UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 12, 2017, at 10:30 a.m.

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1. **15-28108-E-11** **WILLARD BLANKENSHIP** **MOTION TO SELL FREE AND CLEAR OF LIENS**
RLC-10 **Stephen Reynolds** **12-14-16 [175]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on December 15, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Sell Property is granted.

The confirmed Chapter 11 Plan and Bankruptcy Code permit Willard Blankenship, the Plan Administrator/Debtor, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the Estate's 8.5% interest in Apnea Analysis Center, Inc. ("Property").

The proposed purchaser of the Property is Kevin Apman and the terms of the sale are:

A. $5,000.00 purchase price that has been deposited into counsel's client trust account.

B. Sale is where is, as is, without any warranty express or implied.

The Motion seeks to sell the Property free and clear of any lien that may be secured by the Property, but Movant is unable to identify any. The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

> "(f) The trustee[, debtor in possession, or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f)(1)–(5).

For this Motion, Movant has not established that there is any lien attached to the Property. In fact, the Motion states that Movant "is aware of no liens secured by the property." Therefore, a sale free and clear of liens under 11 U.S.C. § 363(f) is not warranted because no liens have been identified. The proposed sale is not one free and clear of any liens; it is merely a sale of the Debtor and Plan Estate's interest under 11 U.S.C. § 363(b).

DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: xxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because such a sale is required by the confirmed Plan within one year of the Plan's confirmation.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Sell Property filed by Willard Blankenship, the Plan Administrator having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Willard Blankenship, Plan Administrator, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Kevin Apman or nominee ("Buyer"), the Property commonly known as 8.5% interest in Apnea Analysis Center, Inc. ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $5,000.00, as set forth in Movant's declaration, Dckt. 177, and as further provided in this Order.

B. The sale proceeds shall first be applied to closing costs, other customary and contractual costs and expenses incurred in order to effectuate the sale.

C. The Plan Administrator is authorized to execute any and all documents reasonably necessary to effectuate the sale.

2. **15-28108-E-11** **WILLARD BLANKENSHIP** **CONTINUED MOTION TO SELL FREE**
RLC-9 **Stephen Reynolds** **AND CLEAR OF LIENS**
11-9-16 [164]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on November 29, 2016. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Sell Property is granted.

The Bankruptcy Code permits Willard Blankenship, the revested Debtor in Possession serving as Plan Administrator, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here, Movant proposes to sell the real property commonly known as 747 Pea Ridge Road, Spencer, Indiana ("Property").

The proposed purchasers of the Property are Brandy Felton, Brandon Felton, William Holdeman, and Vicky Holdeman (collectively, "Buyer"), and the terms of the sale are:

A. Purchase price of $140,006.00, of which Buyer deposited $500.00 as earnest money;

B. Sale includes a stove and a refrigerator, but it excludes a dishwasher and small storage shed next to the garage and generator;

C. Property to be sold where is, as is, and withy any warranty express or implied;

D. The sale is financed by a new first mortgage loan for 80% of the purchase price, payable in not less than thirty years with an annual interest rate of 5.50%;

E. Closing is set for January 5, 2017;

F. Settlement and closing fees are shared equally by the parties;

G. Possession of the Property will be delivered within thirty days after closing, and if not done so, Movant shall pay Buyer $50.00 per day in liquidated damages until possession is delivered;

H. All accrued taxes for the prior calendar year shall be paid by Movant;

I. Movant shall provide a survey of the Property, if Movant possesses one; and

J. The purchase agreement is governed by Indiana law.

DECEMBER 7, 2016 HEARING

At the hearing the court continued the matter to 10:30 a.m. on January 12, 2017, because Movant filed an Amended Notice of Hearing for this Motion. Dckt. 174.

APPLICABLE LAW

The Motion seeks to sell the Property free and clear of any lien that may be secured by the Property, but Movant is unable to identify any. The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

> "(f) The trustee[, debtor in possession, or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f)(1)–(5).

For this Motion, Movant has not established that there is any lien attached to the Property. In fact, the Motion states that Movant "is aware of no consensual liens secured by the real property." Therefore, a sale free and clear of liens under 11 U.S.C. § 363(f) is not warranted because no liens have been identified. The proposed sale is not one free and clear of any liens; it is merely a sale of Estate property under 11 U.S.C. § 363.

DISCUSSION

Movant has identified in the Motion that an additional offer for $169,900.00 was received after Movant had accepted the proposed sale. Movant expects that an overbid of $169,900.00 will be presented at the hearing.

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: xxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it provides funding for the Plan by selling real property that Movant claims never to have lived in and because this sale is anticipated by Section 4 of the confirmed Plan. *See* Dckt. 153 (Order confirming Plan with attached Plan).

