

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Wednesday, October 21, 2020
Place: Department A - Courtroom #11
Fresno, California

ALL APPEARANCES MUST BE TELEPHONIC
(Please see the court's website for instructions.)

Pursuant to District Court General Order 618, no persons are permitted to appear in court unless authorized by order of the court until further notice. All appearances of parties and attorneys shall be telephonic through CourtCall. The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

1. [20-10010](#)-A-11 **IN RE: EDUARDO/AMALIA GARCIA**
[LKW-15](#)

MOTION TO EMPLOY ASU COMMERCIAL AS REALTOR(S)
9-24-2020 [[292](#)]

EDUARDO GARCIA/MV
LEONARD WELSH/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order after the hearing.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Debtors in possession Eduardo Zavala Garcia and Amalia Perez Garcia (collectively, "Debtors" or "DIP") move pursuant to 11 U.S.C. § 327(a) for authorization to employ ASU Commercial ("Broker") to serve as a real estate broker in connection with the sale of agricultural real property located in Kern County, California, including 398.18 acres of irrigated farmland and 474.62 acres of grazing land identified as the Hacienda Ranch, the Pole Barn Ranch, and the Grazing Land (together, the "Property"). Doc. #292.

11 U.S.C. § 1107 gives DIP all the rights and powers of a trustee and requires DIP perform all the functions and duties of a trustee, subject to certain exceptions not applicable here. Section 327(a) of the Bankruptcy Code permits DIP to employ, with court approval, professionals "that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist" DIP in carrying out DIP's duties under the Bankruptcy Code. 11 U.S.C. § 327(a).

DIP selected Broker because of Broker's experience and expertise, and DIP believes Broker's employment is necessary to the administration of this bankruptcy case and in the best interest of all parties. Decl. of Eduardo Zavala Garcia, Doc. #296. DIP and Broker have entered into two listing agreements dated September 22, 2020 (the "Agreements"), which establish, *inter alia*, Broker's engagement for a 7-months listing period and Broker's fee of up to 4% of the sale price at closing. Doc. #294, Exs. E, F. DIP and Broker agree that any compensation is subject to the court's approval. Doc. #296; Doc. #295.

Broker has verified that it has no connection with Debtors, their creditors, attorneys, accountants, any other party in interest, or the United States Trustee, except for Broker's previous representation of Debtors in past real estate sales and Broker's employment by Debtors as set forth in the motion. Decl. of Michael Anchordoquy, Doc. #295. Broker believes it is a disinterested person as defined in 11 U.S.C. § 101(14). Doc. #295.

After review of the evidence, the court finds that Broker does not represent or hold an adverse interest to Debtors or to the estate with respect to the matter on which Broker is to be employed.

Accordingly, the court is inclined to GRANT DIP's motion to employ Broker in connection with the sale of the Property. DIP will be authorized to employ Broker, and the effective date of such employment shall be September 25, 2020. The order authorizing employment of Broker shall specify that any compensation or reimbursement from the estate is subject to the court's approval pursuant to 11 U.S.C. § 330(a).

11:00 AM

1. [20-12286](#)-A-7 **IN RE: DELMA FRUTOZ**

PRO SE REAFFIRMATION AGREEMENT WITH CITIMORTGAGE, INC.
10-5-2020 [[15](#)]

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Dropped.

ORDER: The court will issue an order.

This matter was automatically set for a hearing because the reaffirmation agreement is not signed by an attorney. However, this reaffirmation agreement relates to a consumer debt secured by real property. Pursuant to 11 U.S.C. §524(c)(6)(B), the court is not required to hold a hearing and approve this agreement.

2. [20-12493](#)-A-7 **IN RE: STEPHANIE ORTIZ**

REAFFIRMATION AGREEMENT WITH AMERICAN HONDA FINANCE CORP.
9-24-2020 [[15](#)]

TIMOTHY SPRINGER/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied.

ORDER: The court will issue an order.

Debtor's counsel will inform debtor that no appearance is necessary.

Both the reaffirmation agreement and the bankruptcy schedules show that reaffirmation of this debt creates a presumption of undue hardship which has not been rebutted in the reaffirmation agreement. Although the debtor's attorney executed the agreement, the attorney could not affirm that (a) the agreement was not a hardship, and (b) the debtor would be able to make the payments.

