

1 And despite Debtors vigorously asserting the automatic stay in the state trial court, Debtors
2 proceeded with their appeal in the state appellate court.⁸

3 When Deborah filed a Chapter 13 Plan, she revealed Debtor's intent regarding Kim.
4 Although Kim's claim is partially secured by a judgment lien on Deborah's house, the Plan
5 says that Debtors plan to sell the house but "[t]hose funds to be transferred to Tae Yon Kim
6 will be placed in a trust account pending the outcome of any pending litigation to determine
7 whether the Kim claim will be allowed."⁹

8 At the hearing in this case on April 27, 2005, the Court denied Jeff's motion to convert
9 to Chapter 13, converted Deborah's case to Chapter 7, and consolidated the cases under number
10 04-25567. Although the Deans did not file a motion for relief from stay prior to the hearing,
11 the Court also stated, "I will grant relief from stay for purposes of the debtor pursuing the
12 appeal. It's going to be that - we'll have to resolve how compensation goes on that, but the
13 debtor should have their appeal rights, at least take a look at it and see what's there."¹⁰

14 On May 11, under number 05-10847 (Deborah's former case number), the Deans filed
15 an ex parte motion to employ Dorsey & Whitney as special counsel for the debtors to prosecute
16 the Deans' state court appeal of Kim's Judgment. The Court granted the motion the next day,
17 May 12.

22 ⁷ Docket no. 24, attachment no. 1, ¶ 4d and Ex. A.

⁸ Docket no. 49 in 05-10847-TTG, attachment no. 1, Ex. A.

23 ⁹ Docket no. 42 in 05-10847-TTG.

¹⁰ Docket no. 49 (Transcript of April 27, 2005 Hearing) at 13-14.

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III. ARGUMENT

A. Debtors' motion to appoint Dorsey & Whitney was improper.

1. Debtors improperly presented the motion ex parte.

Local Rule 2014-1(a) requires that an ex parte application for appointment include a statement of "the anticipated method of compensation" and "[c]opies of any fee agreements." But Debtors' motion papers do not include either of these items.¹¹

Likewise, Local Rule 2014-1(b) requires that prior to ex parte appointment, a professional must obtain the written endorsement of the U.S. Trustee or certify that two days have passed since notice to the U.S. Trustee and the U.S. Trustee has not objected to the application for appointment. There is no indication in Debtors' motion papers, or the Court's docket, that the U.S. Trustee consented or that Debtors or Dorsey & Whitney provided the required notice.¹²

2. The motion was not Debtors to make.

a. Subsection 327(e) authorizes employment by the Trustee.

The only authority Debtors cite in their one-page motion is 11 U.S.C. § 327(e). But that subsection says, "*The trustee, with the court's approval, may employ . . . an attorney. . .*"¹³ Thus, under the statute, it is only the Chapter 7 Trustee that can move for appointment of special counsel. Debtors cannot.

¹¹ See docket nos. 53 and 54.

¹² See *id.*

1 **b. The Chapter 7 Trustee owns Debtors' appellate rights.**

2 The Deans' right to appeal Kim's Judgment is a property interest.¹⁴ Thus, Debtors'
3 appellate rights are owned and controlled by the Chapter 7 Trustee.¹⁵ Like any property
4 interest, appellate rights cannot be stripped from the Trustee, or returned to Debtors, without
5 abandonment proceedings under § 554 and Rule 6007.¹⁶

6 Because the Chapter 7 Trustee owns and controls Debtors' appellate rights, he is the
7 one that must evaluate whether pursuing the appeal—and incurring all the expense and risk
8 associated with the appeal and potential new trial—is in the best interests of the estate.¹⁷
9 Likewise, the Trustee is free to pursue a settlement with Kim if, in the Trustee's business
10 judgment, it would be in the best interests of the estate.¹⁸

11 **c. The Chapter 7 Trustee controls the funds of the estate.**

12 Regardless of who owns Debtors' appellate rights, the Chapter 7 Trustee owns the funds
13 of the estate. Indeed, when Jeff filed bankruptcy on December 8, 2004, the \$50,000 held by
14 Dorsey & Whitney became part of the bankruptcy estate and should have been turned over to
15 the Chapter 7 Trustee at that time.¹⁹

18 ¹³ 11 U.S.C. § 327(e) (emphasis added).