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Willard Blankenship, the revested Debtor in Possession serving as Plan Administrator having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Willard Blankenship, the Plan Administrator under the confirmed Chapter 11 Plan, ("Plan Administrator") is authorized to sell pursuant to 11 U.S.C. § 363(b) to Brandy Felton, Brandon Felton, William Holdeman, and Vicky Holdeman or nominee ("Buyer"), the Property commonly known as 747 Pea Ridge Road, Spencer, Indiana ("Property"), on the following terms:
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> A. The Property shall be sold to Buyer for $140,006.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit 1, Dckt. 167, and as further provided in this Order.
>
> B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

C. The Plan Administrator is authorized to execute any and all documents reasonably necessary to effectuate the sale.

D. The Plan Administrator shall disburse the proceeds of the sale as provided in the confirmed Chapter 11 Plan in this case.

3. 15-26620-E-7 PSB-2 | **KEVIN/DEBRA JOHNSON** | **Paul Bains** | **MOTION TO COMPEL ABANDONMENT** | **12-23-16 [126]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2016. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Compel Abandonment is granted.

After notice and a hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or is of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Kevin Johnson and Debra Johnson ("Debtor") requests the court to order the Trustee to abandon property commonly known as 160 De Paul Drive, Vallejo, California ("Property"). The Property is encumbered by the liens of HSBC Bank USA, National Association and Nationwide Assets LLC, securing claims of $243,987.85 and $137,688.11, respectively. The Declaration of Debra Johnson (which has been signed under penalty of perjury by Debra Johnson and by Kevin Johnson) has been filed in support of the Motion and values the Property at $325,000.00.

Hank Spacone, the Chapter 7 Trustee, entered a statement of non-opposition on December 31, 2016.

The court finds that the debt secured by the Property exceeds the value of the Property and that there are negative financial consequences to the Estate caused by retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Trustee to abandon the property.

CHAMBERS PREPARED ORDER

The court shall issue an Order (not a minute order) substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compel Abandonment filed by Kevin Johnson and Debra Johnson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted, and the Property identified as 160 De Paul Drive, Vallejo, California, and listed on Schedule A by Debtor is abandoned by Hank Spacone, the Chapter 7 Trustee to Kevin Johnson and Debra Johnson by this order, with no further act of the Trustee required.

4.	**16-20852-E-11** **DNL-1**	**MATHIOPOULOS 3M FAMILY LIMITED PARTNERSHIP** **Luke Hendrix**	**CONTINUED MOTION TO USE CASH COLLATERAL** **4-21-16 [40]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors, parties requesting special notice, and Office of the United States Trustee on January 5, 2017. By the court's calculation, 7 days' notice was provided. The court required 7 days' notice. Dckt. 167.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion for Authority to Use Cash Collateral is granted.

Mathiopoulos 3M Family Limited Partnership ("Debtor in Possession") filed the instant Supplemental Request for Authority to Use Cash Collateral on January 5, 2017. Dckt. 163. FN.1.

FN.1. The court notes that this Supplemental Request was filed with a Notice of Hearing document for the January 12, 2017. Filing a new Notice of Hearing was not necessary because the court's order from the November 17, 2016 hearing required Debtor in Possession to file a Supplement to the Motion for the continued hearing on January 12, 2017. Similarly, Debtor in Possession will not be required to file a new Notice of Hearing for the March 9, 2017 hearing because the court has ordered that the hearing be continued to the date to hear any Supplement to the Motion filed by Debtor in Possession.

PRIOR MOTIONS FOR AUTHORITY TO USE CASH COLLATERAL

Debtor in Possession has filed Motions for Authority to Use Cash Collateral on the following dates in this case:

A. February 25, 2016. Dckt. 13.

B. April 21, 2016. Dckt. 40.

C. July 7, 2016. Dckt. 60.

D. September 6, 2016. Dckt. 94.

E. November 3, 2016. Dckt. 127.

BACKGROUND

The Debtor in Possession owns real property identified as 3105, 3111, 3119, 3125, 3127, 3129, 3133, 3137, 3141, and 3145 Penryn Road, Penryn, California ("Property"). The Property consists of a business center with approximately 30,700 square feet of rentable building space, which the Debtor in Possession rents out to commercial tenants. Dckt. 13.

The Debtor in Possession states that Wells Fargo Bank, N.A. ("Creditor") asserts a first deed of trust and assignment of rents against the Property to secure a promissory note with a balance of approximately $2,900,000.00. Dckt. 13.

Debtor in Possession argues that it is vital and necessary for the continued operation of the business to use cash collateral to pay necessary expenses to preserve the Property, including property taxes, business expenses, and Property upkeep. Dckt. 13.

Debtor in Possession anticipates that by using the cash collateral it will generate post-petition accounts receivable and/or accumulated cash sufficient to provide adequate protection to holders of secured claims. Dckt. 13.

The Debtor in Possession offers a portion of the accounts receivable and accumulated cash it will generate post-petition as replacement collateral to the Creditor, to the extent that the Creditor's collateral is diminished from the Debtor in Possession's use of cash collateral. The replacement liens on post-petition accounts receivable and cash shall be of the same scope, in the same priority, and subject to the same infirmities and defenses as existed pre-petition. Dckt. 13.

The court has issued several prior orders authorizing the use of cash collateral.

CURRENT MOTION

The Debtor in Possession estimates that the regularly reoccurring expenses will be incurred during the period of February 1, 2017, and March 31, 2017.

