UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge
2500 Tulare Street, Fifth Floor
Department A, Courtroom 11
Fresno, California

TUESDAY

DECEMBER 17, 2013

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

9:00 a.m.

1. 12-13703-A-13 NOEMI MORENO — MOTION TO MODIFY PLAN
RSW-1 — 10-31-13 [31]
NOEMI MORENO/MV

ROBERT WILLIAMS/Atty. for dbt.

Final Ruling

Motion: Confirm Modified Chapter 13 Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 3015-1(d)(2), 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). The court finds that the debtor has sustained that burden, and the court will approve modification of the plan.

2. 13-11803-A-13 JERZY BARANOWSKI — CONTINUED PRE-TRIAL CONFERENCE RE: OBJECTION TO CLAIM OF DENNIS VALDEZ, CLAIM NUMBER 8
PK-1 — 6-3-13 [30]
JERZY BARANOWSKI/MV

PATRICK KAVANAGH/Atty. for dbt.
RESPONSIVE PLEADING

Final Ruling

This matter is continued to January 9, 2014, at 9:00 a.m. in Fresno.

3. 13-11803-A-13 JERZY BARANOWSKI — MOTION TO COMPEL
PK-3 — 10-18-13 [81]
JERZY BARANOWSKI/MV
PATRICK KAVANAGH/Atty. for dbt.

Final Ruling

This matter is continued to January 9, 2014, at 9:00 a.m. in Fresno.

4. 13-14804-A-13 RIGO CHAVEZ
MHM-1
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
9-20-13 [28]

DISMISSED, CLOSED

Final Ruling

The case dismissed, the matter is dropped as moot.

5. 12-19905-A-13 JEFFREY/JANET PAHLOW
PK-2
JEFFREY PAHLOW/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION TO MODIFY PLAN
11-5-13 [39]

Final Ruling

Motion: Confirm Modified Chapter 13 Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 3015-1(d)(2), 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). The court finds that the debtor has sustained that burden, and the court will approve modification of the plan.

6. 13-15115-A-13 REYMUNDO PACAS
MHM-1
MICHAEL MEYER/MV

CONTINUED MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
10-22-13 [19]

ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

The matter is continued to January 22, 2014, at 9:00 a.m. to allow the respondent to submit an order valuing the second deed of trust encumbering the debtor's residence. Motion to Value, November 19, 2013, ECF 23.

7. 13-15115-A-13 REYMUNDO PACAS
RSW-1
REYMUNDO PACAS/MV

MOTION TO VALUE COLLATERAL OF UNITED GUARANTY RESIDENTIAL INSURANCE COMPANY OF NORTH CAROLINA
11-19-13 [23]

ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Collateral Value: $130,000.00
Senior Liens: $142,288.27

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Chapter 13 debtors may strip off a wholly unsecured junior lien encumbering the debtor's principal residence. 11 U.S.C. §§ 506(a), 1322(b)(2); *In re Lam,* 211 B.R. 36, 40-42 (B.A.P. 9th Cir. 1997); *In re Zimmer,* 313 F.3d 1220, 1222–25 (9th Cir. 2002). A motion to value the debtor's principal residence should be granted upon a threefold showing by the moving party. First, the moving party must proceed by noticed motion. Fed. R. Bankr. P. 3012. Second, the motion must be served on the holder of the secured claim. Fed. R. Bankr. P. 3012, 9014(a); LBR 3015-1(j). Third, the moving party must prove by admissible evidence that the debt secured by liens senior to the responding party's claim exceeds the value of the principal residence. 11 U.S.C. § 506(a); *Lam*, 211 B.R. at 40-42; *Zimmer*, 313 F.3d at 1222–25.

The motion seeks to value real property that is the respondent's collateral. The motion describes the collateral as the debtor's "house" and but does not clearly indicate whether the collateral is the debtor's principal residence. Even if the house were owned by the debtor but not the debtor's principal residence, though, the relief requested would be appropriate under § 506(a).

The court, however, concludes that the residence is the debtor's principal residence, taking judicial notice of the debtor's address on the petition and Schedule A, which describes 2908 McCall Ave., Bakersfield, CA, as the debtor's residence. Because the amount owed to senior lienholders exceeds the value of the collateral, the responding party's claim is wholly unsecured and no portion will be allowed as a secured claim. *See* 11 U.S.C. § 506(a).

8. 13-16318-A-13 ROGER/NICOLE PRATER
APN-1
TOYOTA LEASE TRUST/MV
VINCENT GORSKI/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.

OBJECTION TO CONFIRMATION OF PLAN BY TOYOTA LEASE TRUST
11-22-13 [26]

Final Ruling

Objection: Confirmation of Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Overruled as moot
Order: Civil minute order

Chapter 13 debtors may modify the plan before confirmation. 11 U.S.C. § 1323(a). After the debtor files a modification under § 1323, the modified plan becomes the plan. 11 U.S.C. § 1323(b). Doing so renders any pending objection to confirmation of the prior plan moot. The debtor has filed a modified plan, and the objection will be denied as moot.

9. 13-16318-A-13 ROGER/NICOLE PRATER
APN-1
FORD MOTOR CREDIT COMPANY/MV

VINCENT GORSKI/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.

OBJECTION TO CONFIRMATION OF PLAN BY FORD MOTOR CREDIT COMPANY
10-22-13 [14]

Final Ruling

Objection: Confirmation of Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Overruled as moot
Order: Civil minute order

Chapter 13 debtors may modify the plan before confirmation. 11 U.S.C. § 1323(a). After the debtor files a modification under § 1323, the modified plan becomes the plan. 11 U.S.C. § 1323(b). Doing so renders any pending objection to confirmation of the prior plan moot. The debtor has filed a modified plan, and the objection will be denied as moot.

10. 13-16020-A-13 BLANCA MARTINEZ
KK-1
GREEN TREE SERVICING LLC/MV

THOMAS GILLIS/Atty. for dbt.
KATELYN KNAPP/Atty. for mv.
RESPONSIVE PLEADING

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY GREEN TREE SERVICING LLC
11-1-13 [20]

No tentative ruling.

11. 13-16129-A-13 MARIO/CANDELARIA CHAVEZ
WDO-1
MARIO CHAVEZ/MV

WILLIAM OLCOTT/Atty. for dbt.
RESPONSIVE PLEADING

CONTINUED MOTION TO VALUE COLLATERAL OF OLD REPUBLIC INSURANCE COMPANY
9-17-13 [10]

Final Ruling

At the suggestion of the parties, the matter is continued to January 22, 2014, at 9:00 a.m. Not later than 14 days prior to the continued hearing, the parties shall file a joint status report.

12. 13-16129-A-13 MARIO/CANDELARIA CHAVEZ
WDO-2
MARIO CHAVEZ/MV
WILLIAM OLCOTT/Atty. for dbt.

MOTION TO CONFIRM PLAN
10-29-13 [29]

Final Ruling

The matter is continued to January 22, 2014, at 9:00 a.m. to allow resolution of the Motion to Value the collateral of Old Republic Insurance Company, September 23, 2013, ECF No. 10.

13. 13-14334-A-13 ANTONIO/ANAVEL AGUIRRE
NES-4
ANTONIO AGUIRRE/MV
NEIL SCHWARTZ/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO CONFIRM PLAN
10-21-13 [48]

Tentative Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Plan: Modified Chapter 13 Plan, October 21, 2013, ECF No. 53
Disposition: Continued to January 22, 2014, at 9:00 a.m.
Order: Civil minute order

The matter is continued to January 22, 2014, at 9:00 a.m. to allow the debtor to prosecute a motion to value the collateral of Beneficial/HSBC.

14. 13-14334-A-13 ANTONIO/ANAVEL AGUIRRE
NES-5
ANTONIO AGUIRRE/MV
NEIL SCHWARTZ/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF HSBC FINANCE CORPORATION
10-25-13 [58]

Tentative Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

The motion does not comply with Rule 9013. This rule provides in pertinent part: "The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Fed. R. Bankr. P. 9013. Under this rule, a motion lacking proper grounds for relief does not comply with the Rule even though the declaration, exhibits or other papers in support together can be read as containing the required grounds stated with particularity.

Reviewing only the motion, the court cannot determine what collateral is being valued. The motion does not contain a general description of the collateral being valued. Although the declaration contains such information, Rule 9013 requires that the motion state with particularity at least the basic or ultimate facts that constitute the grounds for relief.

The motion seeks to value "the property described in the motion to value collateral attached to the debtors' Chapter 13 plan at the value in the motion." The court cannot comprehend this statement. The motion has been filed separately from the plan. The most recent amended plan does not appear to have a motion attached.

The court also cannot determine the specific relief being requested: the motion requests that the court value the collateral but does not state the specific dollar amount at which the collateral should be valued. The motion references the Chapter 13 plan for the value of the collateral, but such value should be included in the motion itself. Thus, the motion does not set forth the relief or order sought with sufficient specificity. *See* Fed. R. Bankr. P. 9013.

