UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

November 4, 2021 at 10:30 a.m.

1.	**20-90710-E-12** **HSM-1**	**LESLIE JENSEN** **David Johnston**	**CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH MICHAEL J. DYER, LESLIE F. JENSEN** **9-30-21 [167]**

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

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

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 30, 2021. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice).

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 12 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion for Approval of Compromise is xxxx

Leslie F. Jensen, Debtor in Possession, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Leslie F. Jensen, L&L Investments, LLC, Michael J. Dyer,

The Dyer Law Firm, and Krista Osmers ("Settlor"). The claims and disputes to be resolved by the proposed settlement are an Abstract Judgment to be paid to the Osmers by Jensen.

The summaries the relief requested and grounds in the Motion (167) as follows (references to the paragraph numbers in the Motion):

> 5. In July 2017, the Osmers obtained a judgment against Debtor in the principal amount of $318,142.95, which accrues interest at 10% per annum.
>
> 6. Osmers recorded an abstract of Judgment in Stanislaus County on July 7, 2020.
>
> 7. Osmers obtained an Order for Examination of Judgment Debtor on July 14, 2020. The Examination was commenced and has not been completed.
>
> 8. Debtor commenced this bankruptcy case on October 29, 2020 (which the court notes is 107 days after the Order for Examination was issued, but the date of when the Order was served on Debtor is not stated).
>
> 10. On February 1, 2021, Osmers filed a complaint for nondischargeability of debt (the Judgment obligation).
>
> 16. On July 21, 2021, the Osmers assigned their interest in the Judgment to Dyer Law (their lawyers in that State Court Action and in this Bankruptcy Case).
>
> 18-19. Dyer Law, as the successor in interest, and Debtor have engaged in mediation to resolve their disputes concerning whether the Debtor qualifies for relief under Chapter 12, and whether the case should be dismissed or converted to Chapter 7.

The basic terms of the Settlement are stated in Paragraph 21 of the Motion to be (identified by subparagraph alphabetic designation):

> b. While Debtor remains in bankruptcy and there is no default in the Settlement by Debtor, Dyer will not take any action to enforce the Judgement.
>
> c. The Settlement provides for payment of $350,000.00 to Dyer by Debtor no later than October 15, 2021. The source of the monies to make the $350,000.00 payment by October 15, 2021 (which expired six days before the hearing on this Motion) is not identified in the Motion.
>
> d. On or before September 30, 2021, L&L Investments, LLC shall provide an unconditional guarantee payment of the Settlement obligation of Debtor. If Debtor defaults, both the Debtor and the guarantor will obligated to pay the full amount due under the Judgment (not the discounted $350,000 Settlement amount).
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> f. Dyer and Jensen agree that upon payment of the Settlement amount, the Debtor's bankruptcy case will be dismissed.
>
> g. Contemporaneous with the dismissal of Debtor's bankruptcy case, Dyer will dismiss the Adversary Proceeding with prejudice.

h. Upon the dismissing of the bankruptcy case and the clearing of the Settlement payment to Dyer, Dyer will record a satisfaction of judgment.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Probability of Success

Jensen is confident in her position with respect to the Claims, and her ability to confirm a chapter 12 plan herein, Jensen recognizes that Dyer and others contend otherwise, and that litigation always involves risk of loss. Through the proposed Settlement Agreement, Jensen mitigates the risk of failing to obtain confirmation of her chapter 12 plan and subsequently seeing this case either dismissed or potentially converted to a case under another chapter of the Bankruptcy Code.

Difficulties in Collection

Jensen is not collecting from Dyer or any other party. Jensen is paying Dyer, at a discount, to resolve the outstanding Judgment.

Expense, Inconvenience, and Delay of Continued Litigation

Should this chapter 12 case and the adversary proceeding continue, there is no question that the warring parties will conduct both informal and formal discovery, engage in pre-trial law and motion practice, including trial preparation, and thereafter proceed to trial. Settlement of the Claim at issue allows Jensen and others the ability to reasonably mitigate risks in these important respects.