Debtor in Possession estimates the following expenses that will be incurred during the period of February 1, 2017, and March 31, 2017. The Debtor in Possession indicates that the expenses generally track previously approved amounts.

EXPENSE	**AMOUNT**
Property Insurance	$1,045.41 per month
Pacific Gas and Electric	$300.00 per month (approximate)
Recology Auburn (garbage)	$500.00 per month (approximate)
Telephone for business	$200.00 per month (approximate)
Pest control	$123.60 per month (approximate)
Telephone for Fire and Security	$120.00 per month (approximate)
Life Insurance Policies (4)	$675.00 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	$1,500.00 per month (approximate)
	_____
Total Cash Collateral Request	$5,168.01 per month

Debtor in Possession also provides for proposed use for cash collateral as to non-monthly expenses:

EXPENSE	**AMOUNT**
Placer County Water Agency	$1,500.00 due February 2017 (approximate amount due every two months)
Sewer	$2,275.00 due March 2017 (due every three months)
Stanley Security for Fire Alarm	$101.13 due March 2017 (due every three months)
	_____
Total Cash Collateral Request	$3,876.13 through March 31, 2017

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a Debtor in Possession serves as the trustee in a Chapter 11 case when so qualified under 11 U.S.C. § 322. As a Debtor in Possession, the Debtor in Possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> > (A) such sale or such lease is consistent with such policy; or
> >
> > (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
> >
> > > (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
> > >
> > > (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Fed. R. Bankr. P. 4001(b) provides the procedures in which a trustee or Debtor in Possession may move the court for authorization to use cash collateral. In relevant part, Fed. R. Bankr. P. 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

In the instant case, the Debtor in Possession is seeking authorization of the court to use cash collateral to pay necessary expenses to preserve the Property and continue ongoing business rental operations. Debtor in Possession assures the court that the business expenses are modest and track expenses that this court has approved previously.

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtor in Possession has the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. *See In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

Previously, the Debtor in Possession and Creditor filed a stipulation in which the Creditor consented to the Debtor in Possession's use of cash collateral. The adequate protection payment proposed was $13,193.11, beginning March 14, 2016, and continuing thereafter on the fifteenth day of each month through May 2016. Here, Debtor in Possession asserts that it will continue making adequate protection payments of $13,193.11 to Creditor. The court finds that the adequate protection payment is sufficient given the facts of the instant case.

The court authorizes the use of cash collateral, pursuant to the order of the court, for the period February 1, 2017, and March 31, 2017, including the required adequate protection payments and the property tax payment. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by the Debtor in Possession. All surplus Cash Collateral from the Property shall be held in a cash collateral account and separately accounted for by the Debtor in Possession.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Authority to Use Cash Collateral filed by Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Use Cash Collateral is granted, pursuant to this order, for the period February 1, 2017, and March 31, 2017, that the cash collateral may be used through March 31, 2017, to pay the following expenses, granting the Debtor in Possession a variance of ten percent in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

EXPENSE	**AMOUNT**
Property Insurance	$1,045.41 per month
Pacific Gas and Electric	$300.00 per month (approximate)
Recology Auburn (garbage)	$500.00 per month (approximate)
Telephone for business	$200.00 per month (approximate)
Pest control	$123.60 per month (approximate)
Telephone for Fire and Security	$120.00 per month (approximate)

Life Insurance Policies (4)	$675.00 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	$1,500.00 per month (approximate)

EXPENSE	**AMOUNT**
Placer County Water Agency	$1,500.00 due February 2017 (approximate amount due every two months)
Sewer	$2,275.00 due March 2017 (due every three months)
Stanley Security for Fire Alarm	$101.13 due March 2017 (due every three months)

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition rents in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim, which replacement lien is perfected by the issuance of this order, no further act of creditors required.

IT IS FURTHER ORDERED the Debtor in Possession shall continue to make the monthly adequate protection payments of $13,193.11 to Wells Fargo Bank, N.A.

IT IS FURTHER ORDERED Debtor in Possession waives any right to seek a surcharge of Creditor's interests in the Property, Pre-Petition Collateral, or Post-Petition Property under 11 U.S.C. § 506(c), only for the expenses which are authorized to be paid with the cash collateral during the period in which Debtor in Possession is authorized to use cash collateral by this order.

IT IS FURTHER ORDERED that if Creditor asserts that an event for the "automatic" termination of the use of cash collateral has occurred, Creditor shall file an *ex parte* motion for order terminating use of cash collateral and supporting pleadings (evidence of the event of termination) and lodge with the court a proposed order terminating the use of cash collateral. Creditor shall immediately serve (electronically and by First Class Mail) the *ex parte* motion and supporting pleadings and provide telephonic notice to counsel for the Debtor in Possession and the U.S. Trustee. If the Debtor in Possession disputes the event of termination, counsel for

Debtor in Possession shall notify the court and counsel for Creditor. The court may, upon review the *ex parte* motion set an emergency hearing *sua sponte* or may rule on the *ex parte* motion without hearing.

