UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

December 18, 2013 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	09-29162-D-11 SK FOODS, L.P. 10-2117 SHARP ET AL V. INTERNAL REVENUE SERVICE ET AL	PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT FOR AVOIDANCE AND RECOVERY OF FRAUDULENT TRANSFERS 8-6-10 [25]
2.	09-29162-D-11 SK FOODS, L.P. 11-2339 BANK OF MONTREAL V. CALIFORNIA FRANCHISE TAX BOARD ET AL	PRE-TRIAL CONFERENCE RE: COMPLAINT FOR AVOIDANCE AND RECOVERY OF FRAUDULENT TRANSFERS AND FOR OTHER RELIEF 5-4-11 [1]

3. 09-29162-D-11 SK FOODS, L.P.
11-2340
BANK OF MONTREAL V. COLLINS ET AL

PRE-TRIAL CONFERENCE RE: COMPLAINT FOR AVOIDANCE AND RECOVERY OF FRAUDULENT TRANSFERS, AND FOR OTHER RELIEF
5-4-11 [1]

4. 13-27725-D-7 KRISTIAN HARTMAN
WAC-2

MOTION TO DISMISS CASE
10-1-13 [93]

5. 09-29162-D-11 SK FOODS, L.P.
09-2543 TJD-8
SHARP ET AL V. CSSS, LP

CONTINUED MOTION FOR SUMMARY JUDGMENT
8-15-13 [625]

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, Bank of Montreal ("BMO"), for summary judgment against Gerard Rose ("Rose") and Larry Lichtenegger ("Lichtenegger") as respondents to a motion for contempt (the "contempt motion") earlier brought by BMO's predecessor in interest in this adversary proceeding, Bradley Sharp (the "trustee"), chapter 11 trustee in the case of SK Foods, L.P. ("SK Foods"). Rose and Lichtenegger have filed separate oppositions, and BMO has filed a reply. No party has requested an evidentiary hearing and the court finds an evidentiary hearing would not be helpful, and as such, is unnecessary. For the following reasons, the motion will be granted.

Preliminary Procedural Issue

Rose and Lichtenegger oppose the motion on the ground that it is untimely. Citing Fed. R. Civ. P. 56(b) ("Rule 56(b)"), which allows parties to file a motion for summary judgment at any time until 30 days before the close of discovery, they note that the discovery bar date in connection with the contempt motion was October 31, 2012, whereas this summary judgment motion was filed several months later. However, Fed. R. Bankr. P. 7056 ("Rule 7056"), which incorporates the civil rule almost entirely in bankruptcy adversary proceedings, does not incorporate the time limit cited by Rose and Lichtenegger. Instead, Rule 7056 incorporates Rule 56 "except that any motion for summary judgment must be made at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a different time is set by local rule or the court orders

otherwise." Rule 7056.[1] As no evidentiary hearing has been scheduled with regard to the issues raised by the contempt motion; that is, the issues as to which summary judgment is sought, the summary judgment motion is timely.

Applicable Legal Standards

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

"When the moving party has carried its [initial] burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (footnote omitted; citations omitted). "A genuine dispute arises if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003). A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." United Steel Workers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989).

> The standard for finding a party in civil contempt is well settled: "The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply."

FTC v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999), quoting Stone v. City & County of San Francisco, 968 F.2d 850, 856 n.9 (9th Cir. 1992) (internal citations omitted). "[The contemnors] must show they took every reasonable step to comply." Stone, 968 F.2d at 856 n.9. "Intent is irrelevant to a finding of civil contempt and, therefore, good faith is not a defense." Id. at 856.

The TRO and Rose's and Lichtenegger's Conduct

BMO seeks entry of a judgment against Rose and Lichtenegger, jointly and severally, in the amount of $350,000 as a sanction for their alleged violation of this court's Temporary Restraining Order and Order to Show Cause re Preliminary Injunction, filed August 24, 2009 (the "TRO"). The TRO (1) restrained CSSS, LP, dba Central Valley Shippers ("CVS"), its officers, agents, servants, employees, and attorneys, and those in active concert or participation with CVS or with its officers, etc., from, among other things, moving certain equipment referred to by the parties as a Drum Line to any location outside of California; and (2) ordered CVS to produce a corporate designee to testify at a deposition about, among other things, the location of the Drum Line and any plans to move it. BMO contends Rose and Lichtenegger violated both of these provisions of the TRO. The court agrees.

As the following discussion shows, Rose and Lichtenegger knew well before the

Drum Line left California that the trustee had gotten wind of the intention of Scott Salyer ("Salyer"), the principal of the debtor in the chapter 11 case, SK Foods, L.P., to ship the Drum Line to New Zealand, and they knew the trustee was trying to stop the shipment. Rose and Lichtenegger conveyed to the trustee's attorney, before the hearing on his TRO application, a statement that the Drum Line had already shipped -- more specifically, that it was "already gone,"[2] whereas at the time of that communication, Rose and Lichtenegger had not confirmed that statement, and in fact, had reason to doubt it. Lichtenegger soon learned -- again, before the hearing -- that the Drum Line had in fact not shipped, and would not for several days after the TRO hearing, yet he failed to take any steps to correct the inaccurate statement he had made to the trustee's attorney. He failed to do so despite the fact that he knew the trustee's attorney had conveyed Lichtenegger's inaccurate statement to the court. Both Rose and Lichtenegger proceeded to do everything they could think of to distance themselves from the situation so as to create plausible deniability; the court, instead, finds their deniability entirely implausible.

The events relevant to this motion took place in August and September of 2009, beginning August 21, when communications began among Rose, Lichtenegger, Salyer, and other members of Salyer's legal team concerning the TRO application and the status of the shipment of the Drum Line to New Zealand.[3] On Friday, August 21, these communications took place:

• 2:45 p.m. The trustee's counsel, Michael Carlson ("Carlson"), called Rose and told him he would be filing an application for a temporary restraining order that day to prevent the movement of the Drum Line, and would be appearing in court on Monday, August 24, at 11:00 a.m. on the application. Rose asked Carlson to e-mail him the moving papers; Carlson did that, and Rose retrieved them later that evening at his home and forwarded them by e-mail to Salyer and three attorneys – two who represented Salyer in one capacity or another, Malcolm Segal and Paul Pascuzzi, and one who represented certain of Salyer's related entities, Donald Putterman. Carlson had also e-mailed the moving papers to Lichtenegger at 4:23 p.m. the same day.

Rose told Carlson in the 2:45 p.m. conversation that he was leaving California early the next morning for a week-long vacation, and thus, would be unable to attend the Monday morning hearing. Carlson replied that the hearing would go forward anyway.

• The same afternoon, after he spoke with Carlson, Rose states he called Segal and "learned from him that the Drum Line had already been shipped out of the country,"[4] and thus, that any restraining order would be moot.

• As Rose was going to be on vacation from early the next morning, August 22, through the following week, he called Lichtenegger and asked him to make a special appearance on Monday morning to oppose the TRO application. Rose has testified he "arranged to have Mr. Lichtenegger appear specially for [Rose] at the hearing";[5] he also says Lichtenegger responded that he had another matter scheduled for Monday morning, but that he would appear at the TRO hearing if Rose could set up a telephonic appearance for him, which Rose then did.[6] According to Lichtenegger, and not disputed by Rose, Rose also asked him to call and tell Carlson that the Drum Line had already shipped and that the TRO application was moot. According to Lichtenegger, Rose said he was too upset by Carlson's "rude treatment" in their earlier conversation to make the call himself.[7]

• 3:20 p.m. Salyer e-mailed Segal, Pascuzzi, Rose, Lichtenegger, and another member of Salyer's legal team, Gary Perry -- stating that, as they had heard, the trustee was going to try to get a TRO against CVS; Salyer suggested they "attack" the trustee and his attorneys for violating a settlement under which Salyer's daughters' trusts, "which are the sole owners of CVS," were released. Salyer stated it was "[t]ime to pull the gloves off and start asking for Sanctions and restraining orders against the Trustee and his goons." BMO 375.

• 3:25 p.m. Lichtenegger left the following voicemail message for Carlson:

> Mr. Carlson, my name is Larry Lichtenegger. I'm an attorney down in Carmel. I've been asked to specially appear on Monday morning in regard to your Application for a TRO. I wanted to inform you that I've investigated and confirmed that the drums [sic] shipped on Thursday -- they are already gone. That makes your application for a TRO moot. You may have other issues, but not a TRO. My phone number is 831-626-2801. Thank you.[8]

It is undisputed that, as of August 21, the Drum Line was not already gone, and the TRO application was not moot.[9]

• 3:29 p.m. Segal e-mailed Salyer, Pascuzzi, Perry, Rose, and Lichtenegger, stating, "I just spoke to Larry [Lichtenegger] and Gerard [Rose]. If the goods have already shipped, the TRO application is moot." BMO 377 (emphasis added).

• 3:30 p.m. Responding to Salyer's 3:20 p.m. e-mail, described above, Lichtenegger e-mailed Salyer, Segal, Pascuzzi, Perry, and Rose, stating, "GAR [Rose] and I are dealing with this now." BMO 378.[10]

• 3:31 p.m. Responding to Segal's 3:29 p.m. e-mail, Lichtenegger e-mailed Salyer, "Confirm drums shipped on Thursday?" BMO 380.[11]

• 4:11 p.m. Carlson returned Lichtenegger's call. At that time, despite Lichtenegger's 3:31 p.m. question to Segal seeking confirmation, a question that remained unanswered at 4:11 p.m., Lichtenegger took the liberty of telling Carlson it was his understanding the Drum Line had shipped the previous day; Lichtenegger also asked that the TRO hearing be continued "as there was no longer an emergency."[12] Carlson responded that the hearing would go forward as scheduled. According to Carlson, Lichtenegger confirmed he would be appearing by CourtCall at the hearing on behalf of CVS.[13]

• 4:37 p.m. Carlson e-mailed Rose and Lichtenegger a copy of Carlson's supplemental declaration in support of the TRO application, setting forth the text of Lichtenegger's 3:25 p.m. voicemail message, quoted above.

