10:00 AM

9: - **Chapter**

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Docket 0

Tentative Ruling:

10:00 AM

CONT... **Chapter**

- NONE LISTED -

10:00 AM
9:23-10827 Benjamin Ralph Theis **Chapter 13**

#1.00 Hearing
RE: [8] Notice of Motion and Motion in Individual Case for Order Imposing a Stay or Continuing the Automatic Stay as the Court Deems Appropriate 2078 Rhoda Street, Oxnard, CA 93036 .

Docket 8

Tentative Ruling:

October 10, 2023

Appearances waived. The Motion is granted in part and denied in part for the reasons stated infra. Movant to upload a conforming order within 7 days.

Background

On December 19, 2022, Benjamin Ralph Theis (the "Debtor") filed a petition for relief under Chapter 13 of Title 11 of the United States Code. *See* Case No. 9:22-bk-11003-RC (the "First Case"). The First Case was dismissed on August 17, 2023, at the Chapter 13 confirmation hearing. *See* First Case, Docket No. 26.

On September 18, 2023 (the "Petition Date"), the Debtor filed a further voluntary Chapter 13 petition under Title 11 of the United States Code. *See* Case No. 9:23-bk-10827-RC (this "Case") (hereinafter all citations to the Docket will refer to this Case unless otherwise specified).

On the Petition Date, the Debtor filed that *Notice of Motion and Motion in Individual Case for Order Imposing a Stay or Continuing the Automatic Stay as the Court Deems Appropriate* (the "Motion") seeking to continue the automatic stay as to all of his creditors related to a parcel of real property located at 2078 Rhoda Street, Oxnard, CA 93036 (the "Property") pursuant to 11 U.S.C. § 362(c)(3). *See* Docket No. 8. The Debtor contends that this Case was filed in good faith and that the presumption of bad faith under 11 U.S.C. § 362(c)(3)(C) is overcome. *See id.* at p. 5.

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CONT... Benjamin Ralph Theis **Chapter 13**

Notice

Pursuant to this Court’s Local Rule 4001-1(d)(1), "[a] party in interest seeking an extension of the stay under 11 U.S.C. § 362(c)(3)(B) [] must file a motion and serve the motion, notice of hearing, and supporting documents as provided in subsection (c)(1) of this rule and upon all other parties in interest against whom extension or imposition of the stay is sought."

The Motion and notice thereof were served upon all of the Debtor’s creditors via U.S. Mail First Class, postage prepaid on September 18, 2023 (with the exception of Capital One for account numbers 6879 and 0505), and the Chapter 13 Trustee via Notice of Electronic Filing, notifying the parties 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 Document*, p. 10. 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." No party served with the Motion has timely filed an opposition to the Motion. The Court therefore takes the default of all non-responding parties that were served with the Motion. Capital One, as to accounts 6879 and 0505, which address is listed as Box 30285, Salt Lake City, UT 84130 in the Debtor’s *Schedule E/F: Creditors Who Have Unsecured Claims*, remains unaffected by the Motion.

Analysis

Pursuant to 11 U.S.C. § 362(c)(3)(A), where a Chapter 13 case is filed by a debtor, and where that debtor also had a Chapter 13 case dismissed within the year prior, "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case."

"The majority interpretation [of 11 U.S.C. § 362(c)(3)(A)] finds the phrase ‘with respect to the debtor’ to be both critical and unambiguous, and concludes that on the 30th day after the petition date, the automatic stay terminates only with respect to the debtor and the debtor’s property, but not as to property of the estate." *In re Reswick*, 446 B.R. 362, 365-366 (9th Cir. BAP 2011); *see also In re Thu Thi Dao*, 616 B.R. 103, 106 (Bankr. E.D. Cal. 2020); *In re Rinard*, 451 B.R. 12, 17 (C.D. Cal. 2011); *In re Madson*, 2022 WL 1272583 (E.D. Cal. April 27, 2022). "The plain text of § 362(c)(3)(A) is crystal clear that the automatic stay is terminated with respect to the [d]ebtor. There is no mention of the [e]state in the text." *In re Rinard*, 451 B.R. 12 at 19-20.

Pursuant to 11 U.S.C. § 362(c)(3)(B), the debtor or any other interested party may seek to extend the automatic stay that otherwise would expire thirty days after the second petition is filed. The movant must demonstrate that the case was filed "in good faith as to the creditors to be stayed." *In re Sill*, 2018 WL 2728836, at *2 (9th Cir. BAP June 6, 2018) (citing *Reswick v. Reswick (In re Reswick)*, 446 B.R. at 368-369 (9th Cir. BAP 2011)).

"[F]or purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) (i) as to all creditors if—(I) more than 1 previous case under [Chapter 13] in which the individual was a debtor was pending within the preceding 1-year period; (II) a previous case under [Chapter 13] in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—(cc) perform the terms of a plan confirmed by the court." *See* 11 U.S.C. § 362(c)(3)(C).

Based on the majority view of the application of 11 U.S.C. § 362(c)(3)(A) *supra*, which this Court adopts, the automatic stay terminates as to the Debtor on the 30th day after the Petition Date in this Case, but not as to property of the Debtor's bankruptcy estate.

As to termination of the stay regarding the Debtor, as provided under 11 U.S.C. § 362(c)(3)(C), the Debtor must provide clear and convincing evidence that this Case was not filed in bad faith. The Debtor asserts that dismissal of the First Case was due to his failure to file personal and business tax returns and supporting business documentation. *See* Docket No. 8, *Declaration of Debtor Benjamin Ralph Theis*, ¶ 3. In this Case, the Debtor has filed returns and provided copies to his counsel. *See id.* ¶ 4. The Debtor additionally understands the need to remain post-petition current on his mortgage payments as well as his Chapter 13 plan payments. *See id.* at ¶ 5. The Debtor appears to have his tax returns in order. The Debtor also timely filed a plan

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CONT... **Benjamin Ralph Theis** **Chapter 13**

(the "Plan") on October 2, 2023. *See* Docket No. 13. Pursuant to the terms of the Plan, the Debtor proposes to pay 100% to unsecured creditors via $1,870.00 monthly payments for 60 months. *See* id., pp. 2-3. According to the Debtor's schedules, he has sufficient monthly net income of $1,879.00 to fund the proposed monthly Plan payment. *See* Docket No. 1, *Schedule I*, pp. 1-2, *Schedule J*, pp. 1-2. The Court accepts the representations of the Debtor and his counsel, and finds the Case was not filed in bad faith. This said, as the First Case was dismissed in part for the Debtor's failure to provide his 2021 and 2022 tax returns to the Chapter 13 Trustee as requested, and because the Debtor now attests that these tax returns have been filed, those returns are to be provided to the Chapter 13 Trustee within 24 hours of the entry of an Order granting the Motion.

The Court grants the relief requested in the Motion that the stay be continued regarding the Debtor, and related to the Property, after October 18, 2023, as to those creditors served with the notice of the Motion, in overcoming the bad faith presumption under 11 U.S.C. § 362(c)(3)(C)(i). The 2021 and 2022 tax returns of the Debtor are to be provided to the Chapter 13 Trustee within 24 hours of entry of an order on the Motion.

Party Information

Debtor(s):

Benjamin Ralph Theis	Represented By John K Rounds

Movant(s):

Benjamin Ralph Theis	Represented By John K Rounds John K Rounds

Trustee(s):

Elizabeth (ND) F Rojas (TR)	Pro Se

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9:23-10627 Albert Maxwell Goldberg **Chapter 13**

#2.00 HearingRE: [27] Notice of motion and motion for relief from automatic stay with supporting declarations ACTION IN NON-BANKRUPTCY FORUM RE: Circuit Court for the Third Circuit, State of Hawaii, Case No. 3CC16100281K (concerning real property 75-6108 Kipehi Pl, Kailua Kona, HI 96740) .

Docket 27

Tentative Ruling:

October 10, 2023

Appearances required. The Court will grant the Motion for "cause" under 11 U.S.C. § 362(d)(1) with waiver of the 14-day stay FRBP 4001(a)(3) and termination of the co-debtor stay under 11 U.S.C. § 1301(a).

Palm Avenue Hialeah Trust ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) to proceed against the debtor, Albert Maxwell Goldberg (the "Debtor"), in the nonbankruptcy action *Movant v. Goldberg, et al.* (3CC16100281K) filed on August 30, 2016 (the "Nonbankruptcy Action"), pending before the Third Circuit Court of the State of Hawaii. *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. 27).

Movant seeks relief from stay on the grounds that (1) mandatory abstention applies under 28 U.S.C. § 1334(c)(2), and Movant agrees that the stay will remain in effect as to enforcement of any resulting judgment against the Debtor or bankruptcy estate, except that Movant will retain the right to file a proof of claim under 11 U.S.C. § 501 and/or adversary complaint under 11 U.S.C. §§ 523 or 727 in this bankruptcy case, (2) the claims arise under nonbankruptcy law and can be most expeditiously resolved in the nonbankruptcy forum, and (3) the bankruptcy case was filed in bad faith. *See* Motion, pp. 3-4. Movant also requests relief (1) 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, (2) termination of the co-debtor stay of 11 U.S.C. § 1201(a) or §

1301(a), and (3) waiver of the 14-day stay prescribed by FRBP 4001(a)(3). *See* Motion, pp. 4-5.

The Motion and notice thereof were served upon the Debtor via U.S. Mail first class, postage prepaid on August 30, 2023, 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.

On September 26, 2023, the Debtor filed *Debtor's Response to Palm Avenue Hialeah Trust's Motion for Relief from Stay* and that *Response to Motion Regarding the Automatic Stay and Declaration(s) in Support* (collectively, the "Responses"). *See* Docket Nos. 33-34. Through the Responses, the Debtor argues that the Motion was filed prematurely because there is no "pending litigation between the parties here in the bankruptcy court." *See* Docket No. 34, p. 5.

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 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).

Curtis Factors

Whether the relief will result in a partial or complete resolution of the issues

The complaint in the Nonbankruptcy Action alleges claims for relief for foreclosure of property located at 75-6108 Kipehi Place, Kailua Kona, HI 96740 (the "Property"). *See* Docket No. 27, *Exhibit A*. Additionally, the Debtor filed a counter-claim for, *inter-alia*, breach of contract, unfair and deceptive trade practices, and breach of covenant of good faith and fair dealing. *See id*. at *Exhibit B*. Movant seeks relief from this Court to lift the stay solely to allow Movant to proceed to obtain relief as to a pending motion to dismiss the counter-complaint, or to otherwise litigate the counter-complaint matters to completion.

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CONT... Albert Maxwell Goldberg Chapter 13

A judgment on the counter-complaint in the Nonbankruptcy Action would resolve the Debtor's request for damages against Movant. Movant is not scheduled as having a disputed, contingent or unliquidated claim against the Debtor. *See* Docket No. 9, *Schedule D*, p. 2. The Debtor's *Chapter 13 Plan* (the "Plan") does not appear to suggest that the Debtor intends on paying Movant anything less than what it is owed related to the Property. *See* Docket No. 10. However, the claims bar date and the deadline for Movant to object to confirmation of the Plan have not yet passed. Therefore, the Court is uncertain as to whether a judgment on the counter-complaint in the Nonbankruptcy Action will resolve all of the issues between the parties.

The lack of any connection with or interference with the bankruptcy case

Resolution of the Nonbankruptcy Action has a connection with the bankruptcy case because it will determine the Debtor's alleged claims against Movant. The Court has been provided no evidence from the Debtor that allowing the Nonbankruptcy Action to commence will interfere with this bankruptcy case.

Whether the foreign proceeding involves the debtor as a fiduciary

It does not appear that the Nonbankruptcy Action asserts the Debtor to have maintained a fiduciary capacity.

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

The Nonbankruptcy Action involves causes of action for foreclosure, breach of contract, and unfair business practices. *See* Docket No. 27, *Exhibit A*. The Circuit Court of the Third Circuit, State of Hawaii is not a specialized tribunal, and there is not a specialized expertise required of the state court to hear the Nonbankruptcy Action. *See In re Curtis*, 40 B.R. 795 at 800 (specialized tribunals such as a board of contract appeals, state compensation panel, and state courts related to issues such as "unsettled questions of state property law…").

Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation

Neither the Debtor nor Movant has provided no evidence that an insurance carrier has assumed financial responsibility for defending the litigation.

Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question

The Nonbankruptcy Action is between Movant and the Debtor, as well as non-debtor parties Mortgage Electronic Registration Systems, Inc., Pualani Estates at Kona Community Association, and DOES 1-20. *See* Docket No. 27, p. 7. The Nonbankruptcy Action is not based on goods on which the Debtor functions as a bailee or conduit for.

Whether the litigation in another forum would prejudice the interests of other creditors, the creditor's committee, and other interested parties

There is no evidence that litigation of the Nonbankruptcy Action would prejudice other creditors or interested parties.

Whether the judgment claim arising from the foreign action is subject to equitable subordination

This factor is not applicable to the Debtor.

Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f)

This factor is not applicable to the Debtor.