IT IS FURTHER ORDERED the hearing on the Motion is continued to 10:30 a.m. on March 9, 2017, to consider a supplement to the Motion to extend the authorization to use cash collateral. On or before February 23, 2017, the Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the March 9, 2017 hearing. Any opposition to the requested use of cash collateral may be presented orally at the hearing.

5.	**16-20852-E-11** **DNL-8**	**MATHIOPOULOS 3M FAMILY LIMITED PARTNERSHIP** **Luke Hendrix**	**MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH RON TEXEIRA AND MARY ARBEGAST** **11-21-16 [146]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on November 21, 2016. By the court's calculation, 52 days' notice was provided. 28 days' notice is required.

The Motion for Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Approval of Compromise is granted.

Mathiopoulos 3M Family Limited Partnership, the Debtor in Possession ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with Ron Texeira and Mary Arbegast, dba Anytime Fitness of Penryn ("Settlor"). The claims and disputes to be resolved by the

proposed settlement are Proof of Claim No. 4 filed by Settlor relating to a lease agreement between Movant and Settlor under which Settlor asserts that it overpaid common area expenses by $32,000.00.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 149):

A. Movant shall pay Settlor $12,000.00 in full satisfaction of any claims asserted by Settlor under the lease.

B. Payment shall be made in the form of rent deductions for twelve consecutive months beginning March 2017 and continuing through February 2018.

C. Movant and Settlor shall exchange releases of claims with respect to the lease, including Proof of Claim No. 4 filed by Settlor and any other claims that have been filed or could be filed by Settlor, and including any claims of Movant against Settlor for any unpaid rent or common area expenses due under the lease.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Under the terms of the settlement, all claims of the Estate, including any pre-petition claims of the Movant, are fully and completely settled, with all such claims released. Settlor has granted a corresponding release for Movant.

Probability of Success

Movant argues that success in litigation is uncertain because of the ability to secure documentary evidence concerning common area expenses over more than eight years.

Difficulties in Collection

Movant is not aware of any difficulties in collection beyond traditional costs and delay associated with involuntary collection efforts.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that litigation would result in significant costs and difficulty due to obtaining evidence dating back for more than eight years. Litigation would require significant efforts and cost to compile the necessary documentary evidence, especially contrasted against the proposed settlement.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors because the compromise it limits Movant's liability under Settlor's claim of $32,000.00 to $12,000.00; provides a mechanism for payment by way of rent reduction over several months, maintains Movant's ongoing relationship with Settlor as a tenant, and avoids unnecessary administrative expenses.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it limits Movant's liability by almost two-thirds against litigation that could cost more than Settlor's claim in this case, and the compromise also provides a way for the parties to continue their business relationship. The Motion is granted.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Mathiopoulos 3M Family Limited Partnership, Debtor in Possession ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Approval of Compromise between Movant and Ron Texeira and Mary Arbegast, dba Anytime Fitness of Penryn ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 149).

6. 12-36884-E-7 HLC-10 | **JENNY PETTENGILL** **Richard Hall** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF HOLLISTER LAW CORPORATION FOR GEORGE C. HOLLISTER, TRUSTEE'S ATTORNEY 12-8-16 [296]**

Final Ruling: No appearance at the January 12, 2017 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 8, 2016. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Hollister Law Corporation, the Attorney ("Applicant") for John Roberts, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 1, 2013, through December 2, 2016. The order of the court approving employment of Applicant was entered on November 2, 2013. Dckt. 153. Applicant requests fees in the amount of $89,335.00 and costs in the amount of $1,858.98.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (i) unnecessary duplication of services; or
> (ii) services that were not—
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing

judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits over the years of this case (and the related one for Stanislav Lazutkine) including administering the case, employing brokers, moving for turnover of property, objecting to claims, seeking relief in state court, preparing criminal referrals, and settling claims. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Joint General Case Administration—Employment Applications, Status Conferences, and Coordination with Trustee: Applicant spent 9.7 hours in this category. Applicant assisted Client with deciding whether to move forward with certain issues/options/strategies; preparing for, briefing of, and attending status conferences; and preparing and prosecuting employment applications.

Joint General Case Administration—Review of Litigation Files and Coordination with Pettengill State Court Counsel Regarding State Court Litigation: Applicant spent 5.8 hours in this category. Applicant reviewed the contents of Jenny Pettengill's litigation file, which consisted of approximately forty bankers' boxes of financial materials, analysis, correspondence, and transcripts, all of which were located at the offices of Nina Salarno, Pettengill's divorce counsel.

Joint General Case Administration—Defense of Corrigan RAS Motion and Negotiation of Stipulation to Consolidate Cases: Applicant spent 16.3 hours in this category. Applicant objected to a motion for relief from the automatic stay and negotiated a stipulation that not only resulted in the stay relief

motion being dismissed, but also resulting in streamlining the cases (Lazutkine's and Pettengill's) to the benefit of all involved.

Employment of Brokers: Applicant spent 6.0 hours in this category. Applicant worked with various parties in interest to select and obtain approval of the employment of Chase International to represent Corrigan Financial and the Trustee as broker for a Tahoe property.

Other General Issues Pertaining to Sale of Tahoe Property: Applicant spent 0.6 hours in this category. Applicant reviewed purchase offers as they were presented by a broker.

