

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Modesto, California

October 19, 2023 at 10:30 a.m.

1. <u>23-90206-E-7</u> <u>FAT-1</u>	DONALD/KRISTENE DUARTE Flor De Maria Tataje	MOTION BY FLOR DE MARIA A. TATAJE TO WITHDRAW AS ATTORNEY 10-3-23 [36]
--	---	---

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, Chapter 7 Trustee, creditors, and Office of the United States Trustee on October 4, 2023. By the court’s calculation, 15 days’ notice was provided. 14 days’ notice is required.

The Motion to Withdraw as Attorney 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 Withdraw as Attorney is granted.

Flor De Maria Tataje (“Movant”), counsel of record for Donald and Kristene Duarte (“Debtor”), filed a Motion to Withdraw as Attorney as Debtor’s counsel in the bankruptcy case. Movant states the following:

October 19, 2023 at 10:30 a.m.

- Page 1 of 26 -

- A. The Motion is brought pursuant to Local Bankruptcy Rule 2017-1(e) and California Rule of Professional Conduct 1.16(b) and 3-700(C)(1).
- B. Counsel cannot effectively represent Debtor due to inconsistency of and lack of communication, including Debtor withholding important information from Attorney relevant to representation.
- C. Debtor has consented to termination of counsel.

Motion, Dckt. 36.

APPLICABLE LAW

District Court Rule 182(d) governs the withdrawal of counsel. LOCAL BANKR. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. CAL. LOCAL R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, No. 1:08cv01523 OWW GSA, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. June 23, 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554 (Cal. Ct. App. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 559.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. CAL. LOCAL R. 180(e).

Termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdraw from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. CAL. R. PROF'L CONDUCT 3-700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probable cause and for the purpose of harassing or maliciously injuring

any person and (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act. CAL. R. PROF'L CONDUCT 3-700(B).

Permissive withdrawal is limited to certain situations, including the one relevant for this Motion:

(1) The client

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively. . .

(5) The client knowingly and freely assents to termination of the employment.

CAL. R. PROF'L CONDUCT 1.16(b)(4)(d), (b)(6).

DISCUSSION

As a ground for the Motion to Withdraw as Attorney, Movant states that Debtor failed to disclose all relevant assets, and Debtor has consented to termination of representation. Declaration, Dckt. 38.

Movant states she has taken steps to mitigate any prejudice that withdrawal as a counsel may produce, including by giving Debtor ample time to find replacement counsel, informing Debtor of deadlines, and returning all client papers and property to Debtor. Dckt. 38. Neither the Chapter 7 Trustee, Debtor, nor any other relevant party has filed an opposition to this Motion, which was filed according to Local Bankruptcy Rule 9014-1(f)(2).

Furthermore, under California Rule of Professional Conduct 3-700(C)(1)(d), Debtor's conduct, such as failing to disclose all relevant assets to Movant is hindering Movant's ability to carry out her employment and duties effectively. Those are sufficient reasons for permissive withdrawal.

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 Withdraw as Attorney filed by Flor De Maria Tataje ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Withdraw as Attorney is granted, and Movant is permitted to withdraw as counsel for Donald and Kristene Duarte ("Debtor"), with Donald Duarte and Kristene Duarte proceeding in *pro se* in this Bankruptcy Case.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 16, 2023. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

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

The Objection to Claimed Exemptions is sustained, and the exemptions are disallowed in their entirety.

Creditor WVJP 2021-4. LP in this case ("Creditor") objects to John Mendoza's ("Debtor") claimed exemptions under California law, arguing that Debtor has improperly claimed the homestead exemption for the property commonly known as 23955 Cedar Hill Lane, Twain Harte, California 95383 ("Property"). Specifically, Creditor alleges that Debtor's primary residence is not the Property, and so Cal. Civ. Pro. Code § 704.710(c) does not allow Debtor to claim the homestead exemption in the Property. On October 5, 2023 Gary Farrar, the Chapter 7 Trustee ("Trustee"), filed a joinder pleading in this case, siding with Creditor. For reasons discussed further below, the Chapter 7 Trustee and Creditor's Objections are sustained, and the claimed exemptions are disallowed.

CREDITOR'S OBJECTION

Creditor filed its Objection to Debtor's Claimed Homestead Exemption on June 16, 2023. Dckt. 81. In its Objection, Creditor states:

1. Debtor does not reside in the Property and has not continuously resided in the Property from the date Creditor's judicial lien attached to the Property.
2. Debtor also did not reside at the Property on the petition date.
3. Instead of living at the Property, Debtor rents it out.
4. As such, Debtor may not claim the homestead exemption in the Property.

Dckt. 81.

Creditor's counsel provides his Declaration in support of the Objection. Dec.; Dckt. 83. In it, Creditor's counsel testimony, identified by the paragraph numbers used in the Declaration, includes:

3. He authenticates Exhibit B, which are portions of Debtor's tax returns he received from Debtor.
4. At the 341 Meeting of Creditors, Debtor testified that he was looking for tenants to live in the Property, and that he typically rents out 85% to 90% of the Property.

Declaration; Dckt. 83.

On October 5, 2023, the Chapter 7 Trustee filed a Joinder to the Objection to Claim of Exemption. The Trustee does not state the basis by which he can "Join" the objection with the objecting creditor.

