

**United States Bankruptcy Court  
Central District of California  
Los Angeles  
Judge Ernest Robles, Presiding  
Courtroom 1568 Calendar**

Tuesday, October 04, 2016

Hearing Room 1568

10:00 AM

**2:11-54945 Frank J. Smith**

**Chapter 7**

**#1.00** Other Expenses: INTERNATIONAL SURETIES, LTD.

Hearing re Applications for chapter 7 fees and administrative expenses

Docket No: 0

**Tentative Ruling:**

10/3/2016

Grant motion.

**Party Information**

**Debtor(s):**

Frank J. Smith

Represented By

Robert M Yaspan

Robert M Yaspan

Steven E Trabish

Steven E Trabish

**Trustee(s):**

Howard M Ehrenberg, Chapter 7 Trustee

Represented By

Howard M Ehrenberg (TR)

Aram Ordubegian

Andy Kong

M Douglas Flahaut

Howard M Ehrenberg (TR)

Represented By

Howard M Ehrenberg (TR)

M Douglas Flahaut

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**Chapter 7**

**#2.00** Fees: United States Trustee

Hearing re Applications for chapter 7 fees and administrative expenses

Docket No: 0

**Tentative Ruling:**

10/3/2016

Grant motion.

<b>Party Information</b>
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**Debtor(s):**

Frank J. Smith

Represented By

Robert M Yaspan  
Robert M Yaspan  
Steven E Trabish  
Steven E Trabish

**Trustee(s):**

Howard M Ehrenberg, Chapter 7 Trustee

Represented By

Howard M Ehrenberg (TR)  
Aram Ordubegian  
Andy Kong  
M Douglas Flahaut

Howard M Ehrenberg (TR)

Represented By

Howard M Ehrenberg (TR)  
M Douglas Flahaut

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**Chapter 7**

**#3.00** APPLICANT: CROWE HORWATH LLP, Accountant for Trustee

Hearing re Applications for chapter 7 fees and administrative expenses

Docket No: 0

**Tentative Ruling:**

10/3/2016

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below.

Fees: \$117,599.00

Expenses: \$97.70

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

**Party Information**

**Debtor(s):**

Frank J. Smith

Represented By  
Robert M Yaspan  
Robert M Yaspan  
Steven E Trabish  
Steven E Trabish

**Trustee(s):**

Howard M Ehrenberg, Chapter 7 Trustee

Represented By  
Howard M Ehrenberg (TR)  
Aram Ordubegian  
Andy Kong

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**CONT... Frank J. Smith**

**Chapter 7**

M Douglas Flahaut

Howard M Ehrenberg (TR)

Represented By  
Howard M Ehrenberg (TR)  
M Douglas Flahaut

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**Chapter 7**

**#4.00** Other Fees: JOHN A. BAER

Hearing re Applications for chapter 7 fees and administrative expenses

Docket No: 0

**Tentative Ruling:**

10/3/2016

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below.

Fees: \$28,305.00 (of which \$24,288.75 has already been paid) [**Note 1**]

Expenses: \$0.00

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

**Note 1**

By order entered May 16, 2013 [Doc. No. 362] ("Order"), the Court authorized the Trustee to employ Mr. Baer as a paraprofessional, and to pay Mr. Baer's fees on an ongoing basis from cash collateral. Pursuant to the Order, the Trustee has previously paid Mr. Baer \$24,288.75. The Court approves the fees previously paid as final. The Court approves the fees of \$4,016.25 sought in connection with this application.

**Party Information**

**Debtor(s):**

Frank J. Smith

Represented By  
Robert M Yaspan  
Robert M Yaspan  
Steven E Trabish

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CONT... Frank J. Smith

Chapter 7

Steven E Trabish

**Trustee(s):**

Howard M Ehrenberg, Chapter 7 Trustee

Represented By

Howard M Ehrenberg (TR)

Aram Ordubegian

Andy Kong

M Douglas Flahaut

Howard M Ehrenberg (TR)

Represented By

Howard M Ehrenberg (TR)

M Douglas Flahaut

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**Chapter 7**

**#5.00** APPLICANT: ARENT FOX LLP, Attorney for Trustee

Hearing re Applications for chapter 7 fees and administrative expenses

Docket No: 0

**Tentative Ruling:**

10/3/2016

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below.

Fees: \$532,655.00

Expenses: \$15,106.20

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

<b>Party Information</b>
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**Debtor(s):**

Frank J. Smith

Represented By  
Robert M Yaspan  
Robert M Yaspan  
Steven E Trabish  
Steven E Trabish

**Trustee(s):**

Howard M Ehrenberg, Chapter 7 Trustee

Represented By  
Howard M Ehrenberg (TR)  
Aram Ordubegian  
Andy Kong

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**CONT... Frank J. Smith**

**Chapter 7**

M Douglas Flahaut

Howard M Ehrenberg (TR)

Represented By  
Howard M Ehrenberg (TR)  
M Douglas Flahaut

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**2:11-54945 Frank J. Smith**

**Chapter 7**

**#6.00** APPLICANT: HOWARD M. EHRENBERG, Trustee

Hearing re Applications for chapter 7 fees and administrative expenses

Docket No: 0

**Tentative Ruling:**

10/3/2016

No objection has been filed in response to the Trustee's Final Report. This court approves the fees and expenses, and payment, as requested by the Trustee, as follows:

Total Fees: \$241,671.58

Total Expenses: \$1,774.17

United States Trustee's Fees: \$1,300.00

Other Expenses (International Sureties, Ltd.): \$3,470.98

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

**Party Information**

**Debtor(s):**

Frank J. Smith

Represented By  
Robert M Yaspan  
Robert M Yaspan  
Steven E Trabish  
Steven E Trabish

**Trustee(s):**

Howard M Ehrenberg, Chapter 7 Trustee      Represented By

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**CONT... Frank J. Smith**

**Chapter 7**

Howard M Ehrenberg (TR)  
Aram Ordubegian  
Andy Kong  
M Douglas Flahaut

Howard M Ehrenberg (TR)

Represented By  
Howard M Ehrenberg (TR)  
M Douglas Flahaut

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10:00 AM

**2:14-20893 Yolanda Lopez Ramirez and Francisco Ramirez**

**Chapter 7**

**#7.00** HearingRE: [89] Motion Trustees Motion for Approval of: (i) Sale Agreement of Real Estate Property [1517 N. Avon Street, Burbank, California 91505] Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363, (ii) Overbidding Process, and (iii) Distribution of Sale Proceeds; Memorandum of Points and Authorities; Declaration of David M. Goodrich in Support Thereof (Attachments: # 1 Exhibit Exhibit 3 and Proof of Service) (Gonzalez, Rosendo)

Docket No: 89

**Tentative Ruling:**

10/3/2016

Hearing required.

<b>Party Information</b>
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**Debtor(s):**

Yolanda Lopez Ramirez

Represented By  
Alon Darvish

**Joint Debtor(s):**

Francisco Ramirez

Represented By  
Alon Darvish

**Trustee(s):**

David M Goodrich (TR)

Represented By  
Rosendo Gonzalez

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10:00 AM

**2:15-14240 Robert Wong and Annie Wong**

**Chapter 7**

**#8.00** HearingRE: [51] Motion to Approve Compromise Under Rule 9019 Between Trustee and Debtors re Debtors' Real Property (Timeshares) (Dye (TR), Carolyn)

Docket No: 51

**Tentative Ruling:**

10/3/2016: For the reasons set forth below, the Trustee's motion to approve the Settlement Agreement is GRANTED.

