges that relief is sought pursuant to 11 U.S.C. § 506(a) to "value collateral." While valuing collateral is a factual determination of the court, the actual relief is to value the secured claim.

As for the second, the court realizes that in some other courts, judges would sign such an order which purports (incorrectly) to set a binding term of a Chapter 11 plan. This court does not. However, this court does take such representations and agreements by a debtor in possession in considering the good faith prosecution of the case and a Chapter 11 plan if the debtor in possession attempts to double cross such a good faith creditor.

Application of Federal Rule of Civil Procedure 20 and Federal Rule of Bankruptcy Procedure 7020 to this Contested Matter

The court, by prior order (Dckt. 110) has made Federal Rule of Civil Procedure 20 and Federal Rule of Bankruptcy Procedure 7020 applicable to this Contested Matter, allowing Movant to join the two creditors with claims secured by the one Property in this one Contested Matter.

Ruling

The court determines that the value of the Property is $261,900.00. This is the amount stipulated to by the Debtor in Possession and BNYM, as Trustee. Dckt. 130. This is consistent with the valuation asserted by Debtor in Possession in the Motion. FHHLC, the holder of the claim secured by the second deed of trust, did not contest the valuation of the Property as stated in the Motion.

The senior in priority first deed of trust held by BNYM, Trustee, secures a claim with a balance of approximately $341,860. Schedule D, Dckt. 22.

Creditor FHHLC's second deed of trust secures a claim with a balance of approximately $44,700.00. *Id*.

Therefore, Creditor BNYM, Trustee's, claim secured by the senior deed of trust on the non-primary residential property is determined to be $261,900.00, with the balance of such allowable claim to be a general unsecured claim in this case.

Further, Creditor FHHLC's claim secured by the junior deed of trust against the Property is completely under-collateralized. Creditor FHHLC's secured claim for which the Property is the collateral is determined to be in the amount of $0.00, the value of the collateral, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997).

The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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 Value Collateral and Secured Claims filed by John Hst Yap and Irene Laiwah Loke ("Debtor in Possession") having been presented to the court, the court having made Federal Rule of Civil Procedure 20 as incorporated into Federal Rule of Bankruptcy Procedure 7020 to allow for the permissive joinder of Creditors The Bank of New York Mellon and First Horizon Home Loan Corporation effective for this Contested Matter, the Stipulation of the Debtor in Possession and the Bank of New York Mellon having been filed (Dckt. 130), upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the value of the non-residential real property commonly known as 1032 Deena Way, Fallon Nevada is determined to be $261,900.

IT IS FURTHER ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted as to the claim of The Bank of New York Mellon, as Trustee for First Horizon Alternative Mortgage Securities Trust 2005-AA8 ("BNYM, Trustee") secured by a first in priority deed of trust recorded against the non-residential real property commonly known as 1032 Deena Way, Fallon, Nevada, and is determined to be a secured claim in the amount of $261,900.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan.

IT IS FURTHER ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted as to the claim of First Horizon Home Loan Corporation ("FHHLC") secured by a second in priority deed of trust recorded against the non-residential real property commonly known as 1032 Deena Way, Fallon, Nevada, and is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $261,900 and is encumbered by a senior lien securing a claim in the amount of $340,814.41, which exceeds the value of the Property that is subject to FHHLC's lien.

4.	**20-90210-E-11 AF-3**	**JOHN YAP AND IRENE LOKE Arasto Farsad**	**CONTINUED MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON AND/OR MOTION TO VALUE COLLATERAL OF THE PNC FINANCIAL SERVICES GROUP, INC., MOTION TO VALUE COLLATERAL OF PERSOLVE, LLC 4-9-20 [33]**

Final Ruling: No appearance at the October 1, 2020 hearing is required.

Local Rule 9014-1(f)(1) Motion— No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's in Possession, Creditor, parties requesting special notice, and Office of the United States Trustee on April 9, 2020. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Value Collateral and Secured Claim of Bank of New York Mellon, PNC Financial Services Group, Inc., Dreambuilder Investment, LLC, and Persolve, LLC is continued to 10:30 a.m. on November 12, 2020.

Joinder of Multiple Parties One Contested Matter

The present Motion (a Contested Matter as provided in Federal Rule of Bankruptcy Procedure 9014) seeks relief pursuant to 11 U.S.C. § 506(a) against two different persons concerning two different claims. While in an adversary proceeding Federal Rule of Civil Procedure 20, as incorporated into Federal Rule of Bankruptcy Procedure 7020) permits the joinder of multiple parties in one adversary proceeding if there is a common question of law or fact to all defendants, Federal Rule of Bankruptcy Procedure 7020 is not automatically incorporated into contested matter practice. Fed. R. Bankr. P. 9014(c).

However, the court may, and does in this Contested Matter, make Federal Rule of Bankruptcy Procedure 7020 and thereby Federal Rule of Civil Procedure 20 applicable to allow for the permissive

joinder of Creditors Bank of New York Mellon, PNC Financial Services Group, Inc., Dreambuilder Investment, LLC, and Persolve, LLC as respondent parties herein.

REVIEW OF MOTION

The Motion to Value filed by John Hst Yap and Irene Laiwah Loke ("Debtor in Possession") to value two secured claims. The Motion is accompanied by Debtor in Possession's declaration. Declaration, Dckt. 35.

Debtor is the owner of the subject real property commonly known as 1106 Lovell Avenue, Campbell, California ("Property"). Debtor seeks to value the Property at a fair market value of $900,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The valuation of property that secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2 (case or controversy requirement for the parties seeking relief from a federal court).

IDENTITY OF CREDITORS TO HAVE SECURED CLAIMS VALUED

The Motion states that there are two mortgages/deeds of trust recorded against the Property and a judgment lien. These encumbrances are identified by the Debtor in Possession as follows.

Senior Deed of Trust

The First Deed of Trust is stated to have originated with Countrywide Home Loans, Inc. in the amount of $565,000.00. A copy of the Countrywide Deed of Trust is provided as Exhibit 1. Dckt. 36. The Motion then states that this note and deed of trust were assigned to The Bank of New York Mellon, fka The Bank of New York, as Trustee for the Certificate Holders of CWALT, Inc., Alternative loan Trust 2007-

OH2, Mortgage Pass-Through Certificates, Series 2007, and that Mellon NewRez LLC, dba Shellpoint Mortgage Servicing for Bank of New York Mellon, as trustee.

No proof of claim has been filed by Bank of New York Mellon, as Trustee.

Second Deed of Trust

The Motion then identifies a Second Deed of Trust securing an obligation originally owed to National City Bank in the original amount of ($154,950.00). The Motion then states PNC Financial Services Group, Inc. acquired National City Bank.

The Motion then goes further, stating that a company named Dreambuilder Investments, LLC claims to hold ownership of the note secured by the Second Deed of Trust.

Debtor in Possession asserts that this claim is at least ($131,152.00).

No documents showing any assignments or transfers of the deed of trust have been filed.

No proof of claim has been filed for this debt.

The identity of the actual creditor whose claim is to be valued has not been made by the Debtor in Possession.

Judgment Lien

The third obligation encumbering the Property is identified as the judgment lien of Persolve, LLC, which is stated to be in the approximate amount of ($36,670.64). This judgment lien is junior in priority to the two deeds of trust, having been recorded on December 31, 2014.

Proof of Claim No. 1-1 has been filed by Persolve, LLC, asserting an unsecured claim in the amount of ($53,535.09).

OPPOSITION

Creditor Bank of New York Mellon ("Mellon") filed an Opposition. Dckt. 59. First, Creditor opposes on the basis that Debtor's valuation amount is based on a verbal price opinion after review of the Property, without including a formal written broker's Price Opinion or Appraisal. *Id*. at p. 2. Creditor has obtained a Broker's Price Opinion ("BPO") valuing the Property at $1,280,000 as of April 2, 2020. *Id*. Thus, Creditor argues the value of the Property is a material fact in dispute, and requests the opportunity to have an interior inspection verified appraisal. *Id*.

Next, Creditor opposes to the extent that the motion seems to improperly value the Property as of the bankruptcy filing date as opposed to at or near confirmation. *Id*. at p. 3. Debtor's value does not include an "as of" date, and Debtor has not filed a proposed Chapter 11 Plan. *Id*. Creditor points out that a valuation in a Chapter 11 case should be done at or near the time of confirmation. *Id*.

Third, Creditor reserves its right to object to any subsequently filed Chapter 11 Plan based on the Absolute Priority Rule, the violation of 11 U.S.C. 1123(b)(5), lack of feasibility, bad faith, and any other grounds that may exist to object to the Plan.

Lastly, Creditor also reserves the right to make an election under 11 U.S.C. 1111(b). *Id*.

DISCUSSION

Creditor Bank of New York Mellon, as trustee, the senior in priority first deed of trust, secures a claim with a balance of approximately $978,867.00. Schedule D, Dckt. 22. Creditor PNC's second deed of trust secures a claim with a balance of approximately $154,950.00. *Id*. Creditor Persolve, LLC has a judgment lien against the Property in the amount of $32,671.00.

The Motion states that Debtor in Possession requested that a local Realtor provide an opinion as to value of the Property. The Realtor, Regina Zabarte, stated (to an unidentified person) that the property has a value of $900,000. The Debtor in Possession believes that Ms. Zabarte's opinion is accurate. The Debtor in Possession conducted additional research from other third parties identified as Zillow.com and Redfin.com.

There is a significant missing piece to the puzzle - who is the creditor who actually holds the note secured by the second deed of trust. It could be PNC Financial Services Group, Inc. Or, it could be Dreambuilder Investments, LLC. No evidence of the record title is provided and it appears that no discovery has been done for Debtor in Possession to identify the real party in interest.

Declaration of Nancy Weng

On May 29, 2020, Debtor filed the Declaration of Nancy Weng, Esq. Dckt. 74. Ms. Weng testifies that both National City Bank and The PNC Financial Services Group, Inc. were properly served. She further testifies that she spoke with Attorney for PNC, Ms. Jennifer Wong, who acknowledged that while her office represented PNC in several cases, it was impossible for her or the client to identify whether they owned the particular note in the instant case without counsel being assigned. Ms. Weng testifies that thus far no counsel has been assigned to this case to represent the second lienholder and no proof of claim has been filed.

Ms. Weng has done her due diligence and has reviewed title, the recorder's office and Debtor's billing statements. She has also researched the FDIC website showing that PNC acquired National City Bank without government assistance and a copy of this information is filed as Exhibit A (Dckt. 75). Ms. Weng has also researched the Federal Research showing that PNC Bank is a "wholly-owned indirect subsidiary of the PNC Financial Services Group, Inc., and a copy of the research is attached as Exhibit B (Dckt. 75). While the title report Ms. Weng reviewed only lists National City Bank as the originating lender with no recorded assignments to PNC or any other entity, her research indicates that National City Bank merged with PNC Bank in 2009. Thus, she caused service to both via certified mail. She has not received any correspondence or heard from either National City Bank or PNC.

JULY 16, 2020 HEARING

At the July 16, 2020 hearing, the Debtor in Possession and Bank of New York Mellon reported that they have worked out a stipulation resolving this matter and specifying agreed plan treatment terms. They requested a continuance so they could finalize the terms and documentation.

SEPTEMBER 10, 2020 HEARING

At the hearing, Counsel for Debtor reported that the parties are near finalizing a stipulation resolving this, and requested a continuance to 10:30 on October 1, 2020.

OCTOBER 1, 2020 HEARING

On September 28, 2020, the Debtor in Possession and Bank of New York Mellon filed a Request to continue this matter while they document a consensual agreement to this dispute. Dckt. 133. The Debtor in Possession and the Bank working diligently to address these issues, the hearing is continued to 10:30 a.m. on November 12, 2020.

5. 18-90424-E-7 TONY HANA MOTION TO COMPEL ABANDONMENT
DCJ-2 David Johnston 8-30-20 [77]

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 Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 30, 2020. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion to Compel Abandonment is granted.

After notice and a hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or is of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Tony Z. Hana ("Debtor") requests the court to order Michael D. McGranahan ("the Chapter 7 Trustee") to abandon property commonly known as:

(a) 50% interest in a 2009 BMW 528i, the Debtor's interest worth $3,000;

(b) 2008 BMW 535i worth $5,000; and

(c) 50% interest in a 2007 Infinity G-35, the Debtor's interest worth $2,000

(the "Property").

Specifically, the Motion requests that the order require Trustee to abandon property of the estate *nunc pro tunc* as of May 17, 2020, the conversion date when Debtor's Chapter 13 case was converted to a Chapter 7 case. Debtor requested conversion because he was unable to make the required plan payments.

The Property was disclosed in Debtor's Chapter 13 Schedules. Once the case was converted to a Chapter 7, Debtor disclosed at the Meeting of Creditors that the two old BMW vehicles had been sold and that the Infinity had been in an accident and rendered a total loss. Debtor also filed Supplemental Schedules in the Chapter 7 case showing that Debtor no longer held any interest in the vehicles and providing great detail regarding the circumstances of the sales and the insurance claim and disposition of the proceeds of each.