The interests of judicial economy and the expeditious and economical determination of litigation for the parties

The Circuit Court of the Third Circuit, State of Hawaii has presided over the Nonbankruptcy Action since its filing in 2016. *See* Docket No. 27, *Exhibit A*. Litigation in the Nonbankruptcy Action is currently stalled due to the Debtor filing for bankruptcy. It appears that the Nonbankruptcy Action would have proceeded such that Movant's motion to dismiss the Debtor's counter-claim would be ruled on, but for the Debtor's filing of this bankruptcy case. *See* Docket No. 27, *Exhibit B*. It would make little economic sense for this Court to start the litigation process anew given how far the parties are in the Nonbankruptcy Action. What is more, at least as to the Debtor's causes of action against Movant, those matters can be determined faster in the Nonbankruptcy Action than bringing those actions here anew.

This factor breaks in favor of Movant.

Whether the foreign proceedings have progressed to the point where the parties are prepared for trial

Significant litigation has already occurred in the Nonbankruptcy Action. There is a pending dismissal action over the Debtor's counter-claim in the state court. *See* Docket No. 27, *Exhibit D*. The Debtor has filed an opposition to the dismissal. *See* Docket No. 27, *Exhibit E*. By all indications, the state court is prepared to hear the motion to dismiss the counter-claim. If the motion to dismiss is denied, given the fact that the Nonbankruptcy Action has been pending for many years, trial would take place much sooner than any trial related to a new action filed in this Court on the same theories as the counter-claim. The Debtor asserts that it has not yet filed a cause of action based on the counter-claim in this Court, and so the Motion is premature. On the other hand, no plan has been confirmed or stipulation approved resolving any such cause of action. At least as to the cross-claim, unless the Debtor is going to waive or resolve those claims through some vehicle that allows such a waiver or resolution, the causes of action are alive, and have been the subject of years of litigation.

This factor weighs in favor of Movant.

The impact of the stay and the 'balance of the hurt'

The Nonbankruptcy Action has been pending in state court for approximately seven years. The Debtor provides no evidence that it would suffer any injury if the Motion was granted. If Movant's claims have merit, liquidating the claims now would result in a benefit to the Debtor and their bankruptcy estate. Movant would suffer delay in liquidating the Debtor's asserted claims against it, as it has been with the Debtor's prior bankruptcy filings. Those claims, to the extent setoff is available, could affect

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CONT... **Albert Maxwell Goldberg** **Chapter 13**

Movant's treatment under the Plan, or confirmation of the Plan altogether.

This factor breaks in favor of Movant.

Analyzing the totality of the circumstances, and as guided by the Curtis factors, the Court finds cause to lift the stay pursuant to 11 U.S.C. § 362(d)(1) solely to allow the counter-claim to be litigated to its conclusion.

As the Court is granting the Motion pursuant to 11 U.S.C. § 362(d)(1), it need not reach the issues of mandatory abstention or bad faith.

Party Information

Debtor(s):

Albert Maxwell Goldberg	Represented By A. Rita Kostopoulos

Movant(s):

Palm Avenue Hialeah Trust, a	Represented By Renee M Parker

Trustee(s):

Elizabeth (ND) F Rojas (TR)	Pro Se

10:00 AM
9:23-10513 David Lewis Olert **Chapter 7**

#3.00 HearingRE: [30] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 6770 Round Tree Drive, Anchorage, AK 99507-7017 . (Wan, Fanny)

Docket 30

Tentative Ruling:

October 10, 2023

The Court will grant in part, and deny in part the Motion for the reasons discussed *infra*. Movant is to lodge a conforming order within 7 days.

Wells Fargo Bank, National Association ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and 11 U.S.C. § 362(d)(2) in relation to the residential real property located at 6770 Round Tree Drive, Anchorage, AK 99507 (the "Property") of David Lewis Olert (the "Debtor") on the grounds that (1) Movant's interest in the Property is not protected by an adequate equity cushion, and (2) pursuant to 11 U.S.C. § 362(d)(2)(A), the Debtor has no equity in the Property and pursuant to 11 U.S.C. § 362(d)(2)(B) the Property is not necessary for an effective reorganization. *See* Docket No. 30, *Motion for Relief from the Automatic Stay Under 11 U.S.C. 362 – Real Property* (the "Motion").

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) termination of the co-debtor stay of 11 U.S.C. § 1201(a) or § 1301(a), and (4) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3). *See* Motion, at p. 5.

The Motion and notice thereof were served upon the Debtor via U.S. Mail First class, postage prepaid on September 19, 2023, 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*. at *Proof of*

Service of Document, p. 12. 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.

Legal Standard

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). 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 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).

"To be sure, the failure to make mortgage payments constitutes 'cause' for relief from the automatic stay and is one of the best examples of a 'lack of adequate protection' under Section 362(d)(1) of the Bankruptcy Code." *In re Schuessler*, 386 B.R. 458, 480 (Bankr. S.D.N.Y. 2008) (internal citations omitted).

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).

Analysis

Here, Movant first contends that arrearages total $47,738.39, which represents nineteen (19) unpaid payments of $2,465.84 each (as of the date of the Motion) with a payment of $2,465.84 becoming due September 1, 2023. *See* Motion, p. 8. Movant further alleges that its interest in the Property is not adequately protected. Movant has a secured claim against the Property in the amount of $576,911.90. *Id*. at p. 9. As of the petition date of June 24, 2023, Movant asserts that the fair market value of the Property is $549,000.00 per the Debtor's Schedule A/B. *Id.* at *Exhibit B*. Movant argues that the equity cushion in the Property exceeding Movant's liens is negative $27,911.90 ($576,911.90 in liens against the Property valued at $549,000.00) or 5.08% of the fair market value. *Id.* at p. 8.

While the Debtor has failed to make 19 payments to Movant, it is unclear if the Debtor has failed to make payments post-petition.

Cause has been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) as Movant's interest is not adequately protected. Cause has additionally been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(2) due the lack of equity in the Property and because the Property is not necessary for reorganization in a Chapter 7.

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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CONT... David Lewis Olert **Chapter 7**

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.

As to termination of the co-debtor stay, 11 U.S.C. § 1301(a) does not apply to a case that "is closed, dismissed, or converted to a case under chapter 7 or 11 of this title. 11 U.S.C. § 1301(a)(2). The Debtor’s case was converted to one under chapter 7 on August 3, 2023. *See* Docket Nos. 16-17. Therefore, 11 U.S.C. § 1301(a) does not apply and the request will be denied.

Party Information

Debtor(s):

David Lewis Olert	Represented By Kevin Tang

Movant(s):

Wells Fargo Bank, National	Represented By Theron S Covey Fanny Zhang Wan

Trustee(s):

Sandra McBeth (TR)	Pro Se

10:00 AM

9:23-10542 Brahn Philip Centineo **Chapter 7**

#4.00 HearingRE: [14] Notice of motion and motion for relief from the automatic stay with supporting declarations PERSONAL PROPERTY RE: 2017 MERCEDES B S CLASS . (Wan, Fanny)

Docket 14

Tentative Ruling:

October 10, 2023

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

On September 11, 2023, U.S. National Bank Association ("Movant") filed that *Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362* (the "Motion") seeking to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) in relation to a 2017 Mercedes-Benz S-Class (the "Vehicle") of Brahn Philip Centineo (the "Debtor") on the grounds that Movant's interest in the Vehicle is not adequately protected, the Vehicle is not protected by an adequate equity cushion, the fair market value of the Vehicle is declining, and payments are not being made to Movant sufficient to protect Movant's interest against that decline. *See* Docket No. 14, p. 3. Additionally, Movant contends that the Debtor has no equity in the Vehicle pursuant to 11 U.S.C. § 362(d)(2)(A), and the Vehicle is not necessary for an effective reorganization pursuant to 11 U.S.C. § 362(d)(2)(B). *See id.* at p. 4.

In addition to lifting the stay, Movant requests: (1) relief to proceed under applicable nonbankruptcy law to enforce its remedies and repossess and sell the Vehicle; (2) the same shall apply to the co-debtor stay of 11 U.S.C. § 1201(a) or § 1301(a); and (3) waiver of the 14-day stay provided under Fed. R. Bankr. P. 4001(a)(3). *See id.* at p. 5. In the alternative, Movant requests this Court to order adequate protection. *See id.*

Notice

The Motion and notice thereof were served upon the Debtor via U.S. Mail First class, postage prepaid on September 11, 2023, 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. 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. The Court therefore takes the default of all non-responding parties, including the Debtor.

Analysis

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).

Movant asserts through the Motion that its secured claim in this matter, the Vehicle of which serves as collateral for said claim, totals $50,788.61 as of August 2, 2023. *See* Docket No. 14, p. 8. The value of the Vehicle, pursuant to the J.D. Power pricing report, is $36,900.00. *See id.* at *Exhibit C*. The Debtor's own *Schedule A/B* lists the value of the Vehicle as being $35,000. *See* Docket No. 1, *Exhibit A/B*. As there exists no equity in the Vehicle, and because the instant case is one under Chapter 7, the Motion is granted pursuant to 11 U.S.C. § 362(d)(2).

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

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CONT... **Brahn Philip Centineo** **Chapter 7**

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). The failure of a debtor to make post-petition payments on a secured obligation may constitute cause. *See In re Watson*, 286 B.R. 594, 604 (Bankr. D. NJ 2002).

Here, the payments to Movant on the Vehicle pursuant to the underlying loan agreement are in arrears in the total amount of $50,093.03, and no payments have been made post-petition. *See* Docket No. 14, p. 8; *see also Exhibit B*. This, coupled with the Debtors' lack of equity in the Vehicle as discussed *supra*, constitutes cause to lift the stay pursuant to 11 U.S.C. § 362(d)(1).

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

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.

11 U.S.C. § 1301(a)

As to termination of the co-debtor stay, 11 U.S.C. § 1301(a) applies to cases filed under Chapter 13. The Debtor's case was filed under Chapter 7 on July 4, 2023. *See* Docket No. 1. Therefore, 11 U.S.C. § 1301(a) does not apply and the request will be denied.

Party Information

Debtor(s):

Brahn Philip Centineo — Represented By
Daniel A Higson

Movant(s):

U.S. Bank National Association — Represented By
Theron S Covey
Fanny Zhang Wan

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CONT... Brahn Philip Centineo **Chapter 7**

Trustee(s):

Sandra McBeth (TR) Pro Se

10:00 AM
9:10-12334 **Stephen V Andersen** **Chapter 7**
Adv#: 9:22-01035 Andersen et al v. Swick et al

#5.00 CONT'D Hearing
RE: [23] Motion to Compel Defendant Kathryn Swick to Appear for a Deposition

FR. 3-22-23, 4-19-23

Docket 23

Tentative Ruling:

October 10, 2023

Appearances required.

April 19, 2023

Appearances required.

A *Notice of Appeal and Statement of Election* has been filed related to that *Order Granting Motion to Dismiss for Failure To State A Claim Upon Which Relief Can Be Granted*. *See* Docket No. 41. The Court is inclined to continue *Plaintiff's Motion to Compel Defendant Kathryn Swick to Appear for a Deposition* until the appeal has been resolved.

March 22, 2023

Appearances required.

Party Information

Debtor(s):

Stephen V Andersen	Represented By John E Hinden Edwin J Rambuski

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CONT... **Stephen V Andersen** **Chapter 7**

Defendant(s):

Kathryn Swick	Represented By Reed H Olmstead
Maryl Swick	Represented By Reed H Olmstead
Maryl Swick	Represented By Reed H Olmstead
Peak Foreclosure Services, Inc.	Represented By Reed H Olmstead

Joint Debtor(s):

Rosalina Andersen	Represented By John E Hinden Edwin J Rambuski

Movant(s):

Stephen V Andersen	Represented By Edwin J Rambuski
Rosalina Andersen	Represented By Edwin J Rambuski

Plaintiff(s):

Stephen V Andersen	Represented By Edwin J Rambuski
Rosalina Andersen	Represented By Edwin J Rambuski

Trustee(s):

Jerry Namba (TR)	Pro Se

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9:19-10031 Robert Woods Takken and Linda Henry Takken **Chapter 7**

#6.00 Chapter 7 Trustee's Final Report, Application for Compensation and Application(s) for Compensation of Professionals filed on behalf of Trustee Faith. The United States Trustee has reviewed the Chapter 7 Trustee's Final Report. Filed by United States Trustee. (united states trustee (fsy))

Docket 181

Tentative Ruling:

October 10, 2023

Appearances required.

The Court is inclined to approve the Report, absent the discrepancy as to the amount to be paid to ArentFox for incurred expenses.

Before the Court is the *Trustee's Final Report* (the "Report") filed by the duly appointed Chapter 7 Trustee, Jeremy W. Faith (the "Trustee"), for the bankruptcy estate of Robert Woods Takken and Linda Henry Takken on September 6, 2023. *See* Docket No. 181.

On March 13, 2023, ArentFox Schiff LLP ("ArentFox"), in its capacity as general insolvency counsel to the Trustee, filed that *First And Final Fee Application of Arentfox Schiff LLP, General Bankruptcy Counsel to Chapter 7 Trustee, for Allowance of Compensation and Reimbursement of Expenses for the Period from February 10, 2019 to January 31, 2023; Declaration of Aram Ordubegian in Support Thereof* (the "AF Application"), covering the period from February 10, 2019 through January 31, 2023, which requested allowance on a final basis of fees of $264,088.50 and expenses of $4,985.58. *See* Docket No. 176.

