

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room

5A

9:30 AM

8:00-00000

Chapter

#0.00 All hearings on this calendar will be conducted remotely, using ZoomGov video and audio.

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Judge Erithe A. Smith's Cases" on the Court's website at:
<https://www.cacb.uscourts.gov/judges/honorable-erithe-smith> under the
"Telephonic Instructions" section.

To assist in creating a proper record and for the efficiency of these
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- Connect 10 minutes before your hearing time so that you have time to check in.
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- Say your name every time you speak.
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Docket 0

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

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8:17-12213 Solid Landings Behavioral Health, Inc.

Chapter 11

Adv#: 8:20-01151 Bristol SL Holdings, Inc v. HOWARD B. GROBSTEIN

#1.00 STATUS CONFERENCE RE:Complaint For Declaratory Relief

Docket 1

Courtroom Deputy:

SPECIAL NOTE: Stipulation for Judgment filed 10/29/2020; Judgment Lodged in LOU on 10/29/2020, Order #10292351 - td (10/30/2020)

Tentative Ruling:

January 14, 2021

In light of pending settlement, continue the Status Conference to February 18, 2021 at 9:30 a.m.; an updated Status Report must be filed by February 4, 2021 if a Rule 9019 motion has not been filed by such date.

Note: Appearances at this hearing are not required; Plaintiff to serve notice of the continued hearing date/time.

Party Information

Debtor(s):

Solid Landings Behavioral Health,

Represented By
David L. Neale
Juliet Y Oh
Jeffrey S Kwong
David M Samuels

Defendant(s):

HOWARD B. GROBSTEIN

Pro Se

Plaintiff(s):

Bristol SL Holdings, Inc

Represented By
Nathan Fransen

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8:19-11414 Peter Woo Sik Kim

Chapter 7

Adv#: 8:19-01155 Kang Family 2007 Revocable Trust v. Kim et al

**#2.00 STATUS CONFERENCE RE: Complaint Objecting to Discharge of Debt Under
11 U.S.C. §523(a)(3)(a) and 11 U.S.C. §523(a)(2)(B)**

FR: 10-17-19; 1-16-20; 5-7-20; 6-4-20; 7-9-20

Docket 1

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

October 17, 2019

Discovery Cut-off Date:	Mar. 6, 2020
Deadline to Attend Mediation:	Jan. 31, 2020
Pretrial Conference Date:	Apr. 30, 2020 at 9:30 a.m.
Deadline to Lodge Joint Pretrial Stipulation:	Apr. 16, 2020

Note: If all parties agree with the foregoing schedule, appearances at today's hearing are waived and Plaintiff shall serve/lodge a scheduling order consistent with the same.

January 16, 2020

Discovery Cut-off Date:	Mar. 16, 2020
Pretrial Conference Date: (XX)	May 7, 2020 at 9:30 a.m.
Deadline to Lodge Joint Pretrial Stipulation:	Apr. 23, 2020

Note: If all parties accept the foregoing schedule, appearances at today's hearing are waived and Plaintiff shall serve/lodge a scheduling order consistent with the same.

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Chapter 7

June 4, 2020

Continue the Pretrial Conference to July 9, 2020 at 9:30 a.m. to allow the parties to file an amended pretrial stipulation by June 25, 2020. The amended pretrial stipulation should address the comments of the court in its tentative ruling and also whether each party wishes to submit direct testimony by declaration in advance of the trial in accordance with this court's Trial Procedures or if they prefer live direct testimony. (XX)

Comments re the Pretrial Stipulation:

1. The court commends the parties for timely filing a thorough and thoughtful pretrial stipulation ("PS"), including a complete list of exhibits and witnesses. That said, the PS will need to be amended per the comments below.
2. Page 3, line 7: There appear to be action words missing, e.g., should "submitted a signed Letter of Intent to lease the property" be inserted?
3. Chronologically, paragraph 4 should probably replace paragraph 7.
4. Curiously, the Issues of Fact to be Litigated, starting on page 6, do not include all of the factual issues relating to 523(a)(2)(A) and (B). Instead, those issues have been relegated to section IV called Claims for Relief which includes mixed issues of fact and law re 523(a)(2). Also added are sections V (Remedies) and VI (Affirmative Defenses). Sections IV, V and VI (collectively the "Added Sections") are confusing and are not consistent with the structure of a pretrial stipulation as plainly set forth in LBR 7016-1(b)(2)(B) and (C). The section on Issues of Fact to be Litigated should include all issues of fact, including those that appear in the Added Sections. Similarly, the section on Issues of Law to be Litigated (Remaining Legal Issues) should include all legal issues, including those in the Added Sections. The court does not mind subheadings within the Issues of Fact and/or Issues of Law, but there should be one section on disputed facts and one section on issues of law.
4. Page 15, lines 1 and 3: "A list of" should be inserted after "Exhibits:" since

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the exhibits themselves are not attached.

5. It is the court's usual procedure to conduct direct testimony by declaration (the plaintiff submits written direct testimony 30 days before; the defendant does so 21 days before trial and both parties submit any evidentiary objections 7 days prior to trial). See, the court's Trial Procedures at cacb.uscourts.gov. However, direct testimony by declaration is not mandatory if the parties prefer live direct testimony. By listing the direct examination time estimates in the PS, are the communicating a preference for live direct testimony as opposed to direct testimony by declaration (exclusive of adverse or rebuttal testimony)? Live direct vs. written direct will affect the trial time estimate.

6. The trial will likely take place the week of September 21, 2020. While in-person appearances may be possible by that time, the court is amenable to a video conference option for any parties who cannot appear in person.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required; nonappearance at the hearing will be deemed acceptance of the tentative ruling.

July 9, 2020

The parties must appear and address the following issues:

1. Whether direct testimony will be presented by written declarations (see Court's Comment #5 above in the tentative ruling for June 4, 2020. This issue does not appear to be addressed in the amended pretrial stipulation. As previously noted, this affects the trial time estimate and setting of trial dates.

2. Whether the parties will be prepared to conduct the trial entirely by video conference (Zoom) if the trial is held in September during the week of September 21, 2020.

The trial cannot be set until the above issues have been addressed.

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Note: Appearances at this hearing are required.

January 14, 2021

Continue this Trial Procedures Conference to March 11, 2021 at 9:30 a.m.; postpone the Trial Dates to May 26, 2021 and May 27, 2021 starting each day at **9:30 a.m.**

Note: If both parties accept the foregoing tentative ruling, appearances at this hearing are not required; Plaintiff to serve notice of the continued hearing dates/times.

Party Information

Debtor(s):

Peter Woo Sik Kim

Represented By
Andrew S Bisom

Defendant(s):

Peter Kim

Pro Se

Sharon Kim

Pro Se

Joint Debtor(s):

Sharon Soyun Kim

Represented By
Andrew S Bisom

Plaintiff(s):

Kang Family 2007 Revocable Trust

Represented By
Edmond Richard McGuire

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Lynda T Bui

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Peter Woo Sik Kim

Rika Kido

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8:19-11546 Joseph Ra

Chapter 7

Adv#: 8:20-01154 Marshack v. Ra

#3.00 STATUS CONFERENCE RE: Chapter 7 Trustee's Complaint RE: Objection to Debtor's Discharge Under Section 727 of the Bankruptcy Code

Docket 1

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

January 14, 2021

Continue Status Conference to April 1, 2021 at 9:30 a.m.; an updated Status Report must be filed by March 18, 2021 if a motion for default judgement has not been filed by such date.

Special Note:

A motion for default judgment may self-calendared for the same date/time as the continued Status Conference date. Alternatively, the motion may be filed without a hearing pursuant to the procedure set forth in Local Bankruptcy Rule 9013-1(o).

The motion for default judgment, supported by evidence, must be served on defendant and defendant's counsel in accordance with Local Rule 9013-1(d). If the motion for default judgment is not heard by the continued date of the Status Conference, **THE ADVERSARY MAY BE DISMISSED** at the Status Conference for failure to prosecute.

Note: If Plaintiff accepts the foregoing tentative ruling, appearance at today's hearing is not required; Plaintiff to serve notice of the continued hearing date/time.

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CONT... Joseph Ra

Chapter 7

Debtor(s):

Joseph Ra

Represented By
David B Golubchik
Jaenam J Coe

Defendant(s):

Joseph Ra

Pro Se

Plaintiff(s):

Richard A. Marshack

Represented By
Thomas J Polis

Trustee(s):

Richard A Marshack (TR)

Represented By
Michael G Spector
Thomas J Polis

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8:19-13752 Catherine Melissa-Ann Guinto

Chapter 7

Adv#: 8:20-01004 Upstream Capital Investments LLC v. Guinto

#4.00 CON'TD PRE-TRIAL CONFERENCE RE: Complaint Seeking Non-Dischargeability of Debt in Core Adversary Proceeding.

FR: 4-2-20; 6-11-20; 11-5-20

Docket 1

***** VACATED *** REASON: CONTINUED TO 4/1/2021 AT 9:30 A.M.,
PER ORDER ENTERED 12/29/2020 (XX)**

Courtroom Deputy:

**CONTINUED: Pre-Trial Conference Continued to 4/1/2021 at 9:30 a.m.,
Per Order Entered 12/29/2020 (XX) - td (12/29/2020)**

Tentative Ruling:

April 2, 2020

No proof of service or joint status report have been filed. Plaintiff must appear and advise the court as to why the same were not timely filed.

Note: Telephonic appearance by Plaintiff's counsel is required.

June 11, 2020 [TENTATIVE MODIFIED SINCE ORIGINAL POSTING]

Joint status report was not timely filed by May 28, 2020. Impose sanctions in the amount of \$100 against Plaintiff's counsel for failure to do so.

Discovery Deadline:	Aug. 14, 2020
Deadline to attend mandatory mediation:	Sept. 30, 2020
Pretrial Conference:	Nov. 5, 2020 at 9:30
a.m.	(XX)
Joint Pretrial Stipulation due:	Oct. 22, 2020

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Note: If the parties accept the foregoing tentative ruling, appearances at this hearing are not required; Plaintiff's counsel shall lodge a scheduling order consistent with the same. Sanctions payable within 30 days of the hearing, payable to the Clerk of the Bankruptcy Court - Central Dist. CA

November 5, 2020

Continue the Pretrial Conference to December 10, 2020 to allow Defendant one final opportunity to participate in the drafting of the Pretrial Stipulation. Defendant must advise Plaintiff's counsel of her suggested revisions to the Pretrial Stipulation no later than November 19, 2020 and Plaintiff will provide Defendant with a copy of the revised Pretrial Stipulation no later than November 30, 2020. The final version of the Joint Pretrial Stipulation must be filed no later than December 3, 2020.