Debtor argues that pursuant to 11 U.S.C. section 348(f)(1)(A), the vehicles were not property of the estate given that Debtor had no possession or control of the vehicles at the time of conversion. Arguing that the Trustee should be required to abandon the Property as of the conversion date.

Lastly, Debtor argues that due to the post-petition pre-conversion disposition, the Property is both burdensome and of inconsequential value to the estate.

Debtor's Declaration

The Declaration of Tony Z. Hana has been filed in support of the Motion. Dckt. 79. Debtor testifies that Debtor and spouse struggle to make mortgage payments with their respective incomes and the Property was sold so that they could make the mortgage payments . *Id.*, ¶¶ 5,6. There are eight people living in the home and it was imperative that they made the mortgage payments. *Id.* Debtor also testifies that through the Amended Schedules filed on July 29, 2020, Debtor provided in great detail all the information related to the Property:

> (a) The 2009 BMW 528i in which I owned a 50% interest was sold to an unrelated person on March 13, 2020 for $6,000. The co-owner, my daughter, allowed me to receive all proceeds of the sale to retain our home. Around the time the sales proceeds were received, I paid Guild Mortgage (first mortgage) $3,804, Digital Federal Credit Union (second mortgage) $2,010, Fast Auto Loan (title loan) $891, my accountant for tax returns $650, and Stanislaus County Tax Collector $1,089. Both mortgage holders received two payments each because the loans were delinquent and I was aware that both lenders had relief from the automatic stay since they were Class 4 "direct pay" creditors under my confirmed Chapter 13 plan.
>
> (b) The 2008 BMW 535i was sold to an unrelated person in late November, 2018, for $4,000. I paid Guild Mortgage $3,912 (two payments on first mortgage).
>
> (c) The 2007 Infinity G-35 in which I owned a 50% interest was involved in an accident and declared a loss by my insurance company. My insurance company paid me $6,097 in early January, 2020, for the value of the vehicle (my 50% and my son's 50%). My son allowed me to use all of the proceeds of the policy, since I had paid all the premiums and again there delinquent mortgage payments. From the insurance proceeds, I paid Guild Mortgage $1,902, Modesto Junior College (for my daughter's tuition and expenses) $2,000, and Digital Federal Credit Union $2,010.

Id., ¶¶ 10(a)-(c).

Debtor testifies under penalty of perjury that the transactions described took place prior to the conversion date and without the knowledge of Debtor's attorney. *Id.*, ¶ 11.

TRUSTEE'S NON-OPPOSITION

Chapter 7 Trustee has no opposition to the requested relief. Trustee's September 8, 2020 Docket Entry Statement.

DISCUSSION

For what should be a standard, easy motion to abandon, Debtor throws a twist, requesting additional relief to be granted *nunc pro tunc*. While using the words "nunc pro tunc" in the title of the Motion, the introduction, the prayer, and in the footer showing the title of the Motion, it does not appear and no specific grounds are identified for *nunc pro tunc* relief.

In reading the Motion, the court divines that the need for some form of special relief (whether *nunc pro tunc* or other proper relief) relates to the following allegations in the Motion:

> 4. Among the assets the Debtors owned on the petition date were these:
>
> (a) 50% interest in a 2009 BMW 528i, the Debtor's interest worth $3,000;
>
> (b) 2008 BMW 535i worth $5,000; and
>
> (c) 50% interest in a 2007 Infinity G-35, the Debtor's interest worth $2,000.
>
> 5. At the meeting of creditors in the Chapter 7 case, the Debtor disclosed that **the two old BMW vehicles had been sold** [during the Chapter 13 case without authorization from the court] in order to make mortgage payments on the family home where 8 family members live. The Debtor further disclosed that the **Infinity had been in an accident, rendered a total loss,** and the **Debtor had collected the insurance money and used** it to make mortgage payments on the family home and junior college tuition.
>
> 6. On July 29, 2020, the Debtor filed amended schedules and amended statement of financial affairs (more correctly, supplemental documents to show the facts existing on the Conversion Date) showing that the Debtor no longer had any interest in the three vehicles and disclosing in great detail the circumstances of the sales and insurance claim and disposition of the proceeds of each. The Debtor disclosed these facts:
>
> (a) **The 2009 BMW 528i in which the Debtor owned a 50% interest was sold to an unrelated person on March 13, 2020** [after the Chapter 13 case was filed on June 7, 2018] for $6,000. The co-owner, the Debtor's daughter, allowed the Debtor to receive all proceeds of the sale. Around the time the sales proceeds were received, the Debtor paid Guild Mortgage (first mortgage) $3,804, Digital Federal Credit Union (second mortgage) $2,010, Fast Auto Loan (title loan) $891, Debtor's accountant for tax returns $650, and Stanislaus County Tax Collector $1,089. Both

mortgage holders received two payments each because the loans were delinquent and both lenders had relief from the automatic stay since they were Class 4 "direct pay" creditors under the confirmed Chapter 13 plan.

(b) **The 2008 BMW 535i was sold to an unrelated person in late November, 2018**, [after the Chapter 13 case was filed on June 8, 2018] for $4,000. The Debtor paid Guild Mortgage $3,912 (two payments on first mortgage).

(c) **The 2007 Infinity G-35** in which the Debtor owned a 50% interest was involved in an accident and declared a loss by the Debtor's insurance company. The Debtor's insurance company **paid him $6,097 in early January, 2020,** [after the bankruptcy case was filed on June 8, 2018] for the value of the vehicle (Debtor's 50% and Debtor's son's 50%). The Debtor's son allowed him to use all of the proceeds of the policy, for which the Debtor had paid all the premiums. From the insurance proceeds, the Debtor paid Guild Mortgage $1,902, Modesto Junior College (for daughter's tuition and expenses) $2,000, and Digital Federal Credit Union $2,010.

The Debtor offers no legal basis or authority for having sold without court authorization property of the bankruptcy estate, diverted monies of the bankruptcy estate, and violated Debtor's duties under the Chapter 13 Plan.

Debtor offers no legal basis for the court issuing a *nunc pro tunc* order which would make what had not happened legally or was not ordered by the court somehow legal and proper. This unsupported legal request flies in the face of a recent United States Supreme Court rulings (which is consistent with long standing decisions of the Ninth Circuit Court of Appeals) addressing the very limited scope of when issuance of a *nunc pro tunc* order is proper.

> Federal courts may issue *nunc pro tunc orders*, or "now for then" orders, Black's Law Dictionary, at 1287, to "reflect[ ] **the reality" of what has already occurred**, *Missouri v. Jenkins*, 495 U. S. 33, 49, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990). **"Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court**." *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U. S. 376, 390, 32 S. Ct. 277, 56 L. Ed. 476 (1912).
>
> **Put colorfully, "[n]unc pro tunc orders are not some Orwellian vehicle for revisionist history**—creating 'facts' that never occurred in fact." *United States v. Gillespie*, 666 F. Supp. 1137, 1139 (ND Ill. 1987). Put plainly, the court "cannot make the record what it is not." *Jenkins*, 495 U. S., at 49.

Roman Catholic Archdiocese of San Juan v. Feliciano, __ U.S. __, 140 S. Ct. 696, 700-701 (2020) (emphasis added).

Here, the passing reference to *nunc pro tunc* appears to be one in which the court is being asked to make the abandonment effective in the past, apparently at the time of each unauthorized, non-legally permissible transfer of property by the fiduciary Debtor under the Chapter 13 Plan. That clearly is not proper.

It appears that Debtor has three problems. First, whether Debtor's conduct would somehow interfere with obtaining a discharge in a Chapter 7 case.

Second, whether Debtor's conduct would result in personal liability to the Chapter 7 estate. In looking at Schedule C filed by Debtor, an exemption was claimed in a 2013 Ford Edge. Dckt. 12 at 9. On July 29, 2020, Debtor filed an Amended Schedule C, following the conversion of this case. Dckt. 69. On Amended Schedule C Debtor lists the 2013 Ford Edge twice to take advantage of the California Code of Civil Procedure § 704.010 and § 704.060 exemptions.

Debtor and counsel for Debtor place the court in a very difficult spot. The requested *nunc pro tunc* relief is clearly improper and this court will not ignore the Supreme Court, neither the recent decision in *Feliciano* or the prior decision in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, n.14, (2010). Also, while Debtor's counsel is well known and highly regarded for his ethical legal practice, "bending the rules" to slip one by would make it appear that the court has indulgences that are handed out to favored attorneys.

While it may be possible to fashion some relief to protect the transferees and the title they hold, and Debtor, a basis for that has not been presented to the court.

The request for *nunc pro tunc* relief is denied.

While the Estate does not have in it the physical vehicles or monies at issue, the Estate does have potential rights and interests in such vehicles and monies. The court grants the motion as it applies to such interests and rights.

The court finds that the debt secured by the Property exceeds the value of the Property and that there are negative financial consequences to the Estate caused by retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

The court shall issue an Order (not 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 Compel Abandonment filed by Tony Z. Hana ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted, and the rights and interests of the Bankruptcy Estate in and to the following Property identified as:
>
> (a) 50% interest in a 2009 BMW 528i, the Debtor's interest worth $3,000;

(b) 2008 BMW 535i worth $5,000; and

(c) 50% interest in a 2007 Infinity G-35, the Debtor's interest worth $2,000,

and any proceeds thereof, originally listed on Schedule A / B by Debtor are abandoned by the Chapter 7 Trustee, Michael D. McGranahan ("Trustee") to Tony Z. Hana by this order, with no further act of the Trustee required.

6.	**20-90373-E-7** **CLH-2**	**THOMAS SWARTZ** **Pro Se**	**OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS** **8-20-20 [48]**

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 Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on August 20, 2020. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Objection to Claimed Exemptions is sustained, without prejudice to Debtor being afforded one final opportunity to file an amended Schedule without first obtaining leave of the court.

Jane M. Wright, Ron R. Skrbina, Christina A. Tripp and Gaylord W. Skrbina ("Creditors") object to Thomas Patrick Swartz's ("Debtor") claimed exemptions under federal law because Debtor claims exempted "partnership interest" in such interest that is neither disclosed nor scheduled in his Schedule A/B. Thus, it is not possible to determine what asset he is claiming as exempt.

Additionally, the Debtor claimed the property exempt pursuant to 11 U.S.C. § 522(b)(1)(2)(3), and California has opted out of the exemptions provided under 11 U.S.C. section 522 in its enactment of California Code of Civil Procedure section 703.140. Therefore, the 11 U.S.C. § 522(b) exemptions are not available to Debtor. [FN. 1.]

FN. 1. In the Amended Schedule C filed on August 11, 2020, (the exemption claimed when this Objection was filed) lists a partnership interest, Jeep, and Lincoln, stating that 100% of market value is claimed as exempt, and that an exemption pursuant to "11 U.S.C. section 533 (b) (1) (2) (3)" is generically claimed for all. Dckt. 39 at 11.

DEBTOR'S OPPOSITION

On September 3, 2020, Debtor filed an Objection and Motion to Dismiss Creditors Objection. Dckt. 60. Debtor alleges that Creditors are using outdated and faulty title information and further alleges that Creditor's counsel has wilfully and oppressively failed to timely discover additional facts and rules that may be found through standard research.

Debtor further alleges that Creditor's counsel intends to discriminate against Debtor and his request to have Creditor's debt discharged and that counsel's actions constitute coercion under California Civil Code sections 52.1 and 51.7.

Lastly, Debtor asserts that as allowed, he has amended his schedules and thus Creditor's objection should be dismissed and denied. Moreover, Debtor requests a judgment in favor of the United States Trustee's Report of No Distribution, and that Debtor's debt be discharged in this case.

The Amendment reference appears to be the one filed on September 3, 2020, at the same time as the Opposition. Dckt. 62.

DISCUSSION

The court begins with the asserted faulty, oppressive, discriminatory Objection. The Objection is short and simple - Debtor has not claimed an exemption under applicable law.

Reviewing the Second Amended Schedule C filed on September 3, 2020, merely repeats the prior exemptions as follows:

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A/B* that lists this property	**Current value of the portion you own** Copy the value from *Schedule A/B*	**Amount of the exemption you claim** *Check only one box for each exemption.*	**Specific laws that allow exemption**
Brief description: Partnership Interest Line from *Schedule A/B:* 19	$ 30,000.00	☐ $ _____ ☑ 100% of fair market value, up to any applicable statutory limit	11 U.S.C. section 522 (b) (1) (2) (3)
Brief description: Jeep Line from *Schedule A/B:* _____	$ 1,500.00	☐ $ _____ ☑ 100% of fair market value, up to any applicable statutory limit	
Brief description: Lincoln Line from *Schedule A/B:* _____	$ 3,000.00	☐ $ _____ ☑ 100% of fair market value, up to any applicable statutory limit	

plus "Personal Items" in the amount of $3,300 stated on the next page. Dckt. 62 at 14-15.

Though having been given notice that the 11 U.S.C. § 522(b) exemption scheme did not apply in California, Debtor maintains the same generic exemption.

