UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge
Bakersfield, California

PLEASE TAKE NOTICE THAT ALL HEARINGS WILL BE HELD AT THE

BAKERSFIELD FEDERAL COURTHOUSE

510 19TH STREET, SECOND FLOOR

BAKERSFIELD, CALIFORNIA

WEDNESDAY

OCTOBER 23, 2013

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

9:00 a.m.

1. 13-11803-A-13 JERZY BARANOWSKI — PRE-TRIAL CONFERENCE RE: OBJECTION TO CLAIM OF DENNIS VALDEZ, CLAIM NUMBER 8
PK-1 — 6-3-13 [30]
JERZY BARANOWSKI/MV

PATRICK KAVANAGH/Atty. for dbt.
RESPONSIVE PLEADING

Final Ruling

At the suggestion of the parties, the matter is continued to December 17, 2013, at 9:00 a.m. to allow the claimant to find new counsel. On that date, the court intends to set an evidentiary hearing.

2. 10-16609-A-13 JOSE/AMERICA SASVIN — MOTION TO REFINANCE
DMG-3 — 10-4-13 [66]
JOSE SASVIN/MV
D. GARDNER/Atty. for dbt.

Tentative Ruling

Motion: Loan Modification Approval
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

The motion seeks approval of a loan modification agreement. A copy of the loan modification agreement accompanies the motion. *See* Fed. R. Bankr. 4001(c). The court will grant the motion and authorize the debtor to enter into the loan modification agreement subject to the parties' right to reinstatement of the original terms of the loan documents in the event conditions precedent to the loan modification agreement are not satisfied. 11 U.S.C. § 364(d); Fed. R. Bankr. P. 4001(c). To the extent the modification is inconsistent with the confirmed plan, the debtor shall continue to perform the plan as confirmed until it is modified.

3. 09-15216-A-13 BRIAN/QUYEN THOMPSON — MOTION TO APPROVE LOAN MODIFICATION
MBB-1
THE BANK OF NEW YORK MELLON/MV
D. GARDNER/Atty. for dbt.
CORI JONES/Atty. for mv.
9-12-13 [64]

Tentative Ruling

Motion: Loan Modification Approval
Notice: LBR 9014-1(f)(2); written opposition required
Disposition: Granted
Order: Prepared by moving party

Because the amended notice of hearing for this motion was filed and served on September 27, 2013, less than 28 days' notice of the proper hearing date was given. Accordingly, the court will treat the motion as having been noticed under LBR 9014-1(f)(2).

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

The motion seeks approval of a loan modification agreement. A copy of the loan modification agreement accompanies the motion. *See* Fed. R. Bankr. 4001(c). However, the moving party, the Bank of New York Mellon, acting as trustee for a securitized trust, is not the same as the lender, Bank of America, named in the loan modification agreement attached as an exhibit. This may be the case because either the moving party or Bank of America is the servicer of the loan, but the court cannot tell from the moving papers.

Subject to clarification of the relationship between the moving party and Bank of America at the hearing, the court will grant the motion and authorize the debtor to enter into the loan modification agreement subject to the parties' right to reinstatement of the original terms of the loan documents in the event conditions precedent to the loan modification agreement are not satisfied. 11 U.S.C. § 364(d); Fed. R. Bankr. P. 4001(c). To the extent the modification is inconsistent with the confirmed plan, the debtor shall continue to perform the plan as confirmed until it is modified.

4. 13-11119-A-13 SALVADOR LOPEZ AND CONNIE LOZANO
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION/MV
PATRICK KAVANAGH/Atty. for dbt.
ROSHNI PATEL/Atty. for mv.
RESPONSIVE PLEADING

MOTION TO APPROVE LOAN MODIFICATION
9-19-13 [68]

Tentative Ruling

Motion: Loan Modification Approval
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied as moot
Order: Civil minute order

The motion has been withdrawn and will be denied as moot.

5. 13-11119-A-13 SALVADOR LOPEZ AND CONNIE LOZANO
PK-5
PATRICK KAVANAGH/MV

MOTION FOR COMPENSATION FOR PATRICK KAVANAGH, DEBTOR'S ATTORNEY(S), FEE: $6301.50, EXPENSES: $386.00
9-13-13 [62]

PATRICK KAVANAGH/Atty. for dbt.

Tentative Ruling

Motion: Application for Compensation and Expenses
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: Patrick Kavanagh
Compensation approved: $6,301.50
Costs approved: $386.00
Aggregate fees and costs approved: $6,687.50
Retainer held: To Be Determined
Amount to be paid as administrative expense: To Be Determined

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes “reasonable compensation for actual, necessary services” rendered by a debtor’s attorney in a Chapter 13 case and for “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are

reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure. The moving party is authorized to draw on any retainer held.

6. 13-14827-A-13 PHILIP/JUANELDA YOSHIKAWA
APN-1
FORD MOTOR CREDIT COMPANY/MV

OBJECTION TO CONFIRMATION OF PLAN BY FORD MOTOR CREDIT COMPANY
9-5-13 [16]

NEIL SCHWARTZ/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.

Tentative Ruling

Objection: Confirmation of Chapter 13 Plan
Notice: LBR 3015-1(c)(4), 9014-1(f)(2); no written opposition required
Plan: Chapter 13 Plan, filed July 14, 2013, ECF No. 5
Disposition: Sustained
Order: Civil minute order

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994).

CONFIRMATION

Secured creditor Ford Motor Credit objects to confirmation of the debtors' Chapter 13 Plan, filed July 14, 2013, ECF No. 5. The creditor contends that it holds a security interest in the debtor's 2006 Ford Mustang automobile. The court finds that the debtors have not carried their burden as to confirmation and sustains the objection.

The debtors own a 2006 Ford Mustang, which they value at $9,600.00, encumbered by a lien in favor of Ford Motor Credit, which they contend is $7,759.85. The plan provides for payment of the secured claim in Class 2 in the amount of $7,759.85, at 4% interest with monthly payments of $157.26. Chapter 13 Plan 2.09, filed July 14, 2013, ECF No. 5. The debtor contends the debt is not purchase money.

In contrast, Ford Motor Credit has filed a secured claim in the amount of $7,826.20. Claim No. 9. No objection to the claim has been filed. Secured creditor also contends that the loan is purchase money.

Allowed Secured Claim

Confirmation is governed by 11 U.S.C. § 1325, which requires that with respect to each allowed secured claim provided by the plan: (1) the holder accept the plan; (2) the plan provide that the holder retain the lien and the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is

not less than the allowed amount of such claim; or (3) the debtor surrender the property securing the claim to the holder of such claim. 11 U.S.C. § 1325(a)(5). The debtors have selected the second option: paying the allowed amount of the secured claim. But their plan fails to so provide. Absent objection, the Proof of Claim, not Schedule F or the plan, determine the amount of the claim. Chapter 13 Plan § 2.04, filed July 14, 2013, ECF No. 5. Ford Motor Credit's Claim, to which no objection has been filed, fixes the debt as $7,826.20. Claim No. 9. The plan provides for payment of $7,759.85. Chapter 13 Plan § 2.09, filed July 14, 2013, ECF No. 5. No motion to value the claim of Ford Motor Credit has been filed. As a result, the plan cannot be confirmed.

Interest Rate

Section 1325(a)(5)(B) requires that the total amount of payments under the plan be discounted to its present value of the effective date of the plan. 11 U.S.C. § 1325(a)(5)(B)(ii). This is implemented by a payment of interest to the secured creditor to compensate it for the delay in payment. The interest rate is determined at a "prime plus" rate. *Till v. SCS Credit Corp.,* 541 U.S. 465, 474 (2004). The plan proposes an interest rate of 4%. Chapter 13 Plan 2.09, filed July 14, 2013, ECF No. 5. Though not authenticated, Ford Motor Credit has offered the purchase contract reflecting a rate of 10.99%. Were the plan otherwise confirmable, the court would designate the question a disputed material factual issue and schedule an evidentiary hearing. Fed. R. Bankr. P. 9014(d).

Adequate Protection

Section 1325(a)(5)(B)(iii)(II) provides that if the debtor is secured by personal property that the plan payments must be sufficient to provide "adequate protection" to the creditor during the period of the plan. *In re Johnson,* 63 B.R. 550, 554 (Bankr. D. Co. 1986). The parties disagree as to whether the plan does so. The debtors propose a monthly dividend of $157.26. Chapter 13 Plan § 2.09, filed July 14, 2013, ECF No. 5. The creditor demands $170.12, citing a steeper depreciation than the debtors' proposed payments. Were the plan otherwise confirmable, the court would designate the question a disputed material factual issue and schedule an evidentiary hearing. Fed. R. Bankr. P. 9014(d).

Attorneys Fees

Secured creditor prays attorneys fees. The request is denied without prejudice and may be presented by motion.

75 DAY ORDER

A Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on the date of this hearing. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's motion. *See* 11 U.S.C. § 1307(c)(1). Failure to confirm a plan within the 75 day period described herein shall not form the basis of a motion to dismiss, if the debtor has pending:(1) a confirmable Chapter 13 plan noticed for hearing not later than the end of the 75 day period; and (2) all motions to value or avoid liens on which the plan is predicated have been noticed for hearing not later than the end of the 75 day period and the only reason that the plan has not been confirmed and that those motions have not been granted is opposition of the

impacted creditor.

7. 13-12631-A-13 MARK/FABIOLA BUTCHER — CONTINUED MOTION TO CONFIRM PLAN
PK-6
MARK BUTCHER/MV
8-21-13 [138]
PATRICK KAVANAGH/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 3015-1(d)(1), 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1325 and by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). All objections apparently resolved, the court finds that the debtor has sustained that burden, and the court will approve confirmation of the plan.

8. 13-12631-A-13 MARK/FABIOLA BUTCHER
PK-7
MARK BUTCHER/MV
9-25-13 [178]
PATRICK KAVANAGH/Atty. for dbt

MOTION TO ASSUME LEASE OR EXECUTORY CONTRACT

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Tentative Ruling

Motion: Assume Contract
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted subject to the debtors' representation to the court that no defaults exist under the agreement to be assumed
Order: Civil minute order if appropriate

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

LEGAL STANDARDS

Statutory conditions precedent must be satisfied before a court may approve an assumption of an unexpired lease or executory contract. *See* 11 U.S.C. § 365(b). These conditions include curing defaults, compensating the lessor for actual pecuniary losses, or providing adequate assurance of that these conditions will be met. *Id.* § 365(b)(1)(A)–(B). Another condition for assumption is providing adequate assurance of future performance under the lease. *Id.* § 365(b)(3).

In evaluating motions to assume or reject, the court applies the business judgment rule. *See In re Pomona Valley Med. Grp.*, 476 F.3d 665, 670 (9th Cir. 2007); *Durkin v. Benedor Corp. (In re G.I. Indus., Inc.)*, 204 F.3d 1276, 1282 (9th Cir. 2000); March, Ahart & Shapiro, *supra*, ¶¶ 16:1535–1536, 16:515 (rev. 2011). In applying the business judgment rule, the bankruptcy court gives the decision to assume or reject only a cursory review under the presumption that "the debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate." *In re Pomona Valley*, 476 F.3d at 670. The assumption or rejection of an unexpired lease or executory contract should be approved absent a finding that the decision to reject is "so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice." *Id.* (quoting *Lubrizol Enters. v. Richmond Metal Finishers*, 756 F.2d 1043, 1047 (4th Cir. 1985)).