Court's Comments

1. It is Defendant's best interest to participate in the drafting of the Joint Pretrial Stipulation ("Stipulation") because the Stipulation establishes all issues that will be decided at trial as well as the exhibits and witness that may be presented. Defendant is advised to review Local Bankruptcy Rule 7016-1 re the preparation of joint pretrial stipulations. Unless Defendant participates in the process, the unilateral Joint Pretrial Stipulation (except as noted below) will stand. Defendant is strongly advised to communicate with Plaintiff's counsel regarding the Stipulation.
2. On pages 2 and 3 of the Stipulation, Plaintiff lists all facts it believes are not in dispute. See paragraphs 1 (a) through (j). If Defendant disagrees with any of those facts, she needs to advise Plaintiff's counsel so that the disputed fact(s) can be included in paragraph 2 (starting at p.3, lines 15-27 to p. 4, lines 1-4). For example, if Defendant agrees that she filed a chapter 7 bankruptcy case on September 26, 2019, that is an "agreed" fact that need not be determined at trial. It is Defendant's responsibility to identify any facts

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in paragraph 1 that genuinely disputes and communicate that to Defendant.

3. Paragraph 2 includes facts that the parties do not agree on that must be decided by the court at trial, such as whether Defendant made false statements regarding the loan, etc.

4. Plaintiff states as an undisputed fact on p. 3 at lines 3-7 that a "default judgment for *fraud* was entered." However, though the complaint attaches several exhibits, a copy of the actual judgment (showing fraud) was not attached. This is important because the state court complaint also includes a cause of action for breach of contract (which is dischargeable) and there is at least a possibility that the judgment could be solely for breach of contract. The court notes that the judgment is not included on Plaintiff's list of exhibits.

5. Defendant needs to provide to Plaintiff's counsel by November 19, 2020 a) her list of witnesses (even if its just herself) and a short summary of what the witnesses will testify to; and b) her list of exhibits that she will present in her defense. If Defendant does not provide a list of witnesses or exhibits by November 19, 2020, she will not be allowed to present them at trial.

6. The trial date will be provided at the December 10, 2020 hearing.

Note: If the both parties accept the tentative ruling, appearances at this hearing are not required and Plaintiff shall serve notice of the continued hearing date and deadlines. Plaintiff is also encouraged to provide Defendant with a copy of the the tentative ruling prior to the hearing.

Party Information

Debtor(s):

Catherine Melissa-Ann Guinto

Represented By
Lawrence B Yang

Defendant(s):

Catherine Melissa-Ann Guinto

Pro Se

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Chapter 7

Plaintiff(s):

Upstream Capital Investments LLC

Represented By
Lynda E Jacobs

Trustee(s):

Weneta M Kosmala (TR)

Pro Se

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8:20-11898 Louis Sandoval

Chapter 7

Adv#: 8:20-01110 Myers v. Sandoval

- #5.00** STATUS CONFERENCE RE: Complaint to Object to Debtor's Discharge and Complaint to Determine Non-Dischargeability of Debt Under Section 523(A) (2) of The Bankruptcy Code and For Denial of Discharge Under Section 727(A)(4) of The Bankruptcy Code
(Another Summons Issued 10/30/2020)

Docket 1

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

January 14, 2021

No answer or other response to the Complaint has been filed by the defendant, Louis Sandoval. Accordingly, this Status Conference will be continued to April 15, 2021 at 9:30 a.m. to allow Plaintiff to file a motion for entry of a default judgment against the defendant which provides evidence to support the required elements of fraud under Bankruptcy Code Section 523(a)(2)(A).

Special Note:

A motion for default judgment may self-calendared for the same date/time as the continued Status Conference date. Alternatively, the motion may be filed without a hearing pursuant to the procedure set forth in Local Bankruptcy Rule 9013-1(o).

The motion for default judgment, supported by evidence, must be served on defendant and defendant's counsel in accordance with Local Rule 9013-1(d). If the motion for default judgment is not heard by the continued date of the Status Conference, **THE ADVERSARY MAY BE DISMISSED** at the Status Conference for failure to prosecute.

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CONT... Louis Sandoval

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The court strongly suggests that Plaintiff seek legal counsel regarding the preparation of a motion for default judgment.

Note: If Plaintiff accepts the foregoing tentative ruling, appearance at today's hearing is not required; Plaintiff to serve the defendant by mail with notice of the continued hearing date/time.

Party Information

Debtor(s):

Louis Sandoval

Represented By
Steven B Lever

Defendant(s):

Louis Sandoval

Pro Se

Plaintiff(s):

Charlotte Cysner Myers

Pro Se

Trustee(s):

Weneta M Kosmala (TR)

Pro Se

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8:20-11224 Mazin M. Yehia

Chapter 7

Adv#: 8:20-01113 Dawam v. Yehia

#6.00 Hearing RE: Plaintiff's Motion for Order Abstaining and Abating Adversary Proceeding Pending Trial of State Court Proceeding After Grant of Relief from Automatic Stay

Docket 27

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

January 14, 2021

Grant motion for the reasons stated in the Motion and Reply ; overrule opposition.

Basis for Tentative Ruling:

Over the past 26 years, this court has routinely stayed or abated nondischargeability adversary proceedings when state court actions were pending involving fraud and other torts such as conversion. If the state action results in a judgment in favor of the plaintiff, this court then determines if preclusion doctrines apply for purposes of dischargeability. For example, if the state judgment is entered against Debtor on the basis of fraud, such finding of fraud is likely to have preclusive effect in the nondischargeability trial. Conversely, if the state court judgment is based on "oppression," preclusion is not a certainty as "oppression" under California law does not rise to the level of "fraud" or other intentional tort for which discharge can be denied under either 523(a)(2)(A) or 523(a)(6). Finally, the court need not abstain in order to allow the state court action to proceed.

Deference Under the Colorado River Doctrine

Under the Colorado River Doctrine, the bankruptcy court has discretion

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to invoke a stay of bankruptcy proceedings, in favor of state court proceedings, and "that such power is distinct from, and not preempted by, the statutory bankruptcy abstention provisions [11 U.S.C. § 305](#); [28 U.S.C. § 1334\(c\)](#). *In re Bellucci*, 119 B.R. 763, 767 (Bankr. E.D. Cal. 1990)

A Colorado River stay is a form of deference to state court jurisdiction rather than a recognized form of abstention, an exercise of such deference is subject to abstention analysis. *Id.* Citing [Coopers & Lybrand v. Sun-Diamond Growers](#), 912 F.2d 1135, 1137 (9th Cir.1990). Under the *Colorado River* doctrine, a federal trial court has discretion, in "exceptional circumstances" and despite the general obligation to exercise jurisdiction, to stay or dismiss an action for reasons of wise judicial administration solely because of the existence of parallel litigation in state court. The doctrine applies in bankruptcy. See [Wilkey v. Sutton \(In re Sutton\)](#), 109 B.R. 238 (Bankr.W.D.Ky.1989); [Tidwell Indus., Inc.](#), 87 B.R. at 345. The determination is guided by an exceptional circumstances test based upon six factors that emerge from the Supreme Court's decisions in *Colorado River* and its progeny:

1. The assumption of jurisdiction over any res or property in question.
2. The relative convenience of the state and federal forums.
3. The danger of unnecessarily piecemeal litigation.
4. The order in which concurrent tribunals obtained and exercised jurisdiction.
5. Whether federal or state law provides the rule of decision on the merits.

6. The adequacy of the state proceeding to protect the parties' rights. These factors are "to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand." *Id.* at 775, citing [Moses H. Cone Hospital](#), 460 U.S. at 21, 103 S.Ct. at 940. Mechanical applications are disfavored. *Id.*

The Motion cites *Qingdao Tang-Buy Int'l Import & Export Co*, No. 15-cv-00624-LB at 6 (N.D. Cal. Nov. 3, 2016) for a list of eight factors to be consider under the Colorado River Doctrine. I have located that case under the citation 2016 WL 6524396 with the same case number and date, however, this case has no relation to the Colorado River Doctrine or the relevant factors thereunder. The proper case appears to be *R.R. St. & Co.*

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Inc. v. Transp. Ins. Co., 656 F.3d 966, 978–79 (9th Cir. 2011), which provides that:

Drawing from *Colorado River*, *Moses H. Cone* and subsequent Ninth Circuit cases, we have recognized eight factors for assessing the appropriateness of a *Colorado River* stay or dismissal: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. *Holder*, 305 F.3d at 870.

1. Assumption of Jurisdiction Over Property in Question

This case revolves around a failed business arrangement between Plaintiff and Defendant in the investment of a Farmers Insurance Agency in Huntington Beach (the "Agency") and the share of profits from the Agency. See FAC. There is no physical property at issue (which this factor seems to refer to). However, the dispute was first raised in the State Court Proceedings, more than two years before the bankruptcy was filed. Therefore, the state court first assumed jurisdiction.

2. Inconvenience of the Federal Court

This factor does not really weigh either way. Defendant filed bankruptcy so she is subject to federal court. Plaintiff filed this adversary in bankruptcy court and does not allege that bankruptcy court is inconvenient. Plaintiff's argument is more that underlying proceeding has been litigated for over 2 years in state court and has just passed the motion to dismiss and Answer stage in our court.

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3. Piecemeal Litigation

The danger of unnecessary piecemeal litigation favors allowing the state court to rule. The action is ready to proceed to trial in state court and this court has granted RFS. If this court were to go forward with the adversary, it would be some time until a pretrial conference is set, pre trial motions are heard and the matter is set for trial.

4. Order in which Tribunals Obtained and Exercised Jurisdiction.

The order in which the state and federal courts obtained jurisdiction over Plaintiff's claims weigh in favor of a stay. The focus is on the relative progress of the cases in the state and federal forums—how the courts have "exercised" their jurisdiction. In *Swift v. Bellucci*, was filed nearly nine years before the Bellucci bankruptcy. While the State Court Proceeding is not that far along in our case. It is over two years progressed and is ready to proceed to trial. Conversely, Defendant only recently filed an Answer in this case.

5. Whether Federal or State Law Provides the Rule of Decision on the Merits

The underlying causes of action were filed in the State Court, based upon state court allegations of fraud and breach of contract. Once the state court has rendered a final judgment on the fraud claims, this court may rule whether the fraud claims are dischargeable based upon the doctrine of collateral estoppel. Conversely, the breach of contract claims are dischargeable, therefore, as this court has already ruled, Plaintiff may not pursue breach of contract in state court. This was the order of the Court pursuant to the RFS entered December 17, 2020 as docket #25, which was unopposed by Defendant.

6. Adequacy of the State Court Proceeding to Protect the Parties' Rights

As indicated in the previous factor, this court has already granted RFS to proceeding with all but two claims for relief in the state court action.

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Defendant did not file an opposition to the relief from stay. The underlying claims for relief are under state law and are best determined in the State Court Proceeding. Even if Plaintiff receives a positive outcome in the State Court Proceedings, he is not guaranteed a judgment in this court. As such, Defendant's rights are protected. The issue of nondischargeability will be determined in bankruptcy court, but can be done more expeditiously if this court has a final judgment with findings from the that allow the application of collateral estoppel.

7. Desire to Avoid Forum Shopping

The State Court Proceeding has been ongoing for over two years. It wasn't until shortly before trial that Defendant filed bankruptcy. The bankruptcy appears to have been filed to quickly stop the trial and bring the claims in front of this court, i.e. forum shop. This factor weighs in favor of deference.

8. Whether State Court Proceedings Will Resolve All Issues

All issues will not be resolved by the State Court Proceedings because this Court will ultimately decide the issue of nondischargeability. However, a final judgment with findings by the stat court will short circuit the litigation in this court when a proper motion for summary judgment (collateral estoppel) is brought. This factor weighs in favor of deference.

