UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

December 17, 2020 at 10:30 a.m.

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1. 17-90577-E-7 DCJ-4 | **WILSON SARHAD** / **David Johnston** | **MOTION TO AVOID LIEN OF LEONANI GARCIA** / **11-29-20 [103]**

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, Chapter 7 Trustee, Trustee's Attorney, Creditor, parties requesting special notice, and Office of the United States Trustee on November 29, 2020. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien 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 Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Leonani Garcia ("Creditor") against property of the debtor, Wilson Sarhad ("Debtor") commonly known as 3921 Louisburg Avenue, Modesto, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $234,985.48. Exhibit 4, Dckt. 106. An abstract of judgment was recorded with Stanislaus County on May 14, 2014, that encumbers the Property. *Id*.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $286,000.00 as of the petition date. Dckt. 18. The unavoidable consensual liens that total $140,248.00 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 18. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.950 in the amount of $175,000.00 on Schedule C. Dckt. 18.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Wilson Sarhad ("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 judgment lien of Leonani Garcia, California Superior Court for Stanislaus County Case No. 679149, recorded on May 14, 2014, Document No. 2014-0030564-00, with the Stanislaus County Recorder, against the real property commonly known as 3921 Louisburg Avenue, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

2. **20-90210-E-11 AF-8** | **JOHN YAP AND IRENE LOKE** **Arasto Farsad** | **MOTION TO APPROVE LOAN MODIFICATION** **11-11-20 [144]**

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 Debtors in Possession, Debtors in Possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on November 11, 2020. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Approve Loan Modification 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 Approve Loan Modification is xxxxx.

The Motion to Approve Loan Modification filed by John Hst Yap and Irene Laiwah Loke ("Debtors in Possession") seeks court approval for Debtor to incur post-petition credit. The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-OH2, Mortgage Passthrough Certificates, Series 2007-OH1 / New Rez LLC d/b/a Shellpoint Mortgage Servicing ("Creditor"), has agreed to a loan modification that will result in a $6,514.78 per month mortgage payment. The modification will capitalize the pre-petition arrears and provide for a fixed interest rate of 5.0%. The Maturity Date will be July 1, 2047.

The Motion is supported by the Declaration of John Hst Yap. Dckt. 146. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms.

Debtor further testifies that if the loan modification is approved, the Property will be taken out of foreclosure status and the Debtor will be renting it out and will only keep it for as long as needed to sell

it and potentially make a couple hundred thousand dollars in profit. *Id.*, at ¶ 5. The Property's value is expected to increase by 15-20% based on its proximity to the new Google Mega-Campus in San Jose. *Id.*

Review of Financial Information

On Schedule A/B Debtor lists the Property as having a value of $900,000. Dckt. 22 at 4. This value is stated as being based on "Valuation per Regina Zabaret, Realtor . . . on March 17, 2020." *Id*. This is consistent with the valuation stated on Amended Schedule A/B. Dckt. 55.

In his Declaration Debtor in Possession John Yap testifies that he desires to retain this property, hoping that it will increase in value over the next several years, which he believes to be at least $200,000.00. Declaration, ¶5; Dckt. 146. He believes that such great appreciation is reasonable since the property is located in Campbell, which he states is near downtown San Jose where the Google Mega-Campus is being built. *Id*., ¶ 6.

Mr. Yap also testifies that his health is terrible and he hopes to save this property from foreclosure for the benefit of his co-debtor wife. *Id*.

The monthly payment for principal and interest, property taxes, and insurance is ($6,514.78). In the Motion, but not included in Mr. Yap's testimony, is the comment that the Debtor in Possession will turn this into a rental property, projecting $4,500 a month in gross rents.

There is no economic analysis provided as to how the Debtor in Possession can afford this as a rental property, seeking to cash in on a projected couple hundred dollar future appreciation. There is a ($2,000) a month shortfall off of the gross rents monies from what is just the monthly loan payment. No explanation is provided as to what additional expenses - such are repairs, maintenance, landlord insurance/umbrella coverage, and City or County rental fees, inspection fees, and vacancy periods.

The Debtor in Possession's Monthly Operating Report for September 2020 states gross cash receipts of around $11,000 (excluding stimulus money and store return creditors). These include $4,000 of "consulting income." It is not clear whether it is Mr. Yap's, who is in very poor health, consulting income or that of his co-debtor spouse. Dckt. 142 at 4. On the Expense side, the Debtor in Possession lists ($10,374) of expenses. Of this, only ($2,602) a month is for the two Debtors monthly food and living expenses.

A review of the Statement of Financial Affairs filed on April 28, 2020, Dckt. 56 at 2-3, the Debtor lists the following income for 2020 and the two prior years:

2020 - January Through March 17 filing of the Case (3 Months)	John Yap	Avg. Per Month		Irene Loke	Avg. Per Month
Wage/Business	No			No	
Social Security	$5,376	$1,792		$2,400	$800
Pension	$3,342	$1,114		$0	
Rental Income	$14,416	$4,805		$0	

2019 (12 Months)					
Wage/Business	No			No	
Social Security	$21,504	$1,792		$9,600	$800
Pension	$13,368	$1,114		$0	
Rental Income	$89,072	$7,423		$0	
2018 (12 Months)					
Wage/Business	No			No	
Social Security	$21,300	$1,775		$9,480	$790
Pension	$13,368	$1,114		$0	
Rental Income	$31,200	$2,600		$0	

The Debtor's history of income does not show any significant wage or business income sources, except for the rental business which shows a substantially reduced amount post-petition (showing $3,532 in September 2020 and averaging $4,723 in the first six months of the case).

On Schedule I, the two debtors provide the following information concerning their income as of the commencement of this case:

A. Both Debtors are retired and have no wage or salary income.

B. Debtor John Yap has $6,223 in net rental or business income.

C. Debtor John Yap has $1,647 a month in Social Security income.

D. Debtor Irene Loke has $800 a month in Social Security income.

E. Debtor John Yap has $1,114.00 a month in pension income.

F. The two Debtor's aggregate income, before taxes, is $9,784 a month.

Dckt. 22 at 29-39.

On Schedule J Debtor lists having expenses of ($8,354) a month. *Id*. at 31-32. Of this, ($3,212) is for home mortgage (and presumably taxes, and insurance), and ($2,646) is for other real property mortgage (and presumably taxes and insurance). This is not part of the rental expense properties that are included in the rental income and expense statement attached to Schedule J. *Id*. at 33-36. No maintenance expenses are shown for this non-rental property.

Debtor John Yap concludes that by taking on this Million Dollar loan and making ($6,514.78) in mortgage payments (and not considering any maintenance or other landlord expense), several hundred thousand dollars of equity can be realized in the next couple of years.

Assuming that Debtor receives $4,500 a month in payments over the next two years, the gross rent would be $54,000 a year. Without any other expense, just paying the mortgage, taxes, and insurance would be ($78,168), a ($2,014) negative cash flow. Even without considering other costs and expenses for a landlord and assuming no vacancies, the Debtor in Possession will have to fund a ($48,336) shortfall.

Given Debtor Jon Yap's extremely poor health, it is not explained how this rental property would be managed. Reasonably, an additional expense for a property manager will be required.

Assuming the Property increases to $1,200,000 in two years and is sold by the one of the two debtors, one economic analysis would be:

Gross Sales Price	$1,200,000
Costs of Sale (Real Estate Commission and Escrow Fees Est. at 8%)	($96,000)
Estimate for Repairs	($5,000)
Mortgage	($1,000,000)

Estimated Net Monies in Escrow	$99,000
Additional Monies Advanced by Debtor in Possession To Cover Mortgage Payment	($48,336)
	==========
Estimated Gain From Refinance and Sale	$50,664

Therefore, assuming a 33.3% increase in value of the Property over the next two years, the gain from refinancing the property and advancing monies today would be the same as if the debt was not incurred and the Debtor in Possession merely saved the $2,014+ a month rather than advance it to cover the cash flow shortfall.

No provision is made for Debtors to pay any state or federal taxes on their $9,784 a month in income (after deduction of rental property expenses).

It is not clear how the Debtor in Possession can fund this debt or why it is in the reasonable economic interests of the bankruptcy estate.

At the hearing, **xxxxxxx**

xxxxxxx

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 Approve Loan Modification filed by John Hst Yap and Irene Laiwah Loke ("Debtors in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the court authorizes John Hst Yap and Irene Laiwah Loke to amend the terms of the loan with The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-OH2, Mortgage Passthrough Certificates, Series 2007-OH1 / New Rez LLC d/b/a Shellpoint Mortgage Servicing ("Creditor"), which is secured by the real property commonly known as 1006 Lovell Avenue, Campbell, California, on such terms as stated in the Modification Agreement filed as Exhibit B in support of the Motion (Dckt. 147).~~

3. 20-90435-E-11 RDW-1 | **CHARLES MACAWILE** **David Johnston** | **MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7 11-18-20 [48]**

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, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 18, 2020. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Case and/or Motion to Convert 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 Dismiss Case and/or Motion to Convert is denied.

This Motion to Dismiss or Convert the Chapter 11 bankruptcy case of Charles Collantes Macawile, Jr. ("Debtor") has been filed by creditors Scott R. Williams and Anastasie C. Martin, Trustees of The Williams Trust Dated August 19, 2014, its successors and/or assignees ("Movant"). Movant is the current payee of a Promissory Note dated September 6, 2018 in the principal amount of $1,000,000.00 secured by a First Deed of Trust, executed and recorded in Stanislaus County and which encumbers the real property located at 5412 Kieman Avenue, Salida, California 95368 ("Property"). The total amount of Movant's claim as of the Petition Date is $1,190,684.75.

Movant asserts that the case should be dismissed or converted based on the following grounds:

A. This is Debtor's second pending bankruptcy case in the last eight (8) months.

B. In the previous case (Case No. 20-90139), filed as a Chapter 13 case, Debtor proposed paying off the loan via a refinance in nine (9) months. Movant objected to this treatment and the objection was sustained.

C. Six days after the previous case was dismissed, Debtor filed the instant case under Chapter 11 as a Small Business Subchapter V.

D. Pursuant to Schedule I, neither the Debtor nor his non-filing spouse earn any income. Additionally, according to Schedule J, Debtor is running a deficit of $2,267 each month.

E. Debtor has again proposed to refinance to pay off Movant and in the Status Report filed on July 23, 2020, Debtor asserts having obtained a loan commitment from a lender in Mexico and is negotiating an agreement to lease the Property. Moreover, Debtor received an $1.8 Million offer to purchase the subject Property but turned it down.

F. At the meeting of creditors, Debtor testified that he intended to sell the Property to his wife, who qualified for a loan in April 2020 and was waiting for the finance to come through.

G. Debtor has not filed a plan and his motion to extend the deadline to file a plan was denied.

H. At the October 1, 2020 status conference, Debtor's Counsel informed the court that Debtor's plans of financing had not materialized.

I. Debtor has not provided evidence that there is a reasonable likelihood that a plan will be confirmed within a reasonable time.

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

DISCUSSION

Creditor's concerns are well taken. Debtor has failed to confirm a plan. Additionally, the Debtor has no income and is acting to the detriment of creditors by, namely, having turned down an offer to sell the Property which would have allowed for his creditors to be paid.

The instant motion was filed prior to the November 18, 2020 Status Conference. At the status conference, the court addressed the same concerns Movant raises now. After reviewing the facts of the case, it was determined that Debtor in Possession be removed and Subchapter V Trustee will now market and sell the property. Civil Minutes, Dckt. 53.

The court having addressed the concerns and Debtor in Possession having being removed, 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 Convert the Chapter 11 case filed by Scott R. Williams and Anastasie C. Martin, Trustees of The Williams Trust Dated August 19, 2014, its successors and/or assignees ("a creditor") 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 to Dismiss or Convert the Case is denied.

4.	**19-90151-E-11 HSM-3**	**Y&M RENTAL PROPERTY MANAGEMENT, LLC David Johnston**	**MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH WELLS FARGO BANK, N.A. 11-20-20 [123]**

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 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 2020. By the court's calculation, 27 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 11 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 for Approval of Compromise is granted.

Irma C. Edmonds, the Chapter 11 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Wells Fargo Bank, N.A. ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the adversary proceeding commenced by Trustee against Settlor related to real property identified as 2521 Fiesta Way, Ceres, California ("Property"), containing three causes of action: (1) determination of the validity, priority, or extent of their lien as to the Property; (2) Declaratory Relief (as to the Subject Deed of Trust); and (3) Disallowance of Proof of Claim 1 pursuant to 11 U.S.C. § 502.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 123):

A. The Estate shall pay Wells Fargo the sum of $38,000.00 ("Payment"), in a single lump sum payment, within five (5) business days of court's approval of the settlement.

B. Within thirty (30) business days of receipt of the Payment, Wells Fargo is to reconvey the Property's deed of trust.

C. Trustee will dismiss the adversary proceeding within five (5) days of receipt of the reconveyance.

D. Settlor waives and releases all claims against Debtor and the Estate, including but not limited to any claims arising from the Wells Fargo HELOC, and including any claim based on Section 502, and shall not share in any distribution of assets of the Estate, with the exception of the Payment. Further, this waiver does not affect the obligations of borrower Alfredo Flores under the Wells Fargo HELOC.

E. The Agreement does not constitute satisfaction or forgiveness of indebtedness.

F. Trustee and Settlor have exchange mutual releases, which shall not affect or limit any other rights or obligations of the parties with respect to the performance under this Agreement.