DISCUSSION

Here, the debtor has not mentioned that any defaults exist under the agreement or that there have been any actual pecuniary losses resulting from any such default. Under the agreement, Bank of America, N.A. agreed to accept $27,000.00 as settlement in full of this debt, payable at $18,000.00 on March 28, 2013, and 12 payments of $750.00 from April 20, 2013, to March 20, 2014.

On the record at the hearing, if debtors represent that no defaults exist under the agreement, then the court will grant the motion. If, however, a default has occurred under the agreement, the debtor needs to disclose and discuss those with the court, and the court may continue the hearing on the motion to permit the filing of a supplemental declaration addressing the statutory conditions precedent to assumption under § 365(b)(1).

9. 11-17232-A-13 KERRY STEVENS — CONTINUED MOTION TO MODIFY PLAN
RSW-2 — 7-19-13 [39]
KERRY STEVENS/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Confirm Modified Chapter 13 Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required
Plan: Second Modified Chapter 13 Plan, filed July 19, 2013, ECF No. 43
Disposition: Denied
Order: Civil minute order

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994).

The debtor moves to confirm the Second Modified Chapter 13 Plan, filed July 19, 2013, ECF No. 43. Chapter 13 trustee Michael H. Meyer opposes confirmation, as authorized by 11 U.S.C. § 1302(b)(2)(B),(C), arguing that the plan, as proposed, does not satisfy the requirements for confirmation. The Chapter 13 trustee's particular concern is good faith. 11 U.S.C. § 1325(a)(3). The debtor has removed the mortgage from Class 1 (trustee paid) and placed it in Class 4 (direct pay by the debtor), has modified his mortgage to reduce the payment and has reduced the payment to the trustee from $2,030 to $306. The debtor has also experienced a decrease in net income. The debtor contends that the $306.00 per month in the plan is all of the debtor's disposable income. The trustee calculates the debtor's disposable income at $1,396.29.

This matter was originally noticed for August 27, 2013. At the debtor's urging, the matter was continued to September 25, 2013, to allow the debtor time to address the trustee's concerns by providing additional information. The information not provided the trustee by September 25, 2013, the matter was again continued at the debtor's request to October 23, 2013. As of October 16, 2013, the information required had still not been provided to the Chapter 13 trustee. As a consequence, the court finds the debtor has not carried the burden of proof on good faith and the motion is denied.

10. 13-13632-A-13 ROMEO/ROSEMARY TUTOP
MHM-1
MICHAEL MEYER/MV

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY MICHAEL H. MEYER
8-22-13 [29]

ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Objection: Confirmation of Chapter 13 Plan
Notice: LBR 3015-1(c)(4), 9014-1(f)(2); no written opposition required
Plan: Chapter 13 Plan, filed May 22, 2013, ECF No. 5
Disposition: Sustained
Order: Civil minute order

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994).

The Chapter 13 trustee objects to confirmation of the Chapter 13 Plan, filed May 22, 2013, ECF No. 5.

OBJECTION TO CONFIRMATION

There are two problems. First, the possible $60,000 fraudulent transfer of a residence, which, if recovered would increase the amount payable under 11 U.S.C. § 1325(a)(4). Second, the plan includes disposition of asset in violation of Local Bankruptcy Rule 3015-1(i). As a result, the objection will be sustained.

75 DAY ORDER

A Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on the date of this hearing. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's motion. *See* 11 U.S.C. § 1307(c)(1).

11. 13-15832-A-13 MICHAEL/KATHRYN COLLIE
SJS-1
MICHAEL COLLIE/MV

MOTION TO VALUE COLLATERAL OF SIERRA PACIFIC MORTGAGE COMPANY, INC. AND/OR MOTION TO VALUE COLLATERAL OF OCWEN LOAN SERVICING, LLC
9-22-13 [9]

SUSAN SALEHI/Atty. for dbt.

Final Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by the moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Chapter 13 debtors may strip off a wholly unsecured junior lien encumbering the debtor's principal residence. 11 U.S.C. §§ 506(a), 1322(b)(2); *In re Lam,* 211 B.R. 36, 40-42 (B.A.P. 9th Cir. 1997); *In re Zimmer,* 313 F.3d 1220, 1222–25 (9th Cir. 2002). A motion to value the debtor's principal residence should be granted upon a threefold showing by the moving party. First, the moving party must proceed by noticed motion. Fed. R. Bankr. P. 3012. Second, the motion must be served on the holder of the secured claim. Fed. R. Bankr. P. 3012, 9014(a); LBR 3015-1(j). Third, the moving party must prove by admissible evidence that the debt secured by liens senior to the responding party's claim exceeds the value of the principal residence. 11 U.S.C. § 506(a); *Lam*, 211 B.R. at 40-42; *Zimmer*, 313 F.3d at 1222–25.

The motion seeks to value real property collateral that is the moving party's principal residence. Because the amount owed to senior lien holders exceeds the value of the collateral, the responding party's claim is wholly unsecured and no portion will be allowed as a secured claim. *See* 11 U.S.C. § 506(a).

12. 13-14334-A-13 ANTONIO/ANAVEL AGUIRRE — MOTION TO CONFIRM PLAN
NES-1 — 9-6-13 [22]
ANTONIO AGUIRRE/MV
NEIL SCHWARTZ/Atty. for dbt.

Final Ruling

The plan withdrawn, the matter is dropped as moot. See, Notice of Withdrawal of Plan, October 14, 2013, ECF NO. 47.

13. 13-14334-A-13 ANTONIO/ANAVEL AGUIRRE — MOTION TO VALUE COLLATERAL OF HSBC FINANCE CORP
NES-2 — 9-6-13 [29]
ANTONIO AGUIRRE/MV
NEIL SCHWARTZ/Atty. for dbt.

Tentative Ruling

Motion: Value Collateral
Disposition: Denied without prejudice
Order: Civil minute order

SERVICE INSUFFICIENT

Pursuant to a motion to value collateral, chapter 13 debtors may strip off a wholly unsecured junior lien encumbering the debtor's principal residence. *See* 11 U.S.C. § 1322(b)(2); *In re Lam*, 211 B.R. 36, 40–42 (B.A.P. 9th Cir. 1997); *In re Zimmer*, 313 F.3d 1220, 1222–25 (9th Cir.

2002). Because a motion to value collateral substantially alters creditors' property rights, it thereby implicates heightened due process requirements. *In re Millspaugh*, 302 B.R. 90, 99 (Bankr. D. Idaho 2003). Given the impact on property interests of the creditor affected, the motion is treated as a contested matter. *Id.* at 101–02 & n.23.

As a contested matter, a motion to value collateral is governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 9014(a). Rule 9014 requires Rule 7004 service of motions in contested matters. Fed. R. Bankr. P. 9014(b). Under Rule 7004, service on corporations must be made by first class mail addressed "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Fed. R. Bankr. P. 7004(b)(3). "Thus, to meet the requirements of the Rules and comply with considerations of due process, a Rule 3012 motion (either with or without a plan) must be served on the affected creditors in accord with Rule 7004." *Millspaugh*, 302 B.R. at 102 (emphasis added); *see also In re Pereira*, 394 B.R. 501, 506-07 (Bankr. S.D. Cal. 2008) (Chapter 13 plan containing lien stripping proposal must be served on the affected creditor pursuant to Rule 7004). Rule 3012 notice alone will not suffice for the motion. *See Pereira*, 394 B.R. at 506.

Service of the motion was insufficient. The proof of service shows that the motion was transmitted to HSBC Finance Corp. But the motion is ambiguous about the identity of the respondent. The motion's title states "HSBC FINANCE CORP fka HFC BENEFICIAL" but the motion itself contains no factual grounds for relief against HSBC Finance Corp. By contrast, the declaration and the plan attached as an exhibit to the motion both identify Beneficial Finance as the holder of the second deed of trust sought to be valued.

Because the motion is unclear about the identity of the responding party, the court finds that service is not sufficient given that service was on HSBC Finance Corp only. The court cannot determine whether HSBC Finance Corp. holds a deed of trust relating to the collateral to be valued. Nowhere does the motion itself mention Beneficial Finance, although this entity is named in the declaration as the second deed of trust holder. Beneficial Finance, moreover, has not been served.

NONCOMPLIANCE WITH RULES 9013 AND 9014

As discussed above, the declaration identifies a wholly different responding party than the motion does. Further, the motion does not provide any factual grounds for relief as to HSBC Finance Corp.—the motion does not that HSBC Finance Corp. holds a second deed of trust on the property that has a value less than the amount secured by senior liens.

Thus, the court finds that the moving party has not unambiguously identified the responding party in the motion. The Wikipedia article attached to the proof of service does not cure this problem or convince the court that HSBC Finance Corp. should be treated as one and the same entity as Beneficial Finance.

A motion to value collateral that does not identify the responding party does not set forth the relief sought as required by Rule 9013. The court cannot grant relief against a respondent who is unidentified or against a respondent whose identity is ambiguous. Fed. R. Bankr.

P. 9013.

Further, a motion that does not identify clearly the responding party also does not comply with Rule 9014(a) because a motion that is ambiguous about the respondent cannot give reasonable notice and opportunity for hearing to the party against whom relief is sought. Fed. R. Bankr. P. 9014(a).

Lastly, the face of the motion contains no information about the value of the property, the amount of debt secured by senior liens on the property, or any other factual grounds for relief. The court finds that this does not satisfy Rule 9013, which requires the *motion* to state with particularity the grounds supporting the motion. A declaration may contain such factual evidence as required or appropriate. But in the future, counsel should ensure that every motion filed contains the grounds supporting the motion with particularity as required by Rule 9013.

14. 13-14334-A-13 ANTONIO/ANAVEL AGUIRRE
NES-3
ANTONIO AGUIRRE/MV

AMENDED MOTION TO VALUE COLLATERAL OF SAFE 1 CREDIT UNION
9-16-13 [44]

NEIL SCHWARTZ/Atty. for dbt.

Final Ruling

Motion: Value Collateral [Personal Property; Motor Vehicle]
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Collateral Value: $15,050.00

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Chapter 13 debtors may value collateral by noticed motion. Fed. R. Bankr. P. 3012. Section 506(a) of the Bankruptcy Code provides, “An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property” and is unsecured as to the remainder. 11 U.S.C. § 506(a). For personal property, value is defined as “replacement value” on the date of the petition. *Id.* § 506(a)(2). For “property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.” *Id.* The costs of sale or marketing may not be deducted. *Id.*

A debtor's ability to value collateral consisting of a motor vehicle is limited by the terms of the hanging paragraph of § 1325(a). *See* 11 U.S.C. § 1325(a) (hanging paragraph). Under this statute, a lien secured by a motor vehicle cannot be stripped down to the collateral's value if: (i) the lien securing the claim is a purchase money security interest, (ii) the debt was incurred within the 910-day period preceding the date of the petition, and (iii) the motor vehicle was acquired for the debtor's personal use. 11 U.S.C. § 1325(a) (hanging paragraph).