Stay Under §105(a)

Pursuant to section 105(a), the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. 11 U.S.C. §105(a). Moreover, the ability to stay a proceeding is incidental to the court's inherent powers. "The inherent powers of federal courts are those which are necessary to the exercise of all others." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). Such inherent powers are ones governed not by rule or statute but "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court..." *Id.* at 764-65. Thus, "[i]t is well-established that district courts have inherent power to control their dockets and may impose sanctions ... in the exercise of that discretion."

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Thursday, January 14, 2021

Hearing Room

5A

9:30 AM

CONT... Mazin M. Yehia

Chapter 7

Atchison, Topeka & Sante Fe Ry. Co. v. Hercules, Inc., 146 F.3d 1071, 1074 (9th Cir. 1988).

Staying this proceeding will conserve time and resources for the court and the parties. This adversary proceeding seeks a determination that a debt is nondischargeable under §523(a)(2) and (a)(4) for fraud. There is already a parallel action in state court to determine fraud based on the same allegations. The State Court Proceeding is ready to go to trial and should be permitted to do so. Once a final judgment has been entered, this court can determine whether the judgment, if any, is nondischargeable under §523(a) pursuant to a motion for summary judgment under the doctrine of collateral estoppel instead of a lengthy trial. Pursuant to §105, the court's inherent power, and the status conference order, this adversary proceeding should be stayed.

Party Information

Debtor(s):

Mazin M. Yehia

Represented By
Christine A Kingston

Defendant(s):

Mazin M. Yehia

Represented By
Christine A Kingston

Movant(s):

Naeel Hamdy Dawam

Represented By
Benjamin R Heston
Richard G Heston

Plaintiff(s):

Naeel Hamdy Dawam

Represented By
Benjamin R Heston
Richard G Heston

Trustee(s):

Jeffrey I Golden (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

9:30 AM

8:20-11224 Mazin M. Yehia

Chapter 7

Adv#: 8:20-01113 Dawam v. Yehia

#7.00 CON'TD STATUS CONFERENCE RE: Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. §523(a)(2)(A), (a)(2)(B), and (a)(4)

FR: 10-22-20; 11-5-20

Docket 1

Courtroom Deputy:

SPECIAL NOTE: Main Case Closed 8/11/2020 - td (8/25/2020)

Tentative Ruling:

October 22, 2020

Continue Status Conference to November 5, 2020 at 2:00 p.m., same date/time as hearing on Defendant's motion to dismiss. Updated Status Report not required for the November 5, 2020 hearing. (XX)

Note: If all parties accept the foregoing tentative ruling, appearances at today's hearing are not required.

January 14, 2021

Continue Status Conference to May 20, 2021 at 9:30 a.m.; updated Joint Status Report must be filed by May 6, 2021.

Note: If all parties accept the foregoing tentative ruling, appearances at today's hearing are not required.

Party Information

Debtor(s):

Mazin M. Yehia

Represented By

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

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9:30 AM

CONT... Mazin M. Yehia

Chapter 7

Christine A Kingston

Defendant(s):

Mazin M. Yehia

Pro Se

Plaintiff(s):

Naeel Hamdy Dawam

Represented By
Benjamin R Heston

Trustee(s):

Jeffrey I Golden (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room

5A

10:00 AM

8:15-15096 Darshan Upadhyaya

Chapter 7

Adv#: 8:16-01024 Floorit Financial, Inc. v. Upadhyaya

#8.00 CONT'D Examination of Third Person Amanda Upadhyaya aka Amanda C. Ramos Upadhyaya Re: Enforcement of Judgment

FR: 4-9-20; 6-4-20; 9-10-20; 11-19-20

Docket 20

***** VACATED *** REASON: CONTINUED TO 5/20/2021 AT 10:00 A.M.,
PER ORDER ENTERED 1/11/2021 (XX)**

Courtroom Deputy:

CONTINUED: Hearing on Examination Continued to 5/20/2021 at 10:00 a.m., Per Order Entered 1/11/2021 (XX) - td (1/11/2021)

Tentative Ruling:

June 4, 2020

Continue the examination to September 10, 2020 at 10:00 a.m. (XX)

Basis for Tentative Ruling

The courthouse remains closed to in-person court appearances and on-site in-person judgment debtor examinations. Judgment creditor is free to schedule an examination outside the courthouse, including by video conference, prior to September 10, 2020. Depending on the status of pandemic-related rules and policies in place on September 1, 2020, the September 10, 2020 hearing may be further continued.

Note: If the Judgment Creditor accepts the foregoing tentative ruling, appearance at this hearing is not required and Judgment Creditor shall serve notice of the continued hearing date/time. Non-appearance at the hearing will be deemed acceptance of the tentative ruling.

September 10, 2020

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room

5A

10:00 AM

CONT... **Darshan Upadhyaya**

Chapter 7

Continue the examination to November 19, 2020 at 10:00 a.m. (XX)

Basis for Tentative Ruling

The courthouse is currently closed to in-person court appearances and on-site in-person judgment debtor examinations. Judgment creditor is free to schedule an examination outside the courthouse, including by video conference, prior to November 19, 2020. Depending on the status of pandemic-related rules and policies in place on November 19, 2020, the examination may be further continued.

Note: If the Judgment Creditor accepts the foregoing tentative ruling, appearance at this hearing is not required and Judgment Creditor shall serve notice of the continued hearing date/time. Non-appearance at the hearing will be deemed acceptance of the tentative ruling.

November 19, 2020

This tentative ruling applies to #s 15 and 16 on today's calendar:

The courthouse is currently closed to in-person court appearances and on-site in-person judgment debtor examinations. However, as this court now conducts hearings on the Zoom platform, the examination may be accommodated by placing the parties in a separate private Zoom "room" after the examinees are sworn in by the courtroom clerk. It will be the responsibility of the Judgment Creditor to either have the court reporter call into the Zoom hearing at the commencement of the hearing or to make other arrangements for the participation of the court reporter. Alternatively, the Judgment Creditor is free to schedule an examination outside the courthouse, including by video conference, in which case this hearing will be continued to January 14, 2021 at 10:00 a.m.

The Judgment Creditor shall advise the courtroom clerk of its choice at the time of the calendar roll call.

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... Darshan Upadhyaya

Chapter 7

Party Information

Debtor(s):

Darshan Upadhyaya

Represented By
Amid Bahadori

Defendant(s):

Darshan Upadhyaya

Represented By
Amid Bahadori

Plaintiff(s):

Floorit Financial, Inc.

Represented By
Tom Roddy Normandin
James T Jackson

Trustee(s):

Jeffrey I Golden (TR)

Represented By
Jeremy Faith
Nina Z Javan
Meghann A Triplett

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room

5A

10:00 AM

8:15-15096 Darshan Upadhyaya

Chapter 7

Adv#: 8:16-01024 Floorit Financial, Inc. v. Upadhyaya

#9.00 CONT'D Examination of Judgment Debtor Darshan Upadhyaya Re:
Enforcement of Judgment

FR: 4-2-20; 6-4-20; 9-10-20; 11-19-20

Docket 23

***** VACATED *** REASON: CONTINUED TO 5/20/2021 AT 10:00 A.M.,
PER ORDER ENTERED 1/11/2021 (XX)**

Courtroom Deputy:

**CONTINUED: Hearing on Examination Continued to 5/20/2021 at 10:00
a.m., Per Order Entered 1/11/2021 (XX) - td (1/11/2021)**

Tentative Ruling:

April 2, 2020

In order to comply with social distancing guidelines, continue the examination to June 4, 2020 at 10:00 a.m., except that the parties are free to stipulate to a remote videoconference examination at a mutually agreeable time prior to June 4, 2020.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required and Plaintiff shall lodge an order consistent with the same.

June 4, 2020

Continue the examination to September 10, 2020 at 10:00 a.m. (XX)

Basis for Tentative Ruling

The courthouse remains closed to in-person court appearances and on-site

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... Darshan Upadhyaya

Chapter 7

in-person judgment debtor examinations. Judgment creditor is free to schedule an examination outside the courthouse in accordance with applicable rules, including by video conference, prior to September 10, 2020. Depending on the status of pandemic-related rules and policies in place on September 1, 2020, the September 10, 2020 hearing may be further continued.

Note: If the Judgment Creditor accepts the foregoing tentative ruling, appearance at this hearing is not required and Judgment Creditor shall serve notice of the continued hearing date/time. Non-appearance at the hearing will be deemed acceptance of the tentative ruling.

September 10, 2020

Continue the examination to November 19, 2020 at 10:00 a.m. (XX)

Basis for Tentative Ruling

The courthouse is currently closed to in-person court appearances and on-site in-person judgment debtor examinations. Judgment creditor is free to schedule an examination outside the courthouse, including by video conference, prior to November 19, 2020. Depending on the status of pandemic-related rules and policies in place on November 19, 2020, the examination may be further continued.

Note: If the Judgment Creditor accepts the foregoing tentative ruling, appearance at this hearing is not required and Judgment Creditor shall serve notice of the continued hearing date/time. Non-appearance at the hearing will be deemed acceptance of the tentative ruling.

November 19, 2020

This tentative ruling applies to #s 15 and 16 on today's calendar:

The courthouse is currently closed to in-person court appearances and on-

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... Darshan Upadhyaya

Chapter 7

site in-person judgment debtor examinations. However, as this court now conducts hearings on the Zoom platform, the examination may be accommodated by placing the parties in a separate private Zoom "room" after the examinees are sworn in by the courtroom clerk. It will be the responsibility of the Judgment Creditor to either have the court reporter call into the Zoom hearing at the commencement of the hearing or to make other arrangements for the participation of the court reporter. Alternatively, the Judgment Creditor is free to schedule an examination outside the courthouse, including by video conference, in which case this hearing will be continued to January 14, 2021 at 10:00 a.m.

The Judgment Creditor shall advise the courtroom clerk of its choice at the time of the calendar roll call.

Party Information

Debtor(s):

Darshan Upadhyaya

Represented By
Amid Bahadori

Defendant(s):

Darshan Upadhyaya

Represented By
Amid Bahadori

Plaintiff(s):

Floorit Financial, Inc.

Represented By
Tom Roddy Normandin
James T Jackson

Trustee(s):

Jeffrey I Golden (TR)

Represented By
Jeremy Faith
Nina Z Javan
Meghann A Triplett

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

8:20-11893 Peter Ornelas and Rebecca B Ornelas

Chapter 13

#10.00 Hearing RE: Motion for relief from the automatic stay [REAL PROPERTY]

DEUTSCHE BANK NATIONAL TRUST COMPANY

VS.

DEBTORS

Docket 33

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

January 14, 2021

Grant with 4001(a)(3) waiver.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

Peter Ornelas

Represented By
Kevin Tang

Joint Debtor(s):

Rebecca B Ornelas

Represented By
Kevin Tang

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... Peter Ornelas and Rebecca B Ornelas

Chapter 13

Movant(s):

Deutsche Bank National Trust

Represented By
Sean C Ferry
Eric P Enciso

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

8:20-11977 SC Development Fund, LLC

Chapter 7

#11.00 CON'TD Hearing RE: Motion for relief from the automatic stay
[REAL PROPERTY]
(RE: 11411 Ayrshire Road, Los Angeles, CA 90049)

GOLDMAN SACHS BANK USA

VS.

