UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 25, 2018 at 10:30 a.m.

---

1. **17-22347-E-11 JJG-11** **UNITED CHARTER LLC** **OBJECTION TO CLAIM OF WAYNE BIER, CLAIM NUMBER 4 9-11-18 [275]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor and Creditor's Attorney on September 11, 2018. By the court's calculation, 44 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

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

The Objection to Proof of Claim Number 4 of Wayne Bier is XXXXXXXXXX.

United Charter LLC, the Debtor in Possession, ("Objector") requests that the court disallow the claim of Wayne Bier ("Creditor"), Proof of Claim No. 4 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $1,999,215.36. Proof of Claim, No. 4.

Objector states the following in its Motion:

1. Creditor failed his claim by the court-set cutoff of August 3, 2018.

2. Creditor's Proof of Claim is inconsistent with a past Declaration wherein Creditor states his claim was "a little less than the scheduled amount" of $580,000. Dckt. 214, ¶ 2.

3. Objector requests an opportunity to conduct discovery and further briefing in the event Creditor claims failure to file a timely proof of claim was due to excusable neglect.

4. Creditor's claim contradicts the parties' prepetition second modification agreement, which reduced the principal balance of the debt to $580,000.00. The Modification provides for the reinstatement of interest and penalties waved in the event of Objector's material breach, but not reinstatement of the original principal.

5. The Court has already noted that the Objector transferred postpetition the sum of $21,000 to Creditor in three separate $7,000 installments on July 27, 2017 (Docket #157, Bank Statements), August 4, 2017 (Docket #158, Bank Statements) and August 11, 2017 (*Id*.). The Court has ruled that such payments were not authorized "under [Title 11] or by the court." Accordingly, unless and until Bier repays that amount to the estate, his claim must be disallowed.

6. In the event Objector confirms a plan which cures its default on Creditor's claim, Creditor's claim for reinstated interest and penalties should be disallowed. Creditor has received over $190,000 between February 2017 and February 2018, almost all of which (almost $170,000) was received postpetition from either the Debtor in Possession ($21,000) or the Debtor's managing member, Raymond Zhang ($169,218.50). Those payments must be applied to Creditor's claim.

7. Presuming reinstated interest and penalties exist, Objector estimates the maximum amount of Creditor's claim consists of:

September 1, 2016 principal: $580,000

Plus interest at 7.5% from September 1, 2016 to April 6, 2017: $51,961.64

Maximum Allowed Claim as of April 7, 2017: $631,961.64

Less payments made after September 1, 2016: $190,843.92

Amount of Claim for Plan Confirmation Purposes: $441,117.72

8. Creditor is not entitled to postpetition interest because the value of his collateral does not exceed the allowed amount of all senior secured debt and his allowed claim.

Creditor counters that, because Objector listed Creditor and their claim in their Petition and did not identify the claim as disputed, contingent, or unliquidated, the claim filed on June 25, 2018 is merely an amendment curing a defect in the claim it is identified in Objector's Petition. Inter alia, Creditor's Opposition argues in support of the valuation of the claim and asserts bad faith on Objector's part with respect to the signing of the Agreement on the same day of filing the Petition.

CREDITOR'S OPPOSITION

Creditor filed an Opposition to the Objection on October 11, 2018. Dckt. 289. The Opposition asserts the following:

1. On or about February 12, 2008, the Objector executed a promissory note in connection with a $2,000,000 loan made to the Objector in connection with the Objector's purchase of real property from Creditor. Dckt. 289 at ¶ 3.

2. On or about July 1, 2014, the parties entered into a modification agreement, which, inter alia, purported to reduce the principal balance to $925,000, reduce the interest rate to 4.5% per annum, and provide new repayment terms. At that time, the balance due on the Note was $2,474.398. Essentially, the effect of the First Modification was to apply all of the Objector's previous payments to principal, rather than to interest and penalties, and such interest and penalties were forgiven. *Id*, at ¶ 8.

3. The Objector materially breached the First Modification by failing to make all payments when due. Although the Debtor made payments totaling $475,182.64 between August 2014 and August 2016, such payments were not made in the agreed-upon amounts at the agreed upon due dates under the First Modification. The Objector acknowledged that it defaulted on the First Modification, as recited in the Second Modification. Therefore, all the original terms of the Note and Deed of Trust, and all balances, were reinstated. *Id*, at ¶ 11.

4. As of October 2016, taking into account the breach of the First Modification and reinstatement of any amounts due that had been forgiven in the First Modification and crediting payments made, the balance due on the Note was $1,999,215.36. *Id*, at ¶ 12.