On September 24, 2020, Debtor filed a Third Amended Schedule C in which the following exemption is claimed:

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A/B* that lists this property	**Current value of the portion you own** Copy the value from *Schedule A/B*	**Amount of the exemption you claim** *Check only one box for each exemption.*	**Specific laws that allow exemption**
Brief description: Partnership Interest Line from *Schedule A/B:* 19	$30,000.00	☐ $ _____ ☑ 100% of fair market value, up to any applicable statutory limit	California 704 Bankruptcy Homestead Exemption
Brief description: Jeep Line from *Schedule A/B:* 3	$1,500.00	☐ $ _____ ☑ 100% of fair market value, up to any applicable statutory limit	California 704 Bankruptcy Exemption
Brief description: Lincoln Line from *Schedule A/B:* 3C	$3,000.00	☐ $ _____ ☑ 100% of fair market value, up to any applicable statutory limit	California 704 Bankruptcy Exemtpion

plus $3,300 for "personal items" for which the Exemption is stated to be "California 704 Bankruptcy Exemption. Dckt. 67.

When a search for California Code of Civil Procedure § 704 is conducted using the LEXIS NEXIS legal research data base, the following information is provided:

> § 704. [Section repealed 1983]
>
> History
>
> Enacted Stats 1872. Repealed Stats 1982 ch 1364 § 1, operative July 1, 1983. The repealed section related to procedure for making redemption payments.

While California law does provide for a series of exemptions in California Code of Civil Procedure §§ 704.1 et seq., such individual statutory sections relate to different exemptions for different items and is not just one big catch-all section.

In looking at the assets, one is described as a "partnership interest" which asset is referenced as being identified in ¶ 19 of Amended Schedule A/B.

Going to Amended Schedule A/B the "partnership interest" is described as follows:

> Estate of Walter F. Swartz a +or- 40 acre parcel of land Rural & Remote 6 miles of Rail Road Flat on Summing Level Road 3 miles paved 3 miles dirt See Attachment — 25% of ownership — $120,000

ATTACHMENT *(Number)*: ab question 19

> The parcel is 1 of a + or - 50 illegally created parcels by Debtor's brother Don Swartz. This Parcel originally had a mobile home, but was burnt on 12/24/2008. No public water or sewer but has phone and power, with a 60 year old tin Roof, 20'x20' garage & old damaged tin roof barn. The town of Rail Road Flat has a Post Office, General Store, Community Club, and a recently shuttered Grammar School. Nearest gas station and Grammar School are in West Post 15 miles away. Nearest High School, Hospital, Doctors, and Modern Retail Shopping is 30 miles away. Partnership Agreement expired 6/1/1990 General Partners have no standing.

Dckt. 62, at 7-8

For this partnership interest/asset, Debtor states that the exemption is "California 704 Bankruptcy Homestead Exemption." On the Amended Petition Debtor lists the above as where he lives. Dckt. 31 at 2. If Debtor lives on this property and it is his residence, then he should be acting to protect it with a properly claimed exemption.

DISCUSSION

A claimed exemption is presumptively valid. *In re Carter,* 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, "the objecting party has the burden of proving that the exemptions are not properly claimed." FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005).

Unfortunately, Debtor has not claimed exemptions as permitted by applicable California statutes. It is not for the court to complete the exemptions being claimed by the Debtor. Debtor may need to obtain legal assistance to effectively assert his rights, but it is his burden to so properly assert those rights - in this case exemptions that he can properly claim in this case.

The Objection is sustained.

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 Claimed Exemptions filed by Jane M. Wright, Ron R. Skrbina, Christina A. Tripp, and Gaylord W. Skrbina ("Creditors") having been presented to the court, Debtor Thomas Szwartz filing a Amended Schedule C (Dckt. 67) as part of the Opposition to the Objection to Claim of Exemptions, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection is sustained, and the exemptions as stated on Amended Schedule C (Dckt. 39), to which the Objection was first filed, and then

Second Amended Schedule C (Dckt. 62) and Third Amended Schedule C (Dckt. 67) filed as part of the Opposition to the Objection are disallowed without prejudice.

IT IS FURTHER ORDERED that Debtor is allowed to file one final amended Schedule C, and after that such further amended pleadings shall be only with leave of court given the repeated filings of Schedules C which do not cite to appropriate exemption law.

7. 18-90029-E-11 JEFFERY ARAMBEL
20-9008 MRP-1
ARAMBEL V. LBA RV-COMPANY XX.VII, LP ET AL

MOTION TO DISMISS CAUSE(S) OF ACTION FROM COMPLAINT
8-20-20 [11]

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 Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff/Debtor in Possession's Attorney on August 20, 2020. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Complaint for Relief Relating to Holdback Agreement is denied.

LBA RV-COMPANY XXVII, LP, a Delaware limited partnership ("Defendant") moves for the court to dismiss all claims against it in Jeffery Arambel's ("Plaintiff-Debtor" who is the reorganized debtor under the confirmed Chapter 11 Plan) Complaint according to Federal Rule of Civil Procedure 12(b)(6).

REVIEW OF COMPLAINT

The Complaint alleges the following grounds:

A. Debtor entered into a Purchase and Sale Agreement with LBA Realty LLC, to whom Defendant is the successor in interest, for real property consisting of 56.5 acres at Rogers Road, Patterson, California, on April 4, 2017. The sale proceeds of $750,000.00 ("sale proceeds/Holdback") are still held in an escrow account in the custody of Defendant Commonwealth Land Title Company ("Commonwealth").

B. Pursuant to the Escrow Holdback Agreement, disbursement of the sale proceeds depended on the extension of a Large Industrial Investment Program which would provide reimbursement of certain costs to developers of industrial property in Stanislaus County. The Holdback Agreement required the Incentive Program to be extended in substantially its current form by December 31, 2017, for an additional five years in order for the proceeds to be distributed to Debtor's broker Cushman and Wakefield in the amount of $37,500, and Seller's lender MetLife in the amount of $712,500.

C. The Incentive Program was extended timely, but Defendant LBA was resistant to releasing the sale proceeds. On January 16, 2018, Defendant agreed to release of the Holdback through email communications. Specifically, Defendant stated it would release $637,500.00 and retain the balance with the Right of First Refusal ("ROFR") to be extended six months. Plaintiff-Debtor was asked to confirm this agreement by email which he did. The agreement was formalized and executed as a First Amendment to Escrow Holdback Agreement, on January 29, 2018.

D. Defendant reaffirmed and partially implemented both the Email Agreement and the Amended Agreement ("Contracts") by causing the six month extension of the ROFR to be recorded against title to the affected property. Afterwards, MetLife, as Debtor's Lender, prepared the motion seeking an order of the court implementing the Amended Agreement, but Defendant refused to consent to it. Since then, Defendant has refused disbursement of the Holdback consistent with the Contracts.

First Cause of Action: Breach of Contract

E. Plaintiff-Debtor alleges the Contracts were enforceable, that Defendant took the benefit of the Contracts by recording the ROFR which now clouds title to the estate's property, and that Defendant has breached those Contracts by preventing Plaintiff-Debtor/Plan Administrator from receiving the benefit of those contracts-- the disbursement of the Holdback.

Second Cause of Action: Promissory Estoppel

F. Plaintiff alleges that Defendant promised it would cooperate in disbursing the Holdback if Plaintiff-Debtor executed and delivered the ROFR to be recorded, that Defendant should reasonably have expected Plaintiff-Debtor to execute and deliver the ROFR to be recorded in reliance on Defendant's promise, and that Plaintiff-Debtor reasonably relied on Defendant's promise and executed, notarized, and delivered the ROFR to be recorded, which Defendant caused to be recorded. Injustice would be avoided only by enforcing Defendant's promises as set forth in the Contracts.

Third Cause of Action: Unjust Enrichment

G. Plaintiff-Debtor alleges that Defendant arrogated itself the benefit of the ROFR, and then acted expressly to prevent Plaintiff-Debtor from receiving the benefit preventing disbursement of the Holdback, and that Defendant will be unjustly enriched if it enjoys the benefits of the ROFR while depriving Plaintiff-Debtor of the disbursement.

Fourth Cause of Action: Violation of Covenant of Good Faith and Fair Dealing

H. Plaintiff-Debtor alleges that Defendant LBA violated its covenant of good faith and fair dealing when it arrogated the benefit of the ROFR while preventing the disbursement of the sale proceeds.

Fifth Cause of Action: Declaratory Judgment for Holdback Agreement

I. Plaintiff-Debtor contends that even if the Contracts were ineffective and unenforceable, the rights of the parties are governed by the Holdback Agreement aside from the Contracts. Plaintiff-Debtor asserting that because the Incentive Program was timely extended as per agreed under the Holdback Agreement, the entirety of the Holdback must be released to or at the direction of Plaintiff-Debtor.

Sixth Cause of Action: Declaratory Judgment for Attorney's Fees

J. Plaintiff-Debtor argues that pursuant to the language of the Holdback Agreement, Plaintiff-Debtor, as the prevailing party, should recover Attorney's fees from Defendant.

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court "required to"accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

DEFENDANT'S MEMORANDUM
OF POINTS AND AUTHORITIES IN OPPOSITION

Defendant filed a Motion to Dismiss on August 8, 2020. Dckt. 11. Defendant seeks to dismiss Plaintiff-Debtor's First and Fourth Causes of Action on the basis that there is no valid and enforceable contract; the Second Cause of Action on the basis that Plaintiff-Debtor cannot satisfy two of the elements of Promissory Estoppel; and the Third Cause of Action on the basis that Defendant did not retain a benefit which they were not entitled to retain.

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. Plaintiff-Debtor's Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing claims are both based on contracts that were invalid. The Amended Agreement was executed after Debtor had filed for bankruptcy without notice, a hearing, or an approval from the Court. This failure violated §§ 362(a) & 363(b)(1). In addition, the Email Agreement failed to satisfy the requirements of the statute of frauds for an agreement involving the transfer of an interest in real estate.

B. Promissory Estoppel only applies where there is an absence of consideration. *Healy v. Brewster*, 59 Cal. 2d 455, 463 (1963); *Youngman v. Nevada Irrigation Dist.*, 70 Cal. 2d 240, 249 (1969); *Avidity Partners, LLC v. State of Cal.*, 221 Cal. App. 4th 1180, 1208-09 (2013). Plaintiff-Debtor alleged a bargained-for exchange where Defendant made a promise conditioned on performance and Plaintiff-Debtor performed. Plaintiff-

Debtor also fails to allege that reliance on Defendant's promise was reasonable based on an email after Plaintiff-Debtor failed to provide notice of his bankruptcy. Plaintiff-Debtor also failed to allege injury from his reliance after executing and delivering to Defendant the ROFR.

C. Plaintiff-Debtor's Unjust Enrichment claim fails to plead a claim upon which relief may be granted because Plaintiff-Debtor alleges the existence of a valid contract. Further, Plaintiff-Debtor's complaint does not allege facts to establish that Defendant received a benefit it was not entitled to retain through the execution and delivery of the ROFR, nor through a six month extension of the ROFR.

REVIEW OF MEMORANDUM OF POINTS AND AUTHORITIES

A. Defendant argues that the Amended Agreement is void because Plaintiff-Debtor failed to comply with § 363(b)(1), which required Plaintiff-Debtor to provide notice to creditors and obtain approval for sale of estate property outside of the normal course of business. Further, Plaintiff-Debtor violated §362(a)(3) by exerting control over estate property without authority or court approval. Such a violation of the automatic stay should render the Amended Agreement null and void.

B. Defendant argues the Email Agreement cannot be relied upon as an enforceable prepetition contract. Defendant contends that the Email Agreement did not satisfy the statute of frauds under Cal. Civ. Code § 1624 which requires a contract for sale of real property to be in writing, along with the executing agent's authority. The statute of frauds applies to a ROFR to purchase real property. *Smyth v. Berman*, 31 Cal. App. 5th 183, 197 (2019).

C. The Email Agreement also fails to provide essential terms of a contract for the transfer of real property including the sale price of the agreement and a description of the land so it may be identified. *O'Donnell v. Lutter*, 68 Cal. App. 2d 376, 381 (1945). Plaintiff-Debtor may not allege the Email Agreement provided the price of the agreement because it listed a price different from the Amended Agreement and omitted payment to Cushman and Wakefield.

D. An email may only satisfy the requirement that a record be in writing under Cal. Civ. Code §1633.1 where the parties have consented to conduct the transaction by electronic means. Plaintiff-Debtor has failed to allege that the parties agreed to conduct the transaction through electronic means and Defendant's agent stated in the emails that further documentation would be circulated.

E. Defendant argues that enforcing the Email Agreement would conflict with prior agreements between the parties: the Purchase and Sale Agreement and

the Escrow Holdback Agreement. The Purchase Sale Agreement required any amendment be in writing and executed by the Seller and Buyer. The Email Agreement did not constitute an instrument executed by the Defendant. Further, the Escrow Holdback Agreement required written agreement of all parties in order to amend it. The Title Company, which was a party to the Escrow Holdback Agreement, provided no agreement in the Email Agreement.