DEBTOR

FR: 12-10-20

Docket 89

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

December 10, 2020

Continue hearing to February 11, 2021 at 10:00 a.m. to allow Movant to complete timely and adequate service to Debtor and to submit evidence that the subject property has declined in value since the bankruptcy filing. Movant must file any supplemental pleading(s) no later than January 21, 2021; any opposition must be filed no later than January 28, 2021; and any reply must be filed no later than February 4, 2021.

Basis for Tentative Ruling:

Service:

Debtor was not timely served with the Motion or notice of the hearing in accordance with FRBP 7004(b)(3) as required by FRBP 9014. The supplemental proof of service filed on December 3, 2020 shows untimely

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... SC Development Fund, LLC
service.

Chapter 7

Merits:

Movant needs to provide evidence (not supposition) that the subject property has declined in value during the term of the automatic stay. See, e.g., *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 370 (1998) ("It is common ground that the 'interest in property' referred to by §362(d)(1) includes the right of a secured creditor to have the security applied in payment of the debt upon completion of reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay.") and *In re Cambridge Woodbridge Apartments, LLC*, 292 B.R. 832, 841 (Bankr. N.D. Ohio 2003) (stating that, to prevail under § 362(d)(1), a creditor must establish, among other things, "a decline in the value of the collateral securing the debt . . .").

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required.

January 14, 2021

In light of the unrefuted supplemental evidence filed on December 14 [docket #127], grant the Motion.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required.

Party Information

Debtor(s):

SC Development Fund, LLC

Represented By
Keith S Dobbins

Movant(s):

Goldman Sachs Bank c/o Genesis

Represented By
Byron Z Moldo

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... SC Development Fund, LLC

Chapter 7

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

8:20-11977 SC Development Fund, LLC

Chapter 7

**#12.00 CON'TD Hearing RE: Motion for relief from the automatic stay
[REAL PROPERTY]
(RE: 3415, 3417, 3417 West Bellevue Avenue, Los Angeles, CA 90026)**

GOLDMAN SACHS BANK USA

VS.

DEBTOR

FR: 12-10-20

Docket 91

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

December 10, 2020

Continue hearing to January 14, 2021 at 10:00 a.m. to allow Movant to complete timely and adequate service to Debtor and to junior lienholder Jumbo Investments. (XX)

Basis for Tentative Ruling:

Service:

Debtor was not timely served with the Motion or notice of the hearing in accordance with FRBP 7004(b)(3) as required by FRBP 9014. The supplemental proof of service filed on December 3, 2020 shows untimely service.

The court will require notice to junior lienholder Jumbo Investments as well in light of the fact that Jumbo has been very active in the case.

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

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10:00 AM

CONT... SC Development Fund, LLC

Chapter 7

Tentative ruling for 1/14/21 hearing (if unopposed): Grant motion.

Note: If Movant accepts the foregoing tentative ruling, appearance at this hearing is not required.

January 14, 2021

Grant motion.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

SC Development Fund, LLC

Represented By
Keith S Dobbins

Movant(s):

Goldman Sachs Bank c/o Genesis

Represented By
Byron Z Moldo

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

8:20-11977 SC Development Fund, LLC

Chapter 7

#13.00 CON'TD Hearing RE: Motion for relief from the automatic stay
[REAL PROPERTY]
(RE: 2850 Delaware Avenue, Santa Monica, CA 90404)

GOLDMAN SACHS BANK USA

VS.

DEBTOR

FR: 12-10-20

Docket 93

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

December 10, 2020

Continue hearing to February 11, 2021 at 10:00 a.m. to allow Movant to complete timely and adequate service to Debtor and to submit evidence that the subject property has declined in value since the bankruptcy filing. Movant must file any supplemental pleading(s) no later than January 21, 2021; any opposition must be filed no later than January 28, 2021; and any reply must be filed no later than February 4, 2021.

Basis for Tentative Ruling:

Service:

Debtor was not timely served with the Motion or notice of the hearing in accordance with FRBP 7004(b)(3) as required by FRBP 9014. The supplemental proof of service filed on December 3, 2020 shows untimely service.

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... SC Development Fund, LLC

Chapter 7

Merits:

Movant needs to provide evidence (not supposition) that the subject property has declined in value during the term of the automatic stay. See, e.g., *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 370 (1998) ("It is common ground that the 'interest in property' referred to by §362(d)(1) includes the right of a secured creditor to have the security applied in payment of the debt upon completion of reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay.") and *In re Cambridge Woodbridge Apartments, LLC*, 292 B.R. 832, 841 (Bankr. N.D. Ohio 2003) (stating that, to prevail under § 362(d)(1), a creditor must establish, among other things, "a decline in the value of the collateral securing the debt . . .").

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required.

January 14, 2021

In light of the unrefuted supplemental evidence filed on December 14 [docket #127], grant the Motion.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required.

Party Information

Debtor(s):

SC Development Fund, LLC

Represented By
Keith S Dobbins

Movant(s):

Goldman Sachs Bank c/o Genesis

Represented By
Byron Z Moldo

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... SC Development Fund, LLC

Chapter 7

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

8:20-11977 SC Development Fund, LLC

Chapter 7

**#14.00 CON'TD Hearing RE: Motion for relief from the automatic stay
[REAL PROPERTY]
(RE: 1532 Hi Point Street, Los Angeles, CA 90035)**

GOLDMAN SACHS BANK USA

VS.

DEBTOR

FR: 12-10-20

Docket 95

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

December 10, 2020

Continue hearing to January 14, 2021 at 10:00 a.m. to allow Movant to complete timely and adequate service to Debtor and to junior lienholder Jumbo Investments. (XX)

Basis for Tentative Ruling:

Service:

Debtor was not timely served with the Motion or notice of the hearing in accordance with FRBP 7004(b)(3) as required by FRBP 9014. The supplemental proof of service filed on December 3, 2020 shows untimely service.

The court will require notice to junior lienholder Jumbo Investments as well in

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... SC Development Fund, LLC

Chapter 7

light of the fact that Jumbo has been very active in the case.

Tentative ruling for 1/14/21 hearing (if unopposed): Grant motion.

Note: If Movant accepts the foregoing tentative ruling, appearance at this hearing is not required.

January 14, 2021

Grant the Motion.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

SC Development Fund, LLC

Represented By
Keith S Dobbins

Movant(s):

Goldman Sachs Bank c/o Genesis

Represented By
Byron Z Moldo

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room

5A

10:00 AM

8:20-11977 SC Development Fund, LLC

Chapter 7

#15.00 CON'TD Hearing RE: Motion for relief from the automatic stay
[REAL PROPERTY]
(RE: 3515 Ocean View Avenue, Los Angeles, CA 90066)

GOLDMAN SACHS BANK USA

VS.

DEBTOR

FR: 12-10-20

Docket 97

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

December 10, 2020

Continue hearing to February 11, 2021 at 10:00 a.m. to allow Movant to complete timely and adequate service to Debtor and to submit evidence that the subject property has declined in value since the bankruptcy filing. Movant must file any supplemental pleading(s) no later than January 21, 2021; any opposition must be filed no later than January 28, 2021; and any reply must be filed no later than February 4, 2021.

Basis for Tentative Ruling:

Service:

Debtor was not timely served with the Motion or notice of the hearing in accordance with FRBP 7004(b)(3) as required by FRBP 9014. The supplemental proof of service filed on December 3, 2020 shows untimely

**United States Bankruptcy Court
Central District of California
Santa Ana
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Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... SC Development Fund, LLC
service.

Chapter 7

Merits:

Movant needs to provide evidence (not supposition) that the subject property has declined in value during the term of the automatic stay. See, e.g., *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 370 (1998) ("It is common ground that the 'interest in property' referred to by §362(d)(1) includes the right of a secured creditor to have the security applied in payment of the debt upon completion of reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay.") and *In re Cambridge Woodbridge Apartments, LLC*, 292 B.R. 832, 841 (Bankr. N.D. Ohio 2003) (stating that, to prevail under § 362(d)(1), a creditor must establish, among other things, "a decline in the value of the collateral securing the debt . . .").

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required.

January 14, 2021

In light of the unrefuted supplemental evidence filed on December 14 [docket #127], grant the Motion.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required.

Party Information

Debtor(s):

SC Development Fund, LLC

Represented By
Keith S Dobbins

Movant(s):

Goldman Sachs Bank c/o Genesis

Represented By

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

CONT... SC Development Fund, LLC

Chapter 7

Byron Z Moldo

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:00 AM

8:20-11977 SC Development Fund, LLC

Chapter 7

**#16.00 CON'TD Hearing RE: Motion for relief from the automatic stay
[REAL PROPERTY]
(RE: 15625 High Knoll Road, Encino, CA 91436)**

GOLDMAN SACHS BANK USA

VS.

DEBTOR

FR: 12-10-20

Docket 99

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

December 10, 2020

Continue hearing to January 14, 2021 at 10:00 a.m. to allow Movant to complete timely and adequate service to Debtor. (XX)

Basis for Tentative Ruling:

Service:

Debtor was not timely served with the Motion or notice of the hearing in accordance with FRBP 7004(b)(3) as required by FRBP 9014. The supplemental proof of service filed on December 3, 2020 shows untimely service.

Tentative ruling for 1/14/21 hearing (if unopposed): Grant motion

**United States Bankruptcy Court
Central District of California
Santa Ana
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Thursday, January 14, 2021

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10:00 AM

CONT... SC Development Fund, LLC

Chapter 7

Note: If Movant accepts the foregoing tentative ruling, appearance at this hearing is not required.

January 14, 2021

Grant the Motion.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

SC Development Fund, LLC

Represented By
Keith S Dobbins

Movant(s):

Goldman Sachs Bank c/o Genesis

Represented By
Byron Z Moldo

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room

5A

10:30 AM

8:09-20845 Commercial Services Building Inc

Chapter 7

#17.00 CON'TD Hearing RE: Creditor Douglas J. Patrick's Objection to Proof of Claim No. 3-2 Filed by Pro Painting

FR: 11-12-20

Docket 434

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

November 12, 2020:

If Claimant is an active corporation in good standing with the state of California, continue hearing date to January 14, 2021 at 10:30 a.m., with Patrick permitted to file supplemental pleadings by December 14, 2020; any supplemental response by Claimant to be filed by Dec. 23, 2020; and any reply to be filed by January 7, 2021. Discovery may be conducted in the interim in accordance with the adversary rules as permitted by FRBP 9014 for contested matters. Claimant is required to be represented by legal counsel re the filing of pleadings and appearance in court. (XX)

Basis for Tentative Ruling:

Background:

Creditor ProPainting ("Claimant") filed proof of claim no. 3 (the "Claim") in the general unsecured amount of \$273,000 for goods and services as painting sub-contractor for two separate projects" related to the Renaissance Apartments (the "Renaissance Project") and the Stonebridge Apartments (the "Stonebridge Apartments").