15. 13-14638-A-13 STEPHEN/LAURA MANN
RSW-1
STEPHEN MANN/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO CONFIRM PLAN
10-21-13 [33]

Final Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 3015-1(d)(1), 9014-1(f)(1)(B). None

has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1325 and by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). The court finds that the debtor has sustained that burden, and the court will approve confirmation of the plan.

16. 13-14638-A-13 STEPHEN/LAURA MANN — MOTION TO CONFIRM PLAN
RSW-1 — 10-21-13 [39]
STEPHEN MANN/MV
ROBERT WILLIAMS/Atty. for dbt.
DUPLICATE

Final Ruling

This matter is dropped as a duplicate of the Motion to Confirm Chapter 13 Plan, October 21, 2013, ECF No. 33, Item No. 15 hereon.

17. 10-12441-A-13 JEFFREY BROWN — MOTION TO VALUE COLLATERAL OF GREEN TREE SERVICING LLC
NES-5 — 10-21-13 [79]
JEFFREY BROWN/MV
NEIL SCHWARTZ/Atty. for dbt.

Tentative Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

The motion does not comply with Rule 9013. This rule provides in pertinent part: "The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Fed. R. Bankr. P. 9013. Under this rule, a motion lacking proper grounds for relief does not comply with the Rule even though the declaration, exhibits or other papers in support together can be read as containing the required grounds stated with particularity.

Reviewing only the motion, the court cannot determine what collateral is being valued. The motion does not contain a general description of the collateral being valued. Although the declaration contains such information, Rule 9013 requires that the motion state with particularity at least the basic or ultimate facts that constitute the grounds for relief.

The motion seeks to value "the property described in the motion to value collateral attached to the debtors' Chapter 13 plan at the value in the motion. [sic]" The court cannot comprehend this statement. The motion has been filed separately from the plan. The confirmed plan does not appear to have a motion attached.

The court also cannot determine the specific relief being requested: the motion requests that the court value the collateral but does not state the specific dollar amount at which the collateral should be valued. The amount at which collateral should be valued is a critical component of the relief sought by a motion to value collateral. The motion references the Chapter 13 plan, but such value should be included in the motion itself. In the future, the motion should specifically describe the relief or order sought. *See* Fed. R. Bankr. P. 9013.

18. 13-14156-A-13 CO-3 — DAVID DIAZ VALADEZ AND CONSUELO DIAZ — MOTION TO CONFIRM PLAN 11-5-13 [35]

DAVID DIAZ VALADEZ/MV
CLAUDIA OSUNA/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Plan: Second Modified Chapter 13 Plan, filed November 5, 2013, ECF No. 34
Disposition: Denied
Order: Civil minute order

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994).

The debtor moves to confirm the Second Modified Chapter 13 Plan, filed November 5, 2013, ECF No. 34. Chapter 13 trustee Michael H. Meyer opposes confirmation, as authorized by 11 U.S.C. § 1302(b)(2)(B),(C), arguing that the plan, as proposed, does not satisfy the requirements for confirmation.

ON THE MERITS

Insufficient Notice

In the Eastern District of California a motion to confirm the debtor's initial Chapter 13 plan must be set on 42 days notice to all creditors. LBR 3015-1(d)(1). The debtor's first Certificate of Service was served only on the Chapter 13 trustee but shows service more than 42 days before the hearing. Certificate of Service, November 6, 2013, ECF No. 40. Two subsequent proofs do show service on all creditors. But each shows service less than 42 days from the hearing. Certificate of Service, November 12, 2013, ECF No. 47; Certificate of Service, November 20, 2013, ECF No. 49. As a result, the plan is not confirmable.

Section 1322(a): Devotion of Sufficient Income

Title 11 of the U.S.C. § 1322(a)(1) requires the plan to devote all or such portion of future earnings or other future income to the supervision and control of the trustee has is necessary for the execution of the plan. The plan payment is $1,052 per month but commits the Chapter 13 trustee to monthly payments of $1,341.76. As a result, the plan does not fund.

Section 1325(a)(6): Not Feasible

Title 11 of U.S.C. § 1325(a)(6) requires that the debtor be able to make all payments under the plan and otherwise comply with the plan. The debtors' most recent Schedules I and J were filed June 14, 2013, which is too remote in time to carry the debtors' burden of feasibility.

Failure to Successfully Prosecute Motion to Value

In the Eastern District of California a plan cannot be confirmed until motions to value on which the plan is based are successfully prosecuted. LBR 3015-1(j). This plan seeks to value the collateral of Carrington Mortgage. Second Modified Chapter 13 Plan § 2.09, filed November 5, 2013, ECF No. 34. But the debtors have not prosecuted a motion to value that collateral.

75 DAY ORDER

In the event that the case is not dismissed in response to the motion to dismiss, October 21, 2013, ECF No. 30, a Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on the date of this hearing. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's motion. *See* 11 U.S.C. § 1307(c)(1). In making this order the court notes that the case was filed June 14, 2013, which is more than six month ago, and that no plan has been confirmed.

19. 09-62859-A-13 NEIL/JENNIFER WEITING — CONTINUED MOTION TO SELL
RSW-3 — 10-18-13 [79]
NEIL WEITING/MV
ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Motion: Sell Property [Short Sale]
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted in part (sale), denied in part without prejudice (cost recovery)
Order: Prepared by moving party and approved as to form and content by the Chapter 13 trustee

Property: 6708 Noah Avenue, Bakersfield, CA
Buyer: Terrill J. Blair
Sale Price: $300,000.00
Sale Type: Private sale subject to overbid opportunity

SALE UNDER § 363(b)

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Confirmation of a Chapter 13 plan revests property of the estate in the debtor unless the plan or order confirming the plan provides otherwise. 11 U.S.C. § 1327(b); *see also In re Tome*, 113 B.R. 626, 632 (Bankr. C.D. Cal. 1990). Here, the subject property is property of the estate because the debtor's confirmed plan provides that property of the estate will not revest in debtors upon confirmation.

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). A Chapter 13 debtor has the rights and powers given to a trustee under § 363(b). 11 U.S.C. § 1303. Based on the motion and supporting papers, the court finds a proper reorganization purpose for this sale. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

COUNSEL'S PROPOSED COST RECOVERY

Debtors' attorney seeks $53.04 for the actual costs of preparing and mailing the documents presumably for the sale motion. No additional attorneys' fees are sought.

At the hearing on November 21, 2013, the court continued the hearing to allow counsel for the debtors to file a declaration as to cost recovery to supplement the record. No declaration has been filed. Because no supplemental declaration has been filed by counsel, and for the reasons given in the court's civil minutes from the initial hearing on this motion dated November 21, 2013, the court will deny without prejudice the cost-recovery aspect of the relief requested.

20. 13-14959-A-13 JOSE/SALLY SAENZ — MOTION TO CONFIRM PLAN
PK-2 — 10-10-13 [29]
JOSE SAENZ/MV
PATRICK KAVANAGH/Atty. for dbt.

No tentative ruling.

21. 13-14959-A-13 JOSE/SALLY SAENZ — MOTION TO BORROW
PK-3 — 11-15-13 [51]
JOSE SAENZ/MV
PATRICK KAVANAGH/Atty. for dbt.

Tentative Ruling

Motion: Approval of Loan Nunc Pro Tunc
Notice: LBR 9014-1(f)(1)
Disposition: Denied
Order: Prepared by moving party

BACKGROUND

The debtors filed a petition on July 19, 2013. After the petition date, but before debtors were represented by their present counsel, the debtors borrowed $5,000.00 from a creditor without court authorization. The proceeds were used to make 2 house payments and to pay bills.

The collateral for the loan was the debtors' 2006 Chevy Silverado valued at $12,000.00 on Schedule B. This vehicle was claimed exempt on amended Schedule C in the amount of $7,079.52. It was also claimed exempt on the originally filed Schedule C in the full amount of its value.

DISCUSSION

Legal Standard

The debtors have cited the applicable legal factors in *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 523 (9th Cir. 2007) in arguing that the unauthorized post-petition loan should be retroactively approved.

"[W]e distill four factors that the bankruptcy court should consider in determining whether to exercise its equitable discretion to grant nunc pro tunc approval of post-petition financing under section 364(c)(2): (1) whether the financing transaction benefits the bankruptcy estate; (2) whether the creditor has adequately explained its failure to seek prior authorization or otherwise established that it acted in good faith when it failed to seek prior authorization; (3) whether there is full compliance with the requirements of section 364(c)(2); and (4) whether the circumstances of the case present one of those rare situations in which retroactive authorization is appropriate." *Id.* (citing *Thompson v. Margen (In re McConville)*, 110 F.3d 47, 50 (9th Cir. 1997); *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 974 (9th Cir. 1995)).

Analysis

Under § 1303, debtors in Chapter 13 have the rights and powers of a trustee under § 363(b). Debtors who are self-employed and incur trade credit are engaged in business, and debtors engaged in business have the rights and powers of the trustee under §§ 363(c) and 364, subject to any limitations on a trustee under such sections. 11 U.S.C. § 1304.

The debtors have cited a persuasive treatise section on the subject of whether a nonbusiness debtor who is not engaged in business may incur credit. This court agrees with the treatise section cited in the

moving party's memorandum of points and authorities supporting the motion.