On April 3, 2023, Grobstein Teeple, LLP ("Grobstein Teeple"), accountant for the Trustee, filed that *First and Final Application for Compensation and Reimbursement of Expenses of Grobstein Teeple LLP as Accountants for the Chapter 7 Trustee; Declarations of Kermith Boffill and Jeremy W. Faith in Support Thereof* (the "GT Application") covering the period from February 11, 2019 to March 27, 2023, which

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CONT... Robert Woods Takken and Linda Henry Takken Chapter 7

requested allowance on a final bases of fees of $12,152.50 and expenses of $205.19. *See* Docket No. 177.

As of the date of the filing of the AF Application and the GT Application, the Trustee had approximately $137,828.50 in cash on hand. *See* Docket No. 182, p. 3.

On June 28, 2023, the Trustee filed that *Stipulation between Jeremy W. Faith, Chapter 7 Trustee, Arentfox Schiff LLP, and Grobstein Teeple LLP, for Voluntary Subordination of Requested Fees* (the "Stipulation"). *See* Docket No. 178. Pursuant to the Stipulation, the Trustee, ArentFox and Grobstein Teeple have agreed to subordinate their requested fees and expenses to a $15,000.00 distribution to the priority unsecured creditors in this case. *See id.* at p. 1. Through the Stipulation, ArentFox agrees to a distribution on the fees requested in the AF Application of $56,712.15, Grobstein Teeple agrees to a distribution on the fees requested in the GT Application of $2,416.90, and the Trustee agrees to a distribution on his statutory fee of $6,079.04. *See id*. at pp. 1-2.

Through the Report, the Trustee seeks, *inter alia*, and pursuant to the Stipulation, payment of (1) the Trustee's reduced statutory fee of $6,079.04 pursuant to 11 U.S.C. § 326(a) and expenses incurred of $64.64, (2) $56,712.15 in fees and $5,010.58 in expenses related to the AF Application to ArentFox, (3) $2,416.90 in fees and $205.19 in expenses related to the GT Application to Grobstein Teeple. *See* Docket Nos. 181, p. 23.

After payment to professionals, the Trustee, secured creditors, and $15,000 to priority creditors, the balance of cash on hand for unsecured creditors is $0.00. *See id*. at p. 25.

No opposition has been filed to the AF Application, the GT Application, or the Report. 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." Given the lack of any opposition to the AF Application, the GT Application, or the Report, the Court takes the default of all non-responding parties.

The Court is inclined to approve the Report, absent the discrepancy as to the amount

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CONT... **Robert Woods Takken and Linda Henry Takken** **Chapter 7**

to be paid to ArentFox for incurred expenses. That is, the Report provides for payment of expenses to ArentFox of $5,010.58, whereas the AF Application requests allowance of expenses of $4,985.58.

Pursuant to 11 U.S.C. § 330, the Court is inclined to: (1) approve the AF Application, on a final basis, for fees in the amount of $264,088.50 and expenses of $4,985.58, and approves payment on the AF Application of $56,712.15 in fees and $4,985.58 in expenses; and (2) approve the GT Application, on a final basis, for fees in the amount of $12,152.50 and expenses of $205.19, and approves of payment on the GT Application, of $2,416.90 in fees and $205.19 in expenses. The Report is approved in conformance with 11 U.S.C. § 704(9), and the Trustee is awarded their statutory fee in the reduced amount of $6,079.04, and the Court approves of the reimbursement of the Trustee's unreimbursed expenses in the amount of $64.64.

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

Party Information

Debtor(s):

Robert Woods Takken	Represented By Leslie A Tos

Joint Debtor(s):

Linda Henry Takken	Represented By Leslie A Tos

Trustee(s):

Jeremy W. Faith (TR)	Represented By Aram Ordubegian Annie Y Stoops M Douglas Flahaut Anna Landa Dylan J Yamamoto

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9:23-10057 Unlikely Heroes, Inc. **Chapter 7**

#7.00 CONT'D Hearing
RE: [60] Motion For Contempt or Issuance of Order To Show Cause As To Why Erica Greve, Robert Hazlett, And Richard Towne, Should Not Be Held In Contempt And/Or Sanctioned For Failure To Comply With The Court's Rule 2004 Order [Dkt. 30]

FR. 7-11-23, 8-22-23

Docket 60

Tentative Ruling:

October 10, 2023

Appearances required.

On September 11, 2023, that *Human Investment Foundation's Notice of Examination Under Fed. R. Bankr. P. 2004 of Erica Greve Hazlett, Individually and as Corporate Representative of the Debtor* (the "Notice") was filed. *See* Docket No. 130. Pursuant to the Notice, the Rule 2004 Examination of Erica Greve Hazlett was to be taken by the Human Investment Foundation on September 18, 2023. *Id.* at p. 2. Has this matter been resolved?

August 22, 2023

Appearances required.

On July 11, 2023, the Court held hearings on the Court's Order to Show Cause regarding
compliance with the Court's prior Rule 2004 Order, and the witnesses' Motions to Quash, and related relief (collectively, the "Discovery Hearings"). At the Discovery Hearings, the Court ordered the parties to confer and comply with the following deadlines: (a) all counsel must meet and confer by July 25, 2023 via video and (b) a Joint Status Report of the parties' conference status shall be filed by August 8, 2023. *See* Docket No. 115. The Discovery Hearings were continued to August 22, 2023 at

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CONT... Unlikely Heroes, Inc. **Chapter 7**

2:00 p.m. *See* Docket No. 116.

The Joint Status Report

On August 8, 2023, that *Joint Status Report Regarding Show-Cause Order and Motions to Quash* (the "Joint Status Report") was filed. *See* Docket No. 126. The Joint Status Report indicates that the parties intend that at the August 22, 2023 hearing they will be able to report that (a) the Trustee production has been produced to the Foundation; (b) any remaining document requests have been satisfied or narrowed, and (c) the now single and remote late- September 2004 examination has been scheduled. *Id.* p. 3.

The Court will inquire with the parties as to what remains for the Court to decide.

Party Information

Debtor(s):

Unlikely Heroes, Inc.	Represented By Richard P Towne

Movant(s):

Human Investment Foundation	Represented By Wayne R Terry Jacqueline L James

Trustee(s):

Sandra McBeth (TR)	Represented By William C Beall

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9:23-10057 Unlikely Heroes, Inc. **Chapter 7**

#8.00 CONT'D Hearing
RE: [78] Motion to Quash NON-PARTIES ERICA GREVE HAZLETTS AND ROBERT HAZLETTS MEMORANDUM (1) IN RESPONSE TO ORDER TO SHOW CAUSE AND (2) IN SUPPORT OF MOTION TO QUASH SUBPOENAS AND FOR SANCTIONS

FR. 7-11-23, 8-22-23

Docket 78

Tentative Ruling:

October 10, 2023

Appearances required.

See Matter No. 7.

August 22, 2023

Appearances required.

Party Information

Debtor(s):

Unlikely Heroes, Inc.	Represented By Richard P Towne

Movant(s):

Robert Hazlett	Represented By David J Richardson
Erica Greve Hazlett	Represented By David J Richardson

Trustee(s):

Sandra McBeth (TR)	Represented By

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CONT... **Unlikely Heroes, Inc.** **Chapter 7**

William C Beall

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9:23-10550 Robert James Guadagno **Chapter 7**

#9.00 CONT'D Hearing
RE: [14] Notice of motion and motion for relief from automatic stay with supporting declarations ACTION IN NON-BANKRUPTCY FORUM RE: 657 Chinook Drive, Ventura, CA 93001.

FR. 8-22-23, 9-12-23

Docket 14

Tentative Ruling:

October 10, 2023

Appearances required.

Background

The 2021 Case

On November 29, 2021, Robert J. Guadagno (the "Guadagno") filed a petition for relief under Chapter 13 of Title 11 of the U.S. Code, commencing case number 9:21-bk-11164 (the "2021 Case"). *See* Case No. 9:21-bk-11164, Docket No. 1. Guadagno scheduled in the 2021 Case a parcel of real property located at 657 Chinook Dr., Ventura, California 93001 (the "Property"). *See id.* at Docket No. 21, *Schedule A/B: Property*. Guadagno also claimed an exemption in the Property pursuant to Cal. Code. Civ. P. § 704.730, $600,000. *See id.* at Docket No. 22, *Schedule C: The Property You Claim as Exempt*. On February 3, 2022, Mary Ann Manning ("Manning") filed a proof of claim in the 2021 Case in the amount of $221,575.96, secured by the Property, and based on a property settlement in a divorce action as between Manning and Guadagno (the "Claim"). *See id.* at Claim No. 6.

On April 7, 2022, Manning filed in the 2021 Case that *Notice of Hearing on Objection to Exemption and Secured Creditor, Mary Manning's Objection to Debtor's Claimed Homestead Exemption; Memorandum of Points and Authorities; Declaration of Felecita A. Torres* (the "Exemption Objection"). *See id*. at Docket No.

94. On August 25, 2022, this Court entered in the 2021 Case that *Order After Hearing Re: Manning's Objection to Debtor's Claim of Homestead Exemption* ("Exemption Objection Order"). *See id.* at Docket No. 177. Pursuant to the Exemption Objection Order the Court sustained Manning's Exemption Objection "to the extent any Exemption is sought to reduce Manning's lien against [the Property]." *See id.* at Docket No. 177; *see also* tentative ruling for August 18, 2022.

The 2021 Case was dismissed on October 28, 2022, after the Debtor failed to make plan payments and comply with various document requests from the Chapter 13 Trustee. *See id.* at Docket No. 14, p. 10.

The 2023 Case

On July 7, 2023, Guadagno filed a voluntary petition for relief under Chapter 7 of Title 11 of the U.S. Code (the "2023 Case"). *See* Case No. 9:23-bk-10550-RC, Docket No. 1. Guadagno again scheduled the Property, and with a value of $950,000. *See id.* at *Schedule A/B: Property*. Guadagno also claimed an exemption in the Property in the amount of "100% of fair market value, up to any applicable statutory limit" (the "Homestead Exemption"). *See id.* at *Schedule C: The Property You Claim as Exempt*. Guadagno scheduled three (3) creditors, secured by the Property through consensual and judgment liens; Provident Funding in the amount of $120,000 (scheduled as unliquidated), Chase Bank in the amount of $327,000, and Manning in the amount of $300,000. *See id.* at *Schedule D: Creditors Who Have Claim Secured by Property*. No proofs of claim have been filed in the 2023 Case. Based on Guadagno's Schedule D, there are three (3) claims totaling $847,000 against the Property, valued at $950,000.

On July 27, 2023, Manning filed that *Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362* (the "Lift Stay Motion"). *See id.* at Docket No. 9. Pursuant to 11 U.S.C. § 362(d)(1), Manning argues in the Lift Stay Motion that the automatic stay should be lifted to allow a state court appointed receiver to liquidate the Property because her claim against the Property and Guadagno "can be most expeditiously resolved in the nonbankruptcy forum," her claim "arise[s] under nonbankrutpcy law…," and the 2023 Case "was filed in bad faith." *See id.* at pp. 3-4. Manning also requests that the lifting of the stay be "annulled retroactively to the bankruptcy petition date." *See id.* at p. 4.

On September 6, 2023, Manning filed *Mary Manning's Objection to Debtor's Claim of Homestead Exemption* (the "Second Exemption Objection"). *See id.* at Docket No. 28. The Second Exemption Objection opposes the Homestead Exemption on three (3) theories. First, Manning argues Guadagno should be precluded under the principle of Res Judicata from claiming a Homestead Exemption in the Chapter 7. *See id.* at p. 6 lines 6-7. Second, Manning argues that Guadagno cannot avoid Manning's Judicial Lien under 11 U.S.C. 522(f) so pursuant to 11 U.S.C. 522(c)(2)(A) the Property remains liable for her debt. *See id.* at p. 8, lines 1-3. Third, Manning argues Guadagno's Homestead Exemption should be disallowed on equitable estoppel grounds under California Law. *See id.*, lines 17-18.

On September 28, 2023, Guadagno filed that *Opposition of Robert Guadagno to Mary Mann Manning's Motion Objecting to Debtor's Claimed Homestead Exemption and Motion for Relief from Stay* (the "Opposition"). *See id.* at Docket No. 37-1.

Analysis

The Second Exemption Objection

Pursuant to Federal Rule of Bankruptcy Procedure 4003(b)(1) ("Rule 4003"), an objection to the list of property claimed as exempt must be filed "within 30 days after the meeting of creditors held under §341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." Fed. R. Bankr. P. 4003(b)(1). In this Case, the 341(a) meeting of creditors was continued to be held on September 7, 2023. *See* Docket No. 18. Therefore, the Objection was timely filed pursuant to Rule 4003(b)(1) on September 6, 2023. *See* Docket No. 27.

"Generally, a debtor's claimed exemption is presumptively valid, and the party objecting to a debtor's exemption has the burden of proving that the exemption is improper." *In re Carter*, 182 F.3d 1027, 1029 n. 3 (9th Cir.1999); *see also* Fed. R. Bankr. P. 4003(c). If the objecting party can produce evidence sufficient to rebut the presumption of validity, then the burden of production shifts to the debtor to provide unequivocal evidence to demonstrate that the exemption is proper. *Id.* The burden of persuasion always remains with the objecting party who must provide sufficient proof to meet the preponderance of the evidence standard. *In re Diaz*, 547 B.R. 329, 336 (9th Cir. BAP 2016) (citing *In re Carter*, 182 F.3d 1027, 1029 n. 3 (9th Cir.1999).