Paramount Interest of Creditors

Jensen will resolve a long-running battle with Osmers/Dyer through the proposed settlement, and will do so on terms that are financially beneficial to her and the bankruptcy estate. Further, the anticipated dismissal of the Chapter 12 case and the adversary proceeding will enable Jensen to preserve much needed resources to satisfy claims of her other creditors.

Review of Debtor's Declaration

Debtor provides her Declaration in support of the Motion to Approve Compromise. Dckt. 170. The court notes that in paragraph 1 of the Declaration Debtor states that while she has personal knowledge of some of the facts to which she testifies to, others are stated "merely" on information and believe, because she believes them to be true.

Debtor's testimony repeats the background facts concerning the State Court litigation and Judgement, and the motions to dismiss and covert this Chapter 12 case. Debtor does testify as to why she believes that this Settlement and dismissal of the bankruptcy case is in the interest of all her creditors, stating:

> 23. I believe the paramount interest of creditors is to see this case concluded. Fundamentally, I will resolve a long-running battle with Osmers/ Dyer through the proposed Settlement, and will do so on terms that are financially beneficial to me and the bankruptcy estate. Moreover, the anticipated dismissal of the chapter 12 case and the Adversary Proceeding will allow me to preserve much needed resources to satisfy the claims of my other creditors. Upon dismissal of this case, those creditors will no longer be restricted vis- a-vis their rights against me. In short, they will benefit from approval of the proposed Settlement because the bankruptcy case will be dismissed and they will once again enjoy all available rights and remedies under non-bankruptcy law.

Declaration, ¶ 23; Dckt. 170.

Debtor does not provide an analysis (statement of facts) as to how she reaches this conclusion. Additionally, Debtor does not state the source of the $350,000.00 in cash funds which she has access to during this bankruptcy case to pay the Settlement amount.

Review of Assets, Creditors, and Claims

Under penalty of perjury, Debtor has disclosed all of her assets on Amended Schedule A/B. Dckt. 22 at 5-12. The court summarizes the substantial assets below.

Specific Significant Assets		Encumbrances on Such Assets
Briarwood Point - Real Property Debtor has 50% Interest	$348,000	($195,420)
Legend Dr. - Real Property	$477,000	($297,439)
Homestead Exemption	($175,000)	($318,142) Plus Interest Creditor Judgment Lien

Bank Accounts	$26,500	
L&L Investments	$50,000	
PV Condo 10% Interest	$5,000	
Maui and Cabo Timeshares	$4,000	
Business Accounts Receivables	$55,000	

From the above, the source of a $350,000 cash settlement payment by October 15, 2021 is unclear.

In looking at the Schedules, excluding the Dyer Law claim on the assigned Judgment, Debtor lists ($2,473,795) in general unsecured claims owed to other creditors. Amended Schedule E/F, Dckt. 22 at 17-26.

A review of the Proofs of Claim filed in this case shows that ($4,656,552) in general unsecured claims have been filed. This includes a $2,000,000 claim by Iraj Sahahi, Proof of Claim 7-1, a debt Debtor disputes on Amended Schedule E/F.

Under the proposed Settlement Debtor states having $350,000 in cash assets to pay the Settlement amount, after which Debtor will leave bankruptcy and her other creditors will be left to pursue whatever assets she has in excess of the apparently undisclosed $350,000 in cash.

At the hearing, Debtor, serving as the Debtor in Possession subject to the fiduciary duties to the bankruptcy estate akin to that of a trustee, reported that $200,000 was monies from her sister and $150,000 was monies from the operation of her business (law practice) post petition. The Debtor in Possession did not obtain authorization from the court to use property of the bankruptcy estate (11 U.S.C. § 1207(b)(1), (2)) pursuant to 11 U.S.C. § 363 for disbursing property of the estate to Settlor.

The court continues the hearing to allow the Debtor in Possession/Debtor the opportunity to document the source of these funds - not merely who transferred the monies, but the actual source of the monies that were eventually paid to Settlor.

October 29, 2021 Declaration

On October 29, 2021, Debtor filed a declaration and supporting exhibits with the court. Debtor erroneously numbers the exhibits in her declaration, however, from reviewing the exhibits they are filed as followed:

1. Exhibit 1 - Two cashiers checks, $200,000.00 from her sister, Lisa Jensen-Long, and $150,000.00 from Debtor, addressed to Howard S. Nevins. Exhibit 1, Dckt. 191.

