

**United States Bankruptcy Court
Central District of California
Northern Division
Ronald A Clifford III, Presiding
Courtroom 201 Calendar**

Tuesday, May 7, 2024

Hearing Room 201

10:00 AM

9: -

Chapter

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Docket 0

Tentative Ruling:

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- NONE LISTED -

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9:19-10517 Jose Suayan

Chapter 13

#1.00 Hearing RE: [141] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 151 Coral Court, Pismo Beach, CA 93449 . (Schuler-Hintz, Kristin)

Docket 141

Tentative Ruling:

May 7, 2024

Appearances required.

JPMorgan Chase Bank, N.A. as servicer for Bank of America, N.A. ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) in relation to the real property located at 151 Coral Court, Pismo Beach, CA 93449 (the "Property") of Jose Suayan (the "Debtor") on the grounds that the Debtor has failed to make postpetition mortgage payments as they became due under the *1st Amended Chapter 13 Plan* (the "Plan"). *See* Docket No. 141, *Motion for Relief from Stay Under 11 U.S.C. § 362* (the "Motion"), pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) at its option, offer, provide and enter into a potential forbearance agreement or other loan workout/loss mitigation agreement by contacting the Debtor, (3) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3), and (4) upon entry of the order, for purposes of Cal. Civ. Code § 2923.5, the Debtors are borrowers as defined in Cal. Civ. Code § 2920.5(c)(2)(C). *See id.* at p. 5.

Notice

The Motion and notice thereof were served upon the Debtor via U.S. Mail First class, postage prepaid on April 3, 2024, notifying the Debtor that pursuant to this Court's Local Rule 9013-1(d), any opposition to the Motion must be filed and served no less than fourteen (14) days prior to the hearing on the Motion. *See id.*, *Proof of Service of Document*, p. 1. Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting

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or denial of the motion, as the case may be." Neither the Debtor, nor any other party served with the Motion has timely filed an opposition to the Motion. The Court therefore takes the default of all non-responding parties, including the Debtor.

Analysis

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." Failure to make postpetition mortgage payments as they become due in a Chapter 13 case may constitute "cause" for relief from the automatic stay under § 362(d)(1). *See In re Marks*, 2012 WL 6554705, at *11 (9th Cir. BAP Dec. 14, 2012), *aff'd*, 624 F. App'x 963 (9th Cir. 2015) (citing *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985)).

Under the terms of the Plan, the Debtor is required to make regular payments to Movant under the terms of the prepetition lending agreement. *See* Docket No. 51, pp. 5-6, Class 2. Movant asserts that the Debtor defaulted on Plan payments consisting of four (4) unpaid postconfirmation payments of \$4,131.54. *See* Motion, p. 9. Less a suspense account of \$4,034.99, Movant asserts that there is a total post-confirmation delinquency of \$2,491.17 (as of the date of the Motion) with a payment of \$4,131.54 becoming due April 1, 2024. *Id.* According to the Motion, the last monthly payment of \$4,131.54 was received by Movant on March 1, 2024. *Id.*

Under that *Response to Notice of Final Cure Payment*, Movant asserts that \$2,491.17 is due as of April 22, 2024, due to a \$10,000 payment having been made on April 15, 2024. *See* Docket entry dated April 22, 2024.

It is not clear to the Court where the Debtor's account with Movant stands at this juncture. The Court will inquire with Movant as to the current status of the Debtor's account.

Party Information

Debtor(s):

Jose Suayan

Represented By

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Roy M Holland

Movant(s):

Bank of America, N.A.

Represented By
Nancy L Lee
Dane W Exnowski
Kristin A Schuler-Hintz

Trustee(s):

Elizabeth (ND) F Rojas (TR)

Pro Se

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9:22-10437 Cristina Marie Pagan Nowling

Chapter 13

#2.00 CONT'D Hearing

RE: [93] Notice of motion and motion for relief from the automatic stay with supporting declarations UNLAWFUL DETAINER RE: 3935 Foothill Road (back unit); Santa Barbara, CA WITH PROOF OF SERVICE.

FR. 4-9-24

Docket 93

Tentative Ruling:

May 7, 2024

Appearances required.

The Debtor and Movant appeared at the April 9, 2024 hearing and requested a continuance to allow the Debtor to vacate the Property. Has the Debtor vacated the Property? Is the Motion now moot?

April 9, 2024

Appearances required.

Kathy Bailey ("Movant") seeks relief as to the premises of the residential property located at 3935 Foothill Road (back unit), Santa Barbara, CA 93110 (the "Premises") pursuant to 11 U.S.C. § 362(d)(1) and 11 U.S.C. § 362(d)(2) on the grounds that 'cause' exists as to the debtor Cristina Marie Pagan Nowling (the "Debtor"). *See Motion for Relief from the Automatic Stay or for An Order Confirming That Automatic Stay Does Not Apply Under 11 U.S.C. § 362(l)* (the "Motion"). *See* Docket No. 93. [FN 1]

On December 11, 2023, Movant caused a notice to quit to be served on the Debtor. *See* Motion, p. 8. Movant commenced an unlawful detainer proceeding on December 15, 2023. *Id* at 3. Movant received an unlawful detainer judgment on February 14, 2024. *Id.* Under 11 U.S.C. § 362(d)(1), Movant contends that (1) the Debtor's right

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to possession of the Premises should be terminated because the lease expired on December 7, 2023, and lease payments have not been made after the filing of the bankruptcy petition, and (2) pursuant to 11 U.S.C. § 362(d)(2)(A), the Debtor has no equity in the Premises, and pursuant to 11 U.S.C. § 362(d)(2)(B), the Premises are not necessary for reorganization. *Id.* at 4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Premises, (2) the 14-day stay prescribed by FRBP 4001(a)(3) be waived, and (3) a designated law enforcement officer may evict the Debtor and any other occupant from the Premises regardless of any future bankruptcy filing concerning the Premises for a period of 180 days from the hearing on the Motion without further notice. *Id.* at 5.

[FN 2]

Notice

The Motion and notice thereof were served upon the Debtor via U.S. Mail First class, postage prepaid on March 18, 2024, notifying the Debtor that pursuant to this Court's Local Rule 9013-1(d), any opposition to the Motion must be filed and served no less than fourteen (14) days prior to the hearing on the Motion. *Id.*, *Proof of Service of Document*, p. 11. Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." Neither the Debtor, nor any other party served with the Motion has timely filed an opposition to the Motion. The Court therefore takes the default of all non-responding parties, including the Debtor.

Analysis

11 U.S.C. § 362(d)(1)

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay for cause, including the lack of adequate protection of an interest in property of such party in interest." Beyond the lack of adequate protection, "cause" is determined on a case-by-case basis. *See In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985).

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As to "cause" under 11 U.S.C. § 362, Movant asserts that the Debtor has not paid monthly rent of \$4,000.00 beginning on December 1, 2023, with half of the rent paid in December and no additional rent paid since that time. *See Motion*, p. 7. The Debtor lists \$1,100.00 in rental or home ownership expenses on her schedules. *See Docket No. 70, Schedule I*, p. 1, ¶ 4. However, *Schedule G* does not identify the lease agreement with Movant, therefore, it appears that the Debtor does not intend to assume the lease associated with the Premises. *See Docket No. 21, Schedule G*, p. 1. The failure to pay post-petition lease payments on a real property lease may constitute cause to lift the stay under 11 U.S.C. § 362(d)(1). *See In re Rocchio*, 125 B.R. 345, 347 (Bankr. D. RI 1991); *see also In re Toulioumis*, 170 B.R. 825 (Bankr. S.D.N.Y. 1994); 11 U.S.C. § 365(d)(3)(A).

As the Debtor has failed to make lease payments to Movant post-petition, Movant is entitled to relief pursuant to 11 U.S.C. § 362(d)(1). However, the Court is unclear as to who is the moving party. The Motion indicates that "Kathy Bailey" is the Movant. *See Motion*, p. 1. However, that *Unlawful Detainer Declaration* indicates that Timothy Delaney is the movant.

11 U.S.C. § 362(d)(2)

Pursuant to 11 U.S.C. § 362(d)(2), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay with respect to a stay of an act against property under subsection (a) of this section, if (A) the debtor does not have an equity in such property and (B) such property is not necessary to an effective reorganization."

It does not appear to the Court that the Debtor intends on living on the Premises in that their schedules do not indicate as much. Therefore, the Premises do not appear to the Court to be necessary for the Debtor's reorganization efforts.

4001(a)(3) Waiver

As to Fed. R. Bankr. P. 4001(a)(3), "[t]he purpose of this provision is to permit a short period of time for the debtor or the party opposing relief to seek a stay pending

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an appeal of the order.'" *In re Sternitzky*, 635 B.R. 353, 361 (Bankr. W.D. Wis. 2021). "The party obtaining relief from the automatic stay may persuade the court to grant a shorter time period for the debtor to seek a stay pending appeal, or even grant no time." *Id.* No analysis has been provided to support the request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and so the Court declines to do so.

[FN 1] Movant checks the box that pursuant to 11 U.S.C. § 362(b)(22) and (23) there is no stay because Movant commenced an eviction, unlawful detainer action or similar proceeding against the Debtor involving residential property in which the Debtor resides and the Debtor has not filed and served on Movant the certification required under 11 U.S.C. § 362(l)(1).

[FN 2] Under paragraph 6 of the Motion, Movant checks the box "[t]hese actions were taken before Movant knew the bankruptcy petition was filed, and Movant would have been entitled to relief from stay to proceed with these actions." See *id.* at 4. However, Movant does not request relief that the stay be annulled retroactive to the bankruptcy petition date so the Court declines to grant such relief. *Id.* at 5.

Party Information

Debtor(s):

Cristina Marie Pagan Nowling

Represented By
Kevin T Simon

Movant(s):

Timothy Delaney

Represented By
Brian Nomi

Trustee(s):

Elizabeth (ND) F Rojas (TR)

Pro Se

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9:22-10557 Silviano Cedano Quezada

Chapter 13

#3.00 HearingRE: [87] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 653 Verdemont Circle, Simi Valley, CA 93065 .

Docket 87

Tentative Ruling:

May 7, 2024

Appearances are waived. The Court will grant the Motion pursuant to 11 U.S.C. § 362(d)(1) for the reasons set forth *infra*, but will deny the Motion as to its request that the Court waive Fed. R. Bankr. P. 4001(a)(3). Movant to upload a conforming order within 7 days.

The Bank of New York Mellon ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) in relation to the real property located at 653 Verdemont Circle, Simi Valley, CA 93065 (the "Property") of Silviano Cedano Quezada (the "Debtor") on the grounds that the Debtor has failed to make postpetition mortgage payments as they became due under the *2nd Amended Chapter 13 Plan* (the "Plan"). *See* Docket No. 87, *Motion for Relief from Stay Under 11 U.S.C. § 362* (the "Motion"), pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3), and (3) if relief from stay is not granted, adequate protection be ordered. *See id.* at p. 5.

Notice

The Motion and notice thereof were served upon the Debtor via U.S. Mail First class, postage prepaid on April 4, 2024, notifying the Debtor that pursuant to this Court's Local Rule 9013-1(d), any opposition to the Motion must be filed and served no less than fourteen (14) days prior to the hearing on the Motion. *See id., Proof of Service of Document*, pp. 12-13.

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On April 23, 2024, the Debtor filed *Debtor's Opposition to Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362* (the "Opposition"). *See* Docket No. 91. In the Opposition, the Debtor asserts that (1) Movant is adequately protected as there is equity in the Property, (2) the Debtor seeks to enter into an adequate protection agreement to repay the delinquency in equal installments over twelve (12) months beginning June 16, 2024, to May 16, 2025, and (3) the Debtor will resume his ongoing mortgage payments beginning May 2024.

Analysis

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." Failure to make postpetition mortgage payments as they become due in a Chapter 13 case may constitute "cause" for relief from the automatic stay under § 362(d)(1). *See In re Marks*, 2012 WL 6554705, at *11 (9th Cir. BAP Dec. 14, 2012), *aff'd*, 624 F. App'x 963 (9th Cir. 2015) (citing *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985)).

While the term "adequate protection" is not defined in the Code, 11 U.S.C. § 361 sets forth three non-exclusive examples of what may constitute adequate protection: 1) periodic cash payments equivalent to decrease in value, 2) an additional or replacement lien on other property, or 3) other relief that provides the indubitable equivalent. *See In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984). "Equity cushion" is defined as the value in the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the value of the property during the time the automatic stay remains in effect. *Id.* at 1397. "Equity," as opposed to "equity cushion," is the value, above all secured claims against the property that can be realized from the sale of the property for the benefit of the unsecured creditors. *Id.*

"Although the existence of an equity cushion as a method of adequate protection is not specifically mentioned in § 361, it is the classic form of protection for a secured debt justifying the restraint of lien enforcement by a bankruptcy court." *Id.* (internal

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citations omitted). "In fact, it has been held that the existence of an equity cushion alone, can provide adequate protection." *Id.* (internal citations omitted). "A sufficient equity cushion has been found to exist although not a single mortgage payment had been made." *Id.* (internal citations omitted). "A 20% cushion has been held to be an adequate protection for a secured creditor." *Id.* at 1401. (internal citations omitted).

"The issues of adequate protection and equity in the property are irrelevant in the face of post-confirmation payment defaults because creditors are entitled to rely upon the debtors' responsibilities to make their post-confirmation payments. The debtors are not required to remain in Chapter 13 if they cannot satisfy the obligations which they proposed as feasible and which they voluntarily assumed." *In re Williams*, 68 B.R. 442, 443 (Bankr. M.D. Ga. 1987)(citing *In re Davis*, 64 B.R. 358, 359-360 (Bankr. S.D.N.Y. 1986)). "Strictly speaking [], adequate protection is only intended to protect a creditor during the period between the filing of the petition and plan confirmation." *In re Dumbuya*, 428 B.R. 410, 416 (Bankr. N.D. Oh. 2009)(citing *In re Walters*, 203 B.R. 122, 123-124 (Bankr. S.D. Ill. 1996)). "Once [] a plan is confirmed by the court a creditor seeking relief from the stay, based upon a debtor's default in payment under a plan, must establish that the debtor's breach of the plan, itself, provides 'cause' to lift the stay. The issue of 'adequate protection' becomes moot." *Id.* (citing *In re Schultz*, 325 B.R. 197, 201 (Bankr. N.D. Oh. 2005)).

Under the terms of the Plan, the Debtor is required to make regular payments to Movant under the terms of the prepetition lending agreement. *See* Docket No. 50, pp. 5-6, Class 2. Movant asserts that the Debtor defaulted on Plan payments consisting of three (3) unpaid postconfirmation payments of \$4,272.08. *See* Motion, p. 9. Less a suspense account of \$516.78, Movant asserts that there is a total postconfirmation delinquency of \$12,299.46 (as of the date of the Motion) with a payment of \$4,272.08 becoming due April 1, 2024. *Id.* According to the Motion, the last monthly payment of \$4,175.00 was received by Movant on December 28, 2023. *Id.*

Cause has been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) due to the Debtor's failure to make no less than three (3) postpetition/postconfirmation mortgage payments pursuant to the terms of the Plan.

As to Fed. R. Bankr. P. 4001(a)(3), "[t]he purpose of this provision is to permit a short period of time for the debtor or the party opposing relief to seek a stay pending an appeal of the order." *In re Sternitzky*, 635 B.R. 353, 361 (Bankr. W.D. Wis.

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2021). "The party obtaining relief from the automatic stay may persuade the court to grant a shorter time period for the debtor to seek a stay pending appeal, or even grant no time." *Id.* No analysis has been provided to support the request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and so the Court declines to do so.

Party Information

Debtor(s):

Silviano Cedano Quezada

Represented By
Raj T Wadhwani

Movant(s):

The Bank of New York Mellon FKA

Represented By
Daniel K Fujimoto

Trustee(s):

Elizabeth (ND) F Rojas (TR)

Pro Se

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9:23-10119 Debra Marie Fink

Chapter 13

#4.00 CONT'D Hearing

RE: [61] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 1551 Pomeroy Road, Arroyo Grande, CA 93420 . (Weifenbach, Diane)

FR. 4-9-24

Docket 61

*** VACATED *** REASON: Stipulated Adequate Protection Order was Entered on 5/6/24.

Tentative Ruling:

May 7, 2024

Appearances required.

Movant filed that *Stipulation for Adequate Protection* (the "Stipulation") on April 9, 2024, immediately prior to the last hearing on April 9, 2024 at 10:00 a.m. *See Docket No. 66.* The Court advised Movant at the April 9, 2024 hearing that it must augment to Motion to provide evidence that the Debtor has an interest in the Property. To date, no such evidence has been filed. Additionally, the Court is unable to locate an order approving the Stipulation in the Lodged Order Upload (LOU) system. If the appropriate order is lodged, the Court will not sign such order unless Movant files sufficient evidence that the Debtor has an interest in the Property.

April 9, 2024

Appearances required.

U.S. Bank, National Association ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (d)(4) in relation to the real property located at 1551 Pomeroy Road, Arroyo Grande, CA 93420 (the "Property") of Debra Marie Fink (the "Debtor") on the grounds that (1) Movant's interest in the Property is not adequately protected, (2) postpetition mortgage payments due on the note secured by a deed of trust on the Property have not been made to Movant, and (3) the Debtor's

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filings of the bankruptcy petition was part of a scheme to delay, hinder, or defraud creditors that involved multiple cases affecting the Property. *See Docket No. 61, Motion for Relief from Stay Under 11 U.S.C. § 362* (the "Motion"), pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) at its option, offer, provide and enter into a potential forbearance agreement or other loan workout/loss mitigation agreement by contacting the Debtor, (3) the co-debtor stay of 11 U.S.C. § 1201(a) or § 1301(a) be terminated, modified or annulled as to the co-debtor, on the same terms and conditions as to the Debtor, (4) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3), (5) relief under 11 U.S.C. § 362(d)(4), (6) the order be binding and effective in any bankruptcy case commenced by or against any debtor who claims any interest in the Property for a period of 180 days from the hearing on the Motion upon recording of a copy of the order or giving the appropriate notice of its entry in compliance with applicable nonbankruptcy law, (7) the order be binding and effective in any future bankruptcy case, no matter who the debtor may be upon recording of a copy of the order or giving appropriate notice of its entry in compliance with applicable nonbankruptcy law, and (8) reimbursement of Movant's attorney's fees and costs incurred. *See id.* at pp. 5-6.

On March 26, 2024, the Debtor filed that *Opposition to Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362* (the "Opposition"). *See Docket No. 63.*

Through the Opposition the Debtor "acknowledges that she has fallen behind on her mortgage payments since her Chapter 13 Plan was confirmed," but asserts that she "has proposed the terms of an Adequate Protection Order with the Movant..." *See id.* at p. 2, lines 1-6.

Notice

The Motion and notice thereof were served upon the Debtor via U.S. Mail First class, postage prepaid on March 19, 2024, notifying the Debtor that pursuant to this Court's Local Rule 9013-1(d), any opposition to the Motion must be filed and served no less than fourteen (14) days prior to the hearing on the Motion. *See id., Proof of Service of Document*, p. 12.

Analysis

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11 U.S.C. § 362(d)(1)

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." Failure to make postpetition mortgage payments as they become due in a Chapter 13 case may constitute "cause" for relief from the automatic stay under § 362(d)(1). *See In re Marks*, 2012 WL 6554705, at *11 (9th Cir. BAP Dec. 14, 2012), *aff'd*, 624 F. App'x 963 (9th Cir. 2015) (citing *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985)).

As a preliminary matter, it is not clear to the Court that the Debtor is liable on the note or has legal interest in the Property. On the one hand the Debtor lists the Property on her Schedule A/B, lists debt secured by the Property on her Schedule D, and includes the arrears on that debt in that *2nd Amended Chapter 13 Plan* (the "Plan"). *See Docket No. 1, Schedule A/B: Real Property, Schedule D: Creditors Who Have Claims Secured by Property; see also Docket No. 46, pp. 5-6, Class 2.* On the other hand, the Adjustable Rate Note and Deed of Trust filed in support of the Motion identify the "Borrower" as Marylou Fink and Francis C. Fink. *See Motion, Exhibit Note, Exhibit DOT.* The Debtor does not appear on either document. *See id.* There is also no evidence of a guaranty by the Debtor or evidence of a transfer of Marylou Fink's and/or Francis C. Fink's interest in the Property to the Debtor.

Movant asserts that four (4) postpetition postconfirmation payments consisting of three (3) payments of \$4,239.30 and one (1) payment of \$4,008.48 have not been made. *See Motion*, p. 9. Less a suspense account of \$2,087.51, Movant asserts that there is a total postpetition delinquency of \$14,638.87 (as of the date of the Motion) with a payment of \$4,008.48 becoming due February 1, 2024. *Id.* According to the Motion, the last monthly payment of \$3,798.73 was received by Movant on January 9, 2024. *Id.*

Assuming that the Property is Debtor's property, cause has been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) due to the failure to make no less than four (4) postpetition/postconfirmation mortgage payments.

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11 U.S.C. § 362(d)(4)

Movant asserts that the bankruptcy was filed in bad faith as part of a scheme to hinder, delay, or defraud creditors because the Property is the subject of multiple bankruptcy filings. To obtain relief under § 362(d)(4), the court must find the following three elements are present: (1) the debtor's bankruptcy filing was part of a scheme; (2) the object of the scheme was to delay, hinder or defraud creditors; and (3) the scheme must involve either (a) the transfer of some interest in the real property without the secured creditor's consent or court approval, or (b) multiple bankruptcy filings affecting the property. *In re Dorsey*, 476 B.R. 261, 265–66 (Bankr. C.D. Cal. 2012) citing *First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC. (In re First Yorkshire Holdings, Inc.)*, 470 B.R. 864, 870–871 (9th Cir. BAP 2012).

The Debtor has one prior bankruptcy filings within the recent past. The Debtor filed a Chapter 13 bankruptcy case, case no. 9:22-bk-10998-RC (the "2022 Case"), on December 16, 2022, which was dismissed for failure to file information on January 27, 2023. *See Docket No. 28, Case No. 9:22-bk-10998-RC*. The Property was listed on Mrs. Fink's Schedule A/B. *See Docket No. 17, Schedule A/B: Property*. Daniel Carl Fink, the Debtor's deceased husband, filed a Chapter 13 bankruptcy case, case no. 9:21-bk-10022-RC (the "2021 Case"), on January 12, 2021, which was dismissed at the confirmation hearing on October 27, 2022 due to his passing prior to confirmation. *See Docket No. 113, Case No. 9:21-bk-10022-RC*. The Property was listed on Mr. Fink's Schedule A/B. *See Docket No. 1, Schedule A/B: Property*.

Despite the prior filings, the Court is not entirely persuaded that this case was filed in bad faith. The Debtor's primary motivation in filing bankruptcy may be to stop the litigation regarding the Property. However, the Debtor lists \$3,988.15 in priority claims and \$40,196.83 in non-priority claims on her Schedule E/F, which she largely seeks to discharge. *See Docket No. 1, Schedule E/F*. *See Docket No. 18*. Therefore, there is insufficient evidence that the Debtor's filing of the bankruptcy petition was part of a scheme to delay, hinder, or defraud creditors.

11 U.S.C. § 1301(a)

The Debtor did not identify a co-debtor or list an address for a co-debtor on her schedules. *See Docket No. 1, Schedule H: Your Codebtors*, p. 1. Pursuant to 11 U.S.C. § 509(a), a "codebtor" is "an entity that is liable with the debtor on, or that has

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secured, a claim of a creditor against the debtor" (e.g., a guarantor). The Adjustable Rate Note and Deed of Trust identify the "Borrower" as Marylou Fink and Francis C. Fink. *See Motion, Exhibit Note, Exhibit DOT.* The Debtor does not appear on either document. *See id.* There is also no evidence of a guaranty by the Debtor. Despite the Debtor listing the Property on her Schedule A/B and listing debt secured by the Property on her Schedule D, there is no evidence submitted in support of the Motion that indicates the Debtor is liable on the Adjustable Rate Note and Deed of Trust. *See Docket No. 1, Schedule A/B: Real Property, Schedule D: Creditors Who Have Claims Secured by Property.* Therefore, there is no co-debtor stay to waive.