5. In April 2017, the parties entered into a second modification agreement. *Id*, at ¶ 13. The Debtor signed the agreement on April 7, 2017 - the same day that it filed this bankruptcy case. Creditor disputes whether the Objector actually signed the Second Modification before or after the time of the bankruptcy case filing. *Id*, at ¶¶ 14, 15.

6. The Second Modification purported to reduce the principal balance owed by the Objector to $580,000, by, similar to the First Modification, applying all of the Objector's previous payments to principal, rather than to interest and penalties, and such interest and penalties were forgiven. *Id*, at ¶ 16.

7. Creditor believed the Agreement to say all amounts forgiven would be reinstated, and not merely interest and penalties. The Objector materially breached the Second Modification on the same day it signed the Second Modification—April 7, 2017—when it filed its bankruptcy petition. Therefore, all the original terms of the Note and Deed of Trust, and all balances, were reinstated. In addition, not all payments were made in the amounts or on the schedule set forth in the Second Modification. *Id*, ¶¶ 17-20.

8. The Second Modification is void as Objector fraudulently misrepresented intent to perform the terms of the modification, where Debtor in Possession filed bankruptcy immediately after executing the modification. *Id*, ¶ 21. The Second Modification is also void if entered into after the filing of the petition. *Id*, ¶ 22.

9. As of the petition date, Creditor was owed $1,999,215.36, which credits all payments made, but reinstates all amounts forgiven under the First Modification and the Second Modification, because those agreements were not complied with by the Objector (and/or are void). Additional payments in the amount of $190,843.92 were made to Bier between February 2017 and February 2018, which have brought Creditor's current claim amount to $1,808,371.44. *Id*, ¶ 23.

10. **Creditor concedes it stated in a Declaration it was owed less than $580,000. Creditor argues the Declaration was prepared by Objector's counsel,** and was signed before Creditor retained his own counsel. *Id*, ¶ 25.

[This raises an interesting professional issue for counsel. If counsel for Objector was preparing declarations to be signed by a creditor, a clearly legally adverse party, which purported to make statements of the creditor's rights and interests (which subsequently could be used against him) to whom counsel did and does owe his professional and fiduciary duties. See Bier Declaration ¶ 22, Dckt. 290.]

11. Creditor's Proof of Claim was deemed filed under 11 U.S.C. § 1111(a), and therefore the filing of the claim was merely an amendment to a scheduled

claim. *Id*, ¶¶ 27-28. Objector is not prejudiced by the amendment to Creditor's claim, and the amendment was not filed in bad faith. *Id*, ¶¶ 34-35. As Objector believes it has not filed its claim late, it has not addressed any argument for excusable neglect. *Id*, ¶ 38.

12. Creditor's claim should not be disallowed under 11 U.S.C. § 502(d). Creditor is not aware of any court ruling or order that the Objector made $21,000 in post-petition payments to Creditor and that such payments were not authorize under Title 11 or by the Court. As Creditor holds a secured claim, it would be pointless to require the return of post-petition payments. Nevertheless, Creditor is willing to return any payments Objector establishes are avoidable. *Id*, ¶¶ 39-44.

13. Other issues raised by Objector constitute factual disputes and necessitate an evidentiary hearing. See *Id*, ¶¶ 45-47.The issue of post-petition interest should be determined in connection with the Motion to Value Collateral filed by Objector. *Id*, ¶ 49.Creditor requests an evidentiary hearing to resolve the disputes in the Objection.

OBJECTOR'S REPLY

Objector filed its Reply to Creditor's Opposition on October 18, 2018. Dckt. 301. Objector asserts in the Reply:

(1) an evidentiary hearing is required to determine whether Creditor may amend his deemed-allowed claim after Objector incurred costs in reliance on the original claim valuation;

(2) the explicit language of the Second Modification cannot be modified by parol evidence of Creditor's intent;

(3) Objector's managing member cured its default under the Second Modification and therefore Creditor cannot reinstate interest and penalties.

Objector asserts Creditor's claim consists of:

September 1, 2016 Principal: $580,000

Prepetition Interest @ 4.5%: [218 days x $71.50/day] = $15,587

Total Claim as of April 7, 2017: $595,587

Postpetition interest: no interest allowed on undersecured claim

Less postpetition payments received by Mr. Bier: $185,843.92

NET CLAIM: $409,743.08

Dckt. 301 at 7:9-16.5.

DISCUSSION

In its Reply, Objector concedes that Creditor's claim is "deemed allowed," having been scheduled in this case. Dckt. 301 at 2:3-5. Therefore, the court finds that the issue of whether Creditor's claim is timely and "deemed allowed," subject to the court's ruling on the substantive rights and amounts, is resolved in favor of Creditor.