G. In the event of a default, Trustee may continue with the prosecution of the adversary proceeding.

H. Settlor to prepare the necessary documents to modify the scheduling order in the adversary proceeding to extend dates and deadlines to allow for the consummation of the Agreement.

I. Each party shall bear their own attorney's fees and costs incurred prior to the date of this Agreement. In the event of a proceeding necessary to interpret or enforce the Agreement, the prevailing party shall recover from the defaulting party reasonable attorney fees and costs.

J. The Agreement is subject to the court's approval.

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

Trustee is confident in her litigation position where certain facts are favorable to the Estate. However, according to Trustee, it appears that with lack of case law directly on point and other issues regarding notice, application of the law may not favor the Estate in a clear and unambiguous manner and further discovery may reveal facts damaging to Trustee's position.

Difficulties in Collection

The Trustee has concluded that this factor is neutral.

Expense, Inconvenience, and Delay of Continued Litigation

The Trustee argues that due to potential and costly issues with discovery, litigation may become more expensive as the issues will most likely increase factual complexity, administrative expenses around discovery, inconvenience and delay.

Paramount Interest of Creditors

Settlor's claim being the only claim filed in this case, the Agreement resolves the disputed issues related to the Property, while moving the case forward to a dismissal and allowing Trustee to pay all administrative expenses.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

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 Agreement resolves long standing issues related to the Property and allows the Trustee to proceed in the administration of the estate. The Motion 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 Approve Compromise filed by Irma C. Edmonds, the Chapter 11 Trustee, ("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 Wells Fargo Bank, N.A. ("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. 123).

5. **09-93059-E-7 BLF-5 5 thru 7** | **DUDLEY/TERESA CARLL Michael McEnroe** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH DEBTORS 11-12-20 [50]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 12, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Approval of Compromise is granted.

Gary R. Farrar, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Dudley Wager Carll and Teresa Ann Carll ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the distribution of settlement proceeds from the settlement of a multi-district product liability lawsuit in the United States District Court for the Southern District of Texas.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit C in support of the Motion, Dckt. 50):

A. After payment of Special Counsel's fees and costs, Trustee and Settlor will split 50/50 the net proceeds of the lawsuit's settlement. Settlor will not claim any additional interest in the lawsuit and waive all claims for exemption or otherwise.

B. Settlor to receive their share after the settlement has been approved by the court; the time for appeal has expired and no party has filed an appeal; and Trustee has received the settlement proceeds.

C. The Agreement is subject to court's approval. In the event that no such approval occurs, the Releases contained in the Agreement have no effect.

D. The parties have exchanged mutual releases and waive the rights under C.C.P. § 1542.

E. Each party shall bear their own attorney's fees and costs incurred prior to the date of this Agreement. In the event of a proceeding necessary to interpret or enforce the Agreement, the prevailing party shall recover from the defaulting party reasonable attorney fees and costs.

F. Time is of the essence as to each term contained in this Agreement.

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

The Trustee is confident in his position that the lawsuit is property of the estate on the basis that Debtor is not entitled to amend his schedules to exempt the lawsuit because he was aware of the injuries that form the claims at issue at the time of the filing the petition. However, Debtor contend that the failure to amend the schedules was not intentional and Trustee believes it is difficult to predict how these factual disputed issues would be resolved.

Difficulties in Collection

Trustee is unaware of any difficulties in collection as defendants will turn over directly to Trustee the settlement amount less certain fees and expenses.

Expense, Inconvenience, and Delay of Continued Litigation

The compromise avoids further delay and administrative expenses related to the litigation over the dispute and allows Trustee to recover $8,513.88 for the estate's professional fees and distribution to creditors with unsecured claims.

Paramount Interest of Creditors

The compromise allows Trustee to collect $8,513.88 for the benefit of the bankruptcy estate.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

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 it reasonably liquidates this asset, allowing the Trustee to proceed with the administration of this estate and the Debtors to recover a portion of the proceeds (which is the subject of a separate stipulation that has been approved by the court). The Motion 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 Approve Compromise filed by Gary R. Farrar, the Chapter 7 Trustee, ("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 Dudley Wager Carll and Teresa Ann Carll ("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 C in support of the Motion (Dckt. 50).

6. **09-93059-E-7** **DUDLEY/TERESA CARLL** **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT**
BLF-3 **Michael McEnroe** **11-12-20 [38]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 12, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Approval of Compromise is granted.

Gary R. Farrar, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Defendant Automobile Manufacturer ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the bankruptcy estate's interest in a multi-district product liability lawsuit in the United States District Court for the Southern District of Texas.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Litigation Closing Statement filed as Exhibit B in support of the Motion, Dckt. 38):

A. The Gross Settlement Amount is $32,123.14.

B. An MDL Court Ordered Assessment in the amount of $963.69 is to be deducted from the gross settlement amount.

C. Special Counsel's 40% equals Attorney's fees of $12,463.78 and expenses of $1,667.91 to be paid from the gross settlement amount.

D. The Bankruptcy Estate and Debtors will divide the projected net settlement proceeds of $17,027.76 fifty-fifty, with the estate receiving $8,513.88 +/- and the Debtors jointly receiving $8,513.88 +/-

E. The compromise is conditional on the court granting this motion.

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

Success is uncertain as there are difficult and factual issues that would have to be litigated where the defendant in the lawsuit denied all allegations and has raised numerous defenses. Moreover, success is unlikely where special counsel has explained that of the cases that have gone to trial, none have been returned a plaintiff favorable verdict.

Difficulties in Collection

Recovery in the lawsuit is limited due to costly expert witness related discovery, potential appeal from the defendant, and reduction of recovery in litigating the appeal.

Expense, Inconvenience, and Delay of Continued Litigation

Continued prosecution of the lawsuit would lead to further delay as the parties prepare for trial.

Paramount Interest of Creditors

By collecting $31,159.45, Trustee is able to avoid expense, uncertainty, and delay that result from further litigation.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

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 allows for certainty of recovery and payment of $31,159.45 in gross proceeds to the estate and then an appropriate division between the estate and the Debtors of the net proceeds after costs and expenses of the litigation. The Motion 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 Approve Compromise filed by Gary R. Farrar, the Chapter 7 Trustee, ("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 Dudley Wager Carll and Teresa Ann Carll ("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 C in support of the Motion (Dckt. 38).

7. **09-93059-E-7 BLF-4** | **DUDLEY/TERESA CARLL** **Michael McEnroe** | **MOTION FOR COMPENSATION FOR PULASKI KHERKHER AND BAILEY, COWAN, HECKAMAN, PLLC, SPECIAL COUNSEL(S)** **11-12-20 [44]**

Final Ruling: No appearance at the December 17, 2020 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 Debtors, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 12, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees 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 for Allowance of Professional Fees is granted.

Pulaski Kherkher (formerly Pulaski & Middleman, LLC) and Bailey, Cowan, Heckaman, PLLC the Special Counsel ("Applicant") for Gary R. Farrar, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 20, 2014, through August 12, 2020. The order of the court approving employment of Applicant was entered on December 13, 2019. Dckt. 37. Applicant requests fees in the amount of $12,463.78 and costs in the amount of $1,667.91.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include prosecuting a multi-district product liability lawsuit in the United States District Court for the Southern District of Texas, Houston Division. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in litigation to prosecute their claim against an automobile manufacturer for personal injuries and medical expenses incurred as a result of an auto accident that occurred on September 10, 2009, for which Client agreed to a contingent fee of 40% of the gross amounts collected. In approving the employment of applicant, the court approved the contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). $17,027.76 of net monies (exclusive of these requested fees and costs) was recovered for Client.

Professionals and % of Contingent Fee	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Bailey Cowan Heckaman PLLC- 75%	N/A	N/A	$9,347.83
Pulaski & Middleman- 25%	N/A	N/A	$3,115.94
	0	$0.00	$0.00
Total Fees for Period of Application			$12,463.78

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $1,667.91 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Share of Common Benefit Expenses		$961.12
Postage		$22.57
Medical Records		$84.22
Lien Resolution Fee		$600.00
Total Costs Requested in Application		$1,667.91

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the fees computed on a percentage basis recovery for Client are reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees of $12,463.78 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant. The Chapter 7 Trustee is authorized to pay from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $1,667.91 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$12,463.78
Costs and Expenses	$1,667.91

pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case.

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 for Allowance of Fees and Expenses filed by Pulaski Kherkher, formerly Pulaski & Middleman, LLC and Bailey, Cowan, Heckaman, PLLC formerly Bailey Peavy Bailey Cowan Heckaman, PLLC ("Applicant"), Special Counsel for Gary R. Farrar, the Chapter 7 Trustee, ("Client") having been presented to the court,

and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Pulaski Kherkher, formerly Pulaski & Middleman, LLC and Bailey, Cowan, Heckaman, PLLC formerly Bailey Peavy Bailey Cowan Heckaman, PLLC is allowed the following fees and expenses as a professional of the Estate:

Pulaski Kherkher, formerly Pulaski & Middleman, LLC and Bailey, Cowan, Heckaman, PLLC formerly Bailey Peavy Bailey Cowan Heckaman, PLLC , Professional employed by the Chapter 7 Trustee

Fees in the amount of $12,463.78
Expenses in the amount of $1,667.91,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

8. **18-90029-E-11** **JEFFERY ARAMBEL** **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH EL CHE CORPORATION**
DW-3 **Pro Se**
8 thru 11
11-19-20 [1288]

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 in Possession, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on November 19, 2020. By the court's calculation, 28 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 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 for Approval of Compromise is granted.

Jeffery Edward Arambel, the Debtor in Possession, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with El Che Corporation ("Settlor"). The claims and disputes to be resolved by the proposed settlement are allowance of Settlor's Proof of Claim 6 in the total amount of $175,000 as a timely Class 6 general unsecured claim, providing for a general release of all other claims between El Che and the Estate, and requiring dismissal of the state court action within 14 days of the court's approval of the settlement.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 1291):

A. Settlor's claim shall be allowed in the total amount of $175,000. This allowed claim shall be treated as timely and included in Class 6 (General Unsecured Claims) of claims treated under the Plan.

B. Settlor to dismiss with prejudice the state court action within 14 days of the bankruptcy court's approval of the Agreement, with each parties bearing their own fees, costs, and expenses.

C. The agreements is not an admission as to the facts and circumstances related to the claim, and each party denies any liability to the other party and to third parties.

D. Except for the rights and obligations created under the Agreement, the parties have exchanged general mutual releases.

E. Parties to bear the attorneys' fees and costs in connection with the agreement.

F. Time of the essence for this agreement.

G. The Agreement is subject to the bankruptcy court's approval.

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

There is some risk that the Estate will not prevail. If forced to litigate the merits of the claim, the Reorganizing Debtor and Plan Administrator recognize there are colorable arguments for both sides on what amount should be allowed for the various components of the claim.

Difficulties in Collection

The Reorganizing Debtor and Plan Administrator believe that "collection" is not a factor, positive or negative, in this analysis.

Expense, Inconvenience, and Delay of Continued Litigation

Litigation will be complex and involve a fact intensive analysis of the circumstances surrounding the filing of Settlor's claim, and likely a retrial on the merits of the claim—where memories have faded and there is a risk that key documents and other evidence have been lost. Further litigation will cause considerable expense, delay, and uncertainty in the administration of this Estate. It is also expected that any outcome will be appealed.

Paramount Interest of Creditors

The Settlement Agreement provides certainty for the Estate and its creditors, while significantly reducing the asserted claim of Settlor.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

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 it eliminates the uncertainty and delay of further litigation and significantly reduces the claim which will benefit the estate and creditors. The Motion 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 Approve Compromise filed by Jeffery Edward Arambel, the 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 El Che Corporation ("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. 1291).

9. 18-90029-E-11 NAR-5 | **JEFFERY ARAMBEL** Pro Se | **CONTINUED MOTION TO FILE CLAIM AFTER CLAIMS BAR DATE** 12-12-19 [1067]

Final Ruling: No appearance at the August 27, 2020 Hearing is required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on December 12, 2019. By the court's calculation, 56 days' notice was provided. 28 days' notice is required.

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

The Motion to File Claim After Claims Bar Date is dismissed without prejudice, the matter having been resolved by a settlement approved by the court.

AUGUST 20, 2020 SUPPLEMENTAL STATUS REPORT AND *EX PARTE* MOTION TO CONTINUE HEARING

On August 20, 2020, Jeffrey Edward Arambel, Reorganizing Debtor, filed a Status Report requesting the court continue the hearing 60 days, to an available date in the second half of October 2020, and further proposes to file a status report not later than seven (7) days before the continued hearing. Dckt. 1193. Reorganizing Debtor asserts that both Creditor and Plan Administrator have no objection to the continuance.

MAY 13, 2020 SUPPLEMENTAL STATUS REPORT

Jeffrey Edward Arambel, Reorganizing Debtor, filed a Status Report on March 5, 2020 Dckt.1154.

A. The parties have settled upon potential BDRP mediators but scheduling has been delayed due to COVID-19. Concurrent with this report, parties filed an order to appoint the BDRP mediators.

B. To allow time for the public health situation to improve and for mediation to occur, Reorganizing Debtor requests that the scheduled hearing on the Motion be continued about 75 days, to an available date in August 2020.

C. Counsel for the Reorganizing Debtor conferred with counsel for El Che and the Plan Administrator regarding the proposed continued hearing date and understands that there is no objection to the proposed continued hearing date.

D. The Reorganizing Debtor proposes to file a status report regarding the Motion not later than seven days before the continued hearing.

On May 14, 2020, the court signed the order submitted by the parties appointing J. Russell Cunningham as the Resolution Advocate (with George C. Hollister as an Alternate) and assigning the instant motion to the Bankruptcy Dispute Resolution Program. Dckt. 1156.