1. [20-11200](#)-A-7 IN RE: MANPREET/RAMANDEEP BRAR
[NES-2](#)

MOTION TO AVOID LIEN OF LEAF CAPITAL FUNDING, LLC.
9-18-2020 [[28](#)]

MANPREET BRAR/MV
NEIL SCHWARTZ/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied without prejudice.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which movants have not done.

Manpreet Brar and Ramandeep Brar (collectively, "Debtors"), the debtors in this Chapter 7 case, move pursuant to 11 U.S.C. § 522(f) and Federal Rules of Bankruptcy Procedure 4003(d) and 9014 to avoid the judicial lien of Leaf Capital Funding, LLC ("Creditor") on residential real property located at 5022 Villa Bella Lane, Bakersfield, CA 93311 (the "Property"). Doc. #28; Am. Schedule C, Doc. #16.

In order to avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under section 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in section 522(f)(1)(B). 11 U.S.C. § 522(f)(1); Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003) (quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)).

A judgment was entered against Manpreet Brar in the amount of \$24,226.51 in favor of Creditor on November 15, 2019. Ex. D, Doc. #30. The abstract of judgment was recorded with Kern County on January 22, 2020. Ex. D, Doc. #30. That lien attached to Debtors' interest in the Property located in Kern County. Doc. #28. According to Debtors' schedules, the Property is also encumbered by a security interest held by PennyMac Mortgage for \$249,026.73. Ex. C, Doc. #30. Debtors claimed a homestead exemption of \$58,000.00 in the Property under California Code of Civil Procedure § 704.730. Ex. B, Doc. #30. Debtors valued

their interest in the Property as of the petition date at \$325,000.00. Ex. A, Doc. #30.

Debtors' amended schedules reflect that, like other 11 U.S.C. § 522(f)(1) lien avoidance matters that have come before this court, reduce the value of their interest in the Property by the cost of a hypothetical sale. In Amended Schedule A/B, Debtors assert a market value for the Property of \$383,656.00, but deducted an estimated 8% costs of a hypothetical sale leaving the value of their interest in the Property at \$325,000.00 on their Schedules and for this motion. Doc. #16.

However, this approach is contrary to In re Aslanyan, which this court finds persuasive and follows, in which Judge McManus held "[l]iquidation costs or closing costs are not deducted from market value in the context of a motion to avoid a judicial lien." Case No. 17-24195-A-7, 2017 Bankr. LEXIS 4363, at *4 (Bankr. E.D. Cal. Dec. 20, 2017) (citing In re Wolmer, 494 B.R. 783, 784 (Bankr. D. Conn. 2013); In re Barrett, 370 B.R. 1, 3 (Bankr. D. Me. 2007) ("[A] bevy of courts have opted against including hypothetical sales costs and other transaction costs in the valuation of collateral for the purpose of determining the fate of a judicial lien."); In re Sheth, 225 B.R. 913, 918-19 (Bankr. N.D. Ill. 1998); In re Sumerell, 194 B.R. 818, 827 (Bankr. E.D. Tenn. 1996); In re Abrahamzadeh, 162 B.R. 676, 678 (Bankr. N.J. 1994); In re Yackel, 114 B.R. 349, 351 (Bankr. N.D.N.Y. 1990)). "When the bankruptcy court determines a debtor's exemption rights in property, 11 U.S.C. § 522(a)(2) directs it to value property at 'market value as of the date of the filing of the petition' There is no provision in section 522(a)(2) or in the statutory formula in section 522(f)(2)(A) mandating that a debtor's likely costs of sale be taken into account when ascertaining market value." Aslanyan, 2017 Bankr. LEXIS 4363, at *4.

Eliminating Debtors' deduction for the 8% estimated cost of sale, the sum of the judicial lien, all other liens on the Property, and the amount of exemption does not exceed the value of the Debtors' interest in the Property:

Amount of Leaf Capital Funding's Judicial Lien		\$24,226.51
Total amount of all other liens on the Property (excluding junior judicial liens)	+	\$249,026.73
Amount of Debtors' claim of exemption in the Property	+	\$58,000.00
Value of Debtors' interest in the Property	-	\$383,656.00
Extent of impairment of Debtors' exemption in the Property	=	(\$52,402.76)

Under Aslanyan, the valuation of Debtors' Property does not support a determination that Creditor's judicial lien impairs Debtors' current claim of exemption. Therefore, Debtors' have not satisfied the requirements of section 522(f)(1) to avoid Creditor's judicial lien.

