UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

January 24, 2019 at 10:30 a.m.

1.	**16-90603-E-7** **JES-4**	**MARK ONE CORPORATION** **Cecily A. Dumas**	**MOTION FOR COMPENSATION FOR JAMES E. SALVEN, ACCOUNTANT** **12-20-18 [146]**

Final Ruling: No appearance at the January 24, 2019 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, and Office of the United States Trustee on December 20, 2018. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Allowance of Professional Fees is granted.

James E. Salven, the Accountant ("Applicant") for Irma Edwards, the Chapter 7 ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period March 23, 2017, through December 19, 2018. The order of the court approving employment of Applicant was entered on March 23, 2017. Dckt. 67. Applicant requests fees in the amount of $2,800 and costs in the amount of $705.72.

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—
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> (A) the time spent on such services;
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> (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). A professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). 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.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the professional's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the professional exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. A professional must exercise good billing judgment with regard to the services provided because the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505

B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). 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?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include services necessary for the preparation and filing of tax returns. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant has not provided a task billing analysis. Generally, the court declines to review the raw billing records of an applicant. However, here the services performed are not extensive. Three categories are evident from the billing records: tax services, services performed for the employment application, and services performed in preparation of the fee application. Unnamed Exhibit, Dckt. 150.

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**
James E. Salven	11.2	$250.00	$2,800.00
Total Fees for Period of Application			$2,800.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $705.72 pursuant to this application.

However, the costs set forth in the Exhibits, Schedule B (Dckt. 150 at 3), are stated to be:

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copies	$0.15	$50.85
Envelopes	$0.69	$4.14
2016 Tax Return Processing	$87.00	$87.00
2017 Tax Return Processing	$87.00	$87.00
2018 Tax Return Processing	$87.00	$87.00
Postage	$1.80	$1.80
K-1 Postage 2018	$0.93	$0.93
File and Serve Fee Application	$1.29	$193.50
File and Serve 2nd Fee Application	$1.29	$193.50
File and Serve 3rd Fee Application	$1.29	$193.50
Total Costs Requested in Application		$899.22

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 $2,800 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

The Court notes that while Schedule B is totaled to be $705.72, the actual amount when adding all of the numbers together is $899.22. The total of $705.52 is reached by not including one of the service costs for one of the three fee applications.

In this case, this is Applicant's First and Final Application for fees and costs. Two prior Applications were dismissed without prejudice by Applicant. First Final Application For Fees and Costs,

DCN: JES-2, Dckt. 101, and "Withdrawal," Dckt. 113, stating "Additional Work Required;" Second Final Application for Fees and Costs, DCN: JES-3, Dckt. 130, and "Withdrawal," Dckt. 143, stating "Additional money was recovered."

It appears that the $705.72 stated in this third Final Application for Fees and Costs is a clerical error brought over when coping the Second and Final Application. (It appears that in the Expense table Applicant is not using an automatic calculation function, but manually totals the amounts and then plugs in the number.)

It is unfortunate that neither Applicant nor the Chapter 7 Trustee took this opportunity to enlighten the court as to the "additional work required" or "additional monies recovered." Presumably such was substantial enough to warrant pulling back the prior two Applications and incurring the additional service expenses.

The court notes that Trustee filed a Motion to sell "Remnant Assets" for $5,000, with said Motion granted by the court. Order, Dckt. 140. The Motion to Sell was filed the same day as the second Final Application by Applicant.

The Notice sent to all creditors states that for the current application Applicant is seeking approval of expenses in the amount of $705.72. It may be that Applicant is consciously reducing the expense by $193.50 because of having to file the same Application three times. It may be that it is a clerical error, caused by the Trustee yo-yo'ing Applicant in to do additional work, not communicating the need for ongoing services.

In light of the modest amount of the expense, and notwithstanding the amount stated in the Notice sent to Creditors, the court authorizes the full $899.22. If Applicant intentionally reduced the amount of the expenses, he can so notify the Trustee and she can reduce the payment down to the $705.72 amount.

The court concludes that in light of the small dollar amount in question, conducting any hearing on the issue would cause all involved to expend more than the $193.50 and be a waste of time and money.

First and Final Costs in the amount of 899.22 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$2,800.00
Costs and Expenses	$ 899.22

pursuant to this Application as final fees and costs 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 James E. Salven ("Applicant"), Accountant for Irma Edwards, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that James E. Salven is allowed the following fees and expenses as a professional of the Estate:

James E. Salven, Professional employed by the Chapter 7 Trustee

Fees in the amount of $2,800.00
Expenses in the amount of $899.22,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as a professional for the Chapter 7 Trustee

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to pay the fees and costs 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.

2.	**17-90320-E-7** **SSA-5**	**JESUS ALVARADO RODRIGUEZ** **Pro Se**	**MOTION FOR COMPENSATION FOR STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY** **1-2-19 [60]**

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, Trustee's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on January 2, 2019. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 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 Allowance of Professional Fees is granted.

Steven S. Altman, the Attorney ("Applicant") for Irma Edmonds, 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 September 17, 2017, through December 5, 2018. The order of the court approving employment of Applicant was entered on September 20, 2017. Dckt. 30. Applicant requests a reduced fee in the amount of $3,750 for its fees and costs (with the actual total fees being $13,980.00 and costs of $208.42).

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). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). 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.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

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 demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because 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] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). 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?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include general case administration, asset disposition, non-bankruptcy litigation, and other claims administration. The Estate has $9,995 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the 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.

General Case Administration: Applicant spent 4.7 hours in this category. Services in this category include coordination and compliance activities, including preparation of statement of financial affairs, schedules, list of contracts, United States Trustee interim statements, and operating reports, contacts with the United States Trustee, general creditors inquiries, prospective special counsel, and Debtor.

Fee/Employment Applications: Applicant spent 7.2 hours in this category. Services in this category include preparation of employment and fee applications in this case.

Asset Disposition: Applicant spent 1.7 hours in this category. Services in this category include sales, leasing, abandonment, and other transaction work related to estate's property interest in 2416 Snapdragon Court in Modesto, California.

Asset Analysis & Recovery: Applicant spent 6.8 hours in this category. Services in this category include identification and review of potential assets including claims and other non-litigation recovery.

Litigation: Applicant spent 21.4 hours in this category. Services in this category include work performed in Adversary Proceeding No. 17-09014 regarding sale of Property of the Estate.

Claims Administration & Objection: Applicant spent 4.8 hours in this category. Services in this category included review of creditor claims in the case, as well as possible objections and allowances of claims.

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**
Steven Altman	46.60	$300.00	$13,980.00
Total Fees for Period of Application			$13,980.00

Costs & Expenses

Applicant seeks the allowance and recovery of costs and expenses in the amount of $208.42 pursuant to this application.