Motion Against Pettengill for Turnover of Possession of Tahoe Property: Applicant spent 7.3 hours in this category. Applicant filed a motion to compel Pettengill to turn over a Tahoe property to the Trustee that was granted.

Settlement Efforts with Pettengill to Jointly Pursue Corrigan et al: Applicant spent 11.8 hours in this category. Applicant was instructed by the Trustee at the outset of his representation to attempt to broker a cooperative, working relationship with Pettengill against Corrigan and other companies alleged by Pettengill to be community property that was owned and controlled by Lazutkine. Although substantial time was invested into formulating a working relationship, and Trustee was able to obtain access to Pettengill's work product, Pettengill was either unwilling or unable to agree to cooperate beyond such access.

Draft and Prosecute Motion to Employ Nina Salarno to Prosecute Estate Claims in State Court: Applicant spent 10.9 hours in this category. Applicant moved for Debtor's counsel to be employed to prosecute estate claims in state court, which the court denied.

Motion for Relief from Stay to Prosecute Property of Estate Claims in State Court: Applicant spent 17.3 hours in this category. Applicant moved for relief from the automatic stay when Debtor initially agreed to allow her counsel to prosecute estate claims in state court.

Efforts to Fund/Underwrite Financing to Insure Tahoe Property: Applicant spent 2.7 hours in this category. Applicant began drafting a motion for post-petition financing after the Trustee negotiated with Captain Enterprises to advance insurance premiums on an administrative priority basis for a Tahoe property.

General Settlement Negotiations with Corrigan: Applicant spent 8.3 hours in this category. Applicant worked with Corrigan Financial to agree on a settlement in concept, which included a commitment of a significant ($50,000.00) non-refundable deposit before any effort to memorialize or prosecute a settlement motion would be undertaken.

Draft and Prosecute Corrigan Settlement/Sale Motion: Applicant spent 28.0 hours in this category. Applicant drafted motions to approve settlement that were funded, consummated, and eventually granted.

Motion Against Lazutkine for Turnover of Metprom Stock: Applicant spent 18.1 hours in this category. Applicant filed a motion demanding that Lazutkine turn over stock in the "Metprom" family of companies, ultimately sold to Corrigan as a component of its settlement and sale, which motion was granted.

Preparation of Criminal Referral Against Lazutkine: Applicant spent 1.0 hours in this category. There being significant allegations and indications of criminal bankruptcy fraud by or on behalf of Lazutkine, the Trustee instructed Applicant to prepare and forward a detailed analysis for the United States Department of Justice to pursue if it were so inclined. While only a single hour is coded under this category, the report essentially incorporated by reference the allegations made in connection with the declaratory relief action against Corrigan and others. The criminal referral was made and received by the Department of Justice, but Applicant is unaware of its status since delivering it.

Issues Pertaining to State Court Contempt Action: Applicant spent 12.2 hours in this category. Applicant was instructed to track and participate as necessary in a state court contempt action by Debtor against Lazutkine that resulted in the payment of a $1,000,000.00 unpaid priority support claim to the advantage of Lazutkine's creditors.

Defense Against Pettengill's Motion for Abandonment of Estate Claims: Applicant spent 5.3 hours in this category. Applicant successfully defended against Debtor's motion demanding that the Trustee abandon Metprom stock, which the Trustee believed to be valuable despite Debtor's contentions to the contrary.

Objection to Capiel Claim in Lazutkine Case: Applicant spent 0.7 hours in this category. Applicant assisted the Trustee in finalizing and prosecuting an objection to the proof of claim of Mr. Capiel.

Objection to Pettengill Claim in Lazutkine Case: Applicant spent 12.0 hours in this category. At the instruction of the Trustee, and on notice by Debtor that she will contest the objection, Applicant filed a comprehensive objection to Debtor's $924,897.75 priority claim filed against Lazutkine on the grounds that it has been paid in full by Lazutkine in connection with the contempt trial.

Research Regarding Remedies for Conversion of Estate Property by Pettengill: Applicant spent 2.8 hours in this category. Applicant researched remedies that may be available because of Debtor admitting to selling approximately $64,000.00 in non-exempt personal property without court approval.

Compensation Motions: Applicant spent 5.8 hours in this category. Applicant prepared the instant Motion.

Declaratory Relief Action Against Corrigan: Applicant spent 27.6 hours in this category. Applicant commenced Adversary Proceeding 14-02276 against Lazutkine and Corrigan Finance, seeking turnover of a Tahoe property, certain personal property, and Metprom stock. When the Trustee determined that Debtor was either unable or unwilling to assist with the litigation, the Trustee voluntarily dismissed it with the intention of obtaining the requested relief through a declaratory relief action that was pending against Corrigan and Lazutkine in Debtor's divorce proceedings.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
George Hollister, attorney	210.2 hours	$425.00	$89,335.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees For Period of Application			$89,335.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $1,858.98 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopies	$0.08	$437.12
Postage		$386.14
PACER Charges		$12.20
Court Call		$172.40
Metered Conference Calls		$29.43
Court Filing Fees		$702.00
Notary Fees		$10.00
Lexis-Nexis and Westlaw Fees		$81.79
Hearing Transcripts		$27.90

Total Costs Requested in Application	$1,858.98

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $89,335.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $1,604.79 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as online access to bankruptcy and state laws and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include fees for Court Call and for legal research through Lexis-Nexis and Westlaw. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be charged in addition to the professional fees requested as compensation. The court disallows $254.19 of the requested costs.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$89,335.00
Costs and Expenses	$1,604.79

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Hollister Law Corporation ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Hollister Law Corporation is allowed the following fees and expenses as a professional of the Estate:

Hollister Law Corporation, Professional employed by the Trustee

Fees in the amount of $89,335.00
Costs and expenses in the amount of $1,604.79,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Trustee.