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CONT... Robert James Guadagno Chapter 7

Here, the Second Exemption Objection stands on the Court's ruling in the Exemption Objection Order under the doctrine of *res judicata*. That is, because Manning's lien against the Property cannot be avoided under 11 U.S.C. § 522(f), it is not subject to Guadagno's claim of exemption under 11 U.S.C. § 522(c)(2)(A)(i). *See* 2023 Case Docket No. 21, pp. 4-9. Guadagno's analysis is confusing. Guadagno agrees with the Court that Manning's lien on the Property is not avoidable under 11 U.S.C. § 522(f). *See id.* at Docket No. 37-1, pp. 2-3 ("although the judgment [] is likely not avoidable under 11 USC § 522(f)."). Guadagno also argues that "[u]nder Barclay the full exemption, together with senior consensual liens leaves no equity available to this creditor to justify relief from stay to proceed with a forced sale." *See id.* at p. 3, lines 3-4.

Guadagno's use of *In re Barclay* appears misplaced to this Court. 52 F.4th 11725 (9th Cir. 2022). The Court in *In re Barclay* was tasked with deciding a lien avoidance motion pursuant to 11 U.S.C. § 522(f)(1). *See id.* at 1176. Whether 11 U.S.C. § 522(f)(1) could be applied was not the issue in *In re Barclay*, but rather the date used by which to measure the California homestead exemption value. In *In re Barclay*, the homestead exemption under California law had increased drastically from the date the judgment creditor's lien was recorded, and the bankruptcy petition date. The argument Manning is making, it seems to the Court, is the same that was made in the Exemption Objection, which is that Homestead Exemption does not decrease her lien against the Property pursuant to 11 U.S.C. § 522(c)(2)(A)(i). Guadagno has not disputed this contention, and so, for the same reasons set forth in the Exemption Objection Order, the Court rules likewise on the Second Exemption Objection.

The preclusive effect of res judicata has been deemed relevant to disputes involving objections to a debtor's exemption claims. *See, e.g. In re Wolfberg*, 255 B.R. 879 (9th Cir. BAP 2000); *In re Magallanes*, 96 B.R. 253 (9th Cir. BAP 1988); *In re Daniels*, 270 B.R. 417 (Bankr. E.D. Mich. 2001); *In re St. Hill*, 2005 Bankr. LEXIS 3326, * 25-26 (Bankr. E. D. Pa. 2005). This follows because an order either sustaining or overruling an objection to an exemption claim is subject to immediate appeal and thus constitutes a final judgment, as defined by Fed. R. Bankr. P. 7054(a). *See, e.g. Kollar v. Miller*, 176 F.3d 175 (3d Cir. 1999) (appeal from order sustaining the trustee's objection to the debtor's exemption); *In re Price*, 2004 U.S. Dist. LEXIS 22783, 2004 WL 2550590 (W.D. Tex. Oct. 27, 2004) (appeal from a denial of an objection to an exemption); *In re Ladd*, 319 B.R. 599, 603 (8th Cir. BAP 2005) ("The order resolving

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CONT... **Robert James Guadagno** **Chapter 7**

the objection to the exemption is a final judgment."); see also 9 Collier on Bankruptcy, ¶ 4003.03[2], at 4003-13 (15th ed. rev. 2005) ("An order denying a claim of exemption is a final, appealable order.").

The Exemption Objection Order was a final order. *See, e.g., In re Wolfberg*, 255 B.R. 879 (9th Cir. BAP 2000). The Exemption Objection Order was not appealed.

"Res judicata prevents a party from relitigating a cause of action, thus giving finality to legal proceedings. In order for res judicata to apply, the following four elements must be satisfied: (1) a final judgment on the merits; (2) the judgment was rendered by a court of competent jurisdiction; (3) a second action involving the same parties; and (4) the same cause of action involved in both cases." *In re Kelley*, 199 B.R. 698, 702 (9th Cir. BAP 1996)(citing *In re Heritage Hotel P'ship I*, 160 B.R. 374, 376-77 (9th Cir. BAP 1993). "'[R]es judicata belongs to courts as well as to litigants' and a court may invoke res judicata sua sponte." *In re Reagor-Dykes Motors, L.P.*, 613 B.R. 878, 887 (Bankr. N.D. Tex. 2020)(citing *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1997), *Fordham v. Fannie Mae*, 49 F.Supp. 3d 77, 83 (D.D.C. 2014)).

The Exemption Objection Order resolved the issue on whether Guadagno's claimed homestead exemption over the Property reduced in any way Manning's lien on the Property related to the Claim. The Exemption Objection Order dealt with Manning and Guadagno. The Second Exemption Objection, again, deals Manning's request that the Court enter an order confirming that the Homestead Exemption does not reduce Manning's lien on the Property related to the Claim. The Second Exemption Objection has preclusive effect on the issue of whether Manning's lien against the Property in the 2023 case remains unaffected by the Homestead Exemption under 11 U.S.C. §§ 522(f)(1) and (c)(2)(A)(i).

The Lift Stay Motion

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 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).

Whether the relief will result in a partial or complete resolution of the issues

As to Guadagno and Manning, lifting the stay and allowing the state court to oversee litigation relating to the Property, including a liquidation of the Property for the benefit of creditors of Guadagno and Guadagno will completely resolve the issues of all of these creditors and Guadagno in that there exists sufficient equity in the Property by Guadagno's valuation estimation to pay creditors in full with a dividend to Guadagno.

The lack of any connection with or interference with the bankruptcy case

The Property is set to be sold under the supervision of the state court. There is no interference with the 2023 Case. There is nothing for this Court to decide in relation to the Property.

Whether the foreign proceeding involves the debtor as a fiduciary

Guadagno is not a fiduciary in the state court action.

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

The state court is not a specialized tribunal.

Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation

There is no evidence that there is insurance to assume any financial responsibility of Guadagno in defending the state court action.

Whether the action essentially involves third parties, and the debtor functions *only as a bailee or conduit for the goods or proceeds in question*

The state court action is among Guadagno and Manning, and Manning is not a baliee or conduit for goods.

Whether the litigation in another forum would prejudice the interests of other creditors, the creditor's committee and other interested parties

By Guadagno's own measure there is no equity in the Property beyond the liens against the Property, and Guadagno's Homestead Exemption. Using Guadagno's measure as to the value of the Property, all creditors will be paid in full from its liquidation, and there will be a dividend to Guadagno. It appears to the Court that the state court matter has been fully litigated. There is no prejudice to parties-in-interest by the Court's lifting the stay.

Whether the judgment claim arising from the foreign action is subject to equitable subordination

There is no evidence in front of the Court that Manning's judgment is subject to equitable subordination.

Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f)

As Guadagno admits, 11 U.S.C. § 522(f) does not apply to Manning's judgment.

The interests of judicial economy and the expeditious and economical determination of litigation for the parties

There is nothing more for this Court to do regarding the Property. Based on the values of the Property, it is entirely consumed by liens and the Homestead Exemption. A state court has fully litigated the issues between Guadagno and Manning, and is overseeing the effectuation of that judgment though a liquidation of the Property. Judicial economy and the economic interests of Guadagno and Manning favor this Court's lifting of the automatic stay to allow the state court proceeding to continue.

Whether the foreign proceedings have progressed to the point where the parties are prepared for trial

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CONT... Robert James Guadagno Chapter 7

The state court proceeding is past trial, and in the enforcement stages.

The impact of the stay and the 'balance of the hurt

The Property has been marketed by a receiver, and is set to be sold. With rising interest rates, all involved, Guadagno included, are harmed by the state court action being stalled any further.

"The Ninth Circuit Court of Appeals has held that [11 U.S.C. § 362(d)] 'gives the bankruptcy court wide latitude in crafting relief from the automatic stay, *including the power to grant retroactive relief from the stay*.'" *In re Badax*, 608 B.R. 730, 737 (Bankr. C.D. Cal. 2019)(citing *In re Schwartz*, 954 F.2d 569, 573 (9th Cir. 1992), *In re Gurrola*, 328 B.R. 158, 172 (9th Cir. BAP 2005)). "In deciding whether to annul the stay retroactively, a bankruptcy court ordinarily should examine the circumstances of the specific case and balance the equities of the parties' respective positions." *Id.* (citing *In re Nat'l Envtl. Waste Corp.*, 129 F.3d 1052, 1055 (9th Cir. 1997); *In re Fjeldsted*, 293 B.R. 12, 24 (9th Cir. BAP 2003)). "Under this approach, a bankruptcy court considers '(1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor.'" *Id.* (citing *In re Nat'l Envtl. Waste Corp.*, 129 F.3d at 1055). "A bankruptcy court also should consider twelve additional factors that may be relevant to deciding whether retroactive annulment of the stay is justified:

1. Number of [bankruptcy] filings;

2. Whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors;

3. A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser;

4. The debtor's overall good faith (totality of the circumstances test);

5. Whether creditors knew of stay but nonetheless took action, thus compounding the problem;

6. Whether the debtor has complied, and is otherwise complying, with the [Bankruptcy] Code and the [Bankruptcy] Rules;

7. The relative ease of restoring parties to the status quo ante;

8. The costs of annulment to debtors and creditors;

9. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative conduct;

10. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;

11. Whether annulment of the stay will cause irreparable injury to the debtor; and

12. Whether stay relief will promote judicial economy or other efficiencies.

Id. (citing *In re Fjeldsted*, 293 B.R. at 25).

Number of [bankruptcy] filings

Guadagno has filed two (2) bankruptcy cases including the 2023 Case.

Whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors

The 2023 Case appears to have been filed solely to frustrate the efforts of Manning to liquidate the Property. The Opposition does not provide any real challenge to the Lift Stay Motion, and so that only further provides evidence of Guadagno's intentions simply to delay the liquidation of the Property through filing the 2023 Case.

A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser

The receiver filed a request with the state court for an order allowing the sale of the Property post-petition, having only been advised of the 2023 Case on July 18, 2023. *See* 2023 Case, Docket No. 9, p. 15, lines 3-10 and p. 28, lines 19-27. The receiver appointed by the state court violated the automatic stay, albeit unknowingly, by his action post-petition. An annulment of the stay is required to prevent any further actions against the receiver related to the aforementioned actions.

The debtor's overall good faith (totality of the circumstances test)

It is difficult to gauge Guadagno's good faith in filing the 2023 Case. He filed the 2023 Case *pro se*, and to save his home from sale. Trying to save one's home from sale by filing a bankruptcy case occurs in this Court daily. The Court cannot know on the record before it whether Guadagno acted in bad faith in filing the 2023 Case.

Whether creditors knew of stay but nonetheless took action, thus compounding the problem

The receiver attests that he was not aware of the automatic stay, and once he became aware, he ceased all sale efforts. *See id.* at p. 29, lines 1-5.

Whether the debtor has complied, and is otherwise complying, with the [Bankruptcy] Code and the [Bankruptcy] Rules

As far as the Court has been made aware, Guadagno is following the Bankruptcy Rules and Code.

The relative ease of restoring parties to the status quo ante

There is no issue the Court has been made aware of that would complicate the Court's annulment of the stay.

The costs of annulment to debtors and creditors

The Court has not been made aware of any costs in annulling the stay to creditors or Guadagno.

How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative conduct

The Lift Stay Motion was filed within ten (10) days of the receiver's knowledge of the 2023 Case.

Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief

As noted, the receiver attests that all efforts to sell the Property ceased upon his learning of the 2023 Case.

Whether annulment of the stay will cause irreparable injury to the debtor

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CONT... **Robert James Guadagno** **Chapter 7**

The Court has no evidence that any harm will befall Guadagno with the Court's annulment of the stay.

Whether stay relief will promote judicial economy or other efficiencies

To the extent the parties are able to pick up where they left off upon the filing of the 2023 Case, as noted in the "cause" analysis to lift the stay, judicial economy will be promoted.

Conclusion

The Court finds cause to lift the stay to allow the state court matter to proceed, including the state court's orders to liquidate the Property. The Court further finds cause to annul the stay to the date the 2023 Case was filed as to any actions taken by the receiver prior to his knowledge of the 2023 case.

September 12, 2023

Appearances required.

August 22, 2023

Appearances required.

Party Information

Debtor(s):

Robert James Guadagno	Pro Se

Movant(s):

Mary Ann Manning	Represented By Felicita A Torres

Trustee(s):

Jerry Namba (TR)	Pro Se

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9:23-10550 Robert James Guadagno **Chapter 7**

#10.00 HearingRE: [27] Motion Mary Manning's Objection to Debtor's Claim of Homestead Exemption; Memo Points and Authorities; Declaration of Felicita A. Torres

Docket 27

Tentative Ruling:

October 10, 2023

See Matter No. 9.

Party Information

Debtor(s):

Robert James Guadagno — Pro Se

Movant(s):

Mary Ann Manning — Represented By
Felicita A Torres

Trustee(s):

Jerry Namba (TR) — Pro Se

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9:23-10318 Michael Moore and Marlena Moore **Chapter 13**

#11.00 CONT'D Hearing
RE: [15] Motion Objection to Debtors' Claims of Exemption (David, Jill)

FR. 7-25-23, 9-12-23

Docket 15

Tentative Ruling:

October 10, 2023

Appearances required.