Obtaining secured credit requires court authorization. *Id.* § 364(c), (d). The secured loan at issue was made to the debtors without the required authorization and hearing.

The court finds that the loan should not be approved. The loan did not benefit the estate for two reasons. First, the loan was secured by a vehicle that was owned free and clear but was partially exempt and partially not exempt. Taking judicial notice of the schedules, the court finds that the value of the vehicle was scheduled as $12,000.00. The exemption in the vehicle is in the amount of $7,079.52. As a result of the unauthorized loan and the security interest granted in the vehicle, the nonexempt equity in the vehicle was eliminated. This reduces the amount of nonexempt value available to pay creditors either through a plan or in a liquidation if the case were converted.

Second, the loan has an 83.68% interest rate per annum. Such an interest rate would be an excessive drain on debtors' resources and would never have been approved by the court.

The debtors have not adequately explained their failure to seek prior authorization. They were represented by an attorney who "never advised them that it was inappropriate for them to borrow." Mem. P. & A. at 4, ECF No. 55. But the debtors cannot excuse compliance with the Bankruptcy Code merely because their attorney failed to advise them properly.

There has not been full compliance with § 364(c). As a prerequisite to incurring a debt secured by a lien, § 364(c) requires that debtors be unable to obtain unsecured credit allowable under § 503(b)(1) as an administrative expense. The debtors have not addressed whether they were unable to obtain unsecured credit.

Lastly, the circumstances in this case do not represent one of the rare situations in which retroactive authorization is appropriate. The debtors were not properly represented or advised that they should obtain authorization before incurring such a loan. An attorney's failure to advise a debtor of the law's requirements cannot constitute a rare situation in which the court may retroactively authorize the unauthorized act.

22. 13-13660-A-13 MICHAEL/VERONICA WHITE — CONTINUED MOTION TO CONFIRM PLAN
LKW-2
MICHAEL WHITE/MV
LEONARD WELSH/Atty. for dbt.
10-25-13 [46]

Final Ruling

Motion: Confirm Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written

opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 3015-1(d)(1), 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1325 and by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). The court finds that the debtor has sustained that burden, and the court will approve confirmation of the plan.

23. 13-13660-A-13 MICHAEL/VERONICA WHITE
LKW-2
MICHAEL WHITE/MV
LEONARD WELSH/Atty. for dbt.

CONTINUED MOTION TO CONFIRM PLAN
9-5-13 [34]

Final Ruling

This matter is dropped as a duplicate of the Motion to Confirm Chapter 13 Plan, October 25, 2013, ECF No. 46.

24. 10-61461-A-13 STEVEN/JULIETTE WEST
LKW-9
LEONARD WELSH/MV

LEONARD WELSH/Atty. for dbt.

MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTOR'S ATTORNEY(S), FEE: $864.50, EXPENSES: $58.85.
11-26-13 [117]

No tentative ruling.

25. 11-62861-A-13 ROBERT/LYUDMILA BARRAZA
PK-5
ROBERT BARRAZA/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION TO INCUR DEBT AND/OR MOTION TO TRADE IN VEHICLE
11-19-13 [76]

Tentative Ruling

Motion: Approval of Loan Nunc Pro Tunc
Notice: LBR 9014-1(f)(1)
Disposition: Denied
Order: Prepared by moving party

BACKGROUND

The debtors filed a petition on November 29, 2011. After the petition date, the debtors borrowed $7,000.00 from a creditor without court authorization to purchase a 2012 Nissan Versa. As part of this loan transaction, the debtors traded in their 2008 Chevrolet Avalanche, and the net trade in value was $6,900.00. The debtors state that the 2008 Chevrolet Avalanche that was traded in was exempted for $8,208.00.

DISCUSSION

Legal Standard

The debtors have cited the applicable legal factors in *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 523 (9th Cir. 2007) in arguing that the unauthorized post-petition loan should be retroactively approved.

"[W]e distill four factors that the bankruptcy court should consider in determining whether to exercise its equitable discretion to grant nunc pro tunc approval of post-petition financing under section 364(c)(2): (1) whether the financing transaction benefits the bankruptcy estate; (2) whether the creditor has adequately explained its failure to seek prior authorization or otherwise established that it acted in good faith when it failed to seek prior authorization; (3) whether there is full compliance with the requirements of section 364(c)(2); and (4) whether the circumstances of the case present one of those rare situations in which retroactive authorization is appropriate." *Id.* (citing *Thompson v. Margen (In re McConville)*, 110 F.3d 47, 50 (9th Cir. 1997); *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 974 (9th Cir. 1995)).

Analysis

Under § 1303, debtors in Chapter 13 have the rights and powers of a trustee under § 363(b). Debtors who are self-employed and incur trade credit are engaged in business, and debtors engaged in business have the rights and powers of the trustee under §§ 363(c) and 364, subject to any limitations on a trustee under such sections. 11 U.S.C. § 1304.

The debtors have cited a persuasive treatise section on the subject of whether a nonbusiness debtor who is not engaged in business may incur credit. This court agrees with the treatise section cited in the moving party's memorandum of points and authorities supporting the motion.

Obtaining secured credit requires court authorization. *Id.* § 364(c), (d). The confirmed plan provides that "[d]ebtor is prohibited from transferring, encumbering, selling, or otherwise disposing of any personal or real property with a value of $1,000 or more other than in the regular course of the Debtor's financial or business affairs without obtaining court authorization." Ch. 13 Plan § 6.02(a), ECF No. 5. Thus, the secured loan at issue was made to the debtors without the required authorization and hearing.

The financing transaction does not sufficiently benefit the estate. The debtors argue that "[t]he purchase paid off a vehicle that was being paid through the plan thus increasing the distribution to unsecured creditors." Mem. P. & A. Supp. Mot. Approve Loan Nunc Pro

Tunc at 4, ECF No. 81. But the transaction also resulted in new debt that the debtors incurred. No showing has been made that the new debt with interest is significantly less than the previous debt with interest.

The debtors also state that Ms. Barraza is now able to work. But the debtors have not provided facts showing that this vehicle was necessary for Ms. Barraza to begin or continue employment at a location that requires the use of this vehicle.

In addition, the debtors provide their reasons for obtaining this loan to purchase this vehicle. One reason for the vehicle loan and purchase was that the 2008 Chevrolet Avalanche was difficult for Ms. Barraza to drive given its size. The debtors also argue that they were making frequent trips to care for joint debtor Lyudmilla Barraza's mother, who is not well. The debtors had concerns about the 2008 Chevrolet Avalanche's reliability and fuel efficiency, and these concerns were prompted by the trips involving care of debtors' relative. The court finds that these reasons for obtaining the secured loan and engaging in this vehicle purchase benefited the debtors more than it benefited the estate.

The debtors have not adequately explained their failure to seek prior authorization. The debtors engaged in this transaction without their attorney's involvement or input. Kavanagh Decl. ¶ 4. The debtors cannot excuse compliance with the Bankruptcy Code and the plan merely because their attorney failed to advise them properly. The debtors signed the plan which prohibited incurring debt and engaging in transactions outside the ordinary course of business without court authorization.

In addition, the debtors signed the Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, which provides that they agree to "[c]ontact the attorney before buying, refinancing, or selling real or personal property with a value of $1,000 or more, before incurring new debt exceeding $1,000." Rights & Responsibilities of Ch. 13 Debtors & Their Att'ys, ECF No. 7. Their plan also prohibited their "transferring, encumbering, selling, or otherwise disposing of any personal or real property with a value of $1,000 or more other than in the regular course of the Debtor's financial or business affairs without obtaining court authorization." Ch. 13 Plan § 6.02(a), ECF No. 5.

There has not been full compliance with § 364(c). As a prerequisite to incurring a debt secured by a lien, § 364(c) requires that debtors be unable to obtain unsecured credit allowable under § 503(b)(1) as an administrative expense. The debtors have not addressed whether they were unable to obtain unsecured credit.

This does not represent one of the rare situations in which retroactive authorization is appropriate. The debtors have not adequately explained their failure to obtain court authorization for the reasons discussed in this ruling. In addition, the unauthorized transaction resulted in more of a personal benefit rather than an estate benefit. Accordingly, the loan will not be retroactively authorized.

RSW-3 10-23-13 [64]
DARON NUNN/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Confirm Modified Chapter 13 Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required
Plan: First Modified Chapter 13 Plan, filed November 15, 2013, ECF No. 75
Disposition: Denied
Order: Civil minute order

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994).

The debtor moves to confirm the First Modified Chapter 13 Plan, filed November 15, 2013, ECF No. 75. A modified Chapter 13 plan must be filed in good faith. 11 U.S.C. § 1325(a)(3), 1329(b)(1). And though in the absence of an objection, the court pay presume good faith, it need not do so. Fed. R. Bankr. P. 3015(f).