FEES AND COSTS & EXPENSES ALLOWED

Fees, Costs & Expenses

Applicant seeks to be paid a single sum of $3,750.00 for its fees and expenses incurred for Client. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees and Costs in the amount of $3,750.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court authorizes the Chapter 7 Trustee to pay the fees allowed by the court.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees, Costs and Expenses $3,750.00

pursuant to this Application as final fees and costs 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 Steven S. Altman, Attorney ("Applicant") for Irma Edmonds, the Chapter 7 Trustee, ("Client") having

been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Steven S. Altman is allowed the following fees and expenses as a professional of the Estate:

Steven S. Altman, Attorney for the Chapter 7 Trustee

Fees in the amount of $3,750.00

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

The fees and costs pursuant to this Motion, and fees and costs in the amount of $3750.00 are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Chapter 7 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.

3.	**10-92923-E-7** **RKW-2**	**ADAM/AUTUMN BRADLEY** **Randall Walton**	**MOTION TO AVOID LIEN OF HOUSEHOLD FINANCE CORPORATION OF CALIFORNIA** **1-2-19 [22]**

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.

Sufficient Notice Provided. The Amended Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on January 3, 2019. [FN.1.] By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

FN.1. Debtor filed its Original Notice on January 2, 2019 and provided notice the same day. Dckts. 23, 26. The Original Notice sought to set the hearing on the Motion for January 9, 2019 in Modesto. No such hearing date/time existing, the court issued a Memo To File Re: Calendar Correction informing Debtor the Motion would not be calendared until an Amended Notice corrected the defect. Dckt. 27.

Pursuant to the written instruction of the court, Debtor filed an Amended Notice seeking to set the hearing for January 24, 2019. Dckt. 28.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 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 Avoid Judicial Lien is ~~granted~~.

This Motion requests an order avoiding the judicial lien of Household Finance Corporation of California ("Creditor") against property of Adam Richard Bradley and Autumn Kelly Bradley ("Debtor's") commonly known as 2313 6th Street, Hughson, California ("Property").

Service To Creditor

Debtor's Proof Of Service was filed January 3, 2019. Dckt. 29. According to the Proof, notice was served upon Creditor at the following addresses:

> Officer, Managing or General Agent
> Or Agent for Service of Process for
> HSBC FINANCE CORPORATION
> Successor in interest (buyer) for
> Household Finance Corporation of California
> CT CORPORATION SYSTEM
> 111 Eighth Ave 13th FI.
> New York, NY 10011
>
> Barbara L. Bollero, Esq.
> Bishop, White & Marshall P.S.
> 1355 Willow Way, Suite 254
> Concord, CA 94520
>
> Officer, Managing or General Agent
> Or Agent for Service of Process for
> Household Finance Corporation of California
> 1421 W. Shure Dr. Ste. 100
> Arlington Heights IL 60004
>
> Officer, Managing or General Agent
> Or Agent for Service of Process for
> Household Finance Corporation of California
> CT CORPORATION SYSTEM
> 111 Eighth Ave 13th Fl.
> New York, NY 10011

Id. The Proof also states:

> **I RECEIVED A LETTER FROM CT CORPORATION STATING THAT HOUSEHOLD FINANCE CORPORATION OF CALIFORNIA IS NO LONGER LISTED (attached). A SEARCH OF BLOOMBERG REVEALED THAT "AS OF 03/25/2018. HOUSEHOLD FINANCE CORPORATION OF CALIFORNIA WAS ACQUIRED BY HSBC FINANCE CORPORATION." (attached)**

Id. at 2:22.5-25(emphasis in original).

Debtor has not provided any evidence that HSBC Financing Corporation ("HSBC") is the successor in interest, as opposed to merely the parent company. A LEXIS search for HSBC Finance Corporation turns up a summary of the company's SEC EDGAR filing, which indicates Creditor is its subsidiary organized in Delaware. [FN.2]. Nor has Debtor provided authority service would be proper as to Creditor if made on a parent corporation.

FN.2.
https://advance.lexis.com/api/permalink/13343e57-4ddf-4357-a38f-409e938a1047/?context=1000516

In addition to providing service on HSBC, Debtor serves Creditor on an Illinois location and through a possible agent for service, CT Corporation System.

A review of the California Secretary of State website business search shows a Certificate Of Surrender was filed February 20, 2018, to surrender Creditor's rights and authority to transact intrastate business in the State of California. That Certificate provides the following required statements:

Statements 5(a) - 5(d) are true:

> a) The corporation hereby surrenders its rights and authority to transact intrastate business in the State of California.
>
> b) **The corporation hereby revokes its designation of agent for service of process in California.**
>
> c) **The corporation consents** to process against **it** in any action upon any liability or obligation incurred within the State of California prior to the filing of this Certificate of Surrender **may be served upon the California Secretary of State**.
>
> d) All final returns required under the California Revenue and Taxation Code have been or will be filed with the California Franchise Tax Board.

https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=00301482-23798743(emphasis added). The Certificate also specifies in section 4 Creditor's mailing address for legal service is 1421 W. Shure Dr. Ste. 100 Arlington Heights, IL 60004. However, the section also provides the following instructions for filling out the section:

> (Enter the complete mailing address where the California Secretary of State may forward copies of any legal documents against the corporation that are served on the Secretary of State intended for the corporation,)

Id.

Thus, in filing the Certificate of Surrender, Creditor revoked CT Corporation System as its designated agent for service. Furthermore, while Arlington Heights, IL location is provided as a mailing address for legal service, the document specifies this is only the location where the Secretary of State will forward service to, the correct process for service being to serve the secretary of state.

Creditor's filings in the state of California and elsewhere indicates it is incorporated in Delaware. The Delaware Secretary of State website business search shows the following information:

REGISTERED AGENT INFORMATION

Name:	THE CORPORATION TRUST COMPANY	
Address:	CORPORATION TRUST CENTER 1209 ORANGE ST	
City:	WILMINGTON	**County**:New Castle
State:	DE	**Postal Code**:19801
Phone:	302-658-7581	

https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx.

At the hearing, **XXXXXXXXXXXXXXXXXX**.

Attorneys For Household Finance Corporation of California

The Abstract of Judgment filed as Exhibit 1(Dckt. 25) lists the law firm Bishop, White Marshall & Weibel, P.S., and Barbara Bollero (who the State Bar lists as being with the Anglin Flewelling Rasmussen Cambell & Trytten, LLP law firm), Daniel Hembree (who the State Bar lists as being with the Hembree Law firm) and Hallie Bennett (who the State Bar lists under the name Hallie Nash Zimmerman (same State Bar Number) with the Scott & Associate, PC law firm) as the individual attorneys for Household Finance Corporation of California in obtaining the Abstract of Judgment.