FEBRUARY 5, 2020 STATUS REPORT & EX-PARTE MOTION

Jeffrey Edward Arambel, Reorganizing Debtor, filed a Status Report on March 5, 2020 Dckt.1114.

A. Consistent with the court's directives, the parties met and conferred on March 2, 2020, to attempt to resolve both the Motion and allowance of the underlying claim in a sum certain. The parties were not able to reach an agreement at that meet and confer session, but agreed to further mediation and will request referral of the matter to the Court's Bankruptcy Dispute Resolution Program ("BDRP").

B. The parties are exchanging names of potential BDRP mediators and expect to submit a joint motion for referral of this matter to the BDRP mediator within the next 14 days.

C. To allow time for the mediation to occur, Reorganizing Debtor requests that the scheduled hearing on the Motion be continued about 60 days, to May 21, 2020. While May 14 is the regular Modesto day, counsel for the Reorganizing Debtor has a conflict that day and requests that court continued the hearing to May 21, 2020.

D Counsel for the Reorganizing Debtor conferred with counsel for El Che and the Plan Administrator regarding the proposed continued hearing date and understands that there is no objection to the proposed continued hearing date.

E. The Reorganizing Debtor proposes to file a status report regarding the Motion not later than seven days before the continued hearing.

El Che Corporation, Creditor of Jeffery Edward Arambel ("Creditor") requests that the court allow Creditor's late filed claim to be treated as timely filed. Creditor filed Proof of Claim Number 38 on December 10, 2019, substantially after the claims bar date expired in this case.

The Claim is asserted to be unsecured in the amount of $541,842.32. The deadline for filing proofs of claim in this case is May 16, 2018. Notice of Bankruptcy Filing and Deadlines, Dckt. 11.

REVIEW OF THE MOTION

Creditor asserts the following:

A. Creditor filed a lawsuit in the Stanislaus County Superior Court, case number 2021033, in July 2016 for the collection of money due to it from Jeffrey Arambel, and others, arising from services Creditor provided.

B. Creditor was represented in that litigation by the Law Offices of Brunn & Flynn, ("Brunn & Flynn / Prior Counsel").

C. The notice of this bankruptcy proceeding was apparently mailed, care of Brunn & Flynn as reflected on the Debtor's March 1, 2018 amended schedules.

D. However, Brunn & Flynn did not file a claim on behalf of Creditor.

E. Creditor never received any filings from this bankruptcy court, until Brunn & Flynn filed a notice of change of address with this court on May 31, 2018, after the claims bar date.

F. On August 1, 2018, Brunn & Flynn filed a motion to be relieved as counsel from the State Court.

G. When Creditor's new counsel communicated with Brunn and Flynn as to whether or not a claim was filed, Brunn and Flynn adopted the position that it did not represent Creditor in the bankruptcy case.

H. On July 19, 2019, the Debtor filed an Amended Proposed Plan of Reorganization.

I. The Order confirming Debtor's Plan of Reorganization was entered on September 15, 2019.

J. Creditor is informed that no other distributions have been made, and this motion as well as Creditor's Proof of Claim is filed in time to permit payment of such claim without prejudice to any other creditors, nor the Debtor.

K. Creditor employed approximately 80 to 120 employees who worked on Debtor's orchards.

L. Debtor paid Creditor with checks but the checks were returned due to insufficient funds to deposit the checks for the entire amount of $112,000, and Creditor's payroll checks bounced as a result, incurring a fee to Creditor of $2,000 for insufficient funds.

M. Creditor was forced to obtain a loan to meet its payroll obligations to compensate employees, incurring significant interest charges on such loan.

N. Debtor continued to fail to pay Creditor for its services, and Creditor was forced to retain Brunn & Flynn for the purpose of filing a civil complaint for breach of contract against Debtor.

O. After trial in the state court action commenced and the state court took the matter under submission, Creditor learned that Debtor was in bankruptcy.

P. Brunn & Flynn advised Creditor it could file a motion for relief from the automatic stay to continue with the litigation in the state court matter.

Q. Brunn & Flynn demanded a significant retainer that Creditor was unable to afford in order to prepare and appear for the motion for relief.

R. Creditor was not advised that Brunn & Flynn was not filing a claim in the bankruptcy case, that a claims bar date had been set, or that Creditor was required to file a proof of claim in order to preserve its claim.

S. Creditor was eventually referred to its current counsel for the purpose of filing a Proof of Claim, and pursuing the matter in bankruptcy court.

T. In the present action, Debtor did not list Creditor's address, and failed to correctly identify Creditor in his Schedules D, E/F, G, and/or H, as required by F.R.B.P. 1007(a), as Creditor's address as reflected on the invoices mailed to Debtor was not listed.

U. The bankruptcy filings were mailed to Brunn & Flynn, who subsequently advised it did not represent Creditor in this bankruptcy matter, who stated they were not retained for such purposes, and who failed to advise Creditor that it needed to file a proof of claim or of a claims bar deadline.

V. No notice of this bankruptcy proceeding was mailed to Creditor at any time prior to the claims bar deadline, until after Brunn & Flynn filed a notice of change of address listing Creditor's address following the expiration of the deadline.

W. Thus, notice was insufficient throughout the present bankruptcy to give Creditor reasonable notice of the necessity of filing a claim, nor reasonable time to file a Proof of Claim.

X. Moreover, Federal Rule of Bankruptcy Procedure 9006(b)(1) allows the claims bar date to be extended where the failure to timely act "was the result of excusable neglect."

Y. Creditor directs the court's attention to *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, (1993) 507 U.S.

380, explaining that a court's determination of whether the neglect is "excusable" should be an equitable one, whereby a court should "tak[e] account of all relevant circumstances surrounding the party's omission." Id. at 395.

Z. Adding that courts have found excusable neglect and determined that creditors have a right to file late claims where they have not received actual notice of the bankruptcy. See, e.g., *In re Anchor Glass Container Corp.*, (2005) 325 B.R. 892, 897.

AA. In the instant case there is no danger of prejudice to the Debtor or his bankruptcy estate in deeming the Creditor's claims as timely filed because no distributions have been made pursuant to the terms of the Chapter 11 Plan of Reorganization on file with this Court, with the exception of possible payments to professionals made pursuant to motion for compensation.

BB. Moreover, the Debtor had adequate notice of this claim, due to the extensive civil litigation in the State Court Action, and the fact that Debtor filed his bankruptcy after the commencement of the trial.

CC. The Debtor was well aware of the extent and nature of the claim well before the claim was filed.

DD. Finally, Creditor did not receive any bankruptcy filings until after Brunn & Flynn filed a notice of change of address with the bankruptcy court, at which time, Creditor was unaware that the Claims Bar Date had already passed, or that a claim needed to be filed, after it had already filed litigation in the State Court, which proceeded to trial.

EE. Creditor acted in good faith to seek bankruptcy counsel to file a Proof of Claim on his behalf once it learned of the bankruptcy case, that Brunn & Flynn did not timely file an claim and that the Claims Bar Date had passed.

In support of the Motion, Creditor filed the Declarations of Natali A. Ron and Jose Manuel Eguiluz and properly authenticated Exhibits A and B.

Declarations

Natali A. Ron is an attorney with the Law Offices of Hastings and Ron, current attorneys for Creditor. She testifies under penalty of perjury in her Declaration (identified by paragraph number of the Declaration) to the following:

2. Jose Manuel Eguiluz consulted with our firm in approximately July 2019, to discuss representation of his corporation with respect to the present bankruptcy case.

3. " I am informed and believe that the notice of this bankruptcy proceeding was mailed, care of the Law Offices of Brunn & Flynn, with respect to the creditor El Che Corporation . . . ."

4. "I am informed and believe, based on my review of court filings, that El Che Corporation filed a lawsuit in the Stanislaus County Superior Court, case number 2021033, in July 2016 for the collection of money due to it from Jeffrey Arambel, and others, arising from services El Che Corporation provided. . . ."

5. "I am informed and believe, based on my review of court filings, that Brunn & Flynn filed a motion to be relieved as counsel from the State Court."

6. "I am informed and believe that based on my review of the court docket filings, that on or about July 19, 2019, the Debtor filed an Amended Proposed Plan of Reorganization dated July 19, 2019 (hereinafter referred to as the "Proposed Plan")."

7. "I am informed and believe, based on the Court's docket in this matter, that since the date of plan confirmation, the Debtor has filed motions for compensation of certain professionals, and for payment of certain administrative expenses. I am informed and believe that no other distributions have been made."

8. Creditor retained Hastings and Ron to pursue this bankruptcy matter, and she filed a proof of claim on behalf of Creditor on December 10, 2019, while preparing this motion.

In reviewing this Declaration, in which counsel provides testimony under penalty of perjury, states by counsel cause the court significant concern. These statements under penalty of perjury and supposedly in compliance with Federal Rule of Evidence 601 and 602 (and subject to the certifications made pursuant to Fed. R. Bankr. P. 9011), counsel's testimony as to most of the above is based solely on "information and belief."

One of the fundamental principles of testifying under penalty of perjury is that the witness must testify based upon personal knowledge. Federal Rule of Evidence 602 states (emphasis added):

> A **witness may testify** to a matter **only if evidence is introduced** sufficient to **support a finding** that the **witness has personal knowledge of the matter**. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

The use of "information and belief" is not a device to testify under penalty of perjury. Here, counsel has no personal knowledge, but states that she has read and wants now to tell the court what the other documents say. In effect, counsel is wanting to tell the court what she "heard" the written words "say" when she read them. Being an attorney is not a license to provide her opinion of what she read and what she wants to tell the court she believes (especially when counsel is doing it to enhance the case she is seeking to advocate for as an officer of the court for her client). When reviewing Weinstein's Federal Evidence,

§ 602, the phrases "information and belief" and "informed and believe" are not used in addressing what is "personal knowledge" necessary for testifying under penalty of perjury.

Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 discuss how and when a person may use information and belief in a complaint. As discussed in 2 Moore's Federal Practice, Civil § 8.04(4):

> [4] Allegations Supporting Claims for Relief May Be Made on Information and Belief
>
> Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief (see § 8.06[5]). However, Rule 11 permits a pleader, after reasonable inquiry, to **set forth allegations** that "will **likely have evidentiary support** after a reasonable opportunity for further investigation or discovery" (see Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions). Courts have read the policy underlying Rule 8, together with Rule 11, to **permit claimants to aver facts that they believe to be true, but that lack evidentiary support** at the time of pleading. Generally, however, such averments are allowed only when the facts that would support the allegations are solely within the defendant's knowledge or control.

In stating that something is on "information and belief," one necessarily is stating that they don't know it to be true, but believe, if they can conduct discovery or investigate, they can come up with some evidence, in the future, to show that it is true. [FN. 1.]

FN. 1. To the extent that counsel is informed and believes based on documents filed with the court, other court's, or other documents, counsel could have them properly authenticated, presented them as the evidence, and then counsel structure the grounds in the motion or argument in the points and authorities using that evidence. But counsel cannot "create" evidence based on her information and belief and then assert that her information and belief is the evidence upon which she is informed and believes.

Jose Manuel Eguiluz is the principal for Creditor ("Principal"). He testifies under penalty of perjury to the following:

A. From approximately 2012 through 2016, Creditor provided harvesting and pruning services for Debtor.

B. In 2016, Debtor became delinquent on payments to Creditor.

C. Invoices with a past due amount of $21,163.16 were sent to Debtor referencing the work and outlining the amounts due and terms of payment. Each invoice included Creditor's address and/or post-office box address.

D. Debtor issued a partial payment by check but it bounced due to insufficient funds and Creditor was forced to obtain a loan (for $75,000 plus interest, for a total of $108,000.00) in order to pay his employees.

E. Creditor continued borrowing in order to pay back the loans and has incurred $100,000.00 in additional interest.

F. Creditor has also incurred $2,000.00 in insufficient funds bank fees.

G. Principal hired Brunn & Flynn to file a complaint against Debtor in state court to collect past-due payments and recover damages for incurred interest.

H. Close to the date for the state court trial, Principal learned that Debtor had filed for bankruptcy.

I. Principal incurred approximately $60,000.00 in attorneys' fees and $10,000 in costs to pay an interpreter to communicate with prior counsel.

J. Invoices mailed to debtor include a provision for attorneys' fees in the event of litigation is instituted to collect on any outstanding sum of money.

K. Prior Counsel apparently did not do anything in the bankruptcy court to preserve his claim.

L. Prior Counsel discussed filing a motion for relief from the automatic stay but requested a retainer to pursue the matter but principal could not afford it.

M. Principal was not advised that he needed to file a claim with the bankruptcy court in order to preserve said claim.

N. Principal is informed that prior counsel filed a change of address with the bankruptcy court removing the firm's address and substituting to Creditor's company address.

O. Eventually, but after the claim bar date, Principal began receiving mail from the bankruptcy court regarding Debtor's bankruptcy case.

P. In July 2019, Principal contacted Hastings and Ron for the purpose of pursuing the claim in bankruptcy court, who in turn filed a Proof of Claim on December 2019.

Summary of Exhibits

Exhibit A: Invoices

Exhibit A is 70 pages worth of past due invoices for 2016 (April and May 2016), Debtor's checks for payment, and bank records regarding the checks with insufficient funds.

Exhibit B: Proof of Claim Number 38

Exhibit B is Creditor's Proof of claim filed on December 10, 2020 attaching the same invoices and checks submitted as Exhibit A.