Even if the court were to use Debtors' Property value as scheduled, Debtors would only be able to partially avoid Creditor's judicial lien:

Amount of Leaf Capital Funding's Judicial Lien		\$24,226.51
Total amount of all other liens on the Property (excluding junior judicial liens)	+	\$249,026.73
Amount of Debtors' claim of exemption in the Property	+	\$58,000.00
Value of Debtors' interest in the Property	-	\$325,000.00
Extent of impairment of Debtors' exemption in the Property	=	\$6,253.24
Amount of judicial lien remaining on the Property		\$17,973.27

Applying the arithmetical formula required by section 522(f)(2)(A) leaves \$17,973.27 of equity to support Creditor's judicial lien that does not impair

Debtors' exemption in the Property. Thus, at most, the court could avoid Creditor's judicial lien to the extent of \$6,253.24.

The court recognizes that under California Code of Civil Procedure § 704.730, Debtors may be able to claim an exemption in an amount greater than \$58,000.00, but those are not the facts currently before the court.

Accordingly, this motion is DENIED WITHOUT PREJUDICE.

2. [20-12910](#)-A-7 **IN RE: JOHN VALENCIA**
[JHW-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-16-2020 [[14](#)]

CAB WEST, LLC/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
JENNIFER WANG/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a movant make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

The movant, Cab West, LLC ("Movant"), seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1) with respect to a 2018 Ford F150 ("Vehicle"). Doc. #14.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

After review of the included evidence, the court finds that "cause" exists to lift the stay because the debtor has failed to make at least three complete pre-petition payments. Movant has produced evidence that debtor is delinquent by at least \$2,231.01. Doc. #17.

The court also finds that the debtor does not have any equity in the Vehicle and the Vehicle is not necessary to an effective reorganization because the debtor is in chapter 7. Id. The debtor's possession of the Vehicle stems from a lease agreement with Movant that matures on February 20, 2021, according to which the debtor does not own the Vehicle. Doc. #18.

Accordingly, the motion will be granted pursuant to 11 U.S.C. §§ 362(d)(1) to permit Movant to gain immediate possession of the Vehicle pursuant to applicable law. No other relief is awarded. According to the debtor's Statement of Intention, the Vehicle will be surrendered. Movant obtained possession of the Vehicle pre-petition on August 25, 2020.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because debtor has failed to make at least three pre-petition payments to Movant in accordance with the lease agreement.

3. [16-13311](#)-A-7 **IN RE: DENNIS/HELEN MCCAUGHAN**
[FW-2](#)

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C.
FOR PETER A. SAUER, TRUSTEES ATTORNEY(S)
9-18-2020 [[51](#)]

TIMOTHY SPRINGER/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Fear Waddell, P.C. ("Movant"), counsel for Chapter 7 trustee James Salven ("Trustee"), requests an allowance of final compensation and reimbursement for expenses for services rendered November 7, 2016 through September 16, 2020. Doc. #51. Movant provided legal services valued at \$16,364.50, and requests compensation for that amount. Doc. #51. Movant requests reimbursement for expenses in the amount of \$169.32. Doc. #51.

Section 330(a)(1) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a "professional person." 11 U.S.C. § 330(a)(1). In

determining the amount of reasonable compensation to be awarded to a professional person, the court shall consider the nature, extent, and value of such services, taking into account all relevant factors. 11 U.S.C. § 330(a)(3).

Movant's services included, without limitation: (1) case administration; (2) disposition of the debtor's property and property owned in trust; (3) fee and employment application. Exs. A, B, and C, Doc. #55. The court finds the compensation and reimbursement sought are reasonable, actual, and necessary.