Fed. R. Bankr. P. 4001(a)(3)

As to Fed. R. Bankr. P. 4001(a)(3), "[t]he purpose of this provision is to permit a short period of time for the debtor or the party opposing relief to seek a stay pending an appeal of the order." *In re Sternitzky*, 635 B.R. 353, 361 (Bankr. W.D. Wis. 2021). "The party obtaining relief from the automatic stay may persuade the court to grant a shorter time period for the debtor to seek a stay pending appeal, or even grant no time." *Id.* No analysis has been provided to support the request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and so the Court declines to do so.

Party Information

Debtor(s):

Debra Marie Fink

Represented By
Reed H Olmstead

Movant(s):

U.S. Bank, National Association as

Represented By
Diane Weifenbach

Trustee(s):

Elizabeth (ND) F Rojas (TR)

Pro Se

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9:23-10152 Donna Hachey

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#5.00 Hearing

RE: [52] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 4029 Angela St, Simi Valley, CA 93063 . (Ferry, Sean)

Docket 52
*** VACATED *** REASON: Continued by stipulation to 6/18/24 at 9:00AM.

Tentative Ruling:

May 7, 2024

Appearances are waived. The Court will grant the Motion pursuant to 11 U.S.C. § 362(d)(1) for the reasons set forth *infra*, but will deny the Motion as to its request that the Court waive Fed. R. Bankr. P. 4001(a)(3). Movant to upload a conforming order within 7 days.

U.S. Bank N.A. ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) in relation to the real property located at 4029 Angela Street, Simi Valley, CA 93063 (the "Property") of Donna Hachey (the "Debtor") on the grounds that the Debtor has failed to make postpetition mortgage payments as they became due under the *2nd Amended Chapter 13 Plan* (the "Plan"). *See* Docket No. 52, *Motion for Relief from Stay Under 11 U.S.C. § 362* (the "Motion"), pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) at its option, offer, provide and enter into a potential forbearance agreement or other loan workout/loss mitigation agreement by contacting the Debtor, (3) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3), and (4) if relief from stay is not granted, adequate protection be ordered. *See id.* at p. 5.

Notice

The Motion and notice thereof were served upon the Debtor via U.S. Mail First class, postage prepaid on April 4, 2024, notifying the Debtor that pursuant to this Court's Local Rule 9013-1(d), any opposition to the Motion must be filed and served no less

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than fourteen (14) days prior to the hearing on the Motion. *See id., Proof of Service of Document*, p. 12.

On April 20, 2024, the Debtor filed that *Opposition to Motion for Relief from the Automatic Stay* (the "Opposition"). *See* Docket No. 54. In the Opposition, the Debtor asserts that (1) she was the victim of bank fraud and has tendered two postpetition mortgage payments to Movant since it filed the Motion, (2) the Debtor believes she is postpetition current, and (3) if the Debtor is not postpetition current, she would like to enter into an adequate protection agreement. *See id.*, pp. 1-2.

Analysis

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." Failure to make postpetition mortgage payments as they become due in a Chapter 13 case may constitute "cause" for relief from the automatic stay under § 362(d)(1). *See In re Marks*, 2012 WL 6554705, at *11 (9th Cir. BAP Dec. 14, 2012), *aff'd*, 624 F. App'x 963 (9th Cir. 2015) (citing *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985)).

Under the terms of the Plan, the Debtor is required to make regular payments to Movant under the terms of the prepetition lending agreement. *See* Docket No. 38, p. 6, Class 2. Movant asserts that the Debtor defaulted on Plan payments consisting of two (2) unpaid postconfirmation payments of \$2,241.12. *See* Motion, p. 9. Less a suspense account of \$66.40, Movant asserts that there is a total postconfirmation delinquency of \$4,415.84 (as of the date of the Motion) with a payment of \$2,241.12 becoming due February 1, 2024. *Id.* According to the Motion, the last monthly payment of \$2,251.00 was received by Movant on January 2, 2024. *Id.*

The Debtor asserts that she made two postpetition payments since the Motion was filed. *See* Docket No. 54, p. 1. However, the Debtor does not indicate the amount of the payments or otherwise provide evidence of the payments. Assuming, arguendo, the Debtor made two postpetition payments in the total amount of \$4,415.84, the Debtor would still be delinquent the February, March, and April payments in the total

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amount of \$6,723.36 as of the hearing on the Motion.

Cause has been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) due to the Debtor's failure to make postpetition/postconfirmation mortgage payments pursuant to the terms of the Plan.

As to Fed. R. Bankr. P. 4001(a)(3), "[t]he purpose of this provision is to permit a short period of time for the debtor or the party opposing relief to seek a stay pending an appeal of the order." *In re Sternitzky*, 635 B.R. 353, 361 (Bankr. W.D. Wis. 2021). "The party obtaining relief from the automatic stay may persuade the court to grant a shorter time period for the debtor to seek a stay pending appeal, or even grant no time." *Id.* No analysis has been provided to support the request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and so the Court declines to do so.

Party Information

Debtor(s):

Donna Hachey

Represented By
Steven Abraham Wolvek

Movant(s):

U.S. Bank N.A., as trustee, on behalf

Represented By
Holly R Shilliday
Kristin A Schuler-Hintz
Sean C Ferry

Trustee(s):

Elizabeth (ND) F Rojas (TR)

Pro Se

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9:23-10312 Maryanne H Leonard

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#6.00 HearingRE: [75] Notice of motion and motion for relief from automatic stay with supporting declarations ACTION IN NON-BANKRUPTCY FORUM RE: . (Kelly, Brandon)

Docket 75

Tentative Ruling:

May 7, 2024

Appearances waived. The Court will deny the Motion without prejudice for the reasons stated *infra*. Debtor to upload a conforming order within 7 days.

Tim Bouchez dba Tim Bouchez Construction ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) to proceed against the debtor, Maryanne H. Leonard (the "Debtor"), in the nonbankruptcy action *Bouchez v. Leonard Revocable Trust, et al.* (56-2022-00567163-CU-BC-VTA) filed on June 16, 2022 (the "Nonbankruptcy Action"), pending before the Superior Court for the State of California, Ventura County. *See Notice of Motion and Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 (Action in Nonbankruptcy Forum)* (the "Motion") (Docket No. 75).

Movant seeks relief from stay on the grounds that (1) the claims arise under nonbankruptcy law and can be most expeditiously resolved in the nonbankruptcy forum, (2) the bankruptcy case was filed in bad faith, and (3) the Debtor listed Leonard Revocable Trust (the "Trust") as a dba, but the Trust is a separate entity and not a dba of the Debtor, and the Debtor is not a party in the Nonbankruptcy Action. *See Motion*, pp. 3-4. Movant also requests relief to proceed under applicable nonbankruptcy law to enforce its remedies to proceed to final judgment in the nonbankruptcy forum, provided that the stay remains in effect with respect to enforcement of any judgment against the Debtor or the property of the Debtor's bankruptcy estate. *See Motion*, p. 4.

Notice

Pursuant to this Court's Local Rule 4001-1(c)(1)(C)(i), a lift stay motion must be

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served by the moving party upon "[t]he debtor and debtor's attorney (if any)." Under the Federal Rules of Bankruptcy Procedure, to properly serve a motion for relief from automatic stay upon an individual in accordance with Fed. R. Bankr. P. 4001(a)(1), Fed. R. Bankr. P. 9014(b), and Fed. R. Bankr. P. 7004(b)(1), the Motion may be served via one of the methods prescribed under Fed. R. Civ. P. 4(e)-(f), or upon an individual in the United States, "service may be made within the United States by first class mail postage prepaid." Fed. R. Bankr. P. 7004(b).

The Motion was filed and served on March 12, 2024, upon the Debtor's counsel Brian Diaz. *See Proof of Service*, p. 9. On March 13, 2024, Movant filed that *Notice of Motion for: Relief from the Automatic [sic] stay under 11 u.s.c. [sic] 362* (the "Notice"). *See* Docket No. 77. The Notice was served upon the Debtor's counsel Brian Diaz on March 12, 2024. The Debtor is not listed as a recipient via NEF, nor does the Motion or the Notice list her real property address on the *Proof of Service of Document* as having been served via U.S. Mail first class, postage prepaid. The Motion was also not served upon the Leonard Revocable Trust. Therefore, notice of the Motion was improper.

On April 23, 2024, the Debtor filed *Debtor's Opposition to Motion for Relief from the Automatic Stay Filed by Tim Bouchez & Sons* (the "Opposition"). *See* Docket No. 84. In the Opposition, the Debtor asserts that (1) the Motion is procedurally defective, (2) Movant failed to establish cause for stay relief, (3) stay relief will cause serious interference with the Debtor's bankruptcy case, (4) Movant failed to show a scheme to delay or hinder, and (5) Movant's continued prosecution of the Nonbankruptcy Action is a violation of the stay. *See id.*

Analysis

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay for cause, including the lack of adequate protection of an interest in property of such party in interest." Beyond the lack of adequate protection, "cause" is determined on a case-by-case basis. *See In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985). "Courts in the Ninth Circuit have granted stay relief to permit the conclusion of pending litigation in a nonbankruptcy forum when the litigation involves multiple parties or is ready for trial." *In re Wang*, 2010 WL 6259970 *5 (9th Cir. BAP 2010)(citing *In re*

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Tucson Estates, Inc., 912 F.2d 1162, 1169 (9th Cir. 1990). "Courts have also considered whether permitting the conclusion of pending litigation is in the interest of judicial economy or within the expertise of a state court." *Id.* (citing *In re MacDonald*, 755 F.2d 715 at 717).

"Courts evaluate several non-exclusive factors to determine if cause exists to permit pending litigation to continue in another forum [including:]

- (1) Whether the relief will result in a partial or complete resolution of the issues;
- (2) The lack of any connection with or interference with the bankruptcy case;
- (3) Whether the foreign proceeding involves the debtor as a fiduciary;
- (4) Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases;
- (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;
- (6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question;
- (7) Whether the litigation in another forum would prejudice the interests of other creditors, the creditor's committee and other interested parties;
- (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination;
- (9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f);
- (10) The interests of judicial economy and the expeditious and economical determination of litigation for the parties;
- (11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial; and
- (12) The impact of the stay and the 'balance of the hurt.'"

Id. (citing *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Ut. 1984); *In re Plumberex Specialty Prods., Inc.*, 311 B.R. 551, 559 (Bankr. C.D. Cal. 2004); *In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1286 (2d Cir. 1990); *In re Smith*, 389 B.R. 902, 918-919 (Bankr. D. Nev. 2008).

As noted, the so-termed *Curtis* factors are non-exclusive. This Court, in addition to the *Curtis* factors, also considers whether a proof of claim has been filed and any

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objection to any such proof of claim, and the status of the bankruptcy case itself. If a proof of claim has been filed, and absent any objection to that proof of claim, the underlying claim has been liquidated, and lifting the stay to pursue judgment may accomplish no more than what has already been accomplished through the proof of claim. *See 11 U.S.C. § 502(a)* ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest [] objects.").

The Status of the Case

The deadline to file a proof of claim in this case was July 5, 2023. *See Docket No. 4*. Movant was served with the notice of the proof of claim deadline on April 27, 2023. *See Docket No. 6, Certificate of Notice*. On May 23, 2023, the Debtor filed that Schedule E/F, listing Movant as having a disputed claim of \$0. *See Docket No. 16, Schedule E/F: Creditors Who Have Unsecured Claims*, p. 5. Movant filed no proof of claim in this case.

On June 12, 2023, the Debtor filed an initial Chapter 13 plan. *See Docket No. 21*. The Debtor filed a handful of amended plans, the most recent of which is a *3rd Amended Chapter 13 Plan* (the "Plan") filed on November 21, 2023. *See Docket No. 54*. The Debtor does not include Movant's claim in the Plan. *See id. The Plan was served on Movant. See id. at Proof of Service of Document*. Movant did not oppose confirmation of the Plan. An order approving the Plan was entered February 29, 2024. *See Docket No. 70*.

Curtis Factors

Movant failed to provide the Court with a copy of the complaint in the Nonbankruptcy Action or any analysis as to the *Curtis* factors in the Motion. Therefore, the Court is unable to determine whether Movant is entitled to relief from stay as to the Debtor or as to property of the estate.

Bad Faith

"The debtor's lack of good faith in filing a bankruptcy petition has often been used as cause for removing the automatic stay." *In re Arnold*, 806 F.2d 937, 939 (9th Cir. 1986). "The existence of good faith depends on an amalgam of factors and not upon a specific fact." *Id.* "The bankruptcy court should examine the debtor's financial status, motives, and the local economic environment." *Id.* The Ninth Circuit cited the Ninth

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Circuit Bankruptcy Appellate Panel regarding bad faith as follows:

If it is obvious that a debtor is attempting unreasonably to deter and harass creditors in their bona fide efforts to realize upon their securities, good faith does not exist. But if it is apparent that the purpose is not to delay or defeat creditors but rather to put an end to long delays, administration expenses ... to mortgage foreclosures, and to invoke the operation of the [bankruptcy law] in the spirit indicated by Congress in the legislation ... good faith cannot be denied.

Id. "Good faith is lacking only when the debtor's actions are a clear abuse of the bankruptcy process." *Id.* (citing *In re Thirtieth Place, Inc.*, 30 B.R. 503, 505 (9th Cir. BAP 1983) (quotation omitted).

Movant contends that bad faith exists in that the Debtor's timing of the filing of the petition indicates that it was intended to delay or interfere with the Nonbankruptcy Action. *See Motion*, p. 7. Specifically, Movant asserts that "[t]he [nonbankruptcy] action was filed on 06/16/22. Service of the summons and complaint was effectuated. After acknowledging [sic] service, Defendants failed to file responsive pleadings. On 10/18/22, defaults were entered. These defaults were not set aside. On 04/18/23, requests for judgement against both Defendants were filed. On 8/25/23, the requests for judgement [sic] were rejected due to the stay." *See id.*

The Court is not persuaded that this case was filed in bad faith. The Debtor's primary motivation in filing bankruptcy appears to be repaying her debts pursuant to the terms of her confirmed Plan. Movant was listed on that *Verification of Master Mailing List of Creditors* and that *Schedule E/F; Creditors Who Have Unsecured Claims*. *See Docket No. 3, Verification of Master Mailing List of Creditors*, p. 2; *see Docket No. 16, Schedule E/F; Creditors Who Have Unsecured Claims*, p. 5. Therefore, Movant received notice of the bankruptcy case and filings therein. Movant has not presented any evidence establishing that the Debtor filed the case in bad faith.

Party Information

Debtor(s):

Maryanne H Leonard

Represented By
Bryan Diaz

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Movant(s):

Tim Bouchez dba Tim Bouchez Co

Represented By
Brandon S. Kelly

Trustee(s):

Elizabeth (ND) F Rojas (TR)

Pro Se

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9:24-10081 David Jonathan Rice and Donna Marie Rice

Chapter 13

#7.00 Hearing

RE: [36] Notice of motion and motion for relief from the automatic stay with supporting declarations UNLAWFUL DETAINER RE: 933 Westcreek Lane # 218, Westlake Village, CA 91362 with Exhibits A through C and Proof of Service of Documents.

Docket 36

*** VACATED *** REASON: Withdrawn by movant on 3/26/24.

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

David Jonathan Rice

Represented By
Bryan Diaz

Joint Debtor(s):

Donna Marie Rice

Represented By
Bryan Diaz

Movant(s):

Teachers Insurance and Annuity

Represented By
Agop Gary Arakelian

Trustee(s):

Elizabeth (ND) F Rojas (TR)

Pro Se

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9:24-10233 Steven Paul Jensen

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#8.00 Hearing RE: [12] Notice of motion and motion for relief from the automatic stay with supporting declarations UNLAWFUL DETAINER RE: 1832 Fallview Road, Westlake Village, CA 91361 . (Sutter, Randall)

Docket 12

Tentative Ruling:

May 7, 2024

Appearances waived. The Motion is granted pursuant to 11 U.S.C. §§ 362(d)(1) and (2). The request to waive Fed. R. Bankr. P. 4001(a) is denied. Movant to lodge a conforming order within 7 days.

Allan C. Mann ("Movant") seeks relief as to the residential property located at 1832 Fallview Road, Westlake Village, CA 91361 (the "Premises") through an order pursuant to 11 U.S.C. §§ 362(d)(1) and 362(d)(2) on the grounds that 'cause' exists as to the debtor Steven Paul Jensen (the "Debtor") because the Debtor has no right to continued occupancy of the Premises. *See Motion for Relief from the Automatic Stay or for An Order Confirming That Automatic Stay Does Not Apply Under 11 U.S.C. § 362(l)* (the "Motion") (Docket No. 12). [FN 1]

On January 10, 2024, Movant caused a notice to quit to be served on the Debtor. *See Motion*, p. 7. An unlawful detainer proceeding was commenced on January 24, 2024. *See id.* Under 11 U.S.C. § 362(d)(1), Movant contends that: (1) the stay should be lifted to allow eviction of the Debtor from the Premises because Debtor's right to possession of the Premises terminated prepetition due to the termination of the lease based on maturity as of January 15, 2024, and lease payments have not been made after the filing of the bankruptcy petition; and (2) pursuant to 11 U.S.C. § 362(d)(2) (A), the Debtor has no equity in the Premises, and pursuant to 11 U.S.C. § 362(d)(2) (B), the Premises are not necessary for reorganization. *See id.*, pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Premises, (2) the 14-day stay prescribed by FRBP 4001(a)(3) be waived, (3) a designated law enforcement officer may evict the Debtor and any other occupant from

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the Premises regardless of any future bankruptcy filing concerning the Premises for a period of 180 days from the hearing of this motion without further notice, (4) the order be binding and effective in any bankruptcy case commenced by or against any debtor who claims any interest in the Premises for a period of 180 days from the hearing of this Motion without further notice, (5) the order be binding in any other bankruptcy case purporting to affect the Premises filed not later than 2 years after the date of entry of such order, except that a debtor in a subsequent case may move for relief from the order based upon changed circumstances or for good cause shown, after notice and hearing, and (6) the order be binding and effective in any bankruptcy case commenced by or against the Debtor for a period of 180 days, so that no further automatic stay shall arise in that case as to the Premises. *Id.* at 4-5.

Notice

The Motion and notice thereof were served upon the Debtor via U.S. Mail First class, postage prepaid on April 3, 2024, notifying the Debtor that pursuant to this Court's Local Rule 9013-1(d), any opposition to the Motion must be filed and served no less than fourteen (14) days prior to the hearing on the Motion. *See id.*, *Proof of Service of Document*, p. 9. Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." Neither the Debtor, nor any other party served with the Motion has timely filed an opposition to the Motion. The Court therefore takes the default of all non-responding parties, including the Debtor.

Analysis

11 U.S.C. § 362(d)(1)

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay for cause, including the lack of adequate protection of an interest in property of such party in interest." Beyond the lack of adequate protection, "cause" is determined on a case-by-case basis. *See In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985).

As to "cause" under 11 U.S.C. § 362, Movant asserts that the Debtor has not paid monthly rent of \$5,100.00 beginning on November 1, 2023, with \$4,000.00 of the rent

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paid in November 2023, and no additional rent paid since that time. **[FN 2]** *See* Motion, p. 6. Schedule G does not identify the lease agreement with Movant, therefore, it appears that the Debtor does not intend to assume the lease associated with the Premises. *See Docket No. 10, Schedule G: Executory Contracts and Unexpired Leases*, p. 1. The failure to pay post-petition lease payments on real property lease may constitute cause to lift the stay under 11 U.S.C. § 362(d)(1). *See In re Rocchio*, 125 B.R. 345, 347 (Bankr. D. RI 1991); *see also In re Touloumis*, 170 B.R. 825 (Bankr. S.D.N.Y. 1994); 11 U.S.C. § 365(d)(3)(A).

As the Debtor has failed to make lease payments to Movant post-petition, the Motion is granted pursuant to 11 U.S.C. § 362(d)(1).

11 U.S.C. § 362(d)(2)

Pursuant to 11 U.S.C. § 362(d)(2), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay with respect to a stay of an act against property under subsection (a) of this section, if (A) the debtor does not have an equity in such property and (B) such property is not necessary to an effective reorganization." "Since reorganization is not relevant in Chapter 7, the only issues is whether there is equity in the property." *In re Preuss*, 15 B.R. 896, 897 (9th Cir. BAP 1981).

As there exists no equity in the Premises for the Debtor, and because the instant case is one under Chapter 7, the Motion is granted pursuant to 11 U.S.C. § 362(d)(2).

4001(a)(3) Waiver

As to Fed. R. Bankr. P. 4001(a)(3), "[t]he purpose of this provision is to permit a short period of time for the debtor or the party opposing relief to seek a stay pending an appeal of the order." *In re Sternitzky*, 635 B.R. 353, 361 (Bankr. W.D. Wis. 2021). "The party obtaining relief from the automatic stay may persuade the court to grant a shorter time period for the debtor to seek a stay pending appeal, or even grant no time." *Id.* No analysis has been provided to support the request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and so the Court declines to do so.

[FN 1] Movant checks the box that pursuant to 11 U.S.C. § 362(b)(22) and (23) there is no stay because Movant commenced an eviction, unlawful detainer

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action or similar proceeding against the Debtor involving residential property in which the Debtor resides and: (1) the Debtor has not filed and served on Movant the certification required under 11 U.S.C. § 362(l)(1); (2) the Debtor or adult dependent of the Debtor has not deposited with the clerk any rent that would become due during the 30-day period after the filing of the petition; and (3) the Debtor or adult dependent of the Debtor has not filed and served on Movant the further certification required under 11 U.S.C. § 362(l)(2) that the entire monetary default that gave rise to the judgment has been cured.

[FN 2] Movant appears to have a typographical error in the Motion and misstates the year as 2024 as opposed to 2023.

Party Information

Debtor(s):

Steven Paul Jensen

Represented By
Brian Nomi

Movant(s):

Allan C Mann

Represented By
Randall V Sutter

Trustee(s):

Jeremy W. Faith (TR)

Pro Se

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9:24-10181 Alan J Cavaletto

Chapter 12

#9.00 Hearing

RE: [19] Motion for Relief from Stay (with supporting declarations) (Personal Property).

Docket 19

***** VACATED *** REASON: Voluntarily dismissed by movant on 4/25/2024.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Alan J Cavaletto

Represented By
William C Beall
Carissa N Horowitz

Movant(s):

Farm Credit Services of America,

Represented By
Thomas G Mouzes

Trustee(s):

Elizabeth (ND) F Rojas (TR)

Pro Se

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9:23-10945 Jeffrey Dennis Peppard

Chapter 11

#10.00 HearingRE: [80] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 420 Old Coast Highway Santa Barbara, CA 93103 Under 11 U.S.C. § 362. (Exnowski, Dane)

Docket 80

Tentative Ruling:

May 7, 2024

Appearances waived. Motion is denied for the reasons stated *infra*. Movant to lodge a conforming order within 7 days.

Wilmington Savings Fund Society, FSB ("Movant") seeks a lifting of the automatic stay, to the extent there is a stay, pursuant to 11 U.S.C. § 362(d)(1) in relation to the real property located at 420 Old Coast Highway, Santa Barbara, CA 93103 (the "Property") of Jeffrey Dennis Peppard (the "Debtor") on the grounds that the Debtor is no longer the owner of record of the Property. *See* Docket No. 80, *Motion for Relief from Stay Under 11 U.S.C. § 362* (the "Motion"), pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) confirmation that there is no stay in effect, and (3) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3). *See id.* at p. 12.

Notice

Pursuant to Local Bankruptcy Rule 4001-1(c), "[t]he motion [for relief from automatic stay], notice of hearing, and all supporting documents must be served by the moving party in the time and manner prescribed in LBR 9013-1(d). . ." Pursuant to Local Bankruptcy Rule 9013-1(d), "[t]he notice of motion and motion must be filed and served not later than 21 days before the hearing date designated in the notice. . ."

