

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Chief Judge Fredrick E. Clement  
Sacramento Federal Courthouse  
501 I Street, 7<sup>th</sup> Floor  
Courtroom 28, Department A  
Sacramento, California

**DAY: MONDAY**  
**DATE: OCTOBER 31, 2022**  
**CALENDAR: 9:00 A.M. CHAPTER 7 CASES**

**RULINGS**

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

**"No Ruling"** means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

**"Tentative Ruling"** means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

**"Final Ruling"** means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

**CHANGES TO PREVIOUSLY PUBLISHED RULINGS**

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: **"[Since posting its original rulings, the court has changed its intended ruling on this matter]"**.

**ERRORS IN RULINGS**

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("\$880," not "\$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. [22-22003](#)-A-7     **IN RE: ELIZABETH STREETER**  
[NF-1](#)

TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC.  
341(A) MEETING OF CREDITORS  
9-20-2022    [\[16\]](#)

RESPONSIVE PLEADING

### **Tentative Ruling**

**Motion:** Dismiss Case and Extend Trustee's Deadlines

**Notice:** LBR 9014-1(f)(1); written opposition required or case dismissed without hearing

**Disposition:** Conditionally denied in part, granted in part

**Order:** Civil minute order

### **DISMISSAL**

Chapter 7 debtors shall attend the § 341(a) meeting of creditors. 11 U.S.C. § 343. A continuing failure to attend this meeting may be cause for dismissal of the case. See 11 U.S.C. §§ 105(a), 343, 707(a); *In re Witkowski*, 523 B.R. 300, 307 n.8 (B.A.P. 1st Cir. 2014) ("Some courts have ruled that the failure to attend the § 341 meeting of creditors constitutes 'cause' for dismissal.").

In this case, the debtor has failed to appear at a scheduled meeting of creditors required by 11 U.S.C. § 341. Because the debtor's failure to attend this meeting has occurred once, the court will not dismiss the case on condition that the debtor attend the next creditors' meeting. But if the debtor does not appear at the continued meeting of creditors, the case will be dismissed on trustee's declaration without further notice or hearing.

The court notes that the debtor did not provide any reasons for her failure to attend the meeting of creditors. See Notice of Hearing and Opposition on Trustee's Motion to Dismiss, ECF No. 20. The court also notes that the continued meeting of creditors is currently scheduled on October 24, 2022, at 11:00 a.m. which is prior to the hearing on this motion. If the debtor has not attended the meeting of creditors on October 24, 2022, or otherwise opposes this motion at the hearing the trustee may submit a declaration and the case will be dismissed without further notice or hearing.

### **EXTENSION OF DEADLINES**

The court will grant the motion in part to the extent it asks for an extension of deadlines. The court extends the following deadlines to 60 days after the next continued date of the creditors' meeting: (1) the trustee and all creditors' deadline to object to discharge under § 727, see Fed. R. Bankr. P. 4004(a); and (2) the trustee and all creditors' deadline to bring a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, see Fed. R. Bankr. P. 1017(e). These deadlines are no longer set at 60 days after the first creditors' meeting.

## CIVIL MINUTE ORDER

The court will issue a minute order that conforms substantially to the following form:

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

IT IS ORDERED that the Motion to Dismiss is denied on the condition that the debtor attend the next continued § 341(a) meeting of creditors scheduled for October 24, 2022, at 11:00 a.m.. But if the debtor does not appear at this continued meeting, the case will be dismissed on trustee's declaration without further notice or hearing.

IT IS ALSO ORDERED that following deadlines shall be extended to 60 days after the next continued date of the creditors' meeting: (1) the trustee and all creditors' deadline to object to discharge under § 727, see Fed. R. Bankr. P. 4004(a); and (2) the trustee and all creditors' deadline to bring a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, see Fed. R. Bankr. P. 1017(e).

2. [21-23212](#)-A-7      **IN RE: JOHN/DIANE KNITTER**  
[DNL-5](#)

MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN,  
LIVAICH & CUNNINGHAM FOR J. RUSSELL CUNNINGHAM, TRUSTEE'S  
ATTORNEY(S)  
10-3-2022    [\[53\]](#)

PATRICIA WILSON/ATTY. FOR DBT.  
J. CUNNINGHAM/ATTY. FOR MV.  
DEBTORS DISCHARGED: 12/20/2021

### Final Ruling

**Application:** Allowance of First and Final Compensation and Expense Reimbursement

**Notice:** LBR 9014-1(f)(1); written opposition required

**Required Service:** Fed. R. Civ. P. 5, Fed. R. Bankr. P. 7005

**Disposition:** Approved

**Order:** Civil minute order

**Compensation Allowed:** \$4,049.92

**Reimbursement of Expenses:** \$650.08

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 application was required not less than 14 days before the hearing on the application. 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).