This motion is GRANTED on a final basis. The court allows final compensation in the amount of \$16,364.50 and reimbursement for expenses in the amount of \$169.32. Trustee is authorized to make a combined payment of \$16,533.82, representing compensation and reimbursement, to Movant. Trustee is authorized to pay the amount allowed by this order from available funds only if the estate is administratively solvent and such payment is consistent with the priorities of the Bankruptcy Code.

4. [16-13311](#)-A-7 **IN RE: DENNIS/HELEN MCCAUGHAN**
[JES-3](#)

MOTION FOR COMPENSATION FOR JAMES E. SALVEN, ACCOUNTANT(S)
9-14-2020 [[42](#)]

JAMES SALVEN/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

James E. Salven ("Movant"), certified public accountant engaged by Chapter 7 trustee James E. Salven ("Trustee"), requests an allowance of final compensation and reimbursement for expenses for services rendered August 20, 2020 through September 14, 2020. Doc. #42; Ex. A, Doc. #47. Movant provided accounting services valued at \$1,375.00 and requests compensation in that amount. Doc. #42. Movant requests reimbursement for expenses in the amount of \$387.85. Doc. #42.

Section 330(a)(1) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a "professional person." 11 U.S.C. § 330(a)(1). In determining the amount of reasonable compensation to be awarded to a professional person, the court shall consider the nature, extent, and value of such services, taking into account all relevant factors. 11 U.S.C. § 330(a)(3).

Movant's services included, without limitation: (1) determining and reviewing tax consequences; (2) processing final returns; (3) prompt determination letters and filings; and (4) preparing and filing fee application. Ex. A, Doc. #47. The court finds the compensation and reimbursement sought are reasonable, actual, and necessary.

This motion is GRANTED on a final basis. The court allows final compensation in the amount of \$1,375.00 and reimbursement for expenses in the amount of \$387.85. Trustee is authorized to make a combined payment of \$1,762.85, representing compensation and reimbursement, to Movant. Trustee is authorized to pay the amount allowed by this order from available funds only if the estate is administratively solvent and such payment is consistent with the priorities of the Bankruptcy Code.

5. [20-12437](#)-A-7 **IN RE: FEDERICO/CARMEN MORA**
[EMM-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-24-2020 [[15](#)]

LOANCARE, LLC/MV
JERRY LOWE/ATTY. FOR DBT.
ERIN MCCARTNEY/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a movant make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

The movant, LoanCare, LLC ("Movant"), seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1) and (d)(2) with respect to real property located at 4954 N. Holt, Apt. 103, Fresno, CA ("Property"). Doc. #15.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

11 U.S.C. § 362(d)(2) allows the court to grant relief from the stay if the debtor does not have an equity in such property and such property is not necessary to an effective reorganization.

After review of the included evidence, the court finds that "cause" exists to lift the stay because the debtors have failed to make at least 22 complete pre- and post-petition payments. Movant has produced evidence that debtors are delinquent by at least \$9,128.17 and the entire balance of \$53,139.99 is due. Doc. #20.

The court also finds that the debtors do not have any equity in the Property and the Property is not necessary to an effective reorganization because debtors are in chapter 7. The Property is valued at \$50,000.00 and debtors owe \$52,634.45. Doc. #15. According to the debtors' Statement of Intention, the Property will be surrendered.

Accordingly, the motion will be granted pursuant to 11 U.S.C. §§ 362(d)(1) and (d)(2) to permit Movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded.

The order shall also provide that the bankruptcy proceeding has been finalized for purposes of California Civil Code § 2923.5.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because debtors have failed to make at least 22 payments, both pre- and post-petition to Movant.

6. 19-15155-A-7 **IN RE: ADRIAN/PATRICIA GARCIA**
EPE-2

MOTION TO AVOID LIEN OF BENEFICIAL STATE BANK
9-22-2020 [60]

ADRIAN GARCIA/MV
ERIC ESCAMILLA/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is

unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Adrian Garcia and Patricia Ramirez Garcia (collectively, "Debtors"), the debtors in this Chapter 7 case, move pursuant to 11 U.S.C. § 522(f) and Federal Rules of Bankruptcy Procedure 4003(d) and 9014 to avoid the judicial lien of Beneficial State Bank ("Creditor") on their residential real property commonly referred to as 804 F Street, Reedley, California 93654 (the "Property"). Doc. #60; Am. Schedule C, Doc. #54.

