

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

October 13, 2022 at 10:30 a.m.

- | | | |
|---|---|---|
| 1. <u>18-20964</u> -E-7
PA-4 | BRADLEY GILBREATH
Peter Macaluso | MOTION TO SELL, APPROVING
O V E R B I D P R O C E D U R E S ,
AUTHORIZING COMPENSATION OF
BROKERS, AUTHORIZING PAYMENT
OF OTHER COSTS OF SALE, ETC.
9-29-22 <u>[196]</u> |
|---|---|---|

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor), Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on September 29, 2022. By the court's calculation, 14 days' notice was provided. The court required 14 days' notice. Dckt. 186.

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----.

The Motion to Sell Property is granted.
--

The Bankruptcy Code permits Kimberly J. Husted, the Chapter 7 Trustee, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the real property commonly known as 1342 Muscat Circle, Roseville, California (“Property”).

The proposed purchaser of the Property is Raymond Brown, and the terms of the sale are:

- A. Purchase Price: \$461,000.00
- B. Close of Escrow: 25 days after acceptance
- C. Loan Amounts: \$437,950.00
- D. Down Payment: \$5,000.00
- E. Real estate commission: 6%, 3% to Trustee’s agent and 3% to Buyer’s

Movant also requests the following:

- 1. Payment of \$913 in closing costs as an administrative expense;
- 2. Payment of \$507.10 to Placer County for the County Documentary Transfer Tax as an administrative expense of the estate;
- 3. Payment in full of the lien of U.S. Bank, by and through Rushmore;
- 4. Payment in full of charges for Natural Hazard Zone Disclosure Report in the amount of \$99.00;
- 5. Payment of the prorated and delinquent property taxes to Placer County Tax Collector in the amount of \$2,919.35;
- 6. Payment to the Owner’s Title Insurance to Escrow in the amount of \$1,662 as an administrative expense;
- 7. Payment of additional closing costs if any and according to any claim submitted to escrow;
- 8. Authorizing overbid procedures of the following:
 - a. Increments of \$1,000, and
 - b. Deposit: \$6,000 in cash equivalents prior to the hearing;
- 9. Waiving the fourteen (14) day stay;
- 10. Retaining the sole and exclusive jurisdiction to interpret and enforce the Purchase Contract.

DISCUSSION

At the time of the hearing, the court approved the above overbid procedures (\$6,000 cash equivalents to the Trustee prior to the hearing and \$1,000 bidding increments) announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court.

At the hearing, the following overbids were presented in open court: xxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will allow Trustee to pay costs and sale of secured creditors and will generate excess proceeds over Debtor's exemption to pay administrative expenses and a significant amount unsecured claims.

Movant has estimated that a six percent broker's commission from the sale of the Property will equal approximately \$27,660. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than six percent commission.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because of unpredictable market conditions, high interest rates, and to close escrow as soon as possible.

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

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

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

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

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

- A. The Property shall be sold to Buyer for \$461,00.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit xx, Dckt. xx, and as further provided in this Order.

- B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.
- C. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. The Chapter Trustee is authorized to pay a real estate broker's commission in an amount not more than three percent of the actual purchase price upon consummation of the sale. The three percent commission shall be paid to the Chapter 7 Trustee's agent, Reed Block Realty.

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

IT IS FURTHER ORDERED that this Bankruptcy Court retains the sole and exclusive jurisdiction to interpret and enforce the Purchase Contract for the sale of this property of the bankruptcy estate and all issues relating thereto.

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 3, 2022. By the court’s calculation, 10 days’ notice was provided. The court set the hearing for October 13, 2022. Dckt. 10.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----
-----.

<p>The Motion to Compel Abandonment is granted.</p>
--

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 Lovevelle Earl Lang and Makeba Diane Lang (“Debtor”) requests the court to order Gary Farrar (“the Chapter 7 Trustee”) to abandon the following assets:

1. Debtor’s Business’ Name, “Sculptors Barber Shop”
2. Business Checking and Savings Accounts
 - a. Value: \$13.75

- b. Claimed as fully exempt pursuant to California Code of Civil Procedure § 704.070, Schedule C, Dckt. 1
- 3. Various barber shop supplies, valuing roughly \$2,160.00
 - a. (2) Barber Chairs, (1) Salon Chair, 5 mirrors, (1) TV, Cabinet Storage, (1) Table, (3) Floor mats, (1) Sink and Chair, wall decor, (2) Display cases with memorabilia, incense sticks, hair grease and hand sanitizer used for clients, Towel Warmer, Clippers, brushes, combs and (2) workstations used to hold all clippers and tools used for services.
 - b. Claimed as fully exempt pursuant to California Code of Civil Procedure § 704.060, Schedule C, Dckt. 1.