F. Defendant argues that Plaintiff-Debtor failed to state a claim for Promissory Estoppel because Plaintiff-Debtor's alleged reliance was not reasonable or foreseeable as required under the doctrine. *(Laks v. Coast Fed. Savings & Loan Ass'n*, 60 Cal. App. 3d 885, 890 (1976). Plaintiff-Debtor allegedly relied by executing, notarizing, and delivering the ROFR to be recorded after filing for bankruptcy. An act contrary to law, such as a Bankruptcy Code violation, is patently unreasonable. (*Crane v. Wells Fargo*, No. 13-01932, 2014 U.S. Dist. LEXIS 40369, at *16 (N.D. Cal. March 24, 2014).

G. Plaintiff-Debtor also fails to allege any injury suffered through the execution of the ROFR, as required under Promissory Estoppel. The parties were already in a 36-month ROFR due to the Purchase Sale Agreement and the status quo had not been altered, nor was any injury suffered by Plaintiff-Debtor.

H. Promissory Estoppel is not available to Plaintiff-Debtor because actual consideration was given by Plaintiff-Debtor. *Healy v. Brewster*, 59 Cal. 2d 455, 463 (1963); *Youngman v. Nevada Irrigation Dist*., 70 Cal. 2d 240, 249 (1969). Defendant argues that Plaintiff-Debtor alleged consideration in that Defendant promised it would cooperate in disbursing the Holdback if Plaintiff-Debtor executed the ROFR, which Plaintiff-Debtor did.

I. Defendant argues that an Unjust Enrichment cause of action is inapplicable here because a valid enforceable contract between the parties exists, and is alleged in Plaintiff-Debtor's complaint. *Paracor Fin. v. Gen. Elec. Capital Corp.,* 96 F.3d 1151, 1167 (9th Cir. 1996) (citing *Wal-Noon Corp. v. Hill,* 45 Cal. App. 3d 605, 613 (1975).

J. Plaintiff-Debtor does not plead facts showing Defendant obtained a benefit it was not entitled to obtain, as required for an Unjust Enrichment cause of action. *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.,* 175 Cal. App. 4th 64, 78 (2009). The ROFR was previously granted in the Purchase Sale Agreement so the later execution and recording of the ROFR did not provide Defendant anything it did not already possess. Also, no facts were alleged that Defendant received a benefit from an alleged six-month extension of the ROFR beyond the prior expiration date.

K. Defendant argues that Plaintiff-Debtor's Cause of Action for a Violation of the Covenant of Good Faith and Fair Dealing fails on the same basis as the

Breach of Contract cause of action: the existence of a valid contract was not demonstrated. *Racine & Laramie, Ltd., Inc. v. Dep't of Parks and Rec.*, 11 Cal. App. 4th 1026, 1031-32 (1992); *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 342 (2000).

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on September 16, 2020. Dckt. 27. Plaintiff-Debtor argues the Contracts were not void as the transaction was part of his ordinary course of business; that notice was provided through the Plan Confirmation; that a notice and hearing violation would not render the contracts void; that the elements of Promissory Estoppel were met in the Complaint and are not inconsistent with a Breach of Contract claim; that Defendant was unjustly enriched by the ROFR extension; and the cause of action for a Violation of the Covenant of Good Faith and Fair Dealing was based on a valid contract.

The court summarizes the Plaintiff-Debtor's Opposition as follows:

A. Plaintiff-Debtor argues the Contracts were not null and void as they were part of Plaintiff-Debtor's ordinary course of business and did not require notice or approval from the Court. Plaintiff-Debtor states he is a real estate developer, not simply a farmer. Plaintiff-Debtor contends the transaction at issue satisfies both the horizontal and vertical tests required to show that it is in the ordinary course of business. *In re Dant & Russell, Inc.* 853 F.2d.700 (9th Cir. 1988). Plaintiff-Debtor argues the transaction is a "tail end," or an adjustment in the purchase price based on subsequent developments, which is commonly dealt with by real estate developers conducting similar business, as required under the horizontal test. The vertical test requires the transaction to subject a creditor to similar economic risks to those they accepted when they decided to extend credit. The "tail end" transaction here is also one that a normal lender, MetLife in this case, would expect to address, regarding a potential 15% loss of a $750,000.00 subsidy.

B. Plaintiff-Debtor argues that even if the contract was outside of his ordinary course of business, the Plan Confirmation satisfied necessary notice and hearing requirements, pursuant to § 1021(a) which requires only "such notice as is appropriate in the particular circumstances." MetLife was the only creditor facing economic consequences and Metlife was aware of the relevant facts of the contract, evidenced by the motion it drafted to approve the contract at the outset of the case. Therefore, notice and hearing requirements under § 363(b)(1) were also satisfied, allowing enforcement of the contract.

C. Plaintiff-Debtor distinguishes the cases relied upon by Defendant from the facts in the instant case to show that a notice and hearing violation would not render the contract null and void. Plaintiff-Debtor contends that if the contract were rejected by the Court it would allow Defendant to bring a

claim for damages for breach rather than void it entirely. *Mission Prod. Holdings v. Tempnology, LLC* ___ U.S. ___, 193 S. Ct. 1652 (2019).

D. Plaintiff-Debtor argues Defendant has used notice and hearing formalities to attempt to "re-trade" the contract and obtain a greater share of the Holdback. Executory contracts may not be terminated or modified due to the filing of a bankruptcy petition. Section 365(e)(1); and see, *In re Standor Jewelers West, Inc.* 129 B.R 200, 203 (BAP 9th Cir. 1991). Therefore, Defendant should be estopped from complaining about any shortfall of notice and hearing formalities.

E. Plaintiff-Debtor argues the promise element required under the Promissory Estoppel cause of action was satisfied by Defendant's Agent's statement within the Email Agreement that they "will release $637,500 of the holdback amount." The parties then entered into a formal agreement in which Defendant agreed to disburse funds.

F. Plaintiff-Debtor states he suffered detriment in reliance to Defendant's promise since the additional six months of the ROFR would have expired in June 2020 but instead clouds title until December 2020.

G. Plaintiff-Debtor argues that his claim for Promissory Estoppel is not inconsistent with his claim for Breach of Contract, as Promissory Estoppel may be pled in the alternative where the pleader is uncertain of what can be established by evidence. *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 6 Cal.App.5th 1207, 1224-25 (Cal. Ct. App. 2016).

H. Plaintiff-Debtor argues that Defendant did obtain a benefit it was not entitled to retain in the form of a six-month extension of the ROFR due to Plaintiff-Debtor's reliance on the contract. This benefit constitutes unjust enrichment since Defendant failed to perform its obligation under the contract despite obtaining an extension to the ROFR which it had negotiated for and asserted as an impediment to Plaintiff-Debtor's reorganization.

I. A violation of the Covenants of Good Faith and Fair Dealing did occur because there was a valid and enforceable contract and Defendant attempted to re-trade the contract in response to Plaintiff-Debtor's bankruptcy filing.

DISCUSSION

This Adversary Proceeding centers on a transaction in which the Plaintiff-Debtor and Defendant entered into the Purchase Sale Agreement ("PSA") for the sale of real property which is identified as 56.5 acres of unimproved land located at Roger Road in Patterson, California. Exhibit 1 to Answer and Counterclaim, Dckt. 17; Complaint ¶ 10, Dckt. 1; Answer and Counterclaim ¶ 13, Dckt. 16. The PSA was amended four times, with a copy of the Third Amendment to the PSA provided as Exhibit 2 to the Answer and Counterclaim by Defendant. Dckt. 17.

In paragraph 18 of the Answer and Counterclaim, Defendant states that it is in this Third Amendment to the PSA that provision is made for the Escrow Holdback Agreement and that Escrow Holdback Agreement was entered into by Plaintiff-Debtor and Defendant. Dckt. 16.

In a separate agreement, Plaintiff-Debtor and Defendant entered into the Escrow Holdback Agreement. By its express terms, the Escrow Holdback Agreement states that it is separate from the PSA so that Plaintiff-Debtor and Defendant may address "certain post-closing obligations of Seller."

> 9. Miscellaneous. All section headings herein are included only for convenience of reference and are not intended to limit or amplify any term or provision of this Agreement. The Recitals hereto are hereby incorporated into and made a part of this Agreement. **This Agreement contains the entire understanding and agreement of the parties hereto with respect to the subject matter hereof and may not be altered or amended in any way except by the written agreement of all such parties.**

Dckt. 6, Exhibit A, at 4; Dckt. 18, Exhibit 3 at 1 (emphasis added).

This separate Escrow Holdback Agreement, which included the Holdback Provision as to the $750,000 sales proceeds addressed the distribution of $750,000.00 of sales proceeds when the sale of the Property under the PSA closed. The Holdback Agreement specifically stating under Recital B that "Concurrently herewith, Seller has transferred the Property to Purchaser pursuant to the terms of the Purchase Agreement. " *Id.* Thus, the purpose of this separate agreement appears to relate only to the disposition of personal property– sale proceeds after the sale of the real property had closed – not disposition of land.

Plaintiff-Debtor alleges that on January 16, 2018 Debtor entered into an agreement with Defendant via email communications to obtain release of the sale proceeds. Plaintiff-Debtor provides said exchange as Exhibit B of the Complaint. Dckt. 6. Further, Plaintiff-Debtor alleges that such agreement was formalized by executing the First Amendment to the Escrow Holdback Agreement dated January 29, 2018. This Agreement is Exhibit C to Plaintiff's Complaint. *Id.*

On the same day, the parties entered into the Fifth Amendment to the Purchase and Sale Agreement wherein Plaintiff-Debtor agreed to extend Defendant's right of first refusal by six months. This Agreement is Exhibit 4 to Defendant's Answer.

Compliance with 11 U.S.C. § 363(b)

The court first turns to Defendant's argument that Plaintiff-Debtor fails to allege the existence of an enforceable agreement on the basis the agreement made over email which later became the Amended Agreement is void and unenforceable because Plaintiff-Debtor failed to comply with section 363(b) of the bankruptcy code.

Though Defendant cites to 11 U.S.C. section 363(b), Defendant fails to explain exactly how the amending of an already existent agreement is subject to notice and court approval under that section fails to explain why and how amending the existing agreement as it relates to the Holdback Provision is use or

sale of property under section 363(b). In this case, the original Agreement, which included the Holdback Provision and the Right of First Refusal, was signed on April 4, 2017.

Debtor filed for bankruptcy on January 17, 2018, and upon the filing of this case became the fiduciary Debtor in Possession for the Bankruptcy Estate, there having been no Chapter 11 trustee appointed. Defendant. The Debtor, serving as the Debtor in Possession, was fully empowered to act in the ordinary course of business with respect to property of the bankruptcy estate. Indeed, this is Plaintiff-Debtor/Plan Administrator's argument in opposition to the instant motion. Plaintiff-Debtor argues that Debtor was and is a developer and engaging in this type of communication and subsequent amendment of the agreement was done in the ordinary course of business.

A copy of the First Amendment to the Escrow Holdback Agreement is provided as Exhibit C, which is part of the Complaint. Dckt. 6 at 13- 16. The terms of this First Amendment to the Escrow Holdback Agreement are summarized as follows:

A. Holdback Monies under the Escrow Holdback Agreement shall be disbursed as follows:

    1. $615,000.00 to Metropolitan Life Insurance Company, the Seller's [Debtor's] lender;

    2. $22,500.00 to Cushman and Wakefield, the Seller's [Debtor's] broker.

B. All remaining Holdback Monies to be disbursed as separately instructed by LBA RV-Company XXVII, LP [Defendant], the Purchaser.

C. Except for the above, the Holdback Agreement is not modified.

Looking at the above, to the extent that authorizations were given for the payment of debts owed by the Debtor, such would or could have been a plan confirmation issue, but those monies relate to the already closed sale of the real property to Defendant.

The First Amendment to the Escrow Holdback Agreement does not have dates specified for when signed by each signatory. However, the First Amendment is dated January 29, 2018 in the first paragraph of that Amendment document.

Exhibit B to the Complaint (Dckt. 6 at 11) is an email thread. The first email is date and time stamped January 16, 2018 at 11:21 AM, is identified as being sent from James Staunton whose name is followed by "LBA Realty." This text states:

A. "Don and I just spoke on the phone with Jeff Arambel"

B. "We have verbally agreed to the following"

    1. "We will release $637,500 of the holdback amount, LBA to retain the balance"

    2. "The in place ROFR will be extended 6 months"

C. "Jeff, if you could confirm via email, Stacy will draft and circulate the required documentation."

Above this in the email thread is an email which contextually is a reply to the James Staunton email. It is sent to James Staunton, with copies to seven other persons, including Stacy Paek, and Navid More, both who have email address "@seyfarth.com," which could indicate that they are lawyers. A person named "Stacy" is identified as the person in the James Staunton email who will "draft and circulate the required documentation."

The reply email merely states the sender as "Sent from my iPhone," but in the Complaint it is alleged that Debtor was involved in the email exchange. Complaint ¶¶ 15, 16; Dckt. 1. The reply email states:

A. "I am in agreement with this Email regarding releasing $637,500 to MetLife (For Arambel Loan Paydown) and LBA receiving the Holdback Balance."