DEBTOR'S OPPOSITION

Jeffery Edward Arambel, the Reorganized Debtor under the Confirmed Chapter 11 Plan, ("Debtor") filed an Opposition on January 23, 2020. Dckt. 1087. Debtor requests that the court disallow Creditor's claim on the basis that:

A. Creditor received proper actual notice of the claims bar date and it did not act. Its failure to file a timely claim is its own fault, and it has not shown a basis for allowance of a late-filed claim under the Bankruptcy Rules 3002 and 3003.

B. In *Lompa v. Price* (*In re Price*), 871 F.2d 97 (9th Cir. 1989), the Ninth Circuit held that notice to an attorney representing a claimant in a state-court proceeding would apprise a creditor of a bankruptcy and related deadlines. The creditor was not directly notified by the bankruptcy court of the bar date for filing dischargeability complaints under 11 U.S.C. § 523(c) because he was not listed by the debtor, and creditor's motion for extension was not made before the time had expired under Bankr. R. 4007(c). *Id.* at 98. The Bankruptcy Appellate Panel held that notice to creditor's counsel constituted notice to appellant, and that it would apprise the creditor of the pendency of the dischargeability deadline date. *Id.* The Ninth Circuit affirmed. *Id.* at 99.

C. The Ninth Circuit's earlier decision in *Lawrence Tractor Co. v. Gregory* (*In re Gregory*), 705 F.2d 1118 (9th Cir. 1983) is in accord. In *Gregory*, a creditor argued that its claim in bankruptcy should not be discharged because it had received inadequate notice of the debtor's bankruptcy plan. *Id.* at 1120. The Ninth Circuit rejected the creditor's constitutional challenge, holding that "[w]hen the holder of a large, unsecured claim [in bankruptcy] . . . receives any notice from the bankruptcy court that its debtor has initiated bankruptcy proceedings, it is under constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril." *Id.* at 1123. Adding that "[i]f [the creditor] had made any inquiry following receipt of the notice, it would have discovered that it needed to act to protect its interest." *Id.*

D. It is undisputed that as of the Petition Date, Brunn & Flynn represented Creditor in its claim in state court; that Creditor was actively litigating the claim with Debtor when the bankruptcy case was filed; that Creditor knew of the bankruptcy case by virtue of the notice of stay filed with the Superior Court, that Brunn & Flynn was served with a copy of the Notice of Bankruptcy Case and Deadlines as required by F.R.B.P. 2002(a)(7) that

Brunn & Flynn did not withdraw from the representation until after the claim bar date had passed.

E. Thus, under *Price*, notice to Brunn & Flynn constituted notice to Creditor to timely file its claim. Further, Creditor (holder of one of the 20 largest unsecured claims) was in inquiry notice after he received dozens of notices, including the Plan disallowing its claim, regarding the bankruptcy after the change of address.

F. Creditor failed to show excusable neglect.

G. The existence of excusable neglect is determined by considering the totality of the circumstances, including these factors: (1) the reason for the delay; (2) the danger of prejudice to the debtor; (3) the length of delay and its impact on judicial proceedings; and (4) whether the claimant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Co.*, 507 U.S. 380, 395 (1993). The burden of presenting facts to establish excusable neglect is on the moving party. *Key Bar Invs., Inc. v. Cahn* (*In re Cahn*), 188 B.R. 627, 631 (B.A.P. 9th Cir. 1995); see also *In re Pac. Gas & Elec. Co.*, 311 B.R. 84, 89 (Bankr. N.D. Cal. 2004). Pioneer mandated a balancing test for determining excusable neglect, but did not assign the weight to be given to each of its nonexclusive factors in arriving at an equitable determination. *Pincay*, 389 F.3d at 860.

H. Creditor does not meet its burden in its analysis of the *Pioneer* factors. Creditor's main argument is that, because it did not receive actual notice of the bankruptcy case, its failure to file a timely claim was excusable. Motion at 5:7–6:9.

I. However, as discussed, Creditor received actual notice through its counsel in the state court proceeding. Ordinarily, a lawyer is a client's agent and, consistent with agency law, clients "are considered to have notice of all facts known to their lawyer-agent." *Ringgold Corp. v. Worrall*, 880 F.2d 1138, 1141–42 (9th Cir.1989).

J. Creditor contends that no party will be prejudice but in reality all creditor holding unsecured claims will be prejudiced by the reduction in the interim Plan payments.

K. Even assuming that Creditor did not receive notice, Creditor knew of the Claims Bar Date by June 2019 yet did not file the present Motion for another six (6) months. Creditor has not behaved in good faith and by delaying to file his claim, Creditor has prejudiced other parties. This is not excusable neglect. Creditor fails to explain why it waited six months after the alleged discovery of the Claims Bar Date. This is inexcusable neglect and the Motion should be denied.

L. Creditor is bound by the Confirmed Plan and cannot collaterally attack the Confirmation Order.

M. Creditor ignores that the Plan confirmed controls and it is bound by the Plan, including the provision disallowing its claim as untimely. Creditor contends that the Plan provided it with notice of the Claims bar Date. Yet, did nothing to stop its confirmation on September 15, 2019.

N. Where a creditor has notice, a plan is *res judicata* to all issues that could have been raised at the time of confirmation. *Great Lakes Higher Educ. Corp. v. Pardee* (*In re Pardee*), 218 B.R. 916, 924, aff'd 193 F.3d 1083 (9th Cir.1999); see also *Lawrence Tractor Co. v. Gregory* (*In re Gregory*), 705 F.2d 1118, 1121 (9th Cir. 1983) (confirmation of an unopposed plan that provided for no payment to unsecured creditors and discharge of all debts could not be challenged post-confirmation).

O. It is undisputed that Creditor received notice of the Plan, of its disallowance of Creditor's claim and Creditor did not object to the Plan or the disallowance. Creditor failed to act and it now bound by the confirmed Plan.

P. Creditor's Proof of Claim should be disallowed in its entirety because it was not timely filed.

Q. Debtor submits his counter-motion under BLR9014-1(i) to disallow the claim filed by Creditor as untimely under 11 U.S.C. § 502(b)(9) and F.R.B.P. 3003(c)(3). Creditor's Proof of Claim was filed 573 days after the Claims Bar Date. Thus, as untimely, the claim should be disallowed in its entirety.

PLAN ADMINISTRATOR'S OPPOSITION

Focus Management Group USA, Inc., Plan Administrator, ("Plan Administrator") filed an Opposition on January 23, 2020. Dckt. 1091. Plan Administrator opposes on the basis that:

A. The Confirmed Plan expressly disallowed Creditor's claim.

B. Creditor received notice of the proposed plan that disallowed its claim in time to file a motion to allow a late-filed claim or otherwise object to disallowance of its claim prior to confirmation of the plan and did not do so.

C. Confirmation of the Plan precludes the relief requested by Creditor.

D. The Motion is an improper collateral attack on a confirmed Plan.

E. Under Ninth Circuit authority Creditor cannot relitigate the disallowance as the Plan has been confirmed. In *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995), the Ninth Circuit held that "Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been

raised pertaining to the plan are entitled to *res judicata* effect." Furthermore, "A final order confirming a Chapter 11 plan bars litigation of all issues that could have been raised in connection with confirmation. This res judicata effect extends to both claims that were actually litigated and claims that could have been raised in the confirmation proceedings." *In re Landmark West*, LLC, 2015 Bankr. LEXIS 4081 (Bankr. N.D. Cal. Dec. 2, 2015) (citations omitted).

F. Creditor acknowledges it contacted current counsel in July 2019. It did not object to the Plan, which expressly disallows it claim, prior to its confirmation on September 15, 2019.

G. Creditor now requests to have its claim deemed timely notwithstanding that Creditor was properly and timely served with the proposed Plan and disclosure statement, received proper and timely notice of the confirmation hearing, had sufficient time to oppose the plan and its disallowance of the claim, and did not object to the disallowance. The Motion should be denied because Creditor cannot relitigate the disallowed claim.

H. Even if confirmation of the Plan does not preclude the relief requested, Creditor has not shown excusable neglect.

I. Citing *Pioneer,* the Ninth Circuit stated that "[t]o determine whether a party's failure to meet a deadline constitutes 'excusable neglect,' courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Ahanchian c. Xenon Pictures, Inc.*, 624 D.3d 1253, 1261 (9th Cir. 2010)

J. The motion fails to show excusable neglect on the basis that Creditor states that current counsel was contacted in July 2019, yet nothing was done for five (5) months and allowing Creditor's claim would material impact other unsecured creditors under the Plan as it is approximately 9% of the current general unsecured claim pool.

CREDITOR'S REPLY

Creditor filed a Reply on January 30, 2020. Dckt. 1096. In its reply, Creditor addresses the delay in filing the proof of claim discussed by both Debtor and Plan Administrator in their oppositions. Creditor explains that after contacting current counsel he had to withdraw his retainer because one of his 12-year old twin daughters had been detained in Mexico. This meant that he had to send money to Mexico to support her and was forced to hire an immigration attorney. This went on for approximately 16 months, simultaneously with the present bankruptcy case. The daughter was allowed to return home with Creditor's family in August 2019, one month before the plan was confirmed.

Additionally, Creditor asserts in the Response that Creditor's Principal is unable to read or speak English. For both Declarations (Dckts. 1069 and 1097) certifications of translators are attached.

Creditor's prior counsel apparently received notice of the bankruptcy but not file a claim on its behalf nor did they advise Creditor that he needed to preserve its claim through the bankruptcy proceeding. At the same time, Creditor's company was going through financial difficulties, trying to pay his employees and his family suffering from the stress and devastation of the family separation with no definitive time frame or if his daughter would be allowed to return home.

Creditor contends that looking at the totality of the circumstances, mainly Mr. Eguiluz's personal and financial issues, there is excusable neglect and the court should allow the claim. Further arguing that there is no prejudice that warrant denial of th emotion because no interim distributions have been made and Creditor should be compensated for all the expenses Creditor has had to incur after Debtor; failed to pay for work Creditor's employees completed.

Creditor argues that the only possible prejudice would be that allowing the claim would result in Debtor's reduction of surplus dividend after the sale of sufficient property to pay the claims.

Creditor argues that his request to allow the claim is not bar by *res judicata* because under that doctrine the judgment must involve the same parties. Creditor was not represented in the bankruptcy until after the Plan was confirmed. Creditor did not participate and did not have reasonable opportunity to object. Moreover, Creditor is not challenging the Plan but requesting that its claim be allowed as timely filed so that it may be included under the general unsecured claims class.

Creditor further asserts that neither Debtor nor Plan Administrator cite any case in which a late claim should not be allowed to be filed where the confirmed plan provides for unsecured claims to be paid in full and there are millions of dollars in excess property to be distributed to the debtor as surplus.

Finally, Creditor argues that the interests of equity and justice require that the court allow the late claim based on since excusable neglect of the creditor, since there will be no prejudice to the other creditors.

APPLICABLE LAW

Rule 3003 provides for the Filings of Proofs of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases. Specifically, Rule 3003(c) states the following:

> (c) Filing Proof of Claim.
>
> > [. . .]
> >
> > (3) Time for Filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).

F.R.B.P. 3003.

As discussed in 9 Collier on Bankruptcy P 3003.03 (16th 2019), the Supreme Court has placed the Federal Rule of Bankruptcy Procedure 9006(b) excusable neglect standard as an overlay to the Rule 3003(c)(3) relief:

> Likewise, after the passage of the bar date, an extension may be granted upon a showing of cause. Although Rule 3003(c)(3) specifies that the time for filing a proof of claim may be extended for cause, the Supreme Court (in *Pioneer Inv. Servs.*] has adopted the excusable neglect standard without considering whether Rule 3003(c)(3) provides for a test different from Rule 9006(b). However, as interpreted by the Court, application of the excusable neglect standard includes consideration of factors, such as prejudice to the debtor, which some courts had previously determined to be beyond the scope of the Rule 9006(b) analysis.

9 Collier on Bankruptcy P 3003.03[b].

In *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489 (1993), affirming the Court of Appeals for the Sixth Circuit, the Supreme Court, in a five-to-four decision, ruled that a court may find that a creditor's failure to file a proof of claim by the bar date was due to excusable neglect when it has considered all of the relevant circumstances, including danger of prejudice to the debtor; the length of the delay; the reason for the delay and whether such delay was in the control of the party filing the late claim; the possible impact of the delay on the judicial proceedings; and whether the party filing the late claim acted in good faith.

DISCUSSION

The deadline for filing a proof of claim in this matter was May 16, 2018. Creditor's Proof of Claim was filed on December 10, 2019 - nineteen months later. A look at what happened between those two dates should provide some clarity.

Creditor confirms that it was aware of Debtor's bankruptcy sometime on or around March 2018, when it received notice of the bankruptcy's automatic stay on the eve of trial. *See* Eguiluz Declaration, ¶9 and Motion, ¶4. Moreover, Creditor's Principal testifies that Prior Counsel, Brunn and Flynn, informed him of the bankruptcy and that they should act by filing for relief from the automatic stay. *Id.* Creditor testifies that Brunn & Flynn requested a retainer but they did not hire them because Creditor could not afford it. *Id.* Nevertheless, this constitutes notice. Debtor was told that Debtor's bankruptcy and that actions needed to be taken.

What is not discussed is whether Prior Counsel Brunn and Flynn addressed with Creditor the simple filing of a proof of claim.

Thus, the evidence presented by Creditor is that it and its Prior Counsel had actual notice of the Bankruptcy Case. Further, that some action needed to be taken in light of the Bankruptcy Case being filed.