#### **COMPENSATION AND EXPENSES**

In this Chapter 7 case, Desmond, Nolan, Livaich & Cunningham, attorney for the trustee, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the "capped" amount of \$4,700.00. Of necessity the court has allocated the compensation and expenses as required by the Clerk of the Court. The motion itemizes costs and requests reimbursement of costs in the amount of \$650.08. The court will apportion the award and approve \$4,049.92 as compensation and reimbursement of expenses in the amount of \$650.08.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). 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 a final basis.

#### **SERVICE AND NOTICE**

As of November 1, 2022, the court adopted Local Bankruptcy Rules 2002-3 (limiting notice for Rule 2002(a)(6) (motions for compensation), Rule 9036-1 (electronic service) and Rule 7005-1 (requiring attorneys and trustees to use a standardized Certificate of Service, EDC 7-005).

The form certificate of service is intended to allow parties to memorialize service efficiently and accurately, and to aid the court in ensuring sufficient service is achieved in each proceeding.

In this case there are problems with the use and completion of the standardized Certificate of Service, EDC 7-005.

#### Limited Notice Available

This case was filed on September 10, 2021. This is a voluntary asset case and at least 70 days have elapsed since the order for relief. As such this motion is eligible for limited notice under Fed. R. Bankr. P. 2002(h)(1). However, use of the limited notice provisions under Rule 2002(h)(1) are not mandatory, and in some cases expanded notice is preferred by the moving party. The movant has elected to give notice to all creditors and parties in interest, including parties which have filed a request for special notice. This notice election is appropriate, though not required.

#### Section 4 - About the Documents Served

The movant has listed the documents which were served in the space allotted in the form Certificate of Service at Section 4. The space is not sufficiently large for all the documents listed and after the third line it is illegible for this reason. The applicant should have either reduced the type size to fit the box or listed the documents in a separate attachment labeled "Attachment 4". In this case the court will allow the motion to proceed because it is clear from the certificate that a notice, motion, and one supporting declaration were served, but future motions will be denied if all papers are not clearly identified.

#### Section 6 - How Service is Accomplished

The Certificate of Service indicates that service is made pursuant to Fed. R. Bankr. R. 7004. See Box 6A1, Section 6, Certificate of Service, ECF No. 58.

This is a motion to approve compensation, and service is required under Fed. R. Civ. P. 5 *as incorporated by* Fed. R. Bankr. P. 7005. As such Rule 7004 service is not required in this matter. Moreover, service by Rule 7004 has not been accomplished. The matrix lists numerous corporate and insured depository institution parties, none of which were served by certified mail [insured depository institutions] or addressed to the attention of an officer or agent for service of process [corporate parties and insured depository institutions] as required by Rule 7004.

Because service is only required under Fed. R. Civ. P. 5 the service of this motion was correct. The Certificate of Service is incorrect because only the boxes under 6B1 and 6B2 are required to be checked, indicating Rule 5 service.

#### Attachments

The Matrix of Users of the Electronic Filing System is incorrectly labeled. The attachment is labeled Attachment 6B2, and it should be labeled Attachment 6B1 as it corresponds to that section in the Certificate of Service.

Similarly, the Clerks' Mailing Matrix is mislabeled as Attachment 6B3 when it should be labeled "Attachment 6B2" as it corresponds to that section in the form Certificate of Service.

#### **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Desmond, Nolan, Livaich & Cunningham's application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure

to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of \$4,049.92 and reimbursement of expenses in the amount of \$650.08.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

3. [22-22314](#)-A-7     **IN RE: MARIA GARCIA**  
[EJS-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
10-17-2022    [\[16\]](#)

GEORGE BURKE/ATTY. FOR DBT.  
ERIC SCHWAB/ATTY. FOR MV.  
SMOKETREE 520, LLC VS.

**Final Ruling**

**Motion:** Relief from Stay

**Disposition:** Denied without prejudice

**Order:** Civil minute order

As a contested matter, a motion for relief from stay is governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 4001(a)(1), 9014(a). In contested matters generally, "reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." Fed. R. Bankr. P. 9014(a). A motion initiating a contested matter must be served pursuant to Rule 7004. Fed. R. Bankr. P. 9014(b).

Smoketree 520, LLC seeks an order for relief from the automatic stay of 11 U.S.C. § 362(a).

**INCOMPLETE SERVICE**

The motion must be served on the party against whom relief is sought. See Fed. R. Bankr. P. 9014(a)-(b). The debtor and the trustee are ordinarily the parties against whom relief is sought in a typical motion for relief from the automatic stay.

In this case, service of the motion was insufficient and did not comply with Rules 7004 and 9014. The debtor was not served with the moving papers. See Certificate of Service, ECF No. 21. A debtor in bankruptcy may be served before the case is dismissed or closed "at the address shown in the petition or to such other address as the debtor may designate in a filed writing." Fed. R. Bankr. P. 7004(b)(9).

The court notes the following additional concerns with service of the motion.

Special Notice Creditor Not Served

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:

- (a) the trustee or debtor in possession and on those entities specified by these rules; or
- (b) *the entities the court directs if these rules do not require service or specify the entities to be served.*

Fed. R. Bankr. P. 9013 (emphasis added).

When notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, *the entities to whom*, and the form and manner in which the notice shall be given. When feasible, the court may order any notices under these rules to be combined.

Fed. R. Bankr. P. 9007 (emphasis added).

Rules 9013 and 9007 allow the court to designate additional parties which must receive notice of a motion and opportunity to be heard.

When notice of a motion is served without the motion or supporting papers, the notice of hearing shall also succinctly and sufficiently describe the nature of the relief being requested and set forth the essential facts necessary for a party to determine whether to oppose the motion. *However, the motion and supporting papers shall be served on those parties who have requested special notice and those who are directly affected by the requested relief.*

LBR 9014-1(d)(3)(B)(iv) (emphasis added).

In the Eastern District the court has ordered that parties which have filed requests for special notice must receive notice of motions. LBR 9014-1(d)(3)(B)(iv) includes creditors which have filed requests for special notice as parties who must be served with all motions and supporting papers.

In this case creditor AIS Portfolio Services, LLC has filed a request for special notice. *See Request for Notice*, ECF No. 13. Thus, the movant is bound to serve the objection to claim on creditors who have filed requests for special notice.

The Certificate of Service filed in support of this objection does not list the special notice creditor as a party served with the notice as required. See Certificate of Service, ECF No. 21.

Insufficient Evidence Supporting the Motion

The movant seeks relief from the automatic stay to pursue its remedies under state law to recover possession of the property located at 3332 Holly Branch Court, #445, Sacramento, California. The basis of the motion is for cause under 11 U.S.C. § 362(d) as the debtor is delinquent in payments pursuant to the lease. The movant had not obtained a judgment for unlawful detainer as of the date the petition was filed. Neither the moving papers, the declaration, nor the exhibits state the current amount of the delinquency owed by the debtor.

For the reasons indicated the court will deny the motion without prejudice.

**CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Smoketree 520, LLC's Motion for Relief From the Automatic Stay has been presented to the court. Given the procedural deficiencies discussed by the court in its ruling,

IT IS ORDERED that the motion is denied without prejudice.

4. [22-21115](#)-A-7     **IN RE: JANICE/DAVID LACROIX**  
[CAE-1](#)

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION  
5-3-2022    [\[1\]](#)

NIKKI FARRIS/ATTY. FOR DBT.

**No Ruling**



5. [22-21115](#)-A-7     **IN RE: JANICE/DAVID LACROIX**  
[DNL-6](#)

CONTINUED MOTION FOR AUTHORITY TO USE ESTATE FUNDS  
8-25-2022    [\[119\]](#)

NIKKI FARRIS/ATTY. FOR DBT.  
J. CUNNINGHAM/ATTY. FOR MV.

### **Final Ruling**

**Motion:** Motion for Authority to Use Estate Funds

**Notice:** Continued from September 26, 2022

**Disposition:** Withdrawn in part by the moving party without prejudice

**Order:** Civil minute order

On September 28, 2022, the court issued an order granting this motion in part. Specifically, the court ordered:

[T]hat this hearing is bifurcated under Fed. R. Civ P. 42. The court will approve the administrative expense of \$6,147.76 and continue the remaining issues for further evidence and briefing by the parties.

Order, ECF No. 139.

The hearing on the Chapter 7 trustee's motion for authority to use estate funds was continued from September 26, 2022, to allow the court to rule on the trustee's additional motions to abandon assets of the estate and for the trustee to provide further briefing on his motion. On October 18, 2022, the court entered orders granting each of the trustee's motions to abandon assets (DNL-8) and (DNL-9).

On October 17, 2022, the trustee filed a memorandum indicating that he no longer wished to pursue the remaining matters in the instant motion for authority to use estate funds. See Memorandum, ECF No. 165, 3:6-9, 17-18.

### **RULE 41**

Federal Rule of Civil Procedure 41 governs the circumstances where a party may withdraw a motion or objection. Fed. R. Civ. P. 41, *incorporated by* Fed. R. Bankr. P. 7041, 9014(c) (applying rule dismissal of adversary proceedings to contested matters). A motion or objection may be withdrawn without a court order only if it has not been opposed or by stipulation "signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A). In all other instances, a motion or objection may be withdrawn "only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Here, the Chapter 7 trustee has signaled his abandonment of his motion excepting the reimbursement of expenses previously ordered by the court. Neither the debtor(s), nor any creditor, has expressed opposition to the withdrawal of the trustee's motion. No unfair prejudice will result from withdrawal of the objection and the court will accede to the trustee's request.

## **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Chapter 7 trustee Geoffrey Richard's Motion for Authority to Use Estate Funds has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that reimbursement of expenses incurred by the trustee in the amount of \$6,147.76, and as previously ordered by the court is affirmed;

IT IS FURTHER ORDERED that the remaining requests for relief in this motion are withdrawn without prejudice.

6. [22-22020](#)-A-7     **IN RE: RICHARD SAUER**  
[FEC-1](#)

STATUS CONFERENCE RE: INVOLUNTARY PETITION  
8-15-2022    [[1](#)]

RICK MORIN/ATTY. FOR DBT.  
RICHARD SAUER/ATTY. FOR MV.