IT IS FURTHER ORDERED that costs of $254.19 are not allowed by the court.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

7. 13-21893-E-7 HLC-9 | **STANISLAV LAZUTKINE** **Andrew Reisinger** | **OBJECTION TO CLAIM OF JENNY PETTENGILL, CLAIM NUMBER 11 11-23-16 [202]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Chapter 7 Trustee, and Office of the United States Trustee on November 23, 2016. By the court's calculation, 50 days' notice was provided. 44 days' notice is required. *See* Fed. R. Bankr. P. 3007(a) (thirty-day notice); L.B.R. 3007-1(b)(1) (fourteen-day opposition filing requirement).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Claim is sustained, and the claim is disallowed in its entirety.

John Roberts, the Chapter 7 Trustee ("Objector") requests that the court disallow the claim of Jenny Pettengill ("Creditor"), Proof of Claim No. 11 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be a priority domestic support claim in the amount of $924,897.75. Objector asserts that the claims has been paid in full and is no longer owing to Creditor. Alternatively, Objector asserts that any balance owing is a general unsecured claim rather than a priority claim for support. Objector states that he has liquidated all known valuable assets, but cannot close the case while Creditor's claim exists.

The Trustee sets forth the following grounds:

A. Creditor has failed to designate what portion, if any, of the claim is entitled to priority under 11 U.S.C. § 507(a), thereby precluding any presumption of validity on its face.

B. Creditor has admitted under penalty of perjury that Stanislav Lazutkine ("Debtor") paid the administrative support claim. The Trustee relied upon that admission when determining the amount to accept in a settlement with Corrigan Financial. If Creditor's claim is allowed in its entirety, then Debtor's creditors will receive nothing, rather than the estimated 30% distribution referenced in the settlement order. Therefore, Creditor is equitably estopped to deny the admission.

C. A $1,000,000.00 payment from Debtor—and acknowledged by Creditor—was paid to cure a finding that Debtor was "guilty of all 11 counts of contempt as referred to in the Order to Show Cause re Contempt that was filed on January 30, 2013." Debtor's case was filed on February 13, 2013, and the payment occurred pre-petition. Therefore, Debtor's payment must have been applied to Creditor's entire claim.

D. The divorce order attached to the claim is not certified and cannot be readily authenticated by the Trustee as genuine or complete. Should it be properly authenticated, though, Creditor's claim still lacks the documentation required to verify the amount owing to Creditor on account of the twelve claim components net of the $9,000.00 per month in uncontested spousal support ordered by the court. Creditor has failed to furnish evidence that the components of the twelve categories of claims are real rather than imagined.

E. Creditor does not articulate how the categories other than the $9,000.00 per month spousal support qualify under the circumstances of the case as being "in the nature of alimony, maintenance, or support" as required by the Code to qualify as a domestic support obligation. The record supports an assumption that third-parties Stacey Nicholas and Captain Enterprises, LLC advanced and then forgave Creditor's living expenses and attorneys' fees.

F. Other than spousal support and attorneys' fees and costs ordered to be paid by the Superior Court directly to Creditor by Debtor (totaling $513,000.00), the balance of the components of the claim will not qualify as domestic support obligations because they are not owed to or recoverable by Creditor. Instead, they are owed to third parties, who

for the most part, have waived their claims against Creditor or are against her Estate and not her personally.

CREDITOR'S RESPONSE

Creditor filed a Response on December 29, 2016. Dckt. 216. Creditor states that she "intends to present evidence" supporting her claim, and therefore, she requests an evidentiary hearing.

APPLICABLE LAW

Section 502(a) provides that a claim supported by a Proof of Claim is allowed, unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Family law support matters are ones in which the federal courts give due deference to the state courts, so long as the state court proceedings can be diligently prosecuted in a timely manner. 11 U.S.C. § 507(a)(1) allows first priority for allowed unsecured claims for domestic support obligations that as of the date of the filing of the petition are owed to or recoverable by a spouse, former spouse, or child of the debtor. 11 U.S.C. § 101(14A) provides that a "domestic support obligation" means a debt that accrues before, on or after the date of the order for relief, that is owed to a former spouse in the "nature of alimony, maintenance, or support . . . without regard to whether such debt is expressly so designated" of such former spouse.