19 ¹⁴ *In re Mozer*, 302 B.R. 892, 895-96 (C.D. Cal. 2003).

20 ¹⁵ *See* 11 U.S.C. § 541(a); *Mozer*, 302 B.R. at 895-96; *Turner v. Cook*, 362 F.3d 1219, 1225
21 (9th Cir. 2004) (dismissing appeal as to debtor because after filing bankruptcy, "he is no longer
a real party in interest in this matter and has no standing to pursue this appeal"); *In re F.G.M.*
Assoc., Inc., 21 B.R. 442, 442 (B.A.P. 1st Cir. 1982) (finding issue related to state court appeal
moot where Chapter 7 Trustee decided not to pursue the appeal).

22 ¹⁶ *Turner*, 362 F.3d at 1226.

23 ¹⁷ *Mozer*, 302 B.R. at 897-98; *see Turner*, 362 F.3d at 1226; *F.G.M. Assoc.*, 21 B.R. at 442.

¹⁸ *Mozer*, 302 B.R. at 898 (referring to Trustee's "business judgment" when assessing risks of
pursuing appeal).

¹⁹ 11 U.S.C. § 542.

1 In any event, if Dorsey & Whitney is to be paid, the payment is going to come from the
2 estate. And, again, the Trustee is the one that should have full authority to decide whether
3 appealing Kim's jury verdict is worth paying Dorsey & Whitney \$300 to \$475 an hour.²⁰

4 This is not a mere academic point. Apparently, an appeal by Debtors is likely to cost
5 the estate close to \$50,000, the amount Debtors paid Dorsey & Whitney for the appeal. The
6 Deans' chances of overturning the jury verdict in Kim's favor are slim. But even if the appeal
7 succeeded, this would simply mean more money from the estate to defend Debtors in a second
8 trial. Thus, pursuing the appeal and a second trial could easily involve fees and costs in excess
9 of \$100,000. And this does not include the possibility of fees and costs involved in a potential
10 petition or appeal to the state supreme court.

11 In contrast, Kim is willing to negotiate with the Trustee regarding a reasonable
12 compromise of Kim's claim. This means that—through saved costs and a compromise from
13 Kim—the Trustee might well achieve a result that guarantees financial benefit to the estate,
14 rather than risking an expensive appeal that may not benefit the estate at all.

15 The important point is that this is a decision for the Trustee to make applying his best
16 business judgment for the benefit of the estate. It is not a decision for Debtors to make. They
17 chose Chapter 7 for Jeff. And their actions resulted in Chapter 7 for Deborah. Thus, they are
18 responsible for the Chapter 7 Trustee's control of their assets and the state court appeal

19 **3. Appointment should not relate back to Deborah's petition date.**

20 For the reasons stated above, the Court should vacate its ex parte Order Appointing
21 Special Counsel. In the alternative, the Court should modify it such that the effective date is
22 the date of the Order, May 12. It should not—as it currently does—relate back to the petition

23 ²⁰ See docket no. 54 ¶ 5.

1 date of Deborah Dean's case, January 25, 2005. The Deans and Dorsey & Whitney chose to
2 proceed with the state court appeal despite the automatic stay of § 362 and despite not being
3 employed under § 327. Thus, under 11 U.S.C. § 330 and *Lamie v. United States*, Dorsey &
4 Whitney cannot properly be paid for work done prior to appointment under § 327.²¹ Debtors'
5 ex parte attempt to "relate back" the appointment could cost creditors thousands of dollars in
6 attorney fees that would otherwise not be owed.

7 **B. The Court should not allow Debtors to use bankruptcy as a convenient substitute**
8 **for filing a supersedeas bond.**

9 In addition to the reasons stated above, there is an additional reason the Court should
10 vacate its Order Appointing Special Counsel and should recognize the Trustee's control of the
11 state court appeal.