**No Ruling**

7. [22-22020](#)-A-7     **IN RE: RICHARD SAUER**  
[RJM-1](#)

MOTION TO DISMISS CASE  
9-21-2022    [\[10\]](#)

RICK MORIN/ATTY. FOR DBT.  
RESPONSIVE PLEADING

### **Tentative Ruling**

**Motion:** Motion to Dismiss Involuntary Petition

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Denied; purported debtor to file answer not later than November 21, 2022

**Order:** Civil minute order

Richard N. Sauer ("Sauer") moves to dismiss an involuntary chapter 7 petition filed against him by WV Sour Grapes, LLC ("petitioning creditor"). Mot. to Dismiss, ECF No. 10. The petitioning creditor opposes the motion. Oppos., ECF No. 18.

### **FACTS**

On August 15, 2022, the petitioning creditor filed an involuntary chapter 7 petition against Sauer. Invol. Petition, ECF No. 1. Counsel for the petitioning creditor is Jaime P. Dreher.

The petitioning creditor properly used Official Form 105 to present its case against the targeted debtor. As is the case in a forms driven practice, many of the allegations are boilerplate. Among the preprinted allegations alleged are that: (1) "Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b)," *id.* at § 11; (2) The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a)," *id.*; (3) "The debtor is generally not paying such debtor's debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount," *id.*; (4) "Has there been a transfer of any claim against the debtor by or to any petitioner? Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a)," *id.* at § 12. The petition purports to have been signed by one petitioning creditor: WV Sour Grapes, LLC. *Id.*

Appended to the Involuntary Petition is a document entitled, "Statement Required Under Bankruptcy Rule 1003". That statement provided:

I, Anthony O'Neill, do attest as follows: I am President of Wolverine Ventures, Inc., which is the Manager of Wolverine Ventures Management, LLC, which is the Manager of WV Sour Grapes, LLC ("Petitioning Creditor"), the Assignee of Record of that certain Judgment filed on April 6, 2009, subsequently renewed, against Richard Sauer ("Judgment"). Documents evidencing the assignment of the Judgment are submitted herewith. The Judgment was not obtained, or transferred to Petitioning Creditor, for

the purpose of commencing this bankruptcy case. The Judgment was assigned unconditionally, for a combination of cash consideration plus a net percentage of recovery to the seller.

. . .

Invol. Petition, ECF No. 1.

The assignment documents were appended to the involuntary petition as Exhibit 3, *id.* Fed. R. Bankr. P 1003(a).

The petitioning creditor served the summons and involuntary petition on Sauer thereafter. Certificate of Service, ECF Nos. 4, 5.

#### **PROCEDURE**

This motion followed. Sauer filed a motion to dismiss the involuntary petition against him under Rule 12(b)(6), *incorporated* by Fed. R. Bankr. P. 7012. Mot. to Dismiss, ECF No. 10. Sauer is represented by attorney Richard Morin of The Law Office of Rick Morin, PC.

Sauer advances the following arguments: (1) petitioning creditor has failed to allege sufficient facts to establish standing to pursue an involuntary bankruptcy or otherwise state a claim for which relief may be granted, Mot. to Dismiss, 3:1-2, ECF No. 10, (2) petitioning creditor filed the petition for the improper purpose of collecting on a debt in what is essentially a two-party action, *id.*, 5:11-12; and (3) the court should abstain from issuing an order for relief under 11 U.S.C. § 305, *id.* 6:14-15.

The petitioning creditor opposes the motion, arguing: the Involuntary Petition states a facially plausible claim for relief, Oppos., 6:19, ECF No. 18; and that the involuntary petition was not filed for an improper purpose, *id.*, 7:8.

#### **REPLY**

On October 24, 2022, Sauer filed a Reply, ECF No. 28. The reply reasserts Sauer's position that the court should abstain from the proceeding under 11 U.S.C § 305.

#### **JURISDICTION**

This court has jurisdiction. 28 U.S.C. § 1334(a)-(b); *see also* General Order No. 182 of the Eastern District of California. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A); *In re QDOS, Inc.*, 607 B.R. 338, 342 (9th Cir. BAP 2019).

#### **LAW**

##### Involuntary Petitions

Bankruptcy Code § 303 authorizes creditors to file a Chapter 7 bankruptcy on behalf of an individual who is not paying his or her undisputed debts. 11 U.S.C. § 303. Such a bankruptcy is commenced

by filing an involuntary petition; after it is filed it must be served on the debtor. Fed. R. Bankr. P. 1010(a). As a rule, the respondent debtor may file an answer, 11 U.S.C. § 303(h); Fed. R. Bankr. P. 1011(a), or may challenge the sufficiency of the petition by Rule 12 motion. Fed. R. Bankr. P. 1011(b). If the debtor fails to contest the petition, the court shall order relief against the debtor. 11 U.S.C. § 303(h). If the debtor contests the petition by Rule 12 motion, no answer is required until the motion is resolved. Fed. R. Bankr. P. 1011(c); *QDOS, Inc.*, 607 B.R. at 345. If an answer is filed, the debtor must file the list described in Rule 1003(b), other creditors may join the petition, and discovery rights attach. *Id.* at 346-347. In such instances, resolution of evidentiary issues occurs by summary judgment or trial. *Cunningham v. Rothery (In re Rothery)*, 143 F.3d 546, 548-549 (9th Cir. 1998) (summary judgment); *QDOS, Inc.*, 607 B.R. at 344-345.