Trustee's Nonopposition

Trustee filed a docket entry indicating nonopposition on October 4, 2022.

Discussion

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 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 Lovevelle Earl Lang and Makeba Diane Lang ("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 following assets:

- 1. Debtor's Business' Name, "Sculptors Barber Shop"
- 2. Business Checking and Savings Accounts with PNC Bank, Account ending in 4509
- 3. Barber shop supplies, valuing roughly \$2,160.00, including:

- a. (2) Barber Chairs, (1) Salon Chair, 5 mirrors, (1) TV, Cabinet Storage, (1) Table, (3) Floor mats, (1) Sink and Chair, wall decor, (2) Display cases with memorabilia, incense sticks, hair grease and hand sanitizer used for clients, Towel Warmer, Clippers, brushes, combs and (2) workstations used to hold all clippers and tools used for services.

listed on Schedule A / B by Debtor is abandoned by the Chapter Trustee, Gary Farrar ("Trustee") to Lovevelle Earl Lang and Makeba Diane Lang by this order, with no further act of the Trustee required.

4 thru 5

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, on May 31, 2022. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Excuse Turnover and Confirm Exemption from Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Opposition was filed.

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

JULY 28, 2022 HEARING

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

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

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

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

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

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

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

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

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

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

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

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

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

REVIEW OF MOTION AND PRIOR HEARINGS

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

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

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

Motion; Dckt. 12

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

Prior Bankruptcy Case

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

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

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

Debtor's Opposition

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

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

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

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

...

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

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

...

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

...

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

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

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

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

FN. 1. Neither in the Opposition nor the Declaration in Support does Debtor address why Debtor is not in the State Court Action, demonstrating that there is no nuisance, that Debtor and Debtor's family has "seen the light," corrected some of the problems, and that the duties of a receiver to abate the nuisance will not be required, though the receiver could document Debtor and Debtor's family complying with the orders of the State Court to complete certain actions.

Evidence Presented in Opposition

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

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

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

4. There are no illegal apartments on the property.

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

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

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

No other evidence is provided in Opposition to the Motion.

Statement of Disputed Facts

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

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

APPLICABLE LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(11) The term “custodian” means—

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

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

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

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

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

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

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

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

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

Review of the Current Chapter 13 Bankruptcy Case

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

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

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

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

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

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

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

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

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

Chapter 13 Plan Filed

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

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

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

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

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

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

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

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

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

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

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

JUNE 14, 2022 HEARING

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

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

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

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

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

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

JUNE 30, 2022 HEARING

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

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

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

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

JULY 12, 2022 HEARING

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

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

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

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

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

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

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

 FN. 1. In this Case Debtor's plan is to get the Property sold and maximize the recovery of the benefit of the Debtor and her bankruptcy estate, and not to rehabilitate the Property and retain it.

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

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

The court has added further discussion of the issues and shortcomings to date of Debtor with respect to her seeking to wrench control of the Property from the Receiver, correct the deficiencies constituting the nuisance, pay any monies owed in the State Court Action, and market and sell the Property in a prompt, speedy commercially reasonable sale of the Property.

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

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

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

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

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

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

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

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

FN. 1. In this Case Debtor's plan is to get the Property sold and maximize the recovery of the benefit of the Debtor and her bankruptcy estate, and not to rehabilitate the Property and retain it.

The City's Complaint relating to the assertion that Debtor's Property was a public nuisance and a danger to health and safety was filed in 2017. Debtor's default in that State Court Action was entered when she failed to response to the

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

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

July 28, 2022 Hearing

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

August 18, 2022 Hearing

At the hearing, the court addressed these issues in conjunction with the related Motion to Employ Contractor. The Parties and their counsel constructively addressed issues relating to the information necessary and documentation of the work to be done within the contract. This includes all of the permit and other fees which will be required.

Movant-Receiver's Adversary Proceeding

On September 5, 2022, Movant-Receiver filed a complaint against Debtor to determine debts to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(7) for fees owed to Movant-Receiver. It appears to the court that the complaint was improperly filed on the bankruptcy docket. However, there has been an adversary proceeding filed on September 5, 2022. Adversary Case No. 22-02089.