B. "Arambel agrees to extend the ROFR for six months."

C. "Thank You All!"

The Holdback Agreement being amended is included in the Complaint as Exhibit A. Dckt. 6 at 4-9. The parties to the Holdback Agreement are the Debtor and Defendant. It first identifies that in the course of the dealings between them there is an underlying Purchase and Sale Agreement dated April 4, 2017, that had been amended four times during the period May 23, 2017 through June 5, 2017. The Recitals to the Holdback Agreement state:

A. Debtor has transferred Property to Defendant;

B. The Purchase Agreement provides for the Holdback Agreement to be entered into at closing "with respect to certain post-closing obligations" of Debtor.

The terms stated in the Holdback Agreement filed as Exhibit B to the Complaint are summarized as follows:

A. Debtor shall deposit $750,000, the "Holdback," with the title company to serve as escrow.

B. If the "Incentive Program" is not extended, then Defendant is entitled to receive the Holdback monies. If the "Incentive Program" is extended, then Debtor is entitled to receive the Holdback monies. If disbursed to Debtor, then the monies are to be paid to Cushman and Wakefield and Metropolitan Life Insurance Company of New York.

C. If prior to December 31, 2017 the "Incentive Program" is extended for an additional five years, Debtor will receive the Holdback. This provision then continues, contractually providing that the parties may agree to extend the period for the extension to be made, for such period as mutually agreed by Defendant and Debtor - "Purchaser's sole and absolute discretion. . . ."

D. In the Miscellaneous paragraph of the Holdback Agreement, it states that it is "the entire understanding and agreement of the parties hereto with respect to the subject matter hereof and may not be altered or amended din any way except by written agreement of the parties."

On its face, this Escrow Holdback Agreement appears to be an agreement separate and apart from the Purchase Agreement.

Whether Debtor was a developer and whether such development work, including the amendment at issue, was part of the Bankruptcy Estate's ordinary course of business is a factual determination not to be made at this time.

Email Communications

Second, Defendant argues that the email exchange which took place prior to the filing of the petition regarding the release of the sale proceeds does not satisfy the statute of frauds.

Defendant argues that the person who authored the email communications may not have the authority to do so and Plaintiff-Debtor fails to show that the author ever had written authority from Defendant to enter into such agreements. [FN. 1]

FN. 1. In asserting that "Plaintiff-Debtor fails to show," Defendant demonstrates that it may, subject to the certifications in Federal Rule of Bankruptcy Procedure 9011, dispute that the person sending the email, confirming the agreement, and copying Defendant's attorneys, may require testimony for the court to evaluate, if it is actually disputed by Defendant.

Moreover, Defendant alleges that the email exchanges do not meet the "writing" requirement as they fail to identify the specific price, when the alleged price is to be paid, or a description of the land so that it may be identified. The emails also fail to satisfy the statute of frauds on the basis that Plaintiff-Debtor fails to show that the parties agreed to conduct the transaction at issue by electronic means or that there is a valid signature.

As it pertains to satisfying the element of a writing for purposes of the Statute of Frauds relating to contracts, under California Code of Civil Procedure section 1624, the California Supreme Court in *Sterling v. Taylor*, the court held:

> If a memorandum includes the essential terms of the parties' agreement, but the meaning of those terms is unclear, the memorandum is sufficient under the statute of frauds if extrinsic evidence clarifies the terms with reasonable certainty and the evidence as a whole demonstrates that the parties intended to be bound. Conflicts in the extrinsic evidence are for the trier of fact to resolve, but whether the evidence meets the standard of reasonable certainty is a question of law for the court.

Sterling v. Taylor (Cal. Mar. 1, 2007), 40 Cal. 4th 757, 55 Cal. Rptr. 3d 116, 152 P.3d 420, 2007 Cal. LEXIS 1898. This is discussed further by the California Court of Appeal in *Goodman v. Community Sav. & Loan Asso.*, 246 Cal. App. 2d 13, 23 (1966), holding:

> An agreement for the sale of real property does not have to be evidenced by a formal contract on a single document signed by all parties. A memorandum of agreement sufficient to meet the requirements of the statute of frauds may be evidenced by several writings such as an exchange of letters or telegrams, or in a writing from one party to the other acted upon by the other. (*King v. Stanley, supra; Karl v. JeBien*, 231 Cal.App.2d 769, 772; *Searles v. Gonzales*, 191 Cal. 426, 431.

With respect to evidence presented in an action to enforce an interest in real property, California Code of Civil Procedure Section 1971 provides, in pertinent part, that

> "[n]o estate or interest in real property, . . . nor any power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by . . . a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by the party's lawful agent thereunto authorized by writing."

C.C.P. § 1971. Thus, if there is an estate or interest in real property at issue, the granting, transferring or the like with respect to that interest is to be presented in writing.

The California court approach to the writing requirement under the statute of frauds has become broad and courts have enforced contracts where the parties intended to make an agreement even if the required terms were not included. In *Lamle v. Mattel*, the Court of Appeals for the Federal Circuit, applied California contract law to determine whether an email exchange constituted a writing that satisfied the Statute of Frauds. The Federal Circuit court begins with the following premises:

> California law is clear that "a note or memorandum under the statute of frauds need not contain all of the details of an agreement between the parties. "*Gold Seal Prods., Inc. v. RKO Radio Pictures, Inc*., 134 Cal. App. 2d 843, 286 P.2d 954, 967 (Cal. Ct. App. 1955) (quoting *Gibson v. De La Salle Inst.*,66 Cal. App. 2d 609, 152 P.2d 774, 784 (Cal. Ct. App. 1944)). Rather, the statute only requires that "every material term of an agreement within its provisions be reduced to written form." *Burge v. Krug*, 160 Cal. App. 2d 201, 325 P.2d 119, 123 (Cal. Ct. App. 1958). "If the court, after acquiring knowledge of all the facts concerning the transaction which the parties themselves possessed at the time the agreement was made, can plainly determine from the memorandum the identity of the parties to the contract, the nature of its subject matter, and its essential terms, the memorandum will be held to be adequate." *Kaneko v. Okuda*,195 Cal. App. 2d 217, 230, 15 Cal. Rptr. 792 (1961) (citing *Brewer v. Horst & Lachmund Co.*, 127 Cal. 643, 60 P. 418, 419 (Cal. 1900)). What is an essential term "depends on the agreement and its context and also on the subsequent conduct of the parties." *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P.2d 1158, 1162, 206 Cal. Rptr. 354 (Cal. 1984), [**16] overruled on other grounds by *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 44 Cal. Rptr. 2d 420, 900 P.2d 669 (Cal. 1995).

Lamle v. Mattel, Inc., 394 F.3d 1355, 1361 (Fed. Cir. 2005)

As it pertains specifically to a right of first refusal, in *Smyth v. Berman*, the Second Appellate District of the Court of Appeal of California has stated:

> To satisfy the "writing" requirement of the statute of frauds, the writing may be cobbled together from various documents (*Derrick v. C.W.R. Ford Co.* (1915) 27 Cal.App. 456, 458 [150 P. 396]; *Brewer v. Horst and Lachmund Co.* (1900) 127 Cal. 643, 646–647 [60 P. 418]), but must still "identif[y] the subject of the parties' agreement, show[] that they made a contract, and state[] the essential contract terms with reasonable certainty" (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 766 [55 Cal. Rptr. 3d 116, 152 P.3d 420] (*Sterling*), citing Rest.2d Contracts, § 131).

Smyth v. Berman, 31 Cal. App. 5th 183, 197, 242 (2019). As noted by the court, the essential contract terms must be included in the writing.

Here, both the amount of the proceeds to be released and the right of first refusal may be considered essential terms. The email includes the amount ($637,500) of the sale proceeds to be released and the extension of the right of refusal by six months. Moreover, in this case, the description of land is easily identifiable and may be "cobbled together from [a] document" in that the property subject of this transaction was already described in the original purchase agreement.

Though disputed as to authority, the email includes the signature block of "James Staunton," employee of LBA Realty, the party to be charged. Whether or not this person had authority is a factual determination not be made at this time through a motion to dismiss. However, as to signature, the Uniform Electronic Transactions Act, Cal. Civ. Code § 1633.7 (2004), provides that a "record or signature may not be denied legal effect or enforceability solely because it is in electronic form." Thus, the email communications meet the requirements for the statute of frauds. [FN. 2]

FN. 2. It is interesting to note that on the email several persons are cc'd with the email address "@seyfarth.com," including a person named Stacy, the same name as the person identified as being responsible for preparing the documents as "agreed." @seyfarth.com." It appears that while factually questioning Mr. Staunton's authorities, attorneys for Defendant are included on the email.

Defendant has not shown that the pleadings by Plaintiff, including the Exhibits filed with the Complaint, show that the Amended Holdback Agreement was a contract which Plaintiff-Debtor could not enter into without approval from the court, or that the email communications for the Holdback Agreement (which is plead by Plaintiff-Debtor as a separate, post-PSA closing agreement to address distribution of sales proceeds, not the sale of real property) do not sufficiently allege facts to satisfy the statute of frauds.

The Motion to Dismiss the First Cause of Action for Breach of Contract and the Fourth Cause of Action for Violation of Covenant of Good Faith and Fair Dealing is denied.

Promissory Estoppel

Defendant argues that the Second Cause of Action fails on the grounds that the doctrine applies to contracts without consideration and in this case Plaintiff-Debtor expressly alleges a bargained for consideration that of the sale proceeds for the extension of the first right of refusal. Moreover, Defendant argues that the cause of action fails because Plaintiff-Debtor fails to show that Plaintiff reasonably relied on that promise and that Plaintiff-Debtor was harmed on account of those promises. Defendant argues that Plaintiff-Debtor's reliance as unreasonable because Plaintiff-Debtor could not have relied on it without first providing notice to creditors and the court's approval.

With respect to promissory estoppel, the California Supreme Court began its discussion with quoting the Restatement of Contracts:

> Section 90 of the Restatement of Contracts states: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.' This rule applies in this state. *Edmonds v. County of Los Angeles*, 40 Cal.2d 642, 255 P.2d 772; *Frebank Co. v. White*, 152 Cal.App.2d 522, 313 P.2d 633; *Wade v. Markwell & Co.*, 118 Cal.App.2d 410, 258 P.2d 497, 37 A.L.R.2d 1363; *West v. Hunt Foods Co.*, 101 Cal.App.2d 597, 225 P.2d 978; *Hunter v. Sparling*, 87 Cal.App.2d 711, 197 P.2d 807; see 18 Cal.Jur.2d 407-408; 5 Stan.L.Rev. 783.

Drennan v. Star Paving Co., 51 Cal. 2d 409, 413, 333 P.2d 757, 759 (1958). In *Laks v. Coast Fed. Sav.& Loan Assn*., 60 Cal.App.3d 855,890 (1976), cited by Defendant, the California Court of Appeal distilled the elements of promissory estoppel to the following:

> The required elements for promissory estoppel in California are set forth in *Thomson v. Internat. Alliance of Stage Employees*, 232 Cal.App.2d 446, 454. They are (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.

Assuming these to be the terms, Defendant first asserts there can be no reasonable reliance because Plaintiff-Debtor had filed bankruptcy and it is asserted that any actions by Plaintiff-Debtor in entering into the Amended Escrow Agreement violated 11 U.S.C. § 363. However, as discussed above, that is for a later evidentiary determination by the court.

It is asserted that Plaintiff-Debtor does not assert any injury for having granting an extension of the ROFR for which Defendant asserts it does not have to fulfill the act it promised. The asserted injury is that Defendant acquired, recorded, and recorded six additional months of ROFR rights that have clouded the title to the Property subject to the ROFR. While the amount of damages and injury may be in dispute, that Plaintiff-Debtor asserts an injury is not.

Plaintiff-Debtor has plead this as an alterative theory for relief. If there is an enforceable contract, then promissory estoppel will not lie. If there is no enforceable contract, as Defendant stridently asserts, then Plaintiff-Debtor seeks to prosecute this alternative theory. Just as Defendant is asserting alternative theories of defense, Plaintiff-Trustee is asserting alternative theories of recovery.

The Motion is denied as to the Second Claim for Relief.

Unjust Enrichment

Defendant argues that Plaintiff-Debtor fails to properly plead unjust enrichment because the claim relies on both a valid contract and in Defendant obtaining a benefit for which it was not entitled. There being no valid contract and Defendant entitled to the right of first refusal pursuant to the original Purchase Agreement, Plaintiff-Debtor's Complaint fails to plead sufficient facts.

The Complaint expressly states that Defendant "will be unjustly enriched if it enjoys the benefits of the ROFR while depriving Plaintiff of the benefits of the Contracts." The actual pleading in the Complaint is:

> 32. Plaintiff re-alleges and incorporates by this reference Paragraphs 1 through 22 herein.
>
> 33. Defendant LBA has arrogated to itself the benefit of the Contracts by recording the ROFR.
>
> 34. Defendant LBA acted expressly to prevent Plaintiff from receiving the benefit of the Contracts by preventing disbursement of the Holdback.
>
> 35. Defendant LBA will be unjustly enriched if it enjoys the benefits of the ROFR while depriving Plaintiff of the benefits of the Contracts.

Complaint, Dckt. 1.