Review of Second Modification

Working backwards through the various loan documents upon which the rights and amount of secured claim in this case are determined, the relevant portions of the Second Modification are as follows:

> 1. The Modification. All security agreements remain in full force and effect. All terms in the first modification inconsistent with the provisions of this Second modification shall, except as herein otherwise set forth, upon execution of the Second modification, shall be extinguished and replaced and supplemented by the following.
>
> > A. As of September 1, 2016, the new principal balance due under and pursuant to the Note is $580,000.00 to be paid in installments as outlined below. Lender has agreed to reduce the original note from its original amount of $2,000,000 plus past due payments. **Borrower has defaulted on the First Modification. As such, the principal balance, interest rate and monthly payment amount are amended in this Second Agreement.**

(Exhibit D, Dckt. 291. At p. 1(emphasis added)), and:

> > G. Should Borrower fail to perform any material term, covenant or condition required to be performed pursuant to the terms of the Note, the Deed of Trust, the Modification, or the Forbearance Agreement, Borrower will be in material breach of all the Agreements. **In the event Borrower materially breaches this Agreement, all interest and penalties** (the "interest and penalties") **canceled and waived** by the execution of this Agreement, The First Modification or Forbearance Agreement **shall be reinstated and shall be added to the Principal Balance** of the Second Modification . . .

Id. at p. 3(emphasis added).

Section G of the Second Modification clearly entitles Creditor to reinstatement of interest and penalties into the principal upon material default by Objector. The Agreement is silent on reinstatement of the principal all together.

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. Cal. Civ. Code § 1636. When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded. Cal. Civ. Code § 1640. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. Cal. Civ. Code § 1641. If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. Cal. Civ. Code § 1649. Particular clauses of a contract are subordinate to its general intent. Cal. Civ. Code § 1650.

Based on the evidence provided, it is unclear whether the parties intended not to have the principal amounts reinstated. Section G of the Second Modification reuses the same language from the First Modification. Exhibit C, Dckt. 291 at p. 98. But, Section 1A of the Second Modification states that as a result of Objector's default under the First Modification, the principal balance is set by the Second Modification.

Creditor provides the enhancement to his argument asserting that the Second Modification is void due to fraud (it being entered into "minutes" before the, undisclosed to Creditor, bankruptcy was filed or not entered into before the bankruptcy case was filed.

Furthermore, emails sent by Creditor (and not there disputed by Objector) demonstrate that after defaulting on the First Modification, Creditor believed he was entitled to "calling it due and payable in full . . . the figure should be around 2.1 million." Exhibit B, Dckt. 303 at p. 13. While these statements may not have applied retrospectively to the First Modification, they clearly show the parties' understanding of the terms at a time before those terms were used in the Second Modification.

As the Second Modification is silent on reinstatement of the principal, and that term would not contradict any other term of the agreement, it appears there may be a valid factual dispute over whether the contract failed to express the intention of the parties through fraud, mistake, or accident. Cal. Civ. Code § 1640.

Factual Disputes Requiring Evidentiary Hearing

The Parties have asserted the following factual disputes require evidentiary hearing:

A. What "interest and penalties" should be added to the note principal as a result of Objector's default.

B. Whether Creditor is entitled to post-petition interest.

C. Whether the Second Modification was signed after this bankruptcy case was filed.

D. Whether the $21,000 in post-petition payments received by Creditor is avoidable.

E. Whether Objector can cure the default under the Second Modification.

F. How payments paid in February 2017 and 2018 by Objector's managing member should be applied.

G. What the amount of Creditor's claim is.

H. Whether Creditor is entitled to amend his deemed allowed claim.

I. Whether the Second Modification was entered into in reliance on a fraudulent misrepresentation.

The Motion is **XXXXXXXXXXXXXXXXXXX**.

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

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

The Objection to Claim of United Charter LLC ("Creditor"), filed in this case by United Charter LLC, Debtor in Possession, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 4 of Wayne Bier is **XXXXXXXXXXXXX**.

2. **17-22347-E-11 JJG-12** **UNITED CHARTER LLC** **MOTION TO VALUE COLLATERAL OF WAYNE BIER**
9-27-18 [283]

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

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

Sufficient Notice Provided. No Certificate of service has been provided to evidence when notice was served, and who notice was served upon. However, the creditor whose claim is the subject of this Motion filed an Opposition on October 11, 2018. Dckt. 293. Therefore, notice was likely provided. The Notice of Hearing was filed September 27, 2018. Dckt. 284. Presuming notice was actually provided that day, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Wayne Bier ("Creditor") is set for evidentiary hearing at xxxxxxx, xxxxxxxxxxx, .