September 12, 2023

Appearances waived.

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

July 25, 2023

Appearances required.

Background

On April 25, 2023, Michael Moore and Marlena Moore (the "Debtors") filed a voluntary petition under Chapter 13 of Title 11 of the U.S. Code (this "Case"). *See* Docket No. 1. The Debtors' *Schedule A/B* lists property described as "Future Medical for Auto Accident Injuries" in the amount of $1,000,000.00 (the "Settlement"). *Id.* at p. 19. On their amended *Schedule C*, the Debtors claim an exemption of the Settlement in the amount of $1,000,000.00 pursuant to Cal. Code of Civ. P. §§ 704.140(a) and 704.150(a) (the "Exemption"). *See* Docket No. 24, p. 6.

Richard J. Moore, as Trustee of the Moore Marital Trust UA DTD 12/23/1986 (the "Creditor") has filed two secured claims in this case: (1) Proof of Claim No. 3-1, in

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CONT... Michael Moore and Marlena Moore **Chapter 13**

the amount of $793,152.53, for a judgment lien resulting from case number 30-2019-01112125-CU-BC-CJC in the Superior Court of California for the County of Orange; and (2) Proof of Claim No. 6-1, in the amount of $209,831.94 for a matured note secured by a deed of trust against the Debtors' residential property at 2775 Summer Ranch Road, in Paso Robles, CA. *See* Claim Nos. 3-1 and 6-1.

Before the Court is *Secured Creditor Richard J. Moore, as Trustee of the Moore Marital Trust's Objection to Claims of Exemption* (the "Objection"). *See* Docket No. 15. Through the Objection, the Creditor requests the entry of an order: (1) sustaining its objections to, and striking the Exemption; (2) that confirmation of the Debtors' proposed Chapter 13 plan be denied; (3) that the case be converted to Chapter 7; (4) alternatively, that Debtors' Chapter 13 plan be amended to reflect that the arrears listed in Creditor's Proofs of Claim Nos. 3 and 6 be paid within a period not exceeding 60 months; and (5) any other relief as this Court deems just and proper. *Id.* at p. 10.

Notice and Service

The Objection was filed on June 30, 2023. *See* Docket No. 15. Filed together with the Objection, is that *Notice of Motion For: Objection to Debtors' Claims of Exemption* (the "Notice"), informing parties served with the Notice that a hearing on the Objection is set for July 25, 2023. *Id.* The Notice also provides 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 11, 2023. *Id*. The Objection and the Notice were served on the date of its filing on the Debtors via U.S. Mail, and on counsel of record to the Debtors, the Office of the United States Trustee and the Chapter 13 Trustee via NEF. *Id.* at p. 3 and p. 11, *Proof of Service of Document*.

The Debtors' Response

On July 11, 2023, the Debtors filed *Debtor's [sic] Response to Secured Creditor Richard J. Moore, as Trustee of the Moore Marital Trust's Objection to Claims of Exemption* (the "Response"). *See* Docket No. 18.

Analysis of the Objection

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CONT... **Michael Moore and Marlena Moore** **Chapter 13**

Timeliness

Pursuant to Fed. R. Bankr. P. 4003(b)(1), an objection to the list of property claimed as exempt must be filed "within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." In this Case, the 341(a) meeting of creditors was scheduled to be held on June 7, 2023. *See* Docket No. 6. Therefore, to the extent the Objection is an objection to the Exemption, the Objection was timely filed given the fact that is was filed within 30 days following June 7, 2023.

Legal Standard

"When a debtor files a bankruptcy petition, all of his assets become property of the estate and may be used to pay creditors, subject to the debtor's ability to reclaim specified property as exempt." *In re Elliott*, 523 B.R. 188, 192 (9th Cir. BAP 2014) (citing *Schwab v. Reilly*, 560 U.S. 770, 774, 130 S. Ct. 2652, 177 L. Ed. 2d 234 (2010)). "Section 522 provides a default list of exemptions, but allows states to opt out of the federal scheme and define their own exemptions. 11 U.S.C. §§ 522(b)(2), (b)(3)(A), (d). California has opted out of the federal exemption scheme. Cal. Civ. Proc. Code § 703.130. The bankruptcy court decides the merits of state exemptions, but the validity of the exemption is controlled by California law." *See In re Diaz*, 547 B.R. 329, 334 (9th Cir. BAP 2016) (citing *LaFortune v. Naval Weapons Ctr. Fed. Credit Union (In re LaFortune),* 652 F.2d 842, 846 (9th Cir. 1981)).

Pursuant to Cal. Code Civ. P. § 704.150(a), "[e]xcept as provided in Article 5 (commencing with Section 708.410) of Chapter 6, a cause of action for wrongful death is exempt without making a claim."

Pursuant to Cal. Code Civ. P. § 704.140(a), "[e]xcept as provided in Article 5 (commencing with Section 708.410) of Chapter 6, a cause of action for personal injury is exempt without making a claim." Pursuant to Cal. Code of Civ. P. § 704.140(b), "[e]xcept as provided in subdivisions (c) and (d), and award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor."

Burden of Proof

As a preliminary matter, the parties disagree on who has the burden of proof regarding the Objection. The issue is whether the burden of proof found under California law applies, or if it is Fed. R. Bankr. P. 4003 that the Court is to use. "California Code of Civil Procedure § 703.580 expressly provides that for the exemptions claimed using the California exemption scheme: [] (b) At a hearing under this section, the exemption claimant has the burden of proof." *See In re Sinclar*, 563 B.R. 554, 558 (Bankr. E.D. Cal. 2017); *see also* Cal. Code. Civ. P. § 703.580(b). Pursuant to Fed. R. Bankr. P. 4003(c), "[i]n any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed." Courts have differed on the burden of proof question in this context.

The Supreme Court considered whether the burden of proof, in the context of a claim objection, is determined by reference to state law in the case of *Raleigh v. Ill. Dep't of Revenue.* In *Raleigh*, the Supreme Court held that the burden of proof should be determined by reference to state law. *See Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15 (2000).

Although *Raleigh* was decided in the context of an objection to a proof of claim and did not involve Fed. R. Bankr. P. 4003(c), some bankruptcy courts have addressed the issue of whether *Raleigh* dictates that Fed. R. Bankr. P. 4003(c) is invalid when a debtor exempts property under state law, and where state law identifies its own burden for claiming that exemption. *See, e.g., In re Diaz*, 547 B.R. 329 (9th Cir. BAP 2016); *In re Williams*, 556 B.R. 456 (Bankr. C.D. Cal. 2016); *In re Vaughn*, 558 B.R. 897 (Bankr. D. Ala. 2016); *In re Pashenee*, 531 B.R. 834 (Bankr. E.D. Cal. 2015). Other courts have concluded that Rule 4003(c) is still valid despite *Raleigh. See, e.g., In re Nicholson*, 435 B.R. 622 (9th Cir. BAP 2010) (partially abrogated on other grounds); *Matter of Hoffman*, 605 B.R. 560 (Bankr. N.D. Ga. 2019); *In re Weatherspoon*, 605 B.R. 472 (Bankr. S.D. Ohio 2019).

The Ninth Circuit BAP has held that "where a state law exemption statute specifically allocates the burden of proof to the debtor, Rule 4003(c) does not change that allocation." *In re Diaz*, 547 B.R. at 337. While recognizing that there is much disagreement on the issue, this Court finds the BAP's holding in *Diaz* sound. Thus, the Debtors here have the burden to prove that they are entitled to the Exemption.

Cal. Code Civ. P. § 704.150(a)

As noted *supra*, Cal. Code Civ. P. § 704.150(a) relates to wrongful death. The Response provides no response to the Objection as it relates to Cal. Code of Civ. P. § 701.150(a). *See generally*, Docket No. 18. The Response solely analyzes Cal. Code of Civ. P. 704.140. *See id.* at pp. 5-10. As there is no analysis by the Debtors as to their claimed exemption under Cal. Code Civ. P. § 701.150(a), the Court sustains the Objection as to this issue.

Cal. Code Civ. P. § 704.140(a)

"[T]he Debtor must meet two criteria before an exemption pursuant to CCP § 704.140 may be taken. First, the funds sought to be exempted must arise as a result of ‘personal injury.’ Second, the funds are only exempt ‘to the extent necessary for support’ of the Debtor." *In re Sylvester*, 220 B.R. 89, 91 (9th Cir. BAP 1998). Noting that the debtor's exemption rights under state law are determined as of the date of the petition, the Bankruptcy Appellate Panel for the Ninth Circuit identified factors which are relevant in determining the extent of the debtor's exemption under the "necessary for support" standard. *In re Moffat,* 119 B.R. 201, 204, n.3 (9th Cir. BAP 1990); *see also In re Altmiller-Rubio* (Bankr. E.D. Cal. Sept. 13, 2011), 2011 Bankr. LEXIS 5570 (The right to claim the exemption was determined as of commencement of the bankruptcy, but the court could look to changes in the debtors’ circumstances in determining the amount of exemption to allow as necessary for their support under § 704.140(b)). Those factors included "anticipated living expenses and income; the age and health of the debtor and his or her dependents; the debtor's ability to work and earn a living; the debtor's training, job skills and education; the debtor's other assets and their liquidity; the debtor's ability to save for retirement; and any special needs of the debtor and his or her dependents." *Id.* at 206 (citation omitted). The *Moffat* court considered the debtor's assets, income, and expenses in affirming the bankruptcy court's decision. *Id.*

As discussed, the Debtor has the burden to prove these elements. This Court’s Local Rule 9013-1(f)(2) provides that "[a] Response [to a motion] must be a complete written statement of all reasons in opposition thereto or in support, declarations and copies of all evidence on which the responding party intends to rely, and any responding memorandum of points and authorities."

The parties do not appear to disagree on the first prong, which is that the $1 million referenced in the Exemption relates to a settlement received at some point by Michael Moore for a personal injury action. There is a question as to what Mr. Moore did with a part of the money, and where any remaining monies are, but that is a separate question from whether there exists, somewhere, $1 million in proceeds of a settlement from a personal injury action.

As to the second prong, there is virtually no admissible evidence the Court may rely on to conduct an analysis. As the Creditor states, the Response "offer[s] only conclusory statements of 'anticipated significant future medical expenses,' including Michael Moore [is] 'almost certain to undergo spinal surgery' and Marlena Moore [is] 'awaiting confirmation of' 'potential surgery and future treatment related to her work injuries.'" *See* Docket No. 21, pp. 6-7. The Response was filed without any declarations in support. There are a number of factual arguments in the Response, but none of them is supported by a declaration, request for judicial notice of documents or other facts, or any other evidentiary vehicle to corroborate the statements of counsel made therein. *Exhibit A* to the Response seems to be submitted in support of Michael Moore's cognitive decline, but the Court cannot understand what *Exhibit A* means or how to interpret it. What precisely is the Court to take away from *Exhibit A* other than the apparent prescription of medicine for cognitive decline? The Response just references *Exhibit A* generally to support the Debtors' necessity for future medical care, loss of earnings, and loss of earnings capacity. *See* Docket No. 18, p. 5, lines 12-15. *Exhibit B* is likewise referenced in the Response as supporting the Debtors' argument as to the necessity for future medical care, loss of earnings, and loss of earnings capacity, but no *Exhibit B* is attached to the Response.

Anticipated Living Expenses and Income of the Debtors

Through the Response, the Debtors allege that they received a settlement for $1,827,751 in 2018 and their medical bills included operations often costing more than $100,000 per operation. *See* Docket No. 18, p. 7, lines 1-5. They further argue that conservatively estimating an average of $50,000 per year for medical expenses, this leaves them with approximately $1,000,000 from the settlement for medical treatment, care, and living expenses until the end of life. *See id.* at lines 2-13. The Debtors argue that they are senior citizens with a limited income, primarily from Social Security, which is insufficient to meet their monthly expenses. *See id.* at p. 6, line 28. They further argue that the cost of living continues to rise, and they anticipate

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CONT... **Michael Moore and Marlena Moore** **Chapter 13**

significant future medical expenses. *See id.* The Response asserts that Michael Moore has a confirmed need for future physical therapy, injections, and is almost certain to undergo another spinal surgery and Marlena Moore is awaiting confirmation of potential surgery and future treatment related to her work injuries. *See id.* The Debtors also contend that their income is further strained by unreimbursed expenses related to the Debtors' supervision of properties in Salton City, CA. *See id.*

Again, there is no declaration or documentary evidence to support any of these statements.

Pursuant to *Schedule I*, Mr. Moore is unemployed, and the only source of his income is $2,484.00 in monthly social security benefits and Mrs. Moore is employed, yet her monthly income consists of $2,080.00 in "disability income" and $643.00 in monthly social security benefits. *See* Docket No. 1, at pp. 37-38. The Debtors also allege that "[Mrs. Moore] has some injuries and she may not be able to return to work field." *Id*. at p. 41. On *Schedule J*, the Debtors list $123.00 in monthly "medical and dental expenses." *Id*. at p. 40. The Debtors' monthly net income is $222.32. *Id*. With $123.00 in monthly medical expenses, the Court is unable to reconcile the claimed exemption of $1,000,000.00 in "future medical for auto accident injuries" absent further evidentiary support. *See* Docket No. 1, p. 26. Here, the Debtors have proposed a plan lasting sixty months, based on the Debtors' proposed medical expenses of $123.00, the amount incurred over the length of the plan should be approximately $7,380.00. *See* Docket No. 11, p. 3. Does the evidence in other parts of the record not conflict with the Response?