**Pleadings Filed and Reviewed:**

- 1) Trustee's Motion for an Order Approving Settlement and Release Between Trustee and Debtors Re Debtor's Real Property (Timeshares) ("Motion") [Doc. No. 51]
  - a) Notice of Motion [Doc. No. 52]
- 2) Previous related filings:
  - a) Debtor's Motion to Compel Chapter 7 Trustee to Abandon Property of the Estate ("Motion to Compel") [Doc. No. 20]
  - b) Opposition and Request for a Hearing on the Debtors' Motion to Compel Chapter 7 Trustee to Abandon Property of the Estate ("Opposition") [Doc. No. 25]
  - c) Voluntary Dismissal of Debtor's Motion to Compel Chapter 7 Trustee to Abandon Property of the Estate ("Dismissal of Motion to Compel") [Doc. No. 50]
  - d) Trustee's Application to Employ Real Estate Broker for the Estate's Real Property (Timeshares) ("Application to Employ Real Estate Broker") [Doc. No. 28]
  - e) Withdrawal of Trustee's Application to Employ Real Estate Broker [Doc. No. 49]

**I. Facts and Summary of Pleadings**

Debtors filed a voluntary petition for relief under Chapter 7 on March 19, 2015. Debtors scheduled an interest in four timeshares ("Timeshares") located in Hawaii.

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CONT... **Robert Wong and Annie Wong**

**Chapter 7**

On June 3, 2016, Debtors filed a motion to compel the Trustee to abandon the estate's interest in the Timeshares. Doc. No. 25. Shortly thereafter, the Trustee filed an application to employ a real estate broker to market the Timeshares, as well as an opposition to the Debtor's motion to compel abandonment. The court conducted a hearing on the motion to compel abandonment on June 22, 2016, but continued the hearing to provide the parties a chance to negotiate a settlement. The parties subsequently reached a settlement, and the Debtor's motion to compel abandonment and the Trustee's motion to employ a real estate broker were withdrawn. Pursuant to the Settlement Agreement, the Debtor will make a one-time payment of \$5,700 for the estate's interest in the Timeshares. No opposition to the Trustee's motion to approve the Settlement Agreement has been filed.

## **II. Findings of Fact and Conclusions of Law**

Bankruptcy Rule 9019(a) permits the Court to approve a compromise or settlement. "In determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider: (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises." *Martin v. Kane (In re A&C Properties)*, 784 F.2d 1377, 1381 (9th Cir. 1986). "[C]ompromises are favored in bankruptcy, and the decision of the bankruptcy judge to approve or disapprove the compromise of the parties rests in the sound discretion of the bankruptcy judge." *In re Sassalos*, 160 B.R. 646, 653 (D. Ore. 1993). In approving a settlement agreement, the Court must "canvass the issues and see whether the settlement 'falls below the lowest point in the range of reasonableness.'" *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983).

Applying the *A&C Properties* factors, the Court finds that the Settlement Agreement is fair and reasonable. As set forth below, all of the factors weigh in favor of approving the Settlement Agreement.

### Probability of Success in the Litigation

While no litigation is currently active, the Settlement Agreement avoids litigation over the Debtor's motion to compel the Trustee to abandon the Timeshares and the Trustee's motion to employ a real estate broker to market the Timeshares. Although it is likely that the Trustee would ultimately defeat the motion to compel abandonment,

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**CONT... Robert Wong and Annie Wong**

**Chapter 7**

doing so would result in increased administrative costs. Therefore, this factor weighs in favor of approving the Settlement Agreement.

Difficulties of Collection

Absent the Settlement Agreement, the estate would incur additional costs in monetizing the Timeshares. The estate would be required to pay a commission to the real estate brokers and would incur additional accounting and legal fees in connection with marketing the Timeshares. The Settlement Agreement provides an immediate payment to the estate. This factor weighs in favor of approving the Settlement Agreement.

Complexity and Delay

This factor weighs strongly in favor of approving the Settlement Agreement. Absent the Settlement Agreement, the Trustee would have to defeat the Debtor's motion to compel abandonment, and would have to obtain approval of the employment of a real estate broker to market the Timeshares. The Timeshares would then have to be marketed. All this would result in additional delay, whereas the Settlement Agreement provides money for the estate now.

Interests of Creditors

This factor weighs in favor of approving the Settlement Agreement. Approval of the Settlement Agreement is in the interest of the Debtor's creditors because it would bring \$5,700 into the estate. Settling is the best means for the Trustee to liquidate the value of the Timeshares since it avoids the incurrence of additional administrative costs. Further, no creditors have filed an opposition to the motion.

Based upon the foregoing, the Court approves the Settlement Agreement. The Trustee shall submit a conforming order, incorporating this tentative ruling by reference, within seven days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Nathaniel Reinhardt or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling**

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CONT... **Robert Wong and Annie Wong**

**Chapter 7**

**and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

<b>Party Information</b>
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**Debtor(s):**

Robert Wong

Represented By

Eliza Ghanooni

Eliza Ghanooni

**Joint Debtor(s):**

Annie Wong

Represented By

Eliza Ghanooni

**Trustee(s):**

Carolyn A Dye (TR)

Pro Se

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**2:15-19486 Jose Guevara Delgado**

**Chapter 7**

**#9.00 APPLICANT: PETER J MASTAN, TRUSTEE**

Hearing re [43] re Applications for chapter 7 fees and administrative expenses

Docket No: 0

**Tentative Ruling:**

10/3/2016

No objection has been filed in response to the Trustee's Final Report. This court approves the fees and expenses, and payment, as requested by the Trustee, as follows:

Total Fees: \$750.00

Total Expenses: \$67.86

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

<b>Party Information</b>
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**Debtor(s):**

Jose Guevara Delgado

Represented By  
Kathleen A Moreno  
Kathleen A Moreno  
Kathleen A Moreno  
Kathleen A Moreno  
Kathleen A Moreno

**Trustee(s):**

Peter J Mastan (TR)

Pro Se

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**2:16-14852 Jake Nguyen**

**Chapter 7**

Adv#: 2:16-01304 Yoo v. Chan et al

■  
**#10.00** HearingRE: [21] Motion for Default Judgment

Docket No: 21

**Tentative Ruling:**

10/3/2016: For the reasons set forth below, the Motion for Default Judgment is GRANTED.

**Pleadings Filed and Reviewed:**

- 1) Complaint for: (1) Declaratory Relief; (2) Sale of Interest of Co-Owner in Property of the Estate; and (3) Turnover of Property ("Complaint") [Doc. No. 1]
- 2) Motion for Default Judgment Under LBR 7055-1 ("Motion") [Doc. No. 21]
  - a) Notice of Motion [Doc. No. 22]
  - b) Request for Judicial Notice in Support of Motion [Doc. No. 23]

**I. Facts and Summary of Pleadings**

On July 6, 2016, the Chapter 7 Trustee ("Trustee") filed a Complaint for: (1) Declaratory Relief; (2) Sale of Interest of Co-Owner in Property of the Estate; and (3) Turnover of Property ("Complaint") [Doc. No. 1] against Debtor Jake Nguyen and the Debtor's wife, Kara Chan. On August 17, 2016, after the Defendants failed to respond to the Complaint, the Clerk of the Court entered default. Doc. No. 18. The Trustee now seeks entry of default judgment. Defendants have not responded to the Motion for Default Judgment.