The Motion to Value filed by United Charter LLC ("Debtor in Possession" or "ΔIP") to value the secured claim of Wayne Bier ("Creditor") was filed on September 27, 2018. Motion, Dckt. 283. The Declaration of John Hillas, MAI SRA, is filed in support of the Motion. Declaration, Dckt. 285. An exhibit cover sheet has been filed with the Motion, which states that one exhibit, "Appraisal Report of Valbridge Property Advisors dated August 31, 2018" is provided as Exhibit A. Dckt. 286. No Exhibit A is attached to the cover sheet. The Declaration of Mr. Hillis states that he is the "appraiser responsible for directing and supervising the preparation of . . . [the] appraisal report. . . ." Declaration ¶ 2, Dckt. 285.

Debtor in Possession is the owner of the subject real property located in Stockton, California ("Property"). In the Motion, the Debtor in Possession identifies the real property as "a 17+ acre industrial warehouse property located in Stockton, California. Motion, p. 2:3-5; Dckt. 283. By this description, it appears that there is one 17+ acre parcel of property that secures the claim.

The Motion offers no identification of the 17+ acre parcel, but instead merely instructs the court and parties in interest are to review Proof of Claim No. 4 with any questions about the claim that is the subject of this Motion. *Id.* at 2:5.

When one reviews Proof of Claim, No. 4, a Deed of Trust is attached which identifies the real property subject to the encumbrance. The Deed of Trust provides the legal descriptions and Assessor Parcel Numbers for at least twenty (20) different parcels with different APNs. Proof of Claim No. 4, p. 16-16. The court is unsure why the Debtor in Possession could not state these parcel numbers and clearly identify the property subject to the Deed of Trust when stating with particularity the grounds upon which the relief is based and the relief requested (as required in Fed. R. Bankr. P. 9013).

Debtor (who is now serving as the ΔIP) valued the Property at $7,855,018.99. Schedule A/B, Dckt. 12. Some time thereafter, Creditor East West Bank ("EWB") holding a senior mortgage filed a motion seeking relief from automatic stay. Dckt. 80. EWB filed as a supporting Exhibit an appraisal asserting the value of the Property is $5,330,000.00. Dckts. 87-94. Debtor in Possession now seeks to use that appraisal to support the current Motion. Debtor in Possession does not explain why its prior valuation, declared in its Schedules under penalty of perjury, was high by more than $2 million.

Debtor in Possession filed the Declaration of John Hillas, the Appraiser who drafted the appraisal report. Dckt. 285. The Hillas Declaration provides no detail other than Hillas created the report and can testify as to the value of the Property being $5,330,000. As stated, *supra*, Debtor in Possession also sought to file as an Exhibit the appraisal report, but the report itself is not included in the filing. *See* Dckt. 286.

Proof of Claim

Creditor filed Proof of Claim, No. 4, on June 25, 2018. Creditor asserts a claim in the amount of $1,999,215.36 secured by Debtor in Possession's real property valued at $7,855,018.99. The Proof of Claim notes Creditor's valuation relies on Debtor in Possession's Schedules.

RESPONSE OF CREDITOR EAST WEST BANK

EWB filed a Declaration in Response to the Motion on October 10, 2018. Dckt. 287. The Declaration Furth Demoss states the amount of the EWB's claim as of September 30, 2018 is $5,006,168.66.

CREDITOR'S OPPOSITION

Creditor filed an "Objection" To Debtor's Motion on October 11, 2018, which the court interprets to be an opposition. Dckt. 293. Creditor requests that the Court value the Property at $7,230,000 ("as-is" market value) or $7,730,000 (prospective market value).

Creditor states its appraisal report reviews all collateral properties (each within Stockton, California), including:

(1) industrial park buildings at 1881 E. Market Street valued individually at $4,860,00,

(2) industrial park buildings at 1531, 1555, & 1617 E. Main Street valued individually at $2,250,000,

(3) vacant industrial lots at 1531 & 1555 E. Main Street valued individually at $330,000,

(4) vacant industrial lots at 1904 to 1936 E. Weber Avenue valued individually at $170,000, and

(5) two residential-zoned lots at 1914 & 1918 E. Myrtle Street valued individually at $120,000.

Creditor notes that its claim was also secured by a San Francisco property which was foreclosed in 2010.

Creditor requests an evidentiary hearing to determine the value of the Property, noting that it does not consent to the use of affidavits in accordance with Federal Rules of Civil Procedure 43(c).