The Debtors' Age and Health

Here, the Debtors assert that Michael Moore is 67 and Marlena Moore is 66, and that "[b]oth have significant health issues." *See* Docket No. 18, p. 7, lines 22-24. Attached to the Response as *Exhibit A* is correspondence from a David S. Ramin, M.D. indicating a diagnosis of "cognitive decline", presumably for Michael Moore as the name "Michael" is listed in the top left-hand corner but the last name and DOB are redacted. *Id.* at p.15. Again, the Court has no proof of any of these statements other than the statements that appear in the Response, which statements are not supported by declarations or other admissible evidence.

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CONT... **Michael Moore and Marlena Moore** **Chapter 13**

The Debtors' Other Assets and Their Liquidity

"In determining an exemption based upon the needs of the judgment debtor[s] . . . , the court shall take into account all property of the judgment debtor[s] . . . , including community property and separate property . . . , whether or not such property is subject to enforcement of the money judgment." Cal. Code Civ. Proc. § 703.115. According to *Schedule A/B*, the Debtors have nonexempt equity in property comprising of real property located at 2450 Shore Isle Ave., Salton City, CA, 92274 (titled "Sandy"), a 2006 Dodge Ram 2500 Turbo Diesel valued at $15,000.00, a 2003 Dodge Ram Turbo Diesel valued at $15,000.00, a 2009 Streamline Airstream Trailer valued at $17,000.00, a 1998 Dodge Ram 2500 Turbo Diesel valued at $12,000.00, 1997 Dodge Ram 2500 Turbo Diesel valued at $12,000.00 and a 1996 Dump Trailer valued at $8,000.00. *See* Docket No. 1, pp. 10-11. In addition, the Debtors list a life insurance policy with Mutual of Omaha valued at $20,000.00. *Id.* at p. 16.

The Debtors argue that they have limited assets, most of which are essential for their daily living or have little resale value, including older model vehicles, household items, power equipment, livestock, and personal belongings. They contend that liquidating these assets would not significantly contribute to their income but would severely impact their quality of life. *See* Docket No. 18. However, based on the representations in the Response regarding the health of the Debtors and their ability to work, what use do the Debtors have for four (4) Dodge Ram work trucks? The four trucks and the Dump trailer have a collective value of over $60,000.00. It does not appear to the Court that it would be extremely difficult to market the vehicles for sale in today's market. Furthermore, the sale of the real property located at Shore Isle Ave would not require much effort from the Debtors besides listing the parcel on the market for sale. Based on the Debtors' Plan projections for expenses of the Debtors, it appears that they have sufficient income to meet their medical expenses, and there is value in their non-exempt assets to pay their medical costs for the foreseeable future that exceed the projected expenses.

The Debtors' Ability to Work and Earn a Living

The Response asserts that the Debtors "are unable to work due to their health conditions." *See* Docket No. 18, p. 9, lines 8-9. However, Marlene Moore's "ability to work is uncertain pending recovery from her injuries…" *Id.* at lines 9-10. Taking these statements as true, and admissible, it is wholly unclear to the Court what Merlene Moore's earning capacity is. At present, it appears she cannot work, but the Response does not make it clear when she would be able to work post-surgery, and what her earning capacity would be.

The Debtors' Ability to Save for Retirement

The Response provides that the Debtors' "only retirement savings are the proceeds from their 2016 car accident and their Social Security income." *See* Docket No. 18, p. 10, lines 14-16. This, however, does not include what Marlene Moore's earning potential in the future post-surgery could add to the Debtors' monthly net income budget.

Special Needs of the Debtors

The Response provides that "[b]oth debtors are certain to need specialized elderly care in the future, as Michael has severe cognitive decline that is only worsening." *See* Docket No. 18, p. 10, lines 26-28. This statement is completely unsupported, and gives the Court no understanding of what the specialized elderly care actually is, what it would cost, and when it would be required.

The Court simply has little to no evidence that can be used in an analysis under Cal. Code Civ. P. § 704.140 other than the information it can glean from the Debtor's schedules and the Debtor's proposed plan of reorganization. The Debtors' schedules and plan provide a picture that is much different than what the Response provides in terms of what money they require monthly for medical needs.

Without more evidence, the Court is inclined to sustain the Objection.

Party Information

Debtor(s):

Michael Moore	Represented By Anthony James Francisco I

Joint Debtor(s):

Marlena Moore	Represented By Anthony James Francisco I

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CONT... **Michael Moore and Marlena Moore** **Chapter 13**

Movant(s):

Richard J. Moore, as Trustee	Represented By Jill David

Trustee(s):

Elizabeth (ND) F Rojas (TR)	Pro Se

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9:23-10318 Michael Moore and Marlena Moore **Chapter 13**

#12.00 CONT'D Hearing
RE: [34] Motion to Convert Case From Chapter 13 to 7. as Trustee (Attachments: # 1 Affidavit Declaration of Jill S. David in Support of Motion to Convert to Chapter 7) (David, Jill)

FR. 8-17-23, 9-12-23

Docket 34

Tentative Ruling:

October 10, 2023

Appearances required.

Background

On April 25, 2023, Michael Moore and Marlena Moore (the "Debtors") filed a voluntary petition under Chapter 13 of Title 11 of the U.S. Code (this "Case"). *See* Docket No. 1. The Debtors' *Schedule A/B* lists property described as "Future Medical for Auto Accident Injuries" in the amount of $1,000,000.00 (the "Settlement"). *Id.* at *Schedule A/B: Property*, p. 11. On their amended *Schedule C*, the Debtors claim an exemption of the Settlement in the amount of $1,000,000.00 pursuant to Cal. Code of Civ. P. §§ 704.140(a) and 704.150(a) (the "Exemption"). *See* Docket No. 24, p. 6.

The claims bar date lapsed for non-government creditors on July 5, 2023. Two (2) secured creditors have timely filed a total of three (3) proofs of claim: (1) Richard J. Moore, as Trustee of the Moore Marital Trust UA DTD 12/23/1986 (the "Moore Trust"), holding a claim in the amount of $793,152.53; (2) the Moore Trust, holding a second claim in the amount of $209,831.94; and (3) JPMorgan Chase Bank, N.A., holding a claim in the amount of $196,302.85. *See* Claim Nos. 3-3, 6-2, and 7-1.

The Objection to Exemption

On June 30, 2023, the Moore Trust filed that *Notice of Motion for Objection to Debtors' Claims of Exemption* (the "Exemption Objection"), seeking to strike the

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CONT... Michael Moore and Marlena Moore Chapter 13

Debtors' claimed exemption of $1,000,000.00 for "future medical for audio accident injuries" under Cal. Civ. Code. Proc. §§ 704.140(a) and 704.150(a). *See* Docket No. 15. Through the Exemption Objection, the Moore Trust requests the entry of an order: (1) sustaining its objections to, and striking the Exemption; (2) that confirmation of the Debtors' proposed Chapter 13 plan be denied; (3) that this Case be converted to Chapter 7; (4) alternatively, that Debtors' Chapter 13 plan be amended to reflect that the arrears listed in the Moore Trust's Proofs of Claim Nos. 3 and 6 be paid within a period not exceeding 60 months; and (5) any other relief as this Court deems just and proper. *See id.* at p. 10.

On July 25, 2023, a hearing was held on the Exemption Objection. The Court continued the hearing to September 12, 2023. *See* Docket No. 38. The Court further ordered that the Debtors were to augment the Opposition to Exemption Objection by August 30, 2023 and the Moore Trust was to augment the Reply by September 5, 2023. *See id.*

On August 30, 2023, one or both Debtors filed that *Augmented Response to Creditor Richard J Moore's Objection to Claim of Exemption*. *See* Docket No. 65.

On September 5, 2023, that *Secured Creditor Richard J Moore's Reply In Support of Objection to Claims of Exemption* (the "Second Reply") together with that *Secured Creditor Richard J Moore as Trustee's Evidentiary Objections to Debtors' Exhibit*s and that *Supplemental Declaration of Jill S. David In Support of Creditor the Moore Martial Trust's Objection to Debtors' Claims of Exemption* were filed. *See* Docket No. 69.

The Motion to Convert

On July 25, 2023, the Moore Trust filed that *Notice of Motion and Secured Creditor Richard J. Moore as Trustee's Motion to Convert Chapter 13 Case to Case Under Chapter 7 of Title 11 of U.S. Code* (the "Motion to Convert") pursuant to 11 U.S.C. § 1307(c). *See* Docket No. 34, p. 8.

The Motion to Dismiss

The day before the September 12, 2023 hearings on the Exemption Objection and the

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CONT... Michael Moore and Marlena Moore Chapter 13

Motion to Convert, the Debtors filed that *Emergency Notice of Motion for Hearing on Shortened Notice of Debtor's Motion to Dismiss*. *See* Docket No. 71.

On September 12, 2023, the Debtors filed *Debtor's Motion for Voluntary Dismissal of Chapter 13 Case* (the "Motion to Dismiss"). *See* Docket No. 73. Through the Motion to Dismiss, the Debtors assert their absolute right to dismiss this Case and retract any prior statements regarding their consent to conversion of this Case to Chapter 7. The Motion to Dismiss further alleges that the Debtors have reached a settlement with the Moore Trust. *Id*.

On September 16, 2023, the Debtors filed that *Notice of Opportunity to Request a Hearing on Motion Re: Debtor's Motion for Voluntary Dismissal of Chapter 13 Case* (the "Notice") and served a copy of the Notice and Motion to Dismiss via U.S. Mail, postage pre-paid on all of the Debtors creditors on September 15, 2023. *See* Docket No. 79, p. 3, *Proof of Service of Document*.

On September 26, 2023, the Moore Trust filed that *Opposition to Debtor's Motion to Dismiss* (the "Opposition to Dismissal"). *See* Docket No. 89. Through the Opposition to Dismissal, the Moore Trust argues that the Court should deny the Motion to Dismiss and grant the Motion to Convert because the Debtors filed conflicting notices of hearings. *Id.* at p. 2. Alternatively, if the Court is inclined to dismiss this Case, the Moore Trust requests the Court impose a 180-day or longer bar against refiling and the Court deny as moot the Debtors' pending Lien Avoidance Motion (Docket No. 59), the Debtors' Objection to Creditor's Proof of Claim #3 and #6 (Docket No. 66), the Debtors' Motion to Dismiss Adversary (Docket No. 6), and Debtors' Application for Attorney's Fees (Docket No. 87). *See id.* at p. 2.

On October 2, 2023, the Debtors filed that *Reply to Creditor Richard J. Moore's Opposition to Debtors' Motion to Dismiss*. *See* Docket No. 92.

Legal Standard

Pursuant to Section 1307(b) of the Bankruptcy Code, "[o]n request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter." "The term 'shall' 'normally creates an obligation impervious to judicial discretion.'" *In re Nichols*, 10 F.4th 956, 963 (9th Cir. 2021)(citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,

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CONT... Michael Moore and Marlena Moore Chapter 13

523 U.S. 26 (1998); *In re Barbieri*, 199 F.3d 616, 619 (2d. Cir. 1999)). "Section 1307(b)'s text plainly requires the bankruptcy court to dismiss the case upon the debtor's request. There is no textual indication that the bankruptcy court has any discretion whatsoever." *Id.* The Ninth Circuit has concluded "that § 1307(b)'s text confers upon the debtor an absolute right to dismiss a Chapter 13 bankruptcy case, subject to the single exception noted expressly in the statute itself." *Id.* at 964. That single exception being prior conversion under 11 U.S.C. §§ 706, 1112, or 1208. Further, "*Nichols* dictates that bad faith or abuse of the bankruptcy process does not deprive a chapter 13 debtor of his right to voluntarily dismiss his case." *In re Powell*, 644 B.R. 181, 187 (9th Cir. BAP 2022). "*Nichols* also recognizes that the bankruptcy court has other tools to address such abuse. [] For example, it could impose a bar on refiling or other conditions under § 105." *Id.* (internal citations omitted).

"[B]ecause the mandatory right to dismiss under [11 U.S.C. § 1307(b)] is granted only by motion, the court retains jurisdiction sufficient to impose any proper sanctions on the debtor for improper behavior under 11 U.S.C. §§ 349(a), 109(g) and F.R.Bankr.P. 9011 prior to dismissal." *In re Harper-Elder*, 184 B.R. 403, 403 (Bankr. D.D.C. 1995) (citing *In re Dilley*, 125 B.R. 189 (Bankr. N.D. Oh. 1991). "All roads to dismissal pass through Bankruptcy Code § 349(a)." *In re Duran*, 630 B.R. 797, 804 (9th Cir. BAP 2021). Section 349(a) of the Bankruptcy Code "is an independent question that applies to all forms of dismissal, including § 1307(b)." *Id.* at 807.

Pursuant to 11 U.S.C. § 349(a), "[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case filed under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title." *See also In re Leavitt*, 171 F.3d 1219, 1223 (9th Cir. 1999).