Avoidance of Lien

A judgment was entered against Debtor in favor of Creditor in the amount of $28,023.94. An abstract of judgment was recorded with Stanislaus County on May 26, 2010, that encumbers the Property. Exhibit 1, Dckt. 25.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $92,000.00 as of the petition date. Schedule A, Dckt. 1. The unavoidable consensual liens that total $200,000.00 as of the commencement of this case are stated on Debtors' Schedule D. Schedule D, Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Schedule C. Schedule C, Dckt. 1.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

~~**ISSUANCE OF A COURT-DRAFTED ORDER**~~

~~An order (not a minute order) substantially in the following form shall be prepared and issued by the court:~~

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

~~The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Adam Richard Bradley and Autumn Kelly Bradley ("Debtor's") 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 judgment lien of Household Finance Corporation of California, California Superior Court for Stanislaus County Case No. 647727, recorded on May 26, 2010, document number 2010-0046290-00 with the Stanislaus County Recorder, against the real property commonly known as 2313 6th Street, Hughson, California pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.~~

4.	**09-92325-E-7** **LBF-2**	**SERGIO/SANDRA MIRANDA** **Lauren Franzella**	**MOTION TO AVOID LIEN OF CARL WILLIAMS** **11-30-18 [26]**

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, creditors, parties requesting special notice, and Office of the U.S. Trustee December 19, 2018 . By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien 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 Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Carl W. Williams ("Creditor") against property of Sergio Miranda and Sanra Miranda ("Debtor's") commonly known as 520 Codington Way, Modesto, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $45,572.71. Exhibit A, Dckt. 29. An abstract of judgment was recorded with Stanislaus County on March 2, 2009, that encumbers the Property. *Id*. On October 31, 2018, Creditor recorded a renewed judgement in the amount of $88,780.64. Exhibit B, Dckt. 29 at p. 4.

CREDITOR'S OPPOSITION

Creditor filed an Opposition to the Motion on January 3, 2018. Dckt. 38. In the Opposition, Creditor argued that Debtors' discharge did not affect the judgment lien as the lien perfected before the bankruptcy was filed. *Id.* at p. 2:12-20.5. Creditor also disputes the Debtor's lien avoidance calculations, as Debtor uses 2009 values where the value of Debtor's residence has gone up significantly, and the amount owing on Debtor's mortgage has likely decreased. *Id.* at p. 3:13-23.

Creditor filed the Declaration of Sandal Romaine, a licensed real estate broker, to support a current valuation of the Property of $320,720.00. Dckt. 40.

Creditor also filed the Declaration of Bart Barringer, counsel for Creditor, to bring in different estimate valuations from online companies, including Redfin, Zillow, and ReMax. Dckt. 39. These estimates are filed as a single document with the Declaration as Exhibit A. Exhibit A, Dckt. 39. While Declaration of Mr. Barringer authenticates the documents, no exception to the hearsay rule is advanced. Creditor does not argue Mr. Barringer accesses home estimates in the regular course of business.

DEBTOR'S REPLY

Debtor filed a Reply to the Opposition on January 8, 2019. Dckt. 42. Debtor argues that the value of property for a lien avoidance calculation is determined as of the date of the filing of the petition. Debtor argues further there is no statute of limitations precluding Debtor from filing this Motion.

JANUARY 15, 2019 HEARING

Debtor filed its original Notice on November 30, 2018, seeking to set the hearing on the Motion for January 15, 2019 at 10:00 a.m. in Modesto Dckt. 27. Realizing its error (the January 15 date being a Sacramento hearing date), Debtor filed an Amended Notice on December 19, 2018, seeking to re-set the hearing for January 24, 2019 at 10:30 a.m. Dckt. 36.

At the January 15, 2019 hearing date, the court reviewed that the proper practice for adjusting a hearing date, once set, is not to merely file an Amended Notice. Such a practice would allow potential abuse of the court's docket.

However, the court, treating the Amended Notice as an Ex Parte request for a continuance, continued the hearing on the Motion to January 24, 2019 at 10:30 a.m. to be heard at Modesto. Dckt. 44.

DISCUSSION

Debtor's Reply is well-taken. Pursuant to 11 U.S.C. § 522(a)(2) "value" means fair market value as of the date of the filing of the petition. Creditor does not provide any legal authority for its argument that the present value is to be used. The court cannot divine the basis why Creditor's unsupported arguments are "warranted by existing law or by a nonfriviolous argument for the extension, modification, or reversal of existing law or the establishment of new law" or "not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Bankr. P. 9011.

Creditor argues the discharge did not affect its lien. This assertion is correct. *See* 11 U.S.C. § 524(j). However, Creditor has not provided any argument that Debtor should now be barred from bringing a motion to avoid the statutory lien (either by a statute of limitation or the doctrine of laches). Debtor presently is seeking lien avoidance and is not otherwise asserting the lien was discharged.

As discussed by the Ninth Circuit Court of Appeals in *Culver, LLC v. Kai-Ming Chiu (In re Kai-Ming Chiu)*, 304 F.3d 905, 908. (9th Cir. 2002), the "avoidance" of a judicial lien is one by which the debtor can "avoid the fixing" of the judicial lien. This is a retrospective consideration, determining whether the lien existed as of the bankruptcy case being filed and, at the time the case was file, if the Debtor's exemption in the property was impaired. The debtor does not even need to currently, at the time of the motion to avoid the judicial lien, have a present interest in the property–the question is only as to when the bankruptcy case was filed. *Id.* In Culver, the court allowed the avoidance of a judicial lien that the debtor has owed when the case was commenced, had subsequently sold, and at the time of the motion to avoid the debtor no longer had an interest in the property.

Most recently, in November 2018, the Ninth Circuit Court of Appeals restated the long standing rule that exemptions are determined as of the commencement of the bankruptcy case, not a later date in time, stating:

> A debtor's exemptions have long been fixed at "the date of the filing of the [bankruptcy] petition." *White v. Stump*, 266 U.S. 310, 313, 45 S. Ct. 103, 69 L. Ed. 301 (1924); *Wolfe v. Jacobson (In re Jacobson)*, 676 F.3d 1193, 1199 (9th Cir. 2012) ("Under the so-called 'snapshot' rule, bankruptcy exemptions are fixed at the time of the bankruptcy petition."). This rule determines not only what exemptions a debtor may claim, it also fixes the value that a debtor is entitled to claim in her exemptions. *Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206, 1211 (9th Cir. 2010) (noting the well-settled holding in this circuit "that what is frozen as of the date of filing the petition is the value of the debtor's exemption, not the fair market value of the property claimed as exempt"); . . . .

Wilson v. Rigby, 909 F.3d 306, 308 (9th Cir. 2018).

The United States Supreme Court addressed the retrospective nature of this lien avoidance determination in *Owen v. Owen*, 500 U.S. 305, 310-311 (1991), stating:

> To determine the application of § 522(f) they ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he would have been entitled but for the lien itself.
>
> As the preceding italicized words suggest, this reading is more consonant with the text of § 522(f) -- which establishes as the baseline, against which impairment is to be measured, not an exemption to which the debtor "*is entitled*," but one to which he "*would have been entitled*." The latter phrase denotes a state of affairs that is conceived or hypothetical, rather than actual, and requires the reader to disregard some element of reality. "Would have been" but for what? The answer given, with respect to the federal exemptions, *has been but for the lien at issue*, and that seems to us correct.