The Trustee's pleading appears to be a statement in support of the Objection, much in the nature of a separate Objection for the Trustee. In this pleading, the Trustee states:

1. Debtor has failed to establish by a preponderance of the evidence that he is entitled to claim a homestead exemption in the Property.
2. Debtor's tax returns for 2019, 2020, and 2021 list the Property as a rental property, claiming zero days of personal use.
3. Debtor's bank statements for the years 2019, 2020, 2021, and 2022 state the Debtor's address as PO Box 3406, Merced, California 95344, only until October 2022, one month before filing this case.

Dckt. 166.

Trustee first provides his Declaration in which his testimony includes the following (identified by paragraph number used in the Declaration):

2. The Trustee has received copies of cover sheets and Schedules E for Debtor's 2019, 2020, and 2021 tax returns, which are filed as Exhibits A, B, and C.

3. The Trustee received from Debtor profit and loss statements showing Debtor had rental income from the Property of \$2,800.00 in September 2022, \$2,500.00 in October 2022, and \$1,500.00 in November 2022, with copies of such filed as Exhibit D.
4. The Trustee received from Debtor bank statements for the four years preceding the filing of this Bankruptcy Case, which show Debtor's address as P.O. Box 3406, Merced, California, until the month of October 2022, which was one month prior to the filing of the present Bankruptcy Case. The cover pages for the bank statements are filed as Exhibit E.

Declaration; Dckt. 167.

The Declaration of Nora Bakken, a legal assistant at the Trustee's counsel's law firm, is filed, in which she testifies that she transcribed the audio recording of the 341 Meeting of Creditors and her transcription is filed as Exhibit F.

The Trustee's third Declaration is provided by his counsel, Loris Bakken, Esq. Dckt. 169. In it, her testimony, identified by the paragraph number in the Declaration, includes:

2. Counsel recovered from counsel for Creditor copies of billing statements and records that she heard Creditor's counsel say that Creditor obtained them by a subpoena. Copies of the billing statements that she heard Creditor's counsel say were obtained pursuant to a subpoena are filed as Exhibit G.

Neither Creditor nor Trustee asserts or provides evidence that Debtor lived at a different location than the Property.

DEBTOR'S RESPONSE TO CREDITOR'S OBJECTION

Debtor filed a Response to Creditor's Objection on July 22, 2023. Dckt. 131. In his Response, Debtor states:

1. Debtor's claim of the homestead exemption in the Property is proper because Debtor has continuously resided at the Property.
2. Evidence shows that Debtor's mailing address is at the Property.
3. Debtor only rents part of the house, which does not negate the homestead exemption.

Dckt. 131.

Debtor provides his Declaration in opposition to the Objection to Claim of Exemption, which testimony, identified by paragraph number used in the Declaration, includes:

2. Debtor completed construction on the home on the Property in 2003 and Debtor has resided at "my homes" (plural) since that time.

3. The Property is and has been Debtor's residence since 2003.
4. The Property does not have a "normal 'mailbox'" and Debtor must maintain a P.O. Box.
6. Since Debtor's daughters went off to college, Debtor has attempted to rent out part of the Property.
12. Notwithstanding renting out portions of the Property, Debtor has resided in it since 2003.
13. The Trustee has visited the Property.

CREDITOR'S REPLY TO DEBTOR'S RESPONSE

Creditor filed a Reply to Debtor's Response on October 5, 2023. Dckt. 172. In its Reply, Creditor states:

1. Evidence shows that at the time Creditor's abstract of judgment attached to the Property, Debtor did not reside in the Property. Debtor did not reside in the Property at all from October 2017 through October 2018.
2. Debtor has not otherwise continuously lived at the Property since 2017.
3. Creditor is at least entitled to an evidentiary hearing on this matter.

Dckt. 172. In the Reply, Creditor does not clearly identify what "evidence shows" that Debtor did not reside in the Property.

DEBTOR'S OPPOSITION TO TRUSTEE'S JOINDER

Debtor filed an Opposition to Trustee's Joinder on October 12, 2023. Dckt. 183. In his Opposition, Debtor states:

1. Trustee's joinder is not appropriate because Trustee has not requested the court's permission to join.
2. Any evidentiary hearing should be set as "Material Issues of Material Fact(s) Exist."

Dckt. 183.

DISCUSSION

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

presumptively valid exemption, the burden of production then shifts to the debtor to produce unequivocal evidence to demonstrate the exemption is proper. *In re Elliott*, 523 B.R. 188, 192 (9th Cir. B.A.P. 2014). The burden of persuasion, however, always remains with the objecting party. *Id.*

Cal. Civ. Pro. Code § 704.710(c) defines the homestead dwelling for purposes of the homestead exemption under California law. It states in relevant part:

(c) “Homestead” means the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead.

Cal. Civ. Pro. Code § 704.710(c).

In this case, the objecting parties, Creditor and Trustee, have presented enough evidence to rebut the presumption that Debtor’s claimed homestead exemption is valid. The record shows that Debtor’s own tax returns list the Property as a rental property in the years immediately preceding this bankruptcy case, and Debtor’s bank statement’s list his mailing PO box in Merced, California, not at the Twain Harte PO box near the Property. Exhibits A-C, Dckt. 170. Importantly, Debtor must fulfill both qualifiers in Cal. Civ. Pro. Code § 704.710(c) for the Property to be eligible for the homestead exemption. Creditor has shown that Debtor is unable to prove one or both elements. Creditor has presented evidence that its judgment lien attached to the Property during the time in which the Debtor did not reside in the Property, and Debtor has not lived continuously in the Property thereafter.