October 13, 2022 Hearing

Supplement Pleadings Filed By Debtor

On September 29, 2022 Debtor filed several supplemental pleadings. In the Supplemental Pleading, Dckt. 113, Debtor's counsel states:

- A. He reviews the prior status of permits relating to the Properties.
- B. For the current status of the permits, counsel states:
 - 1. For the 1039 Claire Avenue Property
 - a. Permit for new foundation - Expired on July 17, 2022.
 - (1) Bruce Monighan is allowing this to go to the Building Department within a new entitlement.
 - 2. For the 1049 Claire Avenue Property
 - a. Electrical Permit - Issued
 - b. Demolition of accessory dwelling with attached carport.
 - (1) Demolition previously completed
 - (2) Permit Pending
 - c. Enclose bike shed and carport to make a bedroom, bathroom, bar area.
 - (1) Permit submission Incomplete
 - (a) The proposed contractor is working to correct the incomplete permit submission.
- C. Cost Analysis Update
 - 1. Proposed contractor has retained a sub-contractor to complete the design and drawings to complete the permit process.
 - a. No increase in bid amount for the hiring of this sub-contractor.
 - 2. Possible Additional Costs
 - a. Fire Suppression System.....Est. \$18,000
 - b. Water and sewer Fee.....Est. \$14,000
 - 3. For these additional costs, the supplemental pleading states:
 - a. For the estate additional expenses “[t]otaling \$32,000.00, which Mr. Sanders is prepared to all said funds of \$32,000.00 be set aside from the funds presently on had, to insure payment.”

- b. At the hearing, Debtor’s counsel explained the above statement and the source and funding of the additional \$32,000, telling the court and parties in interest, **XXXXXXX**

D. Counsel projects the following Time Table for the work to be done:

- 1. Application
 - a. Ca. Licensed Structural Engineer - prepare design.....9/29/22
 - b. 4 permits in application process.....9/29/22
- 2. Cap-off water and waste lines.....11/1/22
- 3. County Fees, upon issuance of final permits.....11/1/22
- 4. Final Building Permit for 1039 Claire Ave.....2/24/23
- 5. Certificate of Occupancy for 1039 Claire Ave.....3/31/23
- 6. Final Permit for “ADU”.....2/24/23
- 7. Certificate of Occupancy for 1039 Claire Ave.....3/31/23
 - a. It appears that this reference to 1039 Claire Ave is a clerical error. At the hearing, counsel for Debtor clarified this, reporting, **XXXXXXX**

Debtor filed supplemental Exhibits Exhibits, Dckt. 114, consisting of the following documents:

- A. Exhibit A. Email dated September 29, 2022, from the City of Sacramento’s Building Inspector to Debtor’s Counsel, providing information on the status of the permits.
- B. Emails B and C are screen shots from the City of Sacramento showing the status of the various permits.

On October 6, 2022, Debtor filed a Second Supplemental Pleading, Dckt. 116, Debtor’s counsel reports that with the assistance of Dan Collins, the Receiver’s Representative, the Electrical Permit was passed on September 29, 2022. Debtor is now prepared to employ: (1) Flax & Stone, for designs and plans; (2) Chad Qi, an engineer; and (3) Mooni Sanwal, Fire and Safety Contractor. *Id.* at 2:10-13.

Debtor requests that the court authorize the disbursement of \$4,988.28 for Professional Fees. These fees are for **XXXXXXX** :

Additionally, on October 6, 2022, Debtor filed a set of Additional Exhibits, Dckt. 117. Exhibit D is a Deposit Receipt for \$35,000 with the Bank of Marin, and cashier’s checks made payable to Richard Sanders which total \$35,000.

Exhibit E consists of the following documents:

1. Claire Ave Price Breakdown
 - a. Fees for permits and drafting basic set of plans, which total \$6,488.28, and \$1,500.00 cashier's check which is show as being a payment on the forgoing amount.
2. City of Sacramento Building Permit for 1049 Claire Ave, for the electrical work, showing that the \$234.90 fees have been paid.
3. Housing and Dangerous Buildings Permit that expired October 3, 2022.
4. Qi Structural Engineering Services Contract with the contractor, with fees stated to be \$2,000.00.
5. City of Sacramento statement showing the 1039 Clair Ave building permit in "Applied" status.
6. Flex + Stone plan drafting (not including engineering) fee contract, with the fees totaling \$1,700.
7. Mooni Sanwal contact information for "Annual Fire and Safety."

Supplemental Pleading by Receiver

Gerard F. Keenan II, the State Court Receiver for the Properties, filed on October 10, 2022, a Conditional Agreement to the Motion to Employ Contractor filed by Debtor. Dckt. 119. Based on the assumption that the time lines, costs, scope of work, and completion schedules presented by Debtor are accurate, the Receiver does not oppose the Motion to Employ Contractor.

At the hearing, XXXXXXXXXXXXXXXXXX.