As discussed by the Supreme Court it is an exemption the debtor "would have been entitled" (in the past, when the case was filed) not "is entitled" (such as at the time of the motion).

As repeated in *Culver*, there are three established elements to avoiding of a judicial lien pursuant to 11 U.S.C. § 522(f):

> We have previously determined that "under § 522(f)(1), a debtor may avoid a lien if three conditions are met: (1) there was a fixing of a lien on an interest of the debtor in property; (2) such lien impairs an exemption to **which the debtor would have been entitled**; and (3) such lien is a judicial lien." *Estate of Catli v. Catli (In re Catli)*, 999 F.2d 1405, 1406 (9th Cir. 1993).

Culver, 304 F.3d at 908 (emphasis added).

Further, Congress provides in 11 U.S.C. § 522(a) several special definitions to be used in that section of the Bankruptcy Code (emphasis added):

> (a) In this section—(1) "dependent" includes spouse, whether or not actually dependent; and
>
> (2) **"value"** means fair market value **as of the date of the filing of the petition** or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

In 11 U.S.C. § 522(f) the mathematical formula used to determine if a judicial lien may be avoided by a debtor proceeds as follows (emphasis and parenthetical added):

> (f)(2) (A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> **exceeds the value** [as of the filling date of the bankruptcy petition] that the debtor's interest in the property would have in the absence of any liens.

The value of the Debtor's interest in the property, which is based on the value of the property, is computed as of the commencement of the case. The impairment is computed as of that value and that date.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $155,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $156,618.70 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 31. Debtor has

claimed an exemption pursuant to California Code of Civil Procedure §§ 703.140(b) and 703.150 in the amount of $1.00 on Amended Schedule C. Dckt. 1.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided in its entirety subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Sergio Miranda and Sandra Miranda ("Debtor's") 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 judgment lien of Carl W. Williams, California Superior Court for Stanislaus County Case No. 348188, recorded on October 31, 2018, Document Number 2018-0076044-00, with the Stanislaus County Recorder, against the real property commonly known as 520 Codington Way, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

5. 18-90840-E-7 GABRIELLA TAYLOR
Patrick Greenwell

CONTINUED ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
11-27-18 [11]

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on November 29, 2018. The court computes that 21 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on November 13, 2018.

The Order to Show Cause is sustained, and the case is dismissed.

DECEMBER 20, 2018 HEARING

At the December 20, 2018, hearing the hearing on the Motion was continued to January 24th, 2019 at 10:30 AM at Modesto Courtroom.

DISCUSSION

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $335.00.

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 Order to Show Cause 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 Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

6. 18-90841-E-7 KATHERINE BUFFALO
Patrick Greenwell

CONTINUED ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
11-27-18 [11]

Final Ruling: No appearance at the January 24, 2019 Hearing is required.

- - - - - - - - - - -

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on November 29, 2018. The court computes that 21 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on November 13, 2018.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

DECEMBER 20, 2018 HEARING

At the December 20, 2018, hearing, the court continued the hearing on the Motion to January 24, 2019 at 10:30 a.m allowing additional time to pay the filing fees. Dckt. 16.

RULING

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured. January 22, 2019, Clerk's Docket Entry Report of payment of $335.00 filing fee.

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 Order to Show Cause 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 Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

7.	**18-90258-E-7** **MF-2**	**ANDREAS ABRAMSON** **Iain Macdonald**	**CONTINUED MOTION TO DELAY DISCHARGE** **7-19-18 [86]**

Final Ruling: No appearance at the January 24, 2019 Hearing is required.

- - - - - - - - - - -

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor , Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 20, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

The Motion to Delay Discharge was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 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, No opposition was presented at the hearing. The Defaults of the non-responding parties are entered by the court.

The hearing on the Motion to Delay Discharge is continued to 10:30 a.m. on May 2, 2019.

Andreas Abramson ("Debtor"), filed an Application to Extend Time for Entry of Order of Discharge on July 19, 2018. Dckt. 86. Debtor states he requires the extension in order to maintain the protections of automatic stay, as it affects the enforcement of liens against Debtor's residence. Debtor has filed a motion to avoid several liens under §522(f), which is set for hearing on August 23, 2018. *Id.*, ¶ 3. Debtor moves for entry of an order extending the time for entry of discharge for thirty 30 days pursuant to F.R.B.P. 4004(c)(2).

Federal Rule of Bankruptcy Procedure 4004(c)(2) provides:

> Notwithstanding Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within that period, the court may defer entry of the order to a date certain.

Debtor has requested a delay in the entry of an order granting discharge for 30 days so that he may resolve pending motions to avoid judicial liens. Without an extension, Debtor asserts the stay affecting enforcement of the judicial liens will be gone. Debtor has shown cause to delay the entry of discharge and the application is granted.

AUGUST 23, HEARING

At the August 23, Hearing, the court granted the Motion and extended the time for entry of discharge is pursuant to Federal Rule of Bankruptcy Procedure 4004(c)(2) to and including September 30, 2018, subject to further extension. Dckt. 189. The court continued the hearing to September 27, 2018, for further extension of the discharge date.

SEPTEMBER 27, 2018 HEARING

At the September 27, 2018 hearing the court granted the Motion and extended the time for entry of discharge is pursuant to Federal Rule of Bankruptcy Procedure 4004(c)(2) to and including January 24, 2019, subject to further extension. Dckt. 200.

DEBTOR'S STATUS REPORT

Debtor filed a Status Report on January 17, 2019. Dckt. 253. Debtor states the majority of issues in the bankruptcy case have been resolved, with only the Debtor's Motion to Avoid the Judicial Lien of Helen McAbee remaining, which is set for an Evidentiary Hearing Scheduling Conference on February 14, 2019. Debtor requests the entry of discharge be deferred until April 30, 2019.

DISCUSSION

Debtor's sole remaining motion to avoid lien is set for an Evidentiary Hearing Scheduling Conference on February 14, 2019. Debtor has shown cause to delay the entry of discharge and the application is granted.

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Delay Discharge filed by Andreas Abramson ("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 hearing on the Motion to Delay Discharge is continued to **10:30 a.m. on May 2, 2019**, for further consideration.

The Clerk of the Court shall not enter the Debtor's discharge until the court has issued its ruling on this Motion.

8. 13-91566-E-7 RHS-1 — FELIX/REBECCA MANGUERRA — Brian Haddix — ORDER TO SHOW CAUSE — 1-14-19 [57]

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, Office for the U.S. Trustee, and Chapter 7 Trustee as stated on the Certificate of Service on January 17, 2019. The court computes that 7 days' notice has been provided.