At trial, the petitioning creditors bear the burden of proof. *Rothery*, 143 F.3d at 548; *QDOS, Inc.*, 607 B.R. at 343. Those creditors must prove: (1) petitioning creditor eligibility, Fed. R. Bankr. 1003(a) (applicable to assignees only); (2) numerosity: at least one petitioning creditor if the debtor has fewer than 12 creditors or at least three petitioning creditors if the debtor has 12 or more creditors, 11 U.S.C. § 303(b); *In re Kidwell*, 158 B.R. 203 (Bankr. E.D. Cal. 1993) (Klein, J.), cited by *QDOS, Inc.*, 607 B.R. at 347;<sup>1</sup> (3) the petitioning creditors' claims are not contingent and not the subject of a bona fide dispute; (4) the petitioning creditors' claims aggregate is not less than \$18,600, 11 U.S.C. § 303(b); and (5) the debtor is generally not paying undisputed debts as "they become due." 11 U.S.C. § 303(b), (h); *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1064 (9th Cir. 2002); *Morabito v. JH, Inc. (In re Morabito)*, 2016 WL 3267406 \* 8-9 (9th Cir. BAP 2016).

#### Rule 12(b) (6)

Under Federal Rule of Civil Procedure 12(b) (6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b) (6), incorporated by Fed. R. Bankr. P. 7012(b). Failure to state a claim may exist as a matter of law or as a matter of fact. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) ("A Rule 12(b) (6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory"); accord *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering the sufficiency of the complaint, the court may consider the factual allegations in the complaint itself and some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); accord *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357

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<sup>1</sup>Here, it is unclear whether Sauer has at least 12 creditors. If so, at least 2 creditors must join the petition. 11 U.S.C. § 303(b).

F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).

After *Iqbal* and *Twombly*, courts employ a three-step analysis in deciding Rule 12(b)(6) motions. At the outset, the court takes notice of the elements of the claim to be stated. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Next, the court discards conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *United States ex rel. Harper v. Muskingum Watershed Conservancy District*, 842 F.3d 430, 438 (6th Cir. 2016) (the complaint failed to include "facts that show how" the defendant would have known alleged facts). Finally, assuming the truth of the remaining well-pleaded facts, and drawing all reasonable inferences therefrom, the court determines whether the allegations in the complaint "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679; *Sanchez v. United States Dept. of Energy*, 870 F.3d 1185, 1199 (10th Cir. 2017). See generally, *Wagstaff Practice Guide: Federal Civil Procedure Before Trial*, Attacking the Pleadings, Motions to Dismiss § 23.75-23.77 (Matthew Bender & Company, Inc. 2019).

Plausibility means that the plaintiff's entitlement to relief is more than possible. *Twombly*, 550 U.S. at 570 (the facts plead "must cross the line from conceivable to plausible"); *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1074 (11 Cir. 2017). Allegations that are "merely consistent" with liability are insufficient. *Iqbal*, 556 U.S. at 662; *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

If the facts give rise to two competing inferences, one of which supports liability and the other of which does not, the plaintiff will be deemed to have stated a plausible claim within the meaning of *Iqbal* and *Twombly*. *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015); *16630 Southfield Ltd. P'hsip v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013); see also, *Wagstaff*, Motion to Dismiss at § 23.95. But if one of the competing inferences is sufficiently strong as to constitute an "obvious alternative explanation," that inference defeats a finding of plausibility, and the complaint should be dismissed. *Marcus & Millichap Co.*, 751 F.3d at 996 ("Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that the plaintiff's explanation is implausible."); *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 121 (2nd Cir. 2013).

## Abstention

a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if--

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

11 U.S.C. § 305(a) (1).

While the Bankruptcy Code provides for abstention it is considered an extraordinary remedy.

The courts that have construed § 305(a) (1) are in general agreement that abstention in a properly filed bankruptcy case is an extraordinary remedy, and that dismissal is appropriate under § 305(a) (1) only in the situation where the court finds that both "creditors and the debtor" would be "better served" by a dismissal.

*In re Eastman*, 188 B.R. 621, 624 (B.A.P. 9th Cir. 1995).

[E]ven if an involuntary petition satisfies the minimal requirements of § 303(b), the bankruptcy court may exercise its discretion to nonetheless dismiss the petition, or suspend the bankruptcy proceedings, for the reasons identified in § 305(a).

*In re Gelb*, 2013 WL 1296790, at \*4 (B.A.P. 9th Cir. Mar. 29, 2013).

In deciding whether to abstain from a proceeding the court must consider the following factors:

(1) the economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought.