The Motion and notice thereof were filed on April 11, 2024, and served upon the Debtor via U.S. Mail First class, notifying the Debtor that pursuant to this Court's Local Rule 9013-1(d), any opposition to the Motion must be filed and served no less

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than fourteen (14) days prior to the hearing on the Motion. *See id., Proof of Service of Document*, p. 12. There is no date of service listed in sections 1 and 2 of that *Proof of Service of Document*. Therefore, the Court cannot determine if the Motion was timely served on any parties.

Analysis

Pursuant to 11 U.S.C. § 362(a), "[e]xcept as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of . . . (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; . . ."

All of the debtor's legal and equitable interests in property at commencement of the bankruptcy case are automatically included in the bankruptcy estate. 11 USC § 541(a) (1); *see also Clark v. Rameker*, 573 U.S. 122, 134 S. Ct. 2242, 2244, 189 L. Ed. 2d 157 (2014). Property in which the debtor has no legal or equitable interest when the bankruptcy petition is filed does not come into the estate. *See In re Fadel*, 492 B.R. 1, 11 (B.A.P. 9th Cir. 2013).

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1).

Here, the Debtor does not list the Property on his Schedule A/B. *See Docket No. 1, Schedule A/B: Property*. The Debtor does identify Movant and the Property in his Schedule D, noting that Movant has a "[l]oan secured with 420 Old Coast Hwy Santa Barbara, CA 93103, title holder is Debtor's former spouse." *See Docket No. 63, Schedule D: Creditors Who Have Claims Secured by Property*, p. 2. The Deed of

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Trust, Adjustable Rate Note, and Assignment of Deed of Trust (dated roughly two months ago on February 23, 2024, and after the Debtor filed his amended Schedule D) submitted in support of the Motion indicate that the Debtor was granted an interest in the Property on February 28, 2007, and it remains his sole and separate property. *See* Docket No. 80, *Exhibits 1-3*.

The evidence submitted with the Motion appears to provide that the Debtor did on the petition date, and continues to own the Property. While the Debtor's amended Schedule D provides that the Property is titled in his former spouse's name, that is not what the recorded documents show, including a recorded document attached to the Motion that is dated after the amended Schedule D was filed. By all accounts, and by Movant's own evidence, the Property has been since 2007, and is currently property of the estate. As this was Movant's sole argument to lift the stay, cause has not been shown to lift the stay, and so the Motion is denied.

Party Information

Debtor(s):

Jeffrey Dennis Peppard

Represented By
Jeffrey S Shinbrot

Movant(s):

Wilmington Savings Fund Society

Represented By
Dane W Exnowski

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9:19-10992 La Cuesta Farming Co., Inc.

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#11.00 HearingRE: [134] Motion to approve compromise - for preliminary approval of class action settlement; Notice of Motion; Memorandum of Points and Authorities; Proof of Service (Kautz, Ezra)

Docket 134

Tentative Ruling:

May 7, 2024

Appearances waived.

This matter is continued to June 18, 2024, at 1:00 p.m.

Party Information

Debtor(s):

La Cuesta Farming Co., Inc. Represented By
Jerry Namba

Movant(s):

Juana Velasco-Torres Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz
Nancy Hanna

Gabriela Rendon-Vasquez Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz
Nancy Hanna

Cesar Jimenez-Mendoza Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz

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Nancy Hanna

Benito Perez-Reyes

Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz
Nancy Hanna

Luis Morales-Garcia

Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz
Nancy Hanna

Trustee(s):

Jeremy W. Faith (TR)

Represented By
Noreen A Madoyan
Meghann A Triplett
Anna Landa

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9:19-10992 La Cuesta Farming Co., Inc.

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#12.00 CONT'D Hearing

RE: [130] Motion to Approve Compromise Under Rule 9019 Motion for Order Authorizing the Trustee to Compromise Controversy with Luis Morales-Garcia, Benito Perez-Reyes, Cesar Jimenez-Mendoza, Gabriela Rendon-Vasquez, and Juana Velasco-Torres Pursuant to F.R.B.P. 9019; Memorandum of Points and Authorities; Declaration of Chapter 7 Trustee, Jeremy W. Faith in Support (Triplett, Meghann)

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Docket 130

Tentative Ruling:

May 7, 2024

Appearances waived.

This matter is continued to June 18, 2024, at 1:00 p.m.

April 9, 2024

Appearances required.

Background

On June 6, 2018, Luis Morales-Garcia, Benito Perez-Reyes, Cesar Jiminez-Mendoza, Gabriela Rendon-Vasquez and Juana Velasco-Torres (the "Creditors"), on behalf of a class of approximately 1,280 others, filed a complaint against the below defined Debtors, asserting several causes of action related to the class members' work for the Debtors in 2016 and 2017. *See Case No. 9:19-bk-10992-RC, Docket No. 130, Motion for Order Authorizing the Trustee to Compromise Controversy with Luis Morales-Garcia, Benito Perez-Reyes, Cesar Jiminez-Mendoza, Gabriela Rendon-Vasquez, and Juana Velasco-Torres Pursuant to F.R.B.P. 9019* (the "Motion"). During the aforementioned litigation, and before certification of the class, "the Debtors each

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defaulted and filed voluntary bankruptcy petitions under Chapter 7" as detailed below.
See id. at p. 3, lines 26-28.

On May 31, 2019, La Cuesta Farming Co., Inc. filed a voluntary petition for relief pursuant to Chapter 7 of Title 11 of the U.S. Code. *See Case No. 9:19-bk-10992-RC, Docket No. 1, Voluntary petition for Non-Individuals Filing for Bankruptcy.* On October 29, 2019, Higuera Farms, Inc. filed a voluntary petition for relief pursuant to Chapter 7 of Title 11 of the U.S. Code. *See Case No. 9:19-bk-11789-RC, Docket No. 1, Voluntary petition for Non-Individuals Filing for Bankruptcy.* On July 13, 2020, Big F Company, Inc. filed a voluntary petition for relief pursuant to Chapter 7 of Title 11 of the U.S. Code. *See Case No. 9:20-bk-10860-RC, Docket No. 1, Voluntary petition for Non-Individuals Filing for Bankruptcy.* La Cuesta Farming Co., Inc., Higuera Farms, Inc., and Big F Company, Inc., collectively, hereinafter will be referred to as the "Debtors."

The Creditors filed class proofs of claim in each of the Debtors' cases. *See Case No. 9:19-bk-10992-RC, Claim No. 4; Case No. 9:20-bk-10860-RC, Claim No. 2; and Case No. 9:19-bk-11789-RC, Claim No. 5.* This Court has not certified the Creditors' purported class(es).

On or about March 18, 2024, Jeremy W. Faith, the duly appointed Chapter 7 Trustee in each of the Debtors' bankruptcy cases (the "Trustee") and the Creditors entered into that *Settlement Agreement* (the "Agreement"). *See Case No. 9:19-bk-10992-RC, Docket No. 130, Exhibit 1.* The Agreement resolves the Creditors' claims against the Debtors' bankruptcy estates. An unknown settlement administrator is to "negotiate an economical fee while ensuring adequate notice to [the Creditors]," and administer the settlement amounts to the Creditors. *See id.* at p. 22, lines 11-15. "No money will be allocated from the Settlement Funds for attorney fees, attorney costs, or PAGA penalties." *Id.* at p. 23, lines 3-4. The Agreement provides that "after execution of this Agreement, [the Creditors] will file a motion for conditional class certification and preliminary approval of the Agreement, including notice to the class and a date for final approval of the Agreement, and the Trustee will file a motion for approval of compromise." *See id.* at p. 24, lines 19-23.

On March 19, 2024, the Trustee filed the Motion, seeking approval of the Agreement pursuant to Fed. R. Bankr. P. 9019. *See Docket No. 130.*

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Analysis

"There is a 'strong judicial policy in favor of settlements, particularly in the class action context.'" *In re Partsearch Technologies, Inc.*, 453 B.R. 84, 98 (Bankr. S.D.N.Y. 2011)(citing *In re PaineWebber Ltd. P'Ships Litig.*, 144 F.3d 132, 138 (2d Cir. 1998)). "Rule 23 does not provide for 'preliminary approval' or a 'preliminary fairness determination.' Over the years, however, the *Complex Litigation Manual* has come to use that term for what a court does in deciding to order notice to the class of a settlement." *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 236 F.R.D. 53, 55 (D. Me. 2006). Some courts have employed a two-step class action settlement process, utilizing preliminary approvals of settlement agreements. "Procedurally speaking, court review of a proposed class action settlement is subject to two steps." *In re Partsearch Technologies, Inc.*, 453 B.R. at 98. "First, the settlement must be preliminarily approved by the Court. [] Once the court preliminarily approved the settlement, 'it then must direct the preparation of notice informing class members of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing.'" *Id.* Upon preliminary approval of a class-action settlement, the court must direct the preparation of the notice of the certification of a settlement class, the proposed settlement, and the date of the final fairness hearing." *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345 (D. N.Y. 2006); *see also Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007); *Uschold v. NSMG Shared Services, LLC*, 333 F.R.D. 157, 166 (N.D. Cal. 2019) ("Where, as here, parties reach an agreement before class certification, 'courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.' [] If the court preliminarily certifies the class and finds the settlement appropriate after 'a preliminary fairness evaluation,' then the class will be notified, and a final fairness hearing scheduled to determine if the settlement is fair, adequate, and reasonable pursuant to Rule 23.").

"In determining whether a settlement is fair, adequate, and reasonable to all concerned, courts generally consider the following factors: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a

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governmental participant; and (8) the reaction of the class members of the proposed settlement." *Uschold v. NSMG Shared Services, LLC*, 333 F.R.D. at 169 (internal citations omitted). "However, when 'a settlement agreement is negotiated prior to formal class certification, consideration of these eight...factors alone is' insufficient. *Id.* In such cases, courts must not only consider the above factors, but also ensure that the settlement did not result from collusion among the parties." *Id.* Courts have identified certain signs of collusion, including "(1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded; (2) when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class; and (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Id.* "Preliminary approval is thus appropriate if 'the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.'" *Id.* (internal citations omitted).

"The ultimate approval of a class action settlement depends on 'whether the settlement is fair, adequate, and reasonable. [] In evaluating a proposed settlement for preliminary approval, however, the Court is required to determine only whether 'the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.' [] At this stage, the Court 'need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute.' [] A common inquiry is whether the proposed settlements is the result of 'arms-length negotiations.'" *Mehling v. New York Life Inc. Co.*, 246 F.R.C. at 472.

The Court maintains a bit of confusion with the procedure invoked by the Trustee with the Motion. Generally speaking, conditional approval of class settlement agreements are sought alongside conditional certification of the class, and approval of the notice procedures to the class of the settlement agreement. As cited *supra*, the Court approves notice to the class and sets a final determination hearing in

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conjunction with the conditional approval of a settlement agreement. Conditional approval of the Agreement should, it seems to the Court, be analyzed under both Fed. R. Bankr. P. 9019 and 23. *See In re Motors Liquidation Co.*, 591 B.R. 501, 526-527 (Bankr. S.D.N.Y. 2018). In fact, the Agreement specifically calls for the filing of a "motion for conditional class certification and preliminary approval of the Agreement, including notice to the class and a date for final approval of the Agreement..." *See* Docket No. 130, p. 24, lines 19-23. The Agreement's clause that "the Trustee will file a motion for approval of compromise" appears to require the Court to visit the Agreement twice, once through the Motion, and again when the Creditors move the Court for preliminary approval of the Agreement.

The Court is unclear about what is to be accomplished through the Motion that should not be accomplished through the broader settlement package that is to be filed by the Creditors, presumably with the Trustee as a joint movant.

The Court will inquire with the Trustee on these issues. The Court's inclination is to continue the Motion to be heard alongside the broader settlement documents that the Agreement contemplates that the Creditors will file to obtain preliminary and final approval of the Agreement.

Party Information

Debtor(s):

La Cuesta Farming Co., Inc.

Represented By
Jerry Namba

Movant(s):

Jeremy W. Faith (TR)

Represented By
Noreen A Madoyan
Meghann A Triplett
Anna Landa

Trustee(s):

Jeremy W. Faith (TR)

Represented By
Noreen A Madoyan
Meghann A Triplett
Anna Landa

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9:19-11789 Higuera Farms, Inc.

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#13.00 HearingRE: [109] Motion to approve compromise - for preliminary approval of class action settlement; Notice of Motion; Memorandum of Points and Authorities; Proof of Service (Kautz, Ezra)

Docket 109

Tentative Ruling:

May 7, 2024

Appearances waived.

This matter is continued to June 18, 2024, at 1:00 p.m.

Party Information

Debtor(s):

Higuera Farms, Inc. Represented By
Jerry Namba

Movant(s):

Juana Velasco-Torres Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz
Nancy Hanna

Gabriela Rendon-Vasquez Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz
Nancy Hanna

Cesar Jimenez-Mendoza Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz

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Nancy Hanna

Benito Perez-Reyes

Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz
Nancy Hanna

Luis Morales-Garcia

Represented By
Cynthia Rice
Cecilia Guevara Langberg
Ezra Kautz
Nancy Hanna

Trustee(s):

Jeremy W. Faith (TR)

Represented By
Noreen A Madoyan
Meghann A Triplett
Anna Landa

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#14.00 CONT'D Hearing

RE: [105] Motion to Approve Compromise Under Rule 9019 Motion for Order Authorizing the Trustee to Compromise Controversy with Luis Morales-Garcia, Benito Perez-Reyes, Cesar Jimenez-Mendoza, Gabriela Rendon-Vasquez, and Juana Velasco-Torres Pursuant to F.R.B.P. 9019; Memorandum of Points and Authorities; Declaration of Chapter 7 Trustee, Jeremy W. Faith in Support (Triplett, Meghann)

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Docket 105

Tentative Ruling:

May 7, 2024

Appearances waived.

This matter is continued to June 18, 2024, at 1:00 p.m.

April 9, 2024

See calendar item 16.

Party Information

Debtor(s):

Higuera Farms, Inc.

Represented By
Jerry Namba

Movant(s):

Jeremy W. Faith (TR)

Represented By
Noreen A Madoyan
Meghann A Triplett
Anna Landa

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Trustee(s):

Jeremy W. Faith (TR)

Represented By
Noreen A Madoyan
Meghann A Triplett
Anna Landa

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9:20-10860 BIG F COMPANY, INC.

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#15.00 HearingRE: [94] Motion to approve compromise - for preliminary approval of class action settlement; Notice of Motion; Memorandum of Points and Authorities; Proof of Service (Kautz, Ezra)

Docket 94

Tentative Ruling:

May 7, 2024

Appearances waived.

This matter is continued to June 18, 2024, at 1:00 p.m.

Party Information

Debtor(s):

| | |
|---------------------|------------------------------------|
| BIG F COMPANY, INC. | Represented By Hagop T. Bedoyan |
|---------------------|------------------------------------|

Movant(s):

| | |
|-------------------------|------------------------------|
| Juana Velasco-Torres | Represented By Ezra Kautz |
| Gabriela Rendon-Vasquez | Represented By Ezra Kautz |
| Cesar Jimenez-Mendoza | Represented By Ezra Kautz |
| Benito Perez-Reyes | Represented By Ezra Kautz |
| Luis Morales-Garcia | Represented By Ezra Kautz |

Trustee(s):

| | |
|----------------------|----------------|
| Jeremy W. Faith (TR) | Represented By |
|----------------------|----------------|

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Meghann A Triplett
Anna Landa

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9:20-10860 BIG F COMPANY, INC.

Chapter 7

#16.00 CONT'D Hearing

RE: [90] Motion to Approve Compromise Under Rule 9019 Motion for Order Authorizing the Trustee to Compromise Controversy with Luis Morales-Garcia, Benito Perez-Reyes, Cesar Jimenez-Mendoza, Gabriela Rendon-Vasquez, and Juana Velasco-Torres Pursuant to F.R.B.P. 9019; Memorandum of Points and Authorities; Declaration of Chapter 7 Trustee, Jeremy W. Faith in Support (Triplett, Meghann)

FR. 4-9-24

Docket 90

Tentative Ruling:

May 7, 2024

Appearances waived.

This matter is continued to June 18, 2024, at 1:00 p.m.

April 9, 2024

See calendar item 16.

Party Information

Debtor(s):

BIG F COMPANY, INC.

Represented By
Hagop T. Bedoyan

Movant(s):

Jeremy W. Faith (TR)

Represented By
Meghann A Triplett
Anna Landa

**United States Bankruptcy Court
Central District of California
Northern Division
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Tuesday, May 7, 2024

Hearing Room 201

10:00 AM

CONT... BIG F COMPANY, INC.

Chapter 7

Trustee(s):

Jeremy W. Faith (TR)

Represented By
Meghann A Triplett
Anna Landa

United States Bankruptcy Court
Central District of California
Northern Division
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Courtroom 201 Calendar

Tuesday, May 7, 2024

Hearing Room 201

2:00 PM

9:09-14013 David W Brown

Chapter 7

#17.00 Hearing
RE: [18] Motion to Reopen Chapter 7 Case . Filed by Debtor

Docket 18

Tentative Ruling:

May 7, 2024

Appearances waived. Motion is denied for the reasons stated *infra*. The Court will enter its own order.

Background

On September 30, 2009, David W. Brown (the "Debtor") filed a voluntary petition or relief pursuant to Chapter 7 of Title 11 of the United States Code. *See* Docket No. 1. On March 31, 2010, the Court's Clerk entered that *Discharge of Debtor* (the "Discharge"). *See* Docket No. 13. On May 7, 2010, the Court's Clerk entered that *Order Closing Case*. *See* Docket No. 17. On March 15, 2024, the Debtor filed that *Notice of Motion* (the "Motion"), requesting that the instant case be reopened so that they may seek "declaratory relief that Debtor's student loan [] was discharged by operation of law on 03/31/2010 because it is not an educational debt excepted from discharge by section 523(a)(8)." *See* Docket No. 18.

Notice

Pursuant to this Court's Local Rule 5010-1(c), "[t]he movant must give notice of the motion to any former trustee in the case and the United States trustee." The Motion, or notice thereof was not served on the former Chapter 7 trustee or the Office of the United States Trustee by the Debtor. *See* Docket No. 20, *Certificate of Service*. The Debtor's failure to provide the former Chapter 7 trustee and the Office of the United States trustee with notice of the Motion results in this Court's denial of the Motion for its failure to comply with this Court's Local Rule 5010-1.

Analysis

Pursuant to this Court's Local Rule 5010-1(a), "[a] motion to reopen a closed

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CONT... David W Brown

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bankruptcy case must be supported by a declaration establishing a reason or 'cause' to reopen." In accordance with 11 U.S.C. § 350(b), "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." In deciding whether to reopen a case, courts may consider a number of factors, including (1) the length of time the case has been closed (laches), (2) whether the debtor would be entitled to relief if the case were reopened, (3) the availability of nonbankruptcy courts to entertain the claim, (4) the benefit to creditors, (5) the benefit to the debtor, (6) the prejudice to affected parties, (7) whether the estate has been fully administered, and (8) good faith. *See In re Consolidated Freightways Corp.*, 553 B.R. 396, 399 (C.D. Cal. 2016).

Even if the Debtor had provided appropriate notice of the Motion, the Court would deny the Motion on the merits. First, the Discharge was entered fourteen (14) years ago. The instant case was closed nearly fourteen (14) years ago. The length of time that has lapsed since the instant case was closed, this Court finds, should alone result in denial of the Motion. What is more, other than well delineated exceptions, the Discharge resulted in a discharge of the Debtor's pre-petition obligations. Pursuant to 11 U.S.C. § 523(a)(8), "unless excepting such debt from discharge [] would impose an undue hardship on the debtor and the debtor's dependents, [a debtor is not discharged from] an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." If the Debtor had educational loans that fell within 11 U.S.C. § 523(a)(8) when the instant case was filed, unless the Debtor moved to discharge those loans under the "undue hardship" exception under 11 U.S.C. § 523(a)(8), those educational loans were excepted from the Discharge. The Motion provides the Court with no cognizable argument as to why any such educational loans would have been excepted from the Discharge other than a conclusory statement by the Debtor that the obligations were "discharged by operation of law." The Court has no facts or evidence to suggest that reopening the case, now fourteen (14) years after the instant case was closed, would result in any relief for the Debtor. The Motion is denied.

Party Information

Debtor(s):

David W Brown

Represented By

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CONT... David W Brown

Chapter 7

Sandra McBeth

Movant(s):

David W Brown

Represented By
Sandra McBeth

Trustee(s):

Jerry Namba (TR)

Pro Se

United States Bankruptcy Court
Central District of California
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Hearing Room 201

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9:20-11123 Peter James Compton

Chapter 7

#18.00 CONT'D Hearing

RE: [359] Motion to Approve Compromise Under Rule 9019 Amended 352
Motion to Approve Compromise Under Rule 9019

FR. 1-9-24, 2-6-24, 3-19-24, 4-23-24

Docket 359

Tentative Ruling:

May 7, 2024

Appearances required.

The Court has reviewed that *Augmented Memorandum of Points and Authorities In Support of Motion to Approve Compromise Under FRBP 9019* (the "Memo"). *See* Docket No. 389. Nutrien Ag Solutions, Inc. ("Nutrien") asserts through the Memo that "[a]lthough the settlement provides for payment of the proceeds to Plaintiff, case law appears to support the court's view that the payment must be provided to the Trustee. Plaintiff is willing to concede this point to have this matter resolved." *See id.* at p. 5, lines 3-5. Nutrien also asserts through the Memo that "[a]lthough Plaintiff does not oppose the proceeds going to the Trustee for the benefit of the Creditors, modifying and amending the Settlement Agreement would need the acknowledgment and ratification of the Debtor." *See id.* at p. 6, lines 4-6.

The Court is prepared to approve that *Notice of Motion and Motion to Approve Compromise Under FRBP 9019* (the "Motion"). *See* Docket No. 352. The Court's inquiry at this juncture is whether there must be a modification to that *Settlement Agreement* (the "Agreement") regarding the payment of the Settlement Payment to the Chapter 7 trustee in care of all creditors of the estate, or whether the parties are agreeable to a modification of the Agreement through an order granting the Motion.

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CONT... Peter James Compton

Chapter 7

Appearances required. To be called alongside Calendar Item 14.

Background

On September 14, 2020, Peter James Compton (the "Debtor"), filed with this Court a voluntary petition for relief pursuant to Chapter 7 of Title 11 of the United States Code (this "Bankruptcy Case"). *See* Case No. 9:20-bk-11123-RC, Docket No. 1.¹

On August 10, 2021, Nutrien Ag Solutions, Inc. ("Nutrien") filed in this Bankruptcy Case that *First Amended Complaint to Determine Dischargeability of Claim* (the "Complaint"). *See* Case No. 9:21-ap-01017-RC, Docket No. 17. The Complaint seeks to deny the Debtor's discharge in accordance with eighteen (18) causes of action, all pursuant to 11 U.S.C. §§ 727(a)(2), (4), (6) and/or (7). *See id.*

Succeeding two (2) years of litigation, the Debtor and Nutrien resolved the Complaint through that *Settlement Agreement* (the "Agreement"). *See* Docket No. 354, *Exhibit A*. The Agreement provides in relevant part:

Settlement Payment. In full satisfaction of any claims raised against [the Debtor] as alleged in [the Complaint], [the Debtor] individually and by and through his guardian ad litem, agrees to pay the total sum of one hundred fifty thousand dollars (\$150,000) ("Settlement Payment"). Payment shall be due upon approval by the Bankruptcy Court of [the Agreement] but [Nutrien] agrees to forebear collection of the Settlement Payment for 24 months from the date that the approval by the Bankruptcy Court is obtained.

Dismissal of Adversary Complaint. Within fourteen calendar days of entry of a Final Order approving this Agreement, [Nutrien] shall prepare and file a notice of dismissal of the Adversary Proceeding.

See Docket No. 354, *Exhibit A*.

