

UNITED STATES BANKRUPTCY COURT  
Eastern District of California  
Honorable René Lastreto II  
Hearing Date: Tuesday, November 16, 2021  
Place: Department B – Courtroom #13  
Fresno, California

*The court resumed in-person courtroom proceedings in Fresno ONLY on June 28, 2021. Parties may still appear telephonically provided that they comply with the court's telephonic appearance procedures. For more information click [here](#).*

**INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS**

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

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

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

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

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

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

**9:30 AM**

1. [21-12134](#)-B-11     **IN RE: WALTER C. SMITH COMPANY, INC.**

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 SUBCHAPTER V  
VOLUNTARY PETITION  
9-2-2021     [[1](#)]

RILEY WALTER/ATTY. FOR DBT.

TENTATIVE RULING:            This matter will be called as scheduled.

DISPOSITION:                 Dropped from calendar.

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

The status conference will be called as scheduled. The court intends  
to grant the debtor's motion to dismiss this case in matter #2 below  
provided that no opposition is presented at the hearing. If dismissed,  
this status conference will be DROPPED FROM CALENDAR.

2. [21-12134](#)-B-11     **IN RE: WALTER C. SMITH COMPANY, INC.**  
[THA-3](#)

MOTION TO DISMISS CASE  
10-25-2021     [[132](#)]

WALTER C. SMITH COMPANY,  
INC./MV  
RILEY WALTER/ATTY. FOR DBT.

TENTATIVE RULING:            This matter will be called as scheduled.

DISPOSITION:                 Granted.

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

Chapter 11 Subchapter V Debtor Walter C. Smith Company, Inc. ("Debtor") moves to voluntarily dismiss this case pursuant to 11 U.S.C. § 1112(b). Doc. #132.

Written opposition was not required and may be presented at the hearing. In the absence of opposition, the court is inclined to GRANT the motion.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 2002(a)(4) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Debtor filed bankruptcy on September 2, 2021. Doc. #1. David M. Sousa ("Trustee") was appointed as Subchapter V trustee pursuant to 11 U.S.C. § 1183(a) on September 2, 2021. Doc. #8.

The primary reason Debtor filed bankruptcy was to obtain the benefit of the automatic stay under 11 U.S.C. § 362(a) to prevent DeBenedetto Properties, Ltd. ("Landlord") from removing Debtor from real property located at 849 Osmun Circle, Clovis, CA 93612 ("Property"). Doc. #134. Debtor was obligated to pay rent to Landlord under a Stock Redemption Agreement ("SRA") and vacate Property no later than November 30, 2021. After defaulting under the SRA, Landlord commenced proceedings to remove Debtor from Property, which precipitated the filing of this case. *Id.*

Through negotiations, the parties reached an agreement resolving the default under the SRA. As result, automatic stay protections are no longer needed. Debtor's principal, Michael A. DeBenedetto, individually and as trustee of the Michael and Robin DeBenedetto Living Trust as guarantors, have cured the default under the SRA and returned to the positions they held prior to default. *Id.* Debtor is able to perform the remaining terms of the SRA and intends to pay its remaining creditors in the ordinary course of business.

Landlord is comprised of its partners, Scott M. DeBenedetto, Stephen W. DeBenedetto, and Jaymie D. Smith as trustee of (1) the Anthony D. DeBenedetto Survivor's Trust, (2) the Jaymie D. Smith and Michael N. Smith Living Trust, and (3) the Anthony and Margaret DeBenedetto Grandchildren's Trust. Doc. #134. All of Landlord's partners support dismissal. Docs. ##152-54.

Debtor's largest unsecured creditor, R & B Leasing and Finance, LLC (R&B) and its managing member, Dr. William Asbury, also support dismissal. Doc. #135.

Further, the motion says that Trustee will appear at the hearing to express his support for dismissal. Doc. #132.

Debtor previously sold property of the estate with court approval (WJH-1) and generated approximately \$431,249.98 in net proceeds. Doc. #98. Debtor states that there are sufficient funds to pay Trustee his allowed fees and costs, as well as any fees due to the Office of the United States Trustee, and Debtor's usual business expenses. Doc. #134.

11 U.S.C. § 1112(b) allows the court to dismiss a chapter 11 case. Absent "unusual circumstances," § 1112(b)(1) provides that the court shall convert or dismiss a case under this chapter for "cause," whichever is in the best interests of creditors and the estate. Section 1112(b)(4) includes a non-exhaustive list of "causes." Cause exists where there is "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." § 1112(b)(4)(A). Cause exists where creditors will not benefit from administration. *In re Brogdon Inv. Co.*, 22 B.R. 546, 546 (Bankr. N.D. Ga. 1982) ("There is simply nothing to reorganize, no creditors to benefit from the administration of the estate in this court, and no reason to continue the reorganization."). Cause also exists if reorganization is no longer necessary or a debtor's circumstances have materially changed since the filing of the case. *In re OptInRealBig.com, LLC*, 345 B.R. 277, 283-84 (Bankr. D. Colo. 2006).

The court should "consider other factors as they arise and use its equitable power to reach the appropriate result." *Pioneer Liquidating Corp. v. U.S. Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) *aff'd*, 264 F.3d 803 (9th Cir. 2001). The court has broad discretion in determining cause. *Id.*

If there is "cause" to convert or dismiss, the court must then decide: (1) whether dismissal is in the best interests of creditors and the estate; and (2) identify whether there are unusual circumstances that establish dismissal or conversion is not in the best interests of creditors and the estate. *Sullivan v. Harnisch (In re Sullivan)*, 522 B.R. 604, 612 (B.A.P. 9th Cir. 2001).

Debtor contends that cause exists to dismiss this case because Debtor cured its delinquency under the SRA and Landlord, R&B, and Trustee all support dismissal. Doc. #132. Since Debtor has cured the delinquency, returned the parties to their respective positions held prior to default, and Debtor is able to perform the remaining terms of the SRA and pay its remaining creditors in the normal course of business, Landlord no seeks to remove Debtor from Property before November 30, 2021. Therefore, Debtor no longer needs the protection of the automatic stay and has no reason to continue the reorganization. It thus appears that cause exists because Debtor's circumstances have materially changed since the filing of the case and no benefit to creditors from the continued administration of this case.