In order to avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under section 522(b); (2) the property must be listed on the debtors' schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in section 522(f)(1)(B). 11 U.S.C. § 522(f)(1); Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003) (quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)).

A judgment was entered against Adrian Garcia in the amount of \$14,579.15 in favor of Creditor on April 25, 2019. Ex. 2, Doc. #63. The abstract of judgment was recorded with Fresno County on May 23, 2019. Ex. 2, Doc. #63. That lien attached to Debtors' interest in the Property located in Fresno County. Doc. #60. The current amount owed on Creditor's judicial lien is approximately \$14,579.15. Ex. 2, Doc. #63; Doc. #60. The Property is also encumbered by a mortgage held by Caliber Home Loans for \$278,806.00. Ex. 4, Doc. #63. Debtors claimed a homestead exemption of \$100,000.00 in the Property under California Code of Civil Procedure § 704.730. Am. Schedule C, Doc. #54. Debtors valued their interest in the Property as of the petition date at \$376,000.00. Ex.3, Doc. #63.

Amount of Beneficial State Bank's Judicial Lien		\$14,579.15
Total amount of all other liens on the Property (excluding junior judicial liens)	+	\$278,706.00
Amount of Debtors' claim of exemption in the Property	+	\$100,000.00
Value of Debtors' interest in the Property	-	\$376,000.00
Extent of impairment of Debtors' exemption in the Property	=	\$17,285.15

After application of the arithmetical formula required by section 522(f)(2)(A), the court finds there is insufficient equity to support Creditor's judicial lien. Therefore, the fixing of this judicial lien impairs Debtors' exemption in the Property and its fixing will be avoided.

Debtors have established the four elements necessary to avoid a lien under 11 U.S.C. § 522(f)(1). Accordingly, this motion is GRANTED.

MOTION TO COMPEL
9-14-2020 [\[56\]](#)

JAMES SALVEN/MV
ERIC ESCAMILLA/ATTY. FOR DBT.
JAMES SALVEN/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order after the hearing.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought.

James Salven ("Trustee"), the Chapter 7 trustee of the bankruptcy estate of Adrian Garcia and Patricia Ramirez Garcia (collectively, "Debtors"), moves the court to compel Debtors to turn over their 2019 federal tax refund. Doc. #56.

LBR 9014-1(d)(3)(A) requires a motion "set forth the relief or order sought and shall state with particularity the factual and legal grounds therefore. Legal grounds for relief sought means citation to the statute, rule, case, or common law doctrine that forms the basis of the moving party's request but does not include a discussion of those authorities or argument for their applicability." Trustee's motion fails to state with particularity which statute, rule, or other authority supports the relief sought. The court will call this matter at the hearing and permit Trustee to clarify the record.

11 U.S.C. § 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." In the Ninth Circuit, "the right to receive a tax refund constitutes an interest in property[.]" Nichols v. Birdsell, 491 F.3d 987, 990 (9th Cir. 2007).

11 U.S.C. § 542(a) requires Debtors to turn over property of the estate, or its value, then in Debtors' possession, custody or control during the case. "§ 542(a) does not require the debtor to have current possession of the property which is subject to turnover. If a debtor demonstrates that he is not in possession of the property of the estate or its value at the time of the turnover action, the trustee is entitled to recovery of a money judgment for the value of the property of the estate." Newman v. Schwartz (In re Newman), 487 B.R. 193, 202 (B.A.P. 9th Cir. 2013) (citations and punctuation omitted).

Upon clarification of the record by Trustee, the court is inclined to grant this motion. Debtors will be ordered to turn over their 2019 federal tax refund

within 10 days of the court order. Failure to do so may result in sanctions pursuant to 11 U.S.C. § 105(a).

8. [20-12182](#)-A-7 **IN RE: GRACE LOPEZ**
[AP-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-17-2020 [[21](#)]

LAKEVIEW LOAN SERVICING, LLC/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
WENDY LOCKE/ATTY. FOR MV.
NON-OPPOSITION
DISCHARGED 10/16/2020

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted in part and denied as moot in part.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a movant make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

The motion will be GRANTED IN PART as to the trustee's interest and DENIED AS MOOT IN PART as to the debtor's interest pursuant to 11 U.S.C. § 362(c)(2)(C). The debtor's discharge was entered on October 16, 2020. Doc. #30. The motion will be GRANTED IN PART for cause shown as to the chapter 7 trustee.