In this case, the debtor has not carried his burden of proof as to the element of good faith. The debtor has proposed a plan that pay 0% to general unsecured creditors. First Modified Chapter 13 Plan § 2,15, filed November 15, 2013, ECF No. 75. But there are two facts that suggest a lack of good faith. First, the debtor contends that he has no income, gross or net, from his self employment. See, Schedules I and J, filed November 1, 2013, ECF No. 73. This is in contrast to his schedules filed in support of petition, wherein he claimed gross and net income of $3,000 from his self employment. He offers only three sentences of explanation in his supporting declaration: “I fell behind on payments to the Trustee because I am self-employed and my business could no longer afford to give me a salary beginning this year. Although my wife’s income has increased, it is not enough to make up for the loss of my income. I am hopeful that my business will be able to pay me a salary in the future.” Supplemental Declaration of Debtor ¶ 1, December 10, 2013, ECF No. 77.

Second, amended Schedule J includes an expense of $519 per month for the debtor’s adult son for “rent for son at college.” For these reasons, the debtor has not sustained his burden of on the question of good faith.

27. 12-13966-A-13 PATRICIA PULIDO
PK-3
PATRICIA PULIDO/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION TO MODIFY PLAN
11-5-13 [67]

Final Ruling

Motion: Confirm Modified Chapter 13 Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 3015-1(d)(2), 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). The court finds that the debtor has sustained that burden, and the court will approve modification of the plan.

28. 13-16684-A-13 ROBERT/KAREN BAKER
PK-1
ROBERT BAKER/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.
11-15-13 [18]

Final Ruling

The motion resolved by stipulation and order, the matter is dropped as moot.

29. 13-16388-A-13 RONALD/TONI RUSSELL
MHM-1
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.

OBJECTION TO CONFIRMATION OF PLAN BY MICHAEL H. MEYER
11-20-13 [17]

Tentative Ruling

Objection: Confirmation of Chapter 13 Plan
Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition required
Plan: Chapter 13 Plan, filed November 20, 2013, ECF No. 17
Disposition: Sustained
Order: Civil minute order

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir.

1994).

ON THE MERITS

The Chapter 13 trustee objects to the debtors plan. 11 U.S.C. § 1325(b) provides, "If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."

In this case, the plan proposes a 25% dividend to general unsecured creditors. Chapter 13 Plan § 2.15, filed November 20, 2013, ECF No. 17. The debtors' original Form B22C, Line 59 revealed projected disposable income of $671.09 per month. Voluntary Petition, September 26, 2013, ECF No. 1. On the same day, the debtors filed a *Lanning* Form B22C that showed projected disposable income of $391.32. *Lanning* Form B22C, Line 59. The amended Form B22 revealed two changes: (1) reduced income for the husband by $809.54; and (2) Line 43 education expenses of $468.75. At the meeting of creditors the debtors testified the reduced income of the husband reflected a longer than six months average, which the debtors felt more accurately reflected his income. No evidence was provided to the trustee of this income or of the education expenses. The debtors have not carried their burden of confirmation.

75 DAY ORDER

a Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on the date of this hearing. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's motion. *See* 11 U.S.C. § 1307(c)(1). In making this order the court notes that the case was filed June 14, 2013, which is more than six month ago, and that no plan has been confirmed.

30. 13-16388-A-13 RONALD/TONI RUSSELL
RSW-2
RONALD RUSSELL/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO AVOID LIEN OF FORD MOTOR CREDIT COMPANY LLC
12-3-13 [20]

Tentative Ruling

Motion: Avoid Lien that Impairs Exemption
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Liens Plus Exemption: $167,310.00
Property Value: $102,776.00
Judicial Lien Avoided: $7,820.00

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390–91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

The responding party's judicial lien, all other liens, and the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, the responding party's judicial lien will be avoided entirely.

9:15 a.m.

1. 09-18544-A-13 JUAN/ANN PRIETO — OBJECTION TO CLAIM OF NATIONSTAR MORTGAGE, CLAIM NUMBER 17
DMG-3
JUAN PRIETO/MV
3-14-13 [86]

D. GARDNER/Atty. for dbt.

[This matter will be called subsequent to the Chapter 13 trustee's Motion to Dismiss, filed November 18, 2013, ECF No. 117.]

No tentative ruling

2. 09-18544-A-13 JUAN/ANN PRIETO — MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
MHM-3
MICHAEL MEYER/MV
11-8-13 [117]
D. GARDNER/Atty. for dbt.
RESPONSIVE PLEADING

No tentative ruling.

3. 13-14252-A-13 JAIME VENTURA AND MARIA AGUILAR — CONTINUED MOTION TO DISMISS CASE FOR UNREASONABLE DELAY
MHM-1

MICHAEL MEYER/MV

THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
10-21-13 [25]

ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING, MOTION WITHDRAWN

Final Ruling

The motion withdrawn, the matter is dropped as moot.

4. 13-14156-A-13 MHM-1 — DAVID DIAZ VALADEZ AND CONSUELO DIAZ
MICHAEL MEYER/MV

CONTINUED MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
10-21-13 [30]

CLAUDIA OSUNA/Atty. for dbt.
RESPONSIVE PLEADING

No tentative ruling.

5. 13-12265-A-13 MHM-1 — LETICIA GUTIERREZ
MICHAEL MEYER/MV

CONTINUED MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
10-22-13 [48]

VINCENT GORSKI/Atty. for dbt.
RESPONSIVE PLEADING, MOTION WITHDRAWN

Final Ruling

The motion withdrawn, the matter is dropped as moot.

6. 13-15976-A-13 MHM-1 — SHARYL KROMER
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS AND/OR MOTION TO DISMISS CASE
11-19-13 [20]

ROBERT WILLIAMS/Atty. for dbt.

No tentative ruling.

1:00 p.m.

1. 13-10814-A-7 FL.INVEST.USA INC.
BH-2
ROBERT BRUMFIELD/MV

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF BRUMFIELD & HAGAN, LLP FOR ROBERT H. BRUMFIELD III, DEBTOR'S ATTORNEY(S), FEE: $3662.50, EXPENSES: $200.88
10-22-13 [209]

RYAN ERNST/Atty. for dbt.

Final Ruling

This matter duplicative of Brumfield & Hagen LLP's Motion for Compensation, November 25, 2013, ECF No. 240, the matter is dropped.

2. 13-10814-A-7 FL.INVEST.USA INC.
BH-3
ROBERT BRUMFIELD/MV

MOTION FOR COMPENSATION BY THE LAW OFFICE OF BRUMFIELD & HAGEN, LLP FOR ROBERT H. BRUMFIELD III, DEBTOR'S ATTORNEY(S), FEE: $3662.50, EXPENSES: $200.88
11-25-13 [240]

RYAN ERNST/Atty. for dbt.

Tentative Ruling

Motion: First and Final Application for Compensation and Expenses
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: Brumfield & Hagen, LLP
Compensation approved: $3,662.50
Costs approved: $200.88
Aggregate fees and costs approved: $3,863.38
Retainer held: $0.00
Amount to be paid as administrative expense: $3,863.38

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by an attorney for the debtor in possession in a Chapter 11 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

3. 13-10814-A-7 FL.INVEST.USA INC.
DMG-4
ALDO NEMNI/MV
RYAN ERNST/Atty. for dbt.
DONNA HARRIS/Atty. for mv.
RESPONSIVE PLEADING

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
10-9-13 [191]

No tentative ruling.

4. 13-10814-A-7 FL.INVEST.USA INC.
KDG-2
VINCENT GORSKI/MV

CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH MARIA ROSA NEMNI, ALDO NEMNI, AND MIRO' AMERICA LLC
10-2-13 [182]

RYAN ERNST/Atty. for dbt.
LISA HOLDER/Atty. for mv.
RESPONSIVE PLEADING

No tentative ruling.

5. 11-63718-A-7 TIMOTHY/ALLISON DOLAN
TGM-6
RANDELL PARKER/MV
JACOB EATON/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

MOTION TO SELL
11-19-13 [204]

Tentative Ruling

Motion: Sell Real Property and Compensate Real Estate Broker
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Property: 9999 Bluegill Drive, Paso Robles, CA
Buyer: Steve and Candace Henigman
Sale Price: $80,000
Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55(c), *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court

will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

Section 330(a) of Title 11 authorizes "reasonable compensation for actual, necessary services" rendered by a professional person employed under § 327 and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3). The court finds that the compensation sought is reasonable and will approve the application.

6. 13-16421-A-7 MICHAEL SEGUINE — MOTION TO AVOID LIEN OF CITIBANK, N.A.
SJS-1
MICHAEL SEGUINE/MV
SUSAN SALEHI/Atty. for dbt.
11-14-13 [13]

Final Ruling

Motion: Avoid Lien that Impairs Exemption
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390–91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

The responding party's judicial lien, all other liens, and the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, the responding party's judicial lien will be avoided entirely.

7. 10-13742-A-7 LAWRENCE WOJICK
FPS-1
LAWRENCE WOJICK/MV

MOTION TO AVOID LIEN OF ACCESS CAPITAL SERVICES, INC. AND/OR MOTION TO AVOID LIEN OF FORD MOTOR CREDIT COMPANY LLC
11-4-13 [27]

FRANK SAMPLES/Atty. for dbt.