Although significant assets remain in the estate that could be distributed to unsecured claims, Debtor's creditors - including R&B, Debtor's largest unsecured creditor - appear to overwhelmingly support dismissal. Doc. #135; ##152-54. Accordingly, Dismissal appears to be in the best interests of creditors and the estate.

Written opposition was not required and may be presented at the hearing. This matter will be called as scheduled to inquire whether any creditors, the Subchapter V Trustee, the U.S. Trustee, or any other parties in interest oppose dismissal. In the absence of opposition, this motion will be GRANTED and the Chapter 11, Subchapter V case will be dismissed without prejudice for cause under 11 U.S.C. § 1112(b) (1).

3. [21-12183](#)-B-11     **IN RE: UNIVERSAL REAL ESTATE DEVELOPMENT, LLC**  
[UST-1](#)

MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7 , MOTION  
TO DISMISS CASE  
10-26-2021    [\[22\]](#)

TRACY DAVIS/MV  
NOEL KNIGHT/ATTY. FOR DBT.  
JASON BLUMBERG/ATTY. FOR MV.  
DISMISSED 11/09/2021

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

DISPOSITION:     Denied as moot.

ORDER:             The court will issue an order.

Tracy Hope Davis, United States Trustee for Region 17 ("UST"), moves for an order dismissing or converting this case pursuant to 11 U.S.C. § 1112(b) (1), (b) (4) (C), and (H). Doc. #22. UST seeks dismissal because Chapter 11, Subchapter V Debtor Universal Real Estate Development, LLC ("Debtor") failed to:

1.     Provide proof of liability insurance with respect to:  
      (a) undeveloped real property located at 500 Commerce Avenue, Atwater, CA, (b) Debtor's gas and convenience store business, and  
      (c) equipment and inventory used in the gas and convenience store business;
2.     Provide evidence that Debtor has closed its pre-petition bank accounts and opened new debtor-in-possession accounts; and
3.     Attend the continued Initial Debtor Interview continued on October 14, 2021, the meeting of creditors on October 19, 2021, and the continued meeting of creditors on November 1, 2021. Docs. ##25-26.

Previously, on September 20, 2021, the court ordered Debtor to appear at the initial status conference scheduled November 9, 2021. Doc. #14. In addition to other duties, Debtor was required to file a status report at least 14 days prior to the date of the initial status conference. *Id.* Failure to comply could result in the imposition of sanctions, including but not limited to conversion or dismissal of the case. *Id.*

No status report was filed 14 days before the status conference, nor anytime thereafter. Debtor and Debtor's counsel did not appear at the November 9, 2021 status conference hearing. Doc. #29. As result, the court dismissed this case on the record for cause due to Debtor's failure to comply with the order setting the status conference date and for other reasons stated on the record at that hearing. Doc. #31.

Accordingly, UST's motion to dismiss will be DENIED AS MOOT because this case has already been dismissed.

1:30 PM

1. [21-12005](#)-B-7     **IN RE: SANDRA RAMIREZ**  
[ICE-1](#)

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO  
APPEAR AT SEC. 341(A) MEETING OF CREDITORS  
10-14-2021     [\[15\]](#)

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

DISPOSITION:     Conditionally denied.

ORDER:             The court will issue an order.

Chapter 7 trustee Irma C. Edmonds ("Trustee") seeks dismissal of this case for the debtor's failure to appear and testify at the § 341(a) meeting of creditors held on October 12, 2021. Doc. #16.

Sandra Lee Ramirez ("Debtor") timely filed written opposition. Debtor declares that she attempted to appear at the meeting of creditors twice, on September 27, 2021 and October 12, 2021. Doc. #18. Debtor does not have access to a computer and has difficulty understanding how Zoom videoconferencing functions. Debtor called into the Zoom meeting on September 27, 2021 with the assistance of family. Debtor attempted to say that she was present at the hearing by audio, but the meeting was continued to October 12, 2021 because she did not respond "yes" to the first question about whether she was online. *Id.*

For the October 12, 2021 meeting, Debtor was unaware which phone number to call. She attempted to call the Trustee's office at least six times, but the phone line was busy. Debtor located and attempted to call the correct Zoom phone number at least fifteen times, but a recording stated that the meeting had not started yet and to hold on or try again. While on hold, Debtor attempted to use her sister's phone to call the Trustee, but she continued to receive a busy signal. Eventually, Debtor successfully contacted Trustee and was informed that her case had been called and she had failed to appear. *Id.*

This motion to dismiss will be **CONDITIONALLY DENIED**.

Debtor shall attend the meeting of creditors rescheduled for November 22, 2021 at 1:00 p.m. See Doc. #15. If Debtor fails to do so, Trustee may file a declaration with a proposed order and the case may be dismissed without a further hearing.

The times prescribed in Fed. R. Bankr. P. 1017(e)(1) and 4004(a) for the Chapter 7 Trustee and U.S. Trustee to object to Debtor's discharge or file motions for abuse, other than presumed abuse under § 707, are extended to 60 days after the conclusion of the meeting of creditors.

2. [21-11106](#)-B-7     **IN RE: ANA AGUILERA**  
[SL-3](#)

MOTION TO AVOID LIEN OF KINGS CREDIT SERVICES  
10-6-2021     [\[44\]](#)

ANA AGUILERA/MV  
SCOTT LYONS/ATTY. FOR DBT.  
CONT'D TO 12/02/2021 PER ECF ORDER #57

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

DISPOSITION:     Continued to December 2, 2021 at 1:30 p.m.

NO ORDER REQUIRED.

Ana Maria Aguilera ("Debtor") seeks to avoid a judicial lien in favor of Kings Credit Services ("Creditor") in the sum of \$2,358.08 and encumbering residential real property located at 1210 E. Kenneth Ave., Earlimart, CA 93219 ("Property"). Doc. #44.