The Schedule E Tax Return Information filed by the Trustee as Exhibits A, B, and C, Dckt. 170, include the following information:

- A. 2019 Schedule E lists rental properties of 1027 W 18th Street, Merced, California; 1035 W 18th Street, Merced California; 125 W. Michigan Ave, Marshall, MI., 115 Greet St, East Marshall, MI, and 23955 Cedar Hill Ln, Twain Harte, CA (the Property at issue).
 - 1. For each of these the “Fair Rental Days” are stated to be 365, 365, 280, 365, and 365 days, respectively. The “Personal Use Days” for each are stated to be 0 days.
 - a. This includes stating that there were 0 personal use days for the Property.
 - 2. The same information, including stating that the Property has 366 and 365 “Fair Rental Days” and 0 “Personal Use Days” for the Property is included on the Schedules E for the 2020 and 2021 Tax Returns.

Exhibit A; Dckt. 170.

Several examples of addresses as shown on Exhibit E, the cover pages of the bank account first pages includes the following:

Wells Fargo Bank Account Statement for October 2022,
Addressed to Debtor at

John P Mendoza
DBA JPM Developments
23955 Cedar Hill Lane
Coinheart [sic] CA 95383

Dckt. 170 at 15.

Wells Fargo Bank Account Statements for September 2022 - August 2022

Addressed to Debtor at

John P. Mendoza
DBA JPM Developments
710 W 18th ST STE 6
Merced, CA 95340-4629

Id. at 16 - 17.

Mechanics Bank Statements for January 2022 - April 2022

Addressed to Debtor at

John P. Mendoza
Maria Ornlas
P.O. Box 3406
Merced, CA 95344-1406

Id. at 18 - 21

Mechanics Bank Statements for May 2022 - July 2022

Addressed to Debtor at

John P. Mendoza
JPM Developments
P.O. Box 3406
Merced, CA 95344-1406

Id. at 22 - 24.

Mechanics Bank Statements for August 2022 - December 30, 2022

Addressed to Debtor at

John P. Mendoza

JPM Developments
710 W 18th ST Ste 6
Merced, CA 95340-4629

Id. at 25 - 29. What is located at this street address has not been identified by the Parties.

Both the Debtor and Creditor have requested an evidentiary hearing on the Objection.

At the October 18, 2023 hearing, **XXXXXXX**

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 Objection to Claimed Exemptions filed by WVJP 2021-4. LP (“Creditor”) and The Chapter 7 Trustee, Gary Farrar (“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 Objection is **XXXXXXX**.

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

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Trustee, parties requesting special notice, and creditors on July 14, 2023. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<p>The hearing on the Motion to Dismiss is XXXXXX.</p>
--

The United States Trustee, Tracy Hope Davis ("U.S. Trustee"), seeks dismissal of the case under 11 U.S.C. § 707(b)(1) and (b)(3)(B), based on the following grounds stated with particularity (Fed. R. Bank. P. 9013), as summarized by the court (except when the test is set in "quotation marks"), identified by paragraph number used in the Motion:

1. "The Debtors' case should be dismissed under 11 U.S.C. §§ 707(b)(1) and 707(b)(3) because their disposable income is sufficient to pay a meaningful portion of their debts."

Further, that Debtor's monthly income and expenses as stated on Schedules I and J are sufficient to pay all unsecured claims in full in less than 20 month.

2. The Motion is based on:
 - a. The Points and Authorities,
 - b. Exhibits, and
 - c. Everything else filed in this Bankruptcy Case.

The Declaration filed with the Motion states many “grounds” with particularity which are required to be stated with particularity in the motion. Dckt. 24. The same is true for the Points and Authorities, which states with particularity grounds and facts, which must be stated with particularity in the Motion. Dckt. 24.

Grounds Stated in Motion

U.S. Trustee has not provided any grounds, merely unsupported conclusions of law. The insufficient statements made by U.S. Trustee are:

- A. The Debtors’ case should be dismissed under 11 U.S.C. §§ 707(b)(1) and 707(b)(3) because their disposable income is sufficient to pay a meaningful portion of their debts.
- B. The Debtors’ actual monthly net income, as stated on their Schedule I and Schedule J, is sufficient to pay unsecured claims in full in less than 20 months.
- C. Thus, dismissal is warranted under 11 U.S.C. § 707(b)(3)(B).

Those “grounds” are merely a conclusion of law by U.S. Trustee. Presumably, U.S. Trustee believed that the court would make those conclusions, but the “grounds” cannot merely state the anticipated conclusions.

DEBTOR’S OPPOSITION

Debtors Marco Vinicio Alatorre Zamora and Mireya Alatorre (“Debtor”) filed an Opposition on August 24, 2023. Dckt. 27. Debtor states:

- 1. U.S. Trustee has failed to file and provide notice of their Statement of Presumed Abuse, which is required prior to filing a motion to dismiss under 11 U.S.C. § 704(b)(2).
- 2. Debtor’s monthly income throughout the year is less than the period U.S. Trustee reviewed, due to Debtor’s lay-off period.
- 3. U.S. Trustee has not provided facts to support Debtor acted in bad faith.