"A dismissal with prejudice bars further bankruptcy proceedings between the parties and is a complete adjudication of the issues." *In re Leavitt*, 171 F.3d at 1223-24. "Cause" for dismissal with prejudice under 11 U.S.C. § 349(a) is not defined by the Bankruptcy Code. *See id.* at 1224. The Ninth Circuit has held that "bad faith is 'cause' for a dismissal of a Chapter 13 case with prejudice under § 349(a) and § 1307(c)." *Id.* This same analysis has been held to apply to dismissal requests by Chapter 13 debtors under 11 U.S.C. § 1307(b). *In re Duran*, 630 B.R. at 810.

Determining whether bad faith exists "involves the application of the 'totality of the circumstances' test." *Id.* (citing *In re Leavitt*, 171 F.3d at 1224)). A bankruptcy court should consider the following factors:

> 1. Whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his chapter 13 petition or plan in an inequitable manner.
> 2. The debtor's history of filings and dismissals.
> 3. Whether the debtor only intended to defeat state court litigation.
> 4. Whether egregious behavior is present.

Id. A finding of bad faith does not require fraudulent intent, malice, or malfeasance on the part of the debtor. *Id.* at 1224-25; *see also, In re Cortez*, 349 B.R. 608, 612-13 (Bankr. N.D. Cal. 2006).

Whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his chapter 13 petition or plan in an inequitable manner

The Debtors have not filed a viable plan of reorganization. The *2nd Amended Chapter 13 Plan* (the "Plan") suggests that unsecured non-priority creditors hold claims totaling $171,398.78, despite the fact that unsecured creditors have filed claims totaling only $20,777.27, and that the claims bar date for non-government claims had lapsed at the time the Plan was filed. *See* Docket No. 49, p. 3.; *see also* Claim Nos. 1-1, 2-1, 4-1, and 5-1. Not only is the estimated amount of unsecured claims incorrect, but the Debtors propose to pay a total of 13.63% of those claims for an estimated total payment of $8,280.00—a figure which represents 4.83% of the estimated non-priority unsecured claims. *See id*. Notably, the Debtors' First Amended Plan proposed a total payment of 1% of $171,398.78 in estimated non-priority unsecured claims, in the amount of "$27430..00 [sic]," even though one percent of $171,398.78 is $1,713.99. *See* Docket No. 25, p. 3. The Plan appears to admit that conversion to Chapter 7 is in the best interests of creditors, as it provides that the sum of $27,430.00 represents the liquidation value of the Estate in a hypothetical Chapter 7 case, whereas the Debtors plan to pay but $13,200.00 per the Plan. *See* Docket No. 49, p. 3. The calculations provided by the Debtors and their counsel are concerning, and the Plan is nowhere near close to being confirmable. Four months into this Case, the Debtors have failed to make a single Plan payment. *See* Docket No. 31, p. 11. The Trustee has not received the Debtors' 2022 tax returns or the Debtors' proof of income. *Id*. at p. 5.

It is difficult to appreciate how the Debtors entered bankruptcy with a goal of exiting through a confirmed plan of reorganization. Counsel to the Debtors stated early in the case that the initial miscues were his fault, and not that of the Debtors. That excuse, however, has worn thin, as months into this Case have passed without the Debtors ever having proposed a plan of reorganization that is confirmable. Even if the Court were to accept lawyering as of the cause of the errors in the plans of reorganization filed, why have no plan payments been made based on those numbers? It seems clear that the Debtors filed this Case simply to stall the Moore Trust's collection efforts, but without any true intent on confirming a Chapter 13 plan of reorganization.

History of Prior Filings

The Debtors have not had any prior bankruptcy filings that the Court is aware of. *See* Docket No. 1, p. 3.

Filing Bankruptcy Solely to Defeat State Court Litigation

The only state court litigation pertinent to this Case is the State Court Action, commenced by the Moore Trust against the Debtors in 2019. *See id*. at p. 48; *see also* Docket No. 34, p. 11. The State Court found in favor of the Moore Trust and against the Debtors on all causes of action, and awarded the Moore Trust damages of $793,152.53 (the "Judgment"). *See* Claim No. 3-3, p. 13; *see also* Docket No. 34-1, *Exhibit 1*, p. 12.

Egregious Behavior

The Debtors claim that they gave $1 million to a third party to hold for them for the Debtors' future health expenses. In response to the discussion of the transfer in the Motion to Dismiss, the Debtors state that any "allegations of fraudulent transfer and concealment of assets are unfounded and unsupported by the facts." Docket No. 45, p. 14. The Debtors have not been forthcoming about the transfer of the $1 million, and its present location. The Court had to press the Debtors about the transfer, and only then did the Debtors claim that they gave the $1 million to someone at church that they apparently barely know and have no contact information for. The Debtors claim that they are unaware if this individual they gave the $1 million to still has the

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CONT... Michael Moore and Marlena Moore Chapter 13

money. The Debtors' story seems like a tall tale. If this were all true, why have the Debtors not attempted to regain control of the $1 million, through an action in this Court or otherwise? The failure to provide a believable explanation to the Court of the whereabouts of the $1 million in cash constitutes egregious behavior in this Case warranting a bar to refiling.

In sum, viewing the totality of the circumstances, and guided by the *In re Leavitt* factors, the Court finds cause to bar the Debtors from a further bankruptcy filing for 120 days from the date of an order dismissing this Case.

September 12, 2023

Appearances required.

On August 30, 2023, one or both of the Debtors filed that *Augmented Response to Creditor Richard J Moore's Objection to Claim of Exemption* (the "Response"). *See* Docket No. 65. Through the Response, one or both of the Debtors provide that "Debtor now files this response to Creditor's Objection to the Proof of Claim, but consents to conversion to allow the Ch. 7 Trustee to pursue the settlement funds they transferred to Steven Martindale to be held in trust for their future care and support." *Id.* at p. 5, lines 9-13.

It is the Court's understanding that the Debtors now support *Secured Creditor Richard J. moore as Trustee's motion to Convert Chapter 13 Case to Case Under Chapter 7 of Title 11 of U.S. Code* (the "Motion"). *See* Docket No. 34.

The Court will grant the Motion based on the Debtors' support of the Motion, and for cause as set forth in the Motion and related exhibits.

Movant to upload an order within 7 days.

August 17, 2023

Appearances waived. The Motion is denied without prejudice due to the Movant's failure to properly serve all creditors. The Movant shall lodge a

conforming order within seven days.

Background

On April 25, 2023 (the "Petition Date"), Michael Moore and Marlena Moore (collectively, hereinafter, the "Debtors") filed a voluntary petition for relief under Chapter 13 of Title 11 of the U.S. Code (this "Case"). *See* Docket No. 1.

The claims bar date lapsed for non-government creditors on July 5, 2023. Two secured creditors have timely filed a total of three proofs of claim: (1) Richard J. Moore, as Trustee of the Moore Marital Trust UA DTD 12/23/1986 (the "Movant"), holding a claim in the amount of $793,152.53; (2) the Movant, holding a second claim in the amount of $209,831.94; and (3) JPMorgan Chase Bank, N.A., holding a claim in the amount of $196,302.85, secured by a second deed of trust against the Property. *See* Claim Nos. 3-3, 6-2, and 7-1. Three unsecured creditors have timely filed a total of four proofs of claim: (1) Wells Fargo Bank, N.A., holding an unsecured claim in the amount of $8,208.29; (2) Wells Fargo, holding another unsecured claim in the amount of $8,014.12; (3) LVNV Funding, LLC, holding an unsecured claim in the amount of $4,431.34; and (4) CEP America California, holding an unsecured claim in the amount of $123.52. *See* Claim Nos. 1-1, 2-1, 4-1, and 5-1.

Before the Court now is that *Notice of Motion and Secured Creditor Richard J. Moore as Trustee's Motion to Convert Chapter 13 Case to Case Under Chapter 7 of Title 11 of U.S. Code* (the "Motion"), filed by the Movant on July 25, 2023. *See* Docket No. 34. The Motion seeks a Court order converting this Case to a Chapter 7 case, or alternatively dismissing this Case with a bar to refiling. *See id*.

Notice

Fed. R. Bankr. P. 9014 governs a proceeding under 11 U.S.C. § 1307(c) to dismiss a case, or to convert a case to another chapter. *See* Fed. R. Bankr. P. 1017(f)(1); *see also* Fed. R. Bankr. P. 9014(b) ("[t]he motion shall be served in the manner provided for service of a summons and complaint by Rule 7004"). Fed. R. Bankr. P. 7004(b) provides that "service may be made within the United States by first class mail postage prepaid . . . ." Fed. R. Bankr. P. 7004(b). Notice must be provided to "the debtor, debtor's attorney (if any), all creditors, the chapter 13 trustee, any former trustee, and the United States trustee." LBR 3015-1(q)(3).

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CONT... **Michael Moore and Marlena Moore** **Chapter 13**

The Motion and notice thereof were served upon the Debtors via FedEx Overnight Mail on July 25, 2023, using the addresses listed in that *Chapter 13 Voluntary Petition*. *See* Docket No. 34, *Proof of Service of Document*, p. 3; *see also* Docket No. 1, p. 2. The Trustee, U.S. Trustee, and Debtor's counsel were each served via Notice of Electronic Filing ("NEF") on July 25, 2023. *Id*. No other parties were served. Service of the Motion and notice thereof was accordingly deficient and did not comply with Fed. R. Bankr. P. 1017(f)(1), 9014(b), and 7004(b) and this Court's Local Rule 3015-1(q)(3). The Court denies the Motion without prejudice to allow the Movant to refile and serve all creditors with the same.

Party Information

Debtor(s):

Michael Moore — Represented By Anthony James Francisco I

Joint Debtor(s):

Marlena Moore — Represented By Anthony James Francisco I

Movant(s):

Richard J. Moore, as Trustee — Represented By Jill David

Trustee(s):

Elizabeth (ND) F Rojas (TR) — Pro Se

Tuesday, October 10, 2023 **Hearing Room 201**

2:00 PM
9:23-10318 Michael Moore and Marlena Moore **Chapter 13**

#13.00 HearingRE: [59] Motion to Avoid Lien Junior Lien with Richard J. Moore, as Trustee of the Moore Marital Trust UADD 12/23/1986

Docket 59

Tentative Ruling:

October 10, 2023

Appearances required.

Party Information

Debtor(s):

Michael Moore — Represented By
Anthony James Francisco I

Joint Debtor(s):

Marlena Moore — Represented By
Anthony James Francisco I

Movant(s):

Michael Moore — Represented By
Anthony James Francisco I

Trustee(s):

Elizabeth (ND) F Rojas (TR) — Pro Se

2:00 PM

9:22-10278 James E Goldstein **Chapter 11**

#14.00 CONT'D Chapter 11 Status Conference

FR. 6-8-22, 9-7-22, 12-14-22, 2-21-23, 4-4-23, 6-13-23

Docket 1

Tentative Ruling:

October 10, 2023

Appearances required.

The Court has reviewed the *Status Report Regarding Chapter 11 Case*. *See* Docket No. 116. The Court is inclined to continue the status conference to November 21, 2023, at 2:00 p.m., but will hear from the Office of the United States Trustee regarding the Debtor's compliance with the *Guidelines and Requirements for Chapter 11 Debtors in Possession*.

June 13, 2023

Appearances required.

The Court has reviewed the *Status Report Regarding Chapter 11 Case*. *See* Docket No. 84. The Court is inclined to continue the status conference for 120 days, but will hear from the Office of the United States Trustee as to the Debtor's compliance with those *Guidelines and Requirements for Chapter 11 Debtors in Possession*.

April 4, 2023

Appearances required.

The Court has reviewed the *Status Report Regarding Chapter 11 Case*. *See* Docket No. 80. The Court will inquire with the U.S. Trustee regarding the Debtor's compliance with the *Guidelines and Requirements for Chapter 11 Debtors in Possession* (the "Guidelines"). Assuming full compliance with the Guidelines, the

Court intends on continuing the status conference to June 13, 2023, at 2:00 p.m.

February 21, 2023

Appearances required.

In reviewing the *Status Report Regarding Chapter 11 Case*, it appears that the Debtor is attempting to re-file a motion to settle Adversary Proceeding No. 9:22-ap-1028-RC, and is litigating Adversary Proceeding No. 9:22-ap-01059-RC to a conclusion. *See* Docket No. 76. The Court is inclined to continue the status conference to April 4, 2023, at 2:00 p.m.

December 14, 2022

Appearance not required.

The Court reviewed the *Status Report Regarding Chapter 11 Case*. *See* Docket No. 62. The Court will continue the status conference to February 21, 2023, at 2:00 p.m.

September 7, 2022

Appearance required.

The Court has reviewed the *Status Report Regarding Chapter 11 Case*. *See* Docket No. 38. The Court intends on setting a claims bar date in the matter of November 30, 2022, with notice of the bar date to be served by September 15, 2022, and continuing the status conference to December 14, 2022, at 2:00 p.m., with a status conference report filing requirement of December 1, 2022.