Generally, a timely-filed claim may not be amended after the deadline to assert an entirely new claim. 11 U.S.C. § 502(b)(9). Under certain circumstances, courts have permitted creditors to amend timely filed claims after the claims bar deadline. One such circumstance is when the amendment "relates back" to the original claim. The original claim must give"fair notice of the conduct, transaction or occurrence that forms the basis of the claim asserted in the amendment." *In re Westgate-California Corp.*, 621 F2d 983, 984 (9th Cir. 1980).

DISCUSSION

The Trustee filed a similar objection in *pro se* previously, which the court denied without prejudice because of procedural issues and because of a lack of evidence. Civil Minutes, Dckt. 198; Order, Dckt. 201. Now, the Trustee—through his counsel—has filed a proper objection with more than two hundred pages of supporting Exhibits.

The crux of the Trustee's argument now (as it was before) is that Creditor's claim has been paid already. Exhibit B, a Declaration from Creditor's attorney filed with the court on April 11, 2016, establishes at paragraph 23. that "representation [of Creditor] led to the payment by Stan [Debtor] of a significant (@$1m) administrative priority claim against Stan's bankruptcy estate."

Proof of Claim No. 11 was filed by Creditor on October 17, 2013. The Proof of Claim states under penalty of perjury that Creditor is owed $924,879.75 pursuant to a "Domestic Support Order." Attached to Proof of Claim No. 11 is Superior Court Order, County of Placer, in case no. SDR-0037138 ("State Court Action"), which order was filed in that court on January 31, 2011, and provides:

A. It relates to a hearing on an Order to Show Cause issued by the Superior Court in that case. The Order to Show Cause is identified as being filed December 17, 2010, and the hearing was conducted on January 12, 2011.

B. The Superior Court was unable to make a finding as to Lazutkine's income due to his failure to provide sufficient evidence thereof.

C. The court, based on the information it had and subject to retained jurisdiction to increase such amounts, order:

1. Lazutkine to pay Creditor $9,000.00 a month as spousal support;

2. Lazutkine to make the payments (P, I &T) for the note(s) securing the former family home in Loomis, California;

3. Lazutkine to make the payments (including insurance) for the Porsche driven by Creditor;

4. Lazutkine to pay Creditor $100,000 for attorneys' fees; and

5. Lazutkine to pay Creditor $100,000 for costs.

Attached to the Superior Court's Order is a chart of the: (1) home payments (which total $5,135.70 a month), (2) car payment of $1,891.73 a month for the period of September 2010 through September 2012, (3) auto insurance of $300.00 a month, and (4) medical insurance of $543 a month through July 2013. In addition, the Superior Court identifies a debt secured by a second deed of trust (HELOC) in the amount of $924,897.75. These amounts are totaled by the Superior Court to be $924,897.75.

No other documentation or basis for having a $924,897.75 claim against Lazutkine as of the commencement of this bankruptcy case on February 13, 2013, has been shown by Creditor.

The Trustee directs the court to the declaration of Nina Salarno, Esq., an attorney for Creditor in the State Court Action. Exhibit B, Dckt. 208. Ms. Salarno's declaration was provided as part of the request for the Trustee to be authorized to employ Ms. Salarno as special counsel to prosecute claims against Lazutkine. In her declaration, Ms. Salarno testified under penalty of perjury that she, in representing Creditor in the State Court Action:

A. "[a]s to [Creditor's] claims for spousal support against [Lazutkine] which claims the Trustee has agreed are not property of the [Pettengill bankruptcy] estate." Dec., p. 10:8.5–9.5.

B. "That Representation [for Creditor's support claim against Lazutkine] led to payment by [Lazutkine] of a significant (@$1m) administrative priority claim against [Lazutkine]'s bankruptcy estate...." *Id.*, p. 10:9.5–11.5.

C. Payment by Lazutkine of the supposal support claim for which Ms. Salarno represented Creditor resulted in "eventually the withdrawal...of an approximate $1.272m late filed claim by Captain Enterprises LLC...." *Id.*, p. 10:11.5–13.5. This appears to be claim No. 11 filed in Creditor's own Chapter 7 case, (*In re Pettengill*, 12-36884, discharge granted October 10, 2013). Proof of Claim No. 11 filed in the Pettengill bankruptcy case was filed as a general unsecured claim. 12-36884, Proof of Claim No. 11.

Exhibit B, Declaration, Dckt. 208.

In this bankruptcy case filed by Lazutkine, only one priority claim has been filed, that being one by the California Franchise Tax Board. Proof of Claim No. 4. The Original Proof of Claim No. 4 was filed in the amount of $8,901.63 as priority and $1,380.63 as general unsecured. Proof of Claim No. 4 filed July 24, 2013. The Franchise Tax Board filed Amended Proof of Claim No. 4 on July 3, 2015, in which the priority claim is listed to be $507.63, and the general unsecured claim is listed to be $1,846.28. The court could not identify a reason for the amendment. While testifying to such, there does not appear to be any such $1,000,000 "administrative priority claim" against the Lazutkine bankruptcy estate, unless Ms. Salarno is referencing Creditor's Proof of Claim which is now before the court.