Final Ruling

Motion: Avoid Lien that Impairs Exemption
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390–91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

In cases in which there are multiple liens to be avoided, the liens must be avoided in the reverse order of their priority. *See In re Meyer*, 373 B.R. 84, 87–88 (B.A.P. 9th Cir. 2007). "[L]iens already avoided are excluded from the exemption-impairment calculation with respect to other liens." *Id.*; 11 U.S.C § 522(f)(2)(B).

The court finds it unnecessary to apply the reverse-priority analysis individually to each of the responding parties' liens. *See In re Meyer*, 373 B.R. at 88 ("[O]ne must approach lien avoidance from the back of the line, or at least some point far enough back in line that there is no nonexempt equity in sight."). Under the reverse-priority analysis, Ford Motor Credit's judicial lien would be the last judicial lien to be avoided because it has a higher priority than the other judicial lien, though it is still subject to any senior consensual lien. In determining whether Ford Motor Credit's lien may be avoided, the court must exclude all junior judicial liens that would already have been avoided. *See* 11 U.S.C. § 522(f)(2)(B); *In re Meyer*, 373 B.R. at 87–88.

Ford Motor Credit's judicial lien, plus all other liens (excluding judicial liens lower in priority), plus the exemption amount together

exceed the property's value by an amount greater than or equal to the debt secured by such judicial lien. As a result, Ford Motor Credit's judicial lien may be avoided entirely.

Access Capital Services Inc.'s judicial lien may be avoided as well because it is lower in priority than Ford Motor Credit's avoidable judicial lien. Stated differently, the sum of the debt secured by the consensual liens plus the debtors' exemption amount equals or exceeds the fair market value of the real property, so all judicial liens subject to this motion are properly avoidable under § 522(f).

8. 12-16566-A-7 RONALD/DIANA WERTENS — MOTION TO COMPEL ABANDONMENT
NES-1 — 11-7-13 [40]
RONALD WERTENS/MV
NEIL SCHWARTZ/Atty. for dbt.
NON-OPPOSITION

Final Ruling

Motion: Compel Abandonment of Property of the Estate
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party pursuant to the instructions below

Real Property Description: 13890 Flaming Arrow Drive, Moreno Valley, CA

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." *See* 11 U.S.C. § 554(a)–(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The real property described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment is warranted. The order shall state that any exemptions claimed in the real property abandoned may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

9. 13-12066-A-7 SCOTTIE BILLINGTON — MOTION TO COMPEL ABANDONMENT
PK-1 — 11-12-13 [23]
CHERYL BILLINGTON/MV
CYNTHIA SCULLY/Atty. for dbt.
PATRICK KAVANAGH/Atty. for mv.

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Prepared by moving party pursuant to the instructions below

Real Property Description: 7201 Darrin Avenue, Bakersfield, CA ("property")

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." *See* 11 U.S.C. § 554(a)–(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The moving party is the debtor's former wife. She has not shown that the property described above is burdensome or of inconsequential value to the estate. The motion states that the property is worth $239,443.00 to $251,723.00. The property is subject to a deed of trust securing a loan balance that is unclear: the balance of this loan is $220,000.00 (as stated in the motion) or $224,000.00 (as stated in the declaration of Cheryl Billington).

The motion asserts that the property was not exempted but that title to the property has been in the moving party's name as her sole and separate property. The cash down payment of $40,000.00 was a separate property inheritance. But the property was refinanced in 2008 and the cash was withdrawn.

Even at the low end of the range of values, the property has a value that exceeds the secured debt by $15,443 to $19,443 (depending on whether the secured debt is $220,000 or $224,000). As a result, the property is not of inconsequential value and benefit to the estate unless the estate cannot realize any equity value of the property.

Property of the estate includes all legal or equitable interests of the debtor. § 541(a)(1). Under California law, "community property is liable for any debt incurred by either spouse before or during marriage, whether based on contract, tort, or otherwise, and whether one or both spouses are parties to the debt or to a judgment for the debt." 5 Harry D. Miller & Marvin B. Starr, *California Real Estate* § 12:63 (3d. ed. 2006) (footnote omitted). California Family Code section 913 provides, however, that "[t]he separate property of a married person is not liable for a debt incurred by the person's spouse before or during the marriage." Cal. Fam. Code § 913(b)(1). "Separate property is liable for all debts incurred by the owner-spouse . . . . The separate property of one spouse is not liable for debts contracted by the other spouse before or during the marriage, or for debts contracted by the other spouse after marriage, except for the necessities of life." 5 Miller & Starr, *supra*, § 12:63; *see also* Cal. Fam. Code § 914(a)–(b).

Here, even if the entire equity value were the separate property of the moving party, such property may still be liable for any debts of the debtor that were incurred for the necessities of life during the marriage. Accordingly, a prima facie case has not been made for the relief requested.

10. 13-13866-A-7 SCOTT MONROE
TGF-2
JEFFREY VETTER/MV
ROBERT WILLIAMS/Atty. for dbt.
VINCENT GORSKI/Atty. for mv.

MOTION TO SELL
11-26-13 [18]

Tentative Ruling

Motion: Sell Property
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Property: 2008 Vans RV-7A airplane and 2002 GMC pickup truck
Buyer: Debtor
Sale Price: $58,525 ($28,000 cash plus $30,525 exemption credit)
—2008 Vans RV-7A Airplane: $24,075 cash plus $25,925 exemption credit
—2002 GMC pickup truck: $3,925 cash plus $4,600 exemption credit
Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

11. 13-10286-A-13 ALI TORKAMAN
13-1026 SJS-2
TORKAMAN V. TORKAMAN

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH FARGAH TORKAMAN
11-21-13 [46]

SUSAN SALEHI/Atty. for mv.

Final Ruling

Motion: Approve Compromise or Settlement of Controversy
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

ON THE MERITS

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court

considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

In determining whether to approve a compromise under Federal Rule of Bankruptcy Procedure 9019, the court determines whether the compromise was negotiated in good faith and whether the party proposing the compromise reasonably believes that the compromise is the best that can be negotiated under the facts. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1982). More than mere good faith negotiation of a compromise is required. The court must also find that the compromise is fair and equitable. *Id*. "Fair and equitable" involves a consideration of four factors: (i) the probability of success in the litigation; (ii) the difficulties to be encountered in collection; (iii) the complexity of the litigation, and expense, delay and inconvenience necessarily attendant to litigation; and (iv) the paramount interest of creditors and a proper deference to the creditors' expressed wishes, if any. *Id.* The party proposing the compromise bears the burden of persuading the court that the compromise is fair and equitable and should be approved. *Id.*

Based on the motion and supporting papers, the court finds that the compromise is fair and equitable considering the relevant *A & C Properties* factors. The compromise will be approved.

INAPPROPRIATE PROCEDURE

In the future, a motion to compromise a controversy should be filed in the main case, and not in the adversary proceeding.

1:15 p.m.

1. 12-11008-A-7 RAFAEL ALONSO
12-1095
ZUBCIC V. ALONSO

PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT (FOR TRIAL SETTING)
5-9-13 [36]

JOHN DULCICH/Atty. for pl.
ORDER 9/30/13, RESPONSIVE PLEADING

No tentative ruling.

2. 12-11008-A-7 RAFAEL ALONSO
12-1095 PWG-2
ZUBCIC V. ALONSO

MOTION TO EXTEND TIME FOR DISCOVERY CUT OFF DATES BY 60 DAYS UNDER FED. R. CIV. P. 16(B)(4) AND 11 U.S.C. ┬º 105
12-3-13 [60]

JOHN DULCICH/Atty. for mv.

No tentative ruling.

1:30 p.m.

1. 13-17363-A-7 MICHELLE HENRY — MOTION FOR RELIEF FROM AUTOMATIC STAY
WDO-1 — 12-2-13 [10]
INTERCONTINENTAL REALTY, INC./MV
WILLIAM OLCOTT/Atty. for mv.

No tentative ruling.

2. 13-15778-A-7 HARRY KAUBLE — MOTION FOR RELIEF FROM AUTOMATIC STAY
ASW-1 — 10-29-13 [14]
U.S. BANK NATIONAL ASSOCIATION/MV
STEVEN STANLEY/Atty. for dbt.
JOELY BUI/Atty. for mv.

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 5600 Kirkside Drive Unit B, Bakersfield, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

3. 13-14894-A-11 JORENE MIZE
MCG-3
LESTIE FRY/MV
ROSEANN FRAZEE/Atty. for dbt.
SNEZHANA MCGOLDRICK/Atty. for mv.
RESPONSIVE PLEADING

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
10-2-13 [72]

Tentative Ruling

Motion: Continued Motion for Relief from Stay and Motion to Convert
Notice: Continued date of hearing
Disposition: Court to set evidentiary hearing
Order: Civil minute order

Pursuant to the court's prior civil minutes on this matter (ECF No. 124), the court will holding a scheduling conference and set an evidentiary hearing under Bankruptcy Rule 9014(d). The moving party has now served the motion properly pursuant to Bankruptcy Rule 4001(a)(1) and has noticed the motion properly pursuant to Rule 2002(a)(4). At the prior hearing, the moving party also waived § 362(e)(1) and (2).