The movant, Lakeview Loan Servicing, LLC ("Movant"), seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1) and (d)(2) with respect to a piece of real property located at 310 Hazelwood Drive, Lemoore, CA ("Property"). Doc. #21.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

11 U.S.C. § 362(d)(2) allows the court to grant relief from the stay if the debtor does not have an equity in such property and such property is not necessary to an effective reorganization.

After review of the included evidence, the court finds that "cause" exists to lift the stay because the debtor has been in default since June 1, 2019. Doc. #17.

The court also finds that the debtor does not have any equity in the Property and the Property is not necessary to an effective reorganization because debtor is in chapter 7. Debtor has valued the Property at \$219,000.00. Doc. #1. The amount owed to Movant is \$238,180.01. Doc. #22. Debtor's statement of intention indicates that debtor intends to surrender the property. Doc. #1.

The court notes the debtor filed a non-opposition to the motion on September 22, 2020. Doc. #28.

Accordingly, the motion will be granted pursuant to 11 U.S.C. §§ 362(d)(1) and (d)(2) to permit Movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded.

The order shall also provide that the bankruptcy proceeding has been finalized for purposes of California Civil Code § 2923.5.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because debtor intends to surrender the property.

9. [17-12389](#)-A-7 **IN RE: DON ROSE OIL CO., INC.**
[WF-30](#)

MOTION TO ABANDON
10-7-2020 [[1119](#)]

RANDELL PARKER/MV
RILEY WALTER/ATTY. FOR DBT.
DANIEL EGAN/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order after the hearing.

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Randell Parker ("Trustee"), the Chapter 7 trustee of the debtor's bankruptcy estate, moves the court for an order authorizing the abandonment and destruction of documents. Doc. #1119. On July 30, 2018, the initial trustee Ms. Manfredo moved to abandon the same business records. Doc. #1119; Initial Tr.'s Mot., Doc. #875. That motion was withdrawn in response to the objection of Sallyport Commercial Finance, LLC ("Sallyport"), one of the estate's creditors. Sallyport's Opp'n, Doc. #899; Doc. #1119. Trustee recently sold

certain assets to Sallyport, and Trustee has no further need for the remaining records now held in storage at Derrel's Ministorage. Doc. #1119; Tr.'s Decl., Doc. #1121. Trustee is preparing to close the case, but needs to dispose of remaining records currently in storage that have not been sold to Sallyport. Doc. #1119; Tr.'s Decl., Doc. #1121.

11 U.S.C. § 554(a) permits the trustee, after notice and a hearing, to abandon property that is burdensome to the estate or of inconsequential value and benefit to the estate. See Johnston v. Webster (In re Johnston), 49 F.3d 538, 540 (9th Cir. 1995). To grant a motion to abandon property, the bankruptcy court must find either that the property is (1) burdensome to the estate or (2) of inconsequential value and inconsequential benefit to the estate. See id. (citing In re K.C. Machine & Tool Co., 816 F.2d 238, 245 (6th Cir. 1987) (discussing the identical language in § 554(b))).

Trustee seeks to abandon records currently stored at Derrel's Ministorage after selling core samples, records, and other assets (previously held at Derrel's Ministorage) to Sallyport. Doc. #1119. The records are the remaining part of the same records the initial trustee sought to abandon in 2018. Tr.'s Decl., Doc. #1121.

Subject to opposition being raised at the hearing, the court is inclined to GRANT this motion. The court finds that the business records are of inconsequential value and inconsequential benefit to the estate.

10. [17-12389](#)-A-7 **IN RE: DON ROSE OIL CO., INC.**
[WF-31](#)

MOTION FOR AUTHORITY TO PAY EXPENSE OF DOCUMENT DESTRUCTION
10-7-2020 [[1123](#)]

RANDELL PARKER/MV
RILEY WALTER/ATTY. FOR DBT.
DANIEL EGAN/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order after the hearing.