The Trustee has provided the court with the Transcripts for the February 2015 contempt trial in the State Court Action on whether Lazutkine failed to comply with the State Court's support order. The State Court's ruling is stated in the Transcript from February 26, 2015, and includes the following:

> "First of all, the Court finds that there were valid orders, specifically the automatic temporary restraining orders that became effective at the beginning of the case, and secondly, the order of January 31, 2011, by Judge McElhany.
> . . .
> Third, the Court finds that the Respondent failed to comply with those valid orders by failing, among other things, to make all of the payments ordered on January 31, 2011, by failing to pay attorney fees, by failing to pay the costs ordered by the Court, by violating his fiduciary duties to the Petitioner by liquidating and selling assets of Loomis Leasing and Dino Transportation, despite the existence of the automatic temporary restraining orders.
> . . .
> The Court further finds from all of the evidence that the Respondent's failure to comply with the orders of the court were willful given his ability to comply. The Court will also note, just parenthetically, that the Respondent did not rebut the statements attributed to him by the Petitioner during her testimony that he had no intention of complying with the court orders.
> . . .

> It will be the judgment and determination of this Court as the Court is empowered to do that you will be placed on informal probation for a period of one year from today's date upon the following terms and conditions: First, that you serve a disciplinary sentence in the Placer County Jail of 33 days, representing three days for each of the 11 counts for which you have been found guilty. Second, you will be ordered to report to the Placer County Jail by 5:00 p.m. on Tuesday, March 3rd, 2015."

Transcript, pp. 12:20–24, 13:2–9, 13:17–22, 14:23–25, 15:1–5; Dckt. 211.

In reviewing the Transcripts (Exhibits 209, 210, and 211), the State Court makes it clear it was proceeding only on the failure to comply with that court's prior order for Lazutkine to pay the personal obligations for which this court had modified the automatic stay and not various other property dispute issues. Transcript, p. 5:11–23, p. 6:6–10 (statement by Creditor's counsel that the State Court proceedings "only has to do with the claims for spousal support and the contempt, ..., that this has nothing to do with all the joinder claims for Corrigan, for the house in Tahoe, or anything like that."), and p. 7:8–13, where Creditor's counsel states,

> "MS. ASHFORD: It's my understanding. It is my understanding that -- working up in the bankruptcy court, that the contempt is the only thing we can proceed, which includes the -- not child support. They did not have a child together. Spousal support -- Mr. Lazutkine's failure to pay per the order of Judge McElhany. That's the issue before the Court."

Dckt. 209.

Creditor has filed a claim in which she states that pursuant to the January 31, 2011 State Court Order she had a claim against Lazutkine for $924,897.75 for support. Proof of Claim No. 11. In Section 5 of Proof of Claim No. 5, Creditor checks the box stating that some portion is considered a "Domestic Support Obligation," but fails to specify any dollar amount.

The evidence is that as permitted by the court, Creditor went back to the State Court to enforce her personal rights for support. Pursuant to those efforts and the assistance of her then state court counsel, she was paid approximately $1,000,000.00 for enforcing the obligations arising under the order upon which Proof of Claim No. 11 filed by Creditor are based.

The only response of that Debtor can muster is,

> "Ms. Pettengill intends to present evidence including Placer County Superior Court's allocation of payments to Ms. Pettengill to support her claim (#11) in Lazutkine's bankruptcy."

Opposition, Dckt. 216. No response is provided as to the monies received. No response is provided as to how the monies have been allocated. No response is provided as to how the payment of the monies and the

allocation of the monies has been documented in the State Court Action. Rather, it appears that Debtor's response is merely one in which she wants to create the best story possible for this court to try to defeat the Trustee's Objection—not accurately report what has happened.

Debtor is not an unrepresented, unsophisticated *pro se* client. She has been represented by knowledgeable bankruptcy counsel in this case. She has been represented by multiple knowledgeable family law counsel in the State Court Action. Her family law counsel have worked with her bankruptcy counsel, well aware of these proceedings. One state court counsel sought to be special counsel for the Trustee to carry on the fight for the Trustee's and Creditor's joint interests against Lazutkine in the State Court Action. However, state court counsel withdrew from such potential representation, with the court being told that she concluded there would be an irreconcilable conflict for her to try to represent the bankruptcy estate's interests and Creditor's interests against Lazutkine.

Beginning with Federal Rule of Bankruptcy Procedure 3007(a), the creditor is given at least thirty days' notice of the hearing on an objection to a claim. The Objection was filed and served on November 23, 2016. Cert. of Service3, Dckt. 215. That provided fifty days' notice of the hearing on the Objection. Notice was given pursuant to Local Bankruptcy Rule 3007-1(b)(1). That requires an opposition be filed at least 14 days before the hearing.

Here, the only "opposition" is that Creditor wants to think up an opposition in the future, but has nothing to oppose the Objection now. The Trustee has rebutted the initial prima facie established claim. The burden of persuasion is that of Creditor, who offers no evidence in support of the claim.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety. The Objection to the Proof of Claim is sustained.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Jenny Pettengill, Creditor filed in this case by John Roberts, the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 11 of Jenny Pettengill is sustained, and the claim is disallowed in its entirety.