On November 22, 2023, Nutrien filed that *Notice of Motion and Motion to Approve Compromise Under FRBP 9019* (the "Motion"), together with that *Memorandum of Points and Authorities In Support of Motion to Approve Compromise Under FRBP 9019* (the "Memorandum") and that *Declaration of Steven Stoker* (the "Declaration").

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CONT... Peter James Compton

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See Docket Nos. 352, 353 and 354, respectively. The Motion seeks this Court's approval of the Agreement pursuant to Fed. R. Bankr. P. 9019. *See* Docket No. 352, p. 4.

Analysis

Pursuant to Fed. R. Bankr. P. 9019(a), "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." The Ninth Circuit has held that "[i]n determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider: (a) [t]he probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises." *In re A & C Properties*, 784 F.2d 1377, 1381 (1986) (internal citations omitted). "Although the bankruptcy court has 'great latitude' in authorizing a compromise, it may only approve a proposal that is 'fair and equitable' to the creditors." *In re Mickey Thompson Entertainment Group, Inc.*, 292 B.R. 415, 420 (9th Cir. BAP 2003) (internal citations omitted).

Section "727 is a blanket prohibition against a debtor's discharge, that protects the rights of all creditors of the debtor at issue." *In re de Armond*, 240 B.R. 51, 55 (Bankr. C.D. Cal. 1999)(citing *In re Chalasani*, 92 F.3d 1300, 1309 (2d Cir. 1996)). "The underlying purpose of § 727 is to protect the integrity of the bankruptcy system by denying a bankruptcy discharge to a debtor who engages in certain specified objectionable conduct that is of a magnitude broader than injury to a single creditor." *Id.* (citing *In re Taylor*, 190 B.R. 413, 416 (Bankr. D. Colo. 1995)). "The denial of a discharge under § 727 benefits all the creditors of the bankruptcy estate equally." *Id.* "[T]he majority view, hold that any settlement of a § 727 claim is limited to those circumstances where the terms of the settlement are fair and equitable and in the best interest of the estate." *Id.* at 56 (citing *In re Mavrode*, 205 B.R. 716, 720 (Bankr. D.N.J. 1997); (*In re Taylor*, 190 B.R. at 416-417); *In re Speece*, 159 B.R. 314, 317 (Bankr. E.D. Cal. 1993)). "If a § 727 adversary proceeding is successful, it provides a benefit to all creditors in the case, because the debtor's discharge is denied in full. In consequence, a creditor who commences an adversary proceeding under § 727 becomes, in that respect, a fiduciary on behalf of all creditors." *Id.* at 57 (citing *In re Chalasani*, 92 F.3d 1300, 1310 (2d Cir. 1996); *In re Joseph*, 121 B.R. 679, 682

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(Bankr. N.D.N.Y. 1990); *In re Drenckhahn*, 77 B.R. 697, 701 (Bankr. D. Minn. 1987); *In re Bates*, 211 B.R. 338, 346 (Bankr. D. Minn. 1997)). "The dismissal of such a complaint necessarily affects all creditors of the debtor." *Id.* "[T]he fiduciary duties that a creditor assumes in making a § 727 claim must be reflected in the form of settlement. The settlement of such claims belongs to all creditors." *Id.* at 58; *see also In re Djili*, 2012 WL 5246510 *6 (Bankr. N.D. Cal. 2012)("The Court hereby determines that in order for the settlement to be fair and equitable, the settlement amount must benefit the estate and all creditors....the Court refuses to approve a settlement that benefits one creditor and only that creditor."). "[T]he discharge of plaintiff's fiduciaries in this case requires that settlement be shared with the parties to whom the fiduciary are owed. Thus, the settlement must be shared with the other creditors in this case." *Id.* "[T]he plaintiff's fiduciary duties require the plaintiff to turn over the settlement proceeds to the chapter 7 trustee for distribution among the creditors according to the priorities established by § 726. This remedy removes the taint from the compromise and satisfies the plaintiff's fiduciary duties to the creditors on the § 727 claims." *Id.* at 53.

In the case at bar, the Court finds that the probability of success of Nutrien on the Complaint remains uncertain. Nutrien was unsuccessful at the summary judgment stage, and the matter must be litigated to completion at this juncture absent a settlement. The collection prospects on any judgment is not at issue here in that the Complaint seeks a judgment deeming the Debtor's pre-petition obligations excepted from his discharge rather than a money judgment. Nutrien provides no analysis as to the remaining *A & C Props.* factors.

The Court, however, pauses to contemplate "the paramount interest of the creditors" factor. With the above-cited authorities in mind, the Court highlights that the Agreement provides that the Debtor is to pay \$150,000 to Nutrien in exchange for dismissal of the Complaint. Again, the Complaint is comprised solely of causes of action under 11 U.S.C. § 727(a). How then, the Court queries, does the Court approve the Agreement and the Motion where all creditors of the Debtor other than Nutrien take nought? It seems to the Court that as a preliminary point, the Motion must be amended to provide an analysis of the *A & C Props.* factors wholly, as the Motion and Memorandum are bare in their examination. Additionally, if the Court were to approve the Agreement through the Motion, any settlement proceeds, it seems to the Court, should be turned over to the Chapter 7 Trustee for distribution to all creditors

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CONT... Peter James Compton

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of the Debtor's estate in conformance with the priority scheme of 11 U.S.C. § 726.

The Court will inquire with the parties on the aforementioned issues.

Party Information

Debtor(s):

Peter James Compton

Represented By
Reed H Olmstead

Movant(s):

Nutrien Ag c/o Steven Stoker Esq.

Represented By
Steven R Stoker

Trustee(s):

Jerry Namba (TR)

Represented By
D Edward Hays
Laila Masud

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9:20-11123 Peter James Compton

Chapter 7

Adv#: 9:21-01017 Nutrien Ag Solutions, Inc. v. Compton

#19.00 Status Hearing

RE: [1] Adversary case 9:21-ap-01017. Complaint by Nutrien Ag Solutions, Inc. against Peter James Compton.

FR. 11-30-22, 1-11-23, 8-2-23, 10-2-23, 10-11-23, 11-22-23, 1-24-24, 2-6-24, 3-19-24, 4-23-24

Docket 1

Tentative Ruling:

May 7, 2024

Appearances required.

April 23, 2024

Appearances waived.

This matter is continued to May 7, 2024, at 2:00 p.m. to be heard alongside that *Motion to Approve Compromise*.

March 19, 2024

Appearances waived.

On March 1, 2024, the Court entered that *Order Continuing the Hearing on the Motion to Approve Compromise*. See Case No. 9:20-bk-11123-RC, Docket No. 377. This continued hearing relates to that *Motion to Approve Compromise*, which Motion's aim is to resolve the instant adversary proceeding. The Court continues the status conference to April 23, 2024, at 2:00 p.m. to be heard alongside the Motion.

February 6, 2024

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CONT... Peter James Compton
Appearances required.

Chapter 7

January 24, 2024

Appearances waived.

This matter has been settled. *See* Case No. 9:20-bk-11123-RC, Docket No. 359. The Court will continue the status conference to be heard alongside the continued hearing on the 9019 Motion on February 6, 2024, at 2:00 p.m.

November 22, 2023

Appearances waived.

It appears this matter has settled, and a motion to approve the settlement has been filed. The status conference is continued to January 24, 2024, at 10:00 a.m.

October 11, 2023

Appearances waived.

The Court has reviewed that *Joint Status Report* and *Plaintiff's Supplement to Joint Status Report*. *See* Docket Nos. 142 and 143, respectively. The Court will continue the status conference to November 22, 2023, at 10:00 a.m. to allow the parties to document and obtain approval of the underlying settlement.

October 2, 2023

Appearances waived.

On June 29, 2023, the Court entered that *Order Approving Stipulation for Continuance of Trial* (the "Order"). *See* Docket No. 139. Among other things, the Order required the parties "to file a Joint Status Report on or before September 18, 2023 informing the Court of the status of settlement." *See id.* at p. 2. The Court has reviewed the late filed *Plaintiff's Unilateral Status Report*. *See* Docket No. 141. The Court has not located a status report from Defendant as required by the Order.

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CONT... Peter James Compton

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The Court continues the status conference to October 11, 2023, at 10:00 a.m. A "joint" status report is to be filed on or before October 2, 2023.

November 30, 2022

No appearances required.

This matter is continued to January 11, 2023, at 10:00 a.m.

Party Information

Debtor(s):

| | |
|---------------------|-----------------------------------|
| Peter James Compton | Represented By Reed H Olmstead |
|---------------------|-----------------------------------|

Defendant(s):

| | |
|---------------------|-----------------------------------|
| Peter James Compton | Represented By Reed H Olmstead |
|---------------------|-----------------------------------|

Plaintiff(s):

| | |
|----------------------------|-----------------------------------|
| Nutrien Ag Solutions, Inc. | Represented By Steven R Stoker |
|----------------------------|-----------------------------------|

Trustee(s):

| | |
|------------------|--|
| Jerry Namba (TR) | Represented By D Edward Hays Laila Masud |
|------------------|--|

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9:22-10134 Codie Place

Chapter 7

#20.00 HearingRE: [66] Motion to Approve Compromise Under Rule 9019 with proof of service (Beall, William)

Docket 66

Tentative Ruling:

May 7, 2024

Appearances waived. The Motion is granted. Movant is to upload a conforming order within 7 days.

Background

On February 23, 2022, Codie Place (the "Debtor") filed a voluntary petition for relief pursuant to Chapter 7 of Title 11 of the United States Code. *See* Docket No. 1, *Voluntary Petition for Individuals Filing for Bankruptcy*. The Debtor scheduled an interest in a parcel of real property located at 1655 Chianti Lane, Santa Maria, CA 93458 (the "Property") as well an unknown amount related to a civil action and property settlement against the Debtor's ex-husband, Richard M. Davis ("Davis"). *See id.* at *Schedule A/B: Property*; *see also* Docket No. 18, *Amended Schedule A/B: Property*. On March 15, 2023, Sandra McBeth, the duly appointed Chapter 7 trustee (the "Trustee") filed against Davis that *Complaint for Turnover of Estate Asset to Sell Interest of Co-Owner In Property and To Determine Relative Interests in Property* (the "Complaint"), seeking, *inter alia*, a turnover of community property of the Debtor, including the Property. *See* Docket No. 53.

On April 12, 2024, the Trustee filed that *Motion to Compromise Controversy* (the "Motion"), wherein the Trustee seeks approval by the Court of that *Settlement Agreement and Mutual Release* (the "Agreement"), resolving the Complaint in exchange for an \$80,000 payment by Davis to the Trustee (the "Settlement Payment"). *See* Docket No. 66.

Notice

Pursuant to Fed. R. Bankr. P. 2002(a)(2) "the clerk, or some other person as the court

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CONT... Codie Place

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may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of: [] a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice." Pursuant to Fed. R. Bankr. P. 2002(a)(3), "the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of: [] the hearing on approval of the compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent."

This Court's Local Rule 9013-1(f)(1) provides that "each interested party opposing or responding to the motion must file and serve the response [] on the moving party and the United States trustee not later than 14 days before the date designated for hearing." Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be."

On April 12, 2024, the Trustee filed that *Notice of Hearing on Motion to Compromise Controversy* (the "Notice"), informing parties that any opposition to the Motion must be filed and served within fourteen (14) days of the hearing on the Motion. See Docket No. 67. On April 12, 2024, the Notice was served on all creditors and the Office of the United States Trustee. See *id.* at *Proof of Service of Document*. No party served with the Notice has filed an opposition to the Motion. The Court therefore takes the default of all parties served with the Notice.

Analysis

Pursuant to Fed. R. Bankr. P. 9019(a), "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."

The bankruptcy court has great latitude in approving settlement agreements. See *In re A & C Properties*, 784 F.2d 1377, 1380-81 (9th Cir. 1986). A proposed settlement may only be approved if it is "fair and equitable." See *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988); see also *In re Guy F. Atkinson Co. of California*, 242 B.R. 497, 502 (9th Cir. BAP 1999) ("At its base, the approval of a settlement turns on the question of whether the compromise is in the best interest of the estate."). Under this standard, the court must consider: (a) the probability of success in the litigation; (b)

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CONT... Codie Place

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the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. *See Woodson*, 839 F.2d at 620. A court generally gives deference to a trustee's business judgment in deciding whether to settle a matter. *See In re Mickey Thompson Entertainment Group, Inc.*, 292 B.R. 415, 420 (9th Cir. BAP 2003).

"The law favors compromise, 'and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision should be affirmed.'" *In re Open Medicine Institute, Inc.*, 639 B.R. 169, 181 (9th Cir. BAP 2022) (citing *In re A & C Props.*, 784 F.2d at 1383)). "Moreover, '[w]hen assessing a compromise, courts need not rule upon disputed facts and questions of law, but rather only canvass the issues. A mini trial is not required.'" *Id.* (citing *In re Schmitt*, 215 B.R. 417, 423 (9th Cir. BAP 1997)).

"The bankruptcy court's decision to approve a compromise is reviewed for abuse of discretion." *Id.* at 180 (citing *In re Mickey Thompson Ent. Grp.*, 292 B.R. 415, 420 (9th Cir. BAP 2003)).

Probability of Success in Litigation

The Trustee asserts that she believes the estate could potentially succeed in the Complaint as to the Property and a portion of Davis' military pension, but the pension issue poses complications. The Court agrees. Whether the Trustee would be successful *in toto* as to the Property and the pension assets is questionable.

This factor favors approval of the Motion.

Collectability

The Trustee argues that neither the Property nor the military pension "would be easy to liquidate." *See* Docket No. 66, p. 5, lines 10-17. The Trustee argues that selling the Property would first require a 363(f) determination, the Property would have a hostile tenant in Davis that could impede marketing efforts, and interest rates have softened the real estate market. *Id.* at lines 10-13. Further, the pension benefits may need to be collected over "a long period of time." *Id.* at lines 14-17. The Court agrees

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CONT... Codie Place

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with the Trustee. There would appear to be some barriers to collection that would make collection on any judgment difficult and costly.

This factor favors approval of the Motion.

Complexity, Expense, Inconvenience, and Delay Attendant to Continued Litigation

The Trustee here focuses on expense, arguing that "even minimal time expended in pursuit of a judgment will materially affect the bottom line..." *See id.* at lines 19-22. While the issues to be litigated in the Complaint do not appear overly complex, there would certainly be cost, inconvenience and delay litigating the Complaint to judgment, and, as discussed *supra*, in collection efforts.

This factor favors approval of the Motion.

The Interest of Creditors

Here, the Trustee essentially argues that the Settlement Payment will be used to fund administration of the case and to pay claims. *See id.* at pp. 5-6.

The Court finds that approval of the Motion is in the best interest of creditors. First, there has been no opposition to this Court's approval of the Motion. Further, the Agreement results in \$80,000 in cash within six (6) months of the Court's approval of the Motion, which amounts "would cover the costs of administration and provide some return to creditors..." *See id.* at p. 9, lines 2-9.

Conclusion

Weighing the *A & C Props.* factors, the Court finds that the Motion is fair and equitable, and is therefore granted.

Party Information

Debtor(s):

Codie Place

Represented By
Karen L Grant

**United States Bankruptcy Court
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CONT... Codie Place

Chapter 7

Movant(s):

Sandra McBeth (TR)

Represented By
William C Beall

Trustee(s):

Sandra McBeth (TR)

Represented By
William C Beall

United States Bankruptcy Court
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2:00 PM

9:22-10673 Carole D King

Chapter 7

#21.00 Hearing RE: [170] Motion for Damages Pursuant to 11 U.S.C. 303(i) with proof of service (Beall, William)

Docket 170

Tentative Ruling:

May 7, 2024

In-person appearances required. No remote appearances will be allowed.

Party Information

Debtor(s):

Carole D King

Represented By
William C Beall
Carissa N Horowitz

Movant(s):

Carole D King

Represented By
William C Beall
Carissa N Horowitz

United States Bankruptcy Court
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9:22-10674 John E King

Chapter 7

#22.00 HearingRE: [245] Motion for damages pursuant to 11 U. S. C. 303(i) with proof of service (Beall, William)

Docket 245

Tentative Ruling:

May 7, 2024

In-person appearances required. No remote appearances will be allowed.

Background

On August 31, 2022 (the "Petition Date"), Wolverine Endeavors VIII, LLC, a California limited liability company ("Wolverine") filed an *Involuntary Petition Against an Individual* (the "Initial Petition") under Chapter 7 of the Bankruptcy Code as against each John E. King ("John") and Carole D. King ("Carole") (collectively, the "Kings"). *See* Case Nos. 9:22-bk-10674-RC, Docket No. 1 and 9:22-bk-10673-RC, Docket No. 1, respectively. [FN1]

On May 12, 2023, Insurance Company of the West ("ICW") filed that *Joinder to Involuntary Petition by Additional Petitioning Creditor* (the "ICW Joinder"). *See* Docket No. 78. Through the ICW Joinder, ICW "joins [the Amended Petition] filed by [Wolverine]" pursuant to 11 U.S.C. § 303(c) and Rule 1003(b). *Id.* at p. 1. On May 12, 2023, Fence Factory, Inc. ("Fence Factory") filed that *Joinder to Involuntary Petition by Additional Petitioning Creditor* (the "Fence Factory Joinder"). *See* Docket No. 82. Through the Fence Factory Joinder, Fence Factory "joins [the Amended Petition] filed by [Wolverine]" pursuant to 11 U.S.C. § 303(c) and Rule 1003(b). *Id.* at p. 1. On September 7, 2023, Fence Factory filed that *Withdrawal of Joinder to Involuntary Petition* (the "Withdrawal") seeking to "withdraw its Joinder [as it] no longer wishes to participate in the instant involuntary bankruptcy." *See* Docket No. 139, p. 1. On September 14, 2023, that *Joinder to Involuntary Petition by Additional Petitioning Creditor East West Bank* (the "EWB Joinder") was filed by East West Bank ("EWB"). *See* Docket No. 155. Through the EWB Joinder, EWB "joins this case in support of the amended involuntary petition [] filed by [Wolverine]" pursuant

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to 11 U.S.C. § 303(c). *Id.* at p. 1.

On January 8, 2024, the Court issued that *Order on Motion to Dismiss Involuntary Petition* in which the Court dismissed the petition for its lack of numerosity (the "Dismissal Order"). *See* Docket No. 207, p. 22.

On April 4, 2024, John filed that *Motion for Damages Pursuant to 11 U.S.C 303(i)* (the "Motion") seeking costs and attorney's fees against all petitioning creditors as well as a finding of bad faith for compensatory damages and punitive damages against EWB, Wolverine, and Fence Factory. *See* Docket No. 245.

On April 23, 2024, EWB filed that *Opposition of East West Bank to Alleged Debtor John E. King's Motion for Damages Pursuant to 11 U.S.C. §303(i)* (the "EWB Opposition"); Fence Factory filed that *Opposition to Alleged Debtor's Motion for Damages Pursuant to 11 U.S.C. 303(i)* (the "Fence Factory Opposition"); ICW filed *Petitioning Creditor Insurance Company of the West's Objection to John and Carole King's Motions for Fees Pursuant to Section 303(i)(1)* (the "ICW Opposition"); and Wolverine filed *Petitioning Creditor Wolverine Endeavors VIII, LLC's Opposition to Motion for Damages Pursuant to 11 U.S.C § 303(i)* (the "Wolverine Opposition"). *See* Dockets No. 249, 250, 251, and 252 respectively.

On April 29, 2024, the Kings filed that *Omnibus Reply Brief RE Motion for Damages Pursuant to 11 U.S.C. 303(i)* (the "Reply"). *See* Docket No. 255.

Analysis

Court's Jurisdiction to Award Damages under 11 U.S.C. § 303

Citing *In re Bialac*, 694 F.2d 625, 627 (9th Cir. 1982), Wolverine through the Wolverine Opposition argues that this "Court has been divested of jurisdiction on this issue," given the appeal of the Dismissal Order. *See* Docket No. 252, p. 7, lines 15-24.

"When a proper notice of appeal has been timely filed, the general rule is that jurisdiction over any matters involved in the appeal is immediately transferred from

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the district court to the court of appeals." *In re Thorp*, 655 F.2d 997, 998 (9th Cir. 1981)(internal citations omitted). "The district court is divested of authority to proceed further with respect to such matters, except in aid of the appeal, or to correct clerical mistakes, or in aid of execution of a judgment that has not been superseded, until the mandate has been issued by the court of appeals." *Id.* (internal citations omitted). "It is equally established, however, that while an appeal of an order is pending, the trial court retains jurisdiction to implement or enforce the order. This is true because in implementing an appealed order, the court does not disrupt the appellate process so long as its decision remains intact for the appellate court to review." *In re Marino*, 234 B.R. 767, 769-770 (9th Cir. BAP 1999)(internal citation omitted).

Pursuant to Fed. R. Bankr. P. 8007(a)(1)(A), "[o]rdinarily, a party must move first in the bankruptcy court for [] a stay of a judgment, order, or decree of the bankruptcy court pending appeal."

In considering costs and fees pursuant to 11 U.S.C. § 303(i), "this court is not interfering with the order on appeal but is implementing the dismissal order." *In re Allen-Main Assocs., Ltd. P'shp*, 243 B.R. 606, 608-609 (Bankr. D. Conn. 1998). Absent appellant's motion to stay implementation of a dismissal order under Fed. R. Bankr. P. 8007, "[t]he dismissal order [] is in full force and effect and permits [the named debtor] to assert its rights under § 303(i)(1)." *Id.* at 609 (citing *N.L.R.B. v. Cinn. Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987)).

In the case at bar, Wolverine has not moved this Court for a stay pending appeal, pursuant to Fed. R. Bankr. P. 8007. Ergo, this Court may enter orders pursuant to 11 U.S.C. § 303(i).

Proper Procedural Vehicle

Wolverine argues through the Wolverine Opposition that "because section 303 mandates that any award be within the confines of a judgment, King cannot obtain this relief by simple motion." *See* Docket No. 252, p. 8, lines 13-14.

"A § 303(i) proceeding begins with a motion following dismissal of the case without consent of all petitioners and the debtor and without a debtor's waiver of the 'right to

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judgment.'" *In re Linton*, 631 B.R. 882, 892 (9th Cir. BAP 2021). "The end of a § 303(i) proceeding is the 'judgment' awarding fees, costs, and—perhaps—actual and punitive damages." *Id.* "Since Federal Rule of Bankruptcy Procedure 7001 does not require an adversary proceeding to determine issues under § 303(i), such a proceeding is a Rule 9014 'contested matter.'" *Id.* "The discovery rules apply, and evidence is taken in the same manner as in an adversary proceeding." *Id.* "The court makes findings of fact and conclusions of law." *Id.* "The judgment, default, and summary judgment rules apply, as do rules for post-judgment motions." *Id.* (citing Fed. R. Bankr. P. 9014(c)).

The Court does not completely follow Wolverine's argument here. If Wolverine is seeking to take discovery, one would presume such discovery has already been served, and is nearing completion, if not already completed. The Court lacks certainty as to where "the myriad procedural issues" lie.

[FN1]

All following citations refer to the docket in Case Nos. 9:22-bk10674-RC unless otherwise indicated.

Party Information

Debtor(s):

John E King

Represented By
William C Beall
Carissa N Horowitz

Movant(s):

John E King

Represented By
William C Beall
Carissa N Horowitz

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9:22-10735 GCLI, LLC

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#23.00 CONT'D Hearing
RE: [46] Motion to Dismiss Debtor's Bankruptcy Case (Winthrop, Rebecca)

FR. 5-30-23, 8-8-23, 9-26-23, 11-21-23, 1-9-24, 4-9-24

Docket 46

Tentative Ruling:

May 7, 2024

Appearances required.

Does the *Order Granting Trustee's Motion to Approve Settlement Agreement with Metropolitan Parties* resolve this matter?

April 9, 2024

See calendar item 29.

January 9, 2024

Appearances waived.

This matter is continued to April 9, 2024, at 2:00 p.m., pursuant to the Court's order granting that *Stipulation to Continue Hearing on Motion to Dismiss Debtor's Bankruptcy Case Filed by Metropolitan Partners Group Management, LLC and Certain Affiliated Entities*. See Docket No. 104.