The Complaint alleges that property located at 5816–5818 Primrose Avenue, Temple City, CA 91780 (the "Property") is the community property of the Debtor and Chan, and seeks a declaration to that effect. The Complaint seeks turnover of the Property to the Trustee pursuant to §542(a). In the event the Property is not determined to be the community property of the Debtor and Chan, the Complaint seeks to sell the Property, free and clear of Chan's interest, pursuant to §363(h).

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CONT... **Jake Nguyen**

Chapter 7

**II. Findings and Conclusions**

Once default has been entered, the well-pleaded factual allegations of the complaint are taken as true. *Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1267 (9th Cir.1992). The Complaint's allegations, as well as the declaration of Timothy J. Yoo and the Request for Judicial Notice submitted in support of the Motion for Default Judgment, establish that (1) the Property is the community property of the Debtor and Chan, and is therefore property of the estate; and (2) that the Trustee is entitled to turnover of the Property pursuant to §542(a).

Section 760 of the California Family Code provides: "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." As the California Supreme Court has explained:

Property that a spouse acquired during the marriage is community property unless it is (1) traceable to a separate property source, (2) acquired by gift or bequest, or (3) earned or accumulated while the spouses are living separate and apart. A spouse's claim that property acquired during a marriage is separate property must be proven by a preponderance of the evidence.

*In re Marriage of Valli*, 58 Cal. 4th 1396, 1400 (2014).

In *Valli*, the court held that a life insurance policy purchased with community funds was community property notwithstanding the fact that the policy was solely in the wife's name. *Id.* at 1400. Here, the facts are similar: It is undisputed that the Debtor and Chan acquired the Property after marriage, using community property funds. *See* RJN at Ex. 1 (testimony of the Debtor at the meeting of creditors that he and Chan used community funds to purchase the Property). There is no evidence that the Debtor and Chan intended to transmute the Property from community property to separate property. Because the Debtor and Chan have failed to rebut the community property presumption, the Court finds that the Property is community property. Accordingly, pursuant to §541(a)(2), the property is Property of the estate. Because the Property is property of the estate and has equity of approximately \$120,000, the Trustee is entitled to turnover of the Property pursuant to §542(a).

The Court will enter judgment declaring the Property to be community property of the Debtor and Chan, and directing the Debtor and Chan to turnover the Property to the Trustee. The Trustee shall submit a conforming judgment, incorporating this tentative ruling by reference, within seven days of the hearing.

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CONT... Jake Nguyen

Chapter 7

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Nathaniel Reinhardt or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

**Party Information**

**Debtor(s):**

Jake Nguyen

Represented By  
Sina Maghsoudi

**Defendant(s):**

Jake Nguyen

Pro Se

Kara Chan

Pro Se

**Plaintiff(s):**

Timothy J. Yoo

Represented By  
Carmela Pagay

**Trustee(s):**

Timothy Yoo (TR)

Represented By  
Carmela Pagay

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2:16-16552 Adam Jinsoo Shim

Chapter 7

#11.00 Hearing re [19] Motion for order disallowing debtors' claim of exemption

Docket No: 0

**Tentative Ruling:**

10/3/2016: Continued as set forth below.

**Pleadings Filed and Reviewed**

- Chapter 7 Trustee's Notice of Motion and Motion for Order Disallowing Debtor's Claim of Exemption ("Motion") [Doc. No. 19]

**Facts and Summary of Pleadings**

On September 7, 2016, the Trustee filed the instant Motion. Doc. No. 19. For the reasons stated below, the Court continues the motion as a status conference to January 18, 2017 at 10:00 a.m.

***Background***

On May 18, 2016, Adam Jinsoo Shim ("Debtor") filed a voluntary petition under chapter 7 ("Petition"). Doc. No. 1. Alberta P. Stahl was appointed chapter 7 trustee ("Trustee"). In Schedule A, the Debtor listed real property located at 14629 Poner Street, La Mirada, California 90638 ("Property") with a value of \$300,000. Motion, Ex. 1, *see also* Doc. No. 1. In Schedule C, the Debtor claimed an exemption in the amount of \$25,575 for the Property. Motion, Ex. 2; *see also* Doc. No. 1.

Prior to the Petition date, on January 22, 2016, the Debtor transferred his interest in the Property to Joo Hee Shim, ("Joo") "a Married woman as Her Sole and Separate Property," through an Interspousal Transfer Grant Deed ("Spousal Deed"). Motion, Ex. 3. On June 14, 2016, the Trustee commenced an adversary proceeding against Joo to avoid and recover the Debtor's transfer in the Property on the grounds that it had been fraudulently transferred by the Debtor prepetition. The adversary proceeding *Stahl v. Shim et al*, Case No. 2:16-ap-01271-ER ("Adversary

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Chapter 7

Proceeding"), is currently pending.

*Trustee's Motion*

The Trustee contends that the Debtor cannot exempt the Property because the Debtor transferred the Property to Joo and, therefore, had no interest in the Property before filing the Petition. Moreover, the Trustee avers that the Debtor is not entitled to claim an exemption in the Property that the Debtor fraudulently transferred, even if the Trustee eventually recovers the Property. Finally, the Trustee submits that the Debtor has the burden of proving his claimed exemption.

**Findings of Fact and Conclusions of Law**

Section 541(a) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case," with property of the estate being construed broadly. 11 U.S.C. § 541(a)(1); *U.S. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983); *see also In re Contractors Equip. Supply Co.*, 861 F.2d 241, 245 (9th Cir. 1988). Generally, title to estate property remains with the trustee unless abandoned or intentionally re-vested. *In re Bronner*, 135 B.R. 645, 647 (B.A.P. 9th Cir. 1992) (citing *In re Hyman*, 123 B.R. 342, 348 (B.A.P. 9th Cir. 1991)). Subsection 541(a)(3) specifically incorporates, "any interest in property that the trustee **recovers**," including fraudulently transferred property. 11 U.S.C. § 541(a)(3) (emphasis added). A debtor may remove property from the estate by claiming an exemption. *In re Bronner*, 135 B.R. at 647; *Owen v. Owen*, 500 U.S. 305, 308 (U.S. 1991); *In re Galvan*, 110 B.R. 446, 449 (B.A.P. 9th Cir. 1990). Here, the Trustee has not actually recovered the Property for the benefit of the estate. Instead, the Trustee has asserted a pending fraudulent transfer claim, among others, in the Adversary Proceeding.

Section 522(g) provides:

Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

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**Adam Jinsoo Shim**

**Chapter 7**

- (1) (A) such transfer was not a voluntary transfer of such property by the debtor; and  
(B) the debtor did not conceal such property; or
- (2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section.

"Section 522(g) ... limits the ability of a debtor to claim an exemption where the trustee *has recovered* property for the benefit of the estate." *Hitt v. Glass (In re Glass)*, 164 B.R. 759, 761 (9th Cir. BAP 1994) (emphasis added). Its purpose "is to prevent a debtor from claiming an exemption in recovered property which was transferred in a manner giving rise to the trustee's avoiding powers, where the transfer was voluntary or where the transfer or property interest was concealed." *Id.* at 764. Here, the Court finds it premature to consider whether Bankruptcy Code Section 522 (g) applies because the Trustee has not yet recovered the Property for the benefit of the estate.

Based on the foregoing, the Court CONTINUES the Trustee's Motion in light of the Trustee's related Adversary Proceeding to avoid and recover the Property as a fraudulent transfer. Additionally, the continued hearing on January 18, 2017 at 10:00 a.m. shall be a status conference only. The Court will defer making any ruling on the Motion pending a final non-appealable order resolving the Adversary Proceeding.