• 4:38 p.m. Rose and Lichtenegger had a four-minute cell phone conversation.

Thus, the undisputed facts are that by the end of the day on Friday, August 21, both Rose and Lichtenegger had received copies of the TRO application and related documents by e-mail; Carlson had told both of them the hearing would go forward Monday morning; and Lichtenegger had twice informed Carlson, once by voicemail (at Rose's direction) and once in a telephone conversation, that the Drum Line had already shipped, and therefore, that the TRO application was moot.[14] Lichtenegger also knew by the end of the day Friday that Carlson had informed the court of Lichtenegger's unqualified statement that he "[had] investigated and confirmed that

the drums [sic] shipped on Thursday -- they [were] already gone." In other words, Lichtenegger knew Carlson had informed the court of Lichtenegger's statement that he had investigated and confirmed information he had in fact not yet confirmed -- information Lichtenegger knew went to the very heart of the relief the trustee would be seeking from the court Monday morning.

The situation changed significantly over the weekend. On Sunday, August 23, the following transpired:

• 12:45 p.m. Lichtenegger e-mailed Salyer asking him to call because he "need[ed] some info to a decision" (presumably, in order to come to a decision). BMO 384.

• 4:40 p.m. Salyer e-mailed Lichtenegger: "Equipment does not ship out until Wednesday earliest." BMO 385.

• 4:47 p.m. Salyer e-mailed Lichtenegger: "Departs Thursday." BMO 388.

Lichtenegger now testifies, for the first time in this adversary proceeding, that he had a conversation with Salyer Sunday afternoon, August 23, after Salyer's 4:47 p.m. e-mail, which Lichtenegger claims he has not been allowed to testify to earlier. Lichtenegger says Salyer told him in that conversation that the Drum Line "had indeed shipped from CVS the previous week." Lichtenegger Decl. at 3:13-14. This is a truncated version of testimony Lichtenegger prepared in the spring of 2011 which he states his then-attorney decided not to use in his declaration filed with the court at that time. In that earlier testimony, which Lichtenegger has submitted as an exhibit in opposition to this motion, Lichtenegger stated that in that August 23 telephone conversation, Salyer told him the Drum Line "had indeed shipped from CVS the previous week and was currently at the port awaiting departure."[15] Thus, whereas Lichtenegger claims he knew from that telephone conversation that the Drum Line had "shipped" from CVS, he also knew it was still in port "awaiting departure."

Lichtenegger claims he then asked Salyer "if the shipment could be stopped and was told that it could not be stopped as it was already in transit." Lichtenegger Decl. at 3:15-16. Lichtenegger adds that he "briefly discussed the nature of the TRO pending proceeding and [Salyer's] duty to stop the shipment if he could." Id. at 3:17-18. Lichtenegger states he "knew nothing of the nature of seaboard shipping and had no reason to disbelieve [Salyer] when he said he could not stop it." Id. at 3:18-19. Thus, "it did not appear important to know where in transit the Drum Line containers were if the shipment could not be stopped" (id. at 3:22-23), so he did not ask. He adds that he had no one else to ask besides Salyer and Rose, whom he claims he was unable to reach; he apparently did not try to contact Segal, who had been the source of the "if it has shipped" comment, or Pascuzzi. Considering that Lichtenegger knew the Drum Line "was currently at the port awaiting departure," and thus, that it had not left the country, his attitude of unconcern was totally unjustified.

In any event, as of Sunday afternoon, August 23, Lichtenegger knew the Drum Line was "at the port awaiting departure," and he knew it would not ship until two or three days after the TRO hearing Monday morning. Thus, he knew that what he had earlier assured Carlson he had "investigated and confirmed" -- that the Drum Line was "already gone" -- was unequivocally false. Yet he did not call or e-mail Carlson to correct that statement or to qualify it in any way, and he did not appear at the hearing on Monday morning to correct or qualify the statement he knew had been conveyed to the court: the statement that the Drum Line was already gone.

But Lichtenegger did more than conceal the truth. Nine days later, in a sworn declaration filed in opposition to the court's order to show cause why a preliminary injunction should not issue preventing the moving of the Drum Line to a location outside of California, Lichtenegger not only concealed from the court the information he had acquired on August 23 -- that the Drum Line was in port awaiting departure and would not ship for several days after August 23, he stated under oath as a "fact" that as of August 23, the Drum Line had already shipped: "Over the weekend [August 22-23], I debated the usefulness of my appearance [on August 24] in light of my [scheduling conflict] . . . and the fact that the drum line had already shipped and the hearing was a non-event."[16] He also referred to the Friday afternoon communications, stating, "I then made a couple of calls and was aware from speaking briefly with Malcolm Segal that the drum line had shipped the previous day, and I believed the TRO was not timely." Id. at 2:8-11 (emphasis added). Considering that Lichtenegger knew that as of the afternoon of August 23, the Drum Line was still "at the port awaiting departure," a departure that was not scheduled to occur until two or three days later, Lichtenegger's testimony nine days later was false, and he knew it was false at the time he signed that declaration on September 1 and permitted it to be filed with the court by Rose, as attorney for CVS.[17]

In addition to the above falsehoods, Lichtenegger added a further gloss: "I decided that my appearance at the [August 24] hearing, if in fact one would occur, was useless as there was nothing I could do to aid the court or any of the parties in this dispute." Lichtenegger 9/1/09 Decl. at 2:27-3:2. Thus, Lichtenegger cancelled his CourtCall appearance, and did not appear at the August 24 hearing.[18] Of course, there was much Lichtenegger could have done to aid the court -- he could have appeared on August 24 and told the court the truth -- that the earlier information he had conveyed to Carlson, which he knew Carlson had conveyed to the court, was incorrect, and that the Drum Line had in fact not left the country and would not for several days. And that is exactly what Lichtenegger did not want to have to do.

Lichtenegger maintains this position today -- he claims he e-mailed Salyer at 12:45 p.m. Sunday, August 23, because "if the Drum Line was truly on its way and could not be stopped, I would just not attend the hearing as there was nothing I could do to aid the situation." Lichtenegger Decl. at 3:4-6. This testimony is undercut by the fact that when Lichtenegger and Rose spoke on Friday afternoon and agreed that Lichtenegger would make the special appearance, Lichtenegger and Rose claim to have been already under the impression the Drum Line was gone. Thus, although Lichtenegger already viewed the TRO application as moot (and had so informed Carlson), he nevertheless planned, as of Friday afternoon, to make a telephonic appearance at the hearing. That fact conflicts with his testimony that he decided he would not appear "if the Drum Line was truly on its way and could not be stopped."

The only logical conclusion to be drawn from this inconsistency is that when Lichtenegger thought the Drum Line was already gone, he planned to attend the hearing -- presumably, to emphasize to the court that the TRO application was moot, and it was only after Salyer informed him, on Sunday afternoon, that the Drum Line was still "at the port awaiting departure" and would not ship until Wednesday at the earliest that Lichtenegger changed his mind and decided not to appear. By contrast, if at that point, Lichtenegger had really wanted to present CVS's position on the TRO application in an honest and forthright manner, he would have appeared at the hearing Monday morning to defend against the TRO application on its merits. Yet he deliberately did not appear. The court has no trouble concluding that the only reason Lichtenegger cancelled his CourtCall appearance was so that he, Rose, and

Salyer could assert they did not have absolute and specific knowledge of the issuance of the TRO and of its terms. This, they believed, would provide Salyer with "cover," or plausible deniability, for failing to comply with the TRO and Lichtenegger and Rose with cover for failing to take "every reasonable step" to ensure that Salyer complied with it.

Rose, meanwhile, distanced himself physically and, allegedly, technologically from the Drum Line controversy. He left the morning of Saturday, August 22, for a vacation in what he says is a rural location in Michigan where "[his] communications with the outside world were extremely limited." Rose Decl. at 6:10-11. "[A]t no time did [he] review any e-mails, facsimiles, or letters of any kind, including documents or correspondence relating to this controversy." Id. at 6:11-13. He has "no office staff, no associates and no partners" (id. at 7:20-21); thus, there was no one to receive the copies of the TRO Carlson had sent by overnight mail to his office. Rose apparently did not offer Carlson his address in Michigan for that purpose.[19]

At his deposition, Rose readily, almost defiantly, admitted he did nothing to update himself on the status of the TRO application after he left on his vacation. He did not try to contact Segal or any other member of Salyer's legal team (except Lichtenegger) concerning the Drum Line or the TRO application. Rose claims he tried to have a cell phone conversation with Lichtenegger -- about another matter -- but was defeated by the poor cell phone service. Although Rose relies heavily on that excuse -- he says his calls typically involved only "static" or "noise" on the other end, and were "spotty" at best (Rose Decl. at 12:15-17), he testified at his deposition, on November 16, 2009 (just two and one-half months after his vacation), that he did not recall whether the cabin he was staying in had telephone service; he then admitted he did not check to see if the cabin had a phone. Although the trustee's counsel did not nail him down on the issue, he did ask whether the cabin had Internet access, and Rose replied that "it was supposed to but frankly I was on vacation." BMO 512. Rose has never suggested he tried to access his e-mails or to contact Carlson, Salyer, Lichtenegger, or any other member of the Salyer legal team by e-mail while he was on vacation.

Rose attempts to justify this "head-in-the-sand" strategy in two ways. First, he seems to think being on vacation meant he had an unqualified right to cut himself off from his law practice and from what his clients might be up to, and that attorneys for opposing parties would simply have to defer all activity in their cases until Rose returned. He cites what he calls settled California law that "you cannot use an attorney's vacation to his or her disadvantage." Rose Decl. at 13:10-12. Although, arguably, the single case he cites, Tenderloin Housing Clinic, Inc. v. Sparks, 8 Cal. App. 4th 299 (1992), supports that proposition, it does nothing for Rose's position in this case. In that case, the court merely upheld an award of sanctions against an attorney who had set three discovery motions and three depositions on dates he knew his opposing counsel would be out of the country, had refused to continue them although she "begged" him to continue at least the one deposition she believed especially required her personal attendance, and had then cancelled that deposition -- the one his opponent had told him she especially needed to attend -- after she had returned from her vacation four days early to attend it. The court found that the offending attorney had repeatedly tried to take advantage of his opponent's absence, which was "all the more outrageous" in light of the fact that the discovery bar date was two months out. 8 Cal. App. 4th at 305.