VALUATION OF THE VEHICLE

In this case, the debtor seeks to value collateral consisting of a motor vehicle. From Schedule D, it appears that the debt secured by the 2008 Nissan Titan sought to be valued was incurred in 2008. The debt secured by the vehicle was not incurred within the 910-day period preceding the date of the petition. In the absence of any opposition to the motion, the court finds that the replacement value of the vehicle is the amount set forth above.

In the future, the court requests that counsel include specific facts in the motion clearly indicating whether the hanging paragraph of § 1325(a) is applicable or inapplicable. Attaching Schedule D is not sufficient to comply with this requirement. *See* Fed. R. Bankr. P. 9013. The court may deny motions to value motor vehicles that do not provide facts showing the inapplicability of the hanging paragraph.

COMPLIANCE WITH RULE 9013

Additionally, the face of the motion and the amended motion contain no information containing a description of the vehicle being valued. The motion and amended motion refer repeatedly to the responding party's "collateral" but never define or describe such collateral. The court finds that this does not satisfy Rule 9013, which requires the *motion* to state with particularity the grounds supporting the motion, although a declaration may contain such factual evidence as required or appropriate. In the future, counsel should ensure that each motion filed with the court contains the grounds supporting the motion stated with particularity as required by Rule 9013.

15. 12-19240-A-13 ELIAZAR SANCHEZ
LKW-3
LEONARD WELSH/MV

MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTOR'S ATTORNEY(S), FEE: $1,105.00, EXPENSES: $30.36.
9-24-13 [65]

LEONARD WELSH/Atty. for dbt.

Final Ruling

Motion: Application for Compensation and Expenses
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: Leonard K. Welsh
Compensation approved: $1,105.00
Costs approved: $30.36
Aggregate fees and costs approved: $1,135.36
Retainer held: $0.00
Amount to be paid as administrative expense: $1,135.36

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes “reasonable compensation for actual, necessary services” rendered by a debtor’s attorney in a Chapter 13 case and for “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure. The moving party is authorized to draw on any retainer held.

16. 13-14441-A-13 STEPHEN/TERESA GALVAN
MHM-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY MICHAEL H. MEYER
8-22-13 [16]

ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Objection: Confirmation of Chapter 13 Plan
Notice: LBR 3015-1(c)(4), 9014-1(f)(2); no written opposition required
Plan: Chapter 13 Plan, filed June 26, 2013, ECF No. 5
Disposition: Sustained
Order: Civil minute order

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994).

CONFIRMATION

Chapter 13 trustee Michael H. Meyer objects to confirmation, noting that the plan proposes stripping the second deed of trust on the debtors' residence under In re Lam, 211 B.R. 36, 40-42 (9th Cir. B.A.P. 1997), and that a dispute as to the amount actually owed the first deed of trust holder may preclude granting such a motion. See, Chapter 13 Plan 2.09, June 26, 2013, ECF No. 5.

The court need not decide whether *"Lam"* motion could be granted. Local Bankruptcy Rule 3015-1(j) requires that motions to value be successfully prosecuted prior to confirmation. No such motion has been granted, or filed, in this case. As a result, confirmation is denied.

75 DAY ORDER

A Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on the date of this hearing. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's motion. *See* 11 U.S.C. § 1307(c)(1).

17. 13-10044-A-13 ANTHONY/LINDA CARRISOZA
PK-3
PATRICK KAVANAGH/MV

MOTION FOR COMPENSATION FOR PATRICK KAVANAGH, DEBTOR'S ATTORNEY(S), FEE: $4443.50, EXPENSES: $13.40
9-6-13 [40]

PATRICK KAVANAGH/Atty. for dbt.

Tentative Ruling

Motion: Application for Compensation and Expenses
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: Patrick Kavanagh
Compensation approved: $4,443.50
Costs approved: $13.40
Aggregate fees and costs approved: $4,456.90
Retainer held: To Be Determined
Amount to be paid as administrative expense: To Be Determined

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before

the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a debtor's attorney in a Chapter 13 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure. The moving party is authorized to draw on any retainer held.

18. 13-13747-A-13 DAVID/MICHELE KING
RSW-1
DAVID KING/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO VALUE COLLATERAL OF BAKERSFIELD CITY EMPLOYEES FCU
9-12-13 [21]

Tentative Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: Written opposition filed by responding party
Disposition: Continued for evidentiary hearing
Order: Civil Minute Order

The motion seeks to value real property collateral that is the moving party's principal residence. At the hearing, the court will hold a scheduling conference and set an evidentiary hearing under Federal Rule of Bankruptcy Procedure 9014(d). An evidentiary hearing is required because the disputed, material factual issue of the collateral's valuation must be resolved before the court can rule on the relief requested.

Before the hearing, the parties shall attempt to meet and confer to determine: (i) whether the court has fully and fairly described the evidentiary issues requiring resolution; (ii) whether any party wishes to engage in discovery prior to the evidentiary hearing and the time necessary to complete discovery; (iii) the deadlines for any dispositive motions or evidentiary motions; (iv) the dates for the evidentiary hearing and the trial time that will be required; (v) whether the parties wish to use or waive the provisions of Local Bankruptcy Rule 9017-1; and (vi) any other such matters as may be necessary or expedient to the resolution of these issues.

19. 11-15455-A-13 SHANNON EZELL
RSW-4
SHANNON EZELL/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO ALLOW SUBMISSION OF CORRECTED ORDER CONFIRMING PLAN
9-11-13 [41]

Tentative Ruling

Motion: Allow Submission of Corrected Order Confirming Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

As a result of errors by debtor's counsel both the Chapter 13 Plan § 3.08, May 10, 2011, ECF No. 5, and the Order Confirming the Plan, August 4, 2011, ECF No. 16, incorrectly recite that counsel received a retainer of $1,150.00, when he actually only received a retainer of $150.00. Debtor's counsel now seeks to correct the confirming order by motion served on only the U.S. Trustee, Chapter 13 trustee Michael H. Meyer and one of eight creditors that have filed claims in the case.

The court perceives this to be a request for a nonmaterial modification of the plan in a confirming order under Local Bankruptcy Rule 3015-1(d)(3), which allows nonmaterial modifications that do not delay or reduce the dividend payable on account of any claim or otherwise modify the claim of any creditor. The court declines debtor's invitation to modify the confirming order. First, Local Bankruptcy Rule 3015-1(d)(3) is permissible, "The court may approve...nonmaterial modifications of a confirmed chapter 13 plan." The does declines to exercise this discretion given the lack of notice to impacted creditors and the delay in seeking correction. Second, and more importantly, the modification is not nonmaterial. The dividend to unsecured creditors will be delayed. As a result, the motion will be denied without prejudice. Counsel for the debtor may remedy the matter by proposing a modified Chapter 13 plan in compliance with Local Bankruptcy Rule 3015-1(d).

20. 13-13660-A-13 MICHAEL/VERONICA WHITE
LKW-2
MICHAEL WHITE/MV
LEONARD WELSH/Atty. for dbt.

MOTION TO CONFIRM PLAN
9-5-13 [34]

Tentative Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before

the hearing on this motion. LBR 3015-1(d)(1), 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

CONFIRMATION

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1325 and by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994).

Local Bankruptcy Rule 3015-1(d)(1) governs confirmation of Chapter 13 plans modified prior to confirmation. The debtor must give notice to all persons so entitled. LBR 3015-1(d)(1). Federal Rule of Bankruptcy Procedure 2002(b) requires notice to the debtor, trustee and all creditors. A comparison of the Proof of Service, September 5, 2013, ECF No. 37, with the court's creditor's matrix reveals twelve creditors either not served or not served at the correct address. As a result, the motion will be denied.

75 DAY ORDER

A Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on the date of this hearing. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's motion. *See* 11 U.S.C. § 1307(c)(1).

21. 13-14768-A-13 GREGORY/SUSAN ERNST
PLG-2
GREGORY ERNST/MV
STEVEN ALPERT/Atty. for dbt.
WITHDRAWN

OBJECTION TO CLAIM OF DISCOVER BANK, CLAIM NUMBER 3
9-6-13 [28]

Final Ruling

The objection withdrawn, the matter is dropped as moot.

22. 13-14768-A-13 GREGORY/SUSAN ERNST
PLG-3
GREGORY ERNST/MV
STEVEN ALPERT/Atty. for dbt.

MOTION TO CONFIRM PLAN
9-10-13 [35]

Final Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 3015-1(d)(1), 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1325 and by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). The court finds that the debtor has sustained that burden, and the court will approve confirmation of the plan.

23. 13-14172-A-13 KRISTA TWIST
KTT-3
KRISTA TWIST/MV
KRYSTINA TRAN/Atty. for dbt.
PLAN WITHDRAWN

MOTION TO CONFIRM PLAN
9-24-13 [38]

Final Ruling

The plan withdrawn, the matter is dropped as moot.

24. 13-12273-A-13 JOHN NULL
PWG-1
JOHN NULL/MV

PHILLIP GILLET/Atty. for dbt.
RESPONSIVE PLEADING
WITHDRAWN,

CONTINUED MOTION TO VALUE COLLATERAL OF OCWEN LOAN SERVICING, LLC
6-12-13 [19]

Final Ruling

The matter resolved by stipulated order, the motion is dropped as moot.

25. 10-18077-A-13 FAITH TUBI
MHM-3
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

CONTINUED MOTION TO DISMISS CASE
8-13-13 [66]

Tentative Ruling

Motion: Continued Motion to Dismiss
Notice: Continued date of hearing
Disposition: Granted and case dismissed
Order: Prepared by moving party

The Trustee has moved to dismiss the Debtor's case for cause under § 1307(c). The Debtor has filed a response that does not necessarily oppose the Trustee's motion. Instead, the Debtor provides that the disposition of the motion is proper only after the outcome of the hearing on the objection to the Debtor's claim of exemption.

Since the court will sustain the Trustee's objection to the exemption, the court will also grant the Trustee's motion, and the case will be dismissed.

DISCUSSION

On request of a party in interest and after notice and a hearing, the court shall dismiss a Chapter 13 case or convert it to a Chapter 7 case, "whichever is in the best interests of creditors and the estate," for cause shown. 11 U.S.C. § 1307(c). In deciding such motions, the court must engage in a two-step analysis. *See Rollex Corp. v. Associated Materials, Inc. (In re Superior Siding & Window, Inc.)*, 14 F.3d 240, 242 (4th Cir. 1994) (chapter 11 case). First, the court must ascertain whether cause exists. *Id.* Second, if the court finds that cause exists, it must decide whether dismissal or conversion better serves the interests of creditors and the estate. *Shulkin Hutton, Inc., P.S. v. Treiger (In re Owens),* 552 F.3d 958, 960-61 (9th Cir. 2009); *Superior Siding & Window*, 14 F.3d at 242.

The moving party bears the burden of proving by a preponderance of the evidence that cause exists. *In re Creekside Senior Apartments,* L.P., 489 B.R. 51, 60 (B.A.P. 6th Cir. 2013). Once the moving party has met its burden, it is incumbent on the debtor to show that relief is not warranted. *See In re Woodbrook Assocs.*, 19 F.3d 312, 317 (7th Cir. 1994).