2. Exhibit 2 - Correspondence from Mr. Nevins detailing why he returned the two cashiers checks. Exhibit 2, Dckt. 191.

3. Exhibit 3 - Correspondence to Mr. Dyer and scans of two replacement cashiers checks. Exhibit 3, Dckt. 191.

4. Exhibit 4 - Copies of business Bank of America account showing the account's balance of $22,817.61.

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Debtor has provided the court with documentation of the source of the settlement monies. Debtor's $150,000.00 is being paid from property of the bankruptcy estate, her business and the post-petition revenues therefrom being included in the Chapter 12 bankruptcy estate. 11 U.S.C. § 1207(a)(1), (a)(2).[Fn.1.]

FN. 1.

> ¶ 1207.03 Postpetition Earnings; § 1207(a)(2)
>
> **Section 1207(a)(2) provides that property of the estate includes**, in addition to the property specified in section 541 and in section 1207(a)(1), **any earnings from services performed by an individual debtor after the commencement of the case** but prior to the time the case is closed, dismissed, or converted to chapter 7, whichever occurs first. Section 1207(a)(2) overrides section 541(a)(6) which excludes from property of the estate in a chapter 7 case any earnings from services performed by an individual debtor after commencement of the case.
>
> The effect of section 1207(a)(2) is less important in a chapter 12 case than the counterpart provision is in chapter 13 cases. In a typical chapter 13 case, the plan will be funded by the postpetition earnings of the debtor. In a typical chapter 12 case, in contrast, the debtor will not receive income from earnings but will receive profits from the farming or fishing business. The income will arise from the debtor's use of the assets of the estate, such as farmland, farm equipment, seed, fertilizer, and the like, and such income would constitute property of the estate even absent the provisions of section 1207(a)(1). **Nevertheless, if one spouse in a jointly filed case has earnings from outside employment, those earnings will constitute property of the chapter 12 estate regardless of whether the employment has any relationship to the debtors' farming business.**

8 Collier on Bankruptcy P 1207.03 (16th 2021) (emphasis added).

This case has had some interesting, and troubling aspects. As discussed in the Civil Minutes from the January 28, 2021 Status Conference, the information provided by Debtor under penalty of perjury in the Schedules and Statement of Financial Affairs contains conflicting and inconsistent information. Dckt. 54. With respect to inconsistent and inaccurate information provided in declaration on counsel's for the Debtor in Possession pleadings, he stated that one was actually prepared by the Debtor (who is an attorney) and the other by the "expert." As the court noted, counsel for Debtor in Possession got the "credit" for the

inaccurate work. As reflected in the Civil Minutes, counsel for the Debtor in Possession acknowledged that Debtor's income information was inaccurate.

Looking at the proofs of claim filed, Settlor is Debtor's major creditor with an unsecured claim. (While a big dollar amount, the Bank of Stockton's claim is for a personal guarantee of Debtor's farming LLC.) The other former client with a big dollar claim is Iraj Sabahi, seeking to recover $2,000,000 relating to Debtor's representation of Iraj Sabahi. Counsel in this case for Iraj Sabahi is Dustin Dyer, Esq., of the Dyer Law Firm. The Dyer Law Firm is one of the he Settlor along with Michael Dyer, as successor in interest for his other client, Krista Osmers, against Debtor.

Given Dustin Dyer's, Michael Dyer's, and the Dyer Law Firm's professional and ethical duties and obligations to Iraj Sabahi, the court is presented with an interesting situation. It does not appear that the Dyer Law Firm and its attorneys can act to personally enhance their wealth while representing Iraj Sabahi. Any approval of this Settlement shall not include, explicitly or implicitly, any determination that the Dyer Law Firm and its lawyers obtaining payments on this settlement are not in conflict with their professional and ethical duties and obligation to Iraj Sabahi.