APPLICABLE LAW

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

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

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

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

DISCUSSION

The valuation advanced by Debtor in Possession is more than a slight drop from its original value. Furthermore, Debtor in Possession (due to apparent clerical error) has not provided the court with any actual appraisal report.

As provided in Federal Rule of Bankruptcy Procedure 9017, evidence for adversary proceeding and evidentiary hearings will be presented in the manner as provided in Federal Rule of Civil Procedure 43. Unless agreed by the parties to be done by written statement only, it is presented by live testimony, utilizing the direct testimony statement procedure provided in Local Bankruptcy Rule 9017-1.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by United Charter LLC ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on this Motion is continued for evidentiary hearing. The court sets the following schedule for an evidentiary hearing on the Motion to Value:
>
> A. Evidence shall be presented according to Local Bankruptcy Rule 9017-1.
>
> B. On or before **xxxx, 2018**, the Parties shall each file with the court and serve on the other parties the list of witnesses they will present in their respective cases in chief (not including rebuttal witnesses).
>
> C. Movant, shall lodge with the court and serve its Direct Testimony Statements and Exhibits on or before **xxxx, 2018**.
>
> D. Respondent, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before **xxxx, 2018**.
>
> E. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before **xxxx, 2018**.
>
> F. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before **xxxx, 2018**.
>
> G. The Evidentiary Hearing shall be conducted at **xx:xx x.m. on xxxx, 2018**.

3. **18-90258-E-7** **ANDREAS ABRAMSON** **MOTION TO INTERVENE O.S.T. 10-10-18 [207]**
MF-6

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Creditor on October 10, 2018. The court set the hearing for October 25, 2018. Dckt. 213.

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

The Motion To Intervene is xxxxxxxxxxxxxxxxxxxxxxxx.

Bernadette Cattaneo ("Movant") filed this Motion to Intervene in the bankruptcy case of Andreas Abramson ("Debtor"), specifically in the matter of Debtor's Motion to Avid Judicial Lien of Helen McAbee ("Creditor"). *See* Dckt. 141.

Movant seeks to intervene in the aforementioned matter because she disputes Debtor's asserted value of the real property subject to the motion ("Sanguinetti Property"), as well as the amount of the alleged consensual lien in favor of Michael Abramson ("Debtor's Father"). Movant asserts she has an interest in the outcome of the motion to avoid lien as she is also liable to Creditor based on a judgment lien against Movant's separate property. The extent to which the Creditor's judgment lien is reduced or avoided will affect Movant's liability to Creditor. In addition, Movant argues she may own an interest in the Sanguinetti Property depending on the outcome of litigation in family law court scheduled for January 2019.

Review of Supporting Memorandum

Movant asserts in her supporting Memorandum of Points and Authorities ("Memo") that this Motion is pursuant to Federal Rules of Bankruptcy Procedure 2018 and 7024, and should be granted matter of right and permissive intervention at the discretion of the court. Dckt. 209. Movant argues that she has standing to be heard because she, as a co-obligor, is directly liable for the Creditor's debt and the outcome of Debtor's motion to avoid lien impacts Movant's exposure to Creditor's claim. Dckt. 209 at 5:9-18.

Movant also argues " the disposition of the Debtor's Lien Avoidance Motion, as a practical matter, will impair or impede [Movant's] ability to protect her interest in the Sanguinetti Property (which shall be determined at the upcoming Family Law Action trial) . . ." Id. at 7:14-16.

Movant provides the following additional facts in her Memo which are not stated with particularity in the Motion:

1. When she filed for dissolution of marriage, Movant and the Debtor co-owned the following real property: (1) 2720 Arlington Road, Hollister, California (the "Arlington Property"); (2) 841 Calais Circle, Hollister, California (the "Calais Property"); and (3) 83 Sanguinetti Court, Copperopolis, California (the "Sanguinetti Property"). *Id*. at 11-18.

2. Creditor filed judicial liens on all three properties before and family court judgment. *Id*. at 2:19-27.

3. A Family court judgement was entered in January 2018 awarding the Calais Property Movant, the Sanguinetti Property was awarded to the Debtor, and reserving the issue of the Arlington Property. *Id*. at 3:1-5.

Movant asserts she has an interest in resolving (1) the disputed value of the Sanguinetti Property, and (2) the validity and amount of the obligation and deed of trust asserted by the Debtor's Father against the Sanguinetti Property. Movant notes that she will rely on the same appraisal and broker's opinion with respect to the property valuation. Dckt. 209 at 4:10-12.