Cause

The term "cause" is not defined by the Bankruptcy Code, but § 1307(c) provides a non-exhaustive list of grounds that establish "cause" for dismissal or conversion. Relevant here, cause includes "material default by the debtor with respect to a term of a confirmed plan." § 1307(c)(6).

Pursuant to the confirmation order (ECF No. 49), the Debtor was required to do the following:

Debtor shall continue the litigation [against her former nursing school] and, upon settlement or judgment, notify the Chapter 13 Trustee of any settlement or judgment and provide the Trustee with all documents reflecting the amount of the settlement or judgment and the amount the Debtor claims exempt. Any non-exempt amounts shall be paid

immediately to the Chapter 13 Trustee.

The Debtor has failed to perform all of these obligations. The litigation ended, and she received $20,465.92 as an award. Yet, she never notified the Trustee about her receipt of the proceeds, provided the Trustee with the relevant documents, or pay over the funds. These clearly represent defaults under her confirmed plan. At this time, she can no longer transmit any of these funds to the Trustee because she has already exhausted them entirely on non-bankruptcy-related obligations. Since the Debtor has no ability to cure these defaults, the court finds that there has been a "material default by the debtor with respect to a term of a confirmed plan."

Dismissal or Conversion

If the court finds that cause exists, it must then decide whether dismissal or conversion better serves the interests of creditors and the estate. *Shulkin Hutton,* 552 F.3d at 960-61; *Superior Siding & Window*, 14 F.3d at 242. Here, the court finds dismissal is the more appropriate relief.

If the case was converted to chapter 7, it is unclear whether there will even be any assets to distribute to creditors. Under her now-completed 36-month plan, the Debtor had only paid general unsecured claims a total of $6,309.42. If that was sufficient to pass the liquidation test at the time of confirmation, that suggests that any estate in a chapter 7 case would have only non-exempt assets of limited value. Further, the estate would not even include the $20,465.92 award since the Debtor no longer has control of that asset. *See* § 348(f)(1)(A) (providing that "property of the estate in the converted [chapter 13] case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion").

As a result, the court finds that dismissal, rather than conversion, is appropriate in this case.

CONCLUSION

For the reasons set forth above, the court will also grant the Trustee's motion, and the case will be dismissed.

26. 10-18077-A-13 FAITH TUBI
MHM-4
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
9-16-13 [76]

Final Ruling

Motion: Objection to Claim of Exemption
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Sustained
Order: Prepared by objecting party

Unopposed objections are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c); LBR 9001-1(d), (n) (contested matters include objections). Written opposition to the sustaining of this objection was required not less than 14 days before the hearing on this objection. None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

The Debtor has amended her Schedule C in order to exempt her $20,465.92 “claim for refund of tuition against RN Learning Center” under California Code of Civil Procedure § 703.140(b)(11)(A) and (E), as a crime victim’s reparations and a loss of future earnings, respectively. The Trustee has filed an objection as to both claimed exemptions.

For the reasons set forth below, the court will sustain the objection. Neither of the exemptions can be appropriately claimed for the Debtor’s “claim for refund of tuition.”

DISCUSSION

Objection to Claim of Exemption

It is well accepted in the Ninth Circuit that a claimed exemption is presumptively valid. *In re Carter*, 182 F.3d 1027, 1029 n.3 (9th Cir. 1999). Once the exemption has been claimed, “the objecting party has the burden of proving that the exemptions are not properly claimed.” Fed. R. Bankr. P. 4003(c); *In re Davis*, 323 B.R. 732, 736 (B.A.P. 9th Cir. 2005). This means that the objecting party not only has the burden of producing evidence rebutting the presumptively valid exemption but also the ultimate burden of persuasion. *Carter*, 182 F.3d at 1029 n.3. So even if the presumption of validity is rebutted with evidence from the objecting party forcing the debtor to come forward with unequivocal evidence to support the exemption, “[t]he burden of persuasion . . . always remains with the objecting party.” *Id.* Here, the Trustee, as the party objecting to the Debtor’s exemptions, has the burden of production and persuasion to prove that the Debtor’s exemptions were not properly claimed.

Crime Victim Reparations & Loss of Future Earnings

A debtor is entitled to exempt the “debtor’s right to receive, or property that is traceable to . . . [a]n award under a crime victim’s reparation law.” Cal. Civ. Proc. Code § 703.140(b)(11)(A). A debtor is also entitled to exempt the “debtor’s right to receive, or property that is traceable to . . . [a] payment in compensation of loss of future earnings of the debtor . . . to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.” Cal.

Civ. Proc. Code § 703.140(b)(11)(E). These two exemptions under California law mirror the exemptions available under the federal exemption scheme. *See* 11 U.S.C. § 522(d)(11)(A), (E). These exemptions under § 522(d)(11) (and, as a result, under § 703.140(b)(11)) are "designed to cover payments in compensation of actual body injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such a loss, such as medical payments, pain and suffering, or loss of earnings." H.R. Rep. No. 95-595, at 362 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6318.

Here, neither the exemption for a crime victim's reparations nor the exemption for the loss of future earnings is applicable to the Debtor's "claim for refund of tuition against RN Learning Center." The Debtor's own declaration provides that the $20,465.92 funds she had received were the result of a civil lawsuit filed by the Board of Nursing against RN Learning Center, her former school, and represented a partial reimbursement of the tuition that she had paid. She states that a criminal prosecution may be possible against the school in the future, but that does not change the fact that these funds clearly were the result of a civil action. Thus, the funds were not an "award under a crime victim's reparation law." And since these funds were intended as reimbursement of her previously paid tuition, they also do not represent a "payment in compensation of loss of future earnings of the debtor."

CONCLUSION

For the reasons set forth above, the court will sustain the Trustee's objection. Neither of the exemptions can be appropriately claimed for the Debtor's "claim for refund of tuition."

27. 10-63881-A-13 MICKEY/KATHRYN HOWELL
RSW-4
MICKEY HOWELL/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO AVOID LIEN OF AMERICAN EXPRESS CENTURION BANK
10-1-13 [60]

Tentative Ruling

Motion: Avoid Lien that Impairs Exemption
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Liens Plus Exemption: $514,478.10
Property Value: $209,433.00
Judicial Lien Avoided: $25,888.02

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to

avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390–91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

The responding party's judicial lien, all other liens, and the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, the responding party's judicial lien will be avoided entirely.

28. 13-13383-A-13 BOBBY MAXWELL
JFS-1
GERALD MAXWELL/MV

PRE-TRIAL CONFERENCE RE: OBJECTION TO CONFIRMATION OF PLAN BY GERALD MAXWELL
6-19-13 [20]

PATRICK KAVANAGH/Atty. for dbt.
JOSEPH SOARES/Atty. for mv.
RESPONSIVE PLEADING

[This matter will be called at 9:30 a.m. in conjunction with the adversary proceeding Maxwell v. Maxwell, No. 13-1070 (Bankr. E.D. Cal. 2013.]

No tentative ruling

29. 13-10286-A-13 ALI TORKAMAN
SJS-1
ALI TORKAMAN/MV
SUSAN SALEHI/Atty. for dbt.
RESPONSIVE PLEADING

CONTINUED MOTION TO AVOID LIEN OF FARGAH TORKAMAN
3-11-13 [27]

No tentative ruling

30. 13-10286-A-13 ALI TORKAMAN
SJS-2
ALI TORKAMAN/MV
SUSAN SALEHI/Atty. for dbt.
RESPONSIVE PLEADING

OBJECTION TO CLAIM OF FARGAH TORKAMAN, CLAIM NUMBER 8
8-19-13 [49]

Tentative Ruling

Motion: Objection to Proof of Claim No. 8
Notice: LBR 3007-1(b)(1); written opposition filed
Disposition: Overruled
Order: Civil minute order

The claimant Fargah Torkaman ("Torkaman") filed Proof of Claim No. 8, asserting a $74,947 secured claim arising from a state court dissolution judgment and abstract of judgment. The debtor Ali Torkaman (the "Debtor") has filed a claim objection, arguing that the claim should be disallowed in whole.

For the reasons set forth below, the court will overrule the Debtor's objection on all grounds.

DISCUSSION

A properly filed and executed proof of claim "constitutes prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). The burden then shifts to the objecting party to present evidence to overcome the claimant's prima facie case. *Murgillo v. Cal. State Bd. of Equalization (In re Murgillo)*, 176 B.R. 524, 529 (B.A.P. 9th Cir. 1995). The ultimate burden of persuasion is always on the claimant. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991).

Filing Deadline / Informal Proof of Claim

Under Bankruptcy Rule 3002(c), a "proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors," with some exceptions. In a chapter 13 case, if a proof of claim is not timely filed in accordance with Rule 3002(c), then the bankruptcy court must disallow the claim. *See United States v. Osborne (In re Osborne)*, 76 F.3d 306, 309–11 (9th Cir. 1996) (citing *Ledlin v. United States (In re Tomlan)*, 907 F.2d 114 (9th Cir. 1990) (per curiam), *aff'g* 102 B.R. 790 (B.A.P. 9th Cir. 1989)). *But cf. United States v. Towers (In re Pac. Atl. Trading Co.)*, 33 F.3d 1064, 1067 (9th Cir. 1994) (holding that in a chapter 7 case, "Rule 3002(c) does not disallow a late claim").

Here, the deadline for filing proofs of claim was May 29, 2013. However, Torkaman did not file her proof of claim until June 4, 2013. Even though it was untimely, that does not necessarily end the court's inquiry.

Even if a formal proof of claim is untimely filed, the claim may still nevertheless be allowed under the informal proof of claim doctrine, long recognized in the Ninth Circuit. *See Pac. Res. Credit Union v. Fish (In re Fish)*, 456 B.R. 413, 417 (B.A.P. 9th Cir. 2011) (citing cases). "Under the doctrine, a timely informal proof of claim may be amended after the bar date by the filing of a formal proof of claim." *Id.* Application of this doctrine is consistent with the Ninth Circuit's "so-called rule of liberality in amendments" to creditors' proofs of claim. *Anderson-Walker Indus., Inc. v. Lafayette Metals,*

Inc. (In re Anderson-Walker Indus., Inc.), 798 F.2d 1285, 1287 (9th Cir. 1985).

For the court to recognize an informal proof of claim, five requirements must be met: "(1) present of a writing; (2) within the time for the filing of claims; (3) by or on behalf of the creditor; (4) bringing to the attention of the court; (5) the nature and amount of a claim asserted against the estate." *Fish*, 456 B.R. at 417; *accord Anderson-Walker*, 798 F.2d at 1287 ("For a document to constitute an informal proof of claim, it must state an explicit demand showing the nature and amount of the claim against the estate, and evidence an intent to hold the debtor liable."). Even though it must be brought to the attention of the court, the "document that purports to be an informal proof of claim need not be filed in the court." *Wright v. Holm (In re Holm)*, 931 F.2d 620, 622 (9th Cir. 1991) (citing *Cnty. of Napa v. Franciscan Vineyards, Inc. (In re Franciscan Vineyards, Inc.)*, 597 F.2d 181, 183 (9th Cir. 1979) (per curiam) (recognizing informal proof of claim where claimant sent letter to trustee)).