That is a far cry from the situation here, where Rose's right to a vacation, especially in a location in this country that almost certainly had reasonably nearby

Internet and telephone access, was surely subordinate to the trustee's interest in preventing Rose's client from getting an apparently valuable asset of the estate out of the country and beyond this court's reach.[20]

Second, like Lichtenegger, Rose relies on Segal's alleged statement in their telephone conversation on August 21 "that the Drum Line had already been shipped out of the country, and that any TRO would be moot." Rose Decl. at 5:8-9. "At all times thereafter, until I returned from my vacation on August 31st, I still believed that the Drum Line was out of the country, and that any order from the Court on that subject would have been moot." Id. at 6:5-8. Rose is quite insistent on this point:

> According to BMO, I knew while I was on vacation that a TRO had been issued, and that the Drum Line had not yet shipped. In fact, I had no such knowledge. As indicated above, it is undisputed that I had been advised by Mr. Segal on the afternoon of August 21st that the Drum Line had already been shipped out of the country, and that the TRO motion was moot. That fact alone explains why I had no incentive to track down the status of the TRO motion. If the Drum Line were already gone, why would the Court issue an order to prevent its being taken out of California?

Rose Decl. at 11:19-12:1.

This testimony is not credible, and the court does not believe it. There is a written record of the telephone conversation: it contradicts Rose's (and Lichtenegger's) version. Segal himself confirmed the telephone conversation, immediately after it occurred, as follows: "I just spoke to Larry [Lichtenegger] and Gerard [Rose]. If the goods have already shipped, the TRO application is moot." Thus, the only concrete evidence of Segal's information to Rose (and Lichtenegger) is that Segal did not know whether the Drum Line had shipped or not, and accordingly, he did not know whether the TRO application was moot or not.

Two minutes after Segal confirmed the conversation, at 3:31 p.m., Lichtenegger e-mailed Salyer asking him to "Confirm drums shipped on Thursday?" And at 4:38 p.m., according to Rose's Verizon records, Rose had a four-minute cell phone conversation with Lichtenegger. It is not credible, and the court does not believe, that the need for confirmation of the shipment did not come up in that conversation. Rose's Verizon records indicate he had very few cell phone conversations over the weekend, but on Monday, August 24, at 5:09 p.m. -- after the TRO hearing had taken place, Rose made a one-minute call to Lichtenegger, and one minute later, at 5:10 p.m., he made a three-minute call to a number in the same area code as Lichtenegger's but that Rose has redacted from his cell phone records. The next night, Tuesday, August 25, Rose made a one-minute call to Lichtenegger at 9:01 p.m., and the next minute, at 9:02 p.m., made a five-minute call to a number in the same area code as Lichtenegger's but that Rose has, again, redacted from his records.[21] On Friday, August 28, Rose made a 15-minute call to Lichtenegger. Rose claims to remember a 15-minute cell phone conversation with Lichtenegger that day that Rose says was characterized by him walking around trying to find a good cell phone connection. However, the Verizon records indicate Rose's 15-minute call to Lichtenegger on August 28 originated in Evanston, Illinois,[22] as did several other calls Rose made that day and during the ensuing weekend.[23] Even if Rose was in fact in an area with difficult cell phone reception, which appears unlikely, the court simply does not believe that a cell phone call can remain connected for 15 minutes without the parties being able to effectively communicate anything. In short, the court believes that in their August 28 conversation, and in the earlier ones on

August 24 and 25, Rose and Lichtenegger discussed the fact that the court had issued the TRO and its terms.

In light of the evidence discussed, which is undisputed except for the self-serving testimony of Rose and Lichtenegger, the court does not believe Rose's or Lichtenegger's testimony that, based on their conversation with Segal on August 21st, they understood the Drum Line had already been shipped out of the country. Accordingly, contrary to Rose's present self-serving testimony, he had every incentive -- in fact, the court concludes, a duty to track the whereabouts of the Drum Line and the status of the TRO application, to apprise himself of the outcome of the hearing (which the court believes he did by way of the above-described cell phone calls to Lichtenegger), and to take "every reasonable step" to get his client to comply with the TRO that issued at the conclusion of that hearing. Instead Rose buried his head in the sand and tried to distance himself as much as possible from the issuance of the TRO and he did so at his peril.

Back in California, Lichtenegger, on Monday morning, cancelled his CourtCall appearance and skipped the hearing. He claims his decision was influenced in part by his Friday afternoon telephone conversation with Carlson, in which Carlson told him the transcript of Lichtenegger's earlier voicemail message would be provided to the court, adding that anything Lichtenegger said would be used to hold him or anyone else who violated the TRO responsible. Lichtenegger claims this conversation "upset" him, which he says was an "emotional condition" that contributed to his decisions "not to be involved with the issues surrounding the Drum Line shipment" (Lichtenegger Decl. at 22-24) and not to attend the hearing. It also, allegedly, led Lichtenegger "to do nothing when [Carlson's] e-mails, faxes and Fed-Ex packages started coming in." Id. at 2:27-28. Thus, he claims to have deliberately not read Carlson's e-mails, faxes, or overnight mail; in fact, he went so far as to unplug his fax machine when Carlson's faxes started coming in. In this way, if he is to be believed, Lichtenegger, like Rose, hid his head in the sand which, like Rose, he did at his peril.[24]

Even if it is true, which the court does not believe but need not decide, that Lichtenegger did not actually see the TRO, that is not sufficient to protect him from the consequences of ignoring it. First, there is the obvious fact that if a TRO could be evaded merely by refusing to look at it, no TRO would ever have teeth. Thus, under the applicable rule, it is not necessary that a restraining order or injunction be personally served on an individual in order to bind him or her to its terms. Instead, a restraining order or injunction binds individuals "who receive actual notice of it by personal service or otherwise." Fed. R. Civ. P. 65(d), incorporated here by Fed. R. Bankr. P. 7065 (emphasis added); see also NLRB v. Sequoia Dist. Council of Carpenters, 568 F.2d 628, 634 (9th Cir. 1977) (labor union officers were bound by cease and desist order served only on union's attorney and not on the officers); Fidelity Mortg. Investors v. Camelia Builders, Inc., 550 F.2d 47, 52 (2nd Cir. 1976) ("a person is in contempt of court if he knowingly violates a court order, whether or not he received a formal notice."); Central States, Southeast & Southwest Areas Health & Welfare & Pension Funds v. Transcon Lines, 1995 U.S. Dist. LEXIS 11372, *22 (N.D. Ill. 1995) ("constructive notice, namely, less than actual knowledge but awareness of facts sufficient to cause a reasonable person to inquire further, is adequate notice to a corporate officer of the existence of a court order to satisfy due process.").[25]

Based on the evidence discussed above, the court is convinced both Rose and Lichtenegger knew the TRO had issued, they knew what it provided, and they knew it was not moot; that is, they knew the Drum Line had not left California. Rather than

taking "every reasonable step" to ensure their clients' compliance with the TRO, they spent the next week pursuing a strategy they hoped would give them deniability. First, Lichtenegger decided not to make an appearance at the hearing and proceeded to deliberately ignore his faxes, overnight mail, and e-mails so he could argue he did not know for certain the TRO had issued until after the Drum Line had actually left the Port of Oakland. At the same time, Rose decided to ignore his mail, e-mails, and faxes, so he too could claim he was unaware of the TRO and its provisions, like Lichtenegger, in an effort to evade compliance with the TRO. In short, both treated the TRO as a hot potato neither wanted to touch.

Rose and Lichtenegger as Persons Bound by the TRO

Rose and Lichtenegger both claim they were not bound by the TRO because their relationships with CVS and Salyer were too attenuated. Lichtenegger contends he was not an attorney for CVS during the time the Drum Line was still in California. First, he claims he could not have been an attorney for CVS because he had not appeared as its attorney of record in any manner described in LBR 2017-1(b)(2); thus, under subsection (b)(1) of the same rule, he could not participate in the action.[26] The court, however, believes the rule is intended to govern an attorney's participation in proceedings in court, not to define the circumstances under which an attorney-client relationship is created or the circumstances in which an attorney, as an attorney for a party, assumes duties of candor and truthfulness to opposing counsel and the court, as discussed below. Further, the rule was not designed to shield attorneys from the consequences of their actions and choices. Thus, the court rejects Lichtenegger's position.

Lichtenegger also relies heavily on the fact that he agreed to make only a "special appearance" for Rose at the TRO hearing if he could. However, the court does not believe Lichtenegger perceived that what he was doing for Rose, CVS, and Salyer regarding the Drum Line and the TRO application was limited to making a "special appearance" that carried no responsibility for him as an attorney for a party. At the time the Drum Line incident arose, Lichtenegger was not a stranger to Salyer and his related entities; he was not someone Rose called out of the blue to ask for the "favor" of making a special appearance. Instead, in early August of 2009, Salyer had asked Lichtenegger "to represent a list of unnamed entities to avoid a conflict by already engaged attorneys" (Lichtenegger Decl., filed March 21, 2011, at 1:27-28), to develop a new action against BMO regarding a property at Lake Tahoe, to expunge a lis pendens the trustee had filed against certain farming properties, and to sign papers supporting a Rule 12(b)(6) motion in the trustee's substantive consolidation action. Id. Lichtenegger has testified he signed those latter papers "on behalf of a number of entities which, at that time, I knew nothing about (nor was it important for me to know that detail as the motion was directed at the failure to state causes of action in the first instance)." Id. at 2:5-7.[27]

The court concludes from these facts that Lichtenegger was part of Salyer's legal team and he was prepared and willing to do whatever he was asked by Salyer or other members of his legal team. This includes representing whatever person or entity that Salyer, or member of his legal team, requested that Lichtenegger represent. The only reason his prospective appearance at the TRO hearing was characterized as a special appearance was that if Rose had not been on vacation, he would have made it. The court believes that, although they characterized it as a special appearance, Lichtenegger thought he was working for Salyer and/or one of his entities. This conclusion is supported by the series of e-mails among Salyer, Putterman, Segal, Pascuzzi, Rose, and Lichtenegger on August 24 (the day of the TRO hearing) and August 25, in which Lichtenegger was asked to call the attorney for

Olam (purchaser of SK Foods' business operations from the trustee) and demand the return of eight color sorters. At one point in this exchange, Lichtenegger e-mailed Pascuzzi as follows: "It is not clear to me who the owner of the 8 color sorters is that I am representing. Tell me and I will call after lunch." BMO 417 (emphasis added). In short, the court believes Lichtenegger was part of the Salyer legal team and viewed himself as such.