12 Debtors' actions summarized above demonstrate that their bankruptcy filings are
13 intended as a substitute for filing a supersedeas bond in state court. In short, they want the
14 automatic stay to work in one direction: They want the bankruptcy protection of Kim not being
15 able to execute on their assets, but they want to pursue their state court appeal. Yet the Court
16 has rejected this approach in the past: "The debtor filed its petition herein to avoid the
17 consequences of adverse state court decisions while it continues litigating. *This court should*
18 *not, and will not, act as a substitute for a supersedeas bond of state court proceedings.*"²²

21 ²¹ See *Lamie v. U.S. Trustee*, 540 U.S. 526, 538-39 (2004) (Chapter 7 debtor's counsel not
22 eligible for compensation when not employed and approved under § 327).

23 ²² *In re Karum Group, Inc.*, 66 B.R. 436, 438 (Bankr. W.D. Wash. 1986) (emphasis added;
quotation marks and citation omitted) (holding that debtor cannot use Chapter 11 filing to avoid
posting supersedeas bond).

1 Likewise, the Ninth Circuit has condemned filing a petition “solely to delay collection of [a]
2 judgment and avoid posting an appeal bond. . . .”²³

3 This reasoning is well-grounded. It would be completely inequitable for Debtors to be
4 allowed to proceed with their appeal of Kim’s Judgment while simultaneously trying to
5 discharge that Judgment in bankruptcy.²⁴ Unlike a supersedeas bond, which *assures* successful
6 collection of assets if an appeal fails, Debtors are using the bankruptcy process to *defeat*
7 successful collection even if the appeal fails.

8 Moreover, it would be unjust for Debtors to be able use assets that rightfully belong to
9 their creditors to fund the litigation against their primary creditor, Kim. As another bankruptcy
10 court has observed,

11 If debtor’s approach were countenanced, [Kim] is not only deprived of [his]
12 state law right to enforce [his] judgment against debtor’s assets, or the
13 alternative state law right of an adequate bond, but those very assets to which
state law would allow [him] to resort will be used to fund the fight against
[him].²⁵

14 It also is vital for the Court to note that Kim’s claim is fully valid even though Debtors
15 filed an appeal of his Judgment. There is no need to pursue the appeal in order to verify
16 whether Kim’s claim is allowable.²⁶

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20 ²³ *In re Marsch*, 36 F.3d 825, 831 (9th Cir. 1994) (affirming Rule 9011 sanctions against
Chapter 11 debtor); *see id.* at 829 (affirming dismissal where “debtor’s Chapter 11 petition was
21 filed solely to delay collection of the restitution judgment and to avoid posting an appeal bond).

22 ²⁴ *See* 11 U.S.C. § 727.

23 ²⁵ *In re Casey*, 198 B.R. 910, 917 (Bankr. S.D. Cal. 1996).

²⁶ *In re Audre, Inc.*, 216 B.R. 19, 29-30 (B.A.P. 9th Cir. 1997) (*Rooker-Feldman* doctrine
precludes bankruptcy court from disallowing claim based on state court judgment even if
judgment is on appeal).

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IV. CONCLUSION

Debtors refused to carry though on a promise to former employee Tae Kim. Even after a jury found in favor of Kim, Debtors refused to pay him, despite ample assets to do so. When the state court demanded property and financial records, Debtors filed petitions in this Court. From the beginning of these proceedings, they have acted in bad faith in numerous ways, including using this Court's protections as an inappropriate substitute for a state court supersedeas bond. Likewise, they improperly moved ex parte for employment of state court counsel even though that employment decision rightfully belongs to the Chapter 7 Trustee.

Creditor Tae Kim respectfully asks the Court to vacate its Order Appointing Special Counsel and order that (1) Debtors' rights regarding the state court case *Kim v. Dean*, including Debtors' appellate rights, are part of the bankruptcy estate; (2) the Chapter 7 Trustee owns those rights for the benefit of the estate; (3) the Trustee is the proper party in interest in regard to Debtors' interests in *Kim v. Dean*; and (4) Debtors shall take no action in *Kim v. Dean*.

RESPECTFULLY SUBMITTED this May 17, 2005.