November 21, 2023

Appearances waived.

This matter is continued to January 9, 2024, at 2:00 p.m. pursuant to that *Stipulation*

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to Continue Hearing on Motion to Dismiss Debtor's Bankruptcy Case Filed by Metropolitan Partners Group Management, LLC and Certain Affiliated Entities. See Docket No. 95.

September 26, 2023

Appearances waived.

The Motion is continued to November 21, 2023, at 2:00 p.m. pursuant to that *Order Granting Stipulation to Continue Hearing on Motion to Dismiss Debtor's Bankruptcy Case Filed by Metropolitan Partners Group Management, LLC and Certain Affiliated Entities*.

Party Information

Debtor(s):

| | |
|-----------|-----------------------------------|
| GCLI, LLC | Represented By William S Brody |
|-----------|-----------------------------------|

Movant(s):

| | |
|-----------------------------|--------------------------------------|
| Metropolitan Partners Group | Represented By Rebecca J Winthrop |
|-----------------------------|--------------------------------------|

Trustee(s):

| | |
|------------------|--|
| Jerry Namba (TR) | Represented By D Edward Hays Laila Masud Bradford Barnhardt |
|------------------|--|

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9:22-10978 Diego Ramirez

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#24.00 CONT'D Hearing

RE: [33] Motion CHAPTER 7 TRUSTEES OBJECTION TO DEBTORS
CLAIMED HOMESTEAD EXEMPTION AND CLAIMED EXEMPTION OF
UNKNOWN VALUE; DECLARATION OF SANDRA K. MCBETH; with Proof of
Service (McBeth (TR), Sandra)

FR. 6-27-23, 7-25-23, 8-22-23, 9-26-23, 10-24-23, 11-21-23, 1-23-24, 3-5-24

Docket 33

*** VACATED *** REASON: Continued to June 18, 2024, at 1:00 p.m.

Tentative Ruling:

May 7, 2024

Appearances required.

It is the Court's understanding that this matter has been resolved. *See Docket No. 96, Fourth Stipulation to Continue Hearing and Extend Deadlines*, p. 1, lines 23-26. Is the objection withdrawn?

March 5, 2024

Appearances required.

It is unclear to the Court whether the Trustee's *Objection to Exemption* remains given the amendment to *Schedule C*, and, if so, how the amendment to *Schedule C* affects the timing of the Court hearing the Objection.

January 23, 2024

Appearances waived.

On December 7, 2022, Diego Ramirez (the "Debtor") filed a voluntary petition for

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relief pursuant to Chapter 7 of Title 11 of the U.S. Code. *See* Docket No. 1. On May 2, 2023, Ramirez filed an amended *Schedule C: The Property You Claim as Exempt* (the "Schedule"). *See* Docket No. 27. The Schedule lists a property described as 1821 Coronado Pl, Oxnard, CA 93030 (the "Property"), and with Ramirez claiming an exemption in the Property in the amount of \$275,492.00 pursuant to Cal. Code of Civ. P. 704.730. *Id.* at p. 1. The Schedule further lists an asset described as "Affordable Collision Inc.," having an unknown value, and as being exempt in an unknown amount pursuant to Cal. Code of Civ. P. 704.060(a)(2). *Id.* at p. 3.

Pending before the Court is the *Chapter 7 Trustee's Objection to Debtor's Claimed Homestead Exemption and Claimed Exemption of Unknown Value* (the "Objection") filed by Sandra K. McBeth, the Chapter 7 Trustee (the "Trustee") on May 31, 2023. *See* Docket No. 33.

The Debtor amended his schedules and filed *Debtor's Response to Chapter 7 Trustee's Objection to Debtor's Claimed Homestead Exemption and Claimed Exemption of Unknown Value* (the "Response"). *See* Docket Nos. 81 and 82, respectively. Through the amended *Schedule A/B: Property*, the Debtor now asserts an "[e]quitable interest" in the Property. *See* Docket No. 81, *Schedule A/B: Property*, p. 1. Through the amended *Schedule C: The Property You Claim as Exempt*, the Debtor now claims a \$280,225 homestead exemption in the Property pursuant to Cal. Code Civ. P. § 704.730, eliminates the previous claim of exemption over Affordable Collision Inc., and claims an exemption in the amount of \$9,525.00 related to "Debtor's Equipment and Tools Used in Debtor's Corporate business but still under Debtor ownership" pursuant to Cal. Code Civ. P. § 704.060. *See* Docket No. 81, *Schedule C: The Property You Claim as Exempt*, pp. 1-4.

The Court previously continued the matter from November 21, 2023, to January 23, 2024, at 2:00 p.m. pursuant to that *Second Stipulation to Continue Hearing and Extend Deadlines* (the "Stipulation"). *See* Docket No. 88. Pursuant to the Stipulation, the deadline to object to the Debtor's newly filed exemptions (Docket No. 81) is extended from December 4, 2023, to and including February 5, 2024.

The Court will continue the hearing on the Objection to February 20, 2024, to allow the deadline for the Trustee to augment the Objection based on the Debtor's amended exemptions and property assertions.

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November 21, 2023

Appearances waived.

This matter is continued to January 23, 2024, at 2:00 p.m. pursuant to that *Second Stipulation to Continue Hearing and Extend Deadlines*. See Docket No. 88.

October 24, 2023

Appearances required.

Since the last hearing on the Objection, Ramirez amended his schedules and filed *Debtor's Response to Chapter 7 Trustee's Objection to Debtor's Claimed Homestead Exemption and Claimed Exemption of Unknown Value* (the "Response"). See Docket Nos. 81 and 82, respectively. Through the amended *Schedule A/B: Property*, Ramirez now claims an "[e]quitable interest" in the Property. See Docket No. 81, *Schedule A/B: Property*, p. 1. Through the amended *Schedule C: The Property You Claim as Exempt*, Ramirez now claims a \$280,225 homestead exemption in the Property pursuant to Cal. Code Civ. P. § 704.730, eliminates the previous claim of exemption over Affordable Collision Inc., and claims an exemption in the amount of \$9,525.00 related to "Debtor's Equipment and Tools Used in Debtor's Corporate business but still under Debtor ownership" pursuant to Cal. Code Civ. P. § 704.060. See Docket No. 81, *Schedule C: The Property You Claim as Exempt*, pp. 1-4.

Affordable Collision, Inc. and Tools of Trade

With the amended *Schedule C*, Ramirez has eliminated the request to exempt any interest in Affordable Collision, Inc. pursuant to Cal. Code of Civ. P. § 704.060(a)(2) "as a tool of his trade" in an unknown value and amount. The amended *Schedule C* further eliminated any exemption under Cal. Code of Civ. P. § 704.060(a)(2). As noted in the Objection, "assuming [Ramirez] can exempt certain tools of his trade under CCP Section 704.060(a)(1), it is limited to the sum of \$9525." See Docket No. 33, p. 5, lines 21-22. Ramirez now claims an exemption in a "[f]rame machine, 1 two-post lift, air compresson [sic], ladder, hand tools, [and a] tool box" in the amount of \$9,525.00 under Cal. Code of Civ. P. § 704.060. See Docket No. 81, *Schedule C*:

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The Property You Claim as Exempt, p. 4.

The Court will inquire with the Trustee as to whether the amended *Schedule C* resolves those portions of the Objection that relate to the Debtor's tools of trade and Affordable Collision, Inc.

Homestead

As noted *supra*, Ramirez asserts a homestead exemption in the Property in the amount of \$280,225 pursuant to Cal. Code Civ. P. § 704.730. Diego R. Gomez Ramirez (the "Son") that appears on the *Grant Deed* for the Property recorded on November 22, 2016 is Ramirez's adult son, asserts Ramirez. *See Docket No. 82*, p. 2, lines 25-26. As of November 22, 2016, title in the Property was held in the Son's and Tonantzin N. Ramirez's (the "Wife") names. *See Docket No. 82, Exhibit B*. That *Interspousal Transfer Deed* was recorded on November 22, 2016, which provided that Ramirez granted to the Wife the Property "as her sole and separate property." *See id. at Exhibit D*. Ramirez asserts that what the *Grant Deed* and *Interspousal Transfer Deed* provide for was not the intent of he, the Wife and the Son, however. Title to the Property was only taken in the Son's and the Wife's name, and without Ramirez's name, because of Ramirez's "poor credit rating and inability to qualify as a borrower" under the guidelines of the lender for the Property. *See Docket No. 82*, pp. 2-3. Despite the *Deed of Trust* and the *Interspousal Transfer Deed*, Ramirez asserts that "at no time did [Ramirez] or [the Wife] have the intention that Debtor was giving up his equitable interest in the Property." *See id. at p. 3*, lines 17-18. Ramirez asserts that he has always resided in the Property since 2016, and that his and the Wife's community property was used for the down payment for the Property, all mortgage payments on the Property, all tax payments on the Property, and to maintain the Property from November 2016 through the Petition Date. *See id. at lines 22-26*. Ramirez claims that "[a]t no time did [Ramirez's] son contribute to the Property mortgage payments or any other related Property expenses." *See id. at lines 26-27*.

The Son was removed from the title to the Property on August 17, 2017, when that *Grant Deed* was recorded transferring the Property to the Wife alone as "her sole and separate property." *See Docket No. 82, Exhibit F*.

Finally, on May 11, 2020, the Wife transferred title to the Property through that *Quitclaim Deed* to Diego R. Gomez Ramirez and the Wife as trustees of the Ramirez

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Family Trust dated March 24, 2017 (the "Trust"). *See* Docket No. 82, *Exhibit H*. Ramirez asserts an interest in the Trust.

The parties do not appear to dispute that Ramirez has an interest in the Property. The sole dispute surrounds when Ramirez's interest in the Property was obtained. The Trustee asserts that Ramirez's interest in the Property was obtained in 2020 when the *Quitclaim Deed* was recorded, and so 11 U.S.C. § 522(p)(1) limits the homestead exemption that Ramirez may claim in the Property. Ramirez asserts that his interest in the Property relates back to November 2016 when community property was used to purchase the Property, and based on his and the Wife's intention regarding his interest in the Property at the time. Ramirez argues that a resulting trust is implied in his favor dating back to November 2016 under California law.

"Whether the Debtor held the property in trust is governed by state law." *In re Sale Guar. Corp.*, 220 B.R. 660, 664 (9th Cir. BAP 1998)(citing *In re Northern Coin & Currency, Ltd.*, 767 F.2d 1573, 1575 (9th Cir. 1985)).

Under California law:

[a] resulting trust arises by operation of law from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest...Ordinarily a resulting trust arises in favor of the payor of the purchase price of the property where the purchase price, or a part thereof, is paid by one person and the title is taken in the name of another. The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired.

In re Cecconi, 366 B.R. 83, 112 (Bankr. N.D. Cal. 2007)(citing *Lloyds Bank Cal. V. Wells Fargo Bank*, 187 Cal.App.3d 1038, 1042-43 (1986)).

"Under California law, 'one who claims a resulting trust in property has the burden of proving the facts establishing his beneficial interest by clear and convincing evidence.'" *Id.* at 116 (citing *Gomez v. Cecena*, 15 Cal.2d 363, 366-67 (1940)). As evidence in support of Ramirez's resulting trust in the Property from November 2016 through May 2020, Ramirez offers his own declaration and that of the Wife. *See*

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Docket No. 82, *Declaration of Diego Ramirez and Declaration of Tonantzin N. Ramirez*. There is no declaration offered from the Son.

The Court will hear from the Trustee at the hearing.

July 25, 2023

Appearances required.

Since the prior hearing on *Chapter 7 Trustee's Objection to Debtor's Claimed Homestead Exemption of Unknown Value* (the "Objection"), Diego Ramirez (the "Debtor") has filed that *Ex Parte Motion for Enlargement of Time to File Response to Chapter 7 Trustee's Objection to Debtor's Claimed Homestead Exemption and Claimed Exemption of Unknown Value* (the "Motion for Extension"), and Andre Verdun, counsel to the Debtor, has filed that *Revised Declaration of Andre L. Verdun in Response to Order to Show Cause* (the "Declaration"). *See* Docket Nos. 48 and 54, respectively. To date, there has been no substantive response filed to the Objection by the Debtor, and that is despite the nearly two (2) months that have lapsed since the Objection was filed.

The Court continued the hearing on the Objection to July 25, 2023. Further, the Court on June 28, 2023 issued its *Order to Show Cause Why the Court Should Not Order Sanctions Against Andre L. Verdum, Esq. and/or Refer Andre L. Verdum, Esq. to the Court's Disciplinary Panel* (the "OSC"). *See* Docket No. 43. The Declaration was filed in response to the OSC.

Motion for Extension

Procedurally, under this Court's Local Rules, the Motion for Extension is lacking. Pursuant to this Court's Local Rule 9013-1(e), "[e]very document filed pursuant to this rule must be accompanied by a proof of service, completed in compliance with LBR 9013-3...". This Court's Local Rule 9013-3(b) provides that "[p]roof of service must be made by executing court-mandated form F_9013-3.1.PROOF.SERVICE, providing the exact title of the document being served, the methods of service for each person or entity served, the date upon which the proof of service was executed, and the signature of the person who performed the service and identified appropriate

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persons who will be served via NEF by the court's CM/ECF electronic transmission program." Pursuant to this Court's Local Rule 9013-3(d), "[w]hen preparing a proof of service, it must be explicitly indicated how each person who is listed on the proof of service is related to the case or adversary proceeding." Here, attached to the Motion for Extension is a document termed "Certificate of Service," which is not on the Court's mandatory form, does not list the date the Motion for Extension was served, does not provide the relation of those parties served to the instant case, and is confusing as to whether the Motion for Extension was served via NEF or via U.S. mail. The Motion was filed without a proof of service that conforms with this Court's Local Rules regarding the requirements of proofs of service.

Second, the Motion for Extension provides no basis for this Court to rule on the Motion *ex parte*. What is the basis for this Court to rule on a motion extending the time for the Debtor to respond to the Objection, after the response deadline has passed, without any opportunity for the Chapter 7 Trustee or any other party-in-interest to respond to such a request?

Third, Fed. R. Bankr. P. 9006(b) provides that "when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion" "on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." The Supreme Court has held that the determination by the Court as to whether neglect is excusable is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *See In re Tronox Inc.*, 626 B.R. 688, 724 (Bankr. S.D.N.Y. 2021) (citing *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507, U.S. 380, 395 (1993). "The relevant factors include: (1) the danger of prejudice; (2) the length of delay and its potential impact on proceedings; (3) the reason for the delay, including whether it was in the reasonable control of the movant; and (4) whether the movant acted in good faith." *Id.* The Supreme Court has held "that parties are responsible for the conduct of their attorneys," and that "clients cannot obtain relief from deadlines that their lawyers missed unless the lawyers' own neglect was excusable." *Id.* The Supreme Court has given little weight "to the fact that counsel was allegedly experiencing upheaval in his law practice." *Id.*

Here, a response to the Objection was required within 14 days prior to the hearing

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date on the Objection. *See* Docket No. 34, p. 2. Pursuant to this Court's Local Rule ("LBR") 9013-1(f), "... each interested party opposing or responding to the motion must file and serve the response (Response) on the moving party and the United States trustee not later than 14 days before the date designated for hearing." No response has been filed to the Objection.

Prejudice

If the Court allows a late response to the Objection, creditors of the estate would be prejudiced in that it is possible that property that has been claimed by the Trustee as being otherwise non-exempt, could become exempt. The prejudice to creditors weighs in favor of denying the Motion for Extension.

Length of Delay

As noted *supra*, the Objection was filed nearly two (2) months ago, and, as of today, there has been no response filed. This is true even though it appears that the Debtor knows what it seeks to argue in opposition to the Objection. *See* Docket No. 54, pp. 4-5. The length of delay here is substantial enough to weigh in favor of denying the Motion for Extension.

Reason for Delay

The reason for the delay appears to be largely attributable to the Debtor's counsel's failure to act. Counsel has not testified that he was unaware of the deadline, just that he was unable to obtain an extension of the opposition deadline from the Trustee. There was no attempt to seek an extension of the response time to the Objection by filing a request with the Court prior to the expiration of that deadline. Counsel to the Debtor states that he was searching for replacement counsel due to the complexity of the Objection, although no such counsel was found in time to file an opposition to the Objection. Excuses regarding counsel to the Debtor's trial schedule and illness are provided, but counsel's busy trial schedule is not an excuse that the Court accepts as constituting excusable neglect, and counsel's illness was just 2-3 days. *See* Docket No. 54, p. 4. Above all, counsel admits that "[i]n retrospect, not filing a document with the court before to notify the Court that I would like additional time to raise this new argument was an *inexcusable* error..." *See id.* at p. 5, lines 3-6 (emphasis added). The Debtor's reasons provided for the delay in responding to the Objection are

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insufficient to prompt this Court to enlarge the time to oppose the Objection after the lapsing of the response time. This is especially true in light of the failure to file any written response even after the initial hearing on the Objection.

Good Faith

The Court has no reason to believe that bad faith is present. This largely seems to be the missteps of counsel to the Debtor at every turn in this case.

In weighing the totality of the circumstances, guided by the above factors, and taking into account the Debtor's counsel's own admission regarding the absence of excusable neglect, at least as to his actions, the Court does not find excusable neglect.

The Motion to Extend is denied on procedural and substantive grounds as outlined *supra*.

The Objection

To date, there has been no written opposition to the Objection. As provided in this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." For the reasons provided in the Court's tentative ruling on the Objection relating to the June 27, 2023 hearing, which the Court now adopts as its final ruling, the Court sustains the Objection.

The Trustee is to upload orders within seven (7) days denying the Motion to Extend, and sustaining the Objection.

June 27, 2023

Appearances waived.

On December 7, 2022, Diego Ramirez ("Ramirez") filed a voluntary petition for relief pursuant to Chapter 7 of Title 11 of the U.S. Code. *See* Docket No. 1. On May 2, 2023, Ramirez filed an amended *Schedule C* (the "Schedule"). *See* Docket No. 27. The Schedule lists a property described as 1821 Coronado Pl, Oxnard, CA 93030 (the

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"Property"), and with Ramirez claiming an exemption in the Property in the amount of \$275,492.00 pursuant to Cal. Code of Civ. P. 704.730. *Id.* at p. 1. The Schedule further lists an asset described as "Affordable Collision Inc.," having an unknown value, and as being exempt in an unknown amount pursuant to Cal. Code of Civ. P. 704.060(a)(2). *Id.* at p. 3.

On May 31, 2023, Sandra K. McBeth, the Chapter 7 Trustee (the "Trustee") filed *Chapter 7 Trustee's Objection to Debtor's Claimed Homestead Exemption and Claimed Exemption of Unknown Value* (the "Objection"). *See* Docket No. 33. The Objection was served on the date of its filing on Ramirez via U.S. Mail, and on counsel of record to Ramirez via NEF. *See id.* at *Proof of Service of Document*. On May 31, 2023, the Trustee also filed that Notice of the Objection (the "Notice"), informing Ramirez and counsel that pursuant to this Court's Local Rule 9013-1, any opposition to the Objection must be filed and served no less than fourteen (14) days prior to the hearing on the Objection, or June 13, 2023. *See* Docket No. 34. As with the Objection, the Notice was served on Ramirez on May 31, 2023 via U.S. Mail, and on counsel of record to Ramirez via NEF. *See id.* at *Proof of Service of Document*.

Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." Here, the Debtor has not filed a response to the Objection. The Court takes the default of the Debtor.

Analysis

Pursuant to 11 U.S.C. § 522(l), "[t]he debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section ... Unless a party in interest objects, the property claimed as exempt on such list is exempt."

11 U.S.C. § 522(p)

Pursuant to 11 U.S.C. § 522(p)(1)(A), "as a result of electing under subsection (b)(3) (D) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$189,050 in value in real or personal property that the debtor or dependent of the debtor claims as a homestead."

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The Objection points to a *Quitclaim Deed* related to the Property, wherein it provides that on September 25, 2020, Tonantzin Ramirez granted the Property, as her sole and separate property, to Ramirez and Tonantzin N. Ramirez as trustees of the Ramirez Family Trust dated March 24, 2017. *See Docket No. 33, Exhibit B.* This transfer, the Trustee argues, is an acquisition by Ramirez of an interest in the Property within 1,215 days of Ramirez filing for bankruptcy. *See Docket No. 33, p. 4, lines 1-8.* Ramirez claims that he is the "lifetime beneficiary" of the Property in his amended *Schedule A/B.* *See Docket No. 25, Schedule A/B: Property.* If the Property was Tonantzin Ramirez's separate property until September 2020, and absent any argument from Ramirez otherwise, it appears to the Court that Ramirez's interest in the property was acquired on September 25, 2020, 803 days prior to the Petition Date. Therefore, the Objection is sustained regarding the Property, and the homestead exemption is reduced to the extent the claimed exemption exceeds \$189,050.

C.C.P. § 704.060(a)(2)

Pursuant to Cal. Code of Civ. P. 704.060(a)(2), "[t]ools, implements, instruments, materials, uniforms, furnishings, books, equipment, one commercial motor vehicle, one vessel, and other personal property are exempt to the extent that the aggregate equity therein does not exceed [] [\$8,725], if reasonably necessary to and actually used by the spouse of the judgment debtor in the exercise of the trade, business, or profession by which the spouse earns a livelihood."

The Trustee argues that "Section 704.060(a)(2) limits the exemption to the sum of \$8725 for the *spouse* of the Debtor, not the Debtor himself." *See Docket No. 33, p. 5, lines 14-15.* This, however, is an incorrect reading of the law. The exemption is in favor of a judgment debtor, and for tools that the judgment debtor's spouse uses in their trade, business, or profession. The Trustee further argues that "assuming Debtor can exempt certain tools of his trade under CCP Section 704.060(a)(1), it is limited to the sum of \$9525," and "Debtor has already claimed the tools of the trade exemption for several other items totaling \$5450 per amended C." *Id.* at lines 21-24. Again, this conflates the tools of trade of Ramirez for the tools of trade of his spouse. California law differentiates the two to the extent the professions of the spouses are different. Third, the Trustee argues that the spouse of Ramirez "works full time as a dental hygienist," and so there is no evidence that the spouse of Ramirez participates in the

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operation of Affordable Collision, Inc. *Id.* at lines 15-20. The Court here agrees with the Trustee. Cal Code of Civ. P. 704.060(a)(2) deals with "personal property," and Affordable Collision, Inc. appears to be an interest in a corporation. An interest in a corporation is not personal property.

The Court sustains the Objection to the exemption claimed by Ramirez in Affordable Collision, Inc.

The Trustee is to upload a conforming order within 7 days.

Party Information

Debtor(s):

| | |
|---------------|------------------------------------|
| Diego Ramirez | Represented By Randall V Sutter |
|---------------|------------------------------------|

Movant(s):

| | |
|--------------------|-----------------------------------|
| Sandra McBeth (TR) | Represented By Reed H Olmstead |
|--------------------|-----------------------------------|

Trustee(s):

| | |
|--------------------|-----------------------------------|
| Sandra McBeth (TR) | Represented By Reed H Olmstead |
|--------------------|-----------------------------------|

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9:22-11001 Alan Rashkin and Rochelle Rashkin

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#25.00 CONT'D Hearing

RE: [65] Motion for Turnover of Property and Objection to Amended Claimed Exemptions (Horowitz, Carissa)

FR. 3-5-24

Docket 65

Tentative Ruling:

May 7, 2024

Appearances required. Counsel to the Debtors is to appear in-person.

On April 15, 2024, counsel to the Debtors, Haleh C. Naimi ("Counsel"), filed that *Motion to Withdraw as Counsel* (the "Motion to Withdraw"), seeking to withdraw as counsel from the instant case and the related adversary action. *See* Docket No. 72. The Court has set a hearing on the Motion to Withdraw for June 5, 2024. *See* Docket No. 78.