Then, Prior Counsel filed a change of address for Creditor in Debtor's bankruptcy case. Creditor directly received notices regarding Debtor's case following the May 31, 2018, change of address filed for Creditor by Prior Counsel. Dckt. 368. Creditor's Principal testifies that after this change of address he began to receive mail from the bankruptcy court regarding Debtor's case. Eguiluz Declaration, ¶10. Therefore, as early as May or June of 2018, Creditor had notice not only of this Bankruptcy Case, but service of motions, plans, and other pleadings. Creditor undisputedly had actual notice of this Bankruptcy Case. This constitutes actual notice of the bankruptcy case.

Looking at the post-May 31, 2018 pleadings filed and served on Creditor in this Bankruptcy Case, these pleadings include:

Proposed Plan, Proposed Disclosure Statement and Notice of July 18, 2019 Hearing on approval of Disclosure Statement

Certificate of Service filed on June 6, 2019; Dckts. 828, 829.

Notice of September 10, 2019 Hearing on Confirmation of Proposed Plan, Order Approving Disclosure Statement, Disclosure Statement, and Proposed Plan.

Certificate of Serviced filed on July 30, 2019; Exhibit M, Dckt. 871.

The Disclosure Statement and Proposed Chapter 11 Plan served on Creditor specifically stated that the Plan disallowed Creditor's claim in its entirety for failure to timely file a claim. This Disclosure Statement and Chapter 11 Plan were received by Creditor first in June 2019, and then in August 2019 with the notice of the September 2019 confirmation hearing. Yet, Creditor did nothing for six months from first having notice of the Chapter 11 Plan and the terms disallowing its claim, and three months after the Chapter 11 Plan was confirmed.

Creditor argues that there was excusable neglect on their part. Creditor seems to shift the blame to Prior Counsel, stating that the Prior Counsel requested a retainer to represent Creditor in the Bankruptcy Case. Creditor's principal testifies that Prior Counsel "apparently did not do anything in the bankruptcy court to preserve my claim." Eguiluz Declaration, ¶9.

Creditor's Principal further testifies that Prior Counsel did not advise him that he needed to file a claim in the bankruptcy court in order to preserve his claim. *Id.* Principal also testifies that he did not know that there was a claim bar date. *Id.*

In *Pioneer*, the Court considered several factors, one of which is the reason for the delay and whether such delay was in the control of the party filing the late claim. Here, as explained above, Creditor had notice. Creditor took at the very least six months to assert its rights after receiving actual notice of Debtor's bankruptcy. Creditor had control over this delay as it knew of the bankruptcy, contacted current counsel, but yet, the proof of claim was not failed until five months later. What the court sees is Creditor's inexcusable neglect at allowing time to pass without asserting its rights.

Creditor further asserts that its more than $500,000 claim is of small consequence to this case as this will be a surplus case. $500,000 is not a "small consequence."

Consideration of Excusable Factors

In *Pioneer Inv. Servs. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), the Supreme Court discussed some general factors used in considering in allowing the late filing of claims. These include:

(1) whether granting the delay will prejudice the debtor;

On this factor, there is a confirmed Chapter 11 Plan in this case. The terms of the Plan, for which Creditor had notice, that the asserted claim of Creditor is disallowed as a matter of the Federal Rule of Bankruptcy Procedure, stating in Footnote 2 on page 19 of the sixty-three page Plan, to which an additional seventy-three pages of exhibits are attached:

> 2 The Claim of the El Che Corporation was scheduled as disputed, the El Che Corporation did not timely file a proof of Claim, and the El Che Corporation has not yet filed a proof of Claim. Hence, the Claim is disallowed. See Fed. R. Bankr. P. 3002(a), 3003(c)(2).

Chapter 11 Plan, Dckt. 860 at 19 (in the same 10 point font as used in the plan footnote).

Debtor scheduled Creditor's claim. Debtor disputed creditor's claim. Debtor had notice sent to Creditor through the attorneys representing Debtor in the state court action. Notices and information about the bankruptcy case continued to go to Creditor's counsel until a change of address was fled. After that, Debtor continued to receive notices, motions, and pleadings, including the proposed Plan and Disclosure Statement and the approved Disclosure Statement and Plan set for confirmation, all of which include the language that Creditor's claim was disallowed as provided in the Federal Rule of Bankruptcy Procedure.

Debtor sought, litigated, and confirmed the Chapter 11 Plan. Three months after confirmation is concluded and six months after unequivocally receiving notice of the Plan and that its claim was disallowed by operation of law, Creditor comes in to assert the right to be paid more than $500,000.

In the Opposition, the Debtor states that the prejudice consists of:

> 1. All creditors with unsecured claims will have their interim payments reduced if Creditor also receives interim payments.
>
> 2. Creditor has been dilatory in prosecuting its rights, therefore such is "to the prejudice of all other parties."

Opposition, p. 7:25-27, 8:3-5; Dckt. 1087.

In the Opposition filed by Focus Management Group, USA, Inc., the Plan Administrator, the prejudice to the Debtor, Plan or other creditors is not articulated.

As to this factor, it may tip slightly in favor of the Debtor in that the time, money, and expense has gone into a Plan. Creditors moved forward with voting based on there being no claim from Creditor, it appearing that Creditor was not challenging the scheduling of the claim as disputed.

If allowed, then monies will be diverted from the Plan distribution to the claim objection litigation (presuming that the Debtor still disputes the obligation) reducing the payments to creditors, as well as ultimate surplus to Debtor at the end of the day.

(2) the length of the delay and its impact on efficient court administration;

The evidence is undisputed that Creditor acknowledges having actual knowledge of the bankruptcy case as early as March 2018 when the filing of the bankruptcy case disrupted the state court litigation. This actual knowledge was not merely to the principal of the Creditor, but Creditor's Prior

Counsel prosecuting the civil action against the Debtor. The bankruptcy case was expressly discussed and the need for Creditor to take action in the case advised by Creditor's Prior Counsel. Though evidence is presented that Prior Counsel addressed the issue of the relief from the automatic stay being necessary to continue in the state court action, no mention is made of the "simple task" of such counsel completing a proof of claim form and attaching a copy of the state court complaint to be filed within the deadline for filing claims.

Creditor's Principal acknowledges that he consciously did not take action in light of the demands for fees from his Prior Counsel. Creditor's Principal also discusses serious life events which strained his finances further from the strain he states from the asserted obligation owed by Debtor.

But this does not change that twenty-one months and the confirmation of the Chapter 11 Plan floated by before Creditor took any action. During this time not only the Debtor in Possession, prior to confirmation, and the Debtor, after confirmation, were moving forward and making decisions, but other creditors were making decisions on the Plan and there not being a $500,000+ claim being asserted by Creditor.

(3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;

Creditor argues that it did not have or did not want to pay the fees for counsel to represent it in the bankruptcy case. Though Creditor had actual knowledge to timely file its claim, it failed to act. It appears that Creditor did not seek out or ask its Prior Counsel to refer it to a bankruptcy attorney to see what needed to be done so its asserted right to $500,000+ did not get lost. Such was a very simple act, filing a proof of claim.

(4) whether the creditor acted in good faith;

From the evidence presented, it does not appear that Creditor acted with an evil, malevolent intent. Creditor's Principal was distracted by family events, but appears to have been able to keep the Creditor's business running. Creditor's failure to file the proof of claim was not merely inadvertent, but done consciously disregarding the Bankruptcy Case and its asserted right to be paid more than $500,000.

and

(5) whether clients should be penalized for their counsel's mistake or neglect

On this point, Creditor did not engage counsel to represent it in the Bankruptcy Case. Creditor did not want to pay the retainer (of some unstated amount). The Motion does not assert that there was a mistake or neglect by Creditor's counsel. Presumably, such would be the Prior Counsel who advised Creditor that relief from the stay would be needed.

Ruling on Motion to File Late Claim

The court has continued the hearing to allow the Parties the opportunity to engage in settlement negotiations.

Tentative Denial Without Prejudice of Countermotion

As for Debtor's "Countermotion" to disallow the claim section of his Opposition, the court first notes that a "countermotion" must be filed as a separate matter with its own docket control number. L.B.R. 9014-1(c)(4), (i). To the extent this is a Countermotion, it needs to be filed as a separate pleading and contested matter.

However, this requested relief, disallowance of a claim, does not sound in the nature of a countermotion, but an objection to claim. Objections to claim are governed by Federal Rule of Bankruptcy Procedure 3007 and Local Bankruptcy Rule 3007-1. If such relief is necessary, it can be sought by such an objection.

December 17, 2020 Hearing- Motion to Approve Compromise

At the hearing, the court having authorized a settlement that resolves all issues in this Motion, it is dismissed without prejudice.

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 for Allowing the Filing of Claim After the Expiration of the Bar Date filed by El Che Corporation having been presented to the court, the court having approved a settlement pursuant to a separate motion that resolves all issues in this Contested Matter, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed without prejudice.

10. 18-90029-E-11 FWP-4 | **JEFFERY ARAMBEL** **Pro Se** | **CONTINUED MOTION TO SELL FREE AND CLEAR OF LIENS** **10-22-20 [1215]**

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 in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on October 22, 2020. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

In light of the specific facts and circumstances relating to this Motion and the input of the Parties in Interest, the court shortens the notice period to the fourteen days provided.

The Motion Approving Auction Sale Format and Bidding Procedures was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, 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. No opposition was stated at the hearing.

The Motion Approving the Sale and the Auction Sale Format and Bidding Procedures is xxxxx.

Request to Dismiss Motion

On December 16, 2020, the Plan Administrator filed a Required to Withdraw the Motion to Sell. The court construes this to be a motion to dismiss without prejudice as provided in Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 7041, 9014. The Plan Administrator reports that no overbids were presented and that the Buyer has now elected to not proceed as provided in Section 4 of the Purchase and Sale Agreement.

At the hearing, xxxxxxx

REVIEW OF THE MOTION

Pursuant to the terms of the confirmed Chapter 11 Plan in this case, Focus Management Group USA, Inc., the Plan Administrator, ("Movant") has filed a Motion requesting the following relief from the court:

A. A "Bidding Procedures Order" that:

1. Approves the bidding procedures for the sale of the Property (identified below).

B. A "Sale Order" that

1. Approves the sale of the Real Property to Greenlaw Acquisitions, LLC a California limited liability company and Lewis Land Developers, LLC, a Delaware limited liability company (collectively the "Buyer") for $30,539,399;

2. The above approved sale is subject to overbids as provided in the bidding procedures, and includes a breakup fee for Buyer if there is a successful overbidder;

3. The sale is approve pursuant to 11 U.S.C. § 363(b) and § 363(f) [free and clear of liens and encumbrances]; and

4. Authorizes the Movant to pay or reserve from the sales proceeds costs, expenses, commissions, and the net proceeds from the sale.

The real property that is the subject of the sale is identified as:

± 343.25 acres of land: APN: 021-022-332, APN: 021-022-034
APN: 021-022-041, APN: 021-022-042
APN: 021-022-055, APN: 021-022-059
APN: 021-022-061, APN: 021-022-062

("Property").

The proposed purchaser of the Property is Greenlaw Acquisitions, LLC a California limited liability company and Lewis Land Developers, LLC, a Delaware limited liability company, and a summary of terms of the sale are (the complete terms of the Purchase and Sale Agreement ("PSA") are Exhibit 1, Dckt. 1219):

A. Buyer has agreed to purchase the Property for the sum of $30,539,399,

B. The sale is based upon an "all cash" offer that is scheduled to close on or before the date that is thirty (30) days after the date Buyer delivers its Notice of Feasibility Approval.

C. Proposed sale of the Property is on an As-Is/Where-Is basis.

D. A Break-Up Fee of 2% of the original gross purchase price of $30,539,399 (which would total $610,787,98) shall be paid to the Buyer, intended to compensate the Buyer for its significant costs incurred and time and energies expended in completing its due diligence and related investigations concerning the Property, in negotiating and drafting the PSA, and otherwise to bring the sale of the Property before the Court.

E. The Estate's listing agreement with Cushman provides for the Estate to pay a broker's commission of 5% of the gross purchase price (the "Commission"), with 2.5% of the commission to be shared with a broker for an overbidding buyer.

F. The Movant Administrator estimates that closing costs and transfer taxes will not exceed 0.5% of the gross purchase price.

G. The Movant estimates the taxes attributable to this transaction based upon the Buyer's purchase price to be $8,982,086. Furthermore, the transaction is also subject to a 1% U.S. Trustee fee, or $305,394. The Movant requests authority to reserve the income tax and pay the U.S. Trustee fees from the sale proceeds.

H. The auction for presentation of overbids will be conducted via Zoom on December 16, 2020.

Bidding Procedures

November 5, 2020	Deadline for Brighthouse and Summit Consents to Sale of the Property
December 3, 2020	Deadline for Objections to the proposed sale of the Property
December 9, 2020	Deadline for parties to submit Proposed Agreement and Financial Bona Fides Submission Deadline
December 9, 2020	Bid Deadline, Including Required Deposit
December 14, 2020	Notification of Qualified Bid Status:
December 16, 2020	Auction (by Zoom)
December 17, 2020	Sale Hearing
TBD	Closing Date – By January 14, 2021

The proposed overbidding procedures are (the complete Bidding Procedures are Exhibit 2, Dckt. 1219):

A. Auction For Presentation of Overbids. The Movant proposes to conduct the Auction of the Property by Zoom on December 16, 2020.