U.S. TRUSTEE’S REPLY TO DEBTOR’S OPPOSITION

U.S. Trustee filed a Reply to Debtor’s Opposition on August 31, 2023. Dckt. 27. In her response, U.S. Trustee states:

- 1. Despite Debtor suggesting to the contrary, a debtor’s ability to repay a meaningful portion of their debts justifies dismissal under 11 U.S.C. § 707(b)(3).

2. Debtor has disposable income to pay creditors and has demonstrated a likelihood of sufficient future income to repay their creditors.

Dckt. 30.

DISCUSSION

U.S. Trustee's Failure to File Statement Regarding Presumption of Abuse, § 704(b)(1)(A)

Under 11 U.S.C. § 704(b)(1)(A), the United States trustee is required to file a statement within 10 days of the first meeting of creditors that advises the court whether a debtor's case would be presumed abuse under § 707(b). The statement must be filed by the United States trustee in every case. 6 Collier on Bankruptcy P 704.16 (16th 2023).

When reading the plain language of the code, both the statement and the motion to dismiss referred to in § 704(b)(2) relate to the United States trustee's right to bring a motion to dismiss where the presumption of abuse exists, not in cases brought to dismiss under the totality of circumstances. *See also Fokkena v. Draisey (In re Draisey)*, 395 B.R. 79, 82 (B.A.P. 8th Cir. 2008). Therefore, if the United States trustee fails to file the statement on time, they may not seek to dismiss the case based on a presumption of abuse under § 707(b)(2), however, they may still seek dismissal under § 707(b)(3). 6 Collier on Bankruptcy P 704.16 (16th 2023); *See also Fokkena v. Draisey (In re Draisey)*, 395 B.R. 79, 82 (B.A.P. 8th Cir. 2008) ("Filing the § 704(b)(1) statement is a condition precedent to filing a motion to dismiss under § 707(b)(2), not to filing a motion to dismiss under § 707(b)(3)(B).").

Here, the U.S. Trustee seeks to dismiss the case pursuant to 11 U.S.C. §§ 707(b)(1) and (b)(3)(B), not § 704(b)(2). Although the U.S. Trustee was required to file a statement regarding the presumption of abuse and failed to do so, the court does not find that the failure to file the statement precludes the U.S. Trustee from bringing this Motion.

Grounds to Dismiss under 11 U.S.C. §§ 707(b)(1) and (3)

Pursuant to 11 U.S.C. § 707(b)(1), after notice and hearing, the court may dismiss or convert a Chapter 7 case if it finds that granting of relief would be an abuse of the provisions of the chapter. Section 707(b)(2) governs when a court can presume there is an abuse of the provisions of the chapter. Section 707(b)(3), however, governs when there is no presumption of abuse, and rather gives the court discretion to determine whether the petition was filed in bad faith or, under the totality of circumstances, whether debtor's financial situation demonstrates abuse.

Here, U.S. Trustee argues grounds exists under § 707(b)(3) to dismiss the case. In U.S. Trustee's Memorandum of Points and Authorities, Dckt. 25, U.S. Trustee states Debtor's disposable income is \$3,256.24, which would pay off Debtor's scheduled unsecured debt of \$63,351.00 in twenty (20) months. Additionally, U.S. Trustee states that Debtor has demonstrated an ability to pay as debtor Marco Vinicio testified that they are working full time again with their employer of almost twenty (20) years with regular overtime.

Debtor, however, argues that their monthly income fluctuates throughout the year. Opposition, Dckt. 27. Debtor argues their monthly income for 2022 was \$6,568.00, their monthly income for 2021 was \$7,091.74, and their monthly income for 2020 was \$6,797.45. Debtor, curiously, admits if they use their disposable income from 2022, it would take them fifty (50) months to pay off their unsecured claims.

Debtor's Declaration in support of their Opposition states, under penalty of perjury, that their income for this year will be similar to that of 2022, or less. Declaration of debtor Mario Vinicio, Dckt. 28 ¶ 7. Debtor does not indicate why their income for this year will be less than in 2022.

Debtor states they anticipate their disposable income is about \$1,542.00. Declaration, Dckt. 28. This is inconsistent with Debtor's Schedule I/J. Dckt. 1.

Debtor's Schedule I/J, also stated under penalty of perjury, states that as of the date of filing the form, the estimated monthly income is \$8,532.53 while the amount of net income is \$3,256.24. Debtor states, under penalty of perjury, that they do not expect an increase or decrease of their monthly income or monthly expenses within the year after filing the form. Schedules I/J, Dckt. 1. Now, Debtor states they *do* anticipate a decrease in income, due to an anticipated slowdown in debtor Marco Vinicio's work.

The court reminds Debtor and their Counsel that, pursuant to Federal Rules of Bankruptcy Procedure 9011(b), by presenting to the court a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge:

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Failure to comply with the above is grounds for sanctions. Federal Rules of Bankruptcy Procedure 9011(c),

Even if Debtor's Schedules were inaccurate, and Debtor did anticipate a monthly income of only \$6,568.00, and a net income of only \$1,542.00, Debtor's total amount of secured claims total \$15,640.00, while their unsecured claims total roughly \$63,351.00. Schedules D, E/F, Dckt. 1. Thus, Debtor's total debt is roughly \$78,991.00.