Based on several acts and documents from Torkaman, the court concludes that an informal proof of claim has been filed before the claims bar date and that, as a result, Torkaman's untimely formal proof of claim will relate back to the timely informal proof of claim.

First, Torkaman's declaration supporting her opposition to the Debtor's motion to avoid lien (ECF No. 35), filed April 4, 2013, helps establish the informal proof of claim. In the declaration, Torkaman states the following:

1. I am the creditor in the Chapter 13 case filed by Ali Torkaman ("Debtor"). Debtor is my former spouse and the debt owed to me by Debtor represents debt arising out of the dissolution of my marriage to Debtor.

2. Debtor's debt owed to me is memorialized in a Marital Settlement Agreement dated December 11, 2007 and a judgment entered by the Kern County Superior Court on January 28, 2008. I recorded an Abstract of Judgment in the Kern County Recorder's Office on April 23, 2012 to secure repayment of the debt owed to me.

Although the declaration does not expressly state the amount of Torkaman's claim, the declaration references the Abstract of Judgment. That Abstract of Judgment had already been filed by the Debtor as Exhibit A to the motion to avoid lien (ECF No. 27), and the Abstract of Judgment unequivocally states that the debt owed is for $50,000. Thus, an amount has been asserted based on the incorporated reference to the Abstract of Judgment. As a result, this declaration clearly "evidence[s] an intent to hold the debtor liable" and helps establish Torkaman's informal proof of claim.

Second, Torkaman's attorney sent a letter dated May 10, 2013, to the Debtor's attorney, which also supports recognizing an informal proof of claim. In the letter, Torkaman's attorney recommends to the Debtor "modifying [the Debtor's] Chapter 13 Plan to provide for payment in full of [Torkaman's] secured claim" and suggests how that claim could be paid.

Third, Torkaman's answer to the Debtor's complaint (ECF No. 7 in Adv. No. 13-1026), which was filed on April 5, 2013, also supports her position. In the answer, Torkaman admits to the allegation in the

complaint (ECF No. 1 in Adv. No. 13-1026) that "[the Debtor] was ordered to pay [Torkaman] $50,000 . . . as part of their divorce proceedings on January 22, 2008." She also admits that "she is a creditor of [the Debtor."

Lastly, the Debtor has acknowledged that Torkaman had attended the Debtor's meeting of creditors. Attending such a meeting may further support the recognition of an informal proof of claim. *See Anderson-Walker*, 798 F.2d at 1288 (noting that creditor's "active participation in the bankruptcy court proceedings may be considered" in determining whether document constituted informal proof of claim).

Based on the acts and documents from Torkaman (primarily, the declaration supporting her opposition to the motion to avoid lien (ECF No. 35), and the answer to the Debtor's complaint (ECF No. 7 in Adv. No. 13-1026)) and consistent with the Ninth Circuit's liberality on this issue, the court finds that Torkaman had filed an informal proof of claim before the claims bar date. As a result, the untimely formal proof of claim will relate back as a proper amended proof of claim.

The Debtor's objection is overruled on these grounds.

Validity of Claim as a Whole

Turning to the merits of the Debtor's claim objection, the Debtor makes two principal arguments. First, he argues that Torkaman's claim must be disallowed pursuant to Rule 3001(c)(1) for lack of supporting documents. Torkaman has only attached the Abstract of Judgment to her proof of claim, failing to include the Dissolution Judgment and the Marital Settlement Agreement, which establish the debt. Since these documents were not attached, the Debtor is essentially arguing that Torkaman has not met her burden of proof.

The court would agree with the Debtor on this issue since the Abstract of Judgment only establishes the secured status of the debt, rather than establishing the debt itself. Thus, Torkaman would need to include the Dissolution Judgment and the Marital Settlement Agreement to define what that debt is. However, the Debtor has met Torkaman's burden of proof for her by attaching those two missing documents to his claim objection. As a result, this argument must fail.

The Debtor's second argument for disallowing the claim is that the debt is contingent on certain conditions occurring, and such conditions have not yet occurred. The Marital Settlement Agreement (which has been incorporated into the Dissolution Judgment) includes the following language: "Husband [the Debtor] agrees to pay Wife [Torkaman] the sum of $50,000.00 for her community interest in the residence. Husband will pay Wife her entitled sum of money upon sale of said residence, sale of the real property located at 17523 Falling Creek, Bakersfield, California or after spousal support payments are terminated." The Debtor contends that since none of the three conditions stated in the Agreement have occurred (i.e., the properties have not been sold and support payments have not been terminated), Torkaman has no claim against the Debtor at the moment.

This argument must also be rejected for two reasons. First, the claim arising from the Dissolution Judgment and Marital Settlement Agreement does not even represent a contingent liability. "Claims are contingent as to liability when the debtor's duty to pay arises only upon the occurrence of a future event that was contemplated by the parties at the time of the contract's execution. The classic example

is a wager between two parties; until the wagered-on event comes to pass, both have contingent liabilities in the amount of the bet." *Chi. Title Ins. Co. v. Seko Inv., Inc. (In re Seko Inv., Inc.)*, 156 F.3d 1005, 1008 (9th Cir. 1998). If the properties are never sold or support payments are never terminated, that does not mean the Debtor has no duty to pay Torkaman $50,000. Under the terms of the Agreement, that obligation is an absolute one, rather than a contingent one. The three conditions under the Agreement, instead, represent the triggering events for when the duty must be performed, rather than if the duty must be performed. Thus, the claim is more properly characterized as being unmatured, rather than contingent.

Second, even if the claim is contingent, the definition of a "claim" is intended to be expansive to include such claim. The Bankruptcy Code defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated fixed, *contingent*, mature, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 101(5)(A) (emphasis added). Thus, since contingent rights to payment are included in the definition of "claim," that is not a basis for disallowing Torkaman's claim.

The Debtor's objection is overruled on these grounds.

Prepetition Interest

Next, the Debtor argues that prepetition interest on the $50,000 judgment should be disallowed. Specifically, the Debtor points to California Code of Civil Procedure § 685.020(b), which states that "if a money judgment is payable in installments, interest commences to accrue as to each installment on the date the installment becomes due." However, as Torkaman has pointed out, this is not a judgment that is "payable in installments." Rather, the judgment requires the Debtor to pay the judgment amount in full even though payment does not occur until the occurrence of one of three events. Since it is not an installment judgment, "interest commences to accrue on [the] judgment on the date of entry of the judgment." Cal. Civ. Proc. Code § 685.020(a). The dissolution judgment was entered on January 22, 2008, and Torkaman properly started to calculate the interest starting from this date.

The Debtor's objection is overruled on these grounds.

Postpetition Interest

Lastly, the Debtor argues that postpetition interest on the $50,000 judgment should be disallowed. However, at this time, nothing in the proof of claim shows that Torkaman has included postpetition interest in her claim. Rather, she has only calculated interest from January 22, 2008 until January 16, 2013, the petition date. Thus, this objection is premature at this time.

The Debtor's objection is overruled on these grounds.

CONCLUSION

For the reasons set forth above, the court will overrule the Debtor's objection on all grounds.

31. 13-12891-A-13 JOHN/JAYNE DESCHUTTER — OBJECTION TO CONFIRMATION OF PLAN BY VORTEX CONSTRUCTION
9-19-13 [38]

VORTEX CONSTRUCTION/MV
PATRICK KAVANAGH/Atty. for dbt.
RAY MULLEN/Atty. for mv.

Final Ruling

This matter is continued November 21, 2013, at 9:00 a.m. Not later than October 30, 2013, the moving party shall serve the objection, and all supporting documents, and notice of the continued hearing on those persons entitled. LBR 3015-1(c)(4). Not later than October 31, 2013, the moving party shall file a Certificate of Service indicating compliance.

In the future, motions and objections shall be properly identified by docket control number. LBR 3015-1(c)(4), 9014-1(c). In the future, failure to comply with local rules may result in summary denial of motion or overruling of the objection.

32. 13-12891-A-13 JOHN/JAYNE DESCHUTTER — MOTION TO SELL
PK-1 — 9-27-13 [42]

JOHN DESCHUTTER/MV
PATRICK KAVANAGH/Atty. for dbt.

Tentative Ruling

Motion: Sell Property
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted in part under § 363(b) subject to the condition that the sale is not made to nominee or designee of the buyer, and denied in part as to § 363(f) relief
Order: Prepared by moving party

Property: 1/3 interest in 3315 Hillburn Road, Bakersfield, California
Buyer: Curtis Embrey and Julene Embrey but not to their undisclosed nominee
Sale Price: $61,000.00
Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

SALE UNDER § 363(b)

Confirmation of a Chapter 13 plan revests property of the estate in the debtor unless the plan or order confirming the plan provides otherwise. 11 U.S.C. § 1327(b); *see also In re Tome*, 113 B.R. 626, 632 (Bankr. C.D. Cal. 1990). Here, the plan has not yet been confirmed, so the subject property remains property of the estate.

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). A Chapter 13 debtor has the rights and powers given to a trustee under § 363(b). 11 U.S.C. § 1303. Based on the motion and supporting papers, the court finds a proper reorganization purpose for this sale. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

SALE UNDER § 363(f)

Grounds for Relief

The motion requests free and clear relief under § 363(f). The motion states no factual basis for such relief pursuant to any of the statutory grounds for such relief under § 363(f)(1)–(5). Such relief will therefore be denied. *See* Fed. R. Bankr. P. 9013.

Service on Access Capital Services, Inc.

Additionally, service of process on Access Capital Services does not appear to be sufficient. First, the copy of the business entity detail from the Secretary of State's website attached to the proof of service lists 268 N. Main Street, Porterville, CA as the address for this entity. However, the proof of service shows 268 Main Street, Porterville, CA. "N. Main Street" is not the same as "Main Street."

Further, "Access Capital Services, Inc." is the name of this responding party listed in the abstract of judgment attached as an exhibit and on the business entity detail from the Secretary of State's website attached to the proof of service. But the motion lists "Asset Capital Services, Inc." as the respondent. And the proof of service shows service on an agent for "Access Capital Services" with no indication of incorporated status after the name like the name on the abstract of judgment. Any difference between the name of the entity against whom relief is sought and the name of the entity served suggests that service was insufficient and made on a party other than the party named in the motion.

9:15 a.m.

1. 13-13007-A-13 JOSE/MARIA MAUN
MHM-1
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
9-19-13 [47]

JOEL FEINSTEIN/Atty. for dbt.

No tentative ruling

9:30 a.m.

1. 13-13383-A-13 BOBBY MAXWELL
13-1070
MAXWELL V. MAXWELL
JOSEPH SOARES/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-18-13 [1]

[This matter will be called subsequent to the motion for summary judgment, JFS-1, Item No. 2]

No tentative ruling.