The Order to Show Cause is sustained, and the case is dismissed.

On January 14, 2019, the court issued an Order requiring Felix Manguerra and Rebecca Manguerra, debtors in the above captioned case, and their attorney of record, Brian S. Haddix, to appear and show cause as to why:

(1) the court's Order issued January 21, 2014 (Dckt. 26), should not be vacated as an order issued without notice to Stanislaus Credit Control Service, Inc. (the order being void due to the lack of Due Process for person named therein) and the Order containing a clerical error misidentifying the party against whom the relief was sought; and

(2) the Debtor's prior Motion To Avoid Lien of Discover Bank (Dckt. 18) dismissed as moot, a subsequent motion having been filed and order entered thereon granting such relief against Discover Bank (Order, Dckt. 48) as sought in the prior motion seeking the same relief.

Order, Dckt. 57. The court further ordered that appearance at the hearing is not required unless the aforementioned parties do not concur in vacating the January 21, 2014 Order (Dckt. 26) and dismissing without prejudice the prior Motion (DCN: BSH-1).

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 Order to Show Cause 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 Order to Show Cause is **XXXXX**.

9. 15-90680-E-7 JO GIBSON
18-9001

MOTION BY DAVID FOYIL TO WITHDRAW AS ATTORNEY
12-27-18 [57]

GIBSON V. NATIONAL RECOVERIES ET AL

No 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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 27, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Withdraw as Attorney 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 Withdraw as Attorney is xxxxxxxxxxxxxx.

David Foyil ("Movant"), counsel of record for Jo Anne Gibson ("Plaintiff-Debtor"), filed a Motion to Withdraw as Attorney as Plaintiff-Debtor's counsel in the bankruptcy case. Movant states the following:

A. The Motion is brought pursuant to California Rule of Professional Conduct 1.16(b)(4).

Cal. R. Prof. Cond. 1.16(b)(4) provides for termination of representation when a client discharges the attorney.

B. Plaintiff-Debtor suffers from bi-polar disorder, which makes representation difficult.

C. Counsel cannot effectively represent Plaintiff-Debtor due to lack of communication and Debtor's refusal to answer discovery requests

APPLICABLE LAW

District Court Rule 182(d) governs the withdrawal of counsel. LOCAL BANKR. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. CAL. LOCAL R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, No. 1:08cv01523 OWW GSA, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. June 23, 2010). [FN.1.]

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554 (Cal. Ct. App. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 559.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. CAL. LOCAL R. 180(e).

Termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 1.16. Counsel may not seek to withdraw from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. CAL. R. PROF'L CONDUCT 1.16(d). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) the lawyer knows or reasonably should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; (2) the lawyer knows or reasonably should know that the representation will result in violation of these rules or of the State Bar Act; (3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or (4) the client discharges the lawyer. CAL. R. PROF'L CONDUCT 1.16(a).

Permissive withdrawal is limited to certain situations, including the one relevant for this Motion:

> The client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively

CAL. R. PROF'L. CONDUCT 1.16(b)(4).

DISCUSSION

Failure to Serve Debtor

The Proof of Service does not indicate Debtor was served with this Motion. It is unclear to what extent Debtor has knowledge of the present Motion. Furthermore, no discussion has been provided of possible prejudice to the Debtor from withdrawal. If Debtor received notice, Debtor may have opposed the Motion.

At the hearing, XXXXXXXXXXXX.

Permissive Withdrawal

As grounds for the Motion to Withdraw as Attorney, Movant states that Plaintiff-Debtor has on several occasions refused to communicate, and has refused to answer discovery requests. Movant states further he was told by Debtor that Debtor suffers from bi-polar disorder.

~~Under California Rule of Professional Conduct 1.16(b)(4), Debtor's conduct, here failure to cooperate and communicate with counsel, is hindering Movant's ability to carry out her employment and duties effectively. Those are sufficient reasons for permissive withdrawal.~~

~~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 Withdraw as Attorney filed by David Foyil ("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 to Withdraw as Attorney is granted, and David Foyil is permitted to withdraw as counsel for Jo Anne Gibson ("Plaintiff/Debtor").~~

10. 18-90494-E-7 MELINDA BROOME MOTION FOR ENTRY OF DEFAULT JUDGMENT
18-9015 ADJ-1 12-22-18 [12]

BILLINGTON WELDING & MFG., INC. V. BROOME

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor (*pro se*), Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 22, 2018. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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 Entry of Default Judgment is denied without prejudice.

Billinbgton Welding & Mfg., Inc. ("Plaintiff") filed the instant Motion for Default Judgment on December 22, 2018. Dckt. 12. Plaintiff-Debtor seeks an entry of default judgment against Melinda Anne Broome ("Defendant-Debtor-Debtor") in the instant Adversary Proceeding No. 18-09015.

The instant Adversary Proceeding was commenced on October 22, 2018. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on the same day. Dckt. 3. The complaint and summons were properly served on Defendant-Debtor. Dckt. 6.

Defendant-Debtor-Debtor failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant-Debtor pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on November 27, 2018. Dckt. 9.

REVIEW OF COMPLAINT

Plaintiff filed a complaint objecting to the discharge generally and of several specific claims owed by Defendant-Debtor. The Complaint contains the following general allegations as summarized by the court:

A. Defendant-Debtor was an employee of Plaintiff holding the positions of bookkeeper and then chief financial officer between the years of 1992 and 2016. Dckt. 1 at ¶ 3.

B. Defendant-Debtor used her position with Plaintiff to pay herself $220,947.09 above her authorized wages, and $72,394.51 above her authorized vacation wages. *Id.* at ¶ 13. Defendant-Debtor also used Plaintiff's credit cards to make purchases totaling $13,588.66. *Id.*

C. Defendant-Debtor in her position as Chief Financial Officer was responsible for ensuring the taxes of Plaintiff were paid. *Id*. at ¶ 16. Defendant-Debtor neglected her duty to pay taxes owed to the Internal Revenue Service and State of California Employment Development Department, resulting in damages of $112,338.39. *Id*. Furthermore, Defendant-Debtor represented to Plaintiff that taxes had been paid. *Id*.

D. Defendant-Debtor's conduct resulted in total damages to Plaintiff in the amount of $419,268.65.

First Claim for Relief—False Oath

Plaintiff alleges the following for the First Cause of Action:

A. On July 3, 2018, Defendant-Debtor filed this bankruptcy case, along with her Schedules A/B.

B. Defendant-Debtor failed to report converted income received on her Statement of Financial Affairs.

C. Debtor failed to report significant tax obligations owing from converted monies.

D. As a result of intentional and material omissions in her Schedules and Statement of Financial Affairs, Defendant's discharge should be denied under section 11 U.S.C. § 727(a)(4)(A).