From early on this case the Chapter 12 Trustee questioned whether Debtor could qualify for relief under Chapter 12. See Opposition to Chapter 12 Plan, Dckt. 77. Normally, such ineligibility would result in a dismissal of this case, with conversion to Chapter 7 being allowable only if the court were to determine that the debtor committed a fraud on the court.

Under the facts and circumstances of this case, and the pending Motion of the Debtor to Dismiss this case, Dckt. 137, the court concludes that dismissal is proper rather than going down the fraud road, conditioned on refiling limitations as permitted under 11 U.S.C. § 349.

Here, Debtor has dipped into Chapter 12, asserted that she and her law practice qualify a family farmer, and now seeks to pop out of Chapter 12 having made "peace" with the creditor/counsel that drove her into Chapter 12. In seeking approval of this Settlement by paying Settlor, Debtor testifies under penalty of perjury her conclusions as to why the Settlement and dismissal are in the best interests of her other creditors, stating:

> 23. I believe the paramount interest of creditors is to see this case concluded. Fundamentally, I will resolve a long-running battle with Osmers/ Dyer through the proposed Settlement, and will do so on terms that are financially beneficial to me and the bankruptcy estate. Moreover, the anticipated dismissal of the chapter 12 case and the Adversary Proceeding will allow me to preserve much needed resources to satisfy the claims of my other creditors. Upon dismissal of this case, those creditors will no longer be restricted vis- a-vis their rights against me. In short, they will benefit from approval of the proposed Settlement because the bankruptcy case will be dismissed and they will once again enjoy all available rights and remedies under non-bankruptcy law.

Declaration, Dckt. 170. The court reads this as Debtor's firm affirmation/commitment/promise that if the Settlement is approved she will address the creditors and their asserted rights outside of bankruptcy. If Debtor were not to do that, but just dip back into bankruptcy after a 90 day preference period were to run and Settlor walked off with the $150,000 of bankruptcy estate money, such would be a clear abuse of the Bankruptcy Code and Federal Courts.

Therefore, the court approves the Settlement and dismissal of this cause subject to the following additional condition: Debtor is barred from filing a bankruptcy case, under any Chapter of the Bankruptcy Code for the period from the approval of the settlement through December 31, 2024.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because the settlement resolves the dispute and avoids litigation that would result in additional delay and expense to the estate. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Leslie F. Jensen, Debtor in Possession, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and L&L Investments, LLC, Michael J. Dyer, The Dyer Law Firm, and Krista Osmers ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 172), plus that Debtor is barred from filing a bankruptcy case, under any Chapter of the Bankruptcy Code for the period from the approval of the settlement through December 31, 2024.

2. 21-90266-E-7 SLC-1 — MAER SALCIDO CORRAL, Pro Se — OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS, 9-29-21 [13]

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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on September 29, 2021. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Objection to Claimed Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Claimed Exemptions is xxxx.

Sheri L. Carello ("the Chapter 7 Trustee") objects to Maer David Salcido Corral ("Debtor") use of the California exemptions without the filing of the spousal waiver required by California Code of Civil Procedure § 703.140. California Code of Civil Procedure § 703.140(a)(2), provides:

> If the petition is filed individually, and not jointly, for a spouse, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if **both** of the spouses effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(emphasis added). The court's review of the docket reveals that the spousal wavier has not been filed. However, Debtor's signed Statement of Financial Affairs indicates he is not married and is signed under the penalty of perjury. Dckt. 1.

Trustee's evidence supporting this Objection is Trustee's Declaration which states under penalty and perjury that Debtor testified at the first meeting of creditors held on July 27, 2021, he was married. While this statement is generally inadmissible hearsay under Federal Rule of Evidence § 802, it is admissible pursuant to Federal Rules of Evidence § § 801(d)(2) and 804(b)(3) as an opposing party statement and statement against interest, respectively. The Trustee does not provide any other evidence to prove Debtor is in fact married and his claimed exemptions are improper due to failing to file a spousal waiver.

The court notes Debtor did not file a response to Trustee's Objection. However, the court's review of Debtor's Schedule I, line 5f, reflects a payroll deduction of $2,016.24 for Debtor due to domestic support obligations. Dckt. 1. This indicates a divorce or separation between Debtor and a former spouse.