The Trustee shall lodge a conforming proposed order within 7 days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Nathaniel Reinhardt or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

<b>Party Information</b>
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**Debtor(s):**

Adam Jinsoo Shim

Represented By

**United States Bankruptcy Court  
Central District of California  
Los Angeles  
Judge Ernest Robles, Presiding  
Courtroom 1568 Calendar**

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10:00 AM

**CONT... Adam Jinsoo Shim**

**Chapter 7**

Leroy Bishop Austin

**Trustee(s):**

Alberta P Stahl (TR)

Represented By  
Carmela Pagay

**United States Bankruptcy Court  
Central District of California  
Los Angeles  
Judge Ernest Robles, Presiding  
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**2:14-25758 Wesley Brian Ferris**

**Chapter 11**

**#12.00** Hearing re Confirmation of Debtor's Chapter 11 Plan  
fr. 7-6-16

Docket No: 109

**\*\*\* VACATED \*\*\* REASON: CONTINUED 11-9-16 AT 10:00 A.M.**

**Tentative Ruling:**

7/5/2016: Chapter 11 debtor and debtor-in-possession Wesley Brian Ferris ("Debtor") seeks approval of the Disclosure Statement. Doc. No. 109. For the reasons set forth below, the Court grants the motion seeking approval of the Disclosure Statement.

**Pleadings Filed and Reviewed**

- Debtor's Chapter 11 Plan of Reorganization Dated March 4, 2016 ("Plan") [Doc. No. 108]
- Debtor's Disclosure Statement In Support of Plan ("Disclosure Statement") [Doc. No. 109]
- Notice of Hearing on Disclosure Statement and Deadline for Filing Objections to Disclosure Statement ("Notice") [Doc. No. 114]
- Objection to Approval of Disclosure Statement Filed by Secured Creditor The Bank of New York Mellon ("Mellon Objection") [Doc. No. 117]
- Objection to Approval of Disclosure Statement Filed by Secured Creditor Bank of America ("BANA Objection") [Doc. No. 118]
- Debtor's Reply to Objections ("Reply") [Doc. No. 119]

**Facts and Summary of Pleadings**

*Description and History of Debtor's Case and Assets*

The Debtor filed a voluntary, individual chapter 11 petition on August 15, 2014 ("Petition"). Doc. No. 1. The Debtor is a certified public accountant. The Debtor invested in real estate as part of his retirement plan. At the time of the Southern California real estate market crash, the Debtor owned six (6) homes and

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other investment properties. In July 2008, the Debtor was laid off, leading to the sale at a loss or foreclosure on three (3) of the properties. The primary assets of the estate are the remaining three (3) properties (referred to as "Alta Vista," "Myrtle," and "Greystone," or collectively, "Properties"). The Debtor became seriously delinquent on Alta Vista and Myrtle but regained employment in April 2010 and was able to cure the deficiency on Myrtle in 2012. The Debtor filed the Petition to restructure the debts secured by the Properties. The Debtor was laid off in July 2015, but is once again employed and has a regular source of income which he contends will enable him to fund the Plan. The Debtor's financial history for the past 12 months is attached to the Disclosure Statement as Exhibit "D."

*Treatment of Claims and Interests*

The Plan becomes effective on the 30<sup>th</sup> day following the entry of an order of the Court confirming the Plan ("Effective Date"). The Plan classifies claims asserted against the estate into following groups. Plan, Ex. A; Disclosure Statement, Ex. E.

**Class 1: Claims secured by Alta Vista real property:** Claim 1A is comprised of the secured claim of Structured Asset Mortgage Investments II, Inc., Bear Stearns ARM Trust, Mortgage Pass-Through Certificates, Series 2004-3, U.S. National Bank as Trustee, as serviced by Specialized Loan Servicing Inc. ("Specialized"), secured by a first Deed of Trust ("DOT") on Alta Vista. Specialized's claim, estimated to be \$780,000, will be bifurcated into a secured claim of \$750,000 secured by a DOT payable over thirty (30) years from the Effective Date at a fixed rate of 3.85%, fully amortized with no penalty. The remainder will be an unsecured claim of \$30,000 treated as a Class 5 claim. Plan at 2. Specialized has been receiving adequate protection payments of \$2,000 per month since October 2015. Class 1B is comprised of the claim of Green Tree Servicing, LLC ("Green Tree Servicing") filed as Claim No. 3, in the amount of \$51,271.01, based on a "Charged off Second Mortgage." *Id.* at 3. Since Alta Vista has a value of less than the balance due to Specialized, Class 1B will be treated as a Class 5 claim. *Id.*

**Class 2: Claim secured by Greystone real property:** Class 2 is comprised of the secured claim of The Bank Of New York Mellon Fka The Bank Of New York As Trustee For The Certificateholders of the CWALT, Inc. Alternative Loan Trust 2006-OA-17 ("Mellon"), Mortgage Pass-Through Certificates, series secured by a first DOT

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on Greystone. The Debtor's obligation to Mellon is current. The balance of the Class 2 claim as of the Effective Date, calculated to be approximately \$560,000, will be payable over thirty (30) years from the Effective Date at a fixed interest rate of 3.85%, fully amortized, with no prepayment penalty. Plan at 3.

**Class 3: Claims secured by Myrtle real property:** Class 3A is comprised of the secured claim of Bank of America, N.A. ("BANA") secured by a first DOT on Myrtle. The Debtor's obligation to BANA is current. The balance of the Class 3 claim as of the Effective Date, calculated to be approximately \$392,000, will be payable over thirty (30) years from the Effective Date, at a fixed interest rate of 3.85%, fully amortized, with no prepayment penalty. Class 3B is comprised of the claim of the City of Monrovia filed as Claim No. 6 in the amount of \$8,500. The Debtor disputes the amount of Monrovia's claim and the validity of its security interest. The Plan is a compromise to avoid the cost of litigation. Class 3B will be paid \$7,500 on the Effective Date as payment in full of Class 3B's claim.

**Class 4: Priority Claims:** To the Debtor's knowledge, there are no priority claims entitled to special treatment under 11 U.S.C. § 507.

**Class 5: General Unsecured Claims:** Class 5 contains all general unsecured claims. Holders of Class 5 claims will receive a one-time pro rata distribution of Available Cash (as defined below) within thirty (30) days following the Effective Date, estimated to be \$100,000. If Class 5 does not vote to accept the Plan, the Debtor will add "new value" to the Plan by contributing \$500 per month for one (1) year into a "second distribution" fund, from which a second distribution will be made based on a pro rata basis to Class 5 within thirty (30) days following the final payment into the "second distribution" fund. Class 5 consists of three (3) claims: (1) Specialized's deficiency claim of \$30,000; (2) Green Tree Servicing's claim of \$51,271.01; and (3) JP Morgan Chase's wholly underwater secured claim in the amount of \$152,429.42. A proposed treatment of Class 5 claims is detailed in Exhibit "F" to the Disclosure Statement.

**Class 6: Debtor's Interest:** As of the Effective Date, the Debtor will be re-vested with all of his interest in the Properties, subject to the payments required by the Plan.