Second Claim for Relief—Fraud

Plaintiff alleges the following for the Second Cause of Action:

A. While working for Plaintiff, Defendant-Debtor embezzled funds of Plaintiff in amounts totaling $306,930.26.

B. As a result of Defendant-Debtor's conduct, discharge as to this debt should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and (B)(I)-(iv).

Third Claim for Relief—Tax Duty

Plaintiff alleges the following for the Second Cause of Action:

A. While working for Plaintiff in a capacity where she was responsible for paying Plaintiff's taxes, Defendant-Debtor represented paying taxes of Plaintiff where Defendant-Debtor did not.

B. Defendant-Debtor's failure to pay taxes resulted in $112,338.39 in tax penalties to Plaintiff.

C. As a result of Defendant-Debtor's conduct, discharge as to this debt should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(1).

Fourth Claim for Relief—Fraud or Defalcation While Acting in a Fiduciary Capacity, Embezzlement or Larceny

Plaintiff alleges the following for the First Cause of Action:

A. While working for Plaintiff, Defendant-Debtor embezzled funds of Plaintiff in amounts totaling $306,930.26.

B. While working for Plaintiff in a capacity where she was responsible for paying Plaintiff's taxes, Defendant-Debtor represented paying taxes of Plaintiff where Defendant-Debtor did not. Defendant-Debtor's failure to pay taxes resulted in $112,338.39 in tax penalties to Plaintiff.

C. As a result of Defendant-Debtor's conduct, discharge as to these debts should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(4).

Fifth Claim for Relief—Willful and Malicious Injury by Debtor to Another Entity or to the Property of Other Entity

Plaintiff alleges the following for the First Cause of Action:

A. While working for Plaintiff, Defendant-Debtor embezzled funds of Plaintiff in amounts totaling $306,930.26.

B. While working for Plaintiff in a capacity where she was responsible for paying Plaintiff's taxes, Defendant-Debtor represented paying taxes of Plaintiff where Defendant-Debtor did not. Defendant-Debtor's failure to pay taxes resulted in $112,338.39 in tax penalties to Plaintiff.

C. As a result of Defendant-Debtor's wilful and malicious injury, discharge as to these debts should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(6).

Prayer

Plaintiff requests the following relief in the Complaint's prayer:

A. Debtor's discharge in this case is denied;

B. Plaintiff's claims be determined to be nondischargeable;

C. Award attorneys' fees and costs; and

D. For such other relief as the court deems just and proper.

EVIDENCE IN SUPPORT OF THE MOTION

On December 22, 2018, Plaintiff filed several supporting Declarations and Exhibits. Dckts. 14-17.

The Declaration of Michelle Gallagher, a certified public account, provides testimony under penalty of perjury that Mrs. Gallagher, while preparing a final paycheck for Defendant-debtor in July 2016, discovered Defendant-Debtor had been overpaying herself significantly. Dckt. 14 at ¶ 4. Mrs. Gallagher testifies further that Defendant-Debtor made unauthorized credit card purchases (*Id*. at ¶ 19), and represented filing and paying Plaintiff's taxes where she had not done so. *Id.* at ¶ 25.

The Declaration of Timothy Billington, Plaintiff's president, provides testimony under penalty of perjury that Defendant-Debtor was hired by Plaintiff as a bookkeeper in 1999 and then held the position of chief financial officer of Plaintiff from the year 2006 until Plaintiff terminated her employment in June 2016. Dckt. 15 at ¶ 3. From at least the beginning of the year 2000 through her termination of employment in June 2016, Defendant was solely responsible for all aspects of Plaintiff's payroll. *Id*. ¶ 4. From at least the beginning of the year 2000 through her termination of employment in June 2016, Defendant had authority to unilaterally write checks and otherwise make withdrawals from the bank accounts maintained by Plaintiff. *Id*. at ¶ 6. Defendant-Debtor made overpayments of her salary and vacation pay, used Plaintiff's credit cards for unauthorized transactions, and failed to file Plaintiff's taxes resulting in significant tax penalties. *Id* at ¶¶ 9, 15, 19, 25.

The Declaration of Anthony D. Johnston, counsel for Plaintiff, provides testimony under penalty of perjury that Plaintiff filed a complaint against Defendant-Debtor in state court seeking damages for the same underlying causes of action forming grounds for nondischargeability. Dckt. 16 at ¶ 7. Mr. Johnston states further default was entered against Defendant-Debtor.

Also attached are several exhibits demonstrating an accounting of amounts owed by Defendant-Debtor for excess salary and vacation pay, unauthorized credit card charges, and tax penalties. Exhibits A-F, Dckt. 17.

PLAINTIFF'S ANSWER

On January 18, 2019, well after the entry of her default on November 9, 2018, Defendant-Debtor filed an Answer generally denying each of the allegations made in the Complaint. Dckt. 20. The Answer indicates Defendant-Debtor is proceeding in *Pro Se.*

Defendant-Debtor's untimely answer does not indicate to the court that there is a good faith opposition to the Complaint, but an eleventh and one-half hour delay tactic. While the court appreciates that for a *pro-se* defendant the trial process can be complex, this is not a surprise to the Defendant-Debtor and her counsel that has assisted her in the filing of the related Chapter 7 bankruptcy case (18-90494, the "Chapter 7 Case").

Defendant-Debtor's bankruptcy counsel are experienced bankruptcy counsel. When the Chapter 7 Case was commenced on July 3, 2018, it was with the knowledge of the claims being prosecuted in State Court by Plaintiff. *See* Statement of Financial Affairs Question 9, listing the pending State Court litigation with Plaintiff.

The Complaint in this Adversary Proceeding was filed on October 22, 2018, and served on Debtor on October 23, 2018. Complaint, Dckt. 1; Cert. of Serv., Dckt. 6. That was one hundred and nineteen (119) days after the Chapter 7 Case was filed.

The Defendant-Debtor's default was not entered until November 27, 2018, which is one hundred and fifty-five (155) days after the commencement of the Chapter 7 Case.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the Defendant-Debtor's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

Absence of Legal Authority For Relief Sought

Plaintiff has not provided the court with a Memorandum of Points and Legal Authorities or any discussion of the legal basis for the court determining that any of the obligations are nondischargeable. No effort has been made by Plaintiff to provide the applicable law upon which the court might render a decision. Rather, it appears that Plaintiff has determined that the legal work to identify and state the legal requirements for such determinations in Plaintiff's favor is to be assigned to the court to advocate for Plaintiff.

The Motion, which being under six pages in length could also include the points and authorities (L.B.R. 9014-1(d)(4), only includes the following legal authorities:

A. "[t]he complaint heretofore filed and served upon the Defendant in accordance with Fed. R. Bankr. P. 7004(b)(1), ..." Motion, p. 1:27-28; Dckt. 12.