DEBTOR'S OPPOSITION

Debtor filed an Opposition to this Motion on October 17, 2018. Dckt. 216. Debtor asserts the Movant's current position (that she may have an interest in the Sanguinetti Property) conflicts with her Schedules filed in her own bankruptcy proceeding (U.S. Bankr. Crt., N. Dist. of California, Case No. 16-52233). Exhibit A, Dckt. 218. Debtor asserts further that Movant made statements during her 341 Meeting of Creditors conflicting with its current position, including:

> Q: So 83 Sanguinetti?
>
> A: Is the husband's.
>
> Q: Is the husband's?

> A: Correct.
>
> Q: He got it in the husband's name. Do you have any lingering interest in that?
>
> A: Oh, hell, no. I just only owe on the loan, which he continues to not pay on and destroy my credit.

Exhibit B, Dckt. 218 at 5:23-6:2.

Debtor argues further that the Motion to Intervene is untimely, and that Movant's presence at this juncture adds nothing and only complicates issues brought by bringing ancillary questions Debtor will be forced to address.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 7024 makes Federal Rule of Civil Procedure 24 applicable in a Bankruptcy Case adversary proceeding. FED. R. BANKR. P. 7024. For permissive intervention in non-adversary proceeding matters, the Bankruptcy Rules provide:

> (a) Permissive Intervention. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.

FED. R. BANKR. P. 2018.

Federal Rule of Bankruptcy Procedure 9014 permits courts to at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. FED. R. BANKR. P. 9014.

DISCUSSION

Here, Movant is requesting the court exercise its discretion in allowing it to intervene in a contested matter for the avoidance of Creditor's judicial lien. Movant asserts the disputed issues are the value of the Sanguinetti Property, and whether Debtor's Father has a valid lien.

As to Movant's interest in the Sanguinetti Property, it is unclear what Movant is seeking to add to the current proceedings. Movant has conceded it will not seek the opinion of another appraiser or broker as to the value of the property. The motion to avoid lien hinging on the sole remaining issue of the Sanguinetti Property's value, and no other complexities remaining, the court is not persuaded as to the necessity of intervention.

Though not articulated in a plane, clear statement in the Motion, the court could well envision a ground stated as: "Because Creditor has liens on multiple properties, including those owned by Movant, the 'financial incentive' to fully prosecute Creditor's claim for the full value on Debtor's Sanguinetti

Property does not exist. Rather, if Creditor were to lose (electing not to diligently prosecute her rights in the Sanguinetti Property), it might believe it could just pick up the shortfall from Movant's property against which Creditor also has a lien."

However, Movant does not make such a simple statement, but merely asserts that she, as does Creditor, disputes Debtor's asserted value of the Sanguinetti Property. Movant asserts no question as to Creditor's ability, and good faith, in prosecuting Creditor's rights to the fullest result possible.

Movant also raises as an issue in her dispute as to the Debtor's Father's Deed of Trust (asserted to be senior to Movant's judgment lien). However, as previously discussed by the court with the parties, the adjudication of the extent, validity, priority, and amount of the Father's deed of trust is not properly adjudicated in this Contested Matter between Debtor, Creditor, and Movant.

A review of the court's files indicates that neither Movant nor Creditor have commenced an adversary proceeding to determine such extent, validity, priority, and amount of the Father's interests in the Sanguinetti Property (Fed. R. Bank. P. 7001(2)). That issue has been left hanging, not prosecuted by Movant and Creditor – to the extent it is a bona fide, good faith issue.

Movant's Interest in the Sanguinetti Property

In the response, counter repose tete-a-tete between Movant and Debtor, an interesting issue has arisen concerning the Sanguinetti Property and the identify of the real party in interest who may properly be seeking intervention to protect Movant's rights and interest in the Property.

In the Motion to Intervene, Movant asserts that her rights and interest which she seeks to act to protect include not only insuring that Creditor's full lien rights are protected and an artificial shortfall is not created which Creditor would then seek to recover from Movant's properties that are subject to the judgment lien. Movant affirmatively alleges:

> "In addition, Cattanneo [sic] may also ultimately own an interest in the Sanguinetti Property depending on the outcome of litigation in family law court scheduled for January 2019."

Motion, p. 2:12-14. Movant states that she may actually have an ownership interest in the Sanguinetti Property.

No declaration is provided in support of the Motion by Movant. An unauthenticated exhibit (See Fed. R. Evid. 901 et seq.) which is titled "Findings and Order After Hearing of the Superior Court for the County of Calaveras," bearing a filed stamp of September 26, 2018 has been filed. Dckt. 208. This appears to state that the court is going to reconsider its prior order distributing the marital property of Debtor and Movant. From the Motion, it appears that Movant is asserting that the court may assign an interest in the Sanguinetti marital property to Movant.