On April 16, 2024, the Trustee filed that *Supplemental Declaration in Support of Objections to Amended Claimed Exemptions and Motion for Turnover* (the "Supplement"), whereby the Trustee supplemented his *Objections to Amended Claimed Exemptions and Motion for Turnover* (the "Turnover Motion"). *See* Docket No. 73.

On April 23, 2024, the Debtors filed *Debtors' Supplemental to Opposition to the Trustee's Objection to Claimed Exemptions and Motion for Turnover* (the "Debtors' Supplement"). *See* Docket No. 77. The Debtors' Supplement provides no substantive response to the Supplement, but rather requests a continuance of the Turnover Motion in light of the Motion to Withdraw, to allow a "family member to assist [them] going forward with this matter." *See id.* at p. 2, lines 18-22.

The Court is confused by the Debtors' Supplement. The Court afforded the Debtors time to supplement their opposition to the Turnover Motion to account for a tracing method in accordance with California law. *See* Docket Entry dated March 5, 2024.

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The Debtors currently have counsel, and the Debtors and their counsel were provided with more than a month to supplement the Debtors' opposition to the Turnover Motion. The Debtors, through the Debtors' Supplement are requesting a continuance of the Turnover Motion without adhering to this Court's Local Rules regarding the same. Pursuant to this Court's Local Rule 9013-1(m)(1), "[u]nless otherwise ordered, a motion for the continuance of a hearing under this rule must be filed as a separately captioned motion..." This Court's Local Rule 9013-1(m)(1)(A) provides that any such motion to continue "must set forth in detail the reasons for the continuance, state whether any prior continuance has been granted, and be supported by the declaration of a competent witness attesting to the necessity for the continuance." This Court's Local Rule 9013-1(m)(1)(B) provides that "[a] proposed order for continuance must, in accordance with LBR 9021-1(b), be lodged with the court upon a filing of the motion." Any request to continue the hearing on the Turnover Motion has not been properly placed before the Court.

If Counsel sought to continue all pending matters in the instant bankruptcy case and the pending adversary proceeding in light of their request to be relieved as counsel to the Debtors, why was a Local Rule compliant motion to continue all pending motions and other matters not filed alongside the Motion to Withdraw? This Court's Local Rule 2091-1(e)(1) provides that "[a] withdrawal or substitution of counsel will not result in a continuance of any matter, absent an order granting a motion for continuance after notice and a hearing pursuant to LBR 9013-1(m)." This Court's Local Rule 2091-1(e)(2) provides that "[u]nless good cause is shown and the ends of justice require, no substitution or withdrawal will be allowed that will cause unreasonable delay in prosecution of the case or proceeding to completion." It seems to the Court that what Counsel has done is to put her pencil down before this Court has granted the Motion to Withdraw. The Court's inquiry for Counsel is why this was an appropriate course of action given this Court's Local Rules and the California Rules of Ethics.

March 5, 2024

Appearances required.

Background

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On December 19, 2022 (the "Petition Date"), Alan Rashkin and Rochelle Rashkin (collectively, the "Debtors") filed a voluntary petition for relief pursuant to Chapter 7 of Title 11 of the U.S. Code (this "Case"). *See Docket No. 1, Voluntary Petition for Individuals Filing for Bankruptcy.*

On January 9, 2024, the Debtors filed an amended *Schedule C: The Property You Claim as Exempt* (the "Schedule"). *See Docket No. 60.* In the Schedule, the Debtors claim exemptions in the following: (1) \$20,000 for a car under CCP §703.140(b)(2) and (b)(5); (2) \$27,466 in cash in a bank account (the "Account") under CCP § 703.140(b)(1) and (b)(5); (3) \$47,000 in a bank account under §703.140(b)(10); and (4) \$6,184.70 in burial expenses and/or fair market value up to the statutory limit under CCP §703.140(b)(1). *See id.* at pp. 4-5.

The Motion

On February 1, 2024, Jerry Namba, the duly appoint Chapter 7 trustee (the "Trustee") filed his *Objections to Amended Claimed Exemptions and Motion for Turnover* (the "Motion") and that *Request to Take Judicial Notice in Support of Objection to Amended Exemptions and Motion for Turnover* (the "RJN"). *See Docket Nos. 65 and 66, respectively.* Through the Motion, the Trustee argues that the Debtors are only entitled to exempt \$13,840.30 of the \$38,158 contained in the Account on the Petition Date, as the Trustee asserts that this amount is what remains to be claimed as exempt after application of the Debtor's claimed exemptions. *See Docket No. 65, p. 3, lines 7-27.* The Debtors claimed an exemption of all the monies in the Account pursuant to Cal. Code of Civ. P. 703.140(b)(1)(A) as constituting proceeds from Social Security benefits. *See Docket No. 60, p. 4.* The Trustee argues that "the Debtors commingled [the Social Security benefits] in [the Account] with other income and deposits from the E. Rashkin Account, a third-party bank account." *See Docket No. 65, p. 4, lines 4-5.* The Trustee therefore utilizes the "first-in, first-out method" to trace amounts in the Account related to the Social Security benefits, which the Trustee agrees are exempt, and the monies deposited from the E. Rashkin Account, which the Trustee argues are non-exempt. *See id.* at pp. 4-6. After application of the "first-in, first-out method," the Trustee argues that there existed \$23,666.94 in non-exempt monies in the Account on the Petition Date. *See id.* at p. 6, lines 1-3. Lastly, the Trustee requests an order causing the Debtors to turn the \$23,666.94 over to the Trustee for

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the benefit of the Debtors' bankruptcy estate pursuant to 11 U.S.C. § 542(a). *See id.* at lines 5-15.

The Opposition

On February 20, 2024, the Debtors filed *Debtor's Opposition to the Trustee's Objection to Amended Claimed Exemptions and Motion for Turnover* (the "Opposition"). *See* Docket No. 70. The sum total of the Opposition is that "the Court should employ the pro-rata approach" in its tracing analysis of the Account based largely on the "principles of equity." *See id.* at p. 3, lines 23-25.

Analysis

"To help the debtor obtain a fresh start, ...the Bankruptcy Code allows debtors to exempt from the estate limited interests in certain kinds of property." *Schwab v. Reilly*, 560 U.S. 770, 791 (2010). California is an opt-out state, which requires debtors to claim exemptions pursuant to California's laws on exemptions. *In re Applebaum*, 422 B.R. 684, 688 (9th Cir. BAP 2009). Pursuant to Cal. Code of Civ. P. § 703.140(b)(10)(A) a debtor may elect to exempt "[t]he debtor's right to receive [] social security benefit[s]."

Cal. Code of Civ. P. § 703.080 provides:

- (a) Subject to any limitation provided in the particular exemption, a fund that is exempt remains exempt to the extent that it can be traced into deposit accounts or in the form of cash or its equivalent.
- (b) The exemption claimant has the burden of tracing an exempt fund.
- (c) The tracing of exempt funds in a deposit account shall be by application of the *lowest intermediate balance principle* unless the exemption claimant or the judgment creditor shows that some other method of tracing would better serve the interests of justice and equity under the circumstances of the case.

(emphasis added).

Exempt funds remain exempt when held by a debtor in a bank account with other non-exempt funds and are reasonably traceable to the exempt source. *In re Wiltsie*, 463

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B.R. 223, 227 (Bankr. N.D.N.Y 2011); *In re Wood*, 459 B.R. 263, 267 (Bankr. S.D. Ohio 2011); and *In re Moore*, 214 B.R. 628, 631 (Bankr. D. Kan. 1997). The concept of tracing commingled funds is "an equitable substitute for the impossibility of specific identification." *United States v. Henshaw*, 388 F.3d 738, 741 (10th Cir. 2004) (citation omitted).

"C.C.P. § 703.080(c) requires tracing by the 'lowest intermediate balance principle,' which assumes that the traced proceeds are the last funds withdrawn from a commingled account." *In re Marlin*, 2021 WL 815856 fn. 10 (Bankr. D. Id. 2021) (citing *In re Skagit Pac. Corp.*, 316 B.R. 330, 338 (9th Cir. BAP 2004)). "If the traced proceeds are withdrawn and spent, they are treated as lost and no longer available, even if subsequent deposits are made into the account." *Id.* "As such, the exempt funds may not exceed the lowest balance occurring at any time between the deposit of the exempt funds and the time of the levy." *Id.*

Pursuant to Fed. R. Bankr. P. 4003(c), as to objections to claims of exemption, "the objecting party has the burden of proving that the exemptions are not properly claimed."

Through the Motion, the Trustee employs the first-in, first-out form of tracing, citing *In re Lichtenberger*, an Illinois bankruptcy case applying Illinois state law. *See* Docket No. 65, p. 4, lines 13-25. The Debtors, again, argue that the pro-rata approach should be utilized by the Court. It appears to the Court that neither party has cited the appropriate California statute, which statute utilizes the lowest intermediate balance principle, and the Debtor have not convinced the Court that it should depart from that standard. It is unclear to the Court what amount of exemption the Debtors are allowed in the Account utilizing the lowest intermediate balance principle because the Trustee has not provided this analysis, and the Court declines any request to perform the analysis *sua sponte*.

As the burden rests with the Trustee, the Court finds that the Trustee has not met its burden, and the Motion is denied.

Party Information

Debtor(s):

Alan Rashkin

Represented By

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Haleh C Naimi

Joint Debtor(s):

Rochelle Rashkin

Represented By
Haleh C Naimi

Movant(s):

Jerry Namba (TR)

Represented By
Carissa N Horowitz
William C Beall

Trustee(s):

Jerry Namba (TR)

Represented By
Carissa N Horowitz
William C Beall

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9:23-10032 Gregory Ronald Linn and Jana Linn

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#26.00 CONT'D Hearing

RE: [24] Motion to Dismiss Case for Abuse and Notice of Motion (BNC) ;
Memorandum of Points and Authorities

FR. 6-27-23, 7-25-23, 9-26-23, 11-7-23, 2-6-24, 3-5-24, 4-9-24

Docket 24

*** VACATED *** REASON: Withdrawal of motion was filed by movant
on 5/6/24.

Tentative Ruling:

May 7, 2024

Appearances required.

Is this matter resolved?

April 9, 2024

Appearances required.

March 5, 2024

Appearances required.

The Court continued this matter pending the resolution of a settlement. *See* Docket No. 56. The settlement, the Court presumes, is the reduction of the Movant's lien against the real property of the Debtors, with the balance of the lien to survive the Debtors' intention to avoid judgment liens against the real property pursuant to 11 U.S.C. § 522(f). Given the denial of the *Motion to Avoid Liens*, it appears that this matter should be continued until the Debtors have filed appropriate motion(s) to avoid liens pursuant to 11 U.S.C. § 522(f).

February 6, 2024

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On May 5, 2023, WV Jumpstart, LLC filed that *Motion for Order Dismissing Debtors' Chapter 7 Case for Abuse Pursuant to 11 U.S.C. § 707(B)* (the "Motion"). See Docket No. 24. On November 3, 2023, the Court entered that *Order Approving Stipulation to Continue November 7, 2023 Hearing on Motion to Dismiss Pending Consummation of Parties' Agreed Settlement*, continuing the hearing on the Motion to February 6, 2024 (the "Order"). See Docket No. 56. The Order granted that *Stipulation to Continue November 7, 2023 Hearing on Motion to Dismiss Pending Consummation of Parties' Agreed Settlement*. See Docket No. 54.

The Court has found nothing more filed since November 3, 2023. Now, three months on from the Order being entered, and nine months since the Motion was filed, and with nothing more done by either party in this case related to the Motion, it appears to the Court that the Motion has been abandoned and should be dismissed for lack of its prosecution.

November 7, 2023

Appearances required.

Has this matter settled?

September 26, 2023

Appearances waived.

The Court has continued the Motion to November 7, 2023, at 2:00 p.m. through that *Order Approving Stipulation to Continue September 26, 2023 Hearing on Motion to Dismiss in Light of Pending Settlement*.

July 25, 2023

Appearances required.

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At the prior hearing, the Court was inclined to set an evidentiary hearing. Have the parties resolved this matter? If not, the Court will set the matter for an evidentiary hearing.

June 27, 2023

Appearances required.

Background

On January 16, 2023 (the "Petition Date"), Gregory Ronald Linn and Jana Linn (together, the "Linns") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. *See* Case No. 9:23-bk-10032-RC, Docket No. 1. In their *Schedule A/B*, the Linns disclose a legal or equitable interest in real property located at 2260 Valley Oaks Ln., Arroyo Grande, CA 93420 (the "Principal Residence") valued at \$1,675,000.00. *Id.* at *Schedule A/B*, p. 1. The Linns also disclose an interest in a 2020 Audi SQ5 valued at \$38,000.00 (the "Audi"). *Id.* at p. 2. In addition to their household goods and furnishings, the Linns indicate they have a 100% ownership interest in Greg Linn Wines, LLC, dba GZ Wines, LLC valued at \$0.00 (the "Business"). *Id.* at p. 3.

Presumption of Abuse

According to that *Chapter 7 Statement of Your Current Monthly Income*, on or about the Petition Date, the Linns had monthly income of \$8,392.07, or \$100,704.84 annually. *See* Docket No. 1, *Chapter 7 Statement of Your Current Monthly Income*, p. 2. The median income for their state and household size of 2 is \$86,271.00. *Id.* Since the Linns' annual income is over the state median income, the presumption of abuse is determined by Form 122A-2. Based on the Form 122A-2, the Linns have monthly disposable income under 11 U.S.C. § 707(b)(2) of -\$4,624.93, or, over sixty (60) months, - \$277,495.80. *See* Docket No. 1, *Chapter 7 Means Test Calculation*, p. 9. As the Linns' monthly disposable income over sixty (60) months (-\$277,495.80) is less than \$9,075.00, there is no presumption of abuse. *Id.*

The Principal Residence

On *Schedule D*, the Linns provide that Select Portfolio Services' claim is secured by a

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first deed of trust on the Principal Residence in the amount of \$1,284,540.00. *See* Docket No. 1, *Schedule D*, p. 4. First Franklin holds a second deed of trust secured by the Principal Residence in the amount of \$300,000.00. *Id.* at p. 3. In addition to the first and second deeds of trusts, the Linns schedule subsequent encumbrances against the Principal Residence exceeding of \$785,000.00. *Id.* at pp. 1-6. Included in the junior encumbrances is a tax lien of the IRS of approximately \$60,000.00 and a judgment lien held by WV Jumpstart, LLC ("WV") in the amount of \$460,483.65. *Id.* at pp. 4 and 6. According to the *Statement of Intention for Individuals Filing Under Chapter 7* (the "SOI"), the Linns intend to avoid all of the liens against the Principal Residence pursuant to 11 U.S.C. § 522(f) with the exception of the first and second deed of trusts, and the IRS tax lien. *See* Docket No. 1, *Statement of Intention for Individuals Filing Under Chapter 7*, pp. 1-3.

The Audi

Schedule D also lists a secured claim against the Audi in the amount of \$54,380.00 held by Volkswagen Credit Inc. *See* Docket No. 1, *Schedule D*, p. 5. On the SOI, the Linns state that their intention regarding the Audi is to "[r]etain and pay pursuant to contract." *Id.* at *Schedule of Intention for Individuals Filing Under Chapter 7*, p. 3.

The Motion to Dismiss

On May 5, 2023, WV filed that *Motion for Order Dismissing Debtors' Chapter 7 Case for Abuse Pursuant to 11 U.S.C. § 707(B)* (the "Motion"). *See* Docket No. 24. Through the Motion, WV moves the Court for an order dismissing this case pursuant to 11 U.S.C. § 707(b) on the grounds that: (a) the Linns have disposable income of \$1,984.07 per month, totaling at least \$119,044.20 available to pay their creditors over sixty (60) months; (2) the Linns have surrendered their interest in the Audi, which decreases their monthly expenses by \$1,129.00 per month and increases the amount available to pay their creditors to at least \$186,784.20 over sixty (60) months; (3) the Linns have made at least one (1) luxury purchase (the Audi), and have "loaded up on debt;" and (4) the Linns have a significant income source outside of that disclosed in their *Schedule I*, the amount of which they claim to not be able to determine. *Id.* at pp. 5-8.

The Opposition

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On June 13, 2023, the Linns filed *Debtors' Opposition to Motion for Order Dismissing Debtors' Chapter 7 Case for Abuse Pursuant to 11 U.S.C. § 707(B)* (the "Opposition"). *See* Docket No. 34. Through the Opposition, the Linns oppose the Motion on the grounds that Gregory Linn's income varies substantially, and the income and expenses on their *Schedules I* and *J* were based on the six (6) calendar months prior to the Petition Date. Since then, their income has decreased, their expenses have increased, and they have fallen further behind on their ongoing obligations. *Id.* at p. 4. Additionally, the Linns argue that the expenses listed in *Schedule J* do not include several legitimate and necessary expenses they would be paying if they had the income to support them. *Id.* at p. 3. The Linns contend that even if their *Schedule I* income continued post-petition, their legitimate monthly expenses exceed their available funds, and there is no excess income to pay to general unsecured creditors. *Id.* The Linns also argue that their total unsecured debt is far more than provided in the Motion, and that the SBA Loan was an attempt to reignite Gregory Linn's business. *Id.* at pp. 3-4.

Analysis

Request for Judicial Notice

WV requests that the Court take judicial notice of the documents that are referenced in the Motion and/or attached to the *Declaration of Anthony O'Neill in Support of Motion for Order Dismissing Debtors' Chapter 7 Case for Abuse Pursuant to 11 U.S.C. § 707(B)* (the "O'Neill Declaration"). *See* Docket No. 24, p. 3, fn. 1; *see also* Docket No. 26. Attached to the O'Neill Declaration as Exhibits 1 though 5 are pleadings filed in Case No. 1270403, pending in the Superior Court of the State of California for the County of Santa Barbara, and documents recorded with the San Luis Obispo County Clerk-Recorder.

Pursuant to Fed. R. Evid. 201(b), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Judicial notice may be taken "of bankruptcy records in the underlying proceeding..." *In re Tuma*, 916 F.2d 488, 491 (9th Cir. 1990); *see also* *Lee v. City of Los Angeles*, 250 F.3d 668, 688-689 (9th Cir. 2001)("[A] court may take judicial notice of 'matters of public record.'"); *Minden*

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Pictures, Inc. v. Excitant Group, LLC, 2020 WL 80525311 * 2 (C.D. Cal. December 14, 2020)(“A court may take judicial notice of ‘court records available to the public through the PACER system.’”); *Neylon v. County of Inyo*, 2016 WL 6834097 *2 (E.D. Cal. November 21, 2016)(“Federal courts may take judicial notice of orders and proceedings in other courts, including transcripts”).

Pursuant to Fed. R. Evid. 201(e), “[o]n timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.”

There has been no objection filed to WV’s request that the Court take judicial notice, and the documents that WV seeks judicial notice of, Exhibits 1-5 to the O’Neill Declaration, are those that fall within the types of documents that qualify for such notice. The Court, therefore, takes judicial notice of Exhibits 1 through 5 of the O’Neill Declaration.

11 U.S.C. § 707(b)

Pursuant to 11 U.S.C. § 707(b)(1), “[a]fter notice and a hearing, the court [] may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts [] if it finds that the granting of relief would be an abuse of the provisions of this chapter.” Pursuant to 11 U.S.C. § 707(b)(3)(B), “[i]n considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph 2(A)(i) does not arise or is rebutted, the court shall consider [] the totality of the circumstances [] of the debtor’s financial situation demonstrates abuse.”

To determine whether abuse exists under the “totality of the circumstances” in an analysis under 11 U.S.C. § 707(b)(3)(B), courts in the Ninth Circuit consider a nonexclusive list of factors specified in *In re Price*:

1. Whether the debtor has a likelihood of sufficient future income to fund a Chapter 11, 12, or 13 plan that would pay a substantial portion of the unsecured claims;
2. Whether the debtor’s petition was filed as a consequence of illness, disability, unemployment or some other calamity;
3. Whether the schedules suggest the debtor obtained cash advancements and

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CONT... Gregory Ronald Linn and Jana Linn Chapter 7
consumer goods on credit exceeding his or her ability to repay them;
4. Whether the debtor's proposed family budget is excessive or extravagant;
5. Whether the debtor's statement of income and expenses misrepresents the debtor's financial condition; and
6. Whether the debtor engaged in eve-of-bankruptcy purchases.

353 F.3d 1135, 1139-1140, (9th Cir. 2004); *see also In re Ng*, 477 B.R. 118, 125-126 (9th Cir. BAP 2012) (adopting *Price* factors); *In re Suttice*, 487 B.R. 245, 250-251 (Bankr. C.D. Cal. 2013) (adopting *Price* factors); *In re Pak* 343 BR 239, 243 (Bankr. N.D. Cal. 2006) (noting it would be "counterintuitive" to construe the phrase "totality of circumstances" used pre-BAPCPA differently post-BAPCPA).

Whether the debtor has a likelihood of sufficient future income to fund a Chapter 11, 12, or 13 plan that would pay a substantial portion of the unsecured claims

Courts in the Ninth Circuit generally agree that a debtor's ability to pay creditors out of future disposable income may alone be sufficient to support a finding of abuse under 11 § 707(b)(3)(B). *See In re Boyce*, 446 B.R. 447, 452-453 (D. Or. 2011); *In re Ng*, 477 B.R. at 131; *see also In re Lamug*, 403 B.R. 47, 54-55 (Bankr. N.D. Cal. 2009 (collecting cases)]

WV argues that as a baseline, the Linns have disposable income of \$1,984.07 per month, totaling at least \$119,044.20 available to pay their creditors over sixty (60) months. *See* Docket No. 24, p. 4, lines 2-3. WV further argues that the Linns have surrendered their interest in the Audi, which decreases their monthly expenses by \$1,129.00 per month and increases the amount available to pay their creditors to at least \$186,784.20 over sixty (60) months. *Id.* at lines 4-7. This, argues WV, results in the Linns having disposable income over a sixty (60) month period to pay "more than 70% of the claims in [the Linns'] Schedules E and F." *Id.* at lines 6-7.

In the Opposition, the Linns first assert that they are approximately \$300,000 behind in payments on the second deed of trust secured by the Principal Residence and the IRS has perfected tax liens on the Principal Residence exceeding \$60,000. *See* Docket No. 34, p. 3, lines 16-18. The Linns argue that it would require monthly payments of \$6,032.05 to pay these amounts over a sixty (60) month period. *Id.* at

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lines 19-21. The Linns further argue that their expenses have increased “by up to 20%” due to inflation.” *Id.* at p. 4, lines 17-18. What is more, argue the Linns, because the Audi has been surrendered, the Linns “have been paying their son \$518 per month for the use of his automobile.” *Id.* at lines 18-19. The Linns further argue that “their property taxes have increased by more than \$4,000 per year.” *Id.* at lines 19-20. Alongside the increased expenses, the Linns argue that their “income has been far less than listed on Schedule I and the Means Test.” *Id.* at lines 14-15. “In fact, over the past couple of months, Gregory Linn has generated almost no net income from his business.” *Id.* at lines 15-16. The Linns dismiss any arguments of WV regarding odd job income, as they argue that all such income was included in their *Schedule I*. *Id.* at lines 24-28. In terms of the “substantiality” prong, the Linns argue that their unsecured debt is \$980,149.70. *Id.* at p. 3, lines 24-25. Thus, the return to unsecured creditors over a five (5) year period would provide exponentially less than the 70% argued in the Motion. *Id.*

There exists a significant factual dispute on this factor that the Court believes requires further evidence to determine. What precisely is the Linns’ income and expenses at this juncture? Expenses have increased, and income has decreased, according to the Linns, but it is not clear what the actual income and expenses are. It is also not clear to the Court that WV has the analysis correct. Returning the Audi to the lender does not necessarily result in a full net increase to expendable income. One assumes that the Linns require some form of transportation, and they claim that they found a cheaper option in utilizing their son’s automobile, but even that option comes at a \$518 per month cost. Further, it is far from clear whether the Linns’ income has decreased post-petition, and that their expenses have increased. Inflation has caused an increase in some consumer goods in times of late.