In that capacity, Lichtenegger deliberately conveyed information on behalf of Salyer and CVS for the sole purpose of persuading Carlson to drop the TRO application. He did not purport to limit his remarks to what he had learned from another attorney; he stated that he had "investigated" the facts and he had "confirmed" that the Drum Line was "already gone." An attorney proposing nothing more than to make a special appearance for another attorney does not undertake those types of activities. Then, after he left the voicemail message, Lichtenegger e-mailed Salyer, Segal, Pascuzzi, Perry, and Rose, stating that he and Rose were "dealing with [the Drum Line situation] now." The court finds that as of Friday afternoon, August 21, Lichtenegger was an attorney for CVS and Salyer with regard to the Drum Line and the TRO application, and assumed all the associated duties and responsibilities, including the duty not to conceal from the court or opposing counsel material facts that showed his earlier information was inaccurate (see discussion below), and the duty to take "every reasonable step" to ensure compliance with the TRO.[28]

If all of that is not sufficient to find Lichtenegger was bound by the TRO (and the court believes it is), the court also finds that, as discussed above, Lichtenegger, at all times the TRO was in force, was acting with regard to the Drum Line and the TRO in concert with Rose, who himself was an agent of and attorney for CVS, the named target of the TRO (see discussion below). As the TRO bound CVS, its officers, agents, etc., "and those in active concert or participation with CVS or with its officers, agents, [etc.]," Lichtenegger was bound by the TRO. Finally, as indicated above, Lichtenegger had already appeared in AP No. 09-2342 as attorney of record for MPF, the owner of CVS. For this reason also, the court concludes Lichtenegger was acting as an attorney for CVS in the Drum Line controversy, and as such, was bound by the TRO.

Lichtenegger claims that if he was "inadvertently and unknowingly"[29] put into the position of an attorney for CVS by his initial phone call to Carlson, he "completely complied with the duties of an attorney before he withdrew from his favor to Rose[,] as he did advise [CVS's] agent, Scott Salyer, of the pending TRO and the consequences of disobeying it." Id. at 2:1-3. The court cannot conclude that whatever admonition he may have given to Salyer -- even if Lichtenegger actually made it -- in any way qualified as "every reasonable step" he could have taken to ensure Salyer's compliance. Assuming Lichtenegger actually believed Salyer's statement that the shipment could not be stopped (which the court does not believe), Lichtenegger had a duty to make at least some effort to determine whether that was true, rather than simply taking Salyer's word for it. Lichtenegger does not even pretend he thought Salyer's remark meant a court order could not have stopped the shipment. And he did not ask Salyer whether a court order could stop it. Neither Lichtenegger nor Rose has suggested a factual scenario or legal theory under which the shipment of the Drum Line, as of August 24, after the TRO had issued, could not have been stopped. The court finds that as of the time the TRO issued, and through the next seven days, the shipment could and should have been stopped, and that, had Lichtenegger not concealed from Carlson and the court that the Drum Line was still in port "awaiting departure," the shipment likely would have been stopped.

Lichtenegger claims his only obligation in this matter was his promise to help Rose by appearing specially for him at the hearing if he could; in Lichtenegger's view, he had no duty to the trustee or the court. On the contrary, once Lichtenegger made an affirmative unqualified representation to Carlson that the Drum Line had shipped and was "already gone," and thus, that the TRO application was moot, and then learned that those statements were false, he had a duty to follow up. "It is the duty of an attorney . . . : (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Cal. Bus. & Prof. Code § 6068. This subsection "unqualifiedly require[s] an attorney to refrain from acts which mislead or deceive the Court." Oliner v. Kontrabecki (In re Cent. European Indus. Dev. Co.), 51 Bankr. Ct. Dec. 31, 2009 Bankr. LEXIS 639, *17 (Bankr. N.D. Cal. 2009), citing Di Sabatino v. State Bar, 27 Cal.3d 159, 162 (1980). "Furthermore, it is settled that concealment of material facts is just as misleading as explicit false statements . . . ." Oliner, 2009 Bankr. LEXIS 639, at *18, citing Di Sabatino, 27 Cal.3d at 183. "These same rules of candor and truthfulness apply when an attorney is communicating with opposing counsel." Oliner, 2009 Bankr. LEXIS 639, at *18, citing Hallinan v. State Bar, 33 Cal.2d 246, 249 (1948).

Rose, like Lichtenegger, denies he was representing CVS during the episode in which the Drum Line was finally shipped to New Zealand, and thus, claims he was not bound by the TRO. He acknowledges that in the fall of 2009, he was representing CVS in another matter in the SK Foods bankruptcy case. As mentioned above, on August 17, four days before Carlson notified Rose of the TRO application, Rose signed and filed -- as counsel for CVS -- a motion to dismiss the trustee's complaint in AP No. 09-2342 in this court. In addition, Rose was at that time the trustee of two trusts of which Salyer's daughters were the beneficiaries. According to Rose, CVS was owned by MPF, which, in turn, was owned by Salyer's daughters and their trusts -- the trusts of which Rose was the trustee.

Despite those significant relationships, Rose claims that when he took Carlson's call that Friday afternoon, he had not agreed to represent CVS in the Drum Line litigation, and did not agree to do so until he returned to California on August 31. He also says he did not agree, in his telephone conversation with Carlson, to appear at the TRO hearing.[30] Rose adds that by the fall of 2009, CVS had been forced out of business by the United States Trustee in the SK Foods case, and that he understood CVS to have no officers, directors, or employees.

Rose's arguments are spurious. No one denies that CVS, as an entity, continued to exist at the time the Drum Line situation arose. Assuming Rose is correct that it had no officers, directors, or employees (or as is more accurate for a limited partnership, no partners), there must have been someone in charge of its affairs; it appears to the court that that someone can only have been Rose himself, as trustee of the two trusts that owned MPF which, in turn, owned CVS. BMO has submitted a copy of a Purchase and Sale Agreement dated December 1, 2008 (nine months before the Drum Line controversy arose), pursuant to which SK Foods purported to sell the Drum Line to CVS. BMO 699-710. The agreement was signed on behalf of CVS, as the buyer, by Rose and only Rose. Rose signed the agreement as trustee of the trusts of which Salyer's daughters were the beneficiaries, the same capacity he occupied on August 21, 2009 and thereafter, until he purported to resign as such in October of 2009. His signature on the agreement demonstrates that Rose saw himself as the individual with authority to act on behalf of CVS; the court sees him as someone with the responsibility to act on behalf of CVS in connection with all of its affairs, including the TRO, and thus, as someone bound by the TRO.

In addition, with regard to Rose's theory that by August 21, he had not agreed to represent CVS with regard to the Drum Line, although he was representing it in AP No. 09-2342, the court has several times during the course of the SK Foods chapter 11 case had occasion to observe the confusion caused by the Salyer entities' use of different attorneys at different times and in different capacities, which the court believes has been part of a sustained effort, as the court has previously found, "to make it as difficult and expensive as possible for the trustee and the court to maintain the status quo." See final ruling on DC No. SH-7, filed April 30, 2012 in AP No. 09-2692. In some instances, the attorneys themselves have not been able to keep track of which entities they were representing.

In this case, Rose's testimony is simply not credible, and the court does not believe he was not acting as attorney for CVS with regard to the Drum Line when he arranged for Lichtenegger to make the special appearance for him, when he contacted Segal about the whereabouts of the Drum Line, when he instructed Lichtenegger to inform Carlson that the Drum Line had shipped and was "already gone" and the TRO was therefore moot, and when he "dealt with" the Drum Line and TRO issues with Lichtenegger. In fact, Lichtenegger's August 21, 2009, 3:30 p.m. e-mail to Salyer, Segal, Pascuzzi, Perry, and Rose more accurately describes the reality of the situation when Lichtenegger lets the other members of Salyer's legal team know that he and Rose "are dealing with the [TRO] now." The court concludes Rose was acting as an attorney for CVS (and Salyer) with regard to the Drum Line and the TRO from at least August 21, and as such, he was bound by the TRO. His belated disclaimer is nothing but a self-serving attempt to escape his responsibility to take all reasonable steps to ensure compliance with the TRO.

Rose's and Lichtenegger's Duty to Produce a Witness

Finally, BMO contends Rose and Lichtenegger violated the TRO when they failed to produce a corporate designee to testify at a deposition, within five days after entry of the TRO, about, among other things, the current location of the Drum Line and any plans to move it, as the TRO required of CVS and its officers, etc., and those in active concert or participation with them. Lichtenegger reiterates here the argument that he had decided not to accept the representation of CVS and not to appear at the August 24 hearing; thus, he claims he was under no duty to comply with this aspect of the TRO. The court has already found Lichtenegger was bound by the TRO. His alleged failure to have any contact with Salyer or other members of the legal team is irrelevant, as he was bound by the TRO to be in contact with them, to attempt to stop the shipment of the Drum Line, and to produce a witness knowledgeable as to its whereabouts. Lichtenegger does not claim to have taken any steps to produce such a witness until September 25, when he formally entered the litigation as CVS's attorney. As the Drum Line was by then well on its way to New Zealand, and as Lichtenegger was bound by the TRO from several days before it left the Port of Oakland, his efforts after September 25, if any, were too little, too late.