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*Means of Implementation*

As of February 29, 2016, there was approximately \$109,000 in cash in the debtor-in-possession bank account. Plan at 4-5. Available Cash will be the cash remaining in the DIP bank account after the payment of Class 3B held by City of Monrovia and a reserve of \$20,000 for professional fees. It is not anticipated that Available Cash will be less than \$100,000, but in the event that Available Cash on the initial distribution date is less than \$100,000, counsel for the DIP agrees to defer payment of a sufficient portion of her fees to allow an initial distribution of \$100,000, provided the reorganized Debtor provides assurance of payment. Holders of Class 5 claims will receive a pro rata share of Available Cash within thirty (30) days following the Effective Date. According to Debtor's liquidation analysis, unsecured creditors will be paid approximately 65% of their claims in a chapter 7 liquidation proceeding. Disclosure Statement, Ex. "G."

The Debtor's projected revenues and expenses, and proposed payments to creditors under the Plan ("Projected Financials") are specified in Exhibit "C" to the Disclosure Statement. The Projected Financials also include cash flow projections for each of the Properties. The Debtor has no pre-petition executory contracts. Subsequent to the petition date, the Debtor has entered into leases for Myrtle and Greystone. Those leases, to the extent applicable, will be assumed. Plan, Ex. B.

*Mellon Objection*

Secured creditor Mellon objects to approval of the Disclosure Statement ("Mellon Objection"). Doc. No. 17. Under the current promissory note secured by a DOT on Greystone that matures on August 1, 2036, Mellon is entitled to receive a monthly payment, including taxes and insurance, of \$3,688.22. *Id.* at 2. The Debtor proposes to modify the loan by taking the total lien and amortizing it over 30 years from the Effective Date, extending the original maturity date by approximately 10 years at a 3.85% fixed rate per annum. *Id.* Mellon contends that Debtor's proposed fixed rate of 3.85% does not reflect a reasonable market rate. Additionally, the Debtor's proposed treatment of Mellon's secured claim is not beneficial to the estate and its creditors because the proposed fixed rate of 3.85% is higher than the current variable rate of 3.625% and will result in a higher total interest payment over the next thirty (30) years. Based on Debtor's ability to continue paying Mellon under the terms

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of the current promissory note, Mellon contends that Debtor should not be allowed to reduce and extend the payments to Mellon to have additional funds for other expenses.

*BANA Objection*

Secured creditor BANA objects to approval of the Disclosure Statement ("BANA Objection"). Doc. No. 118. BANA is entitled to receive payments pursuant to a promissory note secured by a DOT on Myrtle that matures on August 1, 2037. In sum, BANA contends the Debtor fails to provide adequate information under 11 U.S.C. § 1125 relevant for a creditor to determine whether to accept or object the Plan. *Id.* at 3. Specifically, BANA contends that Disclosure Statement fails to provide necessary financial information, data, valuations or projections relating to the Properties. In addition to not attaching copies of current leases, the Debtor fails to provide any information beyond the projected monthly rental income for each of the Properties. *Id.* Additionally, BANA objects to the reduction of its interest rate from 6.875% to 3.85% because the Debtor has the ability to maintain the loan payments and has maintained the payments post-petition. *Id.* BANA does not believe that Debtor's proposed interest rate is fair and equitable in violation of 11 U.S.C. § 1129 (b)(1) because it does not take into account the Debtor's default record and current bankruptcy filing. *Id.* at 4.

*Debtor's Reply to Objections*

In his response, the Debtor states that while the Debtor has been able to maintain the debt on a current basis for the Alta Vista and Myrtle properties by using earned income to make up the deficiency, the Debtor is unable to do so for the Greystone property ("Reply"). Doc. No. 119, at 2. Further, while the Debtor who is 60 years old has the current ability to earn a substantial income and cut personal living expenses to a bare minimum, "no one can work forever." *Id.* Thus, the Debtor contends that restructure of the debt secured by the Property is "absolutely necessary." *Id.* As to Greystone, contrary to Mellon's contentions, the rent is \$3,000 per month, not \$3,750, with the \$750 transferred into the cash collateral account from the general account to make the monthly mortgage payment. *Id.* at 2-3. Therefore, the expenses of the Greystone property exceed the income by \$1,405.22 per month. *Id.* at 3. The Debtor contends that the payments on a re-amortized loan at the interest rate of 3.85%

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would reduce the mortgage payment by over \$500. Assuming a reasonable rent increase, the rental income would then at least pay for the mortgage, property taxes, and insurance. *Id.*

As to BANA's objection based on failure to provide sufficient financial information, the Debtor states that the Debtor is "more than happy" to provide requested information. Next, the Debtor notes that expenses of the Myrtle property far exceed the income by \$1,937.86. Reply at 2-3. Additionally, the current interest rate of 6.875% is well above market rate, and a reduction would not be unreasonable. *Id.* at 4. The estimated monthly payment on the restructured loan at 3.85% including taxes and insurance is \$2,616.54, well within the ability of the Myrtle property to be sustained. *Id.* The Debtor states that the "modest deficiency" in the income to meet total expenses could be made up from his earned income. *Id.* In sum, the Debtor believes the Plan to restructure the debt enables the Properties to come closer to breaking even and is willing to supplement the Disclosure Statement to the extent the Court believes necessary. *Id.*

**Findings of Fact and Conclusions of Law**

Section 1125 requires a disclosure statement to contain "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, ... that would enable ... a hypothetical investor of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125. In determining whether a disclosure statement provides adequate information, "the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information." 11 U.S.C. § 1125(a). Courts interpreting § 1125(a) have explained that the "primary purpose of a disclosure statement is to give the creditors the information they need to decide whether to accept the plan." *In re Monnier Bros.*, 755 F.2d 1336, 1342 (8th Cir. 1985). "According to the legislative history, the parameters of what constitutes adequate information are intended to be flexible." *In re Diversified Investors Fund XVII*, 91 B.R. 559, 560 (Bankr. C.D. Cal. 1988). "Adequate information will be determined by the facts and circumstances of each case." *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988), *accord. In re Ariz. Fast Foods, Inc.*, 299 B.R. 589 (Bankr. D. Ariz. 2003).

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Relevant factors for evaluating the adequacy of a disclosure statement may include: (1) the events which led to the filing of a bankruptcy petition; (2) a description of the available assets and their value; (3) the anticipated future of the company; (4) the source of information stated in the disclosure statement; (5) a disclaimer; (6) the present condition of the debtor while in Chapter 11; (7) the scheduled claims; (8) the estimated return to creditors under a Chapter 7 liquidation; (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (10) the future management of the debtor; (11) the Chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the collectability of accounts receivable; (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant to the risks posed to creditors under the plan; (16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (17) litigation likely to arise in a nonbankruptcy context; (18) tax attributes of the debtor; and (19) the relationship of the debtor with affiliates.

*In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567, 568 (Bankr. Ga. 1984). However, "[d]isclosure of all factors is not necessary in every case." *Id.* The plan proponent bears the burden of proving the adequacy of the disclosure statement. *In re Jeppson*, 66 B.R. 269 (Bankr. D. Utah 1986).

Notwithstanding, "[a] disclosure statement is not intended to be the primary focus of litigation in a contested chapter 11 proceeding, and care must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing." *In re Broad Assocs. Ltd. P'ship*, 1989 Bankr. LEXIS 2248, at \* 6-7 (Bankr. D. Conn. Dec. 29, 1989); *see also In re Copy Crafter Quickprint, Inc.*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988) ("[C]are must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing, due process considerations are protected and objections are restricted to those deficits that could

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not be cured by voting."). As a general practice, the Court does not consider objections to a plan before confirmation. Only in extraordinary cases where the plan is obviously and patently unconfirmable will the Court deny approval of an associated disclosure statement. *See In re Phoenix Petroleum, Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("[T]he disclosure statement should be disapproved at the ... [disclosure statement hearing] only where the plan it describes displays fatal facial deficiencies or the stark absence of good faith.").