Whether the debtor's statement of income and expenses misrepresents the debtor's financial condition

Courts are free to examine the debtor's actual income (as opposed to the income stated on the "means test" form) under the 11 U.S.C. § 707(b)(3)(B) "totality of the circumstances" test); *see also In re Lamug*, 403 B.R. at 55 ("Debtors' actual current and future income and expenses, intentions, and resulting ability or inability to pay are crucial to an assessment of Debtors' 'financial situation'"); *In re Baeza*, 398 B.R. 692, 697-698 (Bankr. E.D. Cal. 2008) (dismissal analysis under 11 U.S.C. § 707(b)(3)(B)

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not tied to or limited by "means test" formula); *In re Pak*, 343 B.R. at 246-247 (debtor's actual and anticipated future income must be considered under 11 U.S.C. § 707(b)(3)(B) dismissal motion).

The evidentiary record before the Court regarding the instant factor appears to suffer in a way substantially similar to the prior factor.

Whether the debtor's petition was filed as a consequence of illness, disability, unemployment or some other calamity

According to Websters, a calamity is defined as "any extreme misfortune brining great loss and sorrow; disaster." *Websters New World College Dictionary*, Agnes and Guralnik (Wiley Publishing 2009). The Opposition provides that Gregory Linn personally guaranteed a Small Business Administration ("SBA") loan to the Business in "an effort to mend the financial woes of the company and to reignite the business. Unfortunately, the business did not pick up as much as [the Linns] had hoped, and [the Linns] ultimately found themselves seeking relief under chapter 7." *See Docket No. 34, p. 4, lines 9-12.* According to *Schedule E/F*, the SBA loan was an "EIDL," which stands for Economic Injury Disaster Loan. *See Docket No. 1, Exhibit E/F*, p. 11. The Linns scheduled approximately \$257,105.19 in nonpriority unsecured claims, which includes the SBA loan. *See Id.* It appears that the Linns' business was affected by an economic disaster, COVID 19, which consequently contributed to the Linns' filing for bankruptcy. The Linns have eleven (11) judgment liens totaling \$723,044.51 incurred between 2006 through 2018, however. Still, according to the Linns, it was the Business's losses that resulted in the bankruptcy filing, and not the judgments entered years prior.

This factor breaks in favor of the Linns.

Whether the schedules suggest the debtor obtained cash advancements and consumer goods on credit exceeding his or her ability to repay them

WV argues that the Linns purchased a luxury vehicle, the Audi, and have "loaded up on debt" in the form of the SBA loan. *See Docket No. 24, pp. 7-8.* The Audi does appear to have been purchased at a time when the Linns were not paying some of their obligations, namely, the judgments. However, the SBA loan, according to the Linns, was used to "mend the financial woes of the company." Mr. Linn testified at the

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341(a) meeting that the SBA loan money was used to pay rent, utilities, and vehicle expenses. *See Docket No. 39, Declaration of K. Todd Curry in Support of Motion for Order Dismissing Debtors' Chapter 7 Case for Abuse Pursuant to 11 U.S.C. § 707(B), Exhibit 1*, pp. 12-13. These appear to the Court to be normal business expenses. There is no evidence that the Linns were not in-fact seeking to turn their business around. Sure, the Audi was purchased, and ultimately returned to the lender post-petition, but that purchase was more than two (2) years prior to the Petition Date.

On balance, this factor breaks in the Linns' favor.

Whether the debtor's proposed family budget is excessive or extravagant

WV appears to make no argument here.

Schedule J lists monthly expenses of \$8,661.00. *See Docket No. 1, Schedule J*. As notes *supra*, the Linns argue that the expenses have actually increased since the Petition Date. The monthly expenses include \$3,365.00 for home ownership expenses and a monthly car payment of \$1,129.00, in addition to utilities, food and transportation expenses. *Id.* at pp. 1-2.

It is not entirely clear to the Court that the Audi was an extravagant purchase. The Audi was not an inexpensive vehicle to purchase, but in the Court's experience, the price of automobiles increased significantly after the Covid-19 pandemic. Further, to the extent it is argued that the Audi represents an extravagant budget item, the Linns have surrendered the Audi, and replaced it with an automobile that costs them \$518 per month.

The expenses listed, even if increased by 20% because of inflation, do not appear "excessive" or "extravagant."

This factor breaks in favor of the Linns.

Whether the debtor engaged in eve-of-bankruptcy purchases

Although the Audi was purchased in 2020, the Linns filed bankruptcy in 2023. A purchase of an automobile by a consumer more than two (2) years prior to the petition date does not generally constitute an "eve-of-bankruptcy purchase" in this Court's view. Further, as discussed *supra*, the lion's share of the Linns' debts, the judgment

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liens in excess of \$700,000.00, were incurred between 2006 and 2018.

This factor breaks in favor of the Linns.

Conclusion

Here, a majority of the *Price* factors used to weigh the totality of the circumstances under a 11 U.S.C. § 707(b)(3)(B) analysis break in favor of the Linns. However, as to the first two (2) factors discussed herein, the Court has insufficient evidence to perform an analysis. The Court intends on setting an evidentiary hearing on the Motion.

Party Information

Debtor(s):

Gregory Ronald Linn

Represented By
Reed H Olmstead

Joint Debtor(s):

Jana Linn

Represented By
Reed H Olmstead

Movant(s):

WV 23 Jumpstart, LLC

Represented By
Todd Curry

Trustee(s):

Jeremy W. Faith (TR)

Pro Se

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9:23-10174 Jonathan Alan Stein

Chapter 7

#27.00 CONT'D Hearing

RE: [155] Motion to Avoid Lien judicial liens with Gabrielino-Tongva Tribe
Judgment Creditor vol 1 Table Decla and Exhibits 1 to 19 # 2 Volume(s) vol 2
Table Decla and Exhibits 20 to 27 # 3 Proposed Order # 4 Affidavit Proof of
service) (Stein, Jonathan)

FR. 1-23-24, 3-5-24

Docket 155

Tentative Ruling:

May 7, 2024

Appearances waived.

This matter is continued to May 22, 2024, at 10:00 a.m.

March 5, 2024

Appearances required.

Party Information

Debtor(s):

Jonathan Alan Stein

Represented By
Jonathan Stein

Movant(s):

Jonathan Alan Stein

Represented By
Jonathan Stein
Jonathan Stein

Trustee(s):

Jerry Namba (TR)

Represented By
Laila Masud

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Sarah Rose Hasselberger
D Edward Hays
Sarah Cate Hays

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9:23-10302 Matthew Joseph Pavin

Chapter 7

#28.00 CONT'D Hearing
RE: [35] Motion to compel trustee to abandon interest in property of estate .

FR. 3-5-24

Docket 35

Tentative Ruling:

May 7, 2024

Appearances required.

The Court has reviewed the *Status Report on Debtor's Motion to Compel the Trustee to Abandon Property of the Estate* (the "Report"). See Docket No. 50. Since the filing of the Report, the Court has entered that *Order Setting Chapter 7 Trustee's Motion Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure for an Order Compelling Fletcher Pavin to Appear for Examination and to Produce Additional Documents for Hearing*. See Docket No. 53. It seems to the Court that the Chapter 7 Trustee continues in his investigation of assets of the estate, and to that end is requesting information regarding trust at issue.

March 5, 2024

Appearances required.

Background

On April 21, 2023, Matthew Joseph Pavin (the "Debtor") commenced this case by filing that *Chapter 7 Voluntary Petition for Individuals*. See Docket No. 1. After two (2) amendments to his schedules, the Debtor on December 28, 2023 disclosed his "1/3 interest in his parents' trust and the residual trust created when his father passed away in 1997" (the "Trust"). See Docket No. 29, *Schedule A/B: Property*, p. 6. The estimated value of this disclosed trust is \$250,000, although the Debtor provides that "the trust does not vest until Debtor's mother passes away and is unliquidated as

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Debtor's mother has the right to spend the trust assets during her lifetime." *See id.*

On January 30, 2024, the Debtor filed that *Motion to Compel the Trustee to Abandon Property of the Estate* (the "Motion"). *See* Docket No. 35. Pursuant to 11 U.S.C. § 554(b) and Fed. R. Bankr. P. 6007, the Debtor argues through the Motion that the Court should compel abandonment of the Trust as it is both burdensome to the estate and of inconsequential value to the estate. *See id.* at pp. 3-5.

The Debtor argues the burdensome nature of the Trust by first pointing out that he believes the Chapter 7 Trustee (the "Trustee") has a conflict of interest in that the sole unsecured creditor of the estate, Camarillo Village Square, LLC ("Camarillo") could be the target of an action by the Trustee for unfair business practices and business torts that the Debtor disclosed in his Schedules. *See id.* at pp. 3-4. The Debtor further argues that "more than 7 months have passed since the initial meeting of creditors and the Trustee has been unable to liquidate [the Trust] after such a long time." *See id.* at p. 4, lines 4-6. Lastly, the Debtor argues that the Trust will only payout when his mother passes away, and when that will happen is uncertain. *See id.* at lines 6-11.

What is more, the Debtor argues, "in the event that [his mother] becomes ill the limited funds [of the Trust] will very likely be exhausted by medical and administrative expenses thus making it of inconsequential value." *See id.* at p. 4, lines 21-25.

On February 13, 2024, the Trustee filed *Chapter 7 Trustee's Notice of Motion And Motion Pursuant To Rule 2004 of the Federal Rules of Bankruptcy Procedure for an Order Compelling Fletcher Pavin To Produce Documents* (the "Rule 2004 Motion"), requesting that the Court authorize the Trustee to issue a subpoena compelling Fletcher Pavin, the trustee of the Trust, to produce documents related to the Trust as "[t]he Trustee believes the bankruptcy estate may have a vested property interest in an irrevocable subtrust that was created upon [the Debtor's] father's death in 1997." *See* Docket No. 40, p. 2, lines 10-26. Despite requests in early January 2024, the Trustee asserted through the Rule 2004 Motion that "Fletcher [] has refused to provide the Trustee with a full, complete copy of [the Trust]." *See id.* at lines 17-19. The Court granted the Rule 2004 Motion on February 20, 2024. *See* Docket No. 44, *Order Granting Chapter 7 Trustee's Motion Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure for an Order Compelling Fletcher Pavin to Produce*

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On February 13, 2024, the Trustee filed that *Opposition to Motion to Compel the Trustee to Abandon Property of the Estate and Request for Hearing* (the "Opposition"). *See* Docket No. 41. The Trustee argues through the Opposition that the Debtor has not shown that the Trust is burdensome to the estate or that the Trust is of inconsequential value to the estate. *See id.* at pp. 2-3. Importantly, the Trustee argues that he is still seeking a copy of the Trust, which he has had to obtain an order under Fed. R. Bankr. P. 2004 to obtain. *See id.* at pp. 3-4.

On February 27, 2024, the Debtor filed that *Reply to Chapter 7 Trustee's Opposition to Motion to Compel the Trustee to Abandon Property of the Estate*. *See* Docket No. 46.

Analysis

Pursuant to 11 U.S.C. § 554(b), "[o]n request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." To approve a motion to abandon property, the Court must find either the property is burdensome to the estate or of inconsequential value or benefit to the estate. *In re Vu*, 245 B.R. 644, 647 (9th Cir. BAP 2000) (citing *In re K.C. Mach & Tool Co.*, 816 F.2d 238, 245 (6th Cir. 1987) (stating "order compelling abandonment is the exception, not the rule...Absent an attempt by the trustee to churn property worthless to the estate just to increase fees, abandonment should rarely be ordered")).

The movant has the burden to prove that property is indeed burdensome or of inconsequential value and benefit to the estate. *See In re Garcia*, 521 B.R. 680, 686 (Bankr. D. Id. 2014). Moreover, a motion to compel abandonment of property is premature if the value of the property is unknown. *In re Oliver*, 649 B.R. 206, 207 (Bankr. E.D. Cal. 2023)(motion under §544(b) "is denied as premature...The value and benefit to the estate remains uncertain" due to a pending adversary).

Here, to start, neither the Debtor nor the trustee of the Trust have provided the Trustee with a copy of the Trust so that the Trustee may for himself determine the terms of the Trust and the value of the Trust to the Debtor's estate. The Court has entered an order

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under Fed. R. Bankr. P. 2004 requiring the trustee of the Trust to turn over such information to the Trustee. The Debtor may in-fact be correct that the Trust is of no value to the estate, but the Trustee has no documentary evidence to confirm the Debtor's statements, and the Debtor includes none with the Motion. The Debtor argues about the length of the case. Yet, the Trust was only scheduled by the Debtor on December 28, 2023. Two (2) weeks later the Trustee made a formal demand on the trustee of the Trust for the Trust documents. Two (2) weeks after the formal demand, the Trustee moved the Court for an order requiring the turnover of the Trust documents and certain accountings. The Trustee seems to the Court to be working diligently to confirm whether the Trust is of any value to the Debtor's estate. Until the Trustee can verify that the Trust is of no benefit to the Debtor's bankruptcy estate, the Motion is premature.

The Debtor's conflict of interest argument is at best premature. It does not appear to the Court that the Trustee has yet determined the veracity and/or value of the Debtor's scheduled purported claims against Camarillo. Such a determination may be of no benefit if the Trustee is unable to extract any value from the Trust. What is more, as the Trustee cites, at least one other unsecured priority tax claim has been filed since the Motion was filed.

Conclusion

The Motion is denied, as the Debtor has not met its burden. The Trustee is to upload a conforming order within 7 days.

Party Information

Debtor(s):

Matthew Joseph Pavin

Represented By
William E. Winfield

Movant(s):

Matthew Joseph Pavin

Represented By
William E. Winfield

Trustee(s):

Jeremy W. Faith (TR)

Represented By

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| Fletcher Pavin | Todd A. Frealy | |
| | Represented By | |
| | Bret G Anderson | |

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9:23-11188 Harold Galvan and Kerry Ann Galvan

Chapter 7

#29.00 HearingRE: [24] Motion Notice of Motion for Order Delaying Closing of Case to Allow Time To File Motion for Redemption and POS

Docket 24

Tentative Ruling:

May 7, 2024

Appearances required.

Background

On December 19, 2023 (the "Petition Date"), Harold and Kerry Ann Galvan (collectively, hereinafter, the "Debtors") filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code. *See Docket No. 1, Voluntary Petition for Individuals Filing for Bankruptcy.* The Debtors scheduled as personal property, a 2013 JX35 (the "Vehicle"). *See id.* at *Schedule A/B: Property*, p. 2. Carmax Auto Finance was scheduled as having a secured claim against the Vehicle. *See id.* at *Schedule D: Creditors Who Have Claims Secured by Property*, p. 1. In their originally filed *Statement of Intention for Individuals Filing Under Chapter 7* (the "Original Statement"), the Debtors did not mention the Vehicle. *See id.* at *Statement of Intention for Individuals Filing Under Chapter 7*. The Debtors provided that they would retain the Vehicle and keep the payments current in their amended *Statement of Intention for Individuals Filing Under Chapter 7* (the "Amended Statement"). *See Docket No. 9, p.1.* The 341(a) meeting of creditors took place on January 25, 2024. *See Docket No. 5.* The Amended Statement was filed on February 6, 2024, after the 341(a) meeting, and forty-nine (49) days after the Petition Date.

On April 4, 2024, the Debtors filed that *Motion Requesting that Case Remain Open for 60 Days to Allow Time to File Motion for Redemption* (the "Motion"). *See Docket No. 24.* The Motion requests that the Court not close the Debtors' bankruptcy case for sixty (60) days to allow them time to file a motion to redeem the Vehicle. *See id.* at p. 1.

Analysis

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Pursuant to 11 U.S.C. § 521(a)(2), the debtor shall "if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate[,] within thirty days after the date of the filing of the petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property, and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and [] within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property..."

Pursuant to 11 U.S.C. § 362(h)(1), "[i]n a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, [] and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2) [] to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722[; or] enter into an agreement of the kind specified in section 524(c)[; and] to take timely the action specified in such statement as it may be amended before expiration of the period for taking such action..."

It seems to the Court that the Vehicle is not property of the Debtors' estate by operation of 11 U.S.C. §§ 362(h)(1)(A) and 521(a)(2). The stay terminated as to the Vehicle, and the Vehicle failed to continue to constitute property of the Debtors' bankruptcy estate when the Original Statement failed to address the Vehicle, and when the Original Statement was not amended to address the Vehicle prior to January 18, 2024. Even if this were not the case, and the Vehicle had been listed in the Original Statement, or the Amended Statement had been filed prior to January 18, 2024, the Debtors did not redeem the Vehicle by February 26, 2024, and so the analysis would remain the same.

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Given this analysis, the Court does not appreciate the benefit to the Debtors of granting the Motion. The Vehicle no longer constitutes an asset of the Debtors' bankruptcy estate, and their ability to redeem the Vehicle in this Court has lapsed. The Court is inclined to deny the Motion.

Party Information

Debtor(s):

| | |
|---------------|-----------------------------------|
| Harold Galvan | Represented By Richard E Rossi |
|---------------|-----------------------------------|

Joint Debtor(s):

| | |
|------------------|-----------------------------------|
| Kerry Ann Galvan | Represented By Richard E Rossi |
|------------------|-----------------------------------|

Movant(s):

| | |
|---------------|-----------------------------------|
| Harold Galvan | Represented By Richard E Rossi |
|---------------|-----------------------------------|

| | |
|------------------|-----------------------------------|
| Kerry Ann Galvan | Represented By Richard E Rossi |
|------------------|-----------------------------------|

Trustee(s):

| | |
|--------------------|--------|
| Sandra McBeth (TR) | Pro Se |
|--------------------|--------|

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9:23-11192 Anthony Rissio Monziotti

Chapter 7

#30.00 HearingRE: [25] Amended Application (related document(s): 17 Motion Request Further Administration of Case Pursuant to F.R.B.P. 1016; Memorandum of Points & Authorities; Declaration of Yvette Buchanan in Support with proof of service. filed by Debtor Anthony Rissio Monziotti) with proof of service.

Docket 25

Tentative Ruling:

May 7, 2024

Appearances required.

Background

On December 20, 2023, Anthony Rissio Monziotti (the "Debtor") filed a voluntary petition for relief pursuant to Chapter 7 of Title 11 of the United States Code. *See* Docket No. 1, *Voluntary Petition for Individuals Filing for Bankruptcy*. Jeremy W. Faith is the duly appointed Chapter 7 trustee. The Debtor "passed away mere hours after case filing December 20, 2023." *See* Docket No. 25, *Amended Request/Motion for Further Administration of Case Pursuant to F.R.B.P. 1016* (the "Motion"), p. 3, line 13. On February 27, 2024, apparently by the Debtor's "friend/domestic partner," the Motion was filed, requesting that this Court "continue to administer the case." *See id.* at p. 4, lines 20-21.

Analysis

Pursuant to Fed. R. Bankr. P. 1016, "[d]eath [] of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death [] not occurred."

The instant bankruptcy case is a Chapter 7 case. As provided for under Fed. R. Bankr. P. 1016, the liquidation case "shall" not abate due to the Debtor's death. The Motion requests relief that the law now provides for, without the Court's order. The Motion is denied. Movant shall upload a conforming order within 7 days.

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Chapter 7

Party Information

Debtor(s):

Anthony Rissio Monziotti

Represented By
Dana M Douglas

Movant(s):

Anthony Rissio Monziotti

Represented By
Dana M Douglas
Dana M Douglas
Dana M Douglas

Trustee(s):

Jeremy W. Faith (TR)

Pro Se

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9:22-10983 Mansour Nejadrasool

Chapter 13

#31.00 HearingRE: [70] Motion for Authority to Incur Debt (Ch 13)

Docket 70

Tentative Ruling:

May 7, 2024

Appearances required.

Background

On December 8, 2022, Mansour Nejadrasool (the "Debtor") filed a voluntary petition for relief under Chapter 13 of Title 11 of the United States Code. *See* Docket No. 1, *Voluntary Petition for Individuals Filing for Bankruptcy*. The Debtor is a doctor. *See* Docket No. 1, *Schedule I: Your Income*. Pursuant to the Debtor's 2nd Amended Chapter 13 Plan (the "Plan"), the Debtor is to make \$280,200 in payments over sixty (60) months, which pays general unsecured, non-priority creditors 5% of their total claims. *See* Docket No. 25, pp. 2-3. Since the Plan was confirmed, the Chapter 13 Trustee has moved to dismiss the instant case due to the Debtor's failure to make payments under the Plan, and three (3) motions to lift the stay have been filed due to the Debtor's failure to make timely payments to secured creditors. *See* Docket Nos. 49, 57, 59 and 78.

On March 1, 2024, the Debtor filed that *Motion for Authority to Incur Debt (Lien to Be Placed on Real Property)* (the "Motion"). *See* Docket No. 70. The Motion requests this Court's authority for the Debtor to pledge an estate asset, real property, for a \$120,000 loan to a non-debtor corporation that the Debtor owns. *See id.* at p. 2, lines 14-18. The loan is at 14.5% interest, amortized over 30 years, but due and payable in 4 years. *See id.* at lines 16-17. The payments on the proposed loan would virtually comprise interest only, with nearly 99% of the loan coming due in four (4) years.

Analysis

"[A]ny determination on postpetition debt is driven by the specific facts of each case."

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CONT... Mansour Nejadrasool Chapter 13

In re Nacci, 586 B.R. 733, 738 (Bankr. N.D. Oh. 2018). Some courts have held that "a comprehensive review of the facts of an individual case and the terms of the proposed loan with an eye on the reasonableness and necessity of the postpetition debt and any impact on the confirmed plan" should be reviewed when weighing the appropriateness of postpetition debt. *See id.* at 738-739.

The Court would have difficulty in approving the requested financing. The Debtor's trip through bankruptcy, both pre- and post-confirmation has been a challenging one. The Chapter 13 Trustee has only recently withdrawn a motion to dismiss the instant bankruptcy case after the Debtor fell behind more than \$8,800 in payments under the Plan, and multiple motions to lift the stay for defaults post-confirmation to secured lenders have been filed. The Debtor provides little understanding of how the loan proceeds would be used, or how the Debtor's corporation has the ability to repay the loan. Given the Debtor's difficulty in Chapter 13, and the dearth of information regarding the uses of the proposed loan and the ability of the Debtor's corporation to repay the loan, both monthly and when it comes due, appear to call for a denial of the Motion.

Party Information

Debtor(s):

| | |
|---------------------|-------------------------------------|
| Mansour Nejadrasool | Represented By Nathan A Berneman |
|---------------------|-------------------------------------|

Movant(s):

| | |
|---------------------|-------------------------------------|
| Mansour Nejadrasool | Represented By Nathan A Berneman |
|---------------------|-------------------------------------|

Trustee(s):

| | |
|-----------------------------|--------|
| Elizabeth (ND) F Rojas (TR) | Pro Se |
|-----------------------------|--------|

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9:24-10107 Wayne Carl Fulton and Linda Scanlin Fulton

Chapter 13

#32.00 Hearing
RE: [28] Motion, and [30] Objection to Claimed Exemption (Horowitz, Carissa)

FR. 4-23-24

Docket 28

Tentative Ruling:

May 7, 2024

Appearances required.

The Court will inquire about whether the parties are prepared to move forward.

Party Information

Debtor(s):

| | |
|-------------------|----------------------------------|
| Wayne Carl Fulton | Represented By Jenny L Doling |
|-------------------|----------------------------------|

Joint Debtor(s):

| | |
|----------------------|----------------------------------|
| Linda Scanlin Fulton | Represented By Jenny L Doling |
|----------------------|----------------------------------|

Movant(s):

| | |
|----------------|--------------------------------------|
| Kevin Eldredge | Represented By Carissa N Horowitz |
|----------------|--------------------------------------|

Trustee(s):

| | |
|-----------------------------|--------|
| Elizabeth (ND) F Rojas (TR) | Pro Se |
|-----------------------------|--------|

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9:24-10107 Wayne Carl Fulton and Linda Scanlin Fulton

Chapter 13

#33.00 Hearing

RE: [33] Motion to Dismiss Debtor Chapter 13 for Cause or in the alternative
Dismiss motion to Avoid Lien (Horowitz, Carissa)

FR. 4-23-24

Docket 33

Tentative Ruling:

May 7, 2024

Appearances required.