An evidentiary hearing is required because disputed, material factual issues must be resolved before the court can rule on the relief requested. The court identifies the following factual issues:
(1) whether cause exists under § 362(d)(1), in the form of (a) lack of adequate protection, (b) financial hardship on the creditor, and (c) bad faith filing by the debtor;
(2) whether the debtor does not have equity in the property and such property is not necessary to an effective reorganization under § 362(d)(2);
(3) whether cause exists under § 1112(b), in the form of (a) continued loss to the estate and absence of a reasonable likelihood of rehabilitation, and (b) inability to effectuate a plan of reorganization;
(4) whether conversion is in the best interests of creditors and the estate.

Before the hearing, the parties shall attempt to meet and confer to determine: (i) whether the court has fully and fairly described the evidentiary issues requiring resolution; (ii) whether any party wishes to engage in discovery prior to the evidentiary hearing and the time necessary to complete discovery; (iii) the deadlines for any dispositive motions or evidentiary motions; (iv) the dates for the evidentiary hearing and the trial time that will be required; (v) whether the parties wish to use or waive the provisions of Local Bankruptcy Rule 9017-1; and (vi) any other such matters as may be necessary or expedient to the resolution of these issues.

4. 13-14894-A-11 JORENE MIZE
MCG-3
LESTIE FRY/MV

CONTINUED MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7
10-2-13 [72]

ROSEANN FRAZEE/Atty. for dbt.
SNEZHANA MCGOLDRICK/Atty. for mv.
RESPONSIVE PLEADING

[This matter will be heard in conjunction with matter no. 3.]

5. 13-14894-A-11 JORENE MIZE
RAF-7
JORENE MIZE/MV

MOTION TO EXTEND EXCLUSIVITY PERIOD FOR FILING A CHAPTER 11 PLAN
11-14-13 [138]

ROSEANN FRAZEE/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Motion to Extend Exclusivity
Notice: LBR 9014-1(f)(1); written opposition filed
Disposition: Granted
Order: Civil minute order

The debtor Jorene Mize has moved to extend exclusivity under § 1121, requesting that the "120-day period" be extended 90 days until February 12, 2014 and that the "180-day period" be extended 90 days as well until April 14, 2014. The creditor Lester Frye has filed an opposition.

For the reasons set forth below, the court will grant the Debtor's motion.

DISCUSSION

The 120-day period specified in § 1121(b) is an exclusivity period during which only the debtor may file a plan. 11 U.S.C. § 1121(b). Competing plans may not be filed during this period. *Id.* The court may extend this 120-day period for cause. *Id.* § 1121(d)(1). The request to extend must be made before the period ends and after notice and a hearing. *Id.* The 120-day exclusivity period may not be extended beyond a date that is 18 months after the order for relief. *Id.* § 1121(d)(2)(B).

The 180-day period specified in § 1121(c)(3) is an "extended exclusivity period" during which competing plans may not be filed by parties in interest "during the acceptance and solicitation period required by sections 1126 and 1129(a)." 7 *Collier on Bankruptcy* ¶ 1121.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011). This 180-day period may itself be extended by the court for cause. 11 U.S.C. § 1121(d)(1). The request to extend must be made before the period ends and after notice and a hearing. *Id.* The 180-day exclusivity period may not be extended beyond a date that is 20 months after the order for relief. *Id.* § 1121(d)(2)(B).

Further, the 180-day period in § 1121(c)(3) may not be extended if a plan was not filed within the 120-day exclusivity period under §

1121(b) and (c)(2). *See In re Grant Family Farms, Inc.*, No. 06–11795, No. 06–11863, 2007 WL 2332138, at *1 (Bankr. D. Colo. 2007). This rule may be inferred from the fact that the events listed in § 1121(c) that trigger the termination of exclusivity are stated in the disjunctive. *See* 11 U.S.C. § 1121(c)(1)–(3). If no plan has been filed within the initial 120-day exclusivity period or within such period as extended under § 1121(d), then exclusivity ends and § 1121(c)(3) does not come into play. *In re Grant Family Farms, Inc.*, 2007 WL 2332138, at *1.

Courts may consider several fact-specific factors in determining whether cause exists. *See, e.g.*, *In re R.G. Pharmacy, Inc.*, 374 B.R. 484, 487 (Bankr. D. Conn. 2007). These may include (1) the size and complexity of the case; (2) the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information; (3) the existence of good faith progress toward reorganization; (4) the fact that the debtor is paying its bills as they become due; (5) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (6) whether the debtor has made progress in negotiations with its creditors; (7) the amount of time which has elapsed in the case; (8) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; (9) whether an unresolved contingency exists. *Id.* The debtor, as the party seeking the extension, bears the burden of proving the existence of cause. *Id.*

Here, the court finds that the majority of the factors favor the Debtor and granting an extension of exclusivity. Although the Creditor has filed a number of motions in this case, this case can hardly be characterized as a complex case. In fact, this case appears to be relatively straightforward. However, the Debtor's present inability to present a plan of reorganization at this time is excusable even in this less-than-complex case. The court agrees with the Debtor that how her proposed plan will be structured will be substantially determined by the outcome of the Debtor's motion to value the collateral located at 40854 Highway 41 in Oakhurst, California. The Debtor has alleged that the collateral should be valued at $290,000, while the Creditor has alleged in various papers that the value should be between $450,000 to $600,000 (although the Creditor's recently transmitted appraisal report shows a value closer to the Debtor's). Given the wide disparity in value originally alleged by the parties, it would have been impractical for the Debtor to propose a plan that would not have required an amendment after disposition of the motion to value. And even though the disposition of that motion will not occur until at least January, six months after the petition was filed, that delay cannot be attributed to the Debtor. The Debtor had filed the motion to value roughly one month after filing the petition.

Further, given the wide disparity in alleged value of the collateral, it would have been difficult for the Debtor to negotiate with the Creditor on any proposed treatment, especially when the Creditor had not provided evidentiary support for her valuation until after the end of the 120-day period. Even though the Creditor did disclose her expert in a timely manner, that means nothing in terms of the parties' ability to negotiate with one another. Thus, the Debtor should be excused from having to negotiate with the Creditor in good faith until she received the appraisal report from the Creditor. And because this case really revolves around the commercial property and the Creditor, there does not appear to be a reason for the Debtor to have to negotiate with the other creditors (especially if the Creditor's

unsecured claim will be the dominant claim in the class of general unsecured claims).

As to the viability of any proposed plan, the Creditor is incorrect in her analysis for why the Debtor will not be able to present a viable plan. First, unlike in chapter 13 cases, nothing in § 1129 requires that the Debtor modify and pay the Creditor's secured claim over a period of five years. Second, an objection under § 1129(a)(15) requires determining projected disposable income by the means test, not the Debtor's Schedules I and J. Thus, at best (to the Creditor), this factor should be construed as neutral.

The remaining factors also favor the Debtor. First, given the Creditor's recent transmittal of the appraisal report and the date of the hearing on the motion to value, the 120-day period does not represent sufficient time for the Debtor to propose a plan, and there is a need to give the Debtor sufficient time due to the fact that the plan will be substantially influenced by the result of the motion to value. Second, the Debtor appears to be paying her bills on time. Third, the case is only five months old. Fourth, the extension of exclusivity does not appear to be an attempt to pressure the Creditor into the Debtor's reorganization demands; instead, the Debtor simply wishes to wait until the issue of valuation is resolved. Lastly, a contingency in the form of the motion to value still remains unresolved.

CONCLUSION

For the reasons set forth above, the court will grant the Debtor's motion.

6. 13-14894-A-11 JORENE MIZE
RAF-8
ROSEANN FRAZEE/MV

MOTION FOR COMPENSATION FOR SPECIALTY APPRAISALS, INC., APPRAISER(S), FEE: $2500.00, EXPENSES: $0.00
11-21-13 [148]

ROSEANN FRAZEE/Atty. for dbt.

Tentative Ruling

Application: Interim Compensation and Expenses, 11 U.S.C. § 331
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

The court will deny the interim fee application without prejudice for two reasons.

First, for a request for compensation that exceeds $1,000, 21 days' notice of the hearing is required on "the debtor, the trustee, all creditors, and indenture trustees." Fed. R. Bankr. P. 2002(a)(6). Here, the Applicant has failed to notice certain creditors found in the creditors' mailing matrix. The court notes the following omissions: (1) Discovery Financial Services LLC, (2) Sierra Fly Fisher, (3) Timberline Ranch NF Inc., (4) Timothy Hultman, and (5) Wells Fargo Home Mortgage.

Second, the order authorizing employment of the Applicant (ECF No. 115) provides that compensation will be determined by the lodestar method. However, the fee application sets forth a compensation arrangement in the form of a $2,500 flat fee. This is inconsistent with the order. Since compensation will be determined by the lodestar method, the Applicant will be required to attach billing records as part of the fee application.