Debtor previously avoided a lien in favor of Creditor on September 24, 2021. Doc. #41. Debtor sought to avoid a different lien in favor of Credilogical Systems, LLC ("Credilogical") that was heard on November 9, 2021 (SL-2), and Debtor has another motion to avoid lien in favor of Creditor scheduled for December 2, 2021. SL-4. At the November 9, 2021 hearing, the court stated that it is unclear whether the liens are being removed in reverse order of priority as required by 11 U.S.C. § 522(f)(1). *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hanger (In re Hanger)*, 217 B.R. 592, 595 (B.A.P. 9th Cir. 1997), *aff'd*, 196 F.3d 1292 (9th Cir. 1999).

The court continued this motion and the motion to avoid Credilogical's lien to December 2, 2021 at 1:30 p.m. to be heard in connection with Debtor's fourth lien avoidance motion. Docs. ##56-57.

3. [21-12207](#)-B-7     **IN RE: JOSHUA LYNCH**  
[NES-1](#)

MOTION TO DISMISS CASE  
10-11-2021     [\[13\]](#)

JOSHUA LYNCH/MV  
NEIL SCHWARTZ/ATTY. FOR DBT.

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

DISPOSITION:     Granted.

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



Neil E. Schwartz ("Counsel"), the attorney for Joshua Wayne Lynch ("Debtor"), moves for an order dismissing this case without entry of discharge. Doc. #13.

No party in interest timely filed written opposition. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the chapter 7 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

First, the moving papers do not comply with the local rules. LBR 9014-1(d)(3)(B)(i) requires the notice to include the names and addresses of persons who must be served with any opposition. Here, the notice of hearing (Doc. #14) provides, "any and all objections to the granting of the Motion must be delivered to the Debtor and his attorney of record, the Chapter 7 Trustee, the United States Trustee and parties requesting special notice." The names and addresses of these parties, however, are not included. Counsel is advised to review the local rules to ensure procedural compliance in subsequent motions. Future violations of the local rules may result in the matter being denied without prejudice.

11 U.S.C. § 707(a) provides that "[t]he court may dismiss a case under this chapter only after notice and a hearing and only for cause." *Bartee v. Ainsworth (In re Bartee)*, 317 B.R. 362, 366 (B.A.P. 9th Cir. 2004). "The law in the Ninth Circuit is clear: a voluntary Chapter 7 debtor is entitled to dismissal of his case so long as such dismissal will cause no 'legal prejudice' to interested parties." *Leach v. United States (In re Leach)*, 130 B.R. 855, 857 (B.A.P. 9th Cir. 1991). "Legal prejudice means prejudice to some legal interest, some legal claim, some legal argument, but the issue of prejudice may be evaluated using both legal and equitable considerations[.]" *In re Kaur*, 510 B.R. 281, 286 (Bankr. E.D. Cal. 2014) (internal quotations and citations omitted) (quoting *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996); *Hickman v. Hana (In re Hickman)*, 384 B.R. 832, 840 (B.A.P. 9th Cir. 2008)).

11 U.S.C. § 727(a)(8) states, "[t]he court shall grant the debtor a discharge, unless the debtor has been granted a discharge under this section . . . in a case commenced within 8 years before the date of the filing of the petition[.]"

Counsel declares that Debtor was granted a discharge within eight preceding the petition date. Doc. #15. Other than citing § 727(a)(8), Counsel provides no statement regarding prejudice to parties.

Debtor previously filed a joint chapter 7 petition with Alicia Marie Lynch on September 25, 2013 and they received an order of discharge on January 13, 2014. See Case No. 13-16353. Interestingly, Counsel represented the joint debtors in that case.

Since Debtor received a discharge within the last eight years, the Bankruptcy Code does not permit him to obtain one now. There is no opposition to this motion. After review of the schedules, it does not appear that any party will suffer legal prejudice as result of dismissal.

Accordingly, this motion will be GRANTED. The case will be dismissed.

4. [17-13430](#)-B-7     **IN RE: RODNEY/TERESA WITTEN**  
[DMG-2](#)

MOTION TO AVOID LIEN OF MERCHANTS FINANCIAL GUARDIAN INC.  
10-14-2021    [\[19\]](#)

TERESA WITTEN/MV  
D. GARDNER/ATTY. FOR DBT.

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

DISPOSITION:     Granted.

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

Rodney Jewell Witten and Teresa Lynn Witten ("Debtors") seek to avoid a judicial lien in favor of Merchants Financial Guardian, Inc. ("Creditor") in the sum of \$9,674.47 and encumbering residential real property located at 5205 Warwick Place, Bakersfield, CA 93309 ("Property").<sup>1</sup> Doc. #19.

No party in interest timely filed written opposition. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 7 trustee, the U.S. Trustee, or any other party

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

To avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). § 522(f)(1); *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003) (quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992), *aff'd*, 24 F.3d 247 (9th Cir. 1994)).

Here, a judgment was entered against Debtors in favor of Creditor in the sum of \$9,674.47 on October 19, 2015. Doc. #22, Ex. A. The abstract of judgment was issued on May 24, 2017 and recorded in Kern County on June 15, 2017. *Id.* That lien attached to Debtors' interest in Property. *Id.* Joint debtor Rodney Witten estimates the amount of Creditor's lien was approximately \$10,100.00 on the petition date. Doc. #21.

As of the petition date, Property had an approximate value of \$280,000.00. Doc. #1, *Sched. A/B*. The unavoidable liens totaled \$272,265.71 on that same date, consisting of two deeds of trust: (a) \$56,089.95 in favor of Nationwide Credit and (b) \$216,175.76 in favor of Sun Trust Mortgage. *Id.*, *Sched. D*. Property is also encumbered by a senior judgment lien in favor of Capital One Bank (USA), National Association in the amount of \$3,009.09, which is the subject of matter #5 below.<sup>2</sup> DMG-3. Debtors estimate the amount of the Capital One lien to be approximately \$8,200.00 on the petition date. Doc. #29. Debtors claimed a "wildcard" exemption of \$7,734.29 in Property under Cal. Civ. Proc. Code § 703.140(b)(1). Doc. #1, *Sched. C*.