2. 13-13383-A-13 BOBBY MAXWELL
13-1070 JFS-1
MAXWELL V. MAXWELL

MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FO JUDGMENT AS A MATTER OF LAW
9-18-13 [15]

JOSEPH SOARES/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Motion for Summary Judgment
Notice: LBR 9014-1(f)(1); written opposition filed
Disposition: Denied
Order: Civil minute order

The plaintiff Gerald Maxwell (“Maxwell”) has moved for summary judgment on his § 523(a)(4) claim against the debtor/defendant Bobby Maxwell (the “Debtor”). Maxwell argues that summary judgment in his favor is proper if the court applies collateral estoppel based on the state court’s judgment, along with the accompanying decision (the “Intended Decision”), entered against the Debtor. The Debtor has opposed the motion.

For the reasons set forth below, the court will deny the motion for summary judgment.

DISCUSSION

Summary Judgment

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.* Meeting this initial burden requires the moving party to show only "an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.* "In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *Id.* at 387.

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

Failure "to properly address another party's assertion of fact as required by Rule 56(c)" permits the court to "consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). If facts are considered undisputed because a party fails to properly address them, the court may "grant summary judgment if the motion and supporting materials—including facts considered undisputed—show the movant is entitled to it." Fed. R. Civ. P. 56(e)(3).

Collateral Estoppel

Principles of collateral estoppel, also known as issue preclusion, "do indeed apply in discharge exception proceedings pursuant to § 523(a)." *Grogan v. Garner*, 498 U.S. 279, 284 & n.11 (1991). "In addition, 28 U.S.C. § 1738 requires [federal courts], as a matter of full faith and credit, to apply the pertinent state's collateral estoppel principles." *Cal-Micro, Inc. v. Cantrell*, 329 F.3d 1119, 1123 (9th Cir. 2003) (citing *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9th Cir. 1995)).

The five threshold requirements that must be met to apply the doctrine are well established under California law. *See, e.g.*, *id.*; *see also Kelly v. Okoye (In re Kelly)*, 182 B.R. 255, 258 n.3 (B.A.P. 9th Cir. 1995) (noting that federal and state law requirements for application of the doctrine are the same). "[1] First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. [2] Second, this issue must have been actually litigated in the former proceeding. [3] Third, it must have been necessarily decided in the former proceeding. [4] Fourth, the decision in the former proceeding must be final and on the merits. [5] Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." *Cantrell*, 329 F.3d at 1123.

"The party seeking to assert collateral estoppel has the burden of proving all the requisites for its application. To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *Kelly*, 182 B.R. at 258. The court will not apply collateral estoppel if any reasonable doubt exists as to what the prior judgment decided. *Id.* (citing *Spilman v. Harley*, 656 F.2d 224, 227–28 (6th Cir. 1981)).

Analysis

Here, the court concludes that collateral estoppel does not apply since Maxwell has not conclusively established that the issues under § 523(a)(4) were necessarily decided in the state court judgment. The petition filed in the state court case mentions a variety of statutory provisions (California Probate Code §§ 16002, 16006, 16040, 16060, 17200), but the state court's Intended Decision did not reference any of these provisions in support of the judgment in favor of Maxwell. Thus, this court cannot tell the causes of action (and elements of such causes of action) that the state court decided in favor of Maxwell in order to reach the conclusion that Maxwell was entitled to $214,038.86 in damages. Without clarification, this court cannot tell what are the issues that were necessarily decided in the judgment for purposes of applying collateral estoppel.

Simply because a court has made a certain determination in a case does not mean that court has decided an issue that is necessary to the judgment. Thus, for example, on a cause of action that requires only negligent misconduct, a court's finding of gross negligence—though more than sufficient to satisfy that cause of action—cannot be relied upon for collateral estoppel purposes on the issue of gross negligence. On that cause of action, since only negligence was required, only the issue of negligence would be necessary to the judgment and only that issue can be relied upon for collateral estoppel purposes.

Applied here, even if the state court may have stated that the Debtor acted with the requisite state of mind required by *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013), Maxwell has not established whether these determinations were necessary to the state court's judgment. Maxwell has not shown that the causes of action under the applicable state law decided by the state court incorporate the same state of mind required by *Bullock*. Maxwell simply asks the court to read the Intended Decision to find summary judgment in his favor without even going through the appropriate collateral estoppel analysis in his motion. Maxwell has not listed the issues or elements of the applicable state statutes and compared them with the elements of § 523(a)(4), for the purposes of establishing the identity of the issues. And this court cannot rely solely on the state court's Intended Decision since it lacks clarity as to the claims and issues that were decided.

CONCLUSION

For the reasons set forth above, the court will deny the motion for summary judgment.

10:00 a.m.

1. 12-19595-A-12 ROGELIO/PAULA RIOS — MOTION TO DISMISS CASE
DMG-5 — 10-4-13 [64]
ROGELIO RIOS/MV

D. GARDNER/Atty. for dbt.

Tentative Ruling

Motion: Dismiss Chapter 12 Case
Notice: LBR 9014-1(f)(2); comments filed by the Valadezes, secured creditors
Disposition: Continued to November 21, 2013, at 10:00 a.m.
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Chapter 12 debtors may dismiss their case at any time provided the case has not been converted under § 706 or § 1112. 11 U.S.C. § 1208(b). The debtors' motion seeks relief to which they are entitled as a matter of right. The trustee has filed a non-opposition to the motion.

However, the motion was filed and served on October 4, 2013. Creditors and parties in interest received less than the 21 days' notice to which they were entitled under Federal Rule of Bankruptcy Procedure 2002(a). To receive 21 days' notice of the hearing, the motion should have been filed and served no later than October 2, 2013.

The court will continue the hearing on the motion to allow creditors 21 days' notice of the hearing on the dismissal. No later than 21 days before the continued hearing date (October 31, 2013), the debtors shall file a notice of continued hearing that does not require written opposition but permits opposition to be presented at the continued hearing date.

10:30 a.m.

1. 13-14808-A-7 JULIE ESCALANTE — REAFFIRMATION AGREEMENT WITH BMW BANK OF NORTH AMERICA 9-11-13 [13]

ROSETTA REED/Atty. for dbt.

No tentative ruling

1:00 p.m.

1. 13-15401-A-7 SOOK KIM — MOTION TO SELL
VG-1 — 10-7-13 [21]
VINCENT GORSKI/MV
STEFON JONES/Atty. for dbt.
VINCENT GORSKI/Atty. for mv.
OST 10/8

Tentative Ruling

Motion: Sell Property
Notice: LBR 9014-1(f)(3) and order shortening time; no written opposition required
Disposition: Continued to November 21, 2013, at 1:00 p.m. unless: (i) *the trustee confirms at the hearing* that all creditors and parties in interest were provided notice as of the date shown on the proof of service, and (ii) no later than October 22, 2013 at 5:00 p.m., the trustee files a proof of service showing that all creditors and parties in interest on the court's Master Mailing List received notice
Order: If the motion is granted, the order will be prepared by moving party; otherwise, the court will issue a civil minute order

Property: The estate's interest in personal property described in the notice of hearing and motion, which are all the assets of Kim's Rainbow Carpet Cleaning, a sole proprietorship (the motion alleges that the estate has a partial or joint ownership interest in some of the personal property)
Buyer: Debtor
Sale Price: $21,265.64 ($4,875.00 cash plus $16,390.64 exemption credit)
Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

2. 13-15003-A-7 FRANK LAMAR
JMV-1

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
9-10-13 [32]

No Tentative Ruling

Motion: Dismiss Case and Extend Deadlines
Notice: LBR 9014-1(f)(1); written opposition required or case dismissed without hearing
Disposition: Pending
Order: Prepared by chapter 7 trustee

The debtor did not file a proof of service for the notice of hearing. But if the trustee waives any lack of service of the notice of hearing, or if the debtor has served the motion but failed to file a proof of service, the court will grant the motion in part, and conditionally deny the motion in part as stated below.

Proposed ruling in the event that service issues are resolved:

The Chapter 7 trustee has filed a Motion to Dismiss for Failure to Appear at the § 341(a) Meeting of Creditors and Motion to Extend Deadlines for Filing Objections to Discharge. The debtor opposes the motion. The court will deny the motion to dismiss subject to the condition that the debtor attend the continued meeting of creditors.

Certain deadlines will be extended so that they run from the continued date of the § 341(a) meeting of creditors rather than the first date set for the meeting of creditors. The continued date of the meeting of creditors is October 25, 2013, at 10:00 a.m. The deadline for objecting to discharge under § 727 is extended to 60 days after this continued date. *See* Fed. R. Bankr. P. 4004(a). The deadline for bringing a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, is extended to 60 days after such date. *See* Fed. R. Bankr. P. 1017(e).

The motion will be granted in part and conditionally denied in part. The motion will be granted to the extent it requests extension of certain deadlines so that they run from the continued date of the meeting of creditors. The motion will be conditionally denied in part to the extent it requests dismissal of the case. The court will deny the motion to dismiss subject to the condition that the debtor appear at the continued meeting of creditors, but if the debtor does not appear at the continued meeting of creditors, the case will be dismissed on the trustee’s ex parte declaration.

3. 13-15503-A-7 FRANK BUCKLE
UST-1
AUGUST LANDIS/MV
NEIL SCHWARTZ/Atty. for dbt.
ROBIN TUBESING/Atty. for mv.

MOTION TO DISMISS CASE PURSUANT TO 11 U.S.C. SECTION 707(B)
9-17-13 [13]

Final Ruling

Motion: Dismiss Chapter 7 Case under § 707(b)(1)–(2) [Presumption of Abuse]
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

For the reasons stated in the motion and supporting papers, the court finds that the case should be dismissed under § 707(b)(1) because the presumption of abuse arises under § 707(b)(2) of Title 11. *See* 11 U.S.C. § 707(b)(1)–(2).

The debtors have improperly claimed ownership deductions for vehicles for which no debt or lease payments are owed. *See Ransom v. FIA Card Servs.*, 131 S. Ct. 716, 725 (2011) ("The ownership category encompasses the costs of a car loan or lease and nothing more."). After adjusting for these improperly claimed deductions on the means test, the presumption of abuse arises under § 707(b)(2)(A). The motion will be granted, and the case will be dismissed.

4. 13-10814-A-7 FL.INVEST.USA INC.
BH-2
DAVID KLAUDER/MV

MOTION FOR COMPENSATION BY THE LAW OFFICE OF O'KELLY ERNST & BIELLI, LLC FOR DAVID M. KLAUDER, DEBTOR'S ATTORNEY(S), FEE: $53,047.00, EXPENSES: $762.93.
9-9-13 [160]

RYAN ERNST/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Motion: First and Final Application for Compensation and Expenses
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved as to amount and payment, except as to collateral encumbered by Aldo Nemni
Order: Prepared by applicant, approved as to form by Vincent Gorski and by D. Max Gardner

Applicant: O'Kelly, Ernst & Bielli, LLC
Compensation approved: $53,047.00
Costs approved: $762.93
Aggregate fees and costs approved: $53,809.93
Retainer held: $41,760.50
Amount to be paid as administrative expense: $12,049.43

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). Except for opposition by Chapter 7 trustee Vincent Gorski and creditor Aldo Nemni, none has been filed. The default of all other responding parties is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by counsel for the debtor in possession in a Chapter 11 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

Only two parties in interest oppose the motion. First, creditor Aldo Nemni opposes the motion to the extent that O'Kelly, Ernst & Bielli, LLC seeks payment from collateral, or proceeds thereof, subject to a properly perfected security interest in his favor. The court agrees. Section 507(a)(2) claims do not have priority over secured claims. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 4-5 (2000). O'Kelly, Ernst & Bielli, LLC's claim for fees are entitled to priority under 11 U.S.C. § 507(a)(2). As a result, the properly perfected rights, if any, of creditor Nemni trump those of O'Kelly, Ernst & Bielli, LLC and, absent consent of creditor Nemni or further order of this court, collateral or proceeds therefrom may not be used to pay O'Kelly, Ernst & Bielli, LLC's fees. And the court makes no finding as to whether the retainer held by the applicant is subject to an encumbrance in favor of creditor Aldo Nemni. Fed. R. Bank. P. 7001(2).