The Debtor's Opposition informs the court of Movant's own Chapter 7 case in the Northern District of California. It further directs the court to Movant's statements under penalty of perjury that she

has no interest in the Sanguinetti Property (which would have been property of the bankruptcy estate in her Chapter 7 case), that is was her husband's (this Debtor's) property and in response to the question "Do you have any lingering interest in [the Sanguinetti Property]" Movant responded under penalty of perjury:

> Oh hell, no. I just only owe on the loan, which he [Debtor] continues to not pay on and destroy my credit.

Transcript From In Re Bernadette Cattaneo - Debtor, 1652233; Dckt. 218 at 5:27-28, 6:1-2 (reference to page number of the transcript, not to exhibit page number).

Movant provides two subsequent Declarations in this Contested Matter. Movant's first supplemental Declaration was filed on October 16, 2018. Dckt. 215. In it she testifies under penalty of perjury:

> 2. In April 2009, I filed a petition for dissolution of marriage (the "Marriage Dissolution Petition") from my husband Andreas Abramson ("Debtor") in the Superior Court of California, County of Tuolumne, which case was later transferred to the Superior Court of California, County of Calaveras, and assigned Case Number 17FL42860 (the "Family Law Action"). When I filed the Marriage Dissolution Petition, my husband and I were co-owners of the following items of real property: (1) 2720 Arlington Road, Hollister, California (the "Arlington Property"); (2) 841 Calais Circle, Hollister, California (the "Calais Property"); and (3) 83 Sanguinetti Court, Copperopolis, California (the "Sanguinetti Property").

Declaration ¶ 2, Dckt. 215.

Movant testifies that as of April 2009, she had her interest in the Sanguinetti Property, being a co-owner with Debtor. Movant further testifies:

> 4. In January 2014, the Family Court entered its judgment in the Family Law Action (the "Family Court Judgment"). Under the Family Court Judgment, the Calais Property was awarded to me, the Sanguinetti Property was awarded to the Debtor, and ownership of the Arlington Property was left as a reserved issue. I currently own the Calais Property as my sole and separate property. The outcome of the Debtor's Motion to Avoid the McAbee Judgment Lien will directly affect me in that amounts not secured by the Sanguinetti Property will still be secured by the Arlington Property and the Calais Property. In fact, McAbee filed a Writ of Execution on the Calais Property on July 27, 2018, just a little over three months after the Debtor filed his bankruptcy case.

Id. ¶ 4. Movant testifies that in January 2014 (the dissolution proceeding having taken five years at that point in time) Movant was awarded the Calais Property and the Sanguinetti Property was awarded to Debtor. It was only the Arlington Property that was subject to further state court proceedings.

Movant further testifies that it was not until July 2018 (three months after Debtor commenced this bankruptcy case) that a "writ of execution" was filed on the Calais Property owned by Movant. Movant then further testifies as to further proceedings regarding the Sanguinetti Property:

> 5. On September 20, 2018, the Superior Court of California, County of Calaveras, entered an order setting trial in the Family Law Action to begin on January 23, 2019. The **reserved issues for the upcoming trial include** the responsibility for the McAbee debt and any reimbursement and credits for my pay-down of the nearly $200,000 second mortgage against the Sanguinetti Property. The Family Court deferred "to the Trial Court, any decision that needs to be made regarding any **claim by the Petitioner** [Cattaneo] that the Trial Court, as a matter of equity, should **redistribute any community property** and/or debts to equalize the division of community property and debts between the parties." A true and correct copy of the order in the Family Law Action is attached as Exhibit A.
>
> 6. At the upcoming trial in the Family Law Action, I will request that the court **redistribute to me an interest in the Sanguinetti Property** based upon my sole efforts to reduce the debt against the Sanguinetti Property, including **my full payoff of the second mortgage (of approximately $200,000) in November 2012 with my separate property funds** and the creation of additional equity in the Sanguinetti Property as a result.

Id. ¶¶ 5, 6 (emphasis added). It appears that Movant asserts that she has a right, arising out of the 2009 community property to the Sanguinetti Property, the property division not having been completed.

The second supplemental Declaration was filed on October 23, 2018. Dckt. 220. In this Declaration Movant provides the following testimony under penalty of perjury concerning the Sanguinetti Property:

> 2. The Opposition faults me for not listing the real property at 83 Sanguinetti Court, Copperopolis, California (the "Sanguinetti Property") in my bankruptcy filing. However, as noted in my declaration filed in support of the Motion to Intervene [the court notes that no such declaration appears on the Docket for this Contested Matter], the family law judge presiding over the dissolution proceeding between the debtor and me entered a judgment awarded the Sanguinetti Property to the debtor in January 2014. My bankruptcy filing, which I prepared myself, was filed in the U.S. Bankruptcy Court for the Northern District of California on August 3, 2016 (case no. 16-52233). Therefore, by the time I filed my bankruptcy case, the Sanguinetti Property had long since been awarded to the debtor.