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

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

The Motion to Excuse Turnover and Confirm Exemption from Automatic Stay filed by Gerard F. Keena II ("Movant-Receiver") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Excuse Turnover and Confirm Exemption from Automatic Stay is XXXXXXXXXXXXXXXXXX.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2022. By the court’s calculation, 15 days’ notice was provided. 14 days’ notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion to Employ Contractor is XXXXXXXXXXXXXXXXXX

Nadia Zhiry (“Debtor”) seeks to employ Richard Sanders of R. & S. Contractor, LLC. (“Contractor”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Contractor to assist Debtor in making repairs to Debtor’s properties commonly known as 1039 and 1049 Claire Ave., Sacramento, California (collectively “Properties”).

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

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

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

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

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

Opposition of the State Court Receiver

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

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

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

Copy of Contract Not Provided As An Exhibit

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

Contractors Declaration includes amounts and estimates. Dckt. 78.

Reply of Debtor

On August 17, 2022, Debtor filed a Reply Declaration by the Contract to be employed. In it he discusses that he will hire the necessary subcontractors, that the revised plans for the ADU will not include a kitchen, and that the water, sewer, and school district impact fees are included in his bid. Dckt. 95.

August 18, 2022 Hearing

At the hearing, the court addressed these issues in conjunction with the related Motion to Employ Contractor. The Parties and their counsel constructively addressed issues relating to the information necessary and documentation of the work to be done within the contract. This includes all of the permit and other fees which will be required.

At the hearing the court had a frank discussion with the Parties and that they are now in the “Put Up or Shut Up” phase for the Debtor. The scope of the work is clearly identifiable. The contract to provide for the remediation, including any subcontractors, can be prepared and presented to the court. The final version of the plans can be drafted and the permit applications filed by the Debtor forthwith.

September 29, 2022 Supplemental Pleadings

On September 29, 2022, Debtor filed Supplemental Pleadings to the Motion to Employ Mr. Sanders. Dckt. 113.

Debtor provides the previous and current permit status of the two properties. Debtor indicates (and provides as evidence correspondence with Matthew Sartain, a city building instructor, Exhibit A, Dckt. 114) that there are four (4) permits outstanding for the Properties including:

1039 Claire Ave:

1. Status: Submittal Incomplete

“Install 1279 sq ft prefab building on new foundation- Entitlement DR18-208 expired on July 17, 2022- Bruce Monighan is allowing this submittal to go to Building without a new entitlement.”

1049 Claire Ave:

2. Status: Issued

Minor electrical, Adding a wire, Installing a switchleg for a new fan. Carbon monoxide & Smoke alarms required. Reference CRC sections R315 & R314.

3. Status: In Progress

“Demolish accessory dwelling with attached carport. Work has been previously completed PLN22-03562.”

4. Status: Submittal Incomplete

“Enclose existing bike shed and carport to make a bedroom, closet, bathroom and bar sink. 661.5 sqft. Electrical, plumbing, framing, drywall, paint, flooring.”

Debtor indicates that for both incomplete submittals, the Proposed Contractor is rectifying the issue.

Additionally, the Contractor has hired subcontractors “Flax & Stone, LLC.” However, this is included with the Contractor’s bid \$45,000.00.

Also, there may be two additional expenses for (1) the Fire Suppression System (\$18,000.00) and Water and Sewer Fee (\$14,000.00). Contractor will set aside the funds presently on hand to ensure the payment.

The Contractor has also provided an updated time table and compensation schedule, estimating completion and final payment on or about March 31, 2023.

**October 6, 2022
Second Supplemental Pleadings**

Debtor filed a Second Supplemental Pleading on October 6, 2022. Dckt. 116. Debtor states Contractor has updated their fee request to the following:

(1) Work Completed / Fees Paid and Request for Disbursement Approval...\$1,500.00

“For this payment, counsel for the Debtor has advanced his own funds to insure Mr. Sanders is not out of pocket, if this Motion is denied, which has paid the ‘1049’ minor Electrical permit, and has authorized drafting plans be initiated. As such, the Debtor requests said disbursement be approved.”

(2) Professional Fees & Request Disbursement Approval.....\$5,000.00

“For this payment, counsel requests disbursement from the blocked account be authorized and allowed in the amount of \$4,988.28. As such, the Debtor requests approval to disburse \$5,000.00.”

Additionally, Debtor provides an adjusted time table and compensation schedule.

October 13, 2022 Hearing

At the hearing, **XXXXXXXXXX**

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

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

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

IT IS ORDERED that the Motion to Employ Contractor is **XXXXXXXXXX**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on September 29, 2022. By the court's calculation, 14 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice).

Under the facts and circumstances of this Motion, the court shortens the time to the 14 days given.

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

The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is XXXXXXX.

Donald Johnson ("Debtor") seeks to convert this case from one under Chapter 7 to one under Chapter 13. The Bankruptcy Code authorizes a one-time, *near-absolute right* of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007) (emphasis added).