Second, Chapter 7 trustee Vincent Gorski opposes the application arguing that the services were unnecessary, duplicative and unproductive, citing the Memorandum Decision, August 7, 2013, ECF No. 145, finding lack of good faith and converting the case. The court disagrees on two grounds. First, the finding that the debtor's petition was not filed in good faith was specific to the debtor, and no finding was made as to counsel. Memorandum Decision, August 7, 2013, ECF No. 145. And the Chapter 7 trustee has cited no authority holding that the sins of the debtor are, as a matter of law, visited upon its counsel. Second, whether the services were necessary to the administration of the case or beneficial to the estate is determined objectively with reference to the time the services were rendered. 11 U.S.C. § 330(a)(3)(A),(C); *In re Mednet,* 251 B.R. 103, 108 (9th Cir B.A.P. 2000). As viewed from the vantage point of O'Kelly, Ernst & Bielli, LLC as of the rendition of those services, the work was reasonably necessary to the administration of the case or beneficial to the estate.

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

5. 13-10814-A-7 FL.INVEST.USA INC.
KDG-2
VINCENT GORSKI/MV

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH MARIA ROSA NEMNI, ALDO NEMNI, AND MIRO' AMERICA LLC
10-2-13 [182]

RYAN ERNST/Atty. for dbt.
LISA HOLDER/Atty. for mv.

Tentative Ruling

Motion: Approve Compromise or Settlement of Controversy
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied
Order: Civil minute order

Parties to Compromise: Maria Rosa Nemni, Aldo Nemni and Miro America, LLC
Dispute Compromised: Estate and Nemnis and Miro America regarding 240 acres in Kern County and hydrocarbon proceeds therefrom
Summary of Material Terms: Chapter 7 trustee will: (1)abandon 240 acres real property ("Pine Meadows"); and (2) dismiss appeal in Kern County action pending in the Fifth District Court of Appeals, No. F065062. Nemnis and Miro America will: (1) pay the estate $20,000; (2) release any claim to oil and gas proceeds collected post-petition by the estate (approximately $50,000); and (3) waive any claim against the estate.

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Except as to creditor Golden Sun Energy, the default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

In determining whether to approve a compromise under Federal Rule of Bankruptcy Procedure 9019, the court determines whether the compromise was negotiated in good faith and whether the party proposing the compromise reasonably believes that the compromise is the best that can be negotiated under the facts. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1982). More than mere good faith negotiation of a compromise is required. The court must also find that the compromise is fair and equitable. *Id.* "Fair and equitable" involves a consideration of four factors: (i) the probability of success in the litigation; (ii) the difficulties to be encountered in collection; (iii) the complexity of the litigation, and expense, delay and inconvenience necessarily attendant to litigation; and (iv) the paramount interest of creditors and a proper deference to the creditors' expressed wishes, if any. *Id.* The party proposing the compromise bears the burden of persuading the court that the compromise is fair and equitable and should be approved. *Id.*

Unsecured creditor Golden Sun Energy has opposed the sale opposes the compromise. It argues that Panorama Energy Holdings has submitted an offer to purchase Pine Meadows for $4,975,000.00, which is an amount sufficient to pay all unsecured creditors and administrative claims in full. This offer is greater than the trustee's previous interest in the property of $2-3 million. The court finds that the interests of creditors are better served by exploring this offer.

Based on the motion and supporting papers, the court finds that the compromise is not fair and equitable considering the relevant *A & C Properties* factors. The compromise will be denied.

6. 11-63718-A-7 TIMOTHY/ALLISON DOLAN — MOTION TO SELL
TGM-5 — 9-9-13 [196]
RANDELL PARKER/MV
JACOB EATON/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

Tentative Ruling

Motion: Sell Property
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Property: 22.5% membership interest in Clavo Cellars, LLC
Buyer: Neil Roberts
Sale Price: $17,000.00
Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

7. 13-11922-A-7 JOHN/TERRI ALEXANDER — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH JOSLIN D. ALEXANDER
VG-1
VINCENT GORSKI/MV

9-8-13 [46]

ROBERT BRUMFIELD/Atty. for dbt.
VINCENT GORSKI/Atty. for mv.

Tentative Ruling

Motion: Approve Compromise
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Continued to November 21, 2013, at 9:00 a.m.
Order: Civil minute order

This matter is continued to November 21, 2013, at 9:00 a.m. Not later than 21 days before the continued hearing date, Chapter 7 trustee Vincent Gorksi will serve a notice of continued hearing and motion in compliance with Federal Rule of Bankruptcy Procedure 9013, on those persons entitled to notice. Fed. R. Bankr. P. 2002(a)(3).

Federal Rule of Bankruptcy Procedure 9013, in the pertinent part, provides, "The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought." In this case, the trustee has filed a two page motion which seeks an order "Authorizing the Trustee to enter into the proposed settlement outline[d] in the e-mail correspondence attached hereto and incorporated herewith as Exhibit "A"..." Motion, p. 2, lines 5-6. To the motion is attached five pages of emails that apparently include the terms of the settlement. Asking the court and parties in interest to distill the terms of the settlement from multiple emails between the Chapter 7 trustee and the debtor is not in compliance with Federal Rule of Bankruptcy Procedure 9013.

8. 13-13626-A-7 DOXIE PALMA
RSW-1
DOXIE PALMA/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13
10-8-13 [34]

Tentative Ruling

Motion: Convert Case from Chapter 7 to Chapter 13
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 706 of the Bankruptcy Code gives Chapter 7 debtors a qualified conversion right. *See* 11 U.S.C. § 706(a), (d). A debtor's right to convert a case from Chapter 7 to Chapter 11, 12, or 13 is conditioned on (i) the debtor's eligibility for relief under the chapter to which the case will be converted and (ii) the case not having been

previously converted under §§ 1112, 1208, or 1307. 11 U.S.C. § 706(a), (d); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 372–74 (2007) (affirming denial of debtor's conversion from Chapter 7 to Chapter 13 based on bad faith conduct sufficient to establish cause under § 1307(c)).

The secured and unsecured debt amounts shown in the debtor's schedules are below the debt limits provided in § 109(e). *See* 11 U.S.C. § 109(e). The case has not been previously converted under § 1112, 1208, or 1307 of the Bankruptcy Code. *See id.* § 706(a). No party in interest has questioned the debtor's eligibility for relief under Chapter 13.

9. 13-14931-A-7 JMV-1 SCOTT/JACQUELINE BARTEL

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
9-4-13 [22]

No Tentative Ruling

Motion: Dismiss Case and Extend Deadlines
Notice: LBR 9014-1(f)(1); written opposition required or case dismissed without hearing
Disposition: Pending
Order: Prepared by chapter 7 trustee

The debtor's proof of service for the notice of hearing does not indicate the date that it was transmitted to the trustee, although it was otherwise completed and shows that a copy of the notice of hearing was actually mailed to the trustee and U.S. Trustee.

However, the notice of hearing appears to have been timely filed on the court's docket on October 4, 2013. If the trustee timely received the notice of hearing or waives lack of timely receipt, the court will adopt the following proposed ruling.

[Proposed ruling in the event that service issues are resolved:]

The Chapter 7 trustee has filed a Motion to Dismiss for Failure to Appear at the § 341(a) Meeting of Creditors and Motion to Extend Deadlines for Filing Objections to Discharge. The debtor opposes the motion. The court will deny the motion to dismiss subject to the condition that the debtor attend the continued meeting of creditors.

Certain deadlines will be extended so that they run from the continued date of the § 341(a) meeting of creditors rather than the first date set for the meeting of creditors. The continued date of the meeting of creditors is October 25, 2013, at 2:30 p.m. The deadline for objecting to discharge under § 727 is extended to 60 days after this continued date. *See* Fed. R. Bankr. P. 4004(a). The deadline for bringing a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, is extended to 60 days after such date. *See* Fed. R. Bankr. P. 1017(e).

The motion will be granted in part and conditionally denied in part. The motion will be granted to the extent it requests extension of certain deadlines so that they run from the continued date of the meeting of creditors. The motion will be conditionally denied in part to the extent it requests dismissal of the case. The court will deny the motion to dismiss subject to the condition that the debtor appear at the continued meeting of creditors, but if the debtor does not appear at the continued meeting of creditors, the case will be dismissed on the trustee's ex parte declaration.

10. 12-60459-A-7 DAVID LEE
13-1042
VETTER V. WILLIAMS
T. BELDEN/Atty. for pl.

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-19-13 [1]

Tentative Ruling

The court will inquire: (1) whether the settlement has been concluded; and (2) whether the adversary proceeding can be dismissed and the status conference concluded.

11. 10-18879-A-7 JOEL FERNANDEZ
FPS-1
JOEL FERNANDEZ/MV

MOTION TO AVOID LIEN OF ACCESS CAPITAL SERVICES, INC. AND/OR MOTION TO AVOID LIEN OF DISCOVER BANK
9-17-13 [21]

FRANK SAMPLES/Atty. for dbt.

Final Ruling

Motion: Avoid Lien that Impairs Exemption
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been

entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390–91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

In cases in which there are multiple liens to be avoided, the liens must be avoided in the reverse order of their priority. *See In re Meyer*, 373 B.R. 84, 87–88 (B.A.P. 9th Cir. 2007). "[L]iens already avoided are excluded from the exemption-impairment calculation with respect to other liens." *Id.*; 11 U.S.C § 522(f)(2)(B).

The court finds it unnecessary to apply the reverse-priority analysis individually to each of the responding parties' liens. *See In re Meyer*, 373 B.R. at 88 ("[O]ne must approach lien avoidance from the back of the line, or at least some point far enough back in line that there is no nonexempt equity in sight."). Under the reverse-priority analysis, Discover Bank's judicial lien would be the last judicial lien to be avoided because it has a higher priority than the other judicial liens, though it is still subject to any senior consensual lien. In determining whether Discover Bank's lien may be avoided, the court must exclude all junior judicial liens that would already have been avoided. *See* 11 U.S.C. § 522(f)(2)(B); *In re Meyer*, 373 B.R. at 87–88.

Discover Bank's judicial lien, plus all other liens (excluding judicial liens lower in priority), plus the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by such judicial lien. As a result, Discover Bank's judicial lien may be avoided entirely.