Here, the Court notes some concerns regarding lack of information with respect to the Properties. As stated by BANA, the Debtor needs to provide documents and information pertaining to current lease agreements beyond the monthly rental income, including copies of actual lease agreements, payment history of current tenants, scheduled rent increases, necessary or expected repairs of Properties, and any other relevant information relating to rental of the Properties. However, the Court finds that the Disclosure Statement otherwise provides adequate information to permit a reasonable creditor to decide whether to vote to accept or reject the Plan. The Disclosure Statement adequately describes, among other things, the events which led to the filing of a bankruptcy petition; a description of the available assets and their value; present condition of the Debtor; scheduled claims; a liquidation analysis; a summary of the Plan; and estimated administrative expenses. The *Metrocraft* items not present in the Disclosure Statement are either irrelevant, or would not provide sufficient information to creditors, in view of the complexity of the case, to justify the costs of additional disclosure. The secured creditors' objections to the plan treatment of their respective claims should be addressed at the plan confirmation hearing. As stated above, the purpose of a hearing on the approval of the disclosure statement is to determine whether the Disclosure Statement provide adequate information for creditors to vote for or against the Plan. It is not an opportunity for creditors to object to proposed treatment of their claims.

Although the following are plan confirmation issues, Debtor should be aware that the proposed plan in its present form cannot be confirmed over the opposition of the class of general unsecured creditors. Under § 1129(b)(2)(B), a debtor may not retain any pre-petition property under the plan in order for the plan to be confirmed over the dissent of a class of unsecured creditors. *Zachary v. California Bank & Trust*, 811 F.3d 1191, 1199 (9th Cir. 2016); *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. 2012). Here, the Plan provides for the Debtor to retain pre-petition property.

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**Wesley Brian Ferris**

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Additionally, § 1129(a)(15) gives any single unsecured creditor the power to block confirmation where the proposed plan does not pay the creditor the present value of its claims or distribute property equal to the Debtor's projected monthly disposable income. Here, holders of Class 5 claims will receive a pro rata share of Available Cash, estimated to be approximately \$100,000, within thirty (30) days following the Effective Date. Unsecured creditors may seek to challenge the Debtor's projections of disposable income, potentially creating an additional obstacle to confirmation. Based on the foregoing reasons, the Court APPROVES Debtor's Disclosure Statement and sets dates as follows, but expects that he will provide to BANA the additional information it requests:

- No later than July 12, 2016, Debtor shall file and serve an amended disclosure statement and plan containing sufficient information pertaining to the rental properties as explained above.
- A hearing will be held on the confirmation of the Debtor's Chapter 11 Plan on October 4, 2016 at 10:00 a.m.
- In accordance with FRBP 3017(a), the Disclosure Statement, the Plan, a notice of hearing on confirmation of the Plan, and if applicable, a ballot conforming to Official Form No. 14, shall be mailed to all creditors, equity security holders and to the Office of the United States Trustee, pursuant to FRBP 3017(d), on or before August 22, 2016
- **September 2, 2016** is fixed as the last day for creditors and equity security holders to return Debtor's counsel ballots containing written acceptances or rejections of the Plan, which ballots must be actually received by Debtor's counsel by 5:00 p.m. on such date.
- **September 16, 2016** is fixed as the last day on which the Debtor must file and serve a motion for an order confirming the Plan ("Confirmation Motion") including declarations setting forth a tally of the ballots cast with respect to the Plan ("Ballots"), and attaching thereto the original Ballots, and setting forth evidence that the Debtor has complied with all the requirements for the confirmation of the Plan as set forth in § 1129 of the Bankruptcy Code.

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- **September 23, 2016** is fixed as the last day for filing and serving written objections to confirmation of the Plan, as provided in Rule 3020(b)(1) of the Federal Rules of Bankruptcy Procedure (the "Objection Date").
- **September 30, 2016** is fixed as the last day on which the Debtor may file and serve its reply to any opposition to the Confirmation Motion ("Reply").

The Debtor shall lodge a conforming proposed order within 7 days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact James Yu or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

<b>Party Information</b>
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**Debtor(s):**

Wesley Brian Ferris

Represented By  
Diane C Weil

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**2:09-35755 Mojgan Boodaie**

**Chapter 7**

Adv#: 2:15-01617 Farad Rashti and Mahnaz Rashti, as Individuals, an v. Boodaie et al

■  
**#100.00** HearingRE: [43] Motion For Summary Judgment (Walker, Holly)

Docket No: 43

**Tentative Ruling:**

10/3/2016: For the reasons set forth below, the Motion is GRANTED in part and DENIED in part.

**Pleadings Filed and Reviewed:**

- 1) Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment Against Defendant Joseph Boodaie ("Motion") [Doc. No. 43]
  - a) Statement of Uncontroverted Facts and Conclusions of Law [Doc. No. 44]
  - b) Notice of Motion [Doc. No. 45]
  - c) Declaration of Holly Walker in Support of Plaintiff's Motion for Summary Judgment [Doc. No. 46]
  - d) Declaration of Service and Non-Response Re: Plaintiff's Motion for Summary Judgment Against Defendant Joseph Boodaie [Doc. No. 50]
- 2) Notice and Objection of Joseph Boodaie ("Opposition") [Doc. No. 51]

**I. Facts and Summary of Pleadings**

On September 23, 2009, Mojgan Boodaie ("Mojgan") commenced a voluntary Chapter 7 petition. Mojgan Boodaie is married to Joseph Boodaie ("Joseph"). Mojgan's petition was only as to herself; her husband Joseph did not file as a joint debtor.

On May 7, 2009, Farad and Mahnaz Rashti ("Plaintiffs") commenced litigation (the "State Court Action") against Joseph and others. On May 27, 2010, the State Court entered a default judgment in favor of Plaintiffs in the amount of \$1,154,685 (the "State Court Judgment"). The State Court Judgment was based on Joseph's misappropriation of Plaintiffs' funds. On November 20, 2015, Plaintiffs filed a complaint against Joseph in the Bankruptcy Court ("Complaint"), seeking a

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determination that the State Court Judgment would not be dischargeable as to Joseph in a hypothetical Chapter 7 case. Such a determination would enable Plaintiffs to enforce the State Court Judgment against Mojgan and Joseph's community property. Plaintiffs assert that the Complaint is timely because Mojgan failed to schedule them as creditors, and they only learned of Mojgan's Chapter 7 petition when conducting a judgment debtor examination of Joseph on August 11, 2015.

Plaintiffs now seek summary judgment against Joseph. Plaintiffs contend that the State Court Judgment is entitled to preclusive effect, and establishes that Joseph's indebtedness would be non-dischargeable pursuant to §§523(a)(2)(A) and (a)(4) in a hypothetical Chapter 7 case. Joseph filed an untimely *pro se* Opposition to the Motion. Joseph argues that Plaintiffs lack standing because he did not file a bankruptcy petition and because he is currently in the process of divorcing Mojgan. Joseph argues that because he was not part of Mojgan's Chapter 7 petition, his due process rights would be violated if the Court grants Plaintiff's Motion. Joseph does not contest any of the uncontroverted facts asserted by Plaintiffs in support of the Motion.