B. Bidder Qualification. A Potential Bidder must deliver to the Movant, at least eight days prior to the Auction, a cashier's check or wire transfer (with evidence of confirmation and acceptance into escrow), payable the Plan Administrator's counsel's for deposit into its trust account, in the amount of $710,800 towards the Potential Bidder's purchase of the Property, to be returned to such bidder in the event that such bidder is not the Successful Bidder or Back-Up Bidder at the Auction, and to constitute the bidder's nonrefundable deposit under the terms of the respective Proposed Agreement if the bidder is the successful bidder at the Auction. Potential Bidders must provide evidence of prospective buyer's source of capital or other financial ability to complete the contemplated transactions, the adequacy of which the Plan Administrator will determine in its sole discretion, with the consultation of the Reorganizing Debtor, and with the consultation with the Notice Parties.

C. Written Bids Conforming to Proposed Agreement and Bidding Procedures. All initial bids must be at least $710,800 higher than the purchase price agreed upon with the Buyer. Provided, however, that the Proposed Agreement shall not include a Break-Up Fee. Qualified Bids shall not be conditioned on (i) the outcome of unperformed due diligence by the bidder (ii) obtaining financing, or (iii) any other conditions other than (a) being selected as the Successful Bidder or Back-Up Bidder, (b) Plan Administrator Approval, (c) the consent of the Secured Consent Parties for the sale, and (d) Bankruptcy Court Approval.

D. Overbidding. Qualified Bidders may submit overbids at the Auction. The first initial Subsequent Bid must be at least $710,800 higher than the purchase price agreed upon with the Buyer. Each incremental Subsequent bid shall be at least $100,000 over the Starting Bid or the Leading Bid.

E. Prompt Closing. The Successful Bidder must be able to close the sale on or before the later of January 14, 2021, or 15 days after the entry of an order approving the sale.

F. Successful Bid. The Plan Administrator shall select the highest and best overbid as the Successful Bid and the Back-Up Bid, if any, based upon its reasonable judgment in consultation with the Reorganizing Debtor.

G. Backup Buyer. The bidder with the second highest or otherwise best bid (as determined by the Plan Administrator in the exercise of its business judgment) at the Auction the Property shall be required to serve as a back-up bidder (the "Back-Up Bidder") and keep such bid open and irrevocable until closing with the Successful Bidder or as otherwise provided in the Bidding Procedures.

H. Break-Up Fee. The Plan Administrator seeks approval of a break-up fee of an amount equal to two percent (2%) of the Purchase Price that is to be paid to Buyer from the proceeds of the sale to the successful bidder as a

condition precedent to close of that sale. This fee was negotiated and required by the Buyer to compensate the Buyer for its costs incurred and time and energies expended in completing its due diligence and related investigations relating to the Property.

I. Reservation of Rights. The Plan Administrator, after consultation with the Reorganizing Debtor (a) may determine after each round of bidding at the Auction which Qualified Bid, if any, is the highest or otherwise best offer and the value thereof, (b) may reject, at any time, any bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the Transaction, or (iii) contrary to the best interests of the Reorganizing Debtor's estate, and stakeholders as determined by the Plan Administrator in consultation with the Reorganizing Debtor, and (c) except as otherwise specifically set forth herein, may modify the Bidding Procedures or impose, at or prior to the Auction, additional customary terms and conditions on the Transaction.

J. As Is, Where Is, With all Faults. The sale of the Property will be on an "as is, where is, with all faults" basis and without surviving representations or warranties of any kind, nature, or description except to the extent expressly set forth in the PSA or Proposed Agreement, as applicable, and the schedules thereto, with respect to the Successful Bidder.

K. Bifurcated Relief. The Plan Administrator proposes bifurcated relief, such that the PSA and Bidding Procedures be approved, and the Secured Consent Parties consent be delivered, in advance of the Sales Procedure Hearing, and that the final sale terms and buyer be approved at the Sale Hearing.

Requested Sale Free and Clear of Liens

The Reorganizing Debtor and Movant seek to sell the Property free and clear of any liens, claims, interests, or other encumbrances as follows:

Priority of Lien	Claim Holder	Satisfaction and Release
Tax	Stanislaus County Tax Collector	The Plan Administrator seeks authority to pay Stanislaus County Tax Collector from the proceeds of the sale. Therefore, the property tax liens shall be satisfied and released as paid in full.
1st	Brighthouse	Brighthouse holds a secured claim against the Property allowed by the Plan pursuant to a deed of trust recorded November 9, 2012 as Instrument No. 2012-0100449-00. The Plan Administrator seeks authority to pay Brighthouse's remaining allowed claim from the proceeds of the sale. Therefore, Brighthouse's liens shall be satisfied and released as paid in full.
2nd 3rd	Summit	Summit also holds secured claims against the Property: (i) as beneficiary by assignment pursuant to a deed of trust recorded February 28, 2014 as Document No. 2014- 0012421, (ii) as original beneficiary pursuant to a deed of trust recorded April 19, 2017 as Document No. 2017-028232, and (iii) as original beneficiary pursuant to a deed of trust recorded March 27, 2020 as Document No. 2020-022079. The Plan Administrator has sought and will continue to seek the consent of Summit to Summit's release of its liens on the Property to the extent not paid in full. The Plan Administrator expects that Summit will so consent to the sale of the Property free and clear of their liens provided that the net sale proceeds remaining after paying the closing costs, Commissions, real property taxes, U.S. Trustee Fees, and income tax reserve are paid to Summit subject to the allocation provisions of Section 6.6 of the Plan.

The Motion also seeks to sell the Property free and clear of the lien of the following creditors for who Movant asserts their secured claims have already been paid in full:

Disputed Liens or Other Interests As To Certain Portions of the Property	**Basis for Disputes according to Plan Administrator and Reorganized Debtor**
(i) Mid Valley Services, Inc., (ii) Lou Telesmanic and Joanne Telesmanic, husband and wife as joint tenants; Christopher L. Telesmanic (iii) Sam A Borno and Ranna A. Borno, husband and wife, as joint tenants (iv) Sudeep Singh FLLLP (v) Kevin and Janice Delaney Holdings, LLC, a California limited liability company (vi) Golden Gulch Dairy, LLC, a California limited liability company (vii) Lehman Family Farms, Inc., a California corporation (viii) Jesse J. Spain and Bonnie D. Spain, husband and wife as joint tenants (ix) Pensco Trust Company Custodian FBO Sudeep Singh IRA (The above collectively, (i) through (ix) are referred to herein as the "Mid Valley Parties #1") (x) Mid Valley Services, Inc. Retirement Trust Account (xi) Russell Spain (xii) Mid Valley Services, Inc. 401(k) plan (xiii) Gregory A. Kilgore and (xiv) Megan K. Kilgore, husband and wife as joint tenants (xv) Kevin Kummerfield and Sally Kummerfield, husband and wife as joint tenants (The above collectively, (x) through (xv) are referred to herein as the "Mid Valley Parties #2")	The obligations secured by interests of the Mid Valley Parties #1 and #2 have been paid in full. Mid Valley Parties #1 and #2 did not file a proof of claim in this case or otherwise assert an interest in the Property. Therefore, the Reorganizing Debtor contends that the Mid Valley Parties #1 and #2 Deeds of Trust are void and should be reconveyed. If full reconveyances by the Mid Valley Parties #1 and #2 are not promptly recorded for the Mid Valley Parties #1 and #2 Deeds of Trust, the Reorganizing Debtor and/or Plan Administrator intends to formally demand a reconveyance of the Mid Valley Parties #1 and #2 Deeds of Trust. The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the Mid Valley Parties #1 and #2 Deeds of Trust pursuant to Bankruptcy Code section 363(f)(4) with $0.00 reserved for the Mid Valley DOT #1 and #2.

Disputed Liens or Other Interests As To Certain Portions of the Property	Basis for Disputes according to Plan Administrator and Reorganized Debtor
(xvi) Del Puerto Water District as Lessor ("DPW")	The Reorganizing Debtor asserts that this lease has expired and terminated according to its own terms and/or is otherwise unenforceable. The property was detached from the water district after the 2014 Annexation into the City of Patterson. The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the DPW Lease pursuant to Bankruptcy Code section 363(f)(4) with $0.00 reserved for the DPW Lease.
(xvii) Del Puerto Water District	The Reorganizing Debtor asserts that DPW Supply Contract is unenforceable as expired and terminated according to its own terms and/or is otherwise unenforceable. The property was detached from the water district after the 2014 Annexation into the City of Patterson. The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the DPW Supply Contract pursuant to Bankruptcy Code section 363(f)(4) with $0.00 reserved for the DPW Supply Contract.
(xviii) Odell Hale and Lynee Hale as Lessor and Communication Systems Development, Inc. ("CSD") as Lessee	The Reorganizing Debtor asserts that this lease has expired and terminated according to its own terms and/or is otherwise unenforceable as having been made a prior owner or someone outside the title to the Property. The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the CSD Lease pursuant to Bankruptcy Code section 363(f)(4) with $0.00 reserved for the CSD Lease.
(xix) American Tower Systems as lessor and VIA Wireless LLC as Lessee	The Reorganizing Debtor asserts that this lease has expired and terminated according to its own terms and/or is otherwise unenforceable as having been made a prior owner or someone outside the title to the Property. The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the VIA Lease pursuant to Bankruptcy Code section 363(f)(4) with $0.00 reserved for the VIA Lease.

(xx) LBA Realty LLC, a Delaware limited liability company, as assigned to LBA RV-Company XXVII, LP, a Delaware limited partnership	A certain Purchase and Sale Agreement between the Reorganizing Debtor as seller and LBA Realty LLC, a Delaware limited liability company, as assigned to LBA RV-Company XXVII, LP, a Delaware limited partnership ("LBA"), provides for issuance of a right of first refusal letter to LBA ("ROFR Notice"). On October 5, LBA's counsel responded that it contends the ROFR Period set forth in the Purchase and Sale Agreement expired and that the Reorganizing Debtor and the Plan Administrator are free to proceed as they see fit with the Buyer's offer and any future offers. Moreover, more than seven business days have passed since issuance of the ROFR Notice and LBA has not elected to exercise its right to purchase the Property. Therefore, the sale of the Property shall proceed based upon LBA's ROFR opportunity having been satisfied; and the Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the ROFR Memorandum pursuant to Bankruptcy Code section 363(f)(4) with $0.00 reserved.

The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

> (f) The trustee[, debtor in possession, or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(1)–(5).

For this Motion, Movant has established grounds based on 11 U.S.C. § 363(f)(5) for the Stanislaus County Tax Collector and Brighthouse Life Insurance, Co. by paying those secured claim in full from the sale proceeds through escrow.

For the Summit secured claims, Movant states that the consent of Summit will be provided, thus allowing the court to order the sale free and clear as provided in 11 U.S.C. § 363(f)(2).

For the remaining claims, Movant has stated grounds showing that each lien, encumbrance, or interest is in *bona fide* dispute, providing a basis for a sale free and clear, with the liens, encumbrances, and interests attaching to the sale proceeds to the same extent, validity, and priority as they existed in the Property sold pursuant to order of the court.

DISCUSSION

At the hearing, the Plan Administrator reported that the buyer has taken the sale seriously, will get Brighthouse paid in full and Summit reduced substantially. Once Summit gets paid $2,000,000, then further monies subject to Summit's lien are split with the creditors holding general unsecured claims.

Mid-Valley has prepared and will be recording reconveyances, so need not make free and clear, resolving the dispute as to that party.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the Property has been extensively exposed to the market (for over three years) along with the rest of the Arambel Business Park and this is the best offer the estate has received. Moreover, the Plan Administrator projects that the sale will generate significant proceeds for payment of secured claims. The Property is not generating any revenue for the Estate but continues to accrue expenses such as property taxes, insurance, etc.

Movant has estimated that a five (5) percent broker's commission from the sale of the Property, with 2.5% of the commission to be shared with a broker for a buyer. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than five (5) percent commission.

The court grants the Motion and authorizes the sale of the Property to Greenlaw Acquisitions, LLC a California limited liability company and Lewis Land Developers, LLC, a Delaware limited liability company or nominee ("Buyer") for $30,539,399, on the terms and conditions set forth in the Purchase and Sale Agreement, Exhibit 1, Dckt. 1219, and as further provided below.

The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.

The Property is sold free and clear of the lien of the following creditors asserting a secured claim, pursuant to 11 U.S.C. § 363(f)(2), (4), and 5, of the following interests, with the lien of such creditor, if the creditor is not paid in full through the sale escrow, attaching to the proceeds of the sale in the same amount, extent, validity, and priority as it exists in the Property sold:

11 U.S.C. § 363(f)(5) - Compelled to Release Under Non-Bankruptcy Law

The liens of Stanislaus County Tax Collector and Brighthouse Life Insurance, Co., whose claims shall be paid in full from the sale proceeds through escrow.

For the Brighthouse Life Insurance Company liens, it has filed a response stating consent to the sale, as follows:

> Brighthouse consents to the Motion including the form of Bidding Procedures and proposed sale, subject to entry of an order authorizing payment of net proceeds of the sale (after reasonable and authorized expenses) to Brighthouse as requested in the Motion and updated in preliminary closing statements received by Brighthouse. Brighthouse does not intend to credit bid at the Auction.
>
> At the time of this filing, Brighthouse's claim is no less than $6,312,089.57. However, the amount of Brighthouse's claim cannot be finally fixed at the sale hearing because: (a) interest, fees, and expenses (including attorneys' fees) continue to accrue; (b) Brighthouse has made and continues to make Plan Funding Loans as provided the Plan of Reorganization confirmed in this case; (c) the closing date has not been finally determined; and (d) other sales of Brighthouse's collateral are pending and each closing will impact the amount of Brighthouse's remaining claim.

Response, Dckt. 1227.