Creditor Douglas Patrick ("Patrick") objects to the Claim and argues that it should be allowed in the reduced amount of \$103,900 (the "Objection")

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10:30 AM

CONT... **Commercial Services Building Inc**

Chapter 7

[dkt. 434], (the "Reply")[dkt. 453]. Claimant opposes the Objection (the "Response")[dkt. 450]

Standing

The status of Claimant is critical for the following reasons:

1. Under Local Bankruptcy Rule 9011-2(a), a business entity such as a corporation, LLC or partnership, may only appear and file pleadings (other than a proof of claim) through legal counsel. According to the California State Bar website, the author of the response filed on behalf of Claimant, Kwang Ho An ("An"), is not an attorney licensed to practice law in California. If that is the case, the Response is not properly before the court.

b. The fact that An is the president of Claimant suggests that the entity is a corporation and not a sole proprietorship and, therefore, must be represented by an attorney.

c. There is no evidence that Claimant is a business entity in good standing in the state of California. If it is not an active corporation or LLC, it may not appear to defend itself in any court proceeding as pointed out in the Reply.

d. Assuming that Claimant can establish good standing, it will need to employ legal counsel to represent it in this matter.

Standard

A proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure 3001(f) constitutes *prima facie* evidence of the validity and amount of the claim. See Rule 3001(f); *In re Lundell*, 223 F.3d 1035, 1039 (9th Cir. 2000). Therefore, a proof of claim will be deemed allowed unless a party in interest objects. *Lundell*, 223 F.3d at 1039. Once a party in interest objects, the proof of claim will still provide some evidence as to its validity and amount, and will be strong enough to carry over a mere formal objection without more. *Id.* Thus, a party objecting to a claim must present affirmative evidence to overcome the presumption of its validity by showing

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"facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claims." *Id.* (citing *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991); *In re King Street Inv., Inc.*, 219 B.R. 848, 858 (BAP 9th Cir. 1998). If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, then the burden reverts back to the claimant to prove the validity of the claim by a preponderance of the evidence. *Lundell*, 233 F.3d at 1039. The ultimate burden of persuasion remains at all times upon the claimant. *Id.*; *Holm*, 931 F.2d 620 (9th Cir. 1991).

Merits

The Claim is entitled to presumptive validity for the claim amount of \$273,000 (the Response asserts a claim in the increased amount of \$278,300). See, Response, p. 7:23. To date, Claimant has not amended its Claim to the increased amount of \$278,300.

As the Claim is entitled to *prima facie* validity, Patrick must present affirmative evidence to overcome the Claim's presumption of validity. Patrick argues that the Claim should be reduced to \$103,900 in the Objection, and later argues that it should be reduced to \$48,900 in the Reply. See, Obj., p. 7; Reply, p. 7. In support of his argument, based on evidence introduced for the first time in his Reply, Patrick argues that least \$60,122 was paid by Debtor to Claimant for the Renaissance Project, and at least \$112,470 was paid by Debtor to Claimant for the Stonebridge Project, leaving only \$48,900 due under the Claim. Reply, p. 4-6. Patrick also argues that Claimant either was paid in full or voluntarily released its lien against the Renaissance Project which was sold in September 2013. Reply, p. 4. Claimant on the other hand, argues that no amounts were paid on account of the Renaissance Project (\$109,200) and only \$48,900 for the Stonebridge Project was previously paid leaving an unpaid balance of \$169,100, plus interest, for the Stonebridge Project. Response, p. 2-4.

There appears to be a disputed question of fact regarding the amounts that were previously paid to Claimant by Debtor. Assuming Claimant has standing to assert the Claim, the court is inclined to continue the hearing to allow discovery pursuant to FRBP 9014 as requested by Patrick in his reply. See, Reply, p. 7. A continuance will also allow Claimant to address the

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evidence that was presented by Patrick for the first time in its Reply.

January 14, 2021

No tentative ruling. Debtor will be permitted up to 10 minutes to make key arguments in support of the Objection. Claimant Mr. An, will be permitted up to 10 minutes to respond and summarize his opposition to the Objection. Debtor will be permitted up to 5 minutes to reply. Both parties should include the following issue as part their presentation: whether Pro Painting was a dba of Bonaview it entered into the contract with Debtor. At the conclusion of the oral argument, the hearing will be continued to February 11, 2021 at 10:30 a.m. for the Court's oral ruling on the objection.

Party Information

Debtor(s):

Commercial Services Building Inc

Represented By
Phillip B Greer

Trustee(s):

Karl T Anderson (TR)

Represented By
Misty A Perry Isaacson
Misty A Perry Isaacson
Thomas J Polis
Robert M Dato
Jason E Goldstein

**United States Bankruptcy Court
Central District of California
Santa Ana
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Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

8:09-20845 Commercial Services Building Inc

Chapter 7

#18.00 Hearing RE: Creditor Cunningham Builders, LLC's Motion for Reconsideration of Order Disallowing Claim 7-1

Docket 474

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

January 14, 2021

Deny motion for reconsideration for the reasons stated in the Opposition, except as to the issue of standing.

Basis for Tentative Ruling

1. The court has visited the Georgia Secretary of State website set forth in Debtor's opposition and determined that as of 1/13/21, Creditor Cunningham Builders has been reinstated and, therefore has standing to prosecute the Motion.
2. The claim objection was properly and timely served and Creditor's receipt of the same is unrefuted.
3. As pointed out by Debtor in the opposition, the notice of the objection states in clear and plain language that a written response was required to be filed 14 days prior to the hearing and that the failure to file a response could result in disallowance of the claim. Here, Creditor filed no response whatsoever. Not even a response requesting additional time to gather information.
4. The Court is not persuaded by Creditor's argument that it was not aware that it could submit evidence in support of its claim. The Claim Objection states on the last page that "CBL must come forward with evidence that it has

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an actual and valid claim against [Debtor]"

6. The declaration in support of the Claim Objection was sufficient to shift the burden of proof to Creditor. The standard of "sufficiency" applies in this Circuit.

7. The ultimate burden of proof rests with Creditor as a matter of law.

8. Pursuant to 11 U.S.C. § 502(j), "[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case." FRBP 3008 provides that, "A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order." Since Rule 3008 "is silent as to the standard applicable to a motion seeking to reconsider the allowance or disallowance of claims," courts apply the standards of either FRCP 59 or FRCP 60. See *In re Wylie*, 349 B.R. 204, 209 (BAP 9th Cir. 2006).

9. "Under Rule 59(e), a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). "A motion brought under F.R.C.P. 59 involves reconsideration on the merits and should not be granted unless it is based on one or all of the following grounds: (1) to correct manifest errors of law or fact upon which the judgment is based; (2) to allow the moving party the opportunity to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; or (4) to reflect an intervening change in controlling law." *In re Oak Park Calabasas Condo. Ass'n*, 302 B.R. 682, 683 (Bankr. C.D. Cal. 2003)(citing *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir.1999), cert. denied, 529 U.S. 1082 (2000)).

10. Creditor has failed to demonstrate that the merits of the Disallowance Order should be reconsidered to correct manifest errors of law or fact, due to newly discovered evidence, necessary to prevent manifest injustice, or due to an intervening change in controlling law. Contrary to Creditor's assertion that there was "no affirmative declaration that the declarant actually knew for sure

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that no money was owed or that the Creditor was paid" and that it was "simply one aging summary statement showed no money owed," see Mot., pl. 4:27-5:2, Patrick unequivocally stated that no money was owed per the aging summary *and* that his search of Debtor's records did not produce any record to support the Claim. See Obj., p. 8, ¶¶5-6. This testimony was unrefuted because (setting aside why Creditor failed to respond since FRCP 59 looks at the underlying merits of the Disallowance Order) Creditor failed to file any opposition or appear at the hearing. Thus, based on the record before the court at the Objection hearing, the Disallowance Order was not based on any manifest error of fact. And Creditor's argument that its principal "was not allowed any chance to rebut or respond to the Objection and was unaware of what was required to file or response with such limited to prepare" is inaccurate because Creditor was given an opportunity to file opposition by 14 days before the filing deadline

9. The BAP's decision in *Wylie*, 349 B.R. 204, 207-08 (BAP 9th Cir. 2006) is instructive. In *Wylie*, the creditor received notice of the objection but failed to file opposition or appear at the hearing. The creditor filed a motion for reconsideration relying on FRCP 60(b)(1). *Id.* at 210-211. The BAP held that the focus should first be on determining whether the creditor's failure to appear at the claim objection hearing was the "result of its mistake, surprise, or neglect?" *Id.* at 210. "If so, was its failure to appear excusable?" *Id.* The BAP affirmed the bankruptcy court's determination that the creditor's failure to appear was not the result of a mistake, surprise, or neglect because the creditor received proper notice of the hearing. *Id.* at 211-12. The BAP thus found that the bankruptcy court did not abuse its discretion by refusing to reconsider the disallowance of the claim under FRCP 60(b)(1). *Id.* at 212. Here, as in *Wylie*, Creditor received proper notice but elected not to heed the warning in the notice regarding the filing of a response.

8. The court notes that Mr. Cunningham would not have been permitted to argue on behalf of Creditor at the hearing because business entities may not appear before the court without legal counsel.

Party Information

Debtor(s):

Commercial Services Building Inc

Represented By

**United States Bankruptcy Court
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CONT... Commercial Services Building Inc

Chapter 7

Phillip B Greer

Trustee(s):

Karl T Anderson (TR)

Represented By

Misty A Perry Isaacson

Misty A Perry Isaacson

Thomas J Polis

Robert M Dato

Jason E Goldstein

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

8:13-11037 Lawrence Keith Dodge

Chapter 7

#19.00 Hearing RE: First and Final Application for Chapter 11 Fees and Reimbursement of Costs (**September 12, 2014 through January 19, 2016**)

**[BROWN RUDNICK LLP, ATTORNEYS FOR CHAPTER 7 TRUSTEE,
THOMAS H. CASEY]**

Docket 678

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

January 14, 2021

Approve fees and expenses as requested.

Note: This matter appears to be uncontested. Accordingly, no court appearance by Applicant is required. Should an opposition party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Applicant will be so notified.

Party Information

Debtor(s):

Lawrence Keith Dodge

Represented By
Mike D Neue
Derrick Talerico
Alan J Friedman
William N Lobel

Trustee(s):

Thomas H Casey (TR)

Represented By
Cathrine M Castaldi

**United States Bankruptcy Court
Central District of California
Santa Ana
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Thursday, January 14, 2021

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10:30 AM

CONT... Lawrence Keith Dodge

Thomas H Casey
Bruce A Hughes

Chapter 7

United States Bankruptcy Court
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Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

8:13-11037 Lawrence Keith Dodge

Chapter 7

#20.00 Hearing RE: Fourth Interim Application for Chapter 7 Fees and reimbursement of **Costs (December 1, 2018 through November 30, 2020)**

**[BROWN RUDNICK LLP, ATTORNEYS FOR CHAPTER 7 TRUSTEE,
THOMAS H. CASEY]**

Docket 679

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

January 14, 2021

Approve fees and expenses as requested.

Note: This matter appears to be uncontested. Accordingly, no court appearance by Applicant is required. Should an opposition party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Applicant will be so notified.