Additionally, the court reviewed the Stanislaus County Superior Court online file information service, and notes that Debtor is in an open dissolution proceeding in Stanislaus County, with an upcoming Case Management Conference scheduled for January 18, 2022. *See, Salcido, Balanca E Zapien v. Corral, Maer David Salcido*, No. FL-19-002474.

~~Accordingly, the court weighing the evidence provided, the court agrees with Trustee that Debtor is married and the exemptions are improper without a spousal waiver .~~

~~The Trustee's Objection is sustained.~~

~~The court shall issue an order substantially in the following form holding that:~~

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

~~The Objection to Claimed Exemptions filed by Sheri L. Carello ("the Chapter 7 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that Objection is sustained, and the claimed exemptions without the filing of the spousal waiver required by California Code of Civil Procedure § 703.140 are disallowed in their entirety.~~

3. 21-90370-E-7 CYNTHIA VASQUEZ MOTION TO VACATE DISMISSAL OF CASE
WPC-3 Wylie Cashman 10-21-21 [21]

DEBTOR DISMISSED: 08/23/2021

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

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

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 7 Trustee and creditors on October 14, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

In reviewing the Certificate of Service filed for this Motion, the court notes that no service on the U.S. Trustee is documented.

The Motion to Vacate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Vacate is denied.

Cynthia Yvette Vasquez ("Debtor") filed the instant case on August 11, 2021. Dckt. 1. On August 13, 2021, the court issued a Notice of Incomplete Filing and Notice of Intent to Dismiss Case if Documents are not Timely Filed. Dckt. 7. The Notice stated that the Verification and Master Address List was to be filed by August 18, 2021. Debtor did not file the Address List. On August 23, 2021, twelve days after Debtor filed the petition, the court issued an Order Dismissing the Case for Debtor's failure to timely file documents. Dckt. 11. Further, the court issued an Order Closing the Case on September 10, 2021, due to the case being dismissed. Dckt. 13.

On October 12, 2021, Debtor filed a Motion to Reopen Chapter 7 Case. Dckt. 14. The court issued an Order granting the motion to reopen on October 13, 2021. Dckt. 15.

On October 21, 2021, Debtor filed this instant Motion to Vacate, claiming Debtor's previous counsel, David Johnston, initially prepared the creditor's mailing matrix and Debtor signed it, however, it was not filed due to Debtor advising Mr. Johnston of additional creditors to be added. Dckt. 21. Mr. Johnston filed the bankruptcy petition without the verified creditor mailing matrix with the understanding that he would have seven (7) days to file the missing mailing matrix. Mr. Johnston prepared the updated creditor mailing matrix to be filed on, however, he failed to get the Debtor to sign a new verification. In Mr. Johnston's Declaration, he states he was interrupted as he was emailing the revised verification and matrix to the Debtor. Dckt. 23. Mr. Johnston also states that due to the old signed matrix being in his paper file and a PDF verification and matrix being in his electronic file, he believed the revised documents had been filed. Unfortunately, the verification and matrix were not filed with the court and the court dismissed the Debtor's case.

Mr. Johnston further states he realized his mistake when he received the court's notice of dismissal, to which he immediately advised Debtor of the dismissal and accepted responsibility for the error. Soon after this, Mr. Johnston states he contracted COVID-19 and was ordered to remain in isolation for fourteen (14) days. Mr. Johnston's secretary contracted COVID-19 shortly after Mr. Johnston and was hospitalized until she passed away on October 10, 2021. Mr. Johnston states he has been suspended from the practice of law in California since September 22, 2021, and was precluded from filing any documents on behalf of Debtor, and all other clients. Mr. Johnston asserts that he is unaware of any prejudice to creditors due to the mailing matrix not being filed being that there were no creditors to be notified of the dismissal.

The court notes the only creditor the court is aware of is Green Light Automotive Inc. ("Creditor"). Creditor filed its Proof of Claim ("Claim") on September 9, 2021, which is more than three weeks after the case was dismissed. Debtor states the Claim was filed by her former husband on behalf of Creditor, which is a suspended California corporation. Furthermore, Creditor asserts a claim in the amount of $200,000.00, which is secured by real property, but Debtor states she does not own any real property.