*Id.*

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title--

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least \$18,600 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least \$18,600 of such claims;

11 U.S.C. § 303(b).

## **DISCUSSION**

### Rule 12(b)(6) Plausible Claim

Falling back to Rule 12(b)(6), Sauer's motion will be denied. Under the rubric of a Rule 12(b)(6) motion, i.e., consideration of the factual allegations of involuntary petition, and not extrinsic evidence, the petitioning creditor has plead a plausible claim for relief under § 303. That is true for two reasons. First, a fully and properly completed Involuntary Petition, Official Form 105, states a prima facie case for § 303 relief. *In re Gutierrez*, 2020 WL 3720211 \* 3 (Bankr. S.D. Miss. 2020). And that is the case here. Second, the elements of a prima facie case have been plead.<sup>2</sup> Summarized, the elements are: petitioning creditor eligibility; numerosity; claims are not contingent and not the subject of a bona fide dispute; claims aggregate is not less than \$18,600; and the debtor is generally not paying undisputed debts as "they become due." The allegations of the Involuntary Petition, albeit boilerplate, state a plausible claim against Sauer. Invol. Petition, Part 3, Items 11-13, ECF No. 1.

Sauer argues that the issues of whether he is paying all his bills as they come due and whether he has fewer than 12 creditors must be proven by the petitioning creditors. Evidence is required for the court to make such a determination. The record contains no such evidence. The information regarding the payment of debt is potentially complex likely requiring discovery.

The petitioning creditor argues that both issues are properly argued after an answer has been filed, and the parties afforded the opportunity to conduct discovery.

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<sup>2</sup> Any defect with respect to the number of petitioning creditors does not defeat the petition at this time. Lack of numerosity is an affirmative defense and need not be plead. *In re QDOS, Inc.*, 607 B.R. 338, 346-47 (9th Cir. 2019).



"As noted, a Civil Rule 12(b)(6) motion assumes the truth of the allegations in the operative documents, here the involuntary petition." *In re QDOS, Inc.*, 607 B.R. 338, 346 (B.A.P. 9th Cir. 2019).

#### Rule 12(b)(6) Two-Party Dispute

Sauer contends that the filing of the involuntary petition is an improper use of the Bankruptcy Code because the case was filed to resolve a two-party dispute. The petitioning creditor argues that this argument is inappropriate in a Rule 12(b) motion as follows:

The issues of whether the Involuntary Petition was filed for an improper purpose and whether the Involuntary Petition is a two-party dispute are not properly presented by a Civil Rule 12(b)(6) motion. A Civil Rule 12(b)(6) motion is based on the pleadings, and here Petitioning Creditor has stated a plausible claim that satisfies the requirements of 11 U.S.C. § 303.

Opposition, ECF No. 18, 7:9-12.

There is no admissible evidence before the court regarding the number of creditors e.g. whether this is a two-party dispute. Whether the petition was filed for a proper purpose can only be determined after evidence has been presented. Thus, this issue is properly raised after Sauer has filed an answer and appropriate discovery conducted.

#### Abstention

The court will not dismiss the case under 11 U.S.C. § 305 at this time. Sauer argues that the case is essentially a two-party collection matter which is best resolved in state court. The petitioning creditor asserts that additional litigation with other claimants is pending and that it is not the sole claim holder. The court declines to dismiss the proceeding under Section 305 for the following reasons.

First, even if the petitioning creditor was the only claim holder, this fact alone is not a basis to deny relief and dismiss the case under Section 305. The Bankruptcy Code specifically allows a petition to be filed by one creditor "if there are fewer than 12 such holders..." 11 U.S.C. § 303(b)(2).

Second, the request under Section 305 is premature. The court has no evidence before it either supporting or refuting the factors outlined in *Gelb*. *In re Gelb*, 2013 WL 1296790, at \*4 (B.A.P. 9th Cir. Mar. 29, 2013).

The request for dismissal under Section 305 will be denied without prejudice.

## **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Richard Sauer's motion has been presented to the court. Having considered the motion and opposition, as well as the arguments of counsel,

IT IS ORDERED that the motion is denied;

IT IS FURTHER ORDERED that the portion of the motion which requests dismissal and abstention under 11 U.S.C. § 305 is denied without prejudice;

IT IS FURTHER ORDERED that not later than November 21, 2022, Richard N. Sauer shall file an answer to the involuntary petition;  
IT IS FURTHER ORDERED that all other relief is denied.

8. [21-23522](#)-A-7     **IN RE: JOSEPH SMITH**  
[WW-5](#)

MOTION TO COMPEL ABANDONMENT  
9-26-2022    [\[125\]](#)

MARK WOLFF/ATTY. FOR DBT.  
DEBTORS DISCHARGED: 01/24/2022;

### **Final Ruling**

**Motion:** Compel Abandonment of Property of the Estate

**Notice:** LBR 9014-1(f)(1); written opposition filed by creditor

**Disposition:** Continued to December 12, 2022, at 9:00 a.m.

**Order:** Prepared by moving party pursuant to the instructions below

**Subject:** 2518 U Street, Sacramento, California

The debtor seeks an order compelling the Chapter 7 trustee's abandonment of property located at 2518 U Street, Sacramento, California. This is the debtor's fourth motion to compel abandonment of the subject property filed by the debtor. Previous motions were denied to allow the Chapter 7 trustee to evaluate the debtor's ownership interest in, and value of, the subject property. The most recent motion to compel abandonment (WW-4) was denied because the motion was not properly noticed and served under Fed. R. Bankr. P. 6007.