Distilling down the twenty-five (25) paragraphs of the Complaint included in this Third Claim for Relief, Plaintiff-Debtor asserts:

- Defendant obtained the benefits of the extension of the ROFR that it sought from Plaintiff-Debtor.
- Defendant has blocked Plaintiff-Debtor from receiving what Defendant equated in value to the ROFR extension that it obtained from Plaintiff-Debtor
- Defendant has been enriched by the value of the ROFR and will be double-enriched if Defendant also receives the monies that are the subject of the Escrow Holdback Agreement.

Thus, the Motion is denied as to the Third Claim for Relief.

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 Dismiss Adversary Proceeding filed by LBA RV-COMPANY XXVII, LP, a Delaware limited partnership ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is denied as to all Claims for Relief in the Complaint.

8. 20-24123-E-11 FWP-2

RUSSELL LESTER
Thomas Willoughby

CONTINUED FINAL HEARING RE: MOTION TO USE CASH COLLATERAL AND/OR MOTION GRANTING REPLACEMENT LIENS , MOTION SCHEDULING FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001
8-31-20 [12]

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 Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on September 2, 2020. The initial emergency hearing was conducted on August 31, 2020, and the final hearing set by order of the court for September 17, 2020.

The Motion for Authority to Use Cash Collateral is xxxxx.

Russell Wayne Lester, an individual, dba Dixon Ridge Farms ("Debtor in Possession") moves for an order approving the use of cash collateral from:

a. Cash in Debtor in Possession's bank accounts totaling $182,405.24 (of which $3,445.35 of which First Northern Bank has a security interest),

b. Cash in Receiver's account totaling $58,655.89,

c. Cash in the personal bank accounts held by Debtor in Possession's wife, Kathleen Lester, totaling $33,518.68,

d. Inventory of approximately 3,915,003 pounds of walnuts valued by the Receiver at $3,759,737, and

e. Equipment necessary to harvest over one million pounds of currently unharvested walnuts.

("Property").

Debtor in Possession requests the use of cash collateral to be able to pay critical and necessary expenses of its operations. Debtor in Possession proposes to use cash collateral for the following expenses:

1. harvesting the 2020 walnut crop which will cost approximately $166,325.00,

2. issuing payroll and related benefits in the approximate amount of $39,196.70 and

3. paying for utilities, including utility deposits in the approximate amount of $23,000.

Debtor in Possession proposes that the cash collateral be approved with a 15% variance.

Emergency First Day Order

On September 8, 2020, this court entered an emergency "first day order" authorizing the use of cash collateral on an interim basis, which also set a briefing schedule and the September 17, 2020 final hearing for this Motion. The court granted replacement liens for First Northern Bank of Dixon on the 2020 walnut crop (primed senior lien) and on the real property already subject to the Bank's deed of trust to the extent that the use of the Bank's cash collateral resulted in a reduction of the cash collateral available for that creditor.

The emergency first day order was issued with the participation of creditors having secured claims.

OPPOSITIONS FILED

Creditor Prudential's Opposition

Creditor the Prudential Insurance Company of America ("Prudential") filed an Opposition on September 14, 2020. Dckt. 119.

Conservation Easement

Prudential objects to replacement liens being given in the Conservation Easement on the basis that Prudential already has a security interest in the real properties where the easement is being placed - the Carrion Ranch and the McCune Ranch properties. Thus, Prudential believes it may already have a lien on the proceeds of the Conservation Easement once those proceeds arise.

Prudential adds that it objects to First Northern Bank ("FNB") receiving a lien in any proceeds in which Bank does not already hold a mortgage or security interest. If the court moves forward with granting a replacement lien to FNB, Prudential asserts that the FNB lien must be subordinate to Prudential's senior security interests and liens in the Conservation Easement.

Inventory and 2020 Crops

Additionally, Prudential objects to the replacement lien on the inventory and the 2020 crops because both Prudential and FNB claim perfected security interests in Debtor in Possession's inventory and 2020 crops, but their priority has not yet been determined. Prudential contends that it is unnecessary to add liens over the inventory and the crops when both Prudential and FNB have equity in their respective real estate. If the court allows for liens over the inventory and crops, Prudential requests that both Creditor be granted equal amount and priority.

Putah Creek Property

Further, Creditor objects to the proposed replacement liens on assets other that the real estate and argues that replacement liens should only be granted to those parties to the extent of their respective real estate collateral.

$500,000 Adequate Protection Payment

As it pertains to FNB's adequate protection payment in the amount of $500,000, Prudential objects on the basis that said payment is unnecessary and it will come from the proceeds of sales of inventory and/or the crops, and will overprotect FNB at the expense of Prudential and other creditors.

Prudential objects to the proposed variance on the budget because 15% is not the common practice. Prudential calculates that if allowed Debtor in Possession could disburse without the court's or Prudential's consent, over $270,000 in funds over what is needed in the 13-week budget. Prudential asserts that 5% variance is the common practice.

Creditor also seeks clarification regarding the itemized insurance payment in the budget. Creditor requests that Debtor should identify the purpose of this payment whether it is for real property, employees or equipment. Prudential objects to any insurance for real property in which Prudential does not have a security interest.

Further, Prudential requests that the budget take into account and use cash collateral to pay Prudential's reasonable attorney fees asserting that it is common practice to make such payment in connection with the enforcement of creditor's rights during a bankruptcy proceeding.

Lastly, Prudential reserves its rights to: determine the amount of interest actually owed by Debtor; challenge Debtor in Possession's valuations or conduct appraisals to determine the value of collateral; and may object to the Final Cash Collateral Order as they have not seen a draft.

Creditor First Northern Bank of Dixon

Creditor First Northern Bank of Dixon ("FNB") filed an Opposition on September 14, 2020. Dckt. 121.

FNB asserts that adequate protection should be based on the market value of the inventory and not the values presented by Debtor in Possession, which is the forced liquidation value used by the Receiver. According to Creditor, Debtor in Possession has remained in operation and continued sales; thus, FNB's adequate protection payment should be based on the "Post-COVID-19" $11,888,189.21 market value shown

on Debtor in Possession's July 31, 2020 Inventory Report sent to the Receiver on August 20, 2020. (Exhibit P and Q, Dckts. 137, 138)

Moreover, FNB objects on the basis that the value of adequate protection offered by the Debtor in Possession is not indeed adequate and there will be a shortfall of at least approximately $1,142,788.

Conservation Easement

First, FNB asserts that there is no value to the Conservation Easement as it does not presently exist, the funding has not been secured, and there are conditions set by the Solano Land Trust and the state of California that must be met before the easement can become a reality. Thus, the value of this lien is $0.00.

Putah Creek Property

Second, FNB argues that Debtor in Possession has overvalued the Putah Creek Property after obtaining an Appraisal Report valuing the property at $5,650,000, and not at $18,081.581.78 as indicated by Debtor in Possession.

Inventory and 2020 Crops

Third, Bank contends that it already has a first priority lien on the 2020 crops and as such this post-petition lien adds no value.

$500,000 Adequate Protection Payment

Bank does believe that Debtor in Possession will be able to make such a payment.

Other Real Property

Although Debtor in Possession may offer other real property to cover this shortfall, FNB warns the court that an investigation of value may be in order on the basis that Debtor in Possession may have overvalued the real property. Moreover, this other real property is encumbered by Creditor Prudential.

FNB raises the issue over whether Debtor in Possession will achieve projected sales objectives after suffering financial losses for three years in a row (2017, 2018, and 2019), and Debtor in Possession's liabilities have increased during the same period from $19,494,510 to $23,859,464 by the end of 2019. Moreover, FNB points the court to Debtor in Possession's financial statement for the first four months of 2020, which show a net operating loss of $704,000.

Creditor also questions whether Debtor in Possession has taken steps to reduce operating expenses, and it is uncertain whether Debtor in Possession is accounting for a reduced volume of walnuts to be processed or whether Debtor in Possession will be processing his own crops or sending the 2020 crops to another processor.

FNB argues that Prudential is more than adequately protected than FNB as Prudential's loans secure real property valued at $33,327,000 and questions whether Prudential should be paid from FNB's cash collateral.

Lastly, FNB asserts that the use of cash collateral should be permitted only for an additional 4-week period instead of the 13-week period suggested, arguing that this shorter time would allow for a more meaningful comparison between Debtor in Possession's cash flow and actual results.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363, but is limited when that property is cash collateral as follows:

> (c)
> . . .
> (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.
>
> (3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.
>
> (4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

Since the use of cash collateral and the concept is well known to the experienced attorneys involved in this case, the court provides the brief discussion below from COLLIER ON BANKRUPTCY on the required adequate protection if a creditor's cash collateral is being used:

> [3] Form of Adequate Protection for Use of Cash Collateral
>
> In the context of a request for authorization to use cash collateral under section 363(c)(2), it is unlikely that the creditor will be able to receive the precise equivalent of cash collateral. However, section 363 does not require precise equivalency. The special treatment afforded cash collateral recognizes its unique status as the highest and best form of collateral but also establishes that upon an appropriate showing it can be used if the rights of the secured creditor can be adequately protected. Whether adequate protection may be said to exist will depend on a number of factors, including the value of all collateral, the nature of the proposed use and the value of that which is being offered. While cases are quite varied, substitute liens, **equity cushions and operating controls have all been found sufficient**. [12] But

maintaining insurance and granting a right to inspect books and records, without more, is not sufficient, where business is declining. [12a]

12. *In re James Wilson Assocs.*, 965 F.2d 160, 26 C.B.C.2d 1673 (7th Cir. 1992); *Prudential Ins. Co. v. Monnier (In re Monnier Bros.)*, 755 F.2d 1336, 12 C.B.C.2d 323 (8th Cir. 1985); *Martin v. Commodity Credit Corp.* 761 F.2d 472, 12 C.B.C.2d 974 (8th Cir. 1985); *Crocker Nat'l Bank v. American Mariner Indus. (In re American Mariner Indus.)*, 734 F.2d 426, 10 C.B.C.2d 910 (9th Cir. 1984), overruled on other grounds, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740, 17 C.B.C.2d 1368 (1988); *Wilmington Trust Co. v. AMR Corp. (In re AMR Corp.)*, 490 B.R. 470 (S.D.N.Y. 2013). Although the grant of an administrative priority is not adequate protection, see 11 U.S.C. § 361(3), at least one court has held that where the debtor failed to give proper notice to a creditor entitled to protection and failed to provide adequate protection, section 507(b) could provide an equitable solution. *See In re Center Wholesale, Inc.*, 759 F.2d 1440, 12 C.B.C.2d 1107 (9th Cir. 1985); *see also In re California Devices, Inc.*, 126 B.R. 82, 84 (Bankr. N.D. Cal. 1991) (purpose of section 507 is to "[e]stablish a failsafe system in recognition of the ultimate reality that protection previously determined the 'indubitable equivalent' … may later prove inadequate").

12a. *In re Sterling Estates (Delaware), LLC*, 64 C.B.C.2d 1745, 2011 Bankr. LEXIS 54 (Bankr. N.D. Ill. Jan. 6, 2011).

3 Collier on Bankruptcy, Sixteenth Edition, ¶ 363.05[3].

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

As an initial point, neither FNB nor Prudential could provide the court with the Commercial Code law concerning the liens, if any, that are asserted in the 2020 crop. Rather, they merely tell the court the status of any such liens is unknown. This may well indicate that the investigation by their counsel has resulted in showing that they have no such liens and that the post-petition 2020 crop is free and clear of all liens and encumbrances.

The court begins this further consideration taking into account the asserted value of the various items of existing collateral by FNB and Prudential.

FNB Claims

Collateral	**FNB Statement of Value**	
	($2,896,604)	**Ag Production Loan**
	($5,055,159)	**Asset Based Line of Credit**
Personal Property Collateral Securing the Ag and Asset Based Credit		
Inventory (FNB Valuation)	$11,888,189	
Equipment Value	Value Not Provided by FNB	
Schedule A/B	$1,032,190	
Accounts Receivable	Value Not Provided by FNB	
Schedule A/B	$272,975	
Other Personal Property Collateral	Value Not Provided by FNB	
	==========	
Equity Cushion/ (Undersecured)	**$5,241,591**	**For Ag Loan and Asset LOC**
	($1,415,185)	**Real Estate Loan**
Secured by Putah Creek Property 1st Deed of Trust (FNB Valuation)	$5,650,000	
	($503,835)	**HELOC**
Secured by 2nd Deed of Trust on Putah Creek Property		
	==========	

Equity Cushion/ (Undersecured)	**$3,730,980**	**For Real Estate Loan and HELOC**

Prudential Claims

	Prudential Statement of Loans and Value of Collateral	Collateral
First Note	($6,500,000)	
	$33,000,000	First Deeds of Trust on the Following Properties Securing First Note (Values of Properties Stated by Debtor on Schedule A/B - Prudential references this value in the Opposition but has presented no statement as to alleging any contrary value of its collateral)
		Carrion Ranch
		Gordon Ranch
		MacQuiddy Ranch
		Oda Ranch
	Same as listed above for FNB	Personal Property Crops and Proceeds
		Personal Property Securing First Note
Prudential Second Note	($7,500,000)	
	Same as Above	Second Deeds of Trust Securing Second Note
	Same as Above	Personal Property Securing Second Note
	==========	

Equity Cushion/ (Undersecured)	**$19,000,000**	**For First and Second Note**
	Plus Crop inventory and proceeds if senior to FNB or to the extent in excess of other collateral securing FNB secured claims	

Using the best numbers available, FNB states its secured claims are oversecured by $3,730,980 (using FNB's discounted value for the Putah Creek Property) for the two loans secured by the Putah Creek Property and $5,241,591 for the Ag Loan and Asset Based Line of Credit. For the second one, such a cushion exists if it is senior on the inventory lien to Prudential. If its lien is junior to Prudential, it appears that in light of the substantial, multi-million dollar equity cushion enjoyed by Prudential, the inventory and crops collateral value would flow to FNB. This equity cushion is in inventory on the shelf and the dirt itself (real property encumbered by FNB deeds of trust), not some operating value.