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Randell Parker ("Trustee"), the Chapter 7 trustee of the debtor's bankruptcy estate, moves the court for an order authorizing payment under 11 U.S.C. § 503 to Discount Shred for document shredding services. Doc. #1123. Trustee requests authorization to pay Discount Shred up to \$2,000 for services rendered in connection with the destruction of business records sought to be abandoned by Trustee. Doc. #1123; see Tr.'s Mot. to Abandon, Doc. #1119.

11 U.S.C. § 503(b)(1)(A)(i) states that, after notice and a hearing, administrative expenses shall be allowed for "the actual, necessary costs and expenses of preserving the estate including [] wages, salaries, and commissions for services rendered after the commencement of the case[.]" To be deemed an administrative expense, the claim must have arisen from a transaction with the Chapter 7 trustee and directly and substantially benefitted the estate. Boeing N. Am., Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018, 1025 (9th Cir. 2005) (citing Abercrombie v. Hayden Corp. (In re Abercrombie), 139 F.3d 755, 756 (9th Cir. 1998)). The bankruptcy court has broad discretion whether to grant such a claim, and only "the actual, necessary costs and expenses of preserving the estate" shall be approved. Microsoft Corp. v. DAK Indus. (In re DAK Indus.), 66 F.3d 1091, 1094 (9th Cir. 1995).

Trustee has filed a motion to abandon certain business records, with a hearing also on this calendar. Doc. #1119. Subject to the granting of Trustee's motion to abandon, the court is inclined to grant this motion. Trustee is preparing to close the case and will need to dispose of the remaining business records currently held by the estate. Tr.'s Decl., Doc. #1125. Trustee states that Discount Shred is willing to travel to the storage location and shred the remaining business records held in storage and not sold to Sallyport. Doc. #1125. The court finds that the expense arises from a transaction with the Chapter 7 trustee and directly and substantially benefits the estate.

Subject to the granting of Trustee's motion to abandon and subject to opposition raised at the hearing, the court is inclined to GRANT Trustee's motion and authorize Trustee pay Discount Shred, as an administrative expense, up to \$2,000 for services rendered in connection with the destruction of abandoned business records.

11. [16-13295](#)-A-7 **IN RE: DAVID GONZALEZ AND CYNTHIA DE LA GARZA**
[FW-3](#)

MOTION TO EMPLOY CAROLINA L. MAIDA AS SPECIAL COUNSEL,
MOTION TO EMPLOY AVRAM BLAIR AS SPECIAL COUNSEL, MOTION TO
EMPLOY KURT ARNOLD AS SPECIAL COUNSEL
9-18-2020 [\[41\]](#)

PETER FEAR/MV
KARNEY MEKHITARIAN/ATTY. FOR DBT.
PETER FEAR/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006).

Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Peter L. Fear ("Trustee"), the Chapter 7 trustee of the bankruptcy estate of David Mendez Gonzalez, Jr. and Cynthia De La Garza (together, "Debtors"), seeks authorization to employ the law firms of Avram Blair & Associates, P.C., The Mostyn Law Firm, and Arnold & Itkin, LLP (collectively, "Special Counsel") to serve as special counsel effective as of September 8, 2016. Doc. #41.

Debtors filed this Chapter 7 case on September 8, 2016, and the case was closed with no distribution on December 13, 2016. Doc. #1, 17. Pre-petition, on December 19, 2012, co-debtor Cynthia De La Garza received a surgically implanted device, which led co-debtor to retain Special Counsel in March 20, 2015, to prosecute a defective medical device claim (the "Injury Claim"). Decl. of Caroline L. Maida, Doc. #44. Although Debtors retained Special Counsel prior to filing their bankruptcy petition, Debtors did not disclose the claim in their schedules. Doc. #41; Schedules, Doc. #12. The Injury Claim is one of many similar claims filed around the county as party of a Multi-District Litigation ("MDL") against the device manufacturer. Decl., Doc. #44. As it stands, the device manufacturer has made an offer of \$120,000 to resolve the Injury Claim, though the settlement offer has not yet been accepted. Decl., Doc. #44. Debtors' case was ordered reopened on March 6, 2020, to administer the undisclosed Injury Claim. Order, Doc. #23.