Party Information

Debtor(s):

James E Goldstein	Represented By Michael G Spector Vicki L Schennum

2:00 PM

9:22-10622 **Alcaraz Catering, Inc.** **Chapter 11**

#15.00 CONT'D Hearing RE: Post-Confirmation Status Conference

FR. 9-12-23

Docket 181

Tentative Ruling:

October 10, 2023

See Matter No. 16.

September 12, 2023

Appearances required.

On May 8, 2023, the Debtor's third amended chapter 11 plan of reorganization (the "Plan") was confirmed. Docket Nos. 149 and 175, respectively. On May 25, 2023, that *Notice of Post Confirmation Status Conference* (the "Notice"), set to be held on September 12, 2023 was filed. Docket No. 181. The Notice indicated that the Debtor must file a Status Report 14 days prior to the Status Conference. *Id*.

On August 29, 2023, the Subchapter V Trustee Susan Seflin (the "Trustee") filed that *Subchapter V Trustee's Post Confirmation Status Report* (the "Trustee's Report"). *See* Docket No. 210. Through the Trustee's Report, the Trustee indicates that the Debtor has not paid the Trustee's Fees awarded by the Court on July 26, 2023. *See id.* at p. 2, lines 10-19. The Trustee's Report further indicates that, if the Debtor does not provide the Trustee with evidence that the Debtor is complying with its Plan obligations, then the Trustee expects that she will confer with the Office of the United States Trustee as to whether a motion to convert the case to chapter 7 is appropriate. *See id.* at lines 20-22.

On August 31, 2023, counsel for the Debtor, Kenneth Henjum ("Henjum"), filed that *Post Confirmation Status Conference: Declaration of Kenneth H.J. Henjum* (the "Henjum Declaration"). *See* Docket No. 211. Through the Henjum Declaration,

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CONT... Alcaraz Catering, Inc. Chapter 11

Henjum attests that he "has lost communication with his client [Debtor].. [o]ver the past six weeks his emails, texts and phone calls have not been returned". *Id.* at p. 1, lines 23-28. Henjum further attests that "the telephone number does not have an active voicemail attached to it..[o]ur office sent a letter via U.S. Mail and it was returned to our office. *Id.* at lines 26-28.

Pursuant to 11 U.S.C. § 1112(b)(4)(N) "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause..." and cause includes any "material default by the debtor with respect to a confirmed plan." *See also In re Baroni*, 36 F4th 958, 967 (9th Cir. 2022). The "bankruptcy court can convert a case sua sponte under § 105(a) if cause exists to do so." *See In re Kenney G. Enterprises, LLC*, 2014 WL 4100429 *9 (9th Cir. BAP 2014)(internal citations omitted).

The Court will issue an order to show cause why this case should not be converted to Chapter 7 or dismissed for the Debtor's material breach of Article 7 of that *Third Amended Plan of Reorganization for Small Business Under Chapter 11*.

Party Information

Debtor(s):

Alcaraz Catering, Inc.	Represented By Kenneth H J Henjum William C Beall

Trustee(s):

Susan K Seflin (TR)	Pro Se

2:00 PM
9:22-10622 **Alcaraz Catering, Inc.** **Chapter 11**

#16.00 Re: ORDER TO SHOW CAUSE WHY BANKRUPTCY CASE SHOULD NOT BE DISMISSED OR CONVERTED

Docket 215

Tentative Ruling:

October 10, 2023

Appearances required.

Background

On April 4, 2023, Alcaraz Catering, Inc. (the "Debtor") filed its *Third Amended Plan of Reorganization for Small Business Under Chapter 11* (the "Plan.). *See* Docket No. 149. The Plan provided an estimated amount of $20,000 that would be owing to the SubChapter V Trustee, and that such amount would be paid on the effective date of the Plan. *See id.* at p. 6. The effective date was defined as "the first business day following the date that is 15 days after the entry of the confirmation order." *See id.* Class 2c of the Plan related to a claim of Alicia Jimenez, which claim was to be paid in monthly installments of $2,766.04. *See id.* at pp. 4-5. As to the Debtor's counsel, the Plan required payments of approved fees over 24 months, or $2,437.50 per month based on estimated fees of $70,000. *See id.* at p. 6. On May 8, 2023, the Court entered *Findings of Fact, Conclusions of Law, and Order Confirming Debtor's Third Amended Chapter 11 Plan of Reorganization*. *See* Docket No. 175. The effective date of the Plan was therefore May 23, 2023.

On July 26, 2023, the Court entered that *Order Granting Application for Payment of: Final Fees and/or Expenses (11 U.S.C. § 330)*, approving fees in the amount of $22,369.50 and expenses of $86.26 for Susan Seflin, SubChapter V Trustee (the "SubV Trustee"). *See* Docket No. 204. On June 28, 2023, the Court entered that *Order on Application for Payment of: Final Fees and/or Expenses (11 U.S.C. § 330)*, approving fees in the amount of $23,685 and expenses of $12.00 for Beall & Burkhardt, APC ("B&B"). *See* Docket No. 197.

On September 11, 2023, 2958 Oxnard, LLC ("Oxnard") filed that *Reply of Secured*

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CONT... **Alcaraz Catering, Inc.** **Chapter 11**

Creditor 2958 Oxnard, LLC to Status Report Filed on Behalf of Debtor. *See* Docket No. 212. Oxnard made the Court aware that it had informed the Debtor that the Debtor had failed "to make the full payments required under the Loans and [failed] to remit the SBA payment due as of April 1, 2023," was in "default under the Loans" as of July 31, 2023," and "defaulted [on the] business property tax lien in the amount of $13,911.81." *See id.* at p. 2, lines 9-16.

On September 15, 2023, due to the Debtor's default under its obligations under the Plan to Oxnard, the SubV Trustee, B&B, and taxing authorities, the Court entered that *Order to Show Cause Why Bankruptcy Case Should Not be Dismissed or Converted*. *See* Docket No. 215.

On September 26, 2023, the Debtor filed that *Declaration of Antonio Alcaraz* (the "Alcaraz Declaration"). *See* Docket No. 218. Through the Alcaraz Declaration, Antonio Alcaraz, the Debtor's president, attested that the Debtor has made payments to Oxnard, but was "unable to collect enough funds to pay the other creditors from the Chapter 11 case." *See id.* at p. 2, lines 9-10. Antonio Alcaraz attested that his niece is selling her home to make the Debtor's plan payments. *See id.* at lines 15-25. Antonio Alcaraz attested to the fact that "[t]he estimated cost to bring the case current will be $99,699.21 as of October 31, 2023." *See id.* at p. 4, lines 6-9. This appears to be in addition to "attorney fees and costs of approximately $100,000." *See id.* at lines 18-19.

On September 29, 2023, secured creditor Alicia Jimenez filed *Secured Creditor Alicia Jimenez's Response to the Court Order to Show Cause Why Bankruptcy Case Should Not be Dismissed or Converted*. *See* Docket No. 219. Alicia Jimenez requests that the Court not dismiss this case, but rather convert the case to Chapter 7 if the Debtor is unable to meet its obligations under the Plan. *See id.* at pp. 1-2.

On September 29, 2023, the Debtor filed that *Supplemental Declaration of Antonio Alcaraz in Support of Status Conference for Chapter 11 Case* (the "Supplemental Alcaraz Declaration"). *See* Docket No. 220. Essentially, the Debtor through the Supplemental Alcaraz Declaration requested more time to bring the payments due under the Plan current, perhaps by November 2023. *See id.* at p. 2.

On October 3, 2023, the SubV Trustee filed *Subchapter V Trustee's Response to Court's Order to Show Cause Why Bankruptcy Case Should Not be Dismissed or*

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CONT... Alcaraz Catering, Inc. **Chapter 11**

Converted. *See* Docket No. 221.

Analysis

Pursuant to 11 U.S.C. § 1112(b)(1), "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." Section 11 U.S.C. § 1112(b)(4)(N) provides that cause "includes [] material default by the debtor with respect to a confirmed plan." *See also In re Baroni*, 36 F.4th 958, 967 (9th Cir. 2022). The Court may dismiss a case *sua sponte* under 11 U.S.C. § 1112(b). *See In re Starmark Clinics, LP*, 388 B.R. 7298, 735 (Bankr. S.D. Tex. 2008).

On the petition date, the Debtor owned a parcel of real property worth $7 million. *See* Docket No. 1, *Schedule A/B: Assets – Real and Personal Property*, p. 4. In a liquidation scenario all creditors are paid in full, and there is a return to equity of more than $4 million. *See* Docket No. 149, *Exhibit B*.

The Debtor is unable to pay its effective date payments under the Plan, and Oxnard had to place forced insurance on the Debtor's real property. The Debtor is now nearly five (5) months late on its effective date payments and monthly plan payments to creditors other than Oxnard. There exists cause to convert or dismiss the case, and as 11 U.S.C. § 1112(b) provides that upon a finding of cause the Court "shall" either convert or dismiss the case, the Court will do just that. Given the value of the Debtor's real property, and the claims to be paid, it appears to the Court to be in the best interest of the Debtor's creditors and estate to convert the case to Chapter 7 to allow a trustee to immediately liquidate the Debtor's business and real property.

The Court will hear from parties-in-interest and the Office of the United States Trustee regarding conversion vs. dismissal.

Party Information

Debtor(s):

Alcaraz Catering, Inc. — Represented By
Kenneth H J Henjum
William C Beall

2:00 PM

CONT... **Alcaraz Catering, Inc.** **Chapter 11**

Trustee(s):

Susan K Seflin (TR) Pro Se

2:00 PM

9:23-10454 Global Premier Regency Palms Palmdale, LP **Chapter 11**

#17.00 CONT'D Chapter 11 Status Conference

FR. 7-26-23

Docket 1

Tentative Ruling:

October 10, 2023

Appearances required.

The Court has reviewed the *Status Report*. *See* Docket No. 45. The Court is inclined to continue the status conference to December 12, 2023, at 2:00 p.m. The Court will inquire with the Office of the U.S. Trustee regarding the Debtor's compliance with the *Guidelines and Requirements for Chapter 11 Debtors in Possession*.

July 26, 2023

Appearances required.

The Court will set a claims bar date of September 29, 2023 for non-governmental363c entities, and November 29, 2023 for governmental entities. Pursuant to this Court's Local Rule 3003-1, the Debtor will serve notice of the bar date on the Court's form F 3003-1.NOTICE.BARDATE on or before August 2, 2023. An order establishing the bar date shall be lodged by the Debtor within 7 days of the status conference.

The Court will inquire with the Office of the United States Trustee regarding the Debtor's compliance with its *Guidelines and Requirements for Chapter 11 Debtors in Possession*.

The Court is inclined to continue the status conference to October 10, 2023, at 2:00 p.m.

Party Information

2:00 PM
CONT... Global Premier Regency Palms Palmdale, LP **Chapter 11**

Debtor(s):

Global Premier Regency Palms	Represented By Garrick A Hollander

Trustee(s):

United States Trustee (ND)	Represented By Brian David Fittipaldi

2:00 PM

9:23-10517 Global Premier Regency Palms Colton, LP **Chapter 11**

#18.00 CONT'D Hearing
RE: [80] Motion to Dismiss Debtor - United States Trustee's Notice of Motion and Motion Under 11 U.S.C. §1112(b) to Dismiss or Convert Case (Fittipaldi, Brian)

FR. 9-26-23

Docket 80

***** VACATED *** REASON: Order denying motion was entered on 10/10/23.**

Tentative Ruling:

September 26, 2023

Appearances required.

On September 14, 2023, the Office of the United States Trustee (the "OUST") filed *United States Trustee's Notice of Motion and Motion Under 11 U.S.C. § 1112(b) to Dismiss or, in the Alternative, to Convert Case* (the "Motion"). *See* Docket No. 80. At bottom, the OUST, through the Motion, sought dismissal of the Chapter 11 case filed by Global Premier Regency Palms Colton, LP (the "Debtor") pursuant to 11 U.S.C. § 1112(b)(4)(C) and (F) due to the Debtor's failure "to provide evidence of sufficient proof of insurance." *See id.* at p. 4, lines 3-6.

On September 22, 2023, the Debtor filed *Debtor's Opposition to Motion of the United States Trustee for Dismissal or Conversion Pursuant to 11 U.S.C. § 1112(b)* (the "Opposition"). *See* Docket No. 89. The Debtor submits that the Motion should be denied in that the "Debtor has [now] obtained commercial property and general liability insurance which provides coverage for the Debtor's property and specifically identifies the [OUST] as a 'notice party,' and names Debtor's principal secured creditor, iBorrow, as an additional loss payee." *See id.* at p. 2, lines 4-7.

In reviewing *Exhibit A* to the Opposition, the *Certificate of Liability Insurance*, the expiration date is listed as 9/21/2023, the same date the general liability policy was issued. *See id.* at *Exhibit A*. In reviewing the Debtor's latest *Monthly Operating Report*, the Debtor had cash-on-hand of $50 at the end of July 2023. At the hearing,

2:00 PM

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

the Court will inquire with the OUST as to whether the Opposition sufficiently addresses the concerns set forth in the Motion, and will inquire with the Debtor as to the expiration date of the liability insurance policy and the source of cash to pay the premiums for both insurance policies.

Party Information

Debtor(s):

Global Premier Regency Palms — Represented By
Garrick A Hollander
Matthew J Stockl

Movant(s):

United States Trustee (ND) — Represented By
Brian David Fittipaldi