When a debtor seeks to avoid multiple liens under § 522(f)(1), the liens must be avoided in the reverse order of their priority. *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hanger (In re Hanger)*, 217 B.R. 592, 595 (B.A.P. 9th Cir. 1997), *aff'd*, 196 F.3d 1292 (9th Cir. 1999). Liens already avoided are excluded from the exemption impairment calculation. *Ibid.*

The § 522(f)(2) formula is strictly applied as follows:

Amount of Creditor's judicial lien	\$10,100.00
Total amount of all other unavoidable liens (approx.) <sup>3</sup>	+ \$280,465.71
Debtors' "wildcard" exemption in Property	+ \$7,734.29
Sum	= \$298,300.00
Value of Debtors' interest absent liens	- \$280,000.00
Amount Creditor's lien impairs Debtors' exemption	= \$18,300.00

*All Points Cap. Corp. v. Meyer (In re Meyer)*, 373 B.R. 84, 91 (B.A.P. 9th Cir. 2007). The § 522(f)(2) formula can be simplified by going through the same order of operations in the reverse, provided that determinations of fractional interests, if any, and lien deductions are completed in the correct order. Accordingly, Property's encumbrances can also be re-illustrated as follows:

Fair Market Value of Property	\$280,000.00
Total amount of unavoidable liens	- \$272,265.71
Remaining unencumbered equity	= \$7,734.29
Debtors' "wildcard" exemption	- \$7,734.29
Remaining equity for judicial liens	= (\$0.00)
Creditor's judicial lien (approx.)	- \$10,100.00
Extent exemption impaired by Creditor's junior lien	= (\$10,100.00)
Capital One's judicial lien (approx.)	- \$8,200.00
Extent exemption impaired by both liens	= (\$18,300.00)

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is insufficient equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs Debtors' exemption in the Property and its fixing will be avoided.

Debtors have established the four elements necessary to avoid a lien under § 522(f)(1). Therefore, this motion will be GRANTED.

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<sup>1</sup> Debtors complied with Fed. R. Bankr. P. 7004(b)(3) by serving Thomas P. Kugelmann, Creditor's CEO, CFO, and registered agent for service of process at Creditor's mailing address on October 14, 2021. Doc. #23.

<sup>2</sup> The senior judgment lien in favor of Capital One Bank (USA), N.A. was entered on January 28, 2013, issued on February 8, 2013, and recorded on February 26, 2013, which occurred before Creditor's judgment lien was recorded on June 15, 2017. Doc. #30, Ex. A.

<sup>3</sup> This amount includes Capital One's \$8,200.00 senior lien because it cannot be avoided before Creditor's junior lien.

5. [17-13430](#)-B-7     **IN RE: RODNEY/TERESA WITTEN**  
[DMG-3](#)

MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA) N.A.  
10-14-2021    [\[27\]](#)

TERESA WITTEN/MV  
D. GARDNER/ATTY. FOR DBT.

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

DISPOSITION:     Continued to December 14, 2021 at 1:30 p.m.

ORDER:             The court will issue an order.

Rodney Jewell Witten and Teresa Lynn Witten ("Debtors") seek to avoid a judicial lien in favor of Capital One Bank (USA), N.A. ("Creditor") in the sum of \$3,009.09 and encumbering residential real property located at 5205 Warwick Place, Bakersfield, CA 93309 ("Property"). Doc. #27.

This motion will be CONTINUED to December 14, 2021 at 1:30 p.m. so that Debtors can serve a current named officer of Creditor under ("Rule") 7004(h). Debtors shall serve the motion, supporting papers, and an amended notice on Richard D. Fairbanks at 1680 Capital One Drive, McLean, VA 22102 on appropriate notice under LBR 9014-1(f)(1) or (2).

Rule 4003(d) requires that proceedings to avoid a lien under 11 U.S.C. § 522(f) "shall be commenced by motion in the manner provided in Rule 9014." Rule 9014(b) requires motions in contested matters to be served upon the parties against whom relief is being sought pursuant to Rule 7004.

Creditor is a bank insured by the Federal Deposit Insurance Corporation ("FDIC"), so it is an insured depository institution under 11 U.S.C. § 101(35)(A) and 12 U.S.C. § 1813(c)(2) (an "insured depository institution" is any bank insured by the FDIC).<sup>4</sup>

Service on insured depository institutions is governed by Rule 7004(h), which requires service to be made by certified mail and addressed to a named officer, unless one of three exceptions specified in subsections (h)(1) to (3) have been met. There is no indication that any of these exceptions apply.

The Ninth Circuit interprets Rule 7004 to require service upon a named officer, rather than to just the title of the office. *In re Schoon*, 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993) ("By addressing the envelope 'Attn: President' the debtors did not serve an officer, they served an office.") (emphasis in original); see also *Beneficial Cal. Inc. v. Villar (In re Villar)*, 317 B.R. 88, 94 (B.A.P. 9th Cir. 2004)

(strictly construing the named officer requirement with respect to Rule 7004(b)(3)).

Here, Debtors filed two proofs of service - an original and an amended - indicating an attempt to serve Creditor at two different addresses. Docs. #31; #33. Both certificates use the same addresses, but the amended proof of service clarified that the second address was for Creditor's registered agent for service of process. *Id.* Those are addresses are:

- [via certified mail]  
1. R. Scott Blackley  
CFO of Capital One Bank (USA)  
4851 Cox Road  
Glen Allen, Virginia 23060
- [regular U.S. mail]  
2. Capital One Bank (USA) N.A.  
c/o Corporate Service Company<sup>[5]</sup>  
2710 Gateway Oaks Dr. Ste 150N  
Sacramento, CA 95833

Doc. #33. The first service attempt used the correct address according to the FDIC, but R. Scott Blackley is no longer employed by Creditor or related Capital One entities.<sup>6</sup> So, he is not authorized to receive Rule 7004(h) service. Instead, a current officer of Creditor should have been named in the proof of service. The second attempt is directed to the correct registered agent and address, but serving a registered agent is insufficient under Rule 7004(h)

The court notes that little information about Creditor - Capital One Bank (USA), National Association - is available. After hours of combing through different databases, the court is not entirely certain of Creditor's leadership. Creditor is nowhere to be found on the California Secretary of State's "Business Search" tool.<sup>7</sup>

Both Creditor and Capital One, National Association ("CONA") are subsidiaries of Capital One Financial Corporation ("COFC"), which is a bank holding company registered in Virginia. Information about COFC and CONA is available on the Virginia State Corporation Commission's ("SCC") Clerk's Information System ("CIS").<sup>8</sup> However, Creditor is not listed as being registered in Virginia, despite having its main office located there per the FDIC. There is an entry for "Capital One Bank" located at 4581 Cox Road, Glen Allen, VA 23060, but it became inactive on March 1, 2008 due to Creditor's conversion to a national bank. Nevertheless, there is an 881-page Statement of Change of Registered Office and/or Registered Agent filed January 1, 2018. Unfortunately, it is not helpful for Rule 7004(h) service because it appears to concern registered agents for service of process and was filed in 2018, so it is out of date anyways.