Debtor asserts that the case should be converted because he is receiving funds from the Fire Victim Trust which would allow the Trustee to pay the secured claim of Creative Judgment Solutions in full. In addition, Debtor would like to retain and sell his real property, 35501 Brinville Road, Acton, California, over the next twelve months through a Chapter 13 Plan.

As stated in the Motion, Debtor now having funds for the damages caused by the Camp Fire, he will use those proceeds to pay off the secured debt and then, sell the property (presumably using any surplus insurance proceeds to repaid the damage and sell the property in the prompt, ordinary course of business).

The Motion also states that the he, the Debtor, is being grossly disserved by the Realtor hire by the Trustee. The Motion does not state grounds upon which such allegation is made, just the conclusion.

Upon selling the Property, Debtor believes they can pay attorney's fees, Trustee's fees, administrative costs, and whatever is determined to be owed to his wife (the only other claim of value filed in this case, Proof of Claim 2-1).

Debtor's Declaration

Debtor's Declaration is provided in support of the Motion. Dckt. 122. Debtor's personal knowledge testimony (Fed. R. Evid. 602) under penalty of perjury includes:

- A. The filing of this Bankruptcy Case was due to an injury on a stairwell in a restaurant in which a restaurant employee was injured. Dec., p. 2:4-6 (page numbers are for the page number of the exhibit).
- B. When the employee sued Debtor, rather than filing an attorney and defending that action, after being given advice by his soon to be ex-wife, Debtor chose to file a Chapter 13 Case. *Id.* 9-11.
- C. Debtor then testifies that though he was making his plan payments, the Chapter 13 Case got dismissed "because of something the attorney failed to do." *Id.*, 11-13.
- D. With the Chapter 13 Case being dismissed (which he again testifies is due to his attorney's shortcomings), the employee proceed with her lawsuit and a default judgment was entered against Debtor. (No testimony is provided as to why Debtor, once the Chapter 13 Case was dismissed, did not obtain counsel to defend himself in that action.) *Id.*14-16.
- E. Debtor testifies that he should have sued the restaurant (alleging a construction defect in the stairway) or his attorney for allowing the Chapter 13 Case be dismissed, but Debtor "is not one to sue people." *Id.*, 18-20. (This indicates that Debtor believes that his bankruptcy case has claims against others.)
- F. Debtor purchased the Brinville Road, Acton, California residence in 1994. *Id.*, 2:23-25.
- G. In early 2018, Debtor and his wife moved to Paradise, California and purchases a home there. The Paradise home was destroyed in the 2018 paradise Camp Fire. *Id.*; 2:31, 3:1-2.
- H. Debtor testifies that the insurance proceeds from the Paradise fire were taken by his wife and Debtor did not receive any for rebuilding the Paradise home. *Id.* 3:4-9.

- I. Debtor then testifies that in 2020 he was notified by Creative Judgment Solutions that they recorded a lien against his home and would force a sale of the home to pay the judgment the Creditor had. *Id.*, 3:10-12.
- J. Debtor then contacted his attorney, who advised him to move back to the Acton Home (and stop living in a trailer on the Paradise property), so he could claim a homestead exemption and avoid the judgment lien on the Acton Home. *Id.*; 3:13-17.
- K. In this Chapter 7 Case, the Trustee objected to the homestead exemption which was claimed in the Acton Home, and that Objection was sustained.
- L. Debtor now believes that the Trustee's Realtor is not actively marketing the Paradise Property, but is seeking to have it sold at a discount to a colleague or friend so they can make a profit on it. *Id.*; 4:9-13.
- M. Debtor also asserts that people who have contacted the Realtor about purchasing the Paradise Property has been actively discouraged by the Realtor from purchasing the Property. *Id.* 4:17-25. Some of the "discouragements" are stated to include telling purchasers that there is no piped water to the property (which is accurate as Debtor testifies that there is a 10,000 gallon portable water tank and water is trucked in), there are three water companies in the Paradise area to provide water. Further, that there can be no financing of the purchase, as there is no financing available in the area, so it has to be a cash purchase. *Id.* Debtor testifies that the lenders he talks to say financing is available. *Id.*; 4:30-31.
- N. Debtor testifies that while he does not have his approved settlement yet, he believes \$194,164.72 will soon be available, which after attorney's fees and costs, will net the bankruptcy estate \$129,449.62. *Id.*; 5:6-11.
- O. The \$129,449.62 is projected to be sufficient to pay the Creative Judgment claim. *Id.*; 12-13.

Trustee's Opposition

Chapter 7 Trustee, Nikki Farris, filed an opposition to Debtor's Motion to Convert. Dckt. 125. Trustee states Debtor's request to convert is due to their displeasure with Trustee's Realtor. Trustee states the Realtor denies using a "straw person" to sell the Property and has not discouraged people from purchasing it. In addition, there is currently an offer to purchase the Property for \$280,000.00.