B. "Plaintiff respectfully requests that this Court enter a default judgment against Defendant pursuant to Federal Rule of Civil Procedure 55(b)(2) as incorporated by Federal Rule of Bankruptcy Procedure 7055 . . ." *Id.*, ¶ 8.

C. "a. Second claim for relief: 11 U.S.C. section 523(a)(2)(A) and 2(B)(iv)-(iv) (fraud): . . . ." Subsection heading, *Id.*, ¶ 9.a.

D. "b. Third claim for relief: 11 U.S.C. section 523(a)(1) (tax duty): . . . ." Subsection heading, *Id.*, ¶ 9.b.

E. "c. Fourth claim for relief: 11 U.S.C. section 523(a)(4) (fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny): . . . ." Subsection heading; *Id.,* ¶ 9.c.

F. "d. Fifth claim for relief: 11 U.S.C. section 523(a)(6) (willful and malicious injury by debtor to another entity or to the property of other entity): . . . ." Subsection heading; *Id.,* ¶ 9.d.

G. "Defendant, as the chief financial officer of Plaintiff since the year 2006 through her termination of employment in June 2016 was considered as a matter of law a fiduciary of Plaintiff because she participated in the management of the corporation with some discretionary authority. *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 421, [99 Cal.Rptr.2d 665]." *Id.*, ¶ 11.

H. "Once a default is entered, the defendant is considered to have admitted all of the well-pled allegations in the complaint. In re McGee, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006) (citing *In re Kubick*, 171 B.R. 658, 659-60 (B.A.P. (9th Cir. Alaska 1994)." *Id.*, ¶ 12.

Glaring in their absence are any legal authorities, statutory language, case law setting the federal standards for determining when an obligation is nondischargeable for fraud, breach of fiduciary

duty (and what for federal law purposes constitutes a fiduciary duty adequate for this federal statute), and willful and malicious conduct. Plaintiff has elected to merely cite the statute, allege that the unstated federal standards have been met, and then direct the court to undertake the research to lay out the applicable law and advocate for Plaintiff.

Further, Plaintiff offers no legal authorities why it, a corporation, is able to have determined nondischargeable a tax obligation under 11 U.S.C. § 523(a)(1). In § 523(a)(1) Congress provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> (1) for a tax or a customs duty--
>
> > (A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
> >
> > (B) with respect to which a return, or equivalent report or notice, if required–
> >
> > > (i) was not filed or given; or
> > >
> > > (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
> >
> > (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

11 U.S.C. § 523(a)(1). The first qualifier is that it must be a tax as specified in 11 U.S.C. § 507(a)(3) or (a)(8). The first required prong is for a tax which meets the following requirement:

> (3) Third, unsecured claims allowed under section 502(f) of this title.

11 U.S.C. § 507(a)(3). The cross reference is to obligations arising in an involuntary bankruptcy case in the period between the filing of the involuntary petition and the entry of the order for relief. 11 U.S.C. § 502(f). This is not an involuntary case and such provision cannot be applicable to the asserted claim by Plaintiff.

The second alternative required prong stated is for a tax obligation subject to the provisions of 11 U.S.C. § 507(a)(8), which states (emphasis added):

(8) Eighth, **allowed unsecured claims of governmental units**, only to the extent that such claims are for--

> (A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--
>
> > (i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
> >
> > (ii) assessed within 240 days before the date of the filing of the petition, exclusive of--
> >
> > > (I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and
> > >
> > > (II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or
> >
> > (iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title , not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case; . . . .

Plaintiff provides the court with no authorities as to how it, a California corporation, has unsecured claims of a "governmental unit" which is an allowable claim in the Defendant-Debtor's bankruptcy case. Possibly some legal authority exists for such a contention, but none is provided by Plaintiff.

Denial of Motion Without Prejudice

At this juncture the court is faced with several options. First, it could accept the assignment of work from Plaintiff's Counsel and have the judge and law clerk perform associate attorney level support for Plaintiff in prosecuting the claims in this Adversary Proceeding. The court declines the opportunity to accept such a work assignment from Plaintiff's counsel. Further, it is highly improper for Plaintiff and Counsel to put the court in a position of doing such work and advocating for Plaintiff.

Second, the court could merely continue the hearing and allow Plaintiff's Counsel to provide the necessary legal authorities. Such an option is not palatable for the court. It would create the appearance that the court is a marketplace in which attorneys can try to "slip it by the court," but when caught, the worst thing that happens is the attorney has to do what is required of him or her. Such a marketplace would create a financial incentive for attorneys to not do their jobs, hoping the court will let it "slip by," do the work for the attorney, and make the attorney's business more profitable at the cost to the taxpayers.

Third, the court could deny the Motion, with such order precluding Plaintiff from obtaining a default judgment. Then, Plaintiff would have to proceed to a trial in open court.

Fourth, the court deny the Motion without prejudice, requiring the Plaintiff to file a new motion, which will be properly supported by legal points and authorities supplied by Plaintiff's Counsel. Then, if the entry of a default judgment is warranted based on the actual law as provided by Plaintiff's Counsel, such appropriate judgement can be entered. Or it may be, after having to state the actual law in a points and authorities, Plaintiff and Counsel conclude that they are not entitled to such relief. [FN.1.]

FN. 1. A possible fifth option could be to press the point by issuing an order to show cause pursuant to Federal Rule of Bankruptcy Procedure 9011 to have Plaintiff and Counsel show their basis for asserting the claims in good faith.

The court elects the fourth option to allow Plaintiff and Counsel to properly prosecute this Adversary Proceeding and fulfill at least their minimal obligations.

The Motion is denied without prejudice. [FN. 2.]

FN. 2. In the bankruptcy case, Defendant-Debtor and Defendant-Debtor's counsel provide purported testimony that Plaintiff's corporate powers have been suspended. The court says "purported" because it is testimony based only as having been "informed and believes" as opposed to have the required personal knowledge to testify as set forth in Federal Rules of Evidence 601 and 602.

If Plaintiff's corporate powers are suspended, with Plaintiff-Debtor's counsel citing to California Revenue and Tax Code § 23301, the parties need to address how such action can proceed and what the court must do not only in this Adversary Proceeding, but the bankruptcy case itself.

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 Entry of Default Judgment filed by Billinbgton Welding & Mfg., Inc. ("Plaintiff") 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 is denied without prejudice.

11. 18-90494-E-7 JBA-1 | **MELINDA BROOME** **Scott Sagaria** | **CONTINUED MOTION TO CONVERT CASE TO CHAPTER 13** **10-9-18 [26]**

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— Final Hearing.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 9, 2018. By the court's calculation, 30 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice).

The Motion to Convert was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 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.

The court set this for final hearing pursuant to Local Bankruptcy Rule 9014(f)(2).

The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is denied.