Party Information

Debtor(s):

Lawrence Keith Dodge

Represented By
Mike D Neue
Derrick Talerico
Alan J Friedman
William N Lobel

Trustee(s):

Thomas H Casey (TR)

Represented By
Cathrine M Castaldi
Thomas H Casey

**United States Bankruptcy Court
Central District of California
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CONT... Lawrence Keith Dodge

Bruce A Hughes

Chapter 7

**United States Bankruptcy Court
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10:30 AM

8:16-11882 Stephen J Haythorne

Chapter 7

Adv#: 8:16-01247 Damon v. Haythorne

#21.00 CON'TD Examination of Judgment Debtor Stephen J. Haythorne RE:
Enforcement of Judgment

FR: 7-16-19; 8-15-19; 10-17-19; 11-21-19; 1-30-20; 4-2-20; 6-11-20; 9-10-20;
11-19-20

Docket 128

***** VACATED *** REASON: CONTINUED TO 3/11/2021 AT 10:30 A.M.,
PER ORDER ENTERED 1/13/2021 (XX)**

Courtroom Deputy:

**CONTINUED: Judgment Debtor Examination is Continued to 3/11/2021 at
10:30 a.m., Per Order Entered 1/13/2021 (XX) - td (1/13/2021)**

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

July 16, 2019

Stephen Haythorne to appear in court to be sworn in by the court clerk; the examination will take place outside the courtroom.

August 8, 2019

Stephen Haythorne to appear in court to be sworn in by the court clerk; the

**United States Bankruptcy Court
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CONT... Stephen J Haythorne

Chapter 7

examination will take place outside the courtroom.

August 15, 2019

Stephen Haythorne to appear in court to be sworn in by the court clerk; the examination will take place outside the courtroom.

October 17, 2019

Judgment creditor has not sought the issuance of an OSC re contempt. Continue hearing to November 21, 2019 at 10:30 a.m. Any motion for OSC re contempt may be heard on the same date.

November 21, 2019

Judgment creditor to advise the court re the status of this matter. The court notes that judgment creditor has not sought the issuance of an OSC re contempt.

January 30, 2020

Judgment creditor to advise the court re the status of this matter, e.g., production of documents. Stephen Haythorne to appear in court to be sworn in by the court clerk; the examination will take place outside the courtroom.

June 11, 2020

Continue the examination to September 10, 2020 at 10:00 a.m.

Basis for Tentative Ruling

The courthouse remains closed to in-person court appearances and on-site

**United States Bankruptcy Court
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CONT... Stephen J Haythorne

Chapter 7

in-person judgment debtor examinations. Judgment creditor is free to schedule an examination outside the courthouse, including by video conference, prior to September 10, 2020. Depending on the status of pandemic-related rules and policies in place on September 1, 2020, the September 10, 2020 hearing may be further continued.

Note: If the Judgment Creditor accepts the foregoing tentative ruling, appearance at this hearing is not required and Judgment Creditor shall serve notice of the continued hearing date/time. Non-appearance at the hearing will be deemed acceptance of the tentative ruling.

September 10, 2020

Continue the examination to November 19, 2020 at 10:00 a.m. (XX)

Basis for Tentative Ruling

The courthouse is currently closed to in-person court appearances and on-site in-person judgment debtor examinations. Judgment creditor is free to schedule an examination outside the courthouse, including by video conference, prior to November 19, 2020. Depending on the status of pandemic-related rules and policies in place on November 19, 2020, the examination may be further continued.

Note: If the Judgment Creditor accepts the foregoing tentative ruling, appearance at this hearing is not required and Judgment Creditor shall serve notice of the continued hearing date/time. Non-appearance at the hearing will be deemed acceptance of the tentative ruling.

Party Information

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Santa Ana
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10:30 AM

CONT... Stephen J Haythorne

Chapter 7

Debtor(s):

Stephen J Haythorne

Represented By
David S Henshaw

Defendant(s):

Stephen J Haythorne

Pro Se

Plaintiff(s):

Hugh C Damon

Represented By
Robert P Goe
Charity J Manee

Trustee(s):

Weneta M Kosmala (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

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8:16-11882 Stephen J Haythorne
Adv#: 8:16-01247 Damon v. Haythorne

Chapter 7

#22.00 CON'TD Examination of Judgment Debtor/Third Person Kelli R. Haythorne RE:
Enforcement of Judgment

FR: 7-16-19; 8-15-19; 10-17-19; 11-21-19; 1-30-20; 4-2-20; 6-11-20; 9-10-20;
11-19-20

Docket 130

***** VACATED *** REASON: CONTINUED TO 3/11/2021 AT 10:30 A.M.,
PER ORDER ENTERED 1/13/2021 (XX)**

Courtroom Deputy:

**CONTINUED: Judgment Debtor Examination is Continued to 3/11/2021 at
10:30 a.m., Per Order Entered 1/13/2021 (XX) - td (1/13/2021)**

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

July 16, 2019

Kelli Haythorne to appear in court to be sworn in by the court clerk; the examination will take place outside the courtroom.

August 8, 2019

Kelli Haythorne to appear in court to be sworn in by the court clerk; the

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

CONT... Stephen J Haythorne

Chapter 7

examination will take place outside the courtroom.

August 15, 2019

Kelli Haythorne to appear in court to be sworn in by the court clerk; the examination will take place outside the courtroom.

October 17, 2019

Judgment creditor has not sought the issuance of an OSC re contempt. Continue hearing to November 21, 2019 at 10:30 a.m. Any motion for OSC re contempt may be heard on the same date.

November 21, 2019

Judgment creditor to advise the court re the status of this matter. The court notes that judgment creditor has not sought the issuance of an OSC re contempt.

January 30, 2020

Judgment creditor to advise the court re the status of this matter, e.g., production of documents. Kelli Haythorne to appear in court to be sworn in by the court clerk; the examination will take place outside the courtroom (no doctor's note was filed by January 16, 2020 excusing her appearance).

June 4, 2020

Continue the examination to September 10, 2020 at 10:00 a.m.

Basis for Tentative Ruling

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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CONT... Stephen J Haythorne

Chapter 7

The courthouse remains closed to in-person court appearances and on-site in-person judgment debtor examinations. Judgment creditor is free to schedule an examination outside the courthouse, including by video conference, prior to September 10, 2020. Depending on the status of pandemic-related rules and policies in place on September 1, 2020, the September 10, 2020 hearing may be further continued.

Note: If the Judgment Creditor accepts the foregoing tentative ruling, appearance at this hearing is not required and Judgment Creditor shall serve notice of the continued hearing date/time. Non-appearance at the hearing will be deemed acceptance of the tentative ruling.

September 10, 2020

Continue the examination to November 19, 2020 at 10:00 a.m. (XX)

Basis for Tentative Ruling

The courthouse is currently closed to in-person court appearances and on-site in-person judgment debtor examinations. Judgment creditor is free to schedule an examination outside the courthouse, including by video conference, prior to November 19, 2020. Depending on the status of pandemic-related rules and policies in place on November 19, 2020, the examination may be further continued.

Note: If the Judgment Creditor accepts the foregoing tentative ruling, appearance at this hearing is not required and Judgment Creditor shall serve notice of the continued hearing date/time. Non-appearance at the hearing will be deemed acceptance of the tentative ruling.

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Central District of California
Santa Ana
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10:30 AM

CONT... Stephen J Haythorne

Chapter 7

Party Information

Debtor(s):

Stephen J Haythorne

Represented By
David S Henshaw

Defendant(s):

Stephen J Haythorne

Pro Se

Plaintiff(s):

Hugh C Damon

Represented By
Robert P Goe
Charity J Manee

Trustee(s):

Weneta M Kosmala (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

8:19-13858 Bruce Elieff

Chapter 7

#23.00 Hearing RE: Chapter 7 Trustee's Objection to Claim No. 15-1 of Highland Springs Conference and Training Center (Claim Amount: \$881,398.89)

Docket 1043

***** VACATED *** REASON: CONTINUED TO 5/6/2021 AT 10:30 A.M.,
PER ORDER ENTERED 1/5/2021 (XX)**

Courtroom Deputy:

**CONTINUED: Hearing Continued to 5/6/2021 at 10:30 a.m., Per Order
Entered 1/5/2021 (XX) - td (1/5/2021)**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Bruce Elieff

Represented By
Lisa Nelson
Robert P Goe

Trustee(s):

Howard M Ehrenberg (TR)

Represented By
Alan G Tippie
Daniel A Lev
Sean A OKeefe
Claire K Wu

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

8:19-13858 Bruce Elieff

Chapter 7

#24.00 Hearing RE: Chapter 7 Trustee's Objection to Claim No 17-1 of City of Banning
(Claim Amount: \$700,000)

Docket 1044

***** VACATED *** REASON: CONTINUED TO 5/6/2021 AT 10:30 A.M.,
PER ORDER ENTERED 1/5/2021 (XX)**

Courtroom Deputy:

**CONTINUED: Hearing Continued to 5/6/2021 at 10:30 a.m., Per Order
Entered 1/5/2021 (XX) - td (1/5/2021)**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Bruce Elieff

Represented By
Lisa Nelson
Robert P Goe

Trustee(s):

Howard M Ehrenberg (TR)

Represented By
Alan G Tippie
Daniel A Lev
Sean A OKeefe
Claire K Wu

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

8:19-13858 Bruce Elieff

Chapter 7

#25.00 Hearing RE: Chapter 7 Trustee's Objection to Claim No. 19-1 of Banning Bench Community of Interest Association (Claim Amount: \$747,360.09)

Docket 1045

*** VACATED *** REASON: CONTINUED TO 5/6/2021 AT 10:30 A.M.,
PER ORDER ENTERED 1/5/2021 (XX)

Courtroom Deputy:

**CONTINUED: Hearing Continued to 5/6/2021 at 10:30 a.m., Per Order
Entered 1/5/2021 (XX) - td (1/5/2021)**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Bruce Elieff

Represented By
Lisa Nelson
Robert P Goe

Trustee(s):

Howard M Ehrenberg (TR)

Represented By
Alan G Tippie
Daniel A Lev
Sean A OKeefe
Claire K Wu

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
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Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

8:20-11507 Hytera Communications America (West) Inc

Chapter 11

#26.00 CONT'D Hearing RE: Debtors and Debtors-in-Possession's Motion for Order Approving the Assumption of Unexpired Lease of Non-residential Real Property **(Affects Hytera Communications America (West), Inc. Only)**

FR: 12-17-20

Docket 293

***** VACATED *** REASON: OFF CALENDAR: Notice of Withdrawal of Motion, filed 1/13/2021**

Courtroom Deputy:

OFF CALENDAR: Notice of Withdrawal of Motion, filed 1/13/2021 - td (1/13/2021)

Tentative Ruling:

December 17, 2020

Continue hearing to January 14, 2021 at 10:30 a.m to allow Movant to correct service issue: affected landlords were not served in accordance with FRBP 7004(b)(3) as required by FRBP 9014 for contested matters. (XX)

Service was made by email simply to : '*clin@president-llc.com*' and '*achen@president-llc.com*'

Tentative ruling for 1/14/21 hearing (if unopposed): Grant

Party Information

Debtor(s):

Hytera Communications America

Represented By
John W Lucas
Jason H Rosell
Victoria Newmark

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

8:20-11507 Hytera Communications America (West) Inc

Chapter 11

#27.00 Hearing RE: Sunbeam Properties, Inc's Motion to Compel Debtor to Immediately Surrender Premises in Accordance with Bankruptcy Code Section 365(D)(4), and For Attorneys' Fees and Costs

Docket 327

***** VACATED *** REASON: OFF CALENDAR: Joint Stipulation to Dismiss Motion, filed 1/6/2021**

Courtroom Deputy:

OFF CALENDAR: Joint Stipulation to Dismiss Motion, filed 1/6/2021 - td (1/7/2021)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Hytera Communications America

Represented By

John W Lucas

Jason H Rosell

Victoria Newmark

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room 5A

10:30 AM

8:20-11725 Helen Weatherby

Chapter 11

#28.00 CON'TD STATUS CONFERENCE Hearing RE: (1) Status of Chapter 11 Case;
and (2) Requiring Report on Status of Chapter 11 Case

FR: 8-20-20; 11-19-20; 12-3-20

Docket 1

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

August 20, 2020

Claims bar date: Oct. 28, 2020 (notice to creditors by
8/28/20)

Deadline to file plan/DS: Dec. 18, 2020

Continued Status Conference: Nov. 19, 2020 at 10:30 a.m. (XX)

Deadline to file Updated
Status Report: Nov. 5, 2020

Note: If Debtor is in substantial compliance with the requirements of the U.S. Trustee, appearance at this Status Conference is not required. It is Debtor's responsibility to confirm compliance with the U.S. Trustee. The court will issue its own order re the foregoing schedule/deadlines.