Declaration ¶ 2, Dckt. 220.

Movant states that she commenced her bankruptcy case in August 2016 - which is well after the 2009 dissolution proceeding being commenced, well after the purported payments by Movant in November 2012, and well after the January 2014 purported transfer of all title and interest in the Sanguinetti Property

to Debtor. It appears that Movant asserts that she is entitled to more of the Sanguinetti community Property by virtue of her marital interest in the Sanguinetti Property and her conduct in November 2012 - which was four years before the filing of her bankruptcy case.

Thus, it may well be that Movant's statements under penalty of perjury in her 2016 bankruptcy case of:

> Oh hell, no. I just only owe on the loan, which he [Debtor] continues to not pay on and destroy my credit.

were not completely accurate and that she had undisclosed interests and rights in the Sanguinetti Property which dated back to at least 2012 and possibly 2009 based on her contending that the actual award of the Sanguinetti Property to Debtor was not final, but could be reallocated to her.

Thus, it may well be that there is an undisclosed asset, interest, or rights in the Movant's bankruptcy case that have not been administered by the Chapter 7 trustee. Unadministered assets are not automatically abandoned back to the debtor when a Chapter 7 case is closed. 11 U.S.C. § 554(c).

Diligent, Good Faith Prosecution of Action in Federal Court

In reviewing this file, the pleadings, and conduct of the Parties and their respective counsel, the court has several observations. While important and of a significant dollar amount, the Motion now before the court is quite simple. There are no complex, uncharted legal issues. For factual issues, it is the value of the property that secures the judgment lien. While not quite as common in 2018, in 2010-2013 the court was making such determinations almost weekly. Debtor presents his appraiser, appraisal report, and any other evidence of value. Creditor presents her appraiser, appraisal report, and any other evidence of value. Direct testimony is provided for the court to assess the credibility of each appraiser, and then they are each cross examined. Possibly included is rebuttal testimony by each appraiser attacking the other (if not provided as part of the direct testimony). The court then determines the value of the property.

The next step is the mathematical calculation under 11 U.S.C. § 522(f). The computation is made and the judicial lien is not avoided, avoided, or partially avoided.

If the parties are prosecuting such contested matter in good faith, the evidentiary hearing can be completed within three or four months of the motion being filed–sooner if the appraisal reports were already in hand. In many cases, once the appraisal reports are exchanged the parties see the writing on the wall as to the valuation and settle the matter. In some cases, the appraisers are too far apart and the court makes a determination.

Here, the parties are three months into the Motion, appraisals in hand, and arguing about who should be prosecuting the response to the Motion. The court has scheduled a pre-evidentiary hearing conference for January 10, 2019, (five months after the Motion was filed) to allow for discovery and get the parties on a prosecution track so the Motion could be determined. (Though the court is uncertain as to the

discovery in this Motion that is necessary, presumably some discovery could be required with the alleged senior Deed of Trust asserted by Debtor's Father.)

The court also set a deadline of October 26, 2018, for Movant to file and serve a motion to intervene. Order, p. 1; Dckt. 201. Movant has met that deadline.

In looking at the files for this case, as noted above the court does not see any adversary proceeding having been filed to determine the extent, validity, priority, or amount of Debtor's Father's Deed of Trust (interest in the Sanguinetti Property). The court does not see any motions for 2004 examinations of Debtor's Father concerning his asserted secured claim. Possibly the Parties are including that in the discovery in connection with this Contested Matter. Such discovery, if a bona fide belief in such issue exists, would be diligently prosecuted by Creditor as it directly relates to the defense of Creditor's judicial lien.

As with the valuation issue, Debtor's Father should be able to quickly and easily document the obligation secured by the Deed of Trust (which is of record with the County Recorder - Creditor not asserting that it was a lien not of record and junior to Creditor's judgment lien). It would be evident whether such obligation existed, and if so the amount. This would be an even simpler issue than the value.

But such resolution or pushing this matter to a head has eluded the Parties. Now, Movant asserts a right to the Sanguinetti Property based upon rights and interests that pre-dated her bankruptcy case.

OCTOBER 25, 2018 HEARING

At the hearing, Movant explained **XXXXXXXXXXXXXXXXXXX**.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Intervene filed by Bernadette Cattaneo ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is **xxxxxxxxxxxxx**.