Though information about Creditor is not available on the Virginia SCC CIS, there are current filings for both COFC and CONA.

Per COFC's Annual Statements filed on October 27, 2021 (current) and November 17, 2020 (the most recent as of the date this motion was filed), COFC's President, CEO, and Chairman is Richard D. Fairbank. His mailing address is 1680 Capital One Drive, McLean, VA 22102. Fairbank is also the CEO of the CONA. His role with respect to Creditor is unclear, but he appears to be the Chairman.

Per CONA's Annual Statement filed May 27, 2021, Sanjiv Yajnik at 7933 Preston Road, McLean, TX 75024 is the President of CONA. According to that same statement, Andrew M. Young at 1680 Capital Drive, McLean, VA 22102 - cited as Blackley's replacement above - is an officer of CONA. However, Young is not listed as an officer in the previous May 26, 2020 Annual Statement.

Notably, Blackley is not listed as an officer in either of COFC's or CONA's last two Annual Statements.

Though related entities, COFC and CONA are different entities than Creditor. Per the Subpoena Policy on Capital One website:

The primary Capital One operating entities and related customer records are:

- Capital One Bank (USA), N.A. - credit card products including partnership cards such as Cabela's and Bass Pro.
- Capital One, N.A. - traditional banking products for consumers, small businesses, and commercial clients including online accounts; also, several credit card products are booked under this entity including Walmart
- Capital One Auto Finance - automobile financing and related products.

See Subpoena Policy Details.<sup>9</sup>

Similar information is reflected in COFC's Wolfsberg Group Financial Crime Compliance Questionnaire.<sup>10</sup> But this information is less than helpful here.

Public filings relating to "Capital One Bank (USA), National Association" yield limited results. Its primary regulator, the Office of the Comptroller of the Currency ("OCC"), lists only two Application entries for Creditor in the last three years. These relate to one "Subsidiaries & Equities" application, which was filed on September 15, 2021 and withdrawn that same day. A copy of the application is not available.

The most helpful information appears to relate to OCC enforcement actions against Creditor and CONA, specifically one filed on August 5, 2020. Both companies' Boards of Directors provided electronic

signatures on separate signature pages, but the titles of the Directors are omitted. Creditor's Board of Directors are named as follows:

Richard D. Fairbank  
R. Scott Blackley  
Aparna Chennapragada  
Cornelius Petrus Adrianus Joseph ("Eli") Leenaars  
Pierre E. Leroy  
Eileen Serra  
Bradford H. Warner  
Michael J. Wassmer  
Catherine G. West

Consent Order #2020-036.<sup>11</sup> Unfortunately, we already know this information is out of date because Blackley left Capital One on or about March 1, 2021.

Creditor's secondary federal regulator, the Consumer Financial Protection Bureau ("CFPB"), also does not provide many details about Creditor's leadership.<sup>12</sup> There is a Stipulation and Consent Order filed on July 18, 2012 as the result of an administrative proceeding in which Fairbank signed on behalf of Creditor as its Chairman.<sup>13</sup> In addition, Ryan M. Schneider signed as the President of Creditor. But this document was filed in 2012 and Schneider appears to have left Capital One sometime in 2016.<sup>14</sup>

The Federal Financial Institutions Examination Council ("FFIEC") has large swaths of bank data and other financial information available, but none of it is helpful for locating Creditor's officers.<sup>15</sup> For instance, its quarterly-filed Regulatory Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework – FFIEC 101 entirely omits any names or signatures of any officer or senior officer. The same is true of its September 30, 2021 Consolidated Reports of Condition and Income for A Bank With Domestic and Foreign Offices – FFIEC 031, as well as all of its Uniform Bank Reports.<sup>16</sup> Interestingly, the Signature Page is confidential for all information about the executing "Chief Financial (or Equivalent) Signing the Reports," "Other Persons to Whom Questions about the Reports Should be Directed," and the primary and secondary emergency contacts. Though understandable since the Form provides, "Contact Information for the Reports of Condition and Income is for the confidential use of the Agencies and will not be released to the public[.]" It is strange, however, that the name and title of the CFO is entirely omitted, since it should be publicly available information.

The Federal Reserve Bank ("FRB") has some information about Creditor, but none of it is helpful for Rule 7004(h) service. For example, there is an enforcement action from August 4, 2020, but it relates to COFC, while Creditor is only briefly mentioned.<sup>17</sup> Fairbank is mentioned and again signs on behalf of Creditor and its related entities.



Other debtors have faced similar issues locating information about this Creditor specifically. See *In re Eimers*, No. A12-00692-GS, 2013 Bankr. LEXIS 1707 (Bankr. D. Alaska Apr. 23, 2013). In *Eimers*, the Alaska Bankruptcy Court denied a motion to avoid lien without prejudice because the debtors addressed the service to a "Bank Officer" even though they certified to "a multi-hour internet search . . . [that] failed to produce the name of any bank officer of Capital One (USA), N.A." *Id.*, \*\*2-7. No officer was named, and no specific office was identified. Thus, "there is no confidence that service will reach the appropriate office of someone charged with sufficient responsibility to ensure action will be taken. It is simply too generic to constitute acceptable service under Rule 7004(h)." *Id.*, at \*7. The *Eimers* court further reasoned:

The debtors have detailed considerable effort to identify the appropriate person to accept service for Capital One Bank (USA), N.A. The court appreciates their frustration; identifying the current officers of a federally insured national bank for service should not be a difficult task. Even courts that have strictly interpreted Rule 7004(b)(3) and (h) have recognized that service upon an appropriate office may suffice where the party attempting service has been unable to identify an appropriate officer, by name, despite searching with reasonable and appropriate diligence. In this instance, however, service to "Bank Officer" is deficient under either view of Rule 7004(h)'s requirements. Therefore, the court need not determine whether service upon an insured depository institution requires identification of a named individual.