November 19, 2020

Continue this Status Conference to December 3, 2020 at 10:30 a.m., same date/time as hearing on Debtor's motion to sell real property; updated Status Report not required for that hearing. (XX)

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CONT... Helen Weatherby

Chapter 11

Note: Appearance at this hearing is not required.

December 3, 2020

Continue Status Conference to January 14, 2021 at 10:30 a.m.; updated Status Report must be filed by January 7, 2021 if the case is still pending as of that date.(XX)

Note: Appearance at this hearing is not required.

January 14, 2021

Continue Status Conference to February 18, 2021 at 10:30 a.m., same date/time as hearing on motion filed by Debtor on 1/6/21; updated Status Report not required.

Note: Appearance at this hearing is not required.

Party Information

Debtor(s):

Helen Weatherby

Represented By
Bert Briones

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar**

Thursday, January 14, 2021

Hearing Room

5A

10:30 AM

8:20-12328 Chase Merritt Global Fund LLC

Chapter 11

#29.00 CON'TD Hearing RE: Motion for relief from the automatic stay
[REAL PROPERTY]

GREEN ROCK II, LLC

VS.

DEBTOR

FR: 12-10-20

Docket 43

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

December 10, 2020

Continue hearing to January 14, 2021 at 10:00 a.m. to allow Movant to complete timely and adequate service to Debtor.

Basis for Tentative Ruling:

Service:

Debtor was not timely served with the Motion or notice of the hearing in accordance with FRBP 7004(b)(3) as required by FRBP 9014 for contested matters such as motions for relief from the stay.

Tentative ruling for 1/14/21 hearing (if unopposed): Grant motion with 4001(a)(3) waiver; deny request for prospective relief. Movant has not demonstrated evidence sufficient to support a bad faith finding. The court notes that a "duplicate" case that was filed in error was immediately closed.

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10:30 AM

CONT... Chase Merritt Global Fund LLC

Chapter 11

Note: If Movant accepts the foregoing tentative ruling, appearance at this hearing is not required.

January 14, 2021

Deny motion in light of granting of motion to dismiss the case.

Party Information

Debtor(s):

Chase Merritt Global Fund LLC

Represented By
Thomas C Nguyen

Movant(s):

Green Rock II, LLC Wyoming

Represented By
Tinho Mang

**United States Bankruptcy Court
Central District of California
Santa Ana
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Thursday, January 14, 2021

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10:30 AM

8:20-12328 Chase Merritt Global Fund LLC

Chapter 11

#30.00 CON'TD Hearing RE: Motion by United States Trustee to Dismiss Case or Convert Case to One Under Chapter 7 Pursuant to 11 U.S.C. Section 1112(b)

FR: 12-10-20

Docket 34

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

December 10, 2020

Grant motion -- Dismissal

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

January 14, 2021

Grant the Motion -- dismiss the case.

Basis for Tentative Ruling

1. The Court has no confidence that this case can be administered properly, either as a Chapter 11 or a Subchapter V 11. During the hearing held on December 10, 2020, it became apparent that Debtor's attorney of record, has no experience in representing a business chapter 11 debtor and has proven not to be a quick study in coming up to speed on such representation. Among other things, counsel has been unable to navigate the Court's electronic filing system on multiple occasions resulting in several pleadings

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CONT... Chase Merritt Global Fund LLC

Chapter 11

being filed improperly, failed to timely file an application to be employed as counsel for Debtor, and failed to timely file an opposition to either of the two motions to dismiss filed by the U.S. Trustee and creditor Green Rock II ("Creditor").

2. By its order entered on December 18, 2020, the Court ordered any opposition by Debtor be filed by December 31, 2020. Debtor failed to file any opposition by such date. Instead, Debtor did not file an opposition to this Motion until January 12, 2021, just two days prior to today's hearing. The late pleading will not be considered.

3. Though the late opposition will not be considered on its merits, the Court observes one statement in the opposition at page 3 " While the debtor did not file a quarterly report, he did serve on the Trustee *copies of the Bankruptcy Estate's checking account, believing this to be sufficient.*" This one statement illuminates counsel's profound lack of understanding of what is required to properly administer a chapter 11 case.

4. Counsel represented to the Court at the December 10, 2020 hearing that he would seek substitute counsel with chapter 11 experience to represent Debtor. This did not happen. Instead, counsel filed an application to employ him as general bankruptcy counsel for Debtor. The Court is not inclined to approve such an application. Debtor cannot appear in this case without legal counsel.

5. On or about December 30, 2020, Debtor elected to convert the case to one under Subchapter V. Such filing did not excuse Debtor from filing a timely opposition to the motions to dismiss, nor does it cleanse Debtor of its prior missteps in the case.

6. The Application to Employ Real Estate Agent ("Application") is fraught with inconsistencies. For example, Debtor states in the application that the property at 19362 Fisher Lane ("Fisher Property"), that it believes the value of the property to be \$2M - \$2.3M and that the proposed broker, Christopher Kwon ("Kwon") believes it to be worth \$1.9M. See Application at p.2:15-20. Yet, the Listing Agreement attached to the Application dated 10/20/20 indicates a list price of only \$1.775M. Further, as pointed out by Creditor in its opposition to the Application, Kwon's website for the Fisher Property

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CONT... Chase Merritt Global Fund LLC
indicates a list price as of 1/13/21 of \$1.599M.

Chapter 11

5. This is essentially a two-party dispute. Creditor (Green Rock) is one of two listed creditors with a secured debt of \$1.35 million . The only other creditor, Dung No, is scheduled as an unsecured creditor in the amount of \$65,000.

Party Information

Debtor(s):

Chase Merritt Global Fund LLC

Represented By
Thomas C Nguyen

Movant(s):

United States Trustee (SA)

Represented By
Michael J Hauser

**United States Bankruptcy Court
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10:30 AM

8:20-12328 Chase Merritt Global Fund LLC

Chapter 11

#31.00 CON'TD Hearing RE: Motion of Secured Creditor, Green Rock II, LLC, to Dismiss or Convert Bankruptcy Case for Cause Pursuant to 11 USC Section 1112; Demand for Adequate Protection Pursuant to 11 USC Section 363(e)

FR: 12-10-20

Docket 38

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

December 10, 2020

Deny motion as moot in light if the US Trustee' motion to dismiss/convert case is granted.

Special note: Even if the US Trustee's motion is not granted, this hearing would need to be continued because Debtor was not served in accordance with FRBP 7004(b)(3) as required by FRBP 9014 for contested matters such as a motion to dismiss or convert a case brought against a debtor.

January 14, 2021

Grant the Motion if the Court denies the US Trustee's Motion to Dismiss or Convert the Case, also scheduled to be heard on this date; Deny the Motion if the Court grants the US Trustee's Motion to Dismiss or Convert the Case.

Basis for Tentative Ruling -- See Court's comments re #30 on today's calendar

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CONT... Chase Merritt Global Fund LLC

Chapter 11

Debtor(s):

Chase Merritt Global Fund LLC

Represented By
Thomas C Nguyen

**United States Bankruptcy Court
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10:30 AM

8:20-12645 Arnulfo Alatorre

Chapter 7

#32.00 Hearing RE: United States Trustee's Motion to Dismiss Chapter 7 Case,
Pursuant to 11 U.S.C. Section 707(b)(3)(A)

Docket 21

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

January 14, 2021

Grant the Motion to dismiss this case due to Debtor Arnulfo Alatorre's failure attend two scheduled Rule 341(a) creditors' meetings.

No opposition or response has been filed by Debtor.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

Arnulfo Alatorre

Pro Se

Trustee(s):

Thomas H Casey (TR)

Pro Se

**United States Bankruptcy Court
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2:00 PM

8:17-12213 Solid Landings Behavioral Health, Inc.

Chapter 11

Adv#: 8:20-01010 Grobstein v. Degner

#33.00 Hearing RE: Plaintiff's Motion for Partial Summary Judgment on Defendant Gerik M. Degner's Thirty-Second Affirmative Defense

Docket 58

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

January 14, 2021

Grant the Motion.

Basis for Tentative Ruling

All evidentiary objections are overruled.

Solid Landings Behavioral Health, Inc. and Sure Haven, Inc. ("Debtors") filed voluntary chapter 11 petitions on June 1, 2017. An order authorizing joint administration with several related debtors was entered on June 7, 2017. The order confirming the jointly administered liquidation plan was entered March 22, 2018, and Howard Grobstein was appointed liquidating trustee ("Plaintiff").

On January 30, 2020, Plaintiff commenced this adversary proceeding by filing his Complaint for Breach of Fiduciary Duty ("Complaint"). The Complaint alleges a single cause of action for breach of fiduciary duty against defendant, Gerik M. Degner ("Defendant"). Defendant filed an answer to the Complaint on April 21, 2020 ("Answer"), demanding a jury trial. Defendant also filed a third-party complaint (the "Third Party Complaint") against Starr Indemnity & Liability Company ("Starr") on April 22, 2020, and Starr filed its answer on May 26, 2020.

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CONT...

Solid Landings Behavioral Health, Inc.

Chapter 11

Plaintiff now moves for partial summary judgment on Defendant's 32nd affirmative defense, which defense alleges that Plaintiff's claim for breach of fiduciary duty is barred by the business judgment rule under California Corporations Code § 309 and under California common law. By his Motion for Partial Summary Judgment on Defendant Gerek M. Degner's Thirty-Second Affirmative Defense ("Motion"), Plaintiff argues that as Defendant was an officer and not a director of Debtors, California's business judgment rule does not apply to him. Defendant opposes the Motion (the "Opposition") [AP dkt. 65].