For Prudential, even without taking into account whether it holds the senior lien to the inventory and crops, it has a $19,000,000 equity cushion based on the Debtor in Possession's valuation. Cutting that in half to allow for "debtor exuberance," Prudential would still have a $9,000,000 equity cushion, which represents a 38% equity cushion based on the discounted values. This equity cushion is in the dirt itself (real property encumbered by Prudential's deeds of trust), not some operating value.

Based on these substantial equity cushions advocated by FNB and Prudential, it appears that the adequate protection they are entitled to exists due to the prudent, very oversecured loan they have made to Debtor in Possession.

Review of Personal Property Lien Information

In its Opposition Prudential asserts a lien in the Debtor in Possession's crops and inventory based on the following filings:

> May 10, 2019 UCC-1 Filing With California Secretary of State For the First Note
>
> March 15, 2020 UCC-3 Financing Statement Amendment Filed With the California Secretary of State

Opposition, ¶¶ 6, 7.

FNB directs the court to the Declaration of Chaille James (Dckt. 122) and Exhibits C, D, E, and F (Dckts. 140, 136) for the documents upon which it bases its lien in the Debtor in Possession's inventory, crops, and personal property:

> Ag Production Security Agreement (Exhibit C)
>
> October 30, 1998 UCC- 1 Filing With the California Secretary of State (Exhibit D)
>
> August 13, 2003 UCC Continuation Filing With the California Secretary of State (*Id.*)

September 30, 2013 UCC Continuation Filing With the California Secretary of State (*Id*.)

October 15, 2018 UCC Continuation Filing With the California Secretary of State (*Id*.)

October 22, 2008 UCC Continuation Filing With the California Secretary of State (*Id*.)

August 3, 2019 UCC Amendment of Collateral Change Filing With the California Secretary of State (*Id*.)

April 3, 2000 UCC-1 Filing With the California Secretary of State (Exhibit E)

November 30, 2004 UCC Continuation Filing With the California Secretary of State (*Id*.)

April 2, 2010 UCC Continuation Filing With the California Secretary of State *(Id.*)

April 1, 2015 UCC Continuation Filing With the California Secretary of State *(Id.*)

September 16, 2002 UCC-1 Filing With the California Secretary of State (Exhibit F)

April 10, 2007 UCC Continuation Filing With the California Secretary of State (*Id*.)

August 12, 2011 UCC Amendment Filing With the California Secretary of State *(Id.)*

August 20, 2012 UCC Continuation Filing With the California Secretary of State (*Id*.)

July 3, 2017 UCC Continuation Filing With the California Secretary of State (*Id*.)

Beginning with California Commercial Code § 9334(i), it provides that for a security interest asserted to exist in "crops:"

> (i) A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in, or is in possession of, the real property.

The California Legislature further provides in California Commercial Code §§ 9308 and 9310 for the filing of a financing statement to perfect all security interests and agricultural liens.

Revised Budget Presented by the Debtor in Possession

In response to the Oppositions, the Debtor in Possession filed Reply pleadings and a modified proposed budget. For the 13-week period of September through November 2020, the Debtor in Possession has slimmed down the necessary budget to ($1,860,867). Dckt. 149.

On the income side, Debtor projects the following amounts as set out over the sixteen pages of Exhibit 1, Dckt. 149, the amended budget:

	Sept 2020	Oct 2020	Nov 2020	
Ending Inventory	$1,813,100	$2,149,710	$2,459,420	
Ending Accounts Receivable	$1,818,515	$216,344	$292,344	
Cash Receipts For the Month	$291,656	$1,950,171	$372,000	
Cash Disbursements for the Month	($208,600)	($666,888)	($613,379)	

The court is presented with an interesting situation. The two creditors objecting to the use of cash collateral have claims that are grossly oversecured. In substance, their arguments appear to be that by virtue of their liens, the bankruptcy case is dead on arrival. They appear to miss the significance of being grossly oversecured and such equity cushion providing them substantial adequate protection.

Because the two apparently grossly oversecured creditors have not consented, it is left to the court to decided what use of cash collateral is to be authorized. Here, it appears that there is substantial value in excess of the amount of each creditor's claim in their other collateral that they are adequately protected.

The Debtor in Possession requests the authorization to use cash collateral as provided in the budget through October 2, 2020, and have a final hearing on the Motion seeking authorization through November 30, 2020, on the court's October 1, 2020 calendar (specially setting to be heard on the Modesto Division calendar that day).

September 17, 2020 Hearing

Counsel for the Debtor in Possession reported that an agreement has been reached to go forward two weeks and iron out, with the parties in interest agreeing to limit the variance adjustments to 10%.

Further, that in the order authorizing the continued use of cash collateral, is that it is authorized to preserve the 2020 crop, and not an authorization for future years.

Counsel for the Debtor in Possession shall prepare an order form authorizing the further use of cash collateral pending the continued October 1, 2020 hearing, which shall be approved by the respective counsel for First Norther Bank of Dixon and Prudential.

Counsel for First Northern Bank of Dixon noted that while it is stipulating to the interim use of cash collateral, the Debtor's business operations had been losing money for a while, and it appears that a restructuring, including the sale of some assets, is warranted. He also noted that the Schedules reflect a large amount of case, $250,000 of cash, but did not clearly identify the source. Additionally, the Debtor in Possession may qualify for CFAP funding under the CARES Act and that such monies should be accounted for in this bankruptcy case.

Counsel for Prudential reported that the parties are setting a 2004 Examination of the Debtor. Further, that Prudential would provide the Debtor with copies of its appraisals as part of an ongoing constructive discussion with the Debtor in Possession and Debtor.

SUPPLEMENTAL PLEADINGS

At the September 17, 2020 hearing, the Parties agreed to continue the hearing to October 1, 2020, with Supplemental Pleadings being filed no later than Monday, September 28, 2020 at 2:00 p.m.

Conditional Opposition by
Creditor First Northern Bank of Dixon

Creditor First Northern Bank of Dixon ("FNB") filed a Conditional Opposition wherein it continues to oppose the use of cash collateral on the basis that the Debtor in Possession may be unable to fully repay FNB but consents to Debtor in Possession's use of cash collateral through the month of October provided certain terms, primarily in the nature of reporting requirements, are included in an agreed upon order or are otherwise directed by the court. Dckt. 173. Moreover, FNB requests that the language of the second interim order be incorporated into the third interim order for use of cash collateral.

Reporting

Creditor requests the following reporting provisions be placed in paragraph nine (9) of the third interim order:

A. Debtor in Possession should provide simplified weekly cash reports on a cash in/cash out basis in a ledger or income statement form. The reported revenue and expenses reports should be itemized. Creditor clarifies that labor expenses should include the employee names and the specific amounts paid to such employees bi-weekly.

B. Debtor in Possession should provide copies of the actual invoices created for each sale, with information such as the date of the sale, the name of the purchaser, a description of what product is being sold and the quantity thereof, the price for that product, and the terms of payment on the sale.

C. Debtor in Possession shall provide an account receivable ("AR") report showing outstanding invoices and the dates thereof, and the dates of collections on the various AR's, and must also include the name of the account debtor, the amount owed, and the "aging" of the account.

D. Debtor in Possession shall provide Mr. Burbank's actual Excel spreadsheets instead of PDFs.

Request for Budget Formatting

FNB requests that Debtor in Possession provide on a weekly basis a spreadsheet with the first column specifying the original budget, the second column specifying the second budget, the third column showing the variances between the two budgets, and finally, a fourth column showing the cumulative

variances from the third budget to the original budget. FNB requests that all budgets beyond the third budget be formatted similarly.

Lastly, FNB notes that Debtor in Possession should provide a spreadsheet for the operative budget showing a column with the original budget, a column with the current (operative) budget with its date, and a column showing the variance between the original budget and the current budget, together with the variance between the actual to the original budget, and actual to current budget.

Supplemental Conditional Objection by Creditor Prudential

Creditor, The Prudential Insurance Company of America ("Prudential") filed a Conditional Objection wherein Prudential **continues to oppose the use of cash collateral on the basis that Prudential's collateral is likely to decrease in value, the amended 13-week budget does not appear feasible to allow Debtor in Possession to operate,** and Debtor in Possession is not making adequate protection payments. Dckt. 175.

Diminution of its Collateral

First, Creditor Prudential contends the value of the walnuts will continue to depreciate due to a depressed market for walnuts and Debtor in Possession's proposal to decrease its sale believing that there will be a stronger market for walnuts in the near future. Creditor Prudential notes that demand has increased for walnuts, and Debtor in Possession's proposal to create a large inventory stock pile does not align with current market conditions for the walnut industry. Moreover, Prudential argues that Debtor in Possession may not be able to store the amount of inventory. As a result, holding the inventory for a long period of time is disadvantageous given the likely continuation of depressed market conditions, storage costs, and the current demand to sell the walnuts.

Therefore, under the amended 13-week budget where Debtor in Possession proposes a significant reduction in sales of inventory, the inventory will decline in value and fail to generate replacement cash collateral. Thus, Prudential objects to the proposed budget unless it receives additional payments in return.

Budget Infeasibility

Second, Creditor Prudential argues the budget is not feasible because Debtor in Possession purports to reduce its operating budget by approximately $200,000 while losing cash receipts in approximately $1,900,000.

Moreover, by delaying payment to Prudential Debtor in Possession in turn increase its debt burden, as the amounts due to Prudential will begin accruing additional interest. Again, Prudential argues that it is unlikely that Debtor in Possession will be able to sell the walnuts inventory at a better price in the future than what is available now. Without generating revenue through the sale of the walnuts, Debtor in Possession may not be able to continue its operations.

Prudential is also concerned by Debtor in Possession's history in acquiring agricultural loans early in the year to fund operations until it can harvest and sell the inventory at the end of the year. Debtor in Possession has not indicated whether it will do so again and whether such lender exists. Additionally though Debtor in Possession hold s a potential amount of funds of approximately $5,700,000 through the

Conservation Easement, such funds will not be used to fund operations but instead will be used to pay Prudential, FNB, and taxing authorities.

Prudential notes that Debtor in Possession has been unprofitable for many years and unless it changes the way it conducts and operates the business, the Debtor in Possession will continue to lose money. Prudential requests that the use of cash collateral be on an interim basis through November 2020, allowing the parties to continue evaluating Debtor in Possession's financial realities under the proposed budgets.

Creditor Prudential's Specific Requests

Prudential asserts that if the following terms are included in the agreed upon order, Prudential consents to the Debtor in Possession's continued use of cash collateral through a later determined date in November 2020.

A. First, Prudential requests scheduled quarterly interest payments in the amount of $162,363.00 as adequate protection, as originally proposed in the initial 13-week budget and cash collateral motion.

B. Second, Prudential requests payment of Prudential's legal fees and costs from the cash collateral.

C. Third, Creditor Prudential additionally requests that it be granted liens on the proceeds of potential avoidance actions from Debtor in Possession's pre-petition activities.

FINAL RULINGS

9. 20-90550-E-7 CONSUELO MENDOZA
Wilber Manuel Salgado

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-26-20 [11]

Final Ruling: No appearance at the October 1, 2020 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on August 28, 2020. The court computes that 34 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on August 12, 2020.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

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 Order to Show Cause 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 Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

10. 20-90157-E-7 BLF-3

JUAN PENA AND MARIA PADILLA
Mark Nelson

MOTION FOR COMPENSATION FOR LORIS L. BAKKEN, TRUSTEES ATTORNEY(S)
8-25-20 [40]

Final Ruling: No appearance at the October 1, 2020 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 25, 2020. By the court's calculation, 37 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 been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Loris L. Bakken, the Attorney ("Applicant") for Michael D. McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period May 11, 2020, through October 1, 2020. The order of the court approving employment of Applicant was entered on May 22, 2020. Dckt. 22. Applicant requests fees in the amount of $1,800.00 and costs in the amount of $80.85.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

© To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include general case administration and employment of auctioneer and sale of property at public auction. The Estate has $3,415.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

General Case Administration: Applicant spent 3.1 hours in this category. Applicant prepared fee agreement, employment application and fee application and anticipates attending the hearing on the fee application. Applicant did not bill for any time on general case administration.