Also, Trustee does not believe Debtor qualifies as a Chapter 13 debtor and indicates no current Schedules I and J have been filed. However, based on Debtor's original Schedules I and J, Debtor has a negative income of (\$219.00).

Additionally, Trustee indicates Debtor was awarded \$431,477.17 from the fire victims trust. Trustee will be moving forward obtaining court approval to allow the funds to be disbursed.

Debtor's Reply

Debtor replies, stating that he agrees with the Trustee, that the \$431,477.17 to be paid on Debtor's claim from the Camp Fire should be sufficient to pay the claims in this case, with no sale of the Paradise Property necessary by the Trustee. Dckt. 129.

With respect to whether Debtor qualifies to be a Chapter 13 debtor, Debtor's response is, "At no time did the Debtor intimate that his Chapter 13 Plan would be funded by anything other than the sale of the property." Reply, p. 2:31, 2:1-2.

DISCUSSION

Debtor commenced this Bankruptcy Case on January 25, 2021, and was granted his Chapter 7 discharge on February 22, 2022. On Schedule A/B Debtor lists the Paradise Property but states under penalty of perjury:

- ◆ The value of Debtor's interest in the Property is \$0.00.
- ◆ Debtor quitclaimed any interest in the Paradise Property to his wife. All of the insurance proceeds from the Paradise filed were paid to Debtor's wife (presumably as the only owner).
- ◆ **"DEBTOR HAS NO LEGAL INTEREST. LISTED FOR DISCLOSURE PURPOSES ONLY."** (Emphasis in original.)

Dckt. 1 at 10.

Debtor also lists a claim against PG&E for damages caused in the Camp Fire. *Id.* at 14.

Review of Claim filed by Caraly Johnson (Identified as soon to be ex-spouse)

Ms. Johnson's claim is for \$228,125.72, and is not secured and is not a priority claim. POC 2-1 §§ 9,12. On the attachment to Proof of Claim 2-1, Ms. Johnson breaks down the elements of her claim to be:

- A. Paradise Rental Obligation (\$2,000/month, commencing 1/25/21).....\$50,000
- B. Hazardous material and trash removal from Paradise Property.....\$25,000
- C. Prepayment of expected Insurance Proceeds to be reimbursed.....\$30,000
(Copy of \$30,000 check payable to Don Johnson for "Ins. Payout,"
- D. Contribution obligation on fraudulent transfer obligation.....\$95,112.47

The attachments to Proof of Claim 2-1 include an assignment of judgment from Gina White (plaintiff) to Creative Solutions a judgment of \$95,112.47 against Caraly Johnson for the fraudulent conveyance of the 35501 Brinville Road, Acton, California property that Debtor states is his residence.

E. Destruction of Trailer.....\$28,013.25

The attachments to Proof of Claim 2-1 include a copy of a \$28,013.25 cashier's check made payable to Folsom Lake RV, Camp Fire Disaster Shelter, which cashier's check is stated to have been purchased by Caraly Johnson.

Conversion of Case

Pursuant to 11 U.S.C. § 706(a), a debtor at any time may convert a case from Chapter 7 to that under 11, 12, or 13, so long as the case has not been converted previously. Here, Debtor's case has not been converted previously. Although Debtor received a discharge in their Chapter 7 case on February 22, 2022, Dckt. 110, under the plain language of 11 U.S.C. § 706(a), a discharge does not preclude conversion. Therefore, the discharge in the current case does not impact Debtor's ability to convert the case to that under Chapter 13.

Requirements to be a Chapter 13 Debtor

However, under 11 U.S.C. § 706(d), a Chapter 7 case may not convert to another chapter unless the debtor may be a debtor under the new chapter. For Chapter 13 cases, under 11 U.S.C. § 109(e), only an individual with regular income may be a debtor under Chapter 13. An individual with regular income is defined under 11 U.S.C. § 101(30) as an individual, "whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title"

Collier on Bankruptcy discusses this requirement, stating:

[1] Requirement That the Chapter 13 Debtor Be an Individual with Regular Income

The first requirement found in subsection (e) is that the chapter 13 debtor be an "individual with regular income," or such an individual and that individual's spouse. The phrase "individual with regular income" is defined in section 101 of the Code to mean an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker." This definition, barring debtors from chapter 13 eligibility if they are unable to make plan payments, is closely related to the standard of plan feasibility for chapter 13 plan confirmation under section 1325(a)(6).