11 U.S.C. § 363(f)(2) - Consent

The liens of Summit for which consent will be provided. Summit filed a Response, stating it's consent as follows:

> Summit consents to the Transaction; provided that the Bidding Procedures and the Bidding Procedures Order (a) are entered by the Court in substantially the same form and substance as the proposed Bidding Procedures and Bidding Procedures Order submitted with the Motion; and (b) provide that Summit's right to credit bid at the auction shall be limited solely to the right to submit a credit bid as a Back-Up Bid behind the Successful Bid and all other Back-Up Bids. Summit's consent to the Transaction has been made with the assurances of the Plan Administrator that the Auction will not proceed without a Stalking Horse Bid.

Response, Dckt. 1228.

11 U.S.C. § 363(f)(4) - Interest Subject to Bona Fide Dispute

The Motion requests that the following liens and interests be stripped from the Property sold because Movant states they are in *bona fide* dispute:

> (i) Mid Valley Services, Inc.,
>
> (ii) Lou Telesmanic and Joanne Telesmanic, husband and wife as joint tenants; Christopher L. Telesmanic
>
> (iii) Sam A Borno and Ranna A. Borno, husband and wife, as joint tenants
>
> (iv) Sudeep Singh FLLLP
>
> (v) Kevin and Janice Delaney Holdings, LLC, a California limited liability company

(vi) Golden Gulch Dairy, LLC, a California limited liability company

(vii) Lehman Family Farms, Inc., a California corporation

(viii) Jesse J. Spain and Bonnie D. Spain, husband and wife as joint tenants

(ix) Pensco Trust Company Custodian FBO Sudeep Singh IRA

(x) Mid Valley Services, Inc. Retirement Trust Account

(xi) Russell Spain

(xii) Mid Valley Services, Inc. 401(k) plan

(xiii) Gregory A. Kilgore and

(xiv) Megan K. Kilgore, husband and wife as joint tenants

(xv) Kevin Kummerfield and Sally Kummerfield, husband and wife as joint tenants

(xviii) Odell Hale and Lynee Hale as Lessor and Communication Systems Development, Inc. ("CSD") as Lessee

(xx) LBA Realty LLC, a Delaware limited liability company, as assigned to LBA RV-Company XXVII, LP, a Delaware limited partnership

Once stripped off, the Movant requests that they not be attached to the sales proceeds, and that $0.00 be allocated to each of these disputed liens and interests. The evidence presented for these bona fide disputes is the declaration of Juanita Schwartzkopf, a Senior Managing Director at Movant and the declaration of Jeffery Arambel, the Reorganized Debtor. Dckts. 1217 and 1218, respectively.

In his Declaration, the Reorganized Debtor provides factual testimony, and his legal conclusions why he has determined various asserted interests in the Property are void. He makes references to an "unrecorded lease" that somehow has shown up on a title report because a Memorandum of Lease was recorded. The Reorganized Debtor then states his legal conclusion that the lease had either expired or terminated, or is somehow otherwise unenforceable.

The Reorganized Debtor proceeds to dictate to the court his legal conclusions and findings that the various interests identified of record have either "expired and terminated according to its own terms and/or is otherwise unenforceable."

A sale authorized free and clear of liens and interests is not an adjudication of the rights and interests in the property being sold. It is not a shortcut deprivation of a persons property on a 28 day noticed motion. As discussed in Collier on Bankruptcy:

¶ 363.06 Sale Free of Liens or Interests; § 363(f)

Section 363(f) permits a sale of property of the estate free and clear of an interest in the property, including a lien, under a number of circumstances. It has long been recognized that the bankruptcy court has the power to authorize the sale of property free of liens with the liens attaching to the proceeds, with or without the consent of the lienholder. [1] Absent consent of the lienholder, the well-established rule was that the sale should not be held if it would not produce a surplus [2] unless there was a bona fide dispute concerning the validity of the lien. [3] This limitation was not likely of constitutional dimension. The creditor's only constitutional claim would be to the value of the collateral, [4] because any so-called right to control the collateral and to conduct a sale were remedies that bankruptcy might stay or abrogate. [5]

The Code makes no material change to the cases decided under the Bankruptcy Act on sales free and clear of liens but clarifies that other grounds for a sale free and clear may also exist.. . .

. . .

[5] Sale When Interest in Bona Fide Dispute; § 363(f)(4)

A sale may proceed free and clear of liens or interests if they are in bona fide dispute. [53] The trustee has the burden of demonstrating that a bona fide dispute exists. [54] To meet this burden the trustee must establish that there is an objective basis for either a factual or legal dispute as to the validity of the debt. [55] The court is not required to resolve the underlying dispute as a condition to authorizing the sale under this provision, but must determine that it exists. [56] In one case, however, the court held that a bona fide dispute did exist because the adverse interest holders disputed whether the sale could have been free and clear of their interests under a rent stabilization law. [57] Such post-hoc application of this paragraph could raise due process concerns.

1. *See Ray v. Norseworthy*, 90 U.S. (23 Wall.) 128 (128) (1875); *Van Huffel v. Harkelrode*, 284 U.S. 225, 52 S. Ct. 115, 76 L. Ed. 256 (1931); *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 58 S. Ct. 1025, 82 L. Ed. 1490 (1938), *reh'g denied*, *Wright v. Union Cent. L. Ins. Co.*, 305 U.S. 668, 59 S. Ct. 56, 82 L. Ed. 1490 (1938); *Allebach v. Thomas*, 16 F.2d 853 (4th Cir. 1927), *cert. denied*, 274 U.S. 744, 47 S. Ct. 590, 71 L. Ed. 1325 (1927).

2. *Reconstruction Fin. Corp. v. Cohen*, 179 F.2d 773 (10th Cir. 1950); *Hoehn v. McIntosh*, 110 F.2d 199 (6th Cir. 1940); *In re Miller*, 95 F.2d 441 (7th Cir. 1938).

3. *Coulter v. Blieden*, 104 F.2d 29 (8th Cir. 1939), cert. denied, 308 U.S. 583, 60 S. Ct. 106, 84 L. Ed. 488 (1939); *In re National Grain Corp.*, 9 F.2d 802 (2d Cir. 1926).

4. *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, 61 S. Ct. 196, 85 L. Ed. 184 (1940), *reh'g denied*, 312 U.S. 711, 61 S. Ct. 445, 85 L. Ed. 1142 (1941).

5. *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648, 55 S. Ct. 595, 79 L. Ed. 1110 (1935).

. . .

53. 11 U.S.C. § 363(f)(4).

54. *See Scherer v. Federal Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.)*, 159 B.R. 821, 828 (N.D. Ill. 1993) (citing *Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991)). In some situations it may be a third party that raises the issue of bona fide dispute. *See In re Gerwer*, 898 F.2d 730, 733 (9th Cir. 1990); *Scherer v. Federal Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.),* 159 B.R. 821, 828 (N.D. Ill. 1993).

55. *See In re Daufuskie Island Props*., LLC, 431 B.R. 626 (Bankr. D.S.C. 2010) (substantial history of significant litigation over validity of creditor's asserted interest); *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991); In re Collins, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995).

56. *See In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991).

57. *Cheslock-Bakker & Assocs. v. Kremer (In re Downtown Athletic Club of New York City, Inc.)*, 44 C.B.C.2d 342, 2000 U.S. Dist. LEXIS 7917 (S.D.N.Y. June 9, 2000).

3 Collier on Bankruptcy P 363.06 (16th 2020)

For the determination of the actual extent, validity, and priority of a lien or interest in property, an adversary proceeding is required to determine such title rights and interests. Fed. R. Bankr. P. 7001.

At the hearing, Movant addressed the propriety of the court ordering the sale free and clear of liens and interests, and then not providing adequate protection for such disputed liens and interests by having them attach to the sale proceeds until released or adjudicated as being invalid clouds on title (and awarding such damages, attorney's fees and costs, and statutory penalties (if any) as appropriate for the Plan Administrator or the Reorganized Debtor).

For the non-consenting interests, if not paid through escrow, such interests shall attach to the proceeds of the sale.

The Plan Administrator is authorized to pay a real estate broker's commission in an amount not more than five (5) percent of the actual purchase price upon consummation of the sale. The five (5) percent commission shall be paid to the broker, Blake Rasmussen of Cushman & Wakefield. If the Property is sold to an Overbidder and the successful overbidder is represented by another broker or the Buyer is represented by a broker, the 5.0% Commission will be split 50/50 by Cushman and the broker for the buyer.

The bidding procedures as set in Exhibit 2, Dckt. 1219, are approved, including:

1. Sale by Auction. The Plan Administrator proposes to conduct the Auction of the Property by Zoom on December 16, 2020.

2. Bidder Qualification. A Potential Bidder must deliver to the Plan Administrator, at least eight days prior to the Auction, a cashier's check or wire transfer (with evidence of confirmation and acceptance into escrow), payable the Plan Administrator's counsel's for deposit into its trust account, in the amount of $710,800 towards the Potential Bidder's purchase of the Property, to be returned to such bidder in the event that such

bidder is not the Successful Bidder or Back-Up Bidder at the Auction, and to constitute the bidder's nonrefundable deposit under the terms of the respective Proposed Agreement if the bidder is the successful bidder at the Auction. Potential Bidders must provide evidence of prospective buyer's source of capital or other financial ability to complete the contemplated transactions, the adequacy of which the Plan Administrator will determine in its sole discretion, with the consultation of the Reorganizing Debtor, and with the consultation with the Notice Parties.

3. Written Bids Conforming to Proposed Agreement and Bidding Procedures. All initial bids must be at least $710,800 higher than the purchase price agreed upon with the Buyer. Provided, however, that the Proposed Agreement shall not include a Break-Up Fee. Qualified Bids shall not be conditioned on (i) the outcome of unperformed due diligence by the bidder (ii) obtaining financing, or (iii) any other conditions other than (a) being selected as the Successful Bidder or Back-Up Bidder, (b) Plan Administrator Approval, (c) the consent of the Secured Consent Parties for the sale, and (d) Bankruptcy Court Approval.

4. Overbidding. Qualified Bidders may submit overbids at the Auction. The first initial Subsequent Bid must be at least $710,800 higher than the purchase price agreed upon with the Buyer. Each incremental Subsequent bid shall be at least $100,000 over the Starting Bid or the Leading Bid.

5. Prompt Closing. The Successful Bidder must be able to close the sale on or before the later of January 14, 2021, or 15 days after the entry of an order approving the sale.

6. Successful Bid. The Plan Administrator shall select the highest and best overbid as the Successful Bid and the Back-Up Bid, if any, based upon its reasonable judgment in consultation with the Reorganizing Debtor.

7. Backup Buyer. The bidder with the second highest or otherwise best bid (as determined by the Plan Administrator in the exercise of its business judgment) at the Auction the Property shall be required to serve as a back-up bidder (the "Back-Up Bidder") and keep such bid open and irrevocable until closing with the Successful Bidder or as otherwise provided in the Bidding Procedures.

8. Breakup Fee discussed below.

9. Reservation of Rights. The Plan Administrator, after consultation with the Reorganizing Debtor (a) may determine after each round of bidding at the Auction which Qualified Bid, if any, is the highest or otherwise best offer and the value thereof, (b) may reject, at any time, any bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the Transaction, or (iii) contrary to the best interests of the Reorganizing Debtor's estate, and stakeholders as determined by the Plan Administrator in consultation with the Reorganizing Debtor, and (c) except as otherwise specifically set forth herein, may modify the Bidding Procedures or impose, at or prior to the Auction, additional customary terms and conditions on the Transaction.

10. As Is, Where Is, With all Faults. The sale of the Property will be on an "as is, where is, with all faults" basis and without surviving representations or warranties of any kind, nature, or description except to the extent expressly set forth in the PSA or Proposed Agreement, as applicable, and the schedules thereto, with respect to the Successful Bidder.

11. Bifurcated Relief. The Plan Administrator proposes bifurcated relief, such that the PSA and Bidding Procedures be approved, and the Secured Consent Parties consent be delivered, in advance of the Sales Procedure Hearing, and that the final sale terms and buyer be approved at the Sale Hearing.

Break-Up Fee

Movant seeks approval of a break-up fee of in an amount equal to two percent (2%) of the Purchase Price that is to be paid to Buyer from the proceeds of the sale to the successful bidder as a condition precedent to close of that sale. This fee is stated to have been negotiated and required by the Buyer to compensate the Buyer for its costs incurred and time and energies expended in completing its due diligence and related investigations relating to the Property.

While this is a surplus estate and the break-up fee amount will come out of the Reorganized Debtor's pocket at the end of the day, a 2% break-up fee for the actual costs and expenses of Buyer in good faith entering into this Agreement to purchase the Property equals more than Six Hundred Thousand Dollars ($600,000). That seem like a substantial amount of "reasonable costs and expenses" relating to this Agreement.

The Motion offers little insight into what these more than $600,000 of reasonable costs are, but Movant does affirmatively state:

> This fee is intended to compensate the Buyer for its significant costs incurred and time and energies expended in completing its due diligence and related investigations concerning the Property, in negotiating and drafting the PSA, and otherwise to bring the sale of the Property before the Court. Arambel Decl. at ¶ 6; Schwartzkopf Decl. at ¶ 6.

Motion, ¶ 5; Dckt. 1215.

The Reorganized Debtor provides his recitation of the above statement from the Motion in paragraph 6 of his Declaration, apparently doing little more than reading the Motion. Declaration, ¶ 6; Dckt. 1217.