ELLIS, LI & MCKINSTRY PLLC

By: /s/ Chad Allred
KEITH A. KEMPER
WSBA No. 19438
CHAD ALLRED
WSBA No. 28424
Attorneys for Tae Kim

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Proof of Service

Today my office is filing this response with the Court through the Court's CM/ECF system, which should result in electronic service on:

- Debtors' attorneys, Lasher Holzapfel Sperry & Ebberson;
- The Chapter 7 Trustee in this case, Dennis Lee Burman, and his attorneys; and
- The U.S. Trustee.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED this May 17, 2005, at Seattle, Washington.

/s/ Chad Allred
CHAD ALLRED

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HONORABLE THOMAS T. GLOVER
Chapter 7, Seattle Calendar
Friday, June 10, 2005, 9:30 a.m.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re

JEFFREY WARREN DEAN,

Debtor.

NO. 04-25567-TTG

(NO. 05-10847-TTG)

**TAE KIM'S RESPONSE TO
DEBTORS' PROPOSED ORDERS
CONSOLIDATING CASES AND
LIFTING AUTOMATIC STAY**

In re

DEBORAH MARIE DEAN,

Debtor.

Creditor Tae Yon Kim opposes entry of the two Orders consolidating cases and lifting the automatic stay proposed by Debtors Jeffrey and Deborah Dean (attachment 1 to docket no. 53 in case no. 04-25567-TTG, and attachment 1 to docket no. 57 in 05-10847-TTG). Kim's opposition is based on the reasons stated in Kim's Motion for Reconsideration of Ex Parte Order Appointing Special Counsel (docket no. 50) and Tae Kim's Reply in support of that motion (docket no. 56).

TAE KIM'S RESPONSE TO DEBTORS'
PROPOSED ORDERS CONSOLIDATING CASES
AND LIFTING AUTOMATIC STAY - 1

*74947 (11718.00)

ELLIS, LI & MCKINSTRY PLLC
Attorneys at Law
Two Union Square
601 Union Street, Suite 4900
Seattle, WA 98101-3906
206-682-0565 Fax 206-625-1052

1 Kim respectfully asks that the Court not enter the Orders proposed by Debtors and that
2 the Court enter Kim's proposed Order Consolidating Cases Under Chapter 7, Vacating Order
3 Appointing Special Counsel, and Recognizing Trustee's Control of State Court Appeal.
4

5 RESPECTFULLY SUBMITTED this June 6, 2005.

6 MILLER NASH LLP

7 By: /s/ Geoffrey Groshong
8 GEOFFREY GROSHONG
9 WSBA No. 6124

10 ELLIS, LI & MCKINSTRY PLLC

11 By: /s/ Chad Allred
12 CHAD ALLRED
13 WSBA No. 28424
14 KYLE D. NETTERFIELD
15 WSBA No. 27101

16 Attorneys for Tae Kim

17 **Proof of Service**

18 Today my office is filing this response with the Court through the Court's CM/ECF system,
19 which should result in electronic service on:

20 Debtors' attorneys, Lasher Holzapfel Sperry & Ebberson;

21 The Chapter 7 Trustee in this case, Dennis Lee Burman, and his attorneys; and

22 The U.S. Trustee.

23 I declare under penalty of perjury under the laws of the State of Washington that the foregoing
is true and correct.

SIGNED this June 6, 2005, at Seattle, Washington.

/s/ Chad Allred
CHAD ALLRED

TAE KIM'S RESPONSE TO DEBTORS'
PROPOSED ORDERS CONSOLIDATING CASES
AND LIFTING AUTOMATIC STAY - 2

*74947 (11718.00)

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Kim interesting order LB

1 Danial D. Pharris
2 LASHER HOLZAI
3 SPERRY & EBBERSON
4 2600 Two Union Sq
5 601 Union Street
6 Seattle, WA 98101-
7 (206) 624-1230

8 Thomas T. Glover
9
10 Date: June 10, 2005
11 Time: 9:30 a.m.
12 Date: June 6, 2005
13 700 Stewart Street
14 Room 8206
15 Seattle, WA

16 UNITED STATES BANKRUPTCY COURT
17 WESTERN DISTRICT OF WASHINGTON
18 AT SEATTLE

19 In re:

20 JEFFREY DEAN,

21 Debtor.

22 No. 04-25567-TTG

23 ORDER DENYING MOTION TO
24 CONVERT TO CHAPTER 13,
25 CONSOLIDATING CASES
SUBSTANTIVELY UNDER CASE
NO. 04-25567, AND GRANTING
RELIEF FROM STAY TO PURSUE
APPEAL