2 Collier on Bankruptcy P 109.06 (16th 2022)

Upon review of Debtor's Schedules I and J, Debtor has a negative monthly net income of (\$219.00). Schedules I and J, Dckt. 16. Therefore, Debtor does not fit the requirements required by 11 U.S.C. §§ 109(e), 101(30) to be afforded Chapter 13 relief.

However, in several other cases this court has questioned whether the "regular income" sufficient to make plan payments means that all of the plan payments must be made from that income, and that in Chapter 13 a debtor forfeits any ability to liquidate assets to pay claims in situations where a debtor is land rich but cash poor.

In such situation, a debtor must move promptly and diligently in marketing and selling the property in a commercially reasonable manner.

In addition, the Supreme Court has decided that in addition to a Chapter 7 conversion being contingent on the debtor satisfying the requirements of a Chapter 13 debtor, a debtor's bad faith under 11 U.S.C. § 1307(c) may also prevent a Chapter 7 debtor from converting to a Chapter 13 case. *Marrama v. Citizens Bank*, 549 U.S. 365, 373 (2007). The Supreme Court reasoned that under 11 U.S.C. § 1307(c), a Chapter 13 case may be dismissed or converted to that under Chapter 7 "for cause." *Id.*; *See* 11 U.S.C. § 1307(c). Therefore, the Supreme Court noted, dismissal or conversion under Chapter 13 because of a debtor's bad faith is implicitly allowed under § 1307(c) because of the words "for cause." *Id.* Because a Chapter 13 case can be dismissed or converted due to bad-faith, a Chapter 7 debtor's bad-faith can result in the debtor not qualifying as a Chapter 13 debtor, thus precluding conversion. *Id.*

Trustee questions the good faith of the Debtor, stating Debtor only wishes to convert due to their "displeasure with the Trustee's Realtor." Motion ¶ 3, Dckt. 125. Trustee alleges Debtor "makes scurrilous unsupported and in some cases hearsay allegations against the Realtor." *Id.*

Ruling

Debtor's desire to convert this case to one under Chapter 13 and preclude the Trustee from selling the Paradise Property is inconsistent with his statements under penalty of perjury of assets in which Debtor says he has an interest. Unequivocally Debtor states that he has no interest in the Paradise Property, that his value is \$00.00, and "**DEBTOR HAS NO LEGAL INTEREST**" (emphasis in original).

It appears that the Chapter 7 Trustee disagrees with Debtor's statements, and has determined that the bankruptcy estate has an interest in the Paradise Property, and that the Paradise Property can be sold for sufficient monies to pay the secured claim of Creative Judgment Solutions in full. It appears that after paying the secured claim, costs of sale, and ultimately the trustee's fees, there would be remaining case for the Debtor and Debtor's soon to be ex-spouse to fight over.

It is unclear what good faith reason that Debtor has to convert this case to one under Chapter 13 to stop the sale of the Paradise Property. According to Debtor's own statements, he doesn't have a interest of any value in the Property.

XXXXXXX

~~Pursuant to 11 U.S.C. §§ 709(d), 109(c), and 101(30), due to Debtor's inability to fund a plan, the Motion to Convert is denied.~~

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

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

~~The Motion to Convert filed by Donald Johnson (“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 Convert is **XXXXXX**.~~

FINAL RULINGS

7. [20-25541-E-7](#) [DNL-7](#) ANATOLY TKACHUK
Mark Shmorgon MOTION TO EMPLOY BACHECKI,
CROM & CO., LLP AS ACCOUNTANT(S)
8-30-22 [80]

Final Ruling: No appearance at the October 13, 2022 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 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 30, 2022. By the court’s calculation, 45 days’ notice was provided. 28 days’ notice is required.

The Motion to Employ 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 Employ is granted.

J. Michael Hopper (“Trustee”) seeks to employ Bachecki, Crom & Co., LLP (“Accountant”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Accountant to perform a tax analysis and prepare the fiscal year 2021-2022 state and federal income tax returns.

Trustee argues that Accountant’s appointment and retention is necessary to prepare income tax returns for the bankruptcy estate. Accountant will receive compensation in the form of a flat fee of \$3,400.00.

Jay D. Crom, a Partner of Bachecki, Crom & Co., LLP, testifies that he is a certified public accountant and is licensed to practice in California. Jay D. Crom testifies he and the firm do not represent

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

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Accountant, considering the declaration demonstrating that Accountant does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Jay D. Crom as Accountant for the Chapter 7 Estate on the terms and conditions set forth in the Flat Fee Agreement for Accounting Services filed as Exhibit A, Dckt. 82.

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

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

The Motion to Employ filed by J. Michael Hopper ("Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted, and Trustee is authorized to employ Jay D. Crom dba Bachecki, Crom & Co., LLP as Accountant for Trustee on the terms and conditions as set forth in the Flat Fee Agreement for Accounting Services filed as Exhibit A, Dckt. 82.