*Id.*, at \*7 (footnote omitted), citing *Carlo v. Orion Omniservices Co. (In re Carlo)*, 392 B.R. 920, 921-22 (Bankr. S.D. Fla. 2008). By footnote, the *Eimers* court suggested searching the FDIC website, creditor's website, or the Security and Exchange Commission's EDGAR search tool, including publicly filed documents such as annual reports and proxy statements.<sup>18</sup> *Id.*, at \*9, n.19. Lastly, *Eimers* notes that although national banks are not incorporated in a state, "it may be prudent to search the corporate database of the state where the creditor is headquartered." *Ibid.*

This court checked EDGAR; it yielded no answers. There was some moderately useful information in Creditor's 2021 Proxy Statement, however.<sup>19</sup> In particular, Section I - Corporate Governance at Capital One, lists five individuals in which Creditor listed as part of their "Capital One Companies."<sup>20</sup> Those individuals are apparently "Director Nominees" and include (1) Richard D. Fairbank, (2) Eli Leenaars, (3) Eileen Serra, (4) Bradford H. Warner, and (5) Catherine G. West. All five of these individuals were on the Board of Directors and executed the OCC Consent Order cited above filed on August 5, 2020. It is still unclear whether this "Capital One Companies" designation refers to whether they previously held or currently hold an "officer"

role within Creditor's hierarchy, but it does seem likely that these five individuals are currently officers.

It is troubling that compliance with basic service requirements under Rule 7004(h) for a national bank is uncertain. Has Creditor evaded, or at least delayed, being served adversary complaints, or contested matters initiated pursuant to Rule 7004(h)? An average debtor should not be required to file a Freedom of Information Act request with the OCC, CFPB, FRB, FFIEC, or SEC to obtain what should be basic information about a creditor that is quickly and easily accessible to the public.

In light of Fairbank's apparent participation in all matters involving Creditor, as well as representing himself as Creditor's Chairman in the enforcement actions of the OCC in August 2020, the CFPB in July 2012, and FRB in August 2020, the court is persuaded that Fairbank is authorized to receive Rule 7004(h) service on behalf of Creditor. Further, Fairbank is still the President, CEO, and Chairman of COFC, Creditor's parent company.

In future matters, if it is unclear whether the correct officer or party has been served, the movant should describe the reasonable efforts and diligence it undertook to identify, locate, and serve the party to whom proper Rule 7004 service was required.

Often, this motion would have been denied without prejudice because no information about Debtors' reasonable and diligent efforts to locate an officer of Creditor were provided. However, unlike *Eimers*, Debtors did serve an office and attempted to name the officer. An up-to-date and easily accessible list of Creditor's officers eludes this court.

Accordingly, the court will CONTINUE this motion to December 14, 2021 at 1:30 p.m. Debtors shall serve the motion, supporting papers, and an amended notice on Richard D. Fairbank at 1680 Capital One Drive, McLean, VA 22102 on appropriate notice under LBR 9014-1(f)(1) or (2).

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<sup>4</sup> See FDIC Cert. #33954. BankFind Suite, <https://banks.data.fdic.gov/bankfind-suite/bankfind>.

<sup>5</sup> "c/o Corporate Service Company" was omitted from the original proof of service and added in the amended proof of service. Docs. #31; #33.

<sup>6</sup> Mark Maurer, *Capital One CFO to Leave for Health-Insurance Startup*, The Wall Street Journal (Dec. 3, 2020), <https://www.wsj.com/articles/capital-one-cfo-to-leave-for-health-insurance-startup-11607035126>.

<sup>7</sup> CA SOS Business Search, <https://businesssearch.sos.ca.gov/>.

<sup>8</sup> VA SCC Clerk's Information System, <https://cis.scc.virginia.gov/>.

<sup>9</sup> Subpoena Policy Details, Business Entities, *Why can't I just issue a subpoena to 'Capital One'?* <https://www.capitalone.com/digital/subpoena-policy/> (as of Nov. 11, 2021).

<sup>10</sup> Capital One Wolfsberg Group Financial Crime Compliance Questionnaire (Aug. 14, 2019), <https://www.capitalone.com/media/doc/corporate/Wolfsberg%20FCCQ-Capital-One-2019.pdf> (as of Nov. 11, 2021).

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- <sup>11</sup> OCC Consent Order #2020-036, AA-EC-20-51 (Aug. 5, 2020), <https://www.occ.gov/static/enforcement-actions/ea2020-036.pdf>.
- <sup>12</sup> See <https://www.consumerfinance.gov>.
- <sup>13</sup> *In re Capital One Bank, (USA) N.A.*, File No. 12-CFPB-0001 (July 18, 2012), [https://files.consumerfinance.gov/f/201207\\_cfpb\\_consent\\_order\\_0001.pdf](https://files.consumerfinance.gov/f/201207_cfpb_consent_order_0001.pdf).
- <sup>14</sup> <https://www.realogy.com/about/leadership-team/executive-officers/ryan-schneider-exec/> (as of Nov. 11, 2021).
- <sup>15</sup> Capital One Bank (USA), National Association FFIEC entry, <https://www.ffiec.gov/npw/Institution/Profile/2253891?dt=20151231>.
- <sup>16</sup> FFIEC Individual Institution Reports, <https://cdr.ffiec.gov/public/ManageFacsimiles.aspx>.
- <sup>17</sup> *In re Capital One Financial Corporation*, Docket No. 20-014-B-HC (Aug. 4, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20200806a1.pdf>.
- <sup>18</sup> EDGAR Lookup, <https://www.sec.gov/edgar/searchedgar/companysearch.html>.
- <sup>19</sup> The Capital One 2021 Proxy Statement, and other documents, can be located at <http://ir-capitalone.gcs-web.com/corporate-governance/governance-overview> (as of Nov. 11, 2021). Notably, the 2021 Annual Shareholder Meeting, Audit Committee Charter, Compensation Committee Charter, Governance and Nominating Committee Charter, Risk Committee Charter, Certificate of Incorporation, Bylaws, Corporate Governance Guidelines, and all of the 2021 and 2022 Codes of Conduct in English, Spanish, and French provide no useful information for Rule 7004(h) service.
- <sup>20</sup> Capital One Financial Corporation 2021 Proxy Statement, at 20-25 (Mar. 24, 2021) <http://ir-capitalone.gcs-web.com/static-files/7b11ae39-d84e-4e42-b6fa-6422f840b56f> (as of Nov. 11, 2021).