Debtor seeks to have the order dismissing the case vacated, per Federal Rule of Civil Procedure 60(b).

October 27, 2021 Order Granting Substitution of Attorneys

On October 27, 2021, the court granted the *Ex Parte* Motion for Substitution of Attorneys. The order approve Wylie P. Cashman as the new attorney for the Debtor.

APPLICABLE LAW

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Federal Rule of Bankruptcy Procedure 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts that, if taken as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); *see also Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463 (citations omitted).

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

The Debtor asserts that the court should grant this motion to vacate dismissal of the case pursuant to Rule 60(b)(1). This case was only open for twelve days before the court dismissed it for Debtor's failure to file the verification and master address list within seven days of filing the petition. However, the failure is not on the Debtor and is rather the fault of Debtor's previous counsel, Mr. Johnston. While the court notes that Mr. Johnston was aware of the deadline for filing the proper documents, he was also under the impression the documents had been successfully filed. This mistake caused Debtor's case to be dismissed even before any schedules were filed.

Furthermore, due to the case being open only for a short period of time and the creditor mailing matrix not being filed, any creditors of Debtor were not aware of the bankruptcy case and would not have been aware of the dismissal.

In substance, there was little done in this case, which was filed on August 11, 2021 – eighty five (85) days before the hearing on this Motion. Debtor has invested little, if any, time and effort in the present case that will have to be duplicated in a second case filed.

In the current Motion (Dckt. 21)and Debtor's former attorney's declaration (Dckt. 23) offer no basis for their being any prejudice to Debtor by the court not vacating the dismissal, and instead Debtor filing a new case and diligently prosecute that case.

If there was an urgency in rectifying the lack of prosecution, then presumably the present Motion would have been filed sooner, and not fifty-nine (59) days after the August 23, 2021 dismissal of this case.

The court is concerned that resurrecting this case after it has been dismissed for months will create scheduling and deadline confusion, which can be easily avoided by Debtor merely filing a new case. In light of there being no identified prejudice to Debtor in filing a new case, these case administrative concerns outweigh the "convenience" of Debtor to file the documents not filed in this case in the new case. These documents not filed in this case, which led to the dismissal, are identified by the Clerk as:

> Attorney's Disclosure Stmt.
> Form 122A-1 Statement of Monthly Income
> Schedule A/B - Real and Personal Property
> Schedule C - Exempt Property
> Schedule D - Secured Creditors
> Schedule E/F - Unsecured Claims
> Schedule G - Executory Contracts
> Schedule H - Codebtors
> Schedule I - Current Income
> Schedule J - Current Expend.
> Statement of Financial Affairs
> Summary of Assets and Liabilities;

essentially everything a Debtor needs to file, other than the Petition, to initiate the prosecution of a Chapter 7 case. To the extent that these documents have been prepared and ready to be filed in this case, they are ready to be filed in Debtor's new case and that one moving forward from Day 1.

The Motion is denied.

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 Vacate filed by Cynthia Yvette Vasquez ("Debtor") 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 denied.

FINAL RULINGS

4. 21-90484-E-11 TWISTED OAK WINERY, LLC
Brian Haddix
ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
10-19-21 [30]

Final Ruling: No appearance at the November 4, 2021 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 11 Trustee as stated on the Certificate of Service on October 21, 2021. The court computes that 14 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $1,738.00 due on October 4, 2021.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause 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 Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

5. **20-90435-E-7** **CHARLES MACAWILE**
HCS-3 **David Johnston**

MOTION TO ESTABLISH BAR DATE FOR FILING REQUESTS FOR ALLOWANCE/PAYMENT OF CHAPTER 11 ADMINISTRATIVE EXPENSES
9-28-21 [191]

Final Ruling: No appearance at the November 4, 2021 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 28, 2021. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Administrative Expenses 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to establish a December 22, 2021, Bar Date for Filing Motions for Allowance of Chapter 11 Administrative Expenses is granted.