Juanita Schwartzkopf, a Senior Managing Director at Movant, also provides her recitation of the above statement from the Motion in paragraph 6 of her Declaration, apparently doing little more than reading the Motion. Declaration, ¶ 6; Dckt. 1218.

Seeing these verbatim recitations of these two witnesses in their declaration causes the court pause, and to wonder whether anything in either of their declaration is their actual testimony, or merely legal argument prepared by counsel.

At the hearing, the Plan Administrator explained that this was warranted due to the expedited review that the Buyer would have to do. This is because of the Plan Administrator's demand that escrow close quickly due to certain rights of the Plan estate expiring in early January 2021.

It appears unlikely that any other good faith bidder could show up at the auction and bid $35,000,000 or more without having conducted such review, so it does not appear likely that the breakup fee will be at issue.

However, if other buyers show up and no such "expedited review" is actually necessary, the court will revisit the testimony under penalty of perjury purporting of such, and the conduct of persons in creating such a transfer of more than $600,000 to buyer.

Supplemental Pleadings

The Plan administrator seeks a further hearing on the Motion for the court to amend its rulings at the November 5, 2020 hearing to include the proposed modifications to the PSA described below and affirm its rulings regarding the proposed sale to the Buyer as amended. Dckt. 1266. The PSA shall be amended to provide:

> 1. An increase in the purchase price by $1,607,336 from $30,539,399 to $32,146,735 based upon a price per square foot increase from $2.04 to $2.15 per square foot (the "Price Adjustment");
>
> 2. Confirmation that the breakup fee of 2% of the original purchase price shall not be increased as a result of this Price Adjustment;
>
> 3. Additional terms and clarifications to address the changes necessitated by the matters discussed in this Supplement and some transactional matters that have arisen since the PSA was executed.

The Plan Administrator provides the following updates for the court in her Declaration (Dckt. 1268):

> A. The Buyer has agreed to amend the purchase price of the Property to the sum of $32,146,735, subject to Bankruptcy Court approval and overbidding pursuant to the Bidding Procedures set forth in the Motion.
>
> B. The Buyer's present agreement to pay $32,146,735 based upon a price per square foot of $2.15 remains the best current firm offer the Reorganizing Debtor's estate has received.
>
> C. The Price Adjustment has been made because the Plan Administrator recently learned on November 13, 2020 that, unbeknownst to the Plan Administrator, the Buyer had submitted a letter of intent dated September 24, 2020 to purchase the Property for $32,146.735 based upon a price per square foot of $2.15 (the "Prior Offer").

D. The Buyer reduced the purchase price by 5% to $30,539,399 for a reduced price per square foot of $2.04 based upon the Buyer's understanding that the Reorganizing Debtor had accepted the Prior Offer with the caveat that the purchase price be reduced and in consideration for paying 5% of the amount of the Prior Offer to the Reorganizing Debtor's consultant, Joe Hollowell. The Buyer has provided the Plan Administrator with a copy of a contemporaneous email from the Buyer's Broker confirming this account as well as copies of the Prior Offer and other documents related to the proposed payment to Mr. Hollowell.

E. The Prior Offer and its terms were not disclosed to the Plan Administrator. Likewise, neither the price reduction nor the 5% payment to Joe Hollowell were disclosed to the Plan Administrator. Instead, the Reorganizing Debtor only provided the Plan Administrator with a copy of the Final LOI as if it were the first LOI received. The Final LOI does not reference the price reduction or payment to Joe Hollowell. And the Final LOI was the basis for the Plan Administrator's negotiation and acceptance of the PSA believing that the Final LOI was the highest and best terms offered by the Buyer to the estate.

F. The Plan Administrator recently learned that Mr. Hollowell's 5% fees of the purchase price had been denied by the court. See Civil Minutes, Dckt. 373.

G. Before November 13, 2020, neither Plan Administrator nor anyone else on behalf of the Plan Administrator was aware of the Prior Offer, its terms, or the proposed payment to Mr. Hollowell.

H. The Plan Administrator testifies that she is extremely troubled by the new developments, but requests, nonetheless, that the court reaffirm its ruling approving the proposed sale of the Property to the Buyer pursuant to the PSA as amended. The amendments increase the cash consideration from the sale by $1,607,336. This will increase the funds available to pay down Summit's secured claim by over $1 million and the estate's share pursuant to Section 6.6 of the Plan by over $100,000.

I. The Plan Administrator submits that it will be evaluating and pursuing further actions as appropriate regarding the new developments surrounding Reorganized Debtor's conduct.

Movant also provides the Declaration of Wilbur H. Smith, III, principal of Greenlaw Acquisitions, LLC, a California Limited Liability Company. Dckt. 1269. Mr. Smith testifies that he assumed the Plan Administrator had been informed regarding the side agreement for the payment by Buyer of a consultant fee to a consultant of Seller. He further testifies that negotiations concerning the potential purchase of the Property were communicated through the brokers: Cushman & Wakefield Blake Rasmussen, represented the Seller, and Kevin Dal Porto represented the Buyer. Once Mr. Smith received direct communications from Mr. Hollowell indicating that he was the Seller's consultant and was to be paid the 5% consultant fee, Mr. Smith consulted with his attorneys about the consultant fees being approved by the court. After the fee agreement was sent, Mr. Hollowell responded by telling Mr. Smith that Buyer was to

disregard the request for payment of the 5% fee. The communications between Mr. Hollowell and Mr. Smith were filed with the court as Exhibits 8 thru 11 and properly authenticated. See Dckt. 1270.

November 19, 2020 Hearing

At the hearing, the court granted the motion to modify the approval of the sale and to proceed with the bidding procedure.

Counsel for the Plan Administrator shall lodge with the court an order consistent with this ruling.

December 17, 2020 Hearing

At the hearing, xxxxxxxxxxxxxx

11. 18-90029-E-11 FWP-7 | **JEFFERY ARAMBEL** Pro Se | **MOTION FOR AUTHORITY TO ASSIGN CERTAIN UNEXPIRED LEASES AND DEVELOPMENT AGREEMENT RELATED TO SALE OF 343 ACRES (BUSINESS PARK)** **11-12-20 [1255]**

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 in Possession, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on November 12, 2020. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Authority to Assign Certain Unexpired Leases and Development Agreement Related to Sale 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 for Authority to Assign Certain Unexpired Leases and Development Agreement Related to Sale is xxxxx.

Request to Dismiss Motion

On December 16, 2020, the Plan Administrator filed a Required to Withdraw the Motion to Assign Certain Unexpired Leases. The court construes this to be a motion to dismiss without prejudice as provided in Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 7041, 9014. The Plan Administrator reports that the Buyer of the real property to which these leases related has now elected to not proceed with the purchase of the real property. Therefore, there will be no assignee to which the leases would be assigned.

At the hearing, xxxxxxx

REVIEW OF THE MOTION

Pursuant to the terms of the confirmed Chapter 11 Plan in this case, Focus Management Group USA, Inc., the Plan Administrator, ("Movant") requests an order authorizing, but not directing, the Plan Administrator to assign certain unexpired leases and Development Agreements in connection with the proposed sale ("Sale") of property commonly within what is referred to as the "Arambel Business Park" [FN.1] (collectively the "Property") (Dkt. No. 1215), to Greenlaw Acquisitions, LLC a California limited liability company and Lewis Land Developers, LLC, a Delaware limited liability company ("Buyer") or the successful buyer at the sale.

FN.1. The Property is vacant land in Stanislaus County, California, containing approximately 343.25 acres of land, bearing Assessor's Parcel Nos. 021- 022-33, 34, 41, 42, 55, 59, 61 and 62 within the "Arambel Business Park."

Specifically, Plan Administrator seeks authorization to assign certain lease agreements and a development agreement related to the Auction Properties to be sold to the Buyer in connection with the sale scheduled for December 17, 2020 filed as Docket Number 1215:

1. Three lease agreements described as the "Cell Tower Lease(s)" with one or more of American Tower Corp., American Tower Systems, AT&T Wireless, VIA Wireless, ATS/PCS, LLC, and Irwin Mortgage. The Plan Administrator is informed and believes that the rent for the entire 99-year Cell Tower Lease has been paid in advance and shall be retained by the former owner of the Property.

2. The "Development Agreement" dated August 21, 2012 between Reorganized Debtor and the City of Patterson:(ordinance 734) as amended by First Amendment to Development Agreement recorded September 19, 2013 as Instrument No. 2013-079646 (ordinance 741) and as further evidenced by a Corrected First Amendment to Development Agreement recorded November 24, 2015 as Instrument No. 2015-092251 (ordinance 741).

APPLICABLE LAW

Use, Sale, or Lease of Property

Pursuant to Bankruptcy Code section 363, a trustee may use, sell, or lease property of the estate outside of the ordinary course of business outside of the ordinary course of business after notice and hearing

Executory Contracts and Unexpired Leases

Section 365(f) provides:

(f)

(1)Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2)The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A)the trustee assumes such contract or lease in accordance with the provisions of this section; and
(B)adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3)Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

Under section 365(k):

(k)Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

DISCUSSION

The Plan Administrator asserts having the authority to assign the lease agreements and the development agreement under 11 U.S.C. §§ 363, 365(f), and 365(k) of the bankruptcy code.

The Plan Administrator argues that the Lease Agreements and the Development Agreement may be transferred to the successful buyer on the basis that the Agreements have already been assumed by the Reorganized Debtor pursuant to Article VIII of the Plan and, therefore, any objections to such assumption must have been brought prior to confirmation of the plan. The Plan Administrator further argues that the Development Agreement is a form of entitlement for the Property that would not constitute an executory contract subject to assumption or rejection.

Moreover, Plan Administrator contends that the proposed assignments are permitted under 11 U.S.C. § 365(f). The Assignments are an exercise of the Plan Administrator's business judgment in that they are critical component of the sale of the Property which is in the best interest of creditors and the estate. The Plan Administrator argues that the estate will benefit by reducing administrative burdens and other potential liabilities.

The Plan Administrator further asserts that section 365(k) provides for these assignments as they will benefit the estate by relieving the estate from further liability.

Here, the parties have expended much efforts and funds to ensure a successful sale of the Property described. Assignment of the Lease Agreements and the Development Agreement is directly related to the success of the sale. There is a Buyer willing to take the assignments and the Plan Administrator is exercising their business judgment.

Based on the evidence before the court, the Plan Administrator is authorized to assign the Lease Agreements and Development Agreement to the successful buyer.

The Motion is granted.

Counsel for the Plan Administrator shall prepare and lodge with the court a proposed order granting the motion consistent with the Ruling above.

[The court has provided the language below for an order form, which if acceptable to the Plan Administrator the court can issue rather than having counsel prepare one.]

~~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 Sell Property filed by Focus Management Group USA, Inc., the Plan Administrator, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that Focus Management Group USA, Inc., the Plan Administrator, is authorized to assign the following leases and development agreement pursuant to 11 U.S.C. §§ 363, 365(f),a dn 365(k) to Greenlaw Acquisitions, LLC a California limited liability company and Lewis Land Developers, LLC, a Delaware limited liability company ("Buyer") or successful buyer:~~

~~1. Three lease agreements described as the "Cell Tower Lease(s)" with one or more of American Tower Corp., American Tower Systems, AT&T Wireless, VIA Wireless, ATS/PCS, LLC, and Irwin Mortgage. The Plan Administrator is informed and believes that the rent for the entire 99-year Cell Tower Lease has been paid in advance and shall be retained by the former owner of the Property.~~

~~2. The "Development Agreement" dated August 21, 2012 between Reorganized Debtor and the City of Patterson:(ordinance 734) as amended by First Amendment to Development Agreement recorded September 19, 2013 as Instrument No. 2013-079646 (ordinance 741) and as further evidenced by a Corrected First Amendment to Development Agreement recorded November 24, 2015 as Instrument No. 2015-092251 (ordinance 741).~~

FINAL RULINGS

12.	**19-91122-E-7** **BSH-2**	**MARIBEL SOTO RIVERA** **Brian Haddix**	**MOTION TO COMPEL ABANDONMENT** **11-17-20 [102]**

Final Ruling: No appearance at the December 17, 2020 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 Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 17, 2020. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Compel Abandonment 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 Compel Abandonment is granted.

After notice and a hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or is of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Maribel Soto Rivera ("Debtor") requests the court to order Michael D. McGranahan ("the Chapter 7 Trustee") to abandon:

1. real property commonly known as 6225 Howard Ave., Riverbank, California and

2. personal property identified as 2007 Chevy Silverado,

3. $250 cash on hand ("Property").

The Declaration of Maribel Soto Rivera has been filed in support of the Motion. According to Debtor's Amended Schedule C, the real property is valued at $350,000.00 and the 2007 Chevy Silverado at $2,700.00. Dckts. 76, 105.

Debtor purchased the non-exempt interest in the real property from Trustee for $37,000 on October 9, 2020. Dckts. 94, 97. The court authorized the sale on November 19, 2020. Dckt. 108.

Trustee does not opposed Debtor's request to compel abandonment. Dckt. 112.

The court finds that the debt secured by the Property exceeds the value of the Property and that there are negative financial consequences to the Estate caused by retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

The court shall issue an Order (not 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 Compel Abandonment filed by Maribel Soto Rivera ("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 to Compel Abandonment is granted, and the Property identified as
>
> 1. real property commonly known as 6225 Howard Ave., Riverbank, California and
>
> 2. personal property identified as 2007 Chevy Silverado,
>
> 3. $250 cash on hand ("Property")
>
> and listed on Schedule A / B by Debtor is abandoned by the Chapter 7 Trustee, Michael D. McGranahan ("Trustee") to Maribel Soto Rivera by this order, with no further act of the Trustee required.