Trustees fees and administrative expenses for a Chapter 13 case are roughly 7.2%. Additionally, attorney's fees are roughly \$4,000. If Debtor were to fund a Chapter 13 Plan, based on a 100% plan, Debtor's trustees fees, administrative expenses, and attorney's fees would be an estimated additional \$9,687.35, bringing a total of what would be needed to be paid through the plan of \$88,678.35. To fund a 100% Plan, Debtor's disposable income would need to be roughly \$1,477.97 (\$88,678.35 / 60 months).

Debtor's disposable income, even from their 2022 figures at \$1,542.00, appear to be enough to fund a 100% Plan.

At the hearing, the Parties agreed to continue the hearing on the Motion to Dismiss, and the Motion is continued to 10:30 a.m. on October 19, 2023. Debtor shall file an Amended Schedule I and provide the U.S. Trustee with income information showing the actual average monthly income of Debtors (which shall average the monthly overtime over the year) on or before September 28, 2023, and Reply Pleadings, if any, shall be filed and served by October 12, 2023.

OCTOBER 12, 2023 U.S. TRUSTEE RESPONSE

On October 12, 2023 U.S. Trustee filed a Response in the wake of the September 7, 2023 hearing, updating the court on what has since transpired. Response, Dckt. 35. U.S. Trustee filed the Declaration of Laurie Brugger in support of this Response. Declaration, Dckt. 36. In her Response, U.S. Trustee states:

1. Debtor appears to have \$2,370.87 in monthly net income available for payments to creditors, according to their amended Schedule I and subtracting Schedule J expenses. Therefore, Debtor should have its case dismissed under 11 U.S.C. § 707(b)(3) because it has sufficient income to make payments.
2. In defiance of this court's September 12, 2023 Order, Debtor has not provided adequate support or documentation for its Amended Schedule I. Even still, taking the Amended Schedule I as accurate, Debtor still has \$2,370.87 available to make monthly payments.

Dckt. 35.

October 19, 2023 Hearing

On October 10, 2023, Debtor filed an Amended Schedule I. Dckt. 34. On it, Debtor lists having gross monthly income of \$9,692 a month. After withholding and deductions, Debtor's monthly take home income is \$7,647. *Id.* at 2.

Schedule J filed on April 10, 2023 (the court could not identify an amended Schedule J on the Docket) states that the two debtors and their two children have monthly expenses of (\$5,276). Dckt. 1 at 30-31. This indicates that there is \$2,200 in monthly projected disposable income.

The court notes that Debtor, represented by the same counsel as in the present case, filed a Chapter 7 Bankruptcy Case on July 30, 2014. Case 14-91090. The two debtors were granted their Chapter 7 discharge in Case 14-91090 on November 10, 2014.

The current Bankruptcy Case was filed on July 31, 2023, nine years after the filing of the 2014 case. 11 U.S.C. § 727(a)(8) bars the granting of a discharge in a Chapter 7 case if a Chapter 7 discharge was granted in debtor in a prior case filed within eight years of the current case.

Looking at Debtor's Schedule A/B, no real property interests are listed by Debtor. Amended Schedule A/B; Dckt. 17 at 1. On Amended Schedule A/B, Debtor's personal property assets total \$32,767. *Id.* at 1-7.

Reviewing Schedule J, Debtor (as opposed to many other debtors) appears to be more realistic (higher side) on expenses, including \$1,800 for food and housekeeping supplies, \$600 for transportation, \$150 for entertainment, \$210 for clothing and laundry, \$397 for phone/internet/cable a month. *Id.* at 30-31.

Looking at Schedule D, Debtor lists one creditor, Toyota Financial Services, whose (\$15,640) claim is secured by Debtor's 2020 Toyota Camry. Dckt. 1 at 17. The monthly payment for this claim is provided in Schedule J. On Schedule E, Debtor lists (\$63,351) in general unsecured debt. *Id.* at 18 -24.

If Debtor had only 50% of the projected disposable income to fund the plan with each month, \$1,100, then a 60 month plan would generate \$66,000 for payment to creditors holding general unsecured claims. After deducting 8% for Chapter 13 Trustee fees and administrative expenses, that would leave \$60,000 to pay creditors with general unsecured claims. That would be a 90.9% general unsecured claim dividend - an almost unheard of number in Chapter 13 cases.

With Debtor's actual projected disposable income of \$2,200 a month, Debtor would be done with the Chapter 13 case and paying a 100% dividend to creditors with unsecured claims in less than three years.

Looking at Schedule F, the unsecured debt appears to be substantially credit card debt (as opposed to medical expenses, failed business expenses, and the like). Debtor does list some student loan debt, but those amounts total approximately \$1,360 and date back to 2002 and 2004.

Considering the totality of the circumstances, Debtor using Chapter 7 is an abuse of the provisions of Chapter 7. While Debtor offers the argument that Debtor was out on disability for a while (only four months), that is not the reason for what appears to be substantial consumer debt run up by Debtor.

Looking at the pattern of conduct, it appears that Debtor may be establishing an eight year Chapter 7 filing cycle, using the period between cases (when obtaining a Chapter 7 discharge is barred) to run up consumer debts and maintain a credit funded lifestyle.

As the Debtor notes, the median income for a family of four, as reported by the U.S. Trustee on its website, in California was \$122,707 when this case was filed. On Amended Schedule I Debtor's combined monthly gross income is \$9,692, which is \$116,304 annually. While not quite \$122,707, it is knocking on the door. Thus, while Debtor could possibly justify a three year Chapter 13 Plan (see 11 U.S.C. § 1325(b)(4) computation of applicable commitment, that does not mean that \$116,000 a year in income is irrelevant to a consideration of abuse.