The Court will inquire about whether the parties are prepared to move forward.

Party Information

Debtor(s):

Wayne Carl Fulton

Represented By
Jenny L Doling

Joint Debtor(s):

Linda Scanlin Fulton

Represented By
Jenny L Doling

Movant(s):

Kevin Eldredge

Represented By
Carissa N Horowitz

Trustee(s):

Elizabeth (ND) F Rojas (TR)

Pro Se

United States Bankruptcy Court
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Hearing Room 201

2:00 PM

9:18-11110 Vera Rozhko

Chapter 11

#34.00 Hearing

RE: [114] Motion For Sanctions/Disgorgement Motion for Order to Show Cause why the Bank of New York Mellon and Shellpoint Mortgage Servicing Should not be Held in Contempt of Court for Knowingly and Continually violating the Terms of Reorganized Debtors Confirmed Chapter 11 Plan of Reorganization

Docket 114

*** VACATED *** REASON: Continued to June 18, 2024, at 1:00 p.m.

Tentative Ruling:

May 7, 2024

Appearances waived.

This matter has been continued to June 18, 2024, at 1:00 p.m. through that *Order on Stipulation to Continue Hearing on Debtor's Motion for Order to Show Cause Why the Bank of New York Mellon and Shellpoint Mortgage Servicing Should Not Be Held in Contempt of Court for Knowingly and Continually Violating the Terms of Reorganized Debtor's Confirmed Chapter 11 Plan of Reorganization. See Docket No. 128.*

Party Information

Debtor(s):

Vera Rozhko

Represented By
Reed H Olmstead

Movant(s):

Vera Rozhko

Represented By
Reed H Olmstead

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9:23-10672 S&W Blue Jay Way, LLC

Chapter 11

#35.00 CONT'D Hearing

RE: [90] Motion RE: Objection to Claim Number 2 by Claimant Blue Jay 180, LLC, a California limited liability company. Objection to Claim No. 2-1 of Blue Jay 180, LLC, a California Limited Liability Company; Memorandum of Points and Authorities; Declarations of Kailey Wright and Roye Zur in Support Thereof

FR. 12-12-23 (Hearing Continued as a Status Conference)

Docket 90

*** VACATED *** REASON: Continued by Stipulation to 5/21/2024 at 2:00PM.

Tentative Ruling:

May 7, 2024

Appearances required.

December 12, 2023

Appearances required.

On November 10, 2023, S&W Blue Jay Way, LLC (the "Debtor") filed that *Objection to Claim No. 2-1 of Blue Jay 180, LLC, A California Limited Liability Company* (the "Objection"). *See* Docket No. 90. At bottom, the Objection requests two (2) forms of relief: (1) disallowance of Claim No. 2-1 (the "Claim") filed by Blue Jay 180, LLC (the "Claimant") due to the implication of California's usury laws; and (2) an awarding of "Debtor's attorneys' fees in accordance with applicable California law." *See id.* at p. 4, lines 2-6.

On November 28, 2023, the Claimant filed *Blue Jay 180, LLC's Opposition to Objection to Claim No. 2-1 of Blue Jay, LLC, A California Limited Liability Company* (the "Opposition"). *See* Docket No. 105. The Claimant through the Opposition, argues, *inter alia*, that the Objection is procedurally defective in that it fails to comply

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CONT... S&W Blue Jay Way, LLC
with Fed. R. Bankr. P. 3007(b).

Chapter 11

Analysis

The Form of Objection is Proper

As a threshold issue, pursuant to Fed. R. Bankr. P. 3007(b), "[a] party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding."

Fed. R. Bankr. P. 7001(1)

Pursuant to Fed. R. Bankr. P. 7001(1), an adversary proceeding includes "a proceeding to recover money or property." "[T]he word 'recover' by itself could have at least one of two primary meanings in this legal context: a) to get back or regain; or b) to gain by legal process." *See In re Ballard*, 502 B.R. 311, 317 (Bankr. S.D. Oh. 2013)(citing *Black's Law Dictionary* 1389 (9th ed. 2009)). "Rule 7001(1) describes a proceeding to exert dominion and control over money or physical property." *Id.*

"Thus, the term 'to recover money or property' in the context of Rule 7001(1) refers to a proceeding involving the exercise of dominion or control over money or property that may be property of the estate." *Id.* at 317-318. "'Bankruptcy Rule 7001(1), has been applied in the context of replevin actions to recover money or property, motions to avoid post-petition transfers and actions for the turnover of collateral.'" *Id.* at 318 (citing *In re Charter Co.*, 876 F.2d 866, 874 (11th Cir. 1989)). "Rule 7001 does not govern requests for attorneys fees." *In re Chambers*, 140 B.R. 233 (N.D. Ill. 1992). "The request for attorneys' fees in connection with the objection to [] claim was property brought by motion." *In re Chambers*, 131 B.R. 818, 822 (Bankr. N.D. Ill. 1991)(partially rev'd on other grounds).

The Debtor is seeking an order from this Court, should the Court sustain the Objection, requiring the Claimant to pay the Debtor's attorneys' fees as the "prevailing party," arguing that the attorneys' fees clause in the underlying contract should be reciprocally applied under California law. *See* Docket No. 90, pp. 19-20.

The Claimant argues that "the Objection must be overruled as procedurally defective and improperly before this Court under Rule 3007(b), as it attacks the validity of [the Claimant's] lien while also seeking money damages. These issues must be adjudicated by way of an adversary case with a fair evidentiary process, not a claim

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CONT... S&W Blue Jay Way, LLC

Chapter 11

objection." *See* Docket No. 105, p. 12, lines 18-20.

The Court agrees with the Debtor that a request for attorneys' fees in conjunction with a claim objection is procedurally proper, and the attorneys' fees request need not be brought through an adversary action.

Fed. R. Bankr. P. 7001(2)

As set forth in Fed. R. Bankr. P. 7001(2), an adversary proceeding includes "a proceeding to determine the validity, priority, or extent of a lien or other interest in property..." "'Extent,' as used in Rule 7001(2), does not refer to collateral valuation, but rather concerns identification of the collateral to which the lien attaches." *In re Bennett*, 312 B.R. 843, 847 (Bankr. W.D. Ky. 2004)(internal citations omitted).

The Debtor also seeks to reduce the amount of the Claim, a secured claim, under the California usury laws. As noted, the Claimant retorts that "the Objection must be overruled as procedurally defective and improperly before this Court under Rule 3007(b), as it attacks the validity of [the Claimant's] lien while also seeking money damages. These issues must be adjudicated by way of an adversary case with a fair evidentiary process, not a claim objection." *See* Docket No. 105, p. 12, lines 18-20.

As of now, the Debtor is solely seeking to reduce the amount of the Claim under California's usury laws. The Debtor is not seeking: (1) to identify any of the collateral securing the Claim; (2) a determination of the Claim's order in priority as to other secured claims; or (3) a determination as to whether the Claim is secured by a valid lien.

The Court is inclined to agree with the Debtor that the amount of the Claim may be determined through the Objection.

The Discovery Request

"Claim objections [] initiate contested matters." *In re Rosebud Farm, Inc.*, 619 B.R. 202, 209 (Bankr. E.D. Ill. 2020)(citing Fed. R. Bankr. P. 3007). "In contested matters, some, but not all, of the Federal Rules of Bankruptcy Procedure [] regarding adversary proceedings apply." *Id.* "The rules automatically applicable to contested matters include Bankruptcy Rule 7026, except for Fed. R. Civ. P. 26(a)(1)-(3) and (f), and Bankruptcy Rules 7027 to 7037." *Id.* "The court has discretion to apply the other

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CONT... S&W Blue Jay Way, LLC

Chapter 11

Bankruptcy Rules applicable to adversary proceedings to contested matters." *Id.* (citing Fed. R. Bankr. P. 9014(c)). Pursuant to this Court's Local Rule 3007-1(b)(5), "[i]f the claimant timely files and serves a response, the court, in its discretion, may treat the initial hearing as a status conference if it determines that the claim objection involves disputed fact issues or will require substantial time for presentation of evidence or argument."

The Claimant argues that the Objection deprives it of an opportunity to conduct discovery. *See* Docket No. 105, p. 12, lines 14-17.

The Objection appears to the Court to be complicated, although it is not clear that substantial discovery is required. The Court is inclined to continue the hearing to allow some discovery to be taken, and to take live evidence at an evidentiary hearing.

Party Information

Debtor(s):

S&W Blue Jay Way, LLC

Represented By
Roya Zur

Movant(s):

S&W Blue Jay Way, LLC

Represented By
Roya Zur

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9:24-10279 Damian Joseph Nieman

Chapter 11

#36.00 Hearing
RE: [22] Motion to Abandon , Filed by Debtor

Docket 22
*** VACATED *** REASON: Withdrawal of motion was filed by movant on 4/10/24.

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Damian Joseph Nieman

Represented By
Chris Gautschi

Movant(s):

Damian Joseph Nieman

Represented By
Chris Gautschi

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2:00 PM

9:24-10279 Damian Joseph Nieman

Chapter 11

#37.00 HearingRE: [39] Application to Employ Chelsea King Invest SLO as Real Estate Broker and Notice of Motion

Docket 39

Tentative Ruling:

May 7, 2024

Appearances waived.

Background

On March 18, 2024, Damian Jospoh Nieman (the "Debtor") filed a voluntary petition for relief pursuant to Chapter 11 of Title 11 of the United States Code. *See* Docket No. 1, *Voluntary Petition for Individuals Filing for Bankruptcy*. The Debtor scheduled as property of his bankruptcy estate, a parcel of real estate located at 2068 Tapadero Ave., Los Osos, CA 93402 (the "Property"). *See id.* at *Schedule A/B: Property*. On April 11, 2024, the Debtor filed that *Notice of Motion and Motion in Individual Chapter 11 Case for Order Authorizing Debtor in Possession to Employ Professional* (the "Application"), which Application seeks the Court's approval of the Debtor's employment of Chelsea King of Invest SLO ("Applicant") pursuant to 11 U.S.C. § 328 to market and sale the Property, and to be compensated by a 6% commission of any such sale. *See* Docket No. 39. The Application provides that, by Applicant's and the Debtor's statements, the Applicant is disinterested and does not hold an interest adverse to the Debtor's bankruptcy estate. *Id.* at pp. 6 and 8.

Notice

The Application was served on all creditors of the Debtor and the Office of the United States Trustee on April 11, 2024, informing them that any opposition to the Application must be filed and served within fourteen (14) days of the hearing on the Application. *See id.* at pp. 1-2 and 19-20, *Proof of Service of Document*. This Court's Local Rule 9013-1(f)(1) provides that "each interested party opposing or responding to the motion must file and serve the response [] on the moving party and the United States trustee not later than 14 days before the date designated for hearing." Pursuant

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CONT... **Damian Joseph Nieman**

Chapter 11

to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." No party served with the Application has timely filed an opposition. The Court therefore takes the default of all parties served with the Application.

Analysis

Pursuant to 11 U.S.C. § 327(a), "the trustee, with the court's approval, may employ one or more [] professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." Pursuant to 11 U.S.C. § 328(a), "[t]he trustee [] with the court's approval, may employ [] a professional person under section 327 [] of this title [] on any reasonable terms and conditions of employment..."

The Court approves the Application, and the Debtor may employ the Applicant pursuant to 11 U.S.C. § 327(a). However, the Court does not approve any portion of that *Residential Listing Agreement* that provides for Applicant's representation of both the Debtor and any buyer. Any buyer must be represented by their own broker/agent. The Debtor is to upload a conforming order within 7 days.

Party Information

Debtor(s):

Damian Joseph Nieman

Represented By
Chris Gautschi

Movant(s):

Damian Joseph Nieman

Represented By
Chris Gautschi

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9:23-10517 Global Premier Regency Palms Colton, LP

Chapter 11

#38.00 CONT'D Hearing - AS STATUS CONFERENCE
RE: [41] and [42] Notice of motion and motion for relief from the automatic stay
with supporting declarations REAL PROPERTY RE: 839 Fairway Avenue,
Colton, California 92324 .

FR. 9-12-23, 11-14-23, 2-6-24, 2-22-24, 3-19-24, 4-23-24

Docket 41

Tentative Ruling:

May 7, 2024

Appearances required.

April 23, 2024

Appearances required.

March 19, 2024

Appearances required.

September 12, 2023

Appearances required.

Party Information

Debtor(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl
Peter W Lianides

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CONT... Global Premier Regency Palms Colton, LP

Chapter 11

Movant(s):

iBorrow REIT, L.P., a Delaware

Represented By
Daniel H Reiss
David L. Neale
Zachary Page

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9:23-10517 Global Premier Regency Palms Colton, LP

Chapter 11

#39.00 CONT'D Hearing - AS STATUS CONFERENCE
RE: [55] Motion Debtors Motion For Order Authorizing Post-Petition Secured
Loan Pursuant To 11 U.S.C. §§ 364(C)(1), (2), (3) AND (D)(1) On All Assets;
Memorandum Of Points And Authorities

FR. 9-1-23, 9-12-23, 11-14-23, 2-6-24, 2-22-24, 3-19-24, 4-23-24

Docket 55

Tentative Ruling:

May 7, 2024

Appearances required.

April 23, 2024

Appearances required.

March 19, 2024

Appearances required.

September 12, 2023

Appearances required.

September 1, 2023

Appearances required.

Party Information

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CONT... Global Premier Regency Palms Colton, LP

Chapter 11

Debtor(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl
Peter W Lianides

Movant(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl
Peter W Lianides

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9:23-10517 Global Premier Regency Palms Colton, LP

Chapter 11

#40.00 CONT'D Hearing - AS STATUS CONFERENCE
RE: [172] and [176] Motion for Relief from Stay Debtors Motion For Order
Confirming Applicability Of The Automatic Stay And Implicit Waiver Of 11 U.S.C.
Section 362(e), Or, Alternatively, For Continuation Of The Automatic Stay;
Memorandum Of Points And Authorities.

FR. 1-23-24, 3-19-24, 4-23-24

Docket 172

Tentative Ruling:

May 7, 2024

Appearances required.

April 23, 2024

Appearances required.

March 19, 2024

Appearances required.

Party Information

Debtor(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl
Peter W Lianides

Movant(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl

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CONT... Global Premier Regency Palms Colton, LP
Peter W Lianides

Chapter 11

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9:23-10517 Global Premier Regency Palms Colton, LP

Chapter 11

#41.00 CONT'D Hearing - AS STATUS CONFERENCE
RE: [185] Motion to Disallow Claims Debtors Motion For Order Disallowing
Usurious Interest Re Claim By iBorrow REIT, L.P.; Memorandum Of Points And
Authorities

FR. 2-6-24, 3-19-24, 4-23-24

Docket 185

Tentative Ruling:

May 7, 2024

Appearances required.

April 23, 2024

Appearances required.

March 19, 2024

Appearances required.

Party Information

Debtor(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl
Peter W Lianides

Movant(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl
Peter W Lianides

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9:23-10517 Global Premier Regency Palms Colton, LP

Chapter 11

#42.00 CONT'D Hearing (FINAL HEARING)

RE: [241] Motion Debtors Motion For Order Authorizing Post-Petition Secured
Loan Pursuant To 11 U.S.C. §§ 364(c)(1), (2) And (d)(1) On All Assets;
Memorandum Of Points And Authorities

FR. 3-26-24, 4-23-24

Docket 241

Tentative Ruling:

May 7, 2024

Appearances required.

April 23, 2024

Appearances required.

March 26, 2024

Appearances required.

Before the Court is *Debtor's Motion for Order Authorizing Post-Petition Secured Loan Pursuant to 11 U.S.C. §§364(c)(1), (2) and (d)(1) on All Assets* (the "Motion") filed by Global Premier Regency Palms Colton, LP (the "Debtor"). *See* Docket No. 241. Through the Motion, the Debtor seeks, *inter alia*, approval of that *DIP Loan and Security Agreement* (the "DIP Agreement") with Legalist DIP Fund II, LP (the "Lender") to provide the Debtor with post-petition, secured financing (the "DIP Facility"). *See id.* at p. 2, lines 7-19. The DIP Facility is to be advanced first on an interim basis in the amount of \$9,702,104 to allow the Debtor to pay a reduced claim of its current senior secured creditor, iBorrow, real property taxes, closing costs, and the Lender's legal costs. *See id.* at p. 5, lines 9-12. The balance of the DIP Facility, up to \$23.39 million may be obtained by the Debtor from Lender after a final hearing on the Motion, and through several delineated terms. *See id.* at pp. 11-12. Under the

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CONT... Global Premier Regency Palms Colton, LP Chapter 11

settlement agreement with iBorrow, the Debtor has until April 5, 2024 to pay iBorrow \$9.45 million, or its main asset, a parcel of real property, will be provided to iBorrow pursuant to a sale this Court has previously approved.

With the DIP Facility, the Debtor asserts that it will be able to complete construction of its real property over approximately a year and a half, thereby increasing its value from \$13.5 million to between \$31.2 and \$34.7 million. *See id.* at pp. 10-11.

The DIP Facility is to accrue interest at the prime rate plus 8% for the first year, the prime rate plus 9.5% for months 13-18, and the prime rate plus 9.54% for months 19-24. *See id.* at Exhibit 2, Bates stamped p. 11. If the DIP Facility is approved, the Lender would be due a "commitment fee" of \$233,900 and "underwriting fee" of \$233,900, a monthly fee of .3125% based on the difference between the "daily average unpaid principal balance of the [DIP Facility] during the respective month and [the DIP Facility] as of the beginning of such month, and a "monthly loan monitoring fee" of \$14,618.75. *See id.* The Debtor is to pay Lender's legal expenses, of which just \$75,000 is disclosed in the Motion and related pleadings. *See Docket No. 242, Declaration of Christine Hanna in Support of Debtor's Motion for Order Authorizing Post-Petition Secured Loan Pursuant to 11 U.S.C. §§ 364(c)(1), (2), and (d)(1) On All Assets* (the "Hanna Declaration"), Exhibit 1, Bates stamped p. 2. Lender is also granted "not less than 20% of equity interest in [the Debtor]." *See Docket No. 242, Exhibit 2*, Bates stamped p. 25.

Under the DIP Agreement, the Lender receives a senior priority lien over all other secured creditors of the Debtor, and its lien would extend to pre- and post-petition assets of the Debtor and its estate, including "the proceeds of any Avoidance Actions." *See id.* at p. 18. The DIP Agreement provides that the Debtor "shall not" "sell, transfer, lease, encumber or otherwise transfer any interest in the Project or other DIP Collateral without Lender's prior written consent and in Approved form..." *See id.* at p. 22. Upon default the interest rate of the DIP Facility increases to the prime rate, plus the contract rate, plus 4.750%. *See id.* at p. 12. By the Court's math, the default rate would be 21.25% if the Debtor defaults on the DIP Agreement in the first year. Further, after five (5) days' notice of default to certain parties, not including this Court, and without hearing, the automatic stay is lifted. *See id.* at p. 36.

Analysis

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Chapter 11

Pursuant to 11 U.S.C. § 364(c), "[i]f the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debtor (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title; (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or (3) secured by a junior lien on property of the estate that is subject to a lien."

Pursuant to 11 U.S.C. § 364(d)(1), "[t]he court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if (A) the trustee is unable to obtain such credit otherwise; and (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted."

"Debtors in possession generally enjoy little negotiating power with a proposed lender, particularly when the lender has a prepetition lien on cash collateral. As a result, lenders often exact favorable terms that harm the estate and creditors." *In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (9th Cir. BAP 1992)(citing *In re Ames Department Stores, Inc.*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) and *In re Tenney Village Co.*, 104 B.R. 562, 567-570 (Bankr. D. N.H. 1989)). "While certain favorable terms may be permitted as a reasonable exercise of the debtor's business judgment, bankruptcy courts do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender. *Id.* Thus, courts look to whether the proposed terms would prejudice the powers and rights that the Code confers for the benefit of all creditors and leverage the Chapter 11 process by granting the lender excessive control over the debtor or its assets as to unduly prejudice the rights of other parties in interest." *Id.*

Some courts have applied generally accepted factors in considering financing requests, including:

- (1) That the proposed financing is an exercise of sound and reasonable business judgment;

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- (2) That the financing is in the best interests of the estate and its creditors;
- (3) That the credit transaction is necessary to preserve the assets of the estate, and is necessary, essential, and appropriate for the continued operation of the Debtor's business;
- (4) That the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender; and
- (5) That the financing agreement was negotiated in good faith and at arm's length between the Debtors, on the one hand, and...the Lenders, on the other hand.

In re Sterling Min. Co., 2009 WL 2514167 *3 (Bankr. D. Id. 2009) (citing *In re Farmland Indust., Inc.*, 294 B.R. 855 (Bankr. W.D. Mo. 2003)).

The Court here focuses on the fourth of the above-referenced *Sterling Min. Co.* factors, that the terms of the transaction be fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender. The Court cannot find such fairness, reasonableness and adequacy on the record before it. To start, the Motion is incomplete. The budget is not attached to the Motion, and as of 5:45 p.m. the day prior to the hearing on the Motion, none has been filed with the Court and served on creditors. The Court and parties-in-interest have no understanding of what is contained in the budget. What is more, all the "milestones" that are critical to the Debtor's funding requests, and mentioned in the DIP Agreement, are not included under the referenced exhibit tab. The Court has before it, on shortened time, an incomplete Motion, missing critical documents that parties, including the Debtor, require to understand fully the terms of the proposed financing.

Second, the Court finds it inappropriate for the estate's avoidance actions to serve as collateral for the Lender, and, at this juncture, the Court is not inclined to approve such a provision.

Third, the "equity grant" is not a term this Court would approve on the record before it, if ever. The Court is aware of courts that have approved of dip facilities that included collateral enhancements similar in nature to the "equity grant." *See Defender Drug Stores, Inc.*, 145 B.R at 312. The Court does not find the "equity grant" appropriate in this circumstance, and struggles to define a set of facts where it would ever be appropriate. Through the DIP Agreement, the Lender is to be secured by a

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senior lien in all the Debtor's assets, including avoidance actions, paid no less than 16.5% interest, and paid hundreds of thousands of dollars in various loan related fees. By the Debtor's own liquidation valuation, regarding the interim financing portion of the DIP Facility, the Lender would be oversecured by 28% on the real property alone. Presumably, based on further advances being tied to construction milestones, the Lender maintains equity in its collateral base throughout the life of the DIP Facility, or so it presumably projects. The Lender receives a priority administrative expense claim over all other administrative claims other than the purported carve-out, and controls when and how the Debtor may sell its assets. Upon default the interest rate on the DIP Facility exceeds 21%, and upon five (5) days' notice, without a hearing, the Lender is granted relief from the stay. The operating company that has been established to manage the Debtor's operations may not now manage the Debtor's operations, at least not without the Lender's consent. The Lender must consent to leases of the Debtor's property. The Court's point being, the "equity grant" overreaches to the extent it is to serve as a portion of the collateral package for the DIP Facility. What is more, in this Court's view, purchases/exchanges of equity in Chapter 11 matters should be completed through a confirmed Chapter 11 plan of reorganization, and not through emergency noticed financing motions as is the case present.

While there is a credible interest of the Debtor in completing the build of its facility and finally starting its operations, the cost to do so here comes at a cost that the Court understands to be unreasonable, lacking in fairness to the estate, and with inadequate information. The Court is inclined to deny the Motion.

Party Information

Debtor(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander
Matthew J Stockl
Peter W Lianides

Movant(s):

Global Premier Regency Palms

Represented By
Garrick A Hollander

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Docket 1

Tentative Ruling:

May 7, 2024

Appearances required.

April 23, 2024

Appearances required.

March 19, 2024

Appearances required.

February 22, 2023

Continued to March 19, 2024 at 2:00 p.m.

September 12, 2023

Appearances required.

Party Information

Debtor(s):

Global Premier Regency Palms

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