The Chapter 7 Trustee, Gary R. Farrar ("Trustee") for the bankruptcy estate of Charles Collantes Macawile, Jr., ("Debtor"), requests an order establishing the date forty-five (45) days after the date of entry of an order granting this motion, as the last date for any person to file a motion for allowance of a Chapter 11 administrative expense against the estate.

DISCUSSION

Trustee argues that the proposed bar date is necessary due the particular facts in this case:

A. The Debtor filed this case on June 22, 2020 under Chapter 11, Subchapter V. Dckt. 1.

B. On July 21, 2020, the Debtor in Possession filed a motion to employ counsel. Dckt. 22. The court's Order granting the motion stated that no compensation would be permitted except on court order following application pursuant to 11 U.S.C. § 330(a). Dckt. 29. A review of the docket shows no motion for compensation for Debtor's counsel has been filed.

C. On January 25, 2021, the court issued an ordering granting David Sousa's motion to employ a real estate broker. Dckt. 71.

D. On March 17, 2021 the court issued an order granting David Sousa's motion to sell certain real property and authorized David Sousa to use the sale proceeds to pay certain expenses. Dckt. 103.

E. David Sousa filed an ex parte motion on June 4, 2021, to pay creditor John Grill, whose claim is secured by Debtor's real property. The court issued an order granting the motion the same day. Dckt. 148, 156.

F. The court issued orders granting Motions for Compensation filed by David Sousa and his counsel on June 7, 2021 and June 8, 2021. Dckt. 160-162.

This case was converted from a Chapter 11 to a Chapter 7 case on June 20, 2021, with Chapter 7 Trustee being appointed on June 21, 2021. Dckt. 165, 166. Creditor John Grill has yet to be paid since the case being converted. Dckt. 193, Farrar Declaration.

The Trustee is aware of certain Chapter 11 administrative expenses that could potentially be asserted against the estate that must be paid before the Trustee can close this Chapter 11 case.

Trustee proposes that he serves notice at least 30 days prior to the December 22, 2021 Administrative Expense Filing Bar Date to the following persons and entities, or their counsel of record, if any:

(a) known creditors of the estate;

(b) known equity security holders of the Debtor;

(c) potential Chapter 11 administrative expense claimants reasonably known to the Trustee;

(d) employment tax agencies whom it appears may have a claim;

(e) professionals employed while this case was in Chapter 11;

(f) persons that may have filed requests for notice;

(g) the United States Trustee's Office; and

(h) such other persons as this court may direct.

Additionally, the Trustee further requests the court make the following determination:

1. It is appropriate to set a deadline for filing requests of approval of Chapter 11 administrative expenses because one or more entities may seek administrative claim status for expenses incurred while the case was in Chapter 11.

This bankruptcy case was converted to Chapter 7 on June 20, 2021. The Trustee requests the court set the deadline so any remaining possible Chapter 11 administrative expenses are flushed out, to the extent that such administrative expenses are to be asserted.

Establishing Administrative Expense Bar Dates

The Bankruptcy Code provides in 11 U.S.C. § 503(a) that "(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause." Such presupposes that a deadline exists for the filing of such request. However, neither the Bankruptcy Code nor Federal Rules of Bankruptcy Procedure establish such a deadline.

This situation is discussed in Collier on Bankruptcy, ¶ 503.02[2] (16th Edition, 2020), which includes the following:

> [2] Time for Filing a Request for Payment of an Administrative Expense
>
> The use of the word "timely" in the introductory portion of section 503(a), along with the phrase "or may tardily file such a request if permitted by the court for cause," provides courts with the statutory authority to set and enforce administrative claim bar dates. Neither the Bankruptcy Code nor the Bankruptcy Rules set forth a specific limitation period for the filing of administrative expense claims, so courts can exercise their discretion in setting bar dates according to the circumstances of each case.
>
> An entity is permitted to "tardily" file a request for payment of an administrative expense "if permitted by the court for cause." The term "cause" is not a defined term in either the Bankruptcy Code or the Bankruptcy Rules, so the kinds of "cause" sufficient to permit tardy filing of administrative expense claims is left to judicial discretion and development. In determining whether cause exists, cases construing the "for cause shown" standard of Bankruptcy Rules 3002(c)(1), 3003(c)(3) and 9006(b)(1) are relevant. For example, under those cases, defective or inadequate notice of a claims bar date is nearly always considered sufficient "cause" to permit the late filing of a proof of claim.10 Similarly, one court has ruled that because of defective notice of an administrative bar date in a chapter 11 plan, the bar date was not enforceable against the claimant.11 Some courts have applied the excusable neglect standard of Bankruptcy Rule 9006(b)(1) in considering whether to allow a tardily filed request for payment of an administrative expense.12 Other courts have found the excusable neglect standard relevant but have analyzed cause for allowing tardy claims by considering several factors, including (1) prejudice to the claimant, (2) prejudice to other parties, in particular, the debtor, (3) the cause of the delay, (4)