All other judicial liens held by the responding parties may be avoided as well because they are lower in priority than Discover Bank's avoidable judicial lien. Stated differently, the sum of the debt secured by the consensual liens plus the debtors' exemption amount equals or exceeds the fair market value of the real property, so all judicial liens subject to this motion are properly avoidable under § 522(f).

12. 12-11899-A-7 CRAIG/SANDRA SCHARPENBERG — MOTION TO SELL
VG-3 — 10-2-13 [58]
VINCENT GORSKI/MV
LEONARD WELSH/Atty. for dbt.
D. GARDNER/Atty. for mv.

No Tentative Ruling

Motion: Sell Property
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Pending
Order: Prepared by moving party

Property: Real property located at 9501 Flushing Quail Rd., Bakersfield, CA and owned by CSN Properties, Inc., an entity which is wholly owned by the estate
Buyer: Michael F. Hair and Sharon M. Hair Revocable Trust
Sale Price: $526,000.00 (the motion contains a reference to the price being $525,000.00 at page 3, but other references in the motion and notice suggest the price is $526,000.00)
Sale Type: Private sale subject to overbid opportunity

13. 13-10814-A-7 FL.INVEST.USA INC. — MOTION TO EMPLOY LISA HOLDER AS ATTORNEY(S)
KDG-1 — 10-11-13 [195]
VINCENT GORSKI/MV
RYAN ERNST/Atty. for dbt.
LISA HOLDER/Atty. for mv.

No tentative ruling

14. 13-15426-A-7 DAVID/CHRISTINA VILLALPANDO — MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13
RSW-4 — 9-18-13 [30]
DAVID VILLALPANDO/MV
ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Motion: Convert Case from Chapter 7 to Chapter 13
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record,

accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 706 of the Bankruptcy Code gives Chapter 7 debtors a qualified conversion right. *See* 11 U.S.C. § 706(a), (d). A debtor's right to convert a case from Chapter 7 to Chapter 11, 12, or 13 is conditioned on (i) the debtor's eligibility for relief under the chapter to which the case will be converted and (ii) the case not having been previously converted under §§ 1112, 1208, or 1307. 11 U.S.C. § 706(a), (d); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 372–74 (2007) (affirming denial of debtor's conversion from Chapter 7 to Chapter 13 based on bad faith conduct sufficient to establish cause under § 1307(c)).

The secured and unsecured debt amounts shown in the debtor's schedules are below the debt limits provided in § 109(e). *See* 11 U.S.C. § 109(e). The case has not been previously converted under § 1112, 1208, or 1307 of the Bankruptcy Code. *See id.* § 706(a). No party in interest has questioned the debtor's eligibility for relief under Chapter 13.

1:15 p.m.

1. 10-16183-A-7 SALMA AGHA
13-1086
AGHA V. CITIMORTGAGE, INC. ET AL
SALMA AGHA/Atty. for pl.
RESPONSIVE PLEADING

STATUS CONFERENCE RE: COMPLAINT
8-1-13 [1]

Final Ruling

Pursuant to the court's order (ECF No. 28), this matter will be taken off calendar, subject to reset by the court.

2. 10-16183-A-7 SALMA AGHA
13-1086 AAB-1
AGHA V. CITIMORTGAGE, INC. ET AL
ANDREW BAO/Atty. for mv.

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
8-30-13 [9]

Final Ruling

Pursuant to the court's order (ECF No. 28), this matter will be taken off calendar, subject to reset by the court.

3. 10-16183-A-7 SALMA AGHA
13-1086 PD-1
AGHA V. CITIMORTGAGE, INC. ET AL
BRIAN PAINO/Atty. for mv.

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-3-13 [17]

Final Ruling

Pursuant to the court's order (ECF No. 28), this matter will be taken off calendar, subject to reset by the court.

1:30 p.m.

1. 13-14900-A-7 JEFF/SUZANNE KEMPER — MOTION FOR RELIEF FROM AUTOMATIC STAY
NFS-1 — 9-13-13 [20]
GREENTREE SERVICING LLC/MV
ROBERT WILLIAMS/Atty. for dbt.
NATHAN SMITH/Atty. for mv.

Tentative Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 18100 Wakeman Drive, Tehachapi, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

2. 13-10814-A-7 FL.INVEST.USA INC. — MOTION FOR RELIEF FROM AUTOMATIC STAY
DMG-4 — 10-9-13 [191]
ALDO NEMNI/MV
RYAN ERNST/Atty. for dbt.
DONNA HARRIS/Atty. for mv.
ALDO NEMNI VS.

Tentative Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 240 acres of oil producing property (“Pine Meadows”)

No tentative ruling

3. 13-14017-A-7 MARK/MELODY WAYBRIGHT
RCO-1
BANK OF AMERICA, N.A./MV
CYNTHIA SCULLY/Atty. for dbt.
KRISTI WELLS/Atty. for mv.
DISCHARGED

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-16-13 [23]

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part and denied in part as moot
Order: Prepared by moving party

Subject: 9612 Valley Forest Court, Bakersfield, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

AS TO THE DEBTOR

The motion is denied as moot. The stay that protects the debtor terminates at the entry of discharge. 11 U.S.C. § 362(c)(2). In this case, discharge has been entered. As a result, the motion is moot as to the debtor.

AS TO THE ESTATE

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

4. 13-14931-A-7 SCOTT/JACQUELINE BARTEL — MOTION FOR RELIEF FROM AUTOMATIC STAY
DGK-1
JUAN MANZANO/MV
10-8-13 [26]
DIXON KUMMER/Atty. for mv.
JUAN MANZANO VS.

Tentative Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied without prejudice
Order: Prepared by moving party

Subject: Unlawful detainer for 8713 Crowning Shield Drive, Bakersfield, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

ON THE MERITS

Section 362(d)(1)) authorizes stay relief for cause. The motion will be denied. First, the motion is in unsupported by declaration in violation of Local Bankruptcy Rule 9014-1(d)(6). Second, even if the court considers this matter under the default rules, Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c), the movant has not pled facts sufficient to support relief. The only fact plead is that the movant, who owns the property, filed an unlawful detainer prior to the date of the petition. This is an insufficient showing of cause.

PROCEDURAL IRREGULARITIES

This motion was set on 15 days notice. Motion for Stay Relief, October 8, 2013, ECF No. 1. The notice purports to require opposition 14 days prior the hearing. Notice, October 8, 2013, ECF No. 27. Hence, opposition was due from the debtor on October 9, 2013, only day after it was served on the debtor. The 14 day required opposition procedure may only be used where 28 days notice was given. *See,* Local Bankruptcy Rule 9014-1(f)(1). Where less than 28 days notice is given no written opposition is required and notice must so state. LBR 9014-1(d)(3),(f)(2).

5. 13-15954-A-7 MATTHEW/AMANDA GAONA — MOTION FOR RELIEF FROM AUTOMATIC STAY
SW-1 — 9-17-13 [11]
WELLS FARGO BANK N.A./MV
WILLIAM OLCOTT/Atty. for dbt.
TORIANA HOLMES/Atty. for mv.

Tentative Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 2007 Pontiac G6

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

6. 13-13863-A-7 CORINA NIETO — MOTION FOR RELIEF FROM AUTOMATIC STAY
NFS-1 — 9-17-13 [16]
GREENTREE SERVICING LLC/MV
PATRICK KAVANAGH/Atty. for dbt.
NATHAN SMITH/Atty. for mv.
DISCHARGED

Tentative Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted in part and denied in part as moot
Order: Prepared by moving party

Subject: 9000 Saint Jean Court, Bakersfield, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

AS TO THE DEBTOR

The motion is denied as moot. The stay that protects the debtor terminates at the entry of discharge. 11 U.S.C. § 362(c)(2). In this case, discharge has been entered. As a result, the motion is moot as to the debtor.

AS TO THE ESTATE

Section 362(d)(1) authorizes stay relief cause, including lack of adequate protection. There equity in the property is only $9,492.35, or 7% of the value. The debtor is delinquent two post-petition payments totaling $3,369.40, which is rapidly eroding the creditors' position. There being insufficient equity and the debtor not making periodic payments, the creditor has demonstrated a lack of adequate protection. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

1:45 p.m.

1. 13-15801-A-11 VALLEY AND MOUNTAIN, LLC — MOTION TO DISMISS CASE
UST-1 — 9-27-13 [41]
AUGUST LANDIS/MV
JAMES PAGANO/Atty. for dbt.
ROBIN TUBESING/Atty. for mv.
DISMISSED

Final Ruling

The case dismissed, the matter is dropped as moot.

2. 13-12358-A-11 CENTRAL VALLEY SHORING, INC. — CONTINUED CHAPTER 11 STATUS CONFERENCE
4-16-13 [23]

LEONARD WELSH/Atty. for dbt.

No tentative ruling

3. 12-12998-A-11 FARSHAD TAFTI — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH COUNTY OF TULARE
PLF-8 — 10-16-13 [205]
FARSHAD TAFTI/MV

PETER FEAR/Atty. for dbt.
OST 10/17

Tentative Ruling

Motion: Approve Compromise or Settlement of Controversy
Notice: LBR 9014-1(f)(3) and order shortening time; no written opposition required
Disposition: Granted
Order: Prepared by moving party

Parties to Compromise: Debtor in possession and County of Tulare
Dispute Compromised: Appeal of trial court's denial of attorneys' fees incurred by debtor in debtor's appeal of the County of Tulare's judgment against the debtor, Tafti Decl. ¶ 2, and issues relating to the treatment of the County of Tulare's secured claim, and the properties to which the County's lien attaches, and issues relating to plan confirmation
Summary of Material Terms:
—Debtor agrees to dismiss with prejudice the appeal and each side will bear its own fees and costs in the matter
—County of Tulare will be paid all of the net proceeds from the sale of each of the Properties set forth in the Stipulation with a carve out for professional administrative expenses
—County of Tulare's claim will be treated in a new Class 2.23 in the Plan as set forth in the Stipulation

—County of Tulare will vote all of its impaired claims in favor of Debtor's Plan so long as it provides essentially the same treatment as the treatment provided in the Stipulation and so long as the County of Tulare's property tax claims are treated as provided in the Debtor's Plan dated April 17, 2013

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

In determining whether to approve a compromise under Federal Rule of Bankruptcy Procedure 9019, the court determines whether the compromise was negotiated in good faith and whether the party proposing the compromise reasonably believes that the compromise is the best that can be negotiated under the facts. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1982). More than mere good faith negotiation of a compromise is required. The court must also find that the compromise is fair and equitable. *Id.* "Fair and equitable" involves a consideration of four factors: (i) the probability of success in the litigation; (ii) the difficulties to be encountered in collection; (iii) the complexity of the litigation, and expense, delay and inconvenience necessarily attendant to litigation; and (iv) the paramount interest of creditors and a proper deference to the creditors' expressed wishes, if any. *Id.* The party proposing the compromise bears the burden of persuading the court that the compromise is fair and equitable and should be approved. *Id.*

Based on the motion and supporting papers, the court finds that the compromise is fair and equitable considering the relevant *A & C Properties* factors. The compromise will be approved.