Rose readily admits he took no action in response to the TRO until he returned from his vacation, on August 31, and saw Carlson's letter of August 25 indicating that the trustee's attorneys believed the Drum Line may not already have shipped out. By that time, as with Lichtenegger, the situation was well advanced -- the Drum Line left the Port of Oakland that day. As with Lichtenegger, Rose's actions were too little, too late. Rose claims, however, that upon his return, he asked around to see if Carlson's information was true -- that the Drum Line may not already have shipped: he claims to have asked Lichtenegger, Salyer, Segal, and Putterman, but he "couldn't find anybody that knew." BMO 515. Given the

communications among the parties on August 21, given Lichtenegger's additional e-mails and phone call with Salyer on August 23, and given Lichtenegger's phone conversations with Rose on August 24 and 28, Rose's claim that he couldn't find anyone who knew the status of the Drum Line borders on the disingenuous. Even if it were at all believable, Rose does not indicate whether he spoke to Lichtenegger, Salyer, Segal, or Putterman, and if so, what they replied. His evidence is simply too vague to be given any credence.

Rose also claims that because CVS had no employees, he "was in no position to identify any employee [of CVS] who was a 'PMK' [person most knowledgeable]." Rose Decl. at 8:26-27. This too is simply without a basis in fact. The TRO did not limit the person with knowledge to someone who was technically an employee, and Rose was well aware, from, at the latest, Salyer's August 21 e-mail directing his team to "pull the gloves off" and "attack" the trustee for his actions in seeking the TRO, that Salyer was calling the shots with regard to the shipment of the Drum Line. His claim that he contacted Salyer, Segal, Lichtenegger, and Putterman, but could find no one who knew of the whereabouts or plans for shipment of the Drum Line is simply not credible.

Finally, Rose claims he was advised that individuals named Mark McCormick and Steve King were "the relevant person" (Rose Decl. at 21:22), but was told by McCormick's attorney he could not speak to McCormick, and was told King was in Singapore and could not speak to him. Rose apparently made no further efforts to speak with either McCormick or King, and there is no evidence he provided the name of either to the trustee, who may have been able to subpoena them. Rose did produce for deposition individuals named Ruben Gallardo, a foreman/supervisor for MPF, who testified he spent several days cleaning the drum line components and loading them into containers, and Alicia Kinder, an administrative assistant for MPF, neither of whom could provide any evidence of the then whereabouts of the Drum Line.

The court finds by clear and convincing evidence that Rose and Lichtenegger were working in concert as attorneys for CVS and both were bound by the TRO to produce a knowledge individual for deposition, but failed to do so. Thus, the court concludes that both Rose and Lichtenegger failed to comply with this aspect of the TRO.

Miscellaneous Issues

Lichtenegger cites the attorney-client privilege, claiming he could not have told the court in any event that the Drum Line was still in port. "[A] party asserting the attorney-client privilege has the burden of establishing the [existence of an attorney-client] relationship and the privileged nature of the communication. Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed." United States v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010) (citations omitted). Thus, "[t]he party asserting the privilege bears the burden of proving each essential element." Id. The elements are eight-fold (id.); Lichtenegger has provided no analysis, merely an unsupported conclusion; as such, he has failed to satisfy this burden.

For example, the attorney-client privilege apparently did not prevent Lichtenegger from conveying what Rose wanted him to convey -- that the Drum Line was already gone and the TRO application was moot. But when it comes to his responsibility to correct that wrong information and complying with the TRO after it issued, Lichtenegger falls back on the privilege. It is entirely possible in this circumstance that the privilege was waived. "The privilege which protects

attorney-client communications may not be used both as a sword and a shield. Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc., 552 F.3d 1033, 1042 (9th Cir. 2009), quoting Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992). Lichtenegger has made no showing regarding the question of waiver, which is one of the eight elements.

Lichtenegger also contends the TRO was a prohibitory injunction, not a mandatory one, and thus, that it merely prohibited action and "[did] not compel everyone to which [sic] the TRO was addressed . . . to take some active step to assist in enforcement of the TRO." Lichtenegger P. & A. at 15:15-17. In other words, he claims, the TRO only "prohibit[ed] active conduct and [was] not addressed to passive activity (i.e. doing nothing)." Id. at 15:24. Thus, "Lichtenegger had no duty to actively 'ensure' compliance." Id. at 14:17. This argument represents a misunderstanding of the distinction between prohibitory and mandatory injunctions.

> A prohibitory injunction prohibits a party from taking action and preserve[s] the status quo pending a determination of the action on the merits. A mandatory injunction orders a responsible party to take action. A mandatory injunction goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.

Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 878-79 (9th Cir. 2009) (citations omitted; internal quotation marks omitted)[31] "[T]he test for whether an injunction is prohibitory or mandatory can be found in its effect on the status quo ante litem, which means the last, uncontested status which preceded the pending controversy." Ariz. Dream Act Coalition v. Brewer, 2013 U.S. Dist. LEXIS 69603, *13 (D. Ariz. May 16, 2013), citing Marlyn Nutraceuticals, 571 F.3d at 879 (emphasis added).

Thus, the distinction between the two types of injunctions is not, as Lichtenegger would have it, that one requires someone to do something and the other requires someone merely to refrain from doing something. The test is whether the injunction would preserve the status quo between the parties as it existed prior to the controversy. In this case, the status quo between the parties at the time the controversy arose was that the Drum Line was still in California; it was not on its way to New Zealand. That is the status quo the trustee sought to maintain when he applied for the TRO; that is the status quo the court intended to maintain when it issued the TRO. That preserving that status quo may have required someone to do something, as opposed to doing nothing, did not turn the TRO into a mandatory injunction. And the fact that the TRO was a prohibitory injunction did not mean that those bound by it had merely to do nothing in order to comply. To comply with the TRO; that is, to preserve the status quo of the Drum Line remaining in California, those bound by the TRO were required to take all reasonable steps to ensure that the Drum Line remained in California, and that it was not shipped to New Zealand (or anywhere else outside of California). As discussed above, Rose and Lichtenegger were bound by the TRO and they did not comply. The court also notes that had Lichtenegger appeared at the TRO hearing and corrected his false statement to Carlson; that is, had he informed the court that the Drum Line had, in fact, not shipped and was in the Port of Oakland, the trustee could have sought an order from the court that would have specifically prohibited the Drum Line from leaving the Port and preserved the status quo.

Appropriate Sanction

BMO requests a sanction in an amount appropriate to compensate it for the loss of the Drum Line, an outcome the court concludes could have been prevented if Rose and Lichtenegger had complied with the TRO. BMO requests an award of $350,000, based on the price CVS agreed to pay to SK Foods when CVS purchased the Drum Line in December of 2008. Rose's only challenge to that value is that Gallardo testified the Drum Line needed repairs and was not worth fixing. The court's review of Gallardo's deposition testimony indicates he had never seen the Drum Line before he was asked to clean and pack it, and he had almost no understanding of the Drum Line. He did testify that "to [him] it was all destroyed." BMO 672. He believed it had been mishandled when it was put into the containers in which he found it. He said he couldn't say what its value was, but it would "probably cost more to fix it than -- to repair it, because it was poorly installed in the containers, damaged." Id. The court finds that Gallardo (through no fault of his own) was not qualified to provide an opinion as to the value of the Drum Line. The court also notes that Salyer, Rose, and Lichtenegger went to great lengths to maintain possession and control of the Drum Line and to avoid compliance with the TRO and this conduct is inconsistent with their assertion that the Drum Line was of little value.

Lichtenegger's approach to the question of the sanction amount is to refer to the Drum Line as "piles of rusted junk." Lichtenegger P. & A. at 22:20. He also claims the trustee could simply have paid to have the Drum Line shipped back to this country from New Zealand, which, according to Lichtenegger, would have cost between $35,000 and $50,000. There is no evidence Lichtenegger has personal knowledge of the condition of the Drum Line, and there is no admissible evidence of the cost to return it to California. Further, this court has previously found that the return of the Drum Line would be impractical under the circumstances. See final ruling on DC No. TJD-5, filed Feb. 13, 2013 in this adversary proceeding. Finally, the court must question why, if the cost to return the Drum Line were so low, Lichtenegger and Rose, having by their failure to comply with the TRO enabled it to leave the country, did not themselves try to retrieve it from New Zealand.

As already determined, it was Rose's and Lichtenegger's conduct, acting in concert with Salyer, that resulted in the Drum Line being shipped out of California in the first place; it was their subsequent failure to produce a knowledgeable witness that resulted in the trustee not learning of its whereabouts until two and one-half months later, after he had incurred significant attorney's fees and costs.

"'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.'" Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 369 (9th Cir. 1947), quoting Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946).

> 'The fact that personal property which is injured or destroyed by the wrongful or negligent act of another, has no market value, does not restrict the recovery to nominal damages only; its value or the plaintiff's damages must be ascertained in some other rational way and from such elements as are attainable. In such case the proper measure of damages is generally its actual value or its value to the owner. The value of an article may be shown by proof of such elements or facts as may exist- such as its cost, the cost of reproduction or replacing it, its utility and use . . . .'

Universal Pictures Co., 162 F.2d at 370 (citation omitted).

This principle has been applied in the bankruptcy context. In Lundell v.

Ulrich (In re Lundell), 236 B.R. 720 (9th Cir. BAP 1999), the trustee sought damages based on an alleged decline in value of certain stock during the time he was trying to obtain the stock from the debtors. As against the defendants' claims regarding the appropriate method for measuring damages, the Panel agreed with the trustee's approach, finding that "the difficulty in calculating the damages [was] due in large part to the malfeasance of the Debtors." 236 B.R. at 725.[32]

In short, Rose's and Lichtenegger's arguments that the Drum Line had no value are not supported by the evidence; further, the difficulty of fixing the value of the Drum Line was created by their conduct, acting in concert with Salyer, in failing to comply with the TRO. Finally, the court has previously entered judgment against CVS in this adversary proceeding in an amount well in excess of the $350,000 BMO is seeking here.[33] In these circumstances, the court is satisfied that the value of the Drum Line, for purposes of fixing the amount of appropriate sanctions against Rose and Lichtenegger, was at least $350,000, the price at which Salyer and Rose, acting for CVS, agreed it would be sold by SK Foods to CVS.