> the length of the delay, (5) the reason for the delay and (6) whether the movant acted in good faith
>
> Although section 503(a) does not expressly provide that tardily filed administrative expense requests are "disallowed," the effect of not permitting the "filing" of a tardy request (except for cause) is that such expenses will not be approved for payment from the estate, because section 503(b) specifies that administrative expenses are allowed only after "notice and a hearing." The "notice and hearing" requirement for allowance of administrative expenses is in contrast to the "deemed" allowance provision of section 502(a) respecting proofs of claim. . . .

[The court acknowledges that Colliers has melded the term Administrative Expense as provided in 11 U.S.C. § 503 with the statutory definition of a "claim" as provided in 11 U.S.C. § 101(10). However, that melding does not make the changing of a statutorily defined term into something that it is not correct. See discussion below.]

The *Fifth Circuit Court of Appeals in Hall Fin. Group v. DP Partners, Ltd. Pshp. (In re DP Partners, Ltd. Pshp.)*, 106 F.3d 667, 671 (5th Cir. 1997), citing back to the then above section in Collier, stated that since there is not a statutory or rule deadline for requesting the allowance of an administrative expense, "As a result, bankruptcy judges have, for some time, been accorded discretion in setting administrative-claim bar-dates." The authority to set a bar date is included in the general power given to the bankruptcy judge in 11 U.S.C. § 105(a):

> § 105. Power of court
>
> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

The Trustee has established the need for an order setting a Chapter 11 administrative expense bar date. The Trustee knows the claims that have been filed, and now must have a definitive number for Chapter 11 administrative expenses in wrapping up this case by liquidating the estate.

Based on the evidence before the court, the court determines that the proposed deadline establishing a Chapter 11 Administrative Expense Bar Date is reasonable and necessary. A review of the creditors listed in this case shows 16 creditors. Due to the length of the administration of this case, it is logical and reasonable to provide setting such a bar date.

The Motion requesting the Chapter 7 Administrative Expense Bar Date of December 22, 2021. is granted. The Trustee shall provide notice of such at least thirty days prior to December 22, 2021.

Additionally, the court's order shall expressly state that for any such Administrative Expense for which a motion is not timely filed, or as otherwise permitted pursuant to 11 U.S.C. § 503(a), will not be permitted to participate in any distribution in the within chapter 7 case on account of such Chapter 7 Administrative Expense.

No other relief is granted.

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 set a Chapter 11 Administrative Expense bar date filed by Gary Farrar ("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 granted, and the last date for filing a motion for allowance of a Chapter 11 administrative expense in this case is December 22, 2021.

IT IS FURTHER ORDERED that the Trustee shall serve notice at lease thirty days prior to December 22, 2021, of the Chapter 11 Administrative Expense filing deadline on (a) all known creditors of this estate; (b) all persons with potential chapter 11 administrative expenses reasonably known to the Trustee; (c) all professionals employed by the Trustee or prior Subchapter V Trustee during the Administrative Expense Period pursuant to orders of the Bankruptcy Court; (d) the prior Subchapter V Trustee in this case; (e) those persons who have requested notice in this case; and (f) the United States Trustee.

IT IS FURTHER ORDERED that any such Administrative Expense for which a motion is not timely filed, or as otherwise permitted by 11 U.S.C. § 503(a), will not be permitted to participate in any distribution in the within chapter 7 case on account of such Chapter 11 Administrative Expense.

No further relief is granted.