18 THIS MATTER having come regularly before the court upon the motion of the debtor,
19 Jeffrey Dean to convert to Chapter 13, the court having considered the motion and supporting
20 declarations, and objections of the chapter 13 trustee, U.S. Trustee, creditor Tae Kim, and the
21 Chapter 7 trustee, and having heard the arguments of counsel, and deeming itself fully advised in
22 the premises; now, therefore, it is hereby

23 ORDERED that Jeffrey Dean's motion to convert his Chapter 7 case to Chapter 13 is
24 denied; and
25

L A S H E R
H O L Z A P P E L
S P E R R Y &
E B B E R S O N

1 IT IS FURTHER ORDERED that Jeffrey Dean's chapter 7 case shall be substantively
2 consolidated with Deborah Dean's chapter 7 case; and

3 IT IS FURTHER ORDERED that the debtor is authorized to litigate the pending appeal
4 of Tae Kim's Snohomish County Superior Court judgment , and that the automatic stay under 11
5 USC §362 is annulled for the purposes of allowing all parties to litigate the pending appeal in the
6 Washington State Court of Appeals, Division I, Case No. 55406-9-1; and
7

8 IT IS FURTHER ORDERED that the consolidated caption attached hereto as Exhibit "1"
9 and incorporated herein by this reference shall henceforth be the caption of this case and the
10 consolidated chapter 7 cases under case no. 04-25567-TTG.
11

12 DONE IN OPEN COURT this _____ day of June, 2005.
13

14
15 THOMAS T. GLOVER
16 United States Bankruptcy Judge
17

18 Presented by:

19 LASHER HOLZAPFEL
20 SPERRY & EBBERSON, P.L.L.C.
21

22
23 /s/ Danial Pharris
24 Danial Pharris, WSBA #13617
25 Attorneys for Debtor

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Approved for Entry:

UNITED STATES TRUSTEE'S OFFICE

Martin Smith, WSBA #24861
Attorneys for US Trustee

BLLIS LI & MCKINSTRY PLLC

Chad Allred, WSBA #28424
Attorneys for Tae Yon Kim

WOOD & JONES PS

Denice Moewes, WSBA #19464
Attorneys for Chapter 7 Trustee

CHAPTER 13 TRUSTEE

By: _____

L	A	S	H	E	R			
H	O	L	Z	A	P	F	E	L
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1989 Bankruptcy Case C

2 copies to Judge Glover
Hearing: 9/11/89 @ 1:30 p.m.

UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF WASHINGTON AT SEATTLE

	whi Jeffrey Dean,) CHAPTER 13
6)
) No. 89-05025
7)
) MOTION FOR APPROVAL OF
8) SETTLEMENT OF CONTROVERSY
)
9	Debtor.)

The Debtor, Deborah Dean, whi Jeffrey Dean, through counsel, moves the Court for an Order approving the terms of the settlement agreement with Culp, Guterson & Grader [CGG], a copy of which is attached hereto.

In addition, the Debtor also seeks an order confirming the \$14,000.00 payment to be received on CGG as her homestead exemption, to be held free of the claims of creditors or the trustee in this case or in the event of conversion to Chapter 7, provided that the Debtor claims the Washington State exemption scheme.

BACKGROUND OF SETTLEMENT

On 5/25/84, a Washington corporation called JAL, Inc. entered into a real estate contract to purchase land in Carnation, Washington. The corporation was owned by Lorimay Dean, Jeff Dean's former wife. The purchase terms were a price of \$40,000.00, \$8000.00 down, with the balance payable at 12%,

MOTION TO APPROVE
SETTLEMENT, Page 1

EXHIBIT

7-A

Ronald R. Piper
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1 \$500.00 per month, to be cashed out in 4 years. Subsequently, a
2 house was built on the property by the efforts of the Debtor,
3 Jeffrey Dean and various relatives and friends.