6. [21-12044](#)-B-7      **IN RE: MELISSA ARMENTA**  
[YUM-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
10-19-2021    [\[15\]](#)

WESTLAKE SERVICES, LLC/MV  
JOEL WINTER/ATTY. FOR DBT.  
BEHZAD MOHANDESI/ATTY. FOR MV.

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

DISPOSITION:      Dropped from calendar.

NO ORDER REQUIRED.

Westlake Services, LLC ("Movant") seeks relief from the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1) and (2) to permit Movant to exercise its rights and remedies with respect to a 2021 Honda Accord ("Vehicle"). Doc. #15. This motion would have been DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice as stated below.

However, on October 25, 2021, the parties stipulated to stay relief with waiver of the 14-day stay of Fed. R. Bankr. P. 4001(a)(3), to

which the chapter 7 trustee also consented. Doc. #22. The court approved the stipulation on October 26, 2021 and granted the motion. Doc. #23. The parties resolved the motion by stipulation, obtained approval, and Movant has stay relief. Accordingly, this motion will be DROPPED FROM CALENDAR.

The notice of hearing, certificates of service, and inadequate service do not comply with the Local Rules of Practice ("LBR") or Federal Rules of Bankruptcy Procedure ("Rules"). LBR 9014-1(f)(1)(B) states that motions filed on at least 28 days' notice require the movant to notify the respondents that any opposition to the motion must be in writing and filed with the court at least 14 days preceding the date or continued date of the hearing.

The notice states that written opposition is not required because the motion was set on 14 days' notice. Doc. #16. This is incorrect because the motion was filed on October 19, 2021, which is exactly 28 days before the November 16, 2021 hearing. The motion was filed on 28 days' notice under LBR 9014-1(f)(1) and written opposition was required. Since opposition was required, the notice also should have complied with LBR 9014-1(d)(3)(B)(i), which requires the notice to include the names and addresses of persons who must be served with any opposition.

Furthermore, each document has an attached certificate of service. Docs. ##15-22. LBR 9004-2(e)(1) provides that proofs of service shall be filed as separate documents. LBR 9004-2(e)(2) states that copies of the pleadings served "SHALL NOT be attached to the proof of service filed with the court." Here, each motion document included an attached certificate of service in violation of LBR 9004-2(e)(1) and (2). The court notes that only one certificate of service is needed if it includes all motion documents that are required to be served. See LBR 9004-2(e)(3).

Even if the certificates of service were filed separately, Rule 4001(a) requires motions for relief from the automatic stay to be "made in accordance with Rule 9014[.]" Rule 9014(b) requires motions in contested matters to be served upon the parties against whom relief is sought pursuant to Rule 7004. Rule 9036's electronic service provision **does not apply to any pleading or other paper required to be served in accordance with Rule 7004**. And even if it did, Counsel would need to comply with LBR 7005-1(a)(3), which Counsel did not do. Counsel should have served the necessary parties in accordance with Rule 7004.

If this motion had not already been resolved by stipulation, the motion would have been DENIED WITHOUT PREJUDICE for the above procedural deficiencies. Counsel is advised to review the local rules to ensure procedural compliance in subsequent motions. Future violations of the local rules shall result in the matter being denied without prejudice.

7. [21-11168](#)-B-7     **IN RE: FELIPE/ERICA VIDRIO**  
[PFT-1](#)

MOTION TO SELL  
9-30-2021    [[19](#)]

PETER FEAR/MV  
PATRICIA CARRILLO/ATTY. FOR DBT.  
PETER FEAR/ATTY. FOR MV.

TENTATIVE RULING:            This matter will proceed as scheduled for higher  
and better bids, only.

DISPOSITION:                Granted.

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

Chapter 7 trustee Peter L. Fear ("Trustee") asks the court to approve the sale of a 2013 Ford F-150 with 65,000 miles in good condition ("Vehicle") to Felipe Vidrio and Erica S. Vidrio ("Debtors") for \$18,725.00, subject to higher and better bids. Doc. #19. Trustee also requests waiver of the 14-day stay under Fed. R. Bankr. P. 6004(h).

No party in interest timely filed written opposition. This motion will be GRANTED and proceed for higher and better bids only.

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

11 U.S.C. § 363(b)(1) allows the trustee to "sell or lease, other than in the ordinary course of business, property of the estate."

Proposed sales under 11 U.S.C. § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. *In re Alaska Fishing Adventure, LLC*, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) citing *240 North Brand Partners v. Colony GFP Partners, Ltd. P'Ship (In re 240 N.*

*Brand Partners*), 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996); *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991). In the context of sales of estate property under § 363, a bankruptcy court "should determine only whether the trustee's judgment was reasonable and whether a sound business justification exists supporting the sale and its terms." *Alaska Fishing Adventure, LLC*, 594 B.R. at 889 quoting 3 Collier on Bankruptcy ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed.). "[T]he trustee's business judgment is to be given great judicial deference.'" *Id.* citing *In re Psychometric Sys.*, 367 B.R. 670, 674 (Bankr. D. Colo. 2007); *In re Bakalis*, 220 B.R. 525, 531-32 (Bankr. E.D.N.Y. 1998).