The court notes that on the Debtor's Chapter 7 Statement of Current Monthly Income, Dckt. 1 at 42-44, Debtor computes their currently monthly income for the year as \$121,508, even higher than that as based on Amended Schedule I. Debtor's computation is 99.02% of the median income for a family of four.

If determined to be abusing the extraordinary relief granted under Chapter 7, Debtor is not left without possible bankruptcy relief. Debtor can prosecute a Chapter 13 Plan. From their income, Debtor can spend whatever is reasonable and necessary for their family expenses. Then, only from what is left over after

all expenses are provided for, will a plan be funded. If able to limit the Plan to only three years based on Debtor's income, it appears that Debtor would still be able to fund a 100% plan (assuming that Debtor's expense information is accurate).

Debtor's argument (Opposition, p. 7:9-10; Dckt. 27) that if their disposable income was only \$1,291 as projected by the U.S. Trustee, it would take them the extraordinary period of fifty (50) months to pay a 100% dividend to creditors with general unsecured claims. That is not only less than the maximum period of a Chapter 13 plan, but shows an extraordinary financial ability for a debtor. Rather than showing no abuse, that argument demonstrate how the use of Chapter 7 by this Debtor is an abuse of Chapter 7 of the Bankruptcy Code.

Though within one percent of the presumption of abuse standard, Debtor's income is not sufficient to create a presumption of abuse. The US Trustee's arguments focus on the Debtor having some funds to pay a plan, thus it should be an abuse of Chapter 7 if they do not.

Other factors showing an abuse of Chapter 7 were stated at the hearing, including **XXXXXXX**

At the hearing, **XXXXXXXXXXXX**

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 Dismiss the Chapter 7 case filed by the United States Trustee, Tracy Hope Davis ("U.S. 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 Dismiss is **XXXXX**.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor Sawtantra Chopra, Debtor (*pro se*), creditors that have filed claims, parties requesting special notice, other parties in interest, and Office of the United States Trustee on September 1, 2023. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 5-1 of Sawtantra K. Chopra, MD is sustained, and the claim is disallowed in all amounts in excess of \$200,000.00.

Irma Edmonds, the Chapter 7 Trustee, ("Objector") requests that the court disallow the claim of Sawtantra K. Chopra, MD ("Creditor"), Proof of Claim No. 5-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of \$300,000.00. Objector asserts that Creditor is overestimating its claim by at least \$100,000.00. Declaration, Dckt. 200.

DISCUSSION

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

re Wylie), 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Once a party has objected to a proof of claim, the creditor asserting the claim may not withdraw the claim except on order of the court. FED. R. BANKR. P. 3006.

Objector states that Creditor filed a Proof of Claim seeking \$300,000.00 for a loan Creditor made to Debtor on the basis that the Claim is entitled to priority as an employee benefit plan contribution under 11 U.S.C. § 507(a)(5) because the Claim is for pension payments. However, Creditor has failed to provide the Trustee with any documentation or foundation that substantiates the Claim is entitled to priority as an employee benefit plan contribution under 11 U.S.C. § 507(a)(5).

Rather, the Claim appears to be for an unsecured non-priority loan to Debtor. Trustee argues that even if Debtor's loan payments for the Claim are made to Creditor's pension plan, the Claim is still not entitled to priority under 11 U.S.C. § 507(a)(5) because 11 U.S.C. § 501(a)(5) covers contributions made to an employee benefit plan maintained by debtor, not payments made to a claimant's employee benefit plan that is not maintained by the Debtor. Dckt. 198.

Declaration of The Trustee

Trustee Irma Edmonds files her Declaration in support of the Objection. Dec.; Dckt. 200. The court first notes that while the Trustee states in the first paragraph that she has personal knowledge of her testimony, she then qualifies it by stating "I base the statements made in this declaration on the information available to me and my belief." Dec., ¶ 1; Dckt. 200. Thus, this Declaration may be little more than the Trustee saying that somebody "informed her," that such "information" would lead the Trustee to win, and therefore the Trustee "believes" it because she will win.

The Trustee then provides her personal knowledge/belief testimony to state to the court:

- A. The Trustee provides the court with her factual finding and legal conclusion that the Proof of Claim is not properly substantiated. Dec., ¶ 4; Dckt. 200.
- B. The argument that Creditor has failed to proffer evidence to show an entitlement to a priority claim pursuant to 11 U.S.C. § 507(a)(5).
- C. Testimony directing the court to Creditor's Proof of Claim documenting that a payment of \$50,000 was made to Creditor.

Exhibit A is a copy of Creditor's Proof of Claim 5-1.

Furthermore, Objector states that Claimant seeks to recover \$300,000.00 from Debtor, whereas the Promissory Note provides that Creditor loaned debtor \$250,000.00, and Debtor has already paid \$50,000.00 of that loan. Therefore, Creditor seeks repayment of over \$100,000.00 of that loan without providing any explanation or documentation in support of the drastic increase. *Id.*

Review of Proof of Claim 5-1

Proof of Claim 5-1 filed by Creditor states the claim to be in the amount of \$300,000, with an interest rate of 6%. POC 5-1, ¶ 7, 9. Page 4 of Proof of Claim 5-1 provides copies of two checks, each in the amount of \$25,000.00 made payable to Dr. S. Chopra. The two checks are dated August 30, 2016. The Checks are on a Farmers & Merchants Bank account for which Daljeet Mann, the Debtor, is identified as the account owner.