To conclude, the clear and convincing, in fact compelling, evidence in this matter supports the conclusions that both Rose and Lichtenegger acted in concert, were bound by the TRO, which was a specific and definite order of this court, that Rose as an agent of CVS failed to comply with the TRO, and that Rose and Lichtenegger, as attorneys acting on behalf of CVS and Salyer, failed to take all reasonable steps to ensure that CVS and Salyer, the latter acting on behalf of CVS, owner of the Drum Line, complied with the TRO. The only evidence Rose and Lichtenegger have offered to show why they did not comply is their own self-serving testimony, most of which the court does not believe. The court finds, by clear and convincing evidence, that Rose and Lichtenegger's strategy from August 21 forward was to ignore the TRO so they could later claim, as they do now, they were not responsible.

The court will hear the matter.

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> The only exception to complete adoption of Rule 56 F.R.Civ.P. involves the default deadline for filing a summary judgment motion. Rule 56(c)(1)(A) [now Rule 56(b)] makes the default deadline 30 days after the close of all discovery. Because in bankruptcy cases hearings can occur shortly after the close of discovery, a default deadline based on the scheduled hearing date, rather than the close of discovery, is adopted. As with Rule 56(c)(1), the deadline can be altered either by local rule or court order.

Notes of Advisory Committee on 2012 amendments.

2 Lichtenegger is the one who actually told the trustee's attorney the Drum Line had already shipped; he did so at Rose's request.

3 The components of the Drum Line were sent in containers by truck from a ranch in the Central Valley of California to the Port of Oakland, California, and from there, were shipped to New Zealand. The ship with the Drum Line containers did not leave the Port of Oakland for New Zealand until August 31, ten days after these communications began.

4 Gerard A. Rose Decl., filed Sept. 19, 2013 ("Rose Decl."), at 5:8-9.

5 Rose Dep., BMO 511.

6 Lichtenegger's version is that he told Rose he had a scheduling conflict, but he would do what he could to help Rose.

7 Larry J. Lichtenegger Decl., filed Sept. 25, 2013 ("Lichtenegger Decl."), at 2:9.

8 Michael M. Carlson Second Suppl. Decl., filed Sept. 1, 2009, BMO 176 ("Carlson Second Decl."), at 3:19-23 (emphasis added).

9 By August 21, the components of the Drum Line had been transported by truck from the Central Valley to Oakland, and were in the Port of Oakland awaiting documentation that would allow them to be shipped to New Zealand.

10 That Lichtenegger and Rose were "dealing with" the situation implies more involvement and collaboration than Lichtenegger's agreement to make a special appearance, and even than his agreement to make the phone call to Carlson that Rose was too upset to make.

11 Lichtenegger sent this e-mail because "[he] had read Segal's e-mail and wanted to confirm what I had been told." Lichtenegger Decl. at 2:13-14. This is an admission that Lichtenegger had not confirmed the statements he told Carlson in his 3:25 p.m. voicemail message that he had "investigated and confirmed."

12 Larry Lichtenegger Decl., filed Sept. 1, 2009, BMO 133, ("Lichtenegger 9/1/09 Decl."), at 2:17-18.

13 Carlson Second Decl., at 3:25-26.

14 Again, the second of those statements -- in the 4:11 p.m. telephone conversation -- was made at a time when Lichtenegger knew he needed confirmation of the shipment and had sought it but had not received an answer. Yet he did not qualify his statement to Carlson -- he did not say "I think the Drum Line has already shipped" or "I have heard it has already shipped and I'm awaiting confirmation"; he simply said it was his understanding the Drum Line had shipped the previous day, and thus, he asked that the hearing be continued as "there was no longer an emergency."

15 Lichtenegger's Exhibits, filed Sept. 25, 2013, Ex. H, at 2:24-25.

16 Lichtenegger 9/1/09 Decl., at 2:23-27 (emphasis added).

17 In fact, the Drum Line had not shipped until the day before, August 31.

18 The parties mention LBR 2017-1(f) (added to this court's local rules effective May 1, 2012, but previously a rule of this court by incorporation of Local District Court Rule 182(e) under LBR 1001-1(c)). Under the rule, an attorney who makes a limited appearance on behalf of a party solely to contest an application for a temporary restraining order or injunction may withdraw from the action within 14 days by filing a notice and affidavit that he or she is no longer attorney of record for the party. BMO states that Lichtenegger never sought to "withdraw his appearance" pursuant to the rule; Lichtenegger responds that he made no appearance from which he needed to "withdraw." The rule is irrelevant here; Lichtenegger's duty as an attorney in the TRO matter resulted not from his agreement to make a special appearance at the hearing, but from his other conduct, as discussed herein.

19 Carlson has testified Rose did not tell him he would be unable to receive e-mails while on vacation, that he had not made any arrangements to receive his mail or faxes, or that there were no attorneys or staff monitoring his cases while he was on vacation. See Michael M. Carlson Third Suppl. Decl., filed Sept. 2, 2009, BMO 205.

20 Rose complained to Carlson in their August 21 telephone conversation that Carlson was not giving adequate notice of the hearing, and that this was unprofessional. He claimed in his deposition that Carlson had known well in advance he was going to seek a restraining order, but waited until the last minute to spring it on Rose. Rose claimed to have developed that impression from a deposition he later took of Shondale Seymour. The court has reviewed the transcript of that deposition; it does not support Rose's assertion that Carlson, or anyone working for the trustee, had known earlier of the need to seek injunctive relief as to the Drum Line.

Rose states in his declaration opposing the present motion as follows: "Mr. Carlson obviously knew that he intended to ask for a TRO well before he called me late on a Friday afternoon in August of 2009, and yet he gave me no opportunity to change my vacation plans, or postpone the TRO hearing. This was unethical, purely and simply." Rose Decl. at 13:14-19. Quite to the contrary, Rose has offered no evidence whatsoever, or even any factual scenario, for the notion that Carlson had known earlier that he was going to need to seek a restraining order. The accusation of unethical conduct is very much of the "protesting too much" variety.

21 Rose has provided no basis on which he has redacted almost all of the phone numbers on the cell phone records he produced pursuant to BMO's request.

22 Evanston is a suburb 12 miles north of downtown Chicago. It has a population of 75,000, and is the home of the main campus of Northwestern University.

23 It bears repeating here that the Drum Line was still in the Port of Oakland on Friday, August 28; it was not shipped out until the following Monday, August 31.

24 Lichtenegger goes so far as to admit that he ignored Carlson's e-mails, mail, and faxes because he was afraid that responding to them "would subject [him] to the responsibility Carlson notified [him] of on August 21st." Lichtenegger Decl. at 4:12-13.

25 "[W]here a corporate officer knows a court order has been entered against the corporation, but fails to inquire, as a reasonable person would, as to the terms of the order, he may properly be held in contempt. A rule which would allow a corporate officer to remain deliberately ignorant of the particulars of a court order, and thereby avoid a contempt citation, would defy common sense." Central States, 1995 U.S. Dist. LEXIS 11372, at *23.

26 "Except as permitted in Subpart (c) of this Rule [not applicable here], no attorney may participate in any action unless the attorney has appeared as an attorney of record." LBR 2017-1(b)(1).

27 On August 17, 2009, four days before the Drum Line communications began, Lichtenegger signed and filed a motion to dismiss the trustee's complaint in AP No. 09-2342 as counsel for 17 Salyer entities, including Monterey Peninsula Farming, LLC ("MPF"), which according to Rose, was the sole owner of CVS. Rose signed the motion as counsel for CVS and two other entities.

28 In an ironic twist, Lichtenegger suggests he may have had some responsibility to provide further information to the trustee if Carlson had, in response to his representation that the Drum Line had already shipped, withdrawn the TRO application. He states, "Had the Trustee agreed to cancel the TRO hearing based on Lichtenegger's representation about the Drum Line having already shipped, [Lichtenegger's] obligations may have been different, but certainly not when the representation had NO consequence." Lichtenegger P. & A., filed Sept. 25, 2013 ("Lichtenegger P. & A."), at 11:7-9. This argument, first, incorrectly assumes an attorney's duty of candor and truthfulness -- to both opposing counsel and the court, as discussed below -- arises only if he succeeds in hood-winking one or the other. Second, it incorrectly assumes Lichtenegger's false information about the shipment caused no harm, whereas, as discussed below, the court is convinced that had Rose and Lichtenegger not acted in concert to prevent the trustee from discovering the truth, a scheme that began with Lichtenegger's voicemail message, the shipment very likely would have been stopped.

29 Lichtenegger Decl. at 1:28.

30 Yet he took care to arrange for Lichtenegger to make a special appearance for him. Did Rose intend Lichtenegger to make a special appearance for Rose, in turn, on behalf of no one?

31 See also Coffee Dan's, Inc. v. Coffee Don's Charcoal Broiler, 305 F. Supp. 1210, 1216 (N.D. Cal. 1969) [the question is "will it merely proscribe a course of action (prohibitory injunction) or will it require defendant to take affirmative, costly remedial steps (mandatory injunction)."].

32

> Where a defendant by his own wrong has prevented a more precise computation . . . [the factfinder] may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.

Id., quoting Bigelow, 327 U.S. at 264-65.

33 In BMO's motion for summary judgment against CVS, the court had before it the opinion of Ken Gifford, managing director of K-Pack International Ltd., the company in New Zealand that designed and built the Drum Line and to which the Drum Line was shipped in the fall of 2009. Gifford noted in an e-mail to Carlson on November 29, 2009 that the Drum Line had not been maintained, had begun to deteriorate, and had also been vandalized. He estimated the cost to repair it at $400,000, and stated that the Drum Line, "complete in restored order made operational would sell for USD $1,500,000 as a used/reconditioned production line." James Heiser Decl., filed Jan. 11, 2013, BMO 090. On that basis, the court entered judgment against CVS in the amount of $1,500,000 (value of the Drum Line at the time of the transfer in question in that motion, before the vandalism and deterioration); that judgment that has been affirmed on appeal. Given Mr. Gifford's opinion, it would not be unreasonable to conclude that after the deterioration and damage, the Drum Line was worth $1,100,000.