Sales to an insider are subject to heightened scrutiny. *Alaska Fishing Adventure, LLC*, 594 B.R. at 887, citing *Mission Product Holdings, Inc. v. Old Cold, LLC (In re Old Cold LLC)*, 558 B.R. 500, 516 (B.A.P. 1st Cir. 2016). This sale is to the Debtors. Property is listed in the schedules with a value of \$18,000.00. Doc. #1, *Sched. A/B*, ¶ 3.2. Debtors claimed an exemption of \$8,725.00 in Vehicle pursuant to Cal. Civ. Proc. Code § 704.060. Doc. #13, *Am. Sched. C*. Vehicle is not encumbered by any liens or security interests.

Trustee declares that he received an offer from Debtors to purchase the non-exempt portion of Vehicle for \$10,000.00, which he accepted subject to court approval and higher and better bids. Doc. #21. The sale includes credit for Debtors' \$8,725.00 exemption. Trustee took into consideration the fair market value of Vehicle, less the costs associated with storing and selling it at auction. Based on his experience, the \$10,000 will yield more than selling Vehicle at auction after paying auctioneer's commission, cost of storage, and court approval for hiring an auctioneer. *Id.*

The sale appears to be in the best interests of creditors and the estate, for a fair and reasonable price, supported by a valid exercise of Trustee's business judgment, and proposed in good faith. The sale subject to higher and better bids will maximize estate recovery and yield the best results. There is no opposition to the sale.

Accordingly, this motion will be GRANTED. The hearing will proceed for higher and better bids only. Trustee is authorized to sale Vehicle to the highest bidder as determined at the hearing.

The request to waive the 14-day stay in Fed. R. Bankr. P. 6004(h) will be GRANTED provided that there are no successful overbids made for the Vehicle because Debtors are already in possession of Vehicle and are purchasing non-exempt equity from the estate.

Any party wishing to overbid must appear at the hearing. Successful overbidders must pay Trustee in certified funds to be received no later than five business days following the conclusion of the auction. Back-up bids will be taken. In the event that a prior bidder has failed to perform, back-up bidders must pay Trustee to be received no later than five business days after being notified that the back-up

bid is now the winning bid. Prospective overbidders must acknowledge that no warranties or representations are included with the property; it is being sold "as-is, where-is."

8. [21-12278](#)-B-7     **IN RE: LOURDES CEBALLOS**  
[APN-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
10-18-2021    [\[11\]](#)

VW CREDIT LEASING, LTD./MV  
R. BELL/ATTY. FOR DBT.  
AUSTIN NAGEL/ATTY. FOR MV.

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

DISPOSITION:     Granted.

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

VW Credit Leasing, Ltd. ("Movant") seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (2) with respect to a 2020 Audi SQ5 ("Vehicle"). Doc. #11.

No party in interest timely filed written opposition. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the chapter 7 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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

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

This motion relates to an executory contract or lease of personal property. Under 11 U.S.C. § 365(p)(1), if a lease of personal property is rejected or not timely assumed by the trustee, the leased property is no longer property of the estate and the stay under § 362 is automatically terminated. The trustee may assume the lease within 60 days from the commencement of the case or the lease will be deemed rejected under § 365(d)(1).

This case was filed on September 25, 2021. Doc. #1. Under § 365(d)(1), the chapter 7 trustee has until November 24, 2021 to assume the lease or it will be deemed rejected.

After review of the included evidence, the court finds that "cause" exists to lift the stay because debtor has failed to maintain proof of insurance and failed make at least five pre-petition payments, two post-petition payments, and is delinquent at least \$4,389.30. Doc. #13. Debtor's Statement of Intention indicates that Debtor does not intend to assume the lease. Doc. #1, Form 108. However, Movant is not in possession of the Vehicle.

Additionally, the court finds that the debtor does not have an equity in the Vehicle and the Vehicle is not necessary to an effective reorganization because this is a chapter 7 case.

Accordingly, this motion will be GRANTED pursuant to 11 U.S.C. § 362(d)(1) and (2) to permit the movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim.

9. [21-11693](#)-B-7      **IN RE: JUAN LARA-RODRIGUEZ AND MARIA LARA**  
[MMJ-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
10-13-2021    [\[15\]](#)

BMW BANK OF NORTH AMERICA/MV  
JOSEPH PEARL/ATTY. FOR DBT.  
MARJORIE JOHNSON/ATTY. FOR MV.  
DISCHARGED 10/25/21

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

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

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



BMW Bank of North America ("Movant") seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (2) with respect to a 2014 BMW 3 Series 320i Sedan 4d ("Vehicle"). Doc. #15.

No party in interest timely filed written opposition. This motion will be GRANTED IN PART and DENIED AS MOOT IN PART.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the chapter 7 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

As a procedural matter, the notice of hearing (Doc. #16) filed with this motion does not comply with LBR 9014-1(d)(3)(B)(i), which requires the notice to include the names and addresses of persons who must be served with any opposition. Counsel is advised to review the local rules to ensure procedural compliance in subsequent motions. Future violations of the local rules may result in the matter being denied without prejudice.

11 U.S.C. § 362(c)(2)(C) provides that the automatic stay of § 362(a) continues until a discharge is granted. Juan J. Lara-Rodriguez's and Maria De Lourdes Lara's ("Debtors") discharge was entered on October 25, 2021. Doc. #21. Therefore, the automatic stay terminated with respect to Debtors on October 25, 2021.

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

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

After review of the included evidence, the court finds that "cause" exists to list the stay because Debtors have failed to make at least

three post-petition payments. Doc. #19. Movant has produced evidence that Debtors are delinquent at least \$1,270.89 and will owe an additional \$423.63 before the hearing. *Id.*

The court also finds that Debtors do not have any equity in the Vehicle and the Vehicle is not necessary to an effective reorganization because Debtors are in a chapter 7. *Id.* Vehicle is valued at \$14,752.00 and Debtors owe \$15,856.72. *Id.*

Accordingly, this motion will be GRANTED IN PART as to the trustee's interest pursuant to 11 U.S.C. § 362(d)(1) and (2) to permit the movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. The motion will be DENIED AS MOOT as to Debtors' interest under § 362(c)(2)(C).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because Debtors have failed to make at least three post-petition payments and Vehicle is a depreciating asset. No other relief is awarded.