## **II. Findings of Fact and Conclusions of Law**

### **The Court Has Jurisdiction Over Joseph**

Joseph's contention that the Court lacks jurisdiction over him, because he is not part of Mojgan's bankruptcy petition, is easily rejected. Section 524(b)(2) expressly provides that the Court may consider whether the indebtedness of a non-debtor spouse, such as Joseph, would be dischargeable in a hypothetical Chapter 7 case filed by the non-debtor spouse. Joseph was properly served with the Summons and Complaint, and even filed an Answer. The Court has jurisdiction.

### **The Complaint Is Timely**

Creditors who received notice of the petition are required to file a dischargeability complaint within sixty days of the meeting of creditors. Bankruptcy Rule 4007(c). If creditors fail to timely file a dischargeability complaint, their indebtedness is automatically discharged, even if it falls within one of the categories of debt that is non-dischargeable. This result follows from the plain language of §523(c)(1), which provides:

Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of a creditor to whom such

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debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

*See also Fidelity Nat'l Title Ins. Co. v. Franklin (In re Franklin)*, 179 B.R. 913, 923-24 (Bankr. E.D. Cal. 1995) (“[I]f the debt to [the creditor] Fidelity had been listed or scheduled or if Fidelity had notice of Franklin’s bankruptcy, it would have needed to act promptly to request a determination that the debt is nondischargeable ... or else the debt would have been discharged”). A scheduled creditor who does not timely file a dischargeability complaint and thereafter seeks to collect upon the creditor’s prepetition debt acts in violation of the discharge injunction.

Section 523(c)(1)’s preambular phrase “[e]xcept as provided in subsection (a)(3)(B) of this section” creates an important exception to the sixty day deadline. Section 523(a)(3)(B) provides that indebtedness of the kind specified in §523(a)(2), (a)(4), and (a)(6) is not discharged if the creditor was not scheduled and did not have notice or actual knowledge of the bankruptcy petition. *Franklin*, 179 B.R. at 924. Such unscheduled creditors are not required to file a dischargeability complaint within sixty days of the meeting of creditors, and instead may file a dischargeability complaint “at any time.” Bankruptcy Rule 4007(b).

Here, Mojgan failed to schedule the Plaintiffs’ community claim in her Chapter 7 schedules. Plaintiffs did not become aware of Mojgan’s Chapter 7 petition in time to file a timely dischargeability complaint. In fact, Plaintiffs became aware of the petition only on August 11, 2015, when they were conducting a judgment debtor exam of Joseph. Decl. of Mahnaz Rashti at ¶2. Accordingly, Plaintiffs’ are free to file the Complaint "at any time," Bankruptcy Rule 4007(b). Therefore, the Complaint is timely.

**Plaintiffs Are Entitled to Summary Judgment in Their Favor**

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law." Civil Rule 56 (made applicable to these proceedings by Bankruptcy Rule 7056). The moving party has the burden of establishing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is ‘material’ only if it might affect the outcome of the

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case[.]” *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). The court is “required to view all facts and draw all reasonable inferences in favor of the nonmoving party” when reviewing the Motion. *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004).

Joseph has failed to dispute any of the facts set forth in Plaintiffs’ Statement of Undisputed Facts (“SUF”). The Court finds that the facts set forth in the SUF are adequately supported by the declaration testimony and other evidence submitted in support of the Motion. Therefore, pursuant to Local Bankruptcy Rule (“LBR”) 7056-1 (f), the Court finds that Plaintiffs have established the facts set forth in the SUF.

*The State Court Judgment Has Preclusive Effect*

Plaintiffs request that the Court give preclusive effect to the State Court Judgment. The Court finds that it is appropriate to give preclusive effect to the State Court Judgment to establish the following facts:

- 1) In September 2008, Plaintiffs sold a commercial property in Buena Park, California (the “Property”). Plaintiffs realized \$1.4 million in profits from the sale. State Court Complaint at ¶17 (RJN, Ex. 2).
- 2) Plaintiffs’ accountant introduced them to Joseph. *Id.* at ¶20. Joseph held himself out as a real estate lender and investor associated with All Century, Inc., who was fit to act as an intermediary for Internal Revenue Code §1031 exchanges. *Id.* at ¶¶ 21, 63.
- 3) Joseph told the Plaintiffs that they would benefit financially from hiring him as a § 1031 Exchange Accommodator. *Id.*
- 4) On September 17, 2008, Plaintiffs entered into an agreement (the “Agreement”) with Joseph, under which Plaintiffs transferred to Joseph their profits from the sale of the Property. Joseph was to hold the funds in trust for later purchase of another Property, so that the Plaintiffs would receive the tax benefits associated with a §1031 exchange. *Id.* at ¶22, 64.
- 5) All the representations made by Joseph to induce the Plaintiffs to enter into the Agreement were false. Specifically, Joseph falsely represented that he would facilitate Plaintiffs’ §1031 exchange if they deposited profits from the sale of the Property with him. Joseph knew these representations were false at the time he

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- made them, as he had no intent of facilitating Plaintiffs' §1031 exchange, but instead intended to convert the Plaintiffs' funds to his own use. *Id.* at ¶¶66–67.
- 6) On October 22, 2008, Plaintiffs requested that Joseph relinquish his position as an Accommodator for their §1031 exchange. Joseph refused. *Id.* at ¶23.
  - 7) On November 20, 2008, Plaintiffs met with Joseph to complete a §1031 transaction. Joseph refused to complete the transaction, instead recommending that Plaintiffs purchase two properties from him. After reviewing Joseph's proposal, Plaintiffs discovered that the properties had no equity. *Id.* at ¶¶22–26. Plaintiffs declined to purchase the properties. *Id.*
  - 8) On December 10, 2008, Plaintiffs again met with Joseph to complete a §1031 transaction. Joseph refused to complete the transaction. *Id.* at ¶¶27–28.
  - 9) On January 25, 2009, Plaintiffs met with Joseph and demanded that their funds be returned. Joseph refused to return the funds. *Id.* at ¶¶29–30.
  - 10) Between January 25, 2009 and February 10, 2009, Plaintiffs and Joseph met several times. At each meeting, Joseph assured Plaintiffs that their funds were safe and that they should continue to allow him to hold the funds for the purpose of completing a §1031 exchange. *Id.* at ¶31.
  - 11) In April 2009, Joseph returned \$265,000 of the funds Plaintiffs had deposited with him, but did not return the remaining \$1,154,685.00. *Id.* at ¶¶35–39.
  - 12) Joseph never returned the remaining \$1,154,685.00 to the Plaintiffs. Instead, Joseph converted the funds for his own benefit. *Id.*

To determine the preclusive effect of an existing state court judgment, the "bankruptcy court must apply the forum state's law of issue preclusion." *Plyam v. Precision Development, LLC (In re Plyam)*, 530 B.R. 452, 462 (9th Cir. BAP 2015). California preclusion law requires that:

- 1) The issue sought to be precluded from relitigation is identical to that decided in a former proceeding;
- 2) The issue was actually litigated in the former proceeding;
- 3) The issue was necessarily decided in the former proceeding;
- 4) The decision in the former proceeding is final and on the merits; and
- 5) The party against whom preclusion is sought was the same as, or in privity with, the party to the former proceeding.

*Lucido v. Super. Ct.*, 795 P.2d 1223, 1225 (Cal. 1990).

Even if all five elements are satisfied, preclusion is appropriate "only if application of preclusion furthers the public policies underlying the doctrine."