Trustee seeks authorization to employ Special Counsel, effective as of September 8, 2016, to assist in bringing the settlement proceeds into the estate. Tr.'s Decl., Doc. #43. Trustee states Special Counsel are already familiar with the case, having represented co-debtor Cynthia De La Garza in litigating the Injury Claim since 2015. Decl., Doc. #43. Trustee proposes to compensate Special Counsel for their services in pursuing the Injury Claim on the same basis as Special Counsel was retained by co-debtor: a 40% contingency fee, of which 15% will be paid to Avram Blaire & Associates and 42.5% each to Mostyn Law Firm and Arnold & Itkin, LLP, plus costs. Decl., Doc. #43.

Pursuant to 11 U.S.C. § 327(e), Trustee may employ, with the court's approval and for a specified purpose, "an attorney who has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold an adverse interest to the debtor or to the estate with respect to the matter on which such attorney is to be employed." 11 U.S.C. § 327(e). The requirements of section 327(e) are less restrictive than section 327(a) in that there is no disinterested requirement. In re Fondiller, 15 B.R. 890, 892 (B.A.P. 9th Cir. 1981).

The court finds that Special Counsel do not represent or hold any interest adverse to Debtors or to the estate with respect to the matters for which employment is sought. Special Counsel have reviewed Debtors' schedules, and verified that there are no connections between Special Counsel and any of the creditors, or any other party in interest, their respective attorneys or accountants, the U.S. Trustee, or any person employed in the Office of the U.S. Trustee. Decls. of Special Counsel, Doc. ##44-46.

Bankruptcy Code section 328(a) provides, in relevant part: "The trustee . . . with the court's approval, may employ or authorize the employment of a professional person under section 327 . . . on any reasonable terms and conditions of employment, including . . . on a contingency fee basis."

11 U.S.C. § 328(a). In the Ninth Circuit, parties seeking the court's pre-approval of contingency fee agreements must specifically mention section 328 in the employment application, which Trustee has done here. Circle K Corp. v. Houlihan, Lokey, Howard & Zukin, Inc., 279 F.3d 669, 671 (9th Cir. 2002).

The court finds the proposed arrangement reasonable in this instance. If the arrangement proves improvident, the court may allow different compensation under 11 U.S.C. § 328(a).

However, in the Ninth Circuit, retroactive approval of employment of professionals for the estate and a retroactive award of fees for services rendered without court approval is limited to "exceptional circumstances where an applicant can show both a satisfactory explanation for the failure to receive prior judicial approval and that he or she has benefited the bankruptcy estate in some significant manner." Okamoto v. THC Fin. Corp. (In re THC Fin. Corp.), 837 F.2d 389, 392 (9th Cir. 1988). Thus, in order to obtain retroactive approval of employment, Special Counsel must not only demonstrate that they qualify for employment under 11 U.S.C. § 327(e) but also satisfactorily explain their failure to apply for earlier court approval and show that their services benefitted the estate. See Atkins v. Wain, Samuel & Co. (In re Atkins), 69 F.3d 970, 975-76 (9th Cir. 1995).

Special Counsel have submitted declarations explaining that they were unaware of Debtors' bankruptcy estate and any possible interest in the Injury Claim. Decls. of Special Counsel, Doc. ##44-46. Special Counsel state that the MDL appointed a settlement administrator who conducted bankruptcy checks in connection with the settlement offer, and who alerted the U.S. Trustee which led to the re-opening of this case. Doc. #44. The court finds these facts satisfactorily explain the failure of Special Counsel to receive prior court approval of their employment.

The court also finds Special Counsel's services benefitted the bankruptcy estate in a significant manner. This case previously closed with no distribution. Order of Discharge, Doc. #17. The work of Special Counsel in pursuing the Injury Claim resulted in a gross settlement offer of \$120,000.00. Doc. #41.

Accordingly, Trustee's motion is GRANTED. Trustee is authorized to employ the law firms of Avram Blair & Associates, P.C., The Mostyn Law Firm, and Arnold & Itkin, LLP as Special Counsel, effective as of September 8, 2016, under 11 U.S.C. § 328(a), on the terms and conditions set forth in the motion.