Page five of Proof of Claim 5-1 is a promissory note made payable to “Sawtantra K. Chopra, MD, Inc., Pension Plan & Trust, which is identified as the lender. Debtor and Jagtar Singh Otal are identified as the Borrowers. The note does not state the amount of the loan made to Debtor, but states that the following payments will be made:

1. \$50,000.00 from First Commerce Title, Inc. on or before August 30, 2016. (This is consistent with the dates and amount of the two checks identified above.)
2. \$50,000.00 from Borrowers on or before August 30, 2017.
3. \$50,000.00 from Borrowers on or before August 30, 2018.
4. \$50,000.00 from Borrowers on or before August 30, 2019.
5. \$50,000.00 from Borrowers on or before August 30, 2020.

No interest rate is stated in the Note and no principal amount upon which an interest rate may be computed is stated. It may well be that any interest rate is built into the Note itself.

Upon reviewing the Proof of Claim 5-1 and attachments thereto, the court determines that the obligation on the Note was to make payments totaling \$250,000.00 over five equal payments of \$50,000.00 each made annually on or before August 30th of the years 2016, 2017, 2018, 2019, and 2020. The Note does not state the principal amount of any loan, but only the payments to be made under the Note.

Creditor provides evidence that \$50,000.00 was paid on August 30, 2016 - the two checks of which copies have been provided on page four of Proof of Claim 5-1. This reduces the amount of the obligation owed to Creditor to \$200,000.00.

Proof of Claim 5-1 provides no basis for the claim to be stated in the amount of \$300,000.00 or for there to be interest at 6% computed on the pre-petition claim.

With respect to the asserted priority pursuant to 11 U.S.C. § 507(a)(5), the court further agrees with the Trustee and finds that the Claim is not entitled to priority as an employee benefit plan contribution under 11 U.S.C. § 507(a)(5). Congress provides that for this priority the claim must be as follows:

5) Fifth, allowed unsecured claims for **contributions to an employee benefit plan**—

(A) arising **from services rendered within 180 days before the date of the filing of the petition** or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by \$15,150; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(5) [emphasis added]. This priority is only for contributions made to an employee benefit plan, not for loan payments made on an investment made by the benefit plan. Further, the contribution must arise from services rendered within 180 days before the filing of the bankruptcy petition. There were no “services rendered” for which these contributions were to be made within 180 days of the filing of the bankruptcy petition in this Case. ^{FN.1.}

FN. 1. As discussed in Collier on Bankruptcy, the types of employee benefit plans covered under 11 U.S.C. § 507(a)(5) are “pension plans, health insurance plans, and life insurance plans. . . [that] fall into two categories. The first are self-insured plans where employees are reimbursed for expenses incurred by them that are covered by the employee benefit program. . . The other common category of employee benefit plans is that in which the employer maintains insurance programs for the benefit of the employees.” 7 COLLIER ON BANKRUPTCY ¶ 507.07.

Creditor has not submitted any evidence or provided a legal basis that the payment due on a Note for which the lender (investor) was Creditor’s Pension Plan and Trust is a contribution to an employee benefit plan entitled to priority.

The Trustee’s Objection is sustained and the Proof of Claim 5-1 is disallowed for all amounts in excess of \$200,000.00, and is disallowed as a priority claim and allowed only as a general unsecured claim.

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 Objection to Claim of Sawtantra K. Chopra, MD (“Creditor”), filed in this case by Irma Edmonds, the Chapter 7, (“Objector”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 5-1 of Creditor is sustained, and: (1) the claim is disallowed for all amounts in excess of \$200,000.00; (2) is disallowed as a priority claim, and (3) is allowed only as a general unsecured claim.

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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 12 Trustee, attorneys of record who have appeared in the bankruptcy case, all creditors and parties in interest, parties requesting special notice, and Office of the United States Trustee on October 5, 2023. By the court's calculation, 14 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

Though seven days short of the required 21 days notice, the court notes that the proposed sale is in the best interest of the bankruptcy estate because it would pay the secured creditors with liens on the Property in full as well as leave sufficient funds to pay the 2023 plan payment. Motion to Sell, Dckt. 431. The court also notes that the issue is time sensitive, with closing being required by October 24, 2023. *Id.* In light of the sale being in the best interest of the bankruptcy estate, the court shortens the notice period to the 14 days given. However, the court reminds Movant of the requirement for adequate notice as provided in Federal Bankruptcy Procedure 2002(a)(2) and Local Bankruptcy Rule 9014-1(f)(2).

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, creditors, the Chapter 12 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 free and clear of liens is granted.

The Bankruptcy Code permits Jeffrey E. Dyer and Jan Wing-Dyer, the Debtor in Possession, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant

proposes to sell the real property commonly known as 1575 Bay Flat Road, Bodega Bay, California 94923 (“Property”).