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

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

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by accountant in connection with this matter, regardless of

whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

8. [22-20709-E-7](#) **TIFFANY BAILEY** **CONTINUED ORDER TO SHOW CAUSE**
 Michael Hays **- FAILURE TO PAY FEES**
8 thru 10 7-28-22 [\[37\]](#)

Final Ruling: No appearance at the October 13, 2022 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on July 29 and 30, 2022. The court computes that 25 and 26 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: \$78.00, due on 7/25/22.

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 subject of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: \$78 due by 5/24/2022; \$78 due by 6/23/2022; and \$78.00, due on 7/25/22.

In light of the court having issued a final ruling for the dismissal of this case pursuant to the Motion to Dismiss filed by the Chapter 13 Trustee (DCN: DPC-2), the court determined that oral argument will not be of assistance in rendering a decision in this matter.

No appearance was made by Debtor at the August 24, 2022 hearing on the Motion to Dismiss. The court has issued a final ruling that the Motion would be granted and the case dismissed. The court entered an order dismissing the case on August 26, 2022.

As addressed in this court's Order Vacating the Order Dismissing this Bankruptcy Case (Dckt. 59), on August 23, 2022, less than 24 hours prior to the hearing on this Motion, Debtor filed an *Ex Parte* Application to Convert this Case to one under Chapter 7. Dckt. 43. The case was automatically converted.

The case having been converted and Debtor representing that she and counsel are addressing the unpaid fees, the court has entered an Order continuing the hearing on this Order to Show Cause, to be conducted at 10:30 a.m. on October 13, 2022. Order, Dckt. 64.

Status of Filing Fees

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 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 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.

9.	<u>22-20709-E-7</u>	TIFFANY BAILEY Michael Hays	CONTINUED ORDER TO SHOW CAUSE - FAILURE TO PAY FEES 6-28-22 [35]
----	-------------------------------------	--	---

Final Ruling: No appearance at the October 13, 2022 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on June 29 and 30, 2022. The court computes that 25 and 26 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: \$78 due by 6/23/2022.

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

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: \$78 due by 5/24/2022; \$78 due by 6/23/2022; and \$78.00, due on 7/25/22.

In light of the court having issued a final ruling for the dismissal of this case pursuant to the Motion to Dismiss filed by the Chapter 13 Trustee (DCN: DPC-2), the court determined that oral argument will not be of assistance in rendering a decision in this matter.

No appearance was made by Debtor at the August 24, 2022 hearing on the Motion to Dismiss. The court has issued a final ruling that the Motion would be granted and the case dismissed. The court entered an order dismissing the case on August 26, 2022.

As addressed in this court's Order Vacating the Order Dismissing this Bankruptcy Case (Dckt. 59), on August 23, 2022, less than 24 hours prior to the hearing on this Motion, Debtor filed an *Ex Parte* Application to Convert this Case to one under Chapter 7. Dckt. 43. The case was automatically converted.

The case having been converted and Debtor representing that she and counsel are addressing the unpaid fees, the court has entered an Order continuing the hearing on this Order to Show Cause, to be conducted at 10:30 a.m. on October 13, 2022. Order, Dckt. 65.

Status of Filing Fees

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

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 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.

Final Ruling: No appearance at the October 13, 2022 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on June 1 and 2, 2022. The court computes that 83 and 84 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: \$78 due by 5/24/2022.

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 not been cured. The following filing fees are delinquent and unpaid by Debtor: \$78 due by 5/24/2022; \$78 due by 6/23/2022; and \$78.00, due on 7/25/22.

In light of the court having issued a final ruling for the dismissal of this case pursuant to the Motion to Dismiss filed by the Chapter 13 Trustee (DCN: DPC-2), the court determined that oral argument will not be of assistance in rendering a decision in this matter.

No appearance was made by Debtor at the August 24, 2022 hearing on the Motion to Dismiss. The court has issued a final ruling that the Motion would be granted and the case dismissed. The court entered an order dismissing the case on August 26, 2022.

As addressed in this court's Order Vacating the Order Dismissing this Bankruptcy Case (Dckt. 59), on August 23, 2022, less than 24 hours prior to the hearing on this Motion, Debtor filed an *Ex Parte* Application to Convert this Case to one under Chapter 7. Dckt. 43. The case was automatically converted.

The case having been converted and Debtor representing that she and counsel are addressing the unpaid fees, the court has entered an Order continuing the hearing on this Order to Show Cause, to be conducted at 10:30 a.m. on October 13, 2022. Order, Dckt. 66

Status of Filing Fees

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 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 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.