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*Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001) (citing *Lucido v. Super. Ct.*, 795 P.2d at 1225). In California, the public policies supporting preclusion are "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." *Lucido*, 795 P.2d at 1227.

The Elements of Issue Preclusion Are Satisfied

*Element 1: The Issues Are Identical*

Section 523(a)(2)(A) excepts from discharge any debt "to the extent obtained by false pretenses, a false representation, or actual fraud." To prevail on a §523(a)(2)(A) claim, a creditor must prove that:

- (1) the debtor made the representations;
- (2) that at the time he knew they were false;
- (3) that he made them with the intention and purpose of deceiving the creditor;
- (4) that the creditor relied on such representations; and
- (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

*In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010).

The State Court Complaint contains allegations sufficient to satisfy all the required elements of §523(a)(2)(A). The State Court could not have entered default judgment in Plaintiffs' favor on their cause of action for fraud and deceit unless it found that Plaintiffs had established these allegations. Specifically, the State Court would have been required to find, as alleged in the State Court Complaint, that Joseph falsely represented to the Plaintiffs that he would facilitate their §1031 exchange; that Joseph knew these representations were false at the time he made them; that Joseph made the representations for the purpose of inducing Plaintiffs to deposit funds with him; and that Plaintiffs sustained losses as a result of relying upon the misrepresentations. Therefore, with respect to the §523(a)(2)(A) claim, the issues are identical.

Section 523(a)(4) excepts from discharge debts for "embezzlement." "Under federal law, embezzlement in the context of nondischargeability has often been defined as 'the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.' Embezzlement, thus, requires three elements: '(1) property rightfully in the possession

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of a nonowner; (2) nonowner's appropriation of the property to a use other than which [it] was entrusted; and (3) circumstances indicating fraud." *Transamerica Comm. Finance Corp. v. Littleton (In re Littleton)*, 942 F.2d 551, 555 (9th Cir. 1991) (internal citations omitted).

The State Court Complaint alleges that Plaintiffs entrusted Joseph with their funds and that Joseph thereafter converted the funds to his own use. The State Court could not have entered default judgment in Plaintiff's favor on their cause of action for conversion unless it found that Joseph had misappropriated the funds to a use other than that for which the funds were entrusted. As discussed above, the State Court could not have entered judgment on Plaintiffs' fraud cause of action without finding that Joseph made misrepresentations to Plaintiffs to induce them to deposit their funds with him. This establishes the third element of embezzlement—that there were circumstances indicating fraud associated with Joseph's misappropriation. Therefore, with respect to the claim for embezzlement, the issues are identical.

Section 523(a)(4) excepts from discharge "any debt for fraud or defalcation while acting in a fiduciary capacity." "To prevail on a nondischargeability claim under § 523(a)(4) the plaintiff must prove not only the debtor's fraud or defalcation, but also that the debtor was acting in a fiduciary capacity when the debtor committed the fraud or defalcation." *In re Honkanen*, 446 B.R. 373, 378 (B.A.P. 9th Cir. 2011). Federal bankruptcy law determines whether a fiduciary relationship exists within the meaning of §523(a)(4). *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119, 1125 (9th Cir. 2003). For purposes of §523(a)(4), the fiduciary relationship "must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th Cir. 1996). State law determines whether the requisite trust relationship exists. *In re Mele*, 501 B.R. 357, 363 (B.A.P. 9th Cir. 2013).

Plaintiffs have failed to demonstrate that the State Court was required to find that Joseph was acting in a fiduciary capacity to Plaintiffs, within the meaning of §523(a)(4), in order to enter default judgment in their favor. (Although the State Court Complaint alleges that Joseph acted in a fiduciary capacity, Plaintiffs have not demonstrated that the State Court was required to accept that allegation in order to enter judgment in Plaintiffs' favor.) Accordingly, Plaintiffs have failed to establish that the issues are identical with respect to their claims for fraud or defalcation under §523(a)(4).

Further, the Court finds that, based upon the facts pleaded in the State Court Complaint, Plaintiffs could not establish that Joseph was acting in a fiduciary capacity

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within the meaning of §523(a)(4). For purposes of §523(a)(4), the fiduciary relationship "must be one arising from an express or technical trust that was imposed *before and without reference to the wrongdoing* that caused the debt." *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th Cir. 1996) (emphasis added). The State Court Complaint alleges that Joseph induced Plaintiffs to enter into the Agreement by falsely representing that he intended to safeguard Plaintiffs' funds. Therefore, regardless of whether Plaintiffs' Agreement created an express or technical trust, that trust did not come into existence *before* the wrongdoing that caused the debt—it came into existence simultaneously with that wrongdoing.

*Element 2: The Issues Were Actually Litigated*

"[T]he mere fact that a plaintiff 'obtained a judgment by default does not, in itself, foreclose the possibility that the resolution of some issues in the litigation would later have preclusive effect.'" *Baldwin v. Kilpatrick (In re Baldwin)*, 249 F.3d 912, 918 (9th Cir. 2001) (internal citations omitted). Collateral estoppel may be applied provided the defendant "'ha[d] been personally served with [a] summons or ha[d] actual knowledge of the existence of the litigation.'" *Id.* at 919.

The State Court Judgment contains a finding that Joseph was "regularly served" with the State Court Complaint. Accordingly, the Court finds that Joseph had actual knowledge of the existence of the State Court litigation. Element two is satisfied.

*Element 3: The Issues Were Necessarily Decided*

As explained in the discussion of element one, the identity of the issues, the State Court could not have entered default judgment in Plaintiff's favor on their cause of action for fraud and deceit without finding that all the elements of §523(a)(2)(A) were satisfied. Similarly, the State Court could not have entered default judgment in Plaintiff's favor on their cause of action for conversion without finding that all the elements of embezzlement were satisfied.

*Element 4: The State Court Judgment was Final and On the Merits*

The State Court Judgment was final and was on the merits.

*Element 5: The Party Against Whom Preclusion is Sought is the Same as the Party to the State Court Proceeding*

Joseph, the defendant in the instant action, was also a defendant in the State Court action.

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*Public Policy Supports Preclusion*

The Court must also find that public policy supports applying California preclusion law. Such a finding is appropriate here. Applying preclusion law preserves the integrity of the judicial system by giving full effect to judgments that have been obtained after both parties were afforded full opportunity to litigate the matter. Preclusion promotes judicial economy by obviating the need for a duplicative and unnecessary trial. The avoidance of an unnecessary trial promotes the public policy against vexatious litigation.

**III. Conclusion**

Based upon the foregoing, the Court will enter summary judgment in Plaintiffs' favor on Plaintiffs' claims for relief pursuant to (1) §523(a)(2)(A) (third, fourth, and fifth claims for relief) and (2) §523(a)(4), on the grounds of embezzlement. The Court will enter judgment in Joseph's favor on Plaintiffs' claims under §523(a)(4) for fraud and defalcation while acting in a fiduciary capacity.

Plaintiffs shall submit a conforming proposed judgment within seven days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Nathaniel Reinhardt or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

**Party Information**

**Debtor(s):**

Mojgan Boodaie

Represented By  
Stephen F Biegenzahn

**Defendant(s):**

Joseph Boodaie

Pro Se

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Pro Se

**Plaintiff(s):**

Farad Rashti and Mahnaz Rashti, as Inc

Represented By  
Holly Walker

**Trustee(s):**

Sam S Leslie (TR)

Represented By  
Sam S Leslie  
Carolyn A Dye