The proposed purchaser of the Property is Patricia A. Henderson, and the terms of the sale are:

- A. Sales price in the amount of \$1,175,000 paid in cash; verification of all cash to be proven by buyer within 14 days of acceptance.
- B. Close of escrow to be 21 days or sooner; the counter-offer acceptance was dated October 4, 2023, thereby indicating a closing date of October 25, 2023 at the latest.
- C. Debtor in Possession, Jeffrey Dyer, is self-representing as the seller’s real estate agent, and Debtor in Possession will forfeit any commission into the Plan and costs of closing; the buyer’s real estate agent is to receive a commission of 2.5% of the final purchase price.
- D. An earnest money deposit of \$30,000.
- E. All furniture and household items/fixtures, including decor, are included in the sale.
- F. As is, where is without any warranty express or implied.

Sale Free and Clear of Liens

The Motion seeks to sell the Property free and clear of the liens of two creditors, First Community Credit Union, and Rabo AgriFinance LLC (“Creditors”). The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

(f) The debtor in possession may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(1)–(5).

The language of 11 U.S.C. § 363(f) is in the disjunctive, meaning the sale may occur if any one of the conditions have been met. For this Motion, Movant has established proper grounds for Sale Free and Clear of Liens. Specifically, Debtor has shown that the money generated from the sale is greater than the aggregate value of all liens on such property, in accordance with 11 U.S.C. § 363(f)(3). The proposed sale would generate \$1,175,000.00 in cash, while the aggregate value of the liens on the Property is \$653,721.00.

Need for Sale Free and Clear

The Motion does not state a reason why a sale free and clear is needed for creditors First Community Credit Union and Rabo Agrifinance LLC, as opposed to the two creditors presenting their demands and reconveyances into escrow.

Rabobank, N.A. has filed Amended Proof of Claim 11-3 on October 9, 2020, in the amount of \$2,575,719.92, listing its collateral as real property and personal property, including the real property to be sold. The Motion states that Rabo Agrifinance has agreed to accept \$393,963 of the sales proceeds to release its security interest in the Property.

First Community Credit Union has not filed a Proof of Claim in this Case.

The Motion states that from the sales proceeds First Community Credit Union will be paid approximately \$259,758, the full amount of its secured claim, and Rabo AgriFinance, LLC will be paid the release price of \$393,963. These both appear to be paid directly from escrow.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the secured creditors with liens on the Property will be paid in full with proceeds generated by the sale of the Property, and sufficient remaining funds will be available for the 2023 plan payment.

Movant's commission, as the listing broker, is being credited back and will be distributed to the costs of sale and the payment of real estate commissions. Supplement to Motion, Dckt. 437. The realtor representing the buyer will receive a 2.5 percent broker's commission from the sale of the Property, equaling approximately \$29,375. As part of the sale in the best interest of the Estate, the court permits Movant to pay the realtor representing the buyer an amount not more than 2.5 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 Debtor does not anticipate

any opposition to this motion, Debtor has been listing the Property for months preceding the sale, and because the sales agreement contains no financing or inspection contingencies.

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.

At the hearing, **XXXXXXX**

Counsel for Movant Debtor in Possession shall prepare and lodge with the court a proposed order consistent with the forgoing ruling.

The court's draft of a possible order is:

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

The Motion to Sell Property filed by Jeffrey E. Dyer and Jan Wing-Dyer, the Debtor in Possession, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Jeffrey E. Dyer and Jan Wing-Dyer, the Debtor in Possession, is authorized to sell pursuant to 11 U.S.C. § 363(b) and (f)(3) to Patricia A. Henderson or nominee ("Buyer"), the Property commonly known as 1575 Bay Flat Road, Bodega Bay, California 94923 ("Property"), on the following terms:

- A. Sales price in the amount of \$1,175,000 paid in cash; verification of all cash to be proven by buyer within 14 days of acceptance.
- B. The sale is authorized to be made pursuant to 11 U.S.C. § 363(f)(3) free and clear of the liens of:
 1. First Community Credit Union arising under the Deed of Trust recorded on **XXXXXXX** and
 2. Rabo AgriFinance, LLC arising under the Deed of Trust recorded on **XXXXXXX** .
 3. The respective liens of First Community Credit Union and Rabo AgriFinance, LLC in the Property shall attach to the proceeds of the sale in the same priority and amount as they existed in the Property and as provided below that is being sold free and clear of the liens.
 4. First Community Credit Union shall be paid from escrow in full from the sales proceeds in the amount stated in the written demand made to escrow by First Community Credit Union.

5. Rabo AgriFinance, LLC shall be paid \$393,963.00 from escrow from the sales proceeds as the release price for its lien on the Property and it shall have no further lien on the proceeds of the sale of the Property.
 6. If a dispute should exist as to the payment amount to First Community Credit Union, the sales proceeds in the full amount of the First Community Credit Union demand and any surplus proceeds after payment of all closing costs, expenses, and other liens paid shall be held in escrow pending further order of this court.
- C. The Buyer's real estate agent is authorized to receive a commission of not more than 2.5% of the final purchase price.
 - D. All furniture and household items/fixtures, including decor, located on the Property are included in the sale.
 - E. The Sale of the Property is where is and as is, without any warranty express or implied.
 - F. After payment of the closing costs, expenses, and fees, and the payments on the two secured claims for First Community Credit Union and Rabo AgriFinance, LLC, except and unless there is a dispute as to the First Community Credit Union secured claim demand amount and the proceeds must be held in escrow pending further order of the court, all remaining sales proceeds may be disbursed from escrow to the Debtor in Possession

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