A. Legal standard

A party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine issue of material fact, and establishing that it is entitled to judgment as a matter of law as to those matters upon which it has the burden of proof. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. *Id.* at 324. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id.* A factual dispute is genuine where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

The court must view the evidence presented on the motion in the light most favorable to the opposing party. *Id.* "[I]f direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987)(internal citations omitted).

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CONT...

Solid Landings Behavioral Health, Inc.

Chapter 11

In the absence of any disputed material facts, the inquiry shifts to whether the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Furthermore, where intent is at issue, summary judgment is seldom granted. See *Provenz v. Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 48 (1997). The shifting of burden within the context of motion for summary judgment is different, however, if the nonmoving party bears the burden of proof on a specific claim or defense:

Under Rule 56(c), the moving party bears the initial burden to establish that there are no genuine issues of material fact to be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson*, 477 U.S. at 248–50. Where the nonmoving party will bear the burden of proof on a specific claim or defense at trial, the moving party may move for summary judgment based solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." *Celotex Corp.*, 477 U.S. at 324. There is no requirement "that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* at 323 (emphasis in original). The burden then shifts to the nonmoving party to produce "significantly probative evidence" of specific facts showing that there is a genuine issue of material fact requiring a trial. *T.W. Elec. Serv.*, 809 F.2d at 630 (citing Fed.R.Civ.P. 56(e)).

The nonmoving party cannot "withstand a motion for summary judgment merely by making allegations; rather, the party opposing the motion must go beyond its pleadings and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial." *In re Ikon Office Solutions, Inc., Sec. Lit.*, 277 F.3d 658, 666 (3d Cir.2002). If the nonmoving party fails to establish a triable issue on an essential element of its case and upon which it will bear the burden of proof at trial, the moving party is entitled to judgment as a matter of law.

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CONT... **Solid Landings Behavioral Health, Inc.**
Celotex Corp., 477 U.S. at 322–23

Chapter 11

In re Wellman, 2007 WL 4105275, *1, 3-4 (B.A.P. 9th Cir. 2007)(internal citations omitted).

A. Undisputed facts

Debtors are California corporations. Plaintiff's Statement of Uncontroverted Facts ("SUF")[AP dkt. 59], 1, 4; Defendant's Response to SUF ("SGI")[AP dkt. 68], 1, 4. Defendant was an officer (namely, the president) of Debtors. SUF 2, 5; SGI 2, 5.

B. Because the Business Judgment Rule (the "BJR") does not apply to Defendant, Plaintiff is entitled to partial summary adjudication as a matter of law

The parties agree that California law is applicable in this case. See Opp'n, 5:22-26. The parties also agree that the BJR exists in both statutory and common-law form under California law. See Mot., p. 6-8; Opp'n, 7:5-18 and 8:9-9:4; *FDIC v. Van Dellen*, 2012 U.S. Dist. LEXIS 146648, at *17-*18 (C.D. Cal. Oct. 5, 2012) ("California's business judgment rule . . . has two components— immunization from liability that is codified at Corporations Code Section 309 and a judicial policy of deference to the exercise of good-faith business judgment in management decisions.") (internal quotation marks and citation omitted).

California's statutory BJR is codified in Corporations Code § 309(c) which provides that "[a] person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director." California's BJR is applicable only to corporate directors, however, and not corporate officers. See *FDIC v. Perry*, 2011 U.S. Dist. LEXIS 143222, at *10 (C.D. Cal. Dec. 13, 2011) ("California's statutory BJR does not extend its protection to corporate officers. California Corporations Code 309, which

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CONT... **Solid Landings Behavioral Health, Inc.** **Chapter 11**

codifies California's common law BJR, expressly pertains to directors' duties and liabilities and does not mention 'officer' anywhere in its text.

Consequently, the California legislature, without mistake, omitted officers in codifying BJR, and this Court cannot infer otherwise.") (internal citations omitted).

Likewise, California's common law BJR only applies to corporate directors and not corporate officers. See *FDIC v. Reis*, 2013 U.S. Dist. LEXIS 197664, at *9 (C.D. Cal. Sep. 5, 2013) ("[T]he Court does not find persuasive Defendants' arguments that the common law business judgment rule has been extended to officers The Court . . . finds that the business judgment rule does not protect officers' corporate decisions."); Mot., p. 6-9. Defendant is correct that only corporate directors are protected by the BJR. Opp'n, 7:6-8.

As discussed above, because Defendant will bear the burden of proof to prove his 32nd affirmative defense at trial, Plaintiff "may move for summary judgment based solely on the "pleadings, depositions, answers to interrogatories, and admissions on file," *Wellman*, 2007 WL 4105275 at 3 (citing *Celotex Corp.*, 477 U.S. at 324) and the burden will be shifted "to the nonmoving party to produce 'significantly probative evidence' of specific facts showing that there is a genuine issue of material fact requiring a trial." *Wellman*, 2007 WL 4105275, *4 (citing *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987)). The burden is therefore on Defendant to provide "significantly probative evidence" showing that Defendant was a director of Debtors, and not on Plaintiff as stated by Defendant. See Opp'n, 4:24.

To meet that burden, Defendant has submitted his own declaration in which he testifies, in summary, that:

Shortly after taking over as Debtors' President, its owners requested that Defendant also act as a de facto director due to the leave of absence of Stephen Fennelly, Debtors' director and CEO" and that for "almost a year, Defendant fulfilled his role as an officer while also

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CONT...

Solid Landings Behavioral Health, Inc.

Chapter 11

acting as a director. While Defendant's work as President emphasized increasing cash flow and reducing expenses – i.e. making the Debtor's profitable – as a director, he renegotiated the terms of the Debtor's existing line of credit while trying to obtain long-term financing and the sale of non-core assets.

Opp'n, 2:14-2; Declaration of Gerick Denger (the "Denger Declaration") [AP dkt. 66], 4-7, ¶¶13-24. Accordingly, Defendant's position is that a material triable issue of fact exists such that the Motion cannot be granted because Defendant acted as *de facto* director which was allowed under Debtors' bylaws pertaining to "advisory" directors. See Opp'n, 5:27-7:3 and 7:19-8:4.

The Denger Declaration, however, cannot be used to create a triable issue of fact because it contradicts Defendant's own prior testimony. See Reply, 2:8-3:18. "The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (citing *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975)). The Ninth Circuit has reasoned that if a party could raise "raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Kennedy*, 925 F.2d at 266 (citations omitted). Thus, the Ninth Circuit has concluded that:

"[T]hat the Foster–Radobenko rule does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony. Rather, the Radobenko court was concerned with "sham" testimony that flatly contradicts earlier testimony in an attempt to "create" an issue of fact and avoid summary judgment. Therefore, before applying the Radobenko sanction, the district court must make a factual determination that the contradiction was actually a "sham."

Kennedy, 925 F.2d at 266 (citations omitted). In this case, the court can make the determination that the Denger Declaration contradicts his prior testimony in an attempt to "create" an issue of fact to avoid summary judgment.

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CONT... Solid Landings Behavioral Health, Inc.

Chapter 11

Defendant's testimony in the Denger Declaration that he performed certain duties within his capacity as a de facto director contradicts he previous sworn statements that he performed these very same duties within his capacity as CEO and president of Debtors. See Reply, 3:19-7:21. For example, Defendant now testifies that, as a director, he brought in Insuperity as a new human resources provider, worked with Debtors' lender, Capstar to ensure liquidity and refinance Debtors' debts, and brought back Brentwood to market the sale of Debtors' facilities in Texas and Nevada. See Denger Decl., 4-5, ¶¶14-16. Yet, Defendant previously testified in his sworn responses to Plaintiff's interrogatories that he performed these very same duties within his capacity as CEO and president:

Beginning in April 2016, Defendant, in his role as President, began to make operational changes and improvements to Solid Landings...

Human Resources...

- Implemented Insuperity....

Supplemental M. Reider Decl. [AP dkt. 72], Ex. S, 6:8-20. "In his role as CEO and President, Mr. Degner...worked with Capstar Bank...to be sure the Company had proper liquidity to finance its obligations as the operational changes were taking effect" and Brentwood was brought back to sell Debtors' facilities in Nevada and Texas because Capstar had a prior relationship with Brentwood *Id.*, Ex. S, 7:5-7 and 7:16-20. This testimony was signed under penalty of perjury. *Id.*, Ex. S, p. 32.

During his sworn testimony before the court on July 26, 2017, Defendant also characterized his work with Capstar regarding Debtors' financing and to bring back Brentwood to sell Debtors' Nevada and Texas facilities to be part of his duties as president. See M. Reider Decl., Ex. U, 161:13-18, 166:25-167:14, 169:22-170:17 (page numbers referenced our at the bottom of the page). Thus, the Denger Declaration contradicts

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CONT... **Solid Landings Behavioral Health, Inc.**

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Defendant's prior sworn testimony. See Supp. Reply, 3-8.

A finding that Defendant is now attempting to "create" a triable issue of fact by way of the Denger Declaration is further supported by Defendant's failure to allege that he was a director of Debtors in his Third Party Complaint against Starr. See Supp. Reply, 7:23-8:25. In the Third Party Complaint, Defendant had every incentive to allege all potential causes of action against Starr for indemnification under the applicable D&O policy, but is only now alleging that he acted as a director for the first time- after the instant Motion was filed. Thus, the timing of this new, contradictory testimony leads the court to conclude that Defendant is attempting to "create" a triable issue of fact in defense against the Motion.

The court finds that the Denger Declaration is a "sham" declaration (as described by the Ninth Circuit) intended to create a triable issue of fact over whether Defendant performed certain duties within his capacity as an officer or director of Debtors. The Denger Declaration contradicts Defendant's earlier sworn testimony that he performed those same duties within his capacity as CEO and president of Debtors. Under applicable Ninth Circuit law, "The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy*, 952 F.2d 262 at 266.

Notably, Defendant submitted three pieces of documentary evidence: a client service agreement with Insperity, a marketing agreement, and a bill of sale, all of which were signed by him as "president." Denger Decl., Ex. A-C.

In sum, because Defendant bears the burden of proof regarding his BJR affirmative defense at trial, the burden is Defendant to defeat the Motion by producing "'significantly probative evidence' of specific facts showing that there is a genuine issue of material fact requiring a trial." *Wellman*, 2007 WL 4105275 *4. Defendant's offer of a self-serving declaration (and the exhibits attached thereto) is not "significantly probative evidence" establishing a triable issue of material fact.

Even viewing the evidence in the light most favorable to Defendant, Plaintiff is

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CONT... **Solid Landings Behavioral Health, Inc.** **Chapter 11**
entitled to partial summary adjudication on the 32nd affirmative defense as a
matter of law.

EVIDENTIARY OBJECTIONS

Defendant's Evidentiary Objection to Declaration of Stephen Fennelly

<u>Objection #</u>	<u>Ruling</u>
1	Overruled
2	Overruled
3	Overruled
4	Overruled

Party Information

Debtor(s):

Solid Landings Behavioral Health,

Represented By
David L. Neale
Juliet Y Oh
Jeffrey S Kwong
David M Samuels

Defendant(s):

Gerik M. Degner

Represented By
Ismail Amin

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CONT... Solid Landings Behavioral Health, Inc.

Chapter 11

Plaintiff(s):

Howard B Grobstein

Represented By
Rodger M. Landau
Monica Rieder