Employment of Auctioneer and Sale of Property at Public Auction: Applicant spent 8.6 hours in this category. Applicant reviewed auctioneer's agreement and prepared motion to employ auctioneer; appeared telephonically to the hearing for the motion; prepared and filed a request to amend the order to include reimbursement of auctioneer's expenses.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Loris L. Bakken	11.7	$300.00	$3,510.00
	0	$0.00	$0.00
Total Fees for Period of Application			$3,510.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $80.85 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Postage		$43.05
Copying	$0.10 per page	$37.80
		$0.00
Total Costs Requested in Application		$80.85

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks to be paid a single sum of $1,800.00 for its fees incurred for Client. First and Final Fees and Costs in the amount of $1,800.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $80.85 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $1,800.00
Costs and Expenses $80.85

pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case.

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 Allowance of Fees and Expenses filed by Loris L. Bakken ("Applicant"), Attorney for Michael D. McGranahan, the Chapter 7 Trustee,

("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Loris L. Bakken is allowed the following fees and expenses as a professional of the Estate:

Loris L. Bakken, Professional employed by the Chapter 7 Trustee

Fees in the amount of $1,800.00
Expenses in the amount of $80.85,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to pay of the fees and costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

11. 20-90565-E-7 **RACHAEL SURBER** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Brian Haddix **9-15-20 [18]**

Final Ruling: No appearance at the October 1, 2020 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, Creditors, and Chapter 7 Trustee as stated on the Certificate of Service on September 17, 2020. The court computes that 14 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $31.00 due on September 1, 2020.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

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 Order to Show Cause 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 Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

12. 12-92479-E-12 NFG-6 | **DAVID/ESPERANZA AGUILAR** **Nelson Gomez** | **CONTINUED MOTION TO ENFORCE TERMS OF CONFIRMED AMENDED CHAPTER 12 PLAN AND FOR ADDITIONAL RELIEF** **6-1-20 [150]**

Final Ruling: No appearance at the October 1, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's, Chapter 12 Trustee, Creditor, and Office of the United States Trustee on June 1, 2020. By the court's calculation, 66 days' notice was provided. 28 days' notice is required.

The Motion to Enforce Terms of Confirmed Amended Chapter 12 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion to Enforce Terms of Confirmed Amended Chapter 12 plan is continued to 10:30 a.m. on October 22, 2020.

SEPTEMBER 23, 2020 JOINT STATUS REPORT (Dckt. 167)

The Parties have provided a Joint Status Report informing the court that counsel for Debtors and for LoanCare continue to work on the settlement terms. There has been a delay in finalizing the agreement due to Counsel for Debtor having to deal with family matters related to COVID-19. The parties request the court continue the October 1, 2020 hearing to October 22, 2020 at 10:30 a.m. to afford additional time for finalizing the agreement and submitting it to counsel for Creditor.

The court continues the hearing.

SEPTEMBER 4, 2020 JOINT STATUS REPORT (Dckt. 162)

The Parties have provided a Joint Status Report informing the court that counsel for Debtors and for LoanCare have finalized the settlement terms and requesting the court continue the hearing to October 1, 2020 at 10:30 a.m. to afford additional time for review and signature of the settlement.

The court continues the hearing.

REVIEW OF JOINT STATUS REPORT (Dckt. 158)

The Parties have provided the court with a Joint Status Report in advance of the continued hearing. The Parties report that they are continuing in their good faith settlement discussions and request that the court continue the hearing to September 10, 2020 to afford them additional time in their efforts.

The court so continues the hearing.

REVIEW OF THE MOTION

The present Motion to Enforce Terms of the Confirmed Amended Chapter 12 Plan was filed by the debtors, David Tafolla Aguilar and Esperanza Aguilar ("Debtors"), against creditor OneWest Bank ("Creditor"), asserting that Creditor has violated the terms of the Confirmed Amended Chapter 12 Plan ("Plan") by, through its current service, proceeding with a pending foreclosure of Debtors' business property.

In asserting these claims, Debtors state with particularity (Federal Rule of Bankruptcy Procedure 9013) the following grounds for relief:

A. The August 21, 2014 confirmed Amended Plan called for monthly payments of $994.00.

B. The Amended Plan provided for Debtors to make payments on their Business Property, located at 5001 E. Monte Vista Avenue, Denair, California, through the Plan.

C. Creditor did not object to the confirmation of the Plan.

D. Creditor through its current servicer, LoanCare, LLC ("LoanCare"), has continued to ignore and disregard the order of this court regarding the confirmation of the Amended Plan, to the detriment of Debtor, including the pending foreclosure on Debtors' Business Property by Creditor.

Motion, Dckt. 150.

Prayer for Relief

Debtor requests the following relief:

1. For an evidentiary hearing to determine the amount owed by Debtors under terms of the confirmed Amended Chapter 12 Plan;

2. For an order dismissing the amounts claimed by LoanCare as owing which were part of the unsecured portion of Debtors' Amended Chapter 12 Plan;

3. For damages for emotional distress incurred by Debtors as a result of LoanCare's unlawful foreclosure action, according to proof;

4. For attorney's fees incurred by Debtors in defending them against LoanCare's unlawful foreclosure action, according to proof; and

5. For any additional relief which the court may deem appropriate.

Review of Evidence

Debtors have provided the Declaration of Nelson F. Gomez in support of the Motion. Dckt. 152. Declarant is Debtors' Counsel who testifies to the following:

A. No opposition to the entry of discharge was filed and an order granting Debtors' discharge was entered on February 22, 2018.

B. Once the thirty six payments were made to the Chapter 12 Trustee, Counsel communicated with the servicer of the loan, CIT Bank, to inquire as to where Debtors should make the remaining 204 payments called for by the Amended Chapter 12 Plan. He was informed that the Bankruptcy Department of CIT Bank would provide a response. See Exhibit A.

C. Counsel's attempt to communicate with Creditor was unsuccessful and the communication was returned as undeliverable. See Exhibit B.

D. CIT Bank informed Counsel that the servicing of the loan was being transferred to LoanCare. See Exhibit C.

E. On March 12, 2018, Counsel received a Debt Validation Letter ("Debt Letter") from LoanCare, which stated that the loan was in delinquency and that the arrears amount for Principal and Interest was $18,121.97. See Exhibit D.

F. On March 26, 2018, Counsel responded to the Debt Letter, challenging it as inaccurate on the grounds that the amount owed by Debtors was $5,450.76, which amounted to six payments of $908.46. Counsel never received a response to his letter.

G. On May 31, 2018, Counsel forwarded to LoanCare all the relevant documents from the Bankruptcy showing that this borrower only owed payments from October, 2017 to May, 2018. See Exhibit F.

H. Debtors sent payments to LoanCare beginning in March of 2018, until November of 2018. The payments were not accepted by the servicer, but

later claimed that they did not receive them. Debtors have since received the funds from Bank of America. See Exhibit G.

I. On December 17, 2018, LoanCare informed Debtors that the loan was in default and that a foreclosure proceeding had commenced. The Notice of Default included sums which were part of the unsecured claim of Creditor, which had been dismissed when the Discharge of Debtors was entered. See Exhibit H.

J. Multiple attempts to communicate with LoanCare's individual in charge were unsuccessful. The foreclosure action resulted in a Notice of Trustee Sale issued by Trustee Corps, the company hired by LoanCare to conduct the foreclosure on June 24, 2019. See Exhibit I.

K. On May 22, 2019, after Creditor and LoanCare failed to respond to Debtor, through their attorney, Counsel asked this court to reopen the Bankruptcy Case for the purpose of filing the instant Motion.

L. Since the reopening of the case, LoanCare has continued to maintain the Trustee Sale of Debtors' property, only postponing it for terms of 30 days.

M. Counsel adds that Creditor and LoanCare are attempting to recover an unsecured component through the foreclosure action against the terms of the confirmed Plan, and Debtor requests the court to enforce the terms of the plan by issuing a ruling for Creditor and LoanCare to comply with the order so the foreclosure action is based solely on the amount legally owed by Debtor as outline in the Plan.

The following Exhibits are provided as part of the Declaration:

- Exhibit A: copy of October 9, 2017 Debtor's Counsel Letter to CIT Bank, NA and a copy of undeliverable envelope as Exhibit B.

- Exhibit C: copy of Notice of Servicing Transfer dated February 8, 2018

- Exhibit D: copy of March 6, 2018 LoanCare Debt Validation Letter

- Exhibit E: copy of March 26, 2018 Debtor's Counsel Letter to LoanCare

- Exhibit F: copy of Fax Transmission Cover Sheet and May 30, 2018 Letter to LoanCare with accompanying bankruptcy related documents

- Exhibit G: copies of nine (9) Bank of America Cashier's Checks in the amount of $908.46 dated March 2018 through November 2018.

- Exhibit H: copy of December 17, 2018 LoanCare Letter to Debtor regarding default and foreclosure proceedings

- Exhibit I: copy of Notice of Trustee's Sale

Dckt. 152.

RESPONDENT'S OPPOSITION

Respondent filed an Opposition on July 23, 2020. Dckt. 154. Respondent opposes the Motion on the following grounds:

A. Debtors do not allege that their loan is current and fail to explain how, specifically, the March 2018 Debt letter is inaccurate.

B. Debtors have not, and are unable to, produce proof of payments from October 2017 until now. LoanCare has no record of receiving the cashier's checks in question that Debtors contend were sent between March 2018 and November 2018 prior to the commencement of the foreclosure.

C. Debtors have failed to asserts how LoanCare violated the terms of the confirmed plan on the basis that the delinquent amount stated in the Debt Letter in the amount of $18,413.79 is not a portion of the unsecured claim that was to be wiped out upon discharge.

D. Instead, the delinquent amount included in the Debt Letter contains payments that were to be paid subject to the Amended Stipulation Resolving Debtors' Motion to Value Collateral on Subject Business Property and Setting Forth Chapter 12 Plan Treatment, but were, instead, paid at the lower amount of $779.19 (instead of the stipulated monthly plan payment of $908.46) coupled with the Debtors' lack of payments between October 2017 and March 2018 after the closing of the case.

E. Debtors failed to show that LoanCare violated the terms of the Plan and that they suffered any emotional distress damages.

F. The Motion fails to provide evidence or a calculation of the alleged attorney's fees and costs associated with the alleged violation of plan terms, hourly rate paid, or any other details that would allow a court to award fees and costs. Thus, Debtors are not entitled to an award of attorney's fees and costs.

DISCUSSION

The court begins with the Confirmed Amended Chapter 12 Plan, the modified contract between the parties. With respect to the secured claim at issue, the Confirmed Amended Plan provides:

Class 3: Secured claim of One West Bank.

> This class consists of the claim of One West Bank which is secured by a Deed of Trust on the Real Property located at 5001 E. Monte Vista Avenue, Denair, California.
>
> (The Bank filed a claim in the sum of $179,923.80. The Debtors and the Bank reached a Stipulation regarding the secured and unsecured portions of The Bank's claim, and the Court accepted this Stipulation.)

Confirmed Amended Plan, p. 2:22-25, 3:1-3, attached to Confirmation Order; Dckt. 79.

> Class 3: Secured claim of One West Bank.
>
> The holder of the claim in this class will receive $115,630.00, together with interest at the rate of 5% per annum, from September 1, 2014, in 240 fully amortized monthly payments of $779.17.
>
> Prior to confirmation of the Amended Plan, the Debtor will make adequate protection payments of $779.17 to the holder of the claim in this class commencing November 1, 2013. Debtor has made these payments from November 1, 2013 to July 10, 2014.
>
> The Trustee will make a total of 36 payments to the holder of the claim in this class from the funds paid to him, and the Debtors will make the remaining 204 payments. The holder of the claim in this class will retain its Deed of Trust against the Real Property.

Id., p. 3:13-24.

Thus, the confirmed plan provides that Creditor's secured claim is $115,630.00, with fully amortized payments of $779.17 a month until paid in full at the end of 20 years.

There does not appear that there can be many complex issues over whether the required payments under the Note, as modified by the confirmed Amended Plan, have been made - $779.17 per month commencing September 1, 2014.

The court notes that the Stipulation filed on August 20, 2014, a month before the Amended Plan is confirmed. The Stipulation provides for a 5.25% interest rate and for the pre-confirmation adequate protection payments to be $908.46, of which $129.29 to be applied to "escrow."

Using the Microsoft Excel Loan Calculator Program, the court computes the monthly payment for a fully amortized repayment of $115,630.00 over 240 months at 5.25% interest to be $779.17. So, while it appears that the interest rate stated in the plan, 5%, the monthly payment amount was computed consistent with the Stipulation at $779.17. No reference is made in the Plan to amounts for "escrow" (but presumably the portion of the loan documents not modified provide for such amounts if that is the asserted default).

August 27, 2020 Hearing

At the hearing, the court addressed with the Parties identifying the real financial issues that exist and how to clearly and accurately identify the payments required and the payments made.

At the hearing, Counsel for the Debtors reported that Creditor now agrees that the payments from the Debtor began the month after the hearing.

The Parties requested a continuance to 10:30 a.m. August 27, 2020, to further address resolution of this matter.