7. 13-16879-A-11 RODRIGO ROMERO
AOE-2
RODRIGO ROMERO/MV
ANTHONY EGBASE/Atty. for dbt.
OST 12/7

MOTION TO VACATE DISMISSAL OF CASE
12-6-13 [33]

Tentative Ruling

Motion: Vacate Dismissal of Chapter 11 Case
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied
Order: Civil minute order

Debtor in possession Rodrigo Romero moves to vacate the dismissal of his Chapter 11 case for failure to appear at the status conference on December 3, 2013. The motion prays relief nunc pro tunc, insulating the debtor from adverse--but as of yet unspecified--acts of creditors occurring between the dismissal and the reinstatement of the case. Citing the excusable neglect provision of Federal Rule of Civil Procedure 60(b), Romero's counsel, A.O.E. Law & Associates, contends that the failure resulted from a calendaring error on their part and that the debtor should not be held accountable for their mistake.

LEGAL STANDARDS

A party may be relieved from an order or judgment arising from the excusable neglect of counsel. Fed. R. Civ. P. 60(b)(1), *incorporated by* Federal Rule of Bankruptcy Procedure 9024. Distilled to their essence, surprise, inadvertence or excusable neglect require that the moving party has shown a reasonable excuse for the default. *Meadows v. Dominican Republic,* 817 F.2d 517, 520 (9th cir. 1987). "Neglect" describes problems arising from negligence. *Pioneer Investment Services Co. v. Brunswick Associates Ltd.Partnership,* 507 U.S. 380, 394 (1993). "Excusable" is an equitable determination taking into account all relevant circumstances, including the danger of prejudice to the debtor, the length of delay and potential impact on judicial proceedings, the reason for the delay and whether the movant acted in good faith. *Pioneer Investment Services,* 507 U.S. at 395. The movant has not shown cause to vacate the order of dismissal. The moving party bears the burden of proof. *Martinelli v. Valley Bank (In re Martinelli),* 96 B.R. 1011, 1013 (9th Cir. B.A.P. 1988).

DISCUSSION

Independent Duty to Monitor the Docket

The movant has an independent duty to monitor the court docket, particularly electronic dockets available to the public. *Yeschick v. Mineta,* 675 F.3d 622, 629-631 (6th cir. 2012) (failure to monitor docket as basis for denying relief under Rule 60(b). In this case, the Order Re Chapter 11 Status Conference and Notice Thereof is contained in the court docket. Order, October 29, 2013, ECF No. 13. The movant has offered no evidence as to why the date of status conference was not ascertained from the court docket.

Thrice Actual and Inquiry Notice

Carefully parsing the Supplemental Declaration of Kevin Tang, December 9, 2013, ECF No. 46, A.O.E. Law & Associates was given actual or inquiry notice of the hearing on three occasions. First, on October 29, 2013, A.O.E. Law & Associates received an electronic copy of the notice of the status conference from the court. Supplemental Declaration of Kevin Tang at ¶ 5; *see also,* Exh. 1 thereto. The calendar paralegal "failed to open the document attached" and as a result did not calendar the date. Supplemental Declaration of Kevin Tang at ¶ 6. The reason that this staff member did not do so is difficult to understand given the description contained in the body of the document, which states, "Docket Text: Order Re Chapter 11 Status Conference and Notice Thereof." Had she opened the attachment she would have found the order regarding the status conference.

Second, on November 4, 2013, A.O.E. Law & Associates received a hard copy of the order regarding the status conference, as well as the notice of the requirement to complete the personal financial management course and the notice of the meeting of creditors. Supplemental Declaration of Kevin Tang at ¶¶ 5-6; *see also,* Exh. 2 thereto. Two different staff members reviewed these documents and did not see or calendar the status conference.

Third, on December 2, 2013, the day before the status conference, the debtor specifically inquired of attorney Kevin Tang as to the existence of a hearing. Declaration of Kevin Tang at ¶ 14.

Lack of Prejudice to the Debtor

There is no prejudice to debtor Rodrigo Romero. The dismissal of this case is no impediment to re-filing the case. 11 U.S.C. § 349(a). While doing so will require a motion to extend the stay, 11 U.S.C. § 362(c)(3), that leaves the debtor no worse than if the court granted this motion. It is true that this strategy contains a gap between dismissal and a possible re-filing, but that gap would exist even if the court granted this motion because the court would not afford nunc pro tunc relief. *In re Sewell,* 345 B.R. 174 (9th Cir. BAP 2006) (imposing the stay nunc pro tunc after order to dismiss vacated is discretionary). +In this case, there has been no showing of a lack of prejudice to creditors who acted in good faith reliance of the dismissal. As a result, the court would have denied nunc pro tunc relief even if it had vacated the dismissal and the debtor is in no worse position by re-filing the case.

Possible Prejudice to Creditors

The court also considers the possible but unidentified prejudice to creditors who have acted in reliance on the dismissal. Neither the debtor, nor counsel, have offered evidence of the lack of prejudice to creditors. Between the dismissal of this case on December 7, 2013, and the hearing on December 17, 2013, creditors may well have acted in reliance on the court's order. See Civil Minute Order, December 7, 2013, ECF No. 42. Because the dismissal is the fault of counsel for the debtor in possession, the court does not believe it appropriate to afford relief absent a strong showing that creditors are not adversely impacted.

CONCLUSION

For each of these reasons, debtor Romero has not carried his burden of proof and the motion is denied.

1:45 p.m.

1. 13-12358-A-11 CENTRAL VALLEY SHORING, INC. — CONTINUED CHAPTER 11 STATUS CONFERENCE 4-4-13 [10]

LEONARD WELSH/Atty. for dbt.

No tentative ruling.

2. 13-12358-A-11 APN-1 CENTRAL VALLEY SHORING, INC. — MOTION FOR RELIEF FROM AUTOMATIC STAY 11-19-13 [111]

FORD MOTOR CREDIT COMPANY/MV
LEONARD WELSH/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 2008 Ford F550 pickup

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(1) authorizes stay relief cause shown. Cause includes post-petition delinquency. The debtor in possession is delinquent $2,914.17. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

3. 13-11766-A-11 500 WHITE LANE LP
DMG-6
D. GARDNER/MV

MOTION FOR COMPENSATION BY THE LAW OFFICE OF D. MAX GARDNER FOR D. MAX GARDNER, DEBTOR'S ATTORNEY(S), FEE: $11564.85, EXPENSES: $292.40
11-26-13 [147]

D. GARDNER/Atty. for dbt.

Tentative Ruling

Motion: Application for Compensation and Expenses
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: Young Wooldridge, LLP
Compensation approved: $11,564.85
Costs approved: $292.40
Aggregate fees and costs approved: $11,857.25
Retainer held: $5,632.00
Amount to be paid as administrative expense: $6,225.25

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by counsel for the debtor in possession in a Chapter 11 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure. The moving party is authorized to draw on any retainer held.

4. 13-14894-A-11 JORENE MIZE

CONTINUED CHAPTER 11 STATUS CONFERENCE
7-24-13 [21]

ROSEANN FRAZEE/Atty. for dbt.

No tentative ruling.

5. 13-14894-A-11 JORENE MIZE
RAF-6
JORENE MIZE/MV
ROSEANN FRAZEE/Atty. for dbt.
RESPONSIVE PLEADING

CONTINUED MOTION TO USE CASH COLLATERAL
11-5-13 [117]

Tentative Ruling

Motion: Use Cash Collateral
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: To be determined
Order: Prepared by moving party

Creditors: Wells Fargo and Lestie Fry
Expiration: Earlier of plan confirmation, stay relief, conversion or dismissal
Adeq. Protection: Wells Fargo Bank-$2,641.62 per month and $308.57 and Lestie Fry-$1,929.38

The trustee or debtor in possession may not use cash collateral unless each entity that has an interest in the collateral consents or the court, after notice and a hearing, authorizes the use on specified terms and finds that the impacted creditor is adequately protected. 11 U.S.C. §§ 363(c)(2),(e), 361; Fed. R. Bankr. P. 4001(b).

At the hearing, the court will inquire: (1) whether the motion has been resolved by stipulation and, if so, the terms of the stipulation, including those specified in Federal Rule of Bankruptcy Procedure 4001(b)(1)(B); or (2) if the matter is not resolved by stipulation, whether the matter is (a) ripe for resolution, (b) not ripe for resolution but may be resolved without resort to Federal Rule of Bankruptcy Procedure 9014(d), or (c) not ripe for resolution but requires an evidentiary hearing under Federal Rule of Bankruptcy Procedure 9014(d).

Orders approving the use of cash collateral, whether by stipulation or after hearing, shall: (1) specify the duration of the order approving the use of cash collateral; (2) comply with Federal Rule of Bankruptcy Procedure 4001(b)(1)(B)(i)-(iv); (3) comply with LBR 4001-1(c)(3)-(4); (4) attach as an exhibit a specific and itemized budget; (5) expressly reserve the right of any party to proceed under 11 U.S.C. §§ 506(c), 552(b)(1); and (6) be approved as to form by each appearing impacted creditor and any other party in interest so requesting approval.

6. 13-14894-A-11 JORENE MIZE — MOTION FOR SANCTIONS
RAF-8 — 12-3-13 [157]
JORENE MIZE/MV
ROSEANN FRAZEE/Atty. for dbt.