The Chapter 7 trustee, J. Michael Hopper, filed a notice of non-opposition to WW-4. The trustee has not filed anything in opposition to, or in support of, the instant motion.

## **OPPOSITION**

Every motion or other request for relief shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(c)(4).

LBR 9014-1(d)(3)(D).

Opposition to this motion was filed by creditor, Applied Architecture Incorporated, ECF No. 132. The unsworn opposition is unsigned and attaches unauthenticated documents purporting to show the value of the subject property is \$770,347.00. The opposition contends there would be approximately \$100,000.00 in value to the estate after sale of the property. In its current form the court gives no weight to the unsworn testimony and unauthenticated documents.

## **BACKGROUND**

The debtor's ownership interest in the property has been disputed during the pendency of this case. When the case was filed the debtor asserted he owned a 5% interest in the property. See Motion, ECF No. 125, 2:10-11. While the exact percentage of the debtor's ownership interest is yet to be determined the debtor's analysis in the motion contends that that no proceeds would be generated for the estate from a sale of the subject property.

The court will continue the motion to allow the creditor to file admissible evidence, if any, in support of its position, and to require the Chapter 7 trustee to state his position regarding the motion. The Chapter 7 trustee shall file admissible evidence describing his investigation of the debtor's interest in the property, the value of the property, the anticipated costs and difficulty of litigation regarding the debtor's ownership interest in the subject property, and any additional relevant evidence or argument. A statement of non-opposition on the court's docket is not sufficient to meet this requirement.

## **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

IT IS ORDERED that the motion is continued to December 12, 2022, at 9:00 a.m. No later than November 14, 2022, the Chapter 7 trustee shall file and serve, admissible evidence consistent with the court's ruling in this matter. A docket entry statement of non-opposition will not be sufficient.

IT IS FURTHER ORDERED that no later than November 14, 2022, opposing creditor Applied Architecture Incorporated may file and serve any admissible evidence and argument in support of its position;

IT IS FURTHER ORDERED that no later than November 28, 2022, the debtor may file and serve, a reply in support of his position;

IT IS FURTHER ORDERED that the evidentiary record will close on November 28, 2022.

9. [22-22181](#)-A-7     **IN RE: NEAL PRICE**  
[RER-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
9-23-2022    [\[15\]](#)

RACHEL RENNO/ATTY. FOR MV.  
YINGRONG TAO VS.  
TRUSTEE NON-OPPOSITION

**Final Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Denied without prejudice

**Order:** Civil minute order

Movant, Tingrong Tao, seeks relief from the automatic stay of 11 U.S.C. § 362(a) to allow him to proceed with an unlawful detainer action filed against the debtor, and recover possession of real property lease by the debtor. The motion fails to properly identify the property to be recovered.

The movant contends he is the owner of real property described as 5027 Bissett Way, Sacramento, California. The motion contends that the debtor and the movant are parties to a lease allowing the debtor possession of the property. After a breach of the lease the movant filed an action in Unlawful Detainer in the Superior Court of California, County of Sacramento case number 22UD01038. See Motion, ECF No. 15, 2:11-12.

The motion contains contrary information regarding the property to be recovered and the unlawful detainer proceeding. The motion also requests relief from the automatic stay to allow the movant to proceed with recovery of possession of "3939 Streamline Street, Sacramento, CA, 95834, using any and all valid State remedies, including but not limited to continuing with the unlawful detainer action in the Superior Court of California, County of Sacramento case number 22UD01222." Id., 3:7-10.

The court will deny the motion without prejudice.

**CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Tingrong Tao's Motion for Relief From the Automatic Stay has been presented to the court. Given the deficiencies discussed by the court in its ruling,

IT IS ORDERED that the motion is denied without prejudice.

10. [22-22393](#)-A-7     **IN RE: HOME SHIELD INVESTMENT GROUP, LLC**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES  
10-6-2022    [[20](#)]

DEBTOR DISMISSED: 10/12/22

**Final Ruling**

This case was dismissed on October 12, 2022. This Order to Show Cause is removed from the calendar as moot. No appearances are required.

11. [21-22496](#)-A-7     **IN RE: LILLIAN/ISAGANI SISAYAN**  
[DNL-21](#)

MOTION FOR AUTHORITY TO MAKE INTERIM DISTRIBUTION  
9-28-2022    [[457](#)]

STEPHAN BROWN/ATTY. FOR DBT.  
J. CUNNINGHAM/ATTY. FOR MV.