6. 13-26683-D-7 JILL SPOONER — CONTINUED OBJECTION TO CLAIM OF JILL AND DENNIS SPOONER, CLAIM NUMBER 6
RLY-1 — 10-30-13 [51]

Tentative ruling:

This is the debtor's objection to the claim of Dennis and Judy Spooner (the "Spooners"), Claim No. 6 on the court's claims register. The debtor filed her objection on October 30, 2013, and set it for hearing on December 11, 2013. The Spooners filed opposition on December 4, 2013. After the court had issued a pre-hearing disposition indicating the hearing would be continued to December 18, 2013, the debtor filed a reply in which she requested a further continuance to allow her to pursue dispute resolution or discovery. The request will be denied.

The court's local rule requires that an objection to claim "be accompanied by evidence establishing its factual allegations and demonstrating that the proof of claim should be disallowed." LBR 3007-1(a). The debtor, who has controlled the timing of her objection to claim, filed with her objection the evidence she wanted the court to consider. The Spooners have filed their evidence in opposition, not requesting additional time, and the court is prepared to rule on the matter. However, because the debtor noticed the objection under LBR 3007-1(b)(2) (no advance written opposition required), and because the Spooners filed their opposition only seven days before the hearing date as originally scheduled, the court will continue the hearing for a short period to allow the debtor to file a reply to the Spooners' opposition. For the guidance of the parties, the court issues this tentative ruling.

As a preliminary matter, the debtor contends she has standing to object to the claim because disallowance of the claim would result in a greater recovery on her student loan claim, which, to the extent not paid by the estate in this case, will be nondischargeable. The Spooners do not challenge the debtor's standing.

The debtor objects to the Spooners' claim on the grounds that (1) the claim does not indicate the dates on which each of the charges making up the claim was incurred; (2) any charges incurred after the debtor's separation from her former spouse, Ty Spooner, are the separate debts of Ty Spooner, on which the debtor is not obligated; and (3) the proof of claim lacks proper documentation. The first and third of these grounds are insufficient, in and of themselves, to sustain the objection.

The Ninth Circuit Bankruptcy Appellate Panel has held as follows:

> **When a creditor files a proof of claim, that claim is deemed allowed under Sections 501 and 502(a). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f) – it is not prima facie evidence of the validity and amount of the claim – but that by itself is not a basis to disallow the claim. Section 502(b) sets forth the exclusive grounds for disallowance of claims . . . .**

Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 426 (9th

Cir. BAP 2005) (emphasis added). "Noncompliance with Rule 3001(c) is not one of the statutory grounds for disallowance." Id. at 435.

In this case, the Spooners' proof of claim describes the basis for the claim as "Money loaned for Tuff Tech, LLC, to Ty and Jill [the debtor]"; attached to the proof of claim is a list of expenses allegedly paid on behalf of Tuff Tek, by name, amount, and check number. The absence of greater detail, including the absence of dates of the charges, means only that the proof of claim may not be entitled to a presumption of validity. The consequence is not disallowance of the claim. "If the proof of claim is not entitled to prima facie validity then it may have lesser evidentiary weight or none at all, but unless there is a factual dispute that is irrelevant." Heath, 331 B.R. at 436.

The court, then, turns to the evidence both parties have submitted. The only evidence the debtor has submitted is her own declaration, in which she testifies that the Spooners are the parents of her former spouse, Ty Spooner, and that she and Ty Spooner separated on September 20, 2009. The crux of her testimony is this: "I have never incurred separate debt with [the Spooners] during my marriage nor have I incurred any debt whatsoever with [the Spooners] following my separation from my former spouse." J. Spooner Decl., filed Oct. 30, 2013, at 2:1-2. The Spooners, on the other hand, have submitted the declaration of the debtor's former spouse, Ty Spooner, in which he testifies that the charges comprising the Spooners' claim were paid by them as a loan, primarily for the purchase of machinery and equipment, for a business Ty Spooner started during the marriage – Tuff Tek, for which the marital community of the debtor and Ty Spooner became obligated.

Ty Spooner notes that the debtor listed as an asset on her Schedule B filed in this case a "Community interest in Tuff-Tek LLC, operated by Dennis [Ty] Spooner, debtor's ex-spouse, the nature and value of which are unknown"; in fact, the trustee has sold Tuff-Tek's tools for the benefit of the estate. In addition, on a "Propertizer" filed in the parties' marital dissolution proceeding, the debtor listed as community property assets the "Assets of Tuff Tek, including machine, tools and supplies," to which the debtor assigned a value of $70,000. She used that value in her calculation of the payment she sought from Ty Spooner to equalize the division of community property. The court concludes from these documents that the debtor considered Tuff-Tek and its assets to be community property; as the Spooners contend, she cannot now claim that the debts associated with acquiring those assets and other debts paid by the Spooners as a loan for the business of Tuff-Tek were not community debts for which she, as well as Ty Spooner, is liable. In short, for two reasons, the court concludes that the Spooners' claim is a valid claim against the debtor's estate: (1) the evidence supports a finding that the debt is a community debt; and (2) the evidence, including the debtor's listing of significant community assets on her bankruptcy schedules, including the business of Tuff-Tek, supports a finding that there is a significant amount of community property in the estate.[1]

For both these reasons, the court concludes that the debtor has failed to demonstrate that the claim should be disallowed, and her objection will be overruled. The court will hear the matter.

---

1 The exhibits filed by the Spooners and authenticated by Ty Spooner indicate the Spooners' charges were all incurred before the date the debtor and Ty Spooner separated; thus, whether the debtor is liable for post-separation charges is not an issue here.

7. 13-26683-D-7 JILL SPOONER — CONTINUED OBJECTION TO CLAIM OF JILL AND DENNIS SPOONER/ SPOONER & SONS, CLAIM NUMBER 7
RLY-2 — 10-30-13 [56]

Tentative ruling:

This is the debtor's objection to the claim of Spooner & Sons, a partnership ("Spooner & Sons"), Claim No. 7 on the court's claims register. The debtor filed her objection on October 30, 2013, and set it for hearing on December 11, 2013. Spooner & Sons filed opposition on December 4, 2013. After the court had issued a pre-hearing disposition indicating the hearing would be continued to December 18, 2013, the debtor filed a reply in which she requested a further continuance to allow her to pursue dispute resolution or discovery. The request will be denied.

The court's local rule requires that an objection to claim "be accompanied by evidence establishing its factual allegations and demonstrating that the proof of claim should be disallowed." LBR 3007-1(a). The debtor, who has controlled the timing of her objection to claim, filed with her objection the evidence she wanted the court to consider. Spooner & Sons has filed its evidence in opposition, not requesting additional time, and the court is prepared to rule on the matter. However, because the debtor noticed the objection under LBR 3007-1(b)(2) (no advance written opposition required), and because Spooner & Sons filed its opposition only seven days before the hearing date as originally scheduled, the court will continue the hearing for a short period to allow the debtor to file a reply to Spooner & Sons' opposition. For the guidance of the parties, the court issues this tentative ruling.

As a preliminary matter, the debtor contends she has standing to object to the claim because disallowance of the claim would result in a greater recovery on her student loan claim, which, to the extent not paid by the estate in this case, will be nondischargeable. Spooner & Sons does not challenge the debtor's standing.

The debtor objects to Spooner & Sons' claim on the grounds that (1) for charges incurred before September 20, 2009, totaling $34,547.31, the proof of claim lacks sufficient documentation; and (2) for charges after that date, totaling $71,949.92, the debt is a separate debt of the debtor's former spouse for which the debtor is not obligated. The first of these grounds is insufficient, in and of itself, to sustain the objection.

The Ninth Circuit Bankruptcy Appellate Panel has held as follows:

> **When a creditor files a proof of claim, that claim is deemed allowed under Sections 501 and 502(a). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f) – it is not prima facie evidence of the validity and amount of the claim – but that by itself is not a basis to disallow the claim. Section 502(b) sets forth the exclusive grounds for disallowance of claims . . . .**

Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 426 (9th Cir. BAP 2005) (emphasis added). "Noncompliance with Rule 3001(c) is not one of the statutory grounds for disallowance." Id. at 435.

In this case, Spooner & Sons' proof of claim describes the basis for the claim

as "Money paid by S&S partnership for Tuff Tech, LLC, debts"; attached to the proof of claim are two transaction listings, by date, payee, check number, and amount. The absence of greater detail means only that the proof of claim may not be entitled to a presumption of validity. The consequence is not disallowance of the claim. "If the proof of claim is not entitled to prima facie validity then it may have lesser evidentiary weight or none at all, but unless there is a factual dispute that is irrelevant." Heath, 331 B.R. at 436.

The court, then, turns to the evidence both parties have submitted. The only evidence the debtor has submitted is her own declaration, in which she testifies that the Spooners are the parents of her former spouse, Ty Spooner, and that she and Ty Spooner separated on September 20, 2009. The crux of her testimony is this: "I have never incurred separate debt with [Spooner & Sons] during my marriage nor have I incurred any debt whatsoever with [Spooner & Sons] following my separation from my former spouse." J. Spooner Decl., filed Oct. 30, 2013, at 2:1-2. Spooner & Sons, on the other hand, has submitted the declaration of the debtor's former spouse, Ty Spooner, in which he testifies that the charges comprising Spooner & Sons' claim were paid by it as a loan, primarily for the purchase of machinery and equipment, for a business Ty Spooner started during the marriage – Tuff Tek, for which the marital community of the debtor and Ty Spooner became obligated.