Tentative Ruling

Motion: Motion for Sanctions
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

The debtor Jorene Mize has filed a motion for sanctions against the creditor Lestie Fry and her attorney Snezhana McGoldrick pursuant to Bankruptcy Rule 9011, the court's inherent authority, 11 U.S.C. § 105, 28 U.S.C. § 1927, and Civil Rule 16. The Debtor requests sanctions based primarily on the Creditor's "misconduct" in alleging that the value of the collateral in question was $450,000 to $600,000 without evidentiary support, when the Creditor's appraiser subsequently submitted a report showing the collateral valued at $280,000.

For the reasons set forth below, the court will deny the Debtor's motion without prejudice.

DISCUSSION

Sanctions under Bankruptcy Rule 9011

The Debtor first requests sanctions under Rule 9011, but the motion for sanctions was filed and served on the same day, December 3, 2013. For a motion for sanctions under Rule 9011, the motion cannot be filed with the court "unless, within 21 days after service of the motion . . . , the challenged paper . . . is not withdrawn or appropriately corrected." Fed. R. Bankr. P. 9011(c)(1)(A). This is what is known as the "safe harbor."

The substance of Bankruptcy Rule 9011 is substantially similar to that of Civil Rule 11. *Compare* Fed. R. Bankr. P. 9011, *with* Fed. R. Civ. P. 11. Therefore, the court can rely on case law interpreting Civil Rule 11. Civil Rule 11(c)(2) has a similar safe harbor provision as Bankruptcy Rule 9011(c)(1)(A), and the Ninth Circuit has held that the procedural requirements of the safe harbor under Civil Rule 11 are mandatory. *See Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001) (citing *Barber v. Miller*, 146 F.3d 707, 710–11 (9th Cir. 1998)). Thus, the Debtor is incorrect in arguing that the safe harbor somehow does not apply in this case.

Therefore, the request for sanctions under Bankruptcy Rule 9011 will be denied.

Sanctions under the Court's Inherent Authority

Second, the Debtor requests sanctions under the court's inherent authority.

The bankruptcy court has both the express and inherent authority to regulate and sanction attorneys who practice before it. *See Peugeot v. U.S. Tr. (In re Crayton)*, 192 B.R. 970, 975 (B.A.P. 9th Cir. 1996). A bankruptcy court's express sanctioning authority derives from the Code and the Rules. *In re Nguyen*, 447 B.R. 269, 281 (B.A.P. 9th Cir.

2011) (en banc). But in the absence of an applicable statute or rule authorizing sanctions, the bankruptcy court may rely on its inherent sanctioning authority. *In re DeVille*, 361 F.3d 539, 551 (9th Cir. 2004).

The court's inherent authority allows it to sanction a "broad range" of improper conduct. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1196 (9th Cir. 2003) (citing *Fink v. Gomez*, 239 F.3d 989, 992–93 (9th Cir. 2001) (determining limitation of federal district court's inherent sanctioning authority)). But "[b]efore imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct," and "bad faith or willful misconduct consists of something more egregious than mere negligence or recklessness." *Id.* (citing *Fink*, 239 F.3d at 992–94). While mere recklessness is not sanctionable, an attorney's recklessness coupled with an additional factor, such as acting for an improper purpose, is sufficient to impose sanctions. *Fink*, 239 F.3d at 994. Conduct that is "outrageously improper, unprofessional and unethical" constitutes conduct performed in bad faith, allowing the court to impose sanctions pursuant to its inherent authority. *In re Lehtinen*, 564 F.3d 1052, 1061 (9th Cir. 2009) (internal quotation marks omitted).

Here, the court finds that the Creditor's allegations as to the value of the collateral did not rise to the level of bad faith or willfulness. Although the Creditor has not substantiated her claim that the collateral is worth $450,000 to $600,000 with evidence (and it is unclear whether the Creditor will be able to do so), the issue of valuation is still undecided and the court does not believe that the Creditor intended to mislead the court or make a frivolous argument with her statements. The Creditor never represented her estimation as one from an expert or anything more than an estimate. And the court did not accept the Creditor's representations as fact as to the value of the collateral, which is why evidentiary hearings on the Debtor's motion to value and the Creditor's motion for relief from stay are forthcoming. Further, it is difficult to argue that the Creditor's estimation was frivolous in light of the fact that the purchase price in 2008 was $875,000. Thus, it is entirely plausible for the property to be valued at $450,000 to $600,000 at this time (and it does not appear that the Creditor received the appraisal report until after October 25, a date after she filed papers setting forth her estimate). Lastly, the Creditor's opposition to the Debtor's motion to extend exclusivity (ECF No. 155), which was filed before the present motion for sanctions was filed, acknowledged that her expert ultimately estimated the value of the collateral to be $280,000, which shows her willingness to be transparent with the court, rather than an intent to mislead the court. As a result, the court cannot find that the Creditor's actions were in bad faith or willful.

Therefore, the request for sanctions under the court's inherent authority will be denied.

Sanctions under § 105

Third, the Debtor requests sanctions under § 105 of the Bankruptcy Code, which the court construes as a request for sanctions under the court's civil contempt authority.

The bankruptcy court has the authority to impose civil contempt sanctions under § 105(a). *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d

502, 507 (9th Cir. 2002). To find a party in civil contempt, court must find that the offending party knowingly violated a definite and specific court order, and the moving party has the burden of showing the violation by clear and convincing evidence. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1190–91 (9th Cir. 2003). The burden then shifts to the contemnor to demonstrate why she was unable to comply. *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999).

Here, the Debtor has simply restated the legal standard but has not pointed out the definite and specific court order that the Creditor has allegedly violated.

Therefore, the request for sanctions under § 105 will be denied.

Sanctions under 28 U.S.C. § 1927

Fourth, the Debtor requests sanctions under 28 U.S.C. § 1927.

Section 1927 of the Judicial Code provides, "Any attorney or other person admitted to conduct cases in any *court of the United States* or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (emphasis added). However, a bankruptcy court is not a "court of the United States" for purposes of 28 U.S.C. § 1927. *In re Deville*, 280 B.R. 483, 494 (B.A.P. 9th Cir. 2002) (citing *Perroton v. Gray (In re Perroton)*, 958 F.2d 889, 896 (9th Cir. 1992) (holding that bankruptcy court was not "court of the United States" for purposes of 28 U.S.C. § 1915)), *aff'd on other grounds*, 361 F.3d 539 (9th Cir. 2004); *Determan v. Sandoval (In re Sandoval)*, 186 B.R. 490, 495–96 (B.A.P. 9th Cir. 1995); *see also* 28 U.S.C. § 451 (defining "court of the United States" for purposes of title 28).

Therefore, the request for sanctions under 28 U.S.C. § 1927 will be denied.

Sanctions under Civil Rule 16

Fifth, the Debtor requests sanctions under Civil Rule 16(f)(1)(C).

Civil Rule 16(f) provides that "the court may issue any just orders, including [the discovery sanctions under Civil Rule 37], if a party or its attorney . . . fails to obey a scheduling or other pretrial order. Fed. R. Civ. P. 16(f)(C), *incorporated by* Fed. R. Bankr. P. 7016. The rule further reads, "Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 16(f)(2).

Here, the Debtor argues that the Creditor failed to obey the court's scheduling order by (1) failing to state the market value of the collateral at issue in her initial disclosures (where she disclosed the identity of the expert); (2) failing to provide a copy of the appraisal report in her initial disclosures; and (3) stating in the initial disclosures that she reserved the right to modify, amend, or supplement the information contained in the disclosures. However, the court does not interpret these actions as failing to obey the scheduling order.

Even though the Creditor's appraisal report was completed by her appraiser on September 31, 2013, before the deadline for initial disclosures (October 16), it appears that the appraiser did not transmit the report to the Creditor until at least October 25. Thus, the existence of the report may have been within the knowledge of the Creditor at the time of the initial disclosures, but the failure to disclose the report and its contents in these disclosures cannot be construed as a failure to obey the scheduling order. In fact, in the initial disclosures, the Creditor disclosed the expert appraiser and stated that appraisal report will be produced upon completion, indicating an intention to comply with the scheduling order as best as possible.

Further, the appraisal report is best characterized as an expert's written report, and Civil Rule 26(a)(2)(B) requires that such a report accompany the disclosure of the expert witness, rather than accompany the initial disclosures. Here, the scheduling order required the disclosure of expert testimony by November 13, 2013, and the Creditor served the report on the Debtor on November 13, 2013. This complies with the scheduling order.

Finally, there is nothing wrong with the Creditor reserving the right to modify, amend, or supplement the information in the initial disclosures. In fact, Rule 26(e) imposes a duty on the party to do so. Under Rule 26(e)(1)(A), a party must supplement or correct its disclosure or response "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

The Debtor has not shown how the Creditor failed to obey the scheduling order.

Therefore, the request for sanctions under Civil Rule 16(f)(1)(C) will be denied.

CONCLUSION

For the reasons set forth above, the court will deny the Debtor's motion without prejudice.

7. 13-11766-A-11 500 WHITE LANE LP
DMG-7
500 WHITE LANE LP/MV

D. GARDNER/Atty. for dbt.
OST 12/10

MOTION TO APPROVE STIPULATION FOR RELIEF FROM THE AUTOMATIC STAY
12-10-13 [158]

No tentative ruling.