**Final Ruling**

**Motion:** Authorize Interim Distribution in Chapter 7

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by the movant

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 7 trustee Kimberly Husted seeks an order authorizing interim distributions to creditors under 11 U.S.C. § 363(b). The request proposes distributions in the amount of \$1,819,821.03. The trustee also requests allowance and authorization to pay, as a Chapter 7 administrative expense, the employer's share of resulting payroll

taxes that will become due and payable upon payment of the wage portion of the proposed distributions in an amount not to exceed \$85,000.00. 11 U.S.C. § 503(b)(1)(B).

The motion is supported by the declaration of Chapter 7 trustee, Kimberly Husted, ECF No. 459, and a signed Stipulation between the trustee and the Wage Claimants described in the motion. The Stipulation, ECF No. 461, indicates the Wage Claimants' support of the instant motion for interim distributions and provides that the separate enhancement claims filed by each of the Wage Claimants will be subordinated to all other timely filed and allowed claims. See *Id.*, 2:23, 25-26.

### **INTERIM DISTRIBUTIONS**

"The court has the power to authorize interim distributions in a Chapter 7 case to the holders of prepetition unsecured claims. However, it will only do so if assured there will be sufficient remaining funds to pay all administrative claims (including those that might accrue in the future)." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 17:1762 (rev. 2017) (citing cases).

The language of the Federal Rules of Bankruptcy Procedure supports the making of an interim distribution in chapter 7 cases. The rules mandate that dividends to creditors in chapter 7 be paid "as promptly as practicable." Fed. R. Bankr. P. 3009. "Dividend checks shall be made payable to and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another entity to receive dividends has been executed and filed in accordance with Rule 9010." If the time that a chapter 7 case has been pending is lengthy, an interim distribution may be proper if the case is administratively solvent.

### Background

On July 6, 2022, in Adversary Proceeding No. 2022-02007, the court entered a judgment avoiding pre-petition transfers of real and personal property the estimated net liquidation proceeds of which would be sufficient to return a surplus to the debtors. See Motion, ECF No. 457, 3:23-25. On August 16, 2022, the court entered an order granting DNL-18, a motion to approve a trustee compromise that allowed the claims of the estate's principal general unsecured creditors ("Wage Claimants") in the collective amount of \$2.4 million: (a) \$1,062,371.93 for wages ("Wages"); and (b) \$1,337,628.07 for interest, liquidated damages, and attorney fees ("Enhancements"). *Id.*, 3:26-27, 4:1-3.

Subsequently, the Wage Claimants, who had originally filed a collective claim, withdrew the claim and each filed individual claims. The claimants have filed separate claims for "Wages" and "Enhancements" as indicated above.

The Chapter 7 trustee is presently holding \$2,850,798.69 and there is no pending objection to any claim. *Id.*, 4:12-13, 17.

The proposed distribution will "pay all pre-petition claims that are the subject of a filed proof of claim except for the balance due on the Enhancements claims allowed the Wage Claimants." *Id.*, 4:18-20.

The trustee contends that the proposed distribution is in the best interests of the estate because:

(a) the recipients will benefit from earlier realization on their respective claims; (b) monthly bank charges (which are calculated based on the amount on deposit) will be mitigated; (c) post-petition interest otherwise recoverable in a surplus case will be mitigated; and (d) resulting subordination of the Enhancements claims will simplify calculation of additional reductions resulting from additional collateral source recoveries.

*Id.*, 5:2-6.

In this case, the motion describes the necessity and reasons for an interim distribution to creditors with allowed claims. The court will authorize the interim distribution in the amounts specified and to the creditors listed in the motion.

#### **ALLOWANCE OF ADMINISTRATIVE EXPENSE**

"Subject to limited exceptions, a trustee must pay the taxes of the estate on or before the date they come due, 28 U.S.C. § 960(b), even if no request for administrative expenses is filed by the tax authorities, 11 U.S.C. § 503(b)(1)(D), and the trustee must insure that 'notice and a hearing' have been provided before doing so, see *id.* § 503(b)(1)(B). The hearing requirement insures that interested parties . . . have an opportunity to contest the amount of tax paid before the estate's funds are diminished, perhaps irretrievably." *In re Clooback*, 788 F.3d 1243, 1246 (9th Cir. 2015). It is error to approve a trustee's final report without first holding a hearing, see 11 U.S.C. § 102(1), to allow creditors and parties in interest an opportunity to object to the allowance or amount of tax before it is paid. *Id.* 1245 n.1, 1246.

Creditors and parties in interest have had an opportunity to contest the allowance and amount of the estate taxes in this case. No objection has been made. Accordingly, the taxes specified in the motion shall be allowed as an administrative expense under 11 U.S.C. § 503(b)(1)(B).

The court will grant the motion and approve the stipulation, ECF No. 461. The Movant shall prepare an order consistent with this ruling.

12. [22-22020](#)-A-7     **IN RE: RICHARD SAUER**  
[DB-1](#)

MOTION TO SET TRIAL DATE  
10-18-2022    [[23](#)]

RICK MORIN/ATTY. FOR DBT.

**No Ruling**