Ty Spooner notes that the debtor listed as an asset on her Schedule B filed in this case a "Community interest in Tuff-Tek LLC, operated by Dennis [Ty] Spooner, debtor's ex-spouse, the nature and value of which are unknown"; in fact, the trustee has sold Tuff-Tek's tools for the benefit of the estate. In addition, on a "Propertizer" filed in the parties' marital dissolution proceeding, the debtor listed as community property assets the "Assets of Tuff Tek, including machine, tools and supplies," to which the debtor assigned a value of $70,000. She used that value in her calculation of the payment she sought from Ty Spooner to equalize the division of community property. The court concludes from these documents that the debtor considered Tuff-Tek and its assets to be community property; as Spooner & Sons contends, she cannot now claim that the debts associated with acquiring those assets and other debts paid by Spooner & Sons as a loan for the business of Tuff-Tek were not community debts for which she, as well as Ty Spooner, is liable. In short, for two reasons, the court concludes that, except as discussed below, Spooner & Sons' claim is a valid claim against the debtor's estate: (1) the evidence supports a finding that the debt is a community debt; and (2) the evidence, including the debtor's listing of significant community assets on her bankruptcy schedules, including the business of Tuff-Tek, supports a finding that there is a significant amount of community property in the estate.

The debtor contends she is not responsible for the debts incurred by her former spouse after their separation, on September 20, 2009. Spooner & Sons does not dispute the date of separation, and does not dispute that portions of its claim were incurred post-separation. As a general proposition, the court agrees with the debtor that she is not liable for debts incurred by Ty Spooner post-separation. However, in California, "a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution." In re Marriage of Epstein, 24 Cal. 3d 76, 84 (1979), quoting and adopting In re Marriage of Smith, 79 Cal. App. 3d 725, 747 (1978). Thus, a spouse is entitled to reimbursement for amounts he or she pays post-separation to preserve and maintain the family residence unless those amounts were paid as a support obligation. Id. at 80.

Spooner & Sons states that "[p]ayment by Spooner & Sons after separation to

maintain the business assets, which protected and preserved those assets, are legitimately reimbursable to [Spooner & Sons]." Spooner & Sons and Dennis and Judy Spooner P. & A., filed Dec. 4, 2013 ("P. & A."), at 2:25-3:2. Ty Spooner has testified that post-separation, the business of Tuff-Tek "basically collapsed leaving substantial indebtedness to Wells Fargo Bank and to [his] parents." D. Spooner Decl., filed Dec. 4, 2013, at 3:20-21. The transaction listings attached to Spooner & Sons' proof of claim shows that it continued to make payments on the Wells Fargo equipment loan after the separation date, September 20, 2009. According to Ty Spooner, the listing "shows payments made to Wells Fargo Bank between February 11, 2008 and February 13, 2012, totaling $71,123.72 all related to the Tuff Tek business." Id. at 4:24-26. Thus, the court concludes that as to the payments made by Spooner & Sons post-separation, (1) the evidence supports a finding that the payments were made to preserve and maintain a community asset; namely, the assets of Tuff-Tek; (2) as a result, the debt is a community debt; and (3) the evidence, including the debtor's listing of significant community assets on her bankruptcy schedules, including the business of Tuff-Tek, supports a finding that there is a significant amount of community property in the estate. For these reasons, the claim, even as to the post-separation amounts (but except as discussed below), is a valid claim against the debtor's estate.

The exceptions are these. First, Spooner & Sons appears to concede in its opposition that the amount of its claim is inaccurate. The total amount of the claim, as filed, was $106,497.23. Spooner & Sons states in its opposition that its claim has been "scaled back"[1] to $80,304.31, as described in Ty Spooner's declaration. Thus, the debtor's objection will be sustained as to the difference, $26,192.92. In addition, two of the charges included in the $80,304.31 figure are not supported by the evidence, and will be disallowed. (Spooner & Sons has had sufficient opportunity to present its evidence and has not requested additional time to supplement the record.) The balance of the claim will be allowed.

In his declaration, Ty Spooner refers to the transaction listings attached to the proof of claim, describing in particular the following:

List of payments to Wells Fargo Bank totaling $71,123.72
Payments to Franchise Tax Board totaling $2,400
Payments to Wells Fargo Finance totaling $3,358.22
Payments to Wells Fargo Lease totaling $3,422.37

These are the figures comprising the $80,304.31 scaled-back total. However, the transaction listings attached to the proof of claim – both the original filed with the court and the copy filed with Spooner & Sons' opposition – do not include any payments to Wells Fargo Finance or Wells Fargo Lease. There is one payment for $3,358.22, but it is shown as paid to Wells Fargo Bank, and is included in the list that totals $71,123.72. There are several payments for $3,422.37 each, but again, they are shown as paid to Wells Fargo Bank, and they are included in the list totaling $71,123.72.[2] Thus, the documentary evidence does not support a conclusion that there were any payments to Wells Fargo Finance or Wells Fargo Lease or any payments in the amounts of $3,358.22 or $3,422.37 other than those already included in the $71,123.72 figure. For that reason, the $3,358.22 and $3,422.37 portions of the $80,304.31 scaled-back total of the claim will be disallowed, and the claim will be allowed in the amount of $73,523.72.

For the reasons stated, the objection will be sustained in part, and the claim will be disallowed in any amount over and above $73,523.72. The court will hear the matter.

_____

1 P. & A. at 3:19.

2 Mr. Spooner's declaration describes the $3,358.22 and $3,422.37 charges as being shown on page 3 of the Transaction by Account itemization; however, that itemization, as included in both the proof of claim filed with the court and the copy filed with Spooner & Sons' opposition, has only two pages.

8. 13-28039-E-7 SOHAIL AZIZ — MOTION TO ABANDON
SLC-2 Richard E. Oriakhi — 12-13-13 [74]

DEPARTMENT E CASE SPECIALLY SET

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Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service filed on December 13, 2013, states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, other parties in interest, and Office of the United States Trustee. By the court's calculation, 6 days' notice was provided.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Abandon Real Property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Sheri Carello, Chapter 7 Trustee moves for authorization to abandon vehicles of the bankruptcy estate, including:

1. 1998 Toyota Camry
2. 2000 Buick Century
3. 2000 Mercedes 430E
4. 2001 Chevy Cavalier
5. 2001 Honda Civic
6. 2001 VW Passat
7. 2002 Honda Accord
8. 2003 Hyundai Sonata

9. 2004 Dodge Stratus
10. 2005 Pontiac Grand Am
11. 2006 Hyundai Elantra
12. 2006 Suzuki Forenza

Trustee states the vehicles have little or no equity and are of inconsequential value for the estate and will be burdensome to administer. Trustee states the Debtor has a rental car business and the vehicles sought to be abandoned are either exempt or would not benefit the estate due to the costs of sale.

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

The Debtor previously noticed a hearing on a motion to compel the Trustee to abandon personal property. The notice of hearing for that motion identified the property to be abandoned as "certain business vehicles and miscellaneous shop tools and equipment." Dckt. 59. Though the motion was denied without prejudice for failure to comply with Federal Rule of Bankruptcy Procedure 9013, creditors have been provided with notice of the possible abandonment of vehicles.

Since the vehicles are either fully or partially exempt and the costs of sale would outweigh any benefit to the estate, and the negative financial consequences to the Estate from retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the property identified as:
>
> 1. 1998 Toyota Camry
> 2. 2000 Buick Century
> 3. 2000 Mercedes 430E
> 4. 2001 Chevy Cavalier
> 5. 2001 Honda Civic
> 6. 2001 VW Passat
> 7. 2002 Honda Accord
> 8. 2003 Hyundai Sonata
> 9. 2004 Dodge Stratus
> 10. 2005 Pontiac Grand Am
> 11. 2006 Hyundai Elantra
> 12. 2006 Suzuki Forenza

are abandoned to Sohail Abdul Aziz, the Debtor by this order, with no further act of the Trustee required.

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9.	13-91989-E-7 PBG-1	WILFRED/TINA ANDERSON Patrick B. Greenwell	MOTION TO COMPEL ABANDONMENT 12-12-13 [21]

DEPARTMENT E CASE SPECIALLY SET

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Local Rule 9014-1(f)(3).

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 13, 2013. By the court's calculation, 6 days' notice was provided.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Abandon Real Property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtors, Wilfred and Tina Anderson, seek to compel the Trustee to abandon a home daycare operation known as "Tina's Daycare" and related assets. Debtors state the subject property of the estate is burdensome and of inconsequential value and benefit to the estate. The business consists of the following assets:

A. Exempt Tools-of-Trade: Miscellaneous tables, chairs, toys, mats and supplies used in Tina's Daycare. These items are valued at $1,500 and have been exempted.

B. Business Intangibles: Business intangibles such as name, contact list, good will, etc. These items are valued at $2,500 and have been exempted.

Debtors assert the business produces a minimal net income of approximately $200 to $900 per month, which is essential to the support of the Debtors and their family. It is believed that the Trustee supports the

present Motion under these circumstances.

DISCUSSION

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

The Motion clearly identifies the specific assets to be abandoned, which the Trustee has been able to identify as being of minimal value, as well as the amount of the exemption claimed in the assets. By clearly identifying the specific assets, the Trustee, Creditors, and the court can quickly assess the merits of the Motion. The business known as "Tina's Daycare" as described above and the assets therewith appear to be fully exempted and thus of inconsequential value and benefit to the Estate.

Further, while modest, the income generated by the Debtors from the operation of the day care business is essential to the payment of their monthly expenses. Delay in the abandonment, and forcing an extended cessation of the Debtors' ability to generate this income creates a significant detriment and there is no value, as determined by the Trustee, in such a delay.

Since the property is fully exempted and no value remains for the estate, and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the property identified as:
>
> A. Exempt Tools-of-Trade: Miscellaneous tables, chairs, toys, mats and supplies used in Tina's Daycare. These items are valued at $1,500 and have been exempted.
>
> B. Business Intangibles: Business intangibles identified as business name (Tina's Daycare), contact list, good will, etc. These items are valued at $2,500 and have been exempted.
>
> on Schedule B are abandoned to Wilfred and Tina Anderson, the Debtors, by this order, with no further act of the Trustee required.