4 On 6/3/85 Lorimay Dean's shares in the corporation were
5 assigned to Deborah Pederson (the Debtor). The consideration paid
6 for this assignment was \$6000.00, paid to the contract vendor to
7 cure an arrearage, with funds obtained by Deborah as gift from
8 her parents. In addition, Deborah also provided funds to pay
9 approximately \$10,000.00 owing to various materials suppliers,
10 who had contributed to construction of the house. Thereafter she
11 made the \$500.00/month contract payments from her own earnings.

12 In December 1986, JAL, Inc. assigned it's interest in the
13 real estate contract to Deborah. Thereafter the corporation
14 became inactive.

15 On 2/14/87, Deborah Pederson married Jeffrey Dean.

16 In March, 1988 CGG filed suit in King County Superior
17 Court to recover funds it alleged had been wrongfully converted
18 from it by Jeffrey Dean, through Dean-Redman & Associates during
19 the period from 7/22/85 through 2/8/88, and some of which CGG
20 claimed had been used for construction of the house.

21 The Deans represented themselves pro-se in this action.

22 On September 7, CGG moved for and was granted summary
23 judgment. The Deans were not present in court due to a conflict
24 with another appearance in Northeast District Court.

25 MOTION TO APPROVE
SETTLEMENT, Page 2

EXHIBIT

7-13

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1 Judgment was entered against Jeff Dean in the principal
2 amount of \$464,381.45. Of this sum \$185,000.00 was secured with a
3 constructive trust on the house, representing the amount of funds
4 paid to various contractors, etc., out of the bank accounts into
5 which the allegedly converted money had been co-mingled with
6 other funds generated by Dean-Redman & Associates. In addition a
7 separate judgment in the principal amount of \$47,943.68 was
8 entered against Deborah Dean, representing the amount of funds
9 disbursed to her from the same accounts by her husband during the
10 time period in question. A judgment was also entered against the
11 marital community in the amount of \$171,890.11, representing the
12 total of funds allegedly converted by Jeff Dean after the 2/14/87
13 marriage.

14 On April 24, 1989, the Deans moved to vacate the
15 judgment. The motion was denied.

16 CGG purchased the vendor's interest in the real estate
17 contract and either commenced or continued a forfeiture action.
18 On 3/27/89 Deborah paid \$26,300.01 to CGG to payoff the real
19 estate contract balance from funds borrowed from her parents.

20 A receiver was appointed to sell the property and evict
21 the Deans. Eviction was scheduled for July 11, 1989. On that same
22 date, Deborah Dean filed Chapter 13.

23 MERITS OF THE SETTLEMENT

24 The respective positions of the parties are as follows.

25 MOTION TO APPROVE
SETTLEMENT, Page 3

EXHIBIT 7-C

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1 Deborah Dean contends that the house at issue herein is
2 her separate property, that she has put separate funds into it in
3 amounts exceeding the \$30,000.00 state homestead allowance, that
4 the house was built through the labor of herself, her husband and
5 various relatives, that the total claim of CGG in the house
6 should be limited to the sum of the separate judgment against her
7 and the constructive trust, the amounts of which she disagrees
8 with. Ms. Dean denies that allegedly stolen funds were used in
9 the construction of the home.

10 CGG contends that the house was built with money
11 wrongfully converted from them by Jeffrey Dean through Dean-
12 Redman & Associates, that they are entitled to apply all of the
13 net proceeds of sale of the house against their judgments, and
14 that equity should bar Deborah Dean and the marital community
15 from asserting a homestead in the house or its proceeds.

16 Under the circumstances the Debtor does not believe it
17 will be possible to confirm a Chapter 13 plan as originally
18 intended over CGG's objection. In addition CGG has indicated that
19 if the Debtor converted the case to Chapter 7 and continued to
20 claim an interest in the house, it would object to her discharge
21 and to her homestead exemption. Although the Debtor believes she
22 would prevail, she does not wish to incur either the financial
23 expense or emotional stress that such litigation would involve.
24 Both parties have compromised their positions in this matter, and

25 MOTION TO APPROVE
SETTLEMENT, Page 4

EXHIBIT 7-D

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that compromise is reflected in the settlement agreement filed with this motion. Therefore, the Debtor asks the court to approve this agreement.

DATED this 17th day of August, 1989.



RONALD R. PIPER
Attorney for Debtor