Melinda Broome ("Debtor") seeks to convert this case from one under Chapter 7 to one under Chapter 13. The Bankruptcy Code authorizes a one-time, near-absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

Debtor states in her Declaration (Dckt. 28) that proceeding under Chapter 13 is in her best interest. Debtor explains she is trying to pay off her vehicle loan through the plan.

A review of the Motion demonstrates that the "grounds stated with particularity" (FED. R. BANKR. P. 9013) are:

> 6.Debtor seeks Court approval for the conversion because the Debtor wishes to pay her vehicle loan and debts through the chapter 13 process.
>
> 7.Debtor has filed a proposed plan and a revised budget.

Motion, Dckt. 26.

The factual testimony provided by Debtor in support of the above motion consists of the following conclusions of law and findings of fact made by Debtor:

> 3. I determine that it would be in my best interest to proceed under Chapter 13 of the Bankruptcy Code.
> . . .
> 5.I am not seeking to convert for an improper purpose or in bad faith.
>
> 6.I am not in violation of 11 U.S.C. §1307(c).
>
> 7.I seek Court approval for the conversion because I wish to pay my vehicle loan through the chapter 13 process.
>
> 8.I have filed a proposed Chapter 13 Plan and revised budget.

Dckt. 28.

Exhibits in support of the Motion to Convert were filed. Exhibit A is the Chapter 13 plan Debtor intends to file. Dckt. 29 at 2-8. The Chapter 13 plan would provide for a $700 a month plan payment for a period of sixty months, which would be used to pay:

> (1) Chapter 13 trustee fees of approximately $56 a month;
>
> (2) Defendant-Debtor's attorney's fees of approximately $66.66 a month (if amortized over sixty months);
>
> (3) Class 2 Car Payment of $541 a month; and
>
> (4) Class 7 Dividend of 6% on General Unsecured Claims of $20,779.00, which would be $20.78 a month.

All told, the above would require $684.44 a month in payments, leaving the Debtor a $16 cushion.

The Chapter13 plan makes no provision of the claims asserted in the State Court Action or as have now been brought in this Adversary Proceeding. The claim asserted by Plaintiff is $491,268.65. No provision is made for funding such litigation.

In her Reply to Plaintiff's Opposition to the Motion to Convert, Defendant-Debtor asserts that Plaintiff's corporate powers are suspended. Reply, p.2:16-21; Dckt. 51. No competent, credible evidence is provided of such alleged suspension. Rather, a Declaration, buried as an exhibit, is field by one of Defendant-Debtor's bankruptcy attorneys, in which he states, "I am informed and believe that. . . ." FN. 1.

FN. 1. For almost a decade this court has addressed with the attorneys appearing in this court that alleging things on "information and belief" may be a proper pleading tool for a complaint or motion, but is not proper testimony in federal court for a witness. Fed. R. Evid. 601, 602. Defendant-Debtor's law firm has repeatedly appeared in this court over the past decade and is very experienced in litigation in this court.

Seeing such statement made by an attorney is very concerning. By separate Order to Show Cause the court shall address such non-personal testimony by an attorney, both with the individual attorney involved and the law firm to determine if sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011 are warranted, and if this should be referred to the Chief Judge of the United States District court for assignment to a district court judge for his or her exercise of the further corrective and punitive sanction powers of an Article III judge.

The "fact" that for such an allegation there is only "information and belief" testimony by a licensed California attorney does not lead the court to believe that there is a good faith prosecution of the bankruptcy case, or this Adversary Proceeding.

Exhibit B filed in Reply is that of the Defendant-Debtor. *Id.*, Dckt. 52 at 5-6. She too, with the assistance of her bankruptcy counsel, proceeds to provide "information and belief" testimony.

TRUSTEE'S RESPONSE

The Chapter 7 Trustee, Gary Farrar ("Trustee"), filed a Response to Debtor's Motion October 24, 2018. Dckt. 35. The Trustee does not oppose the Motion so long as (1) this Motion is not construed as one to confirm the Chapter 13 plan, (2) all approved administrative expenses from the Chapter 7 case are included in any confirmed Chapter 13 plan, and (3) in the event Debtor fails to make plan payments, the case should be converted back to Chapter 7 and not dismissed.

NOVEMBER 8, 2018 HEARING

At the November 8, 2018, hearing the court continued the hearing on the Motion to January 24, 2019 to allow Creditor to depose Debtor and her husband. Dckt. 38.

CREDITOR'S SUPPLEMENTAL OPPOSITION

Billinbgton Welding & Mfg., Inc. ("Creditor") filed an Opposition on January 4, 2019. Dckt. 43. Creditor relates the details of its Complaint and Adversary Proceeding commenced against Debtor for damages in the amount of $419,268.65 to be excepted from discharge. *See* Complaint, Bankr. E.D. Cal. No. 18-09015, Dckt. 1.

Creditor served Debtor with notice of deposition for Debtor; Debtor did not respond to or attend the noticed deposition. Dckt. 43 at ¶¶ 7, 8. Creditor also personally served Debtor's husband a subpoena for his deposition. *Id.* at ¶ 9. While Mr. Broome requested a continuance of that deposition date to January 4, 2019, he did not attend the continued deposition date. *Id.*

Creditor argues primarily that Debtor is ineligible for Chapter 13 relief because her unsecured debts total more than $394,725.00. *Id.* at ¶ 11. Creditor also opposes the Motion on grounds the Debtor's plan is not feasible, fails the liquidation test, and was filed in bad faith.

TRUSTEE'S SUPPLEMENTAL STATEMENT IN OPPOSITION TO MOTION

Trustee filed a Supplemental Statement in Opposition of the Motion on January 7, 2019. Dckt. 47. Trustee argues the Motion should be denied because Debtor has insufficient net monthly income to have sufficient projected disposable income to fund a Chapter 13 plan. Dckt. 47 at p. 5:6-9. The Trustee notes that while the Chapter 13 Plan requires $700 a month payments for sixty (60) months, Debtor's Schedules I and J state under penalty of perjury that she has only $317.77 of monthly net income to fund a plan.

On Schedule J Debtor lists a 20 year old son as a dependant. Dckt. 1 at 44. On Schedule J Debtor states that she has a negative ($462.23) in income after expenses (which include a $565.00 car payment). Even after backing out the car payment, presuming it is the one to be provided in the plan, Debtor is showing positive net monthly income of only $102.77. A review of the expenses on Schedule J do not disclose anything that appears to be overstated as an expense.

Counsel for the Trustee provides her Declaration (Dckt. 48) in which she testifies about a conversation she had with party opponent counsel. In the Declaration Counsel for the Trustee makes reference to an Amended Schedule J being filed. Dec. ¶ 3; Dckt. 48. The court cannot find an Amended Schedule J in this case.

The court notes that in the Exhibits filed with the Motion to Convert, there are Schedule I and J Forms included. Dckt. 29. These are not identified by any Exhibit Numbers. In her Declaration, Debtor makes no reference to this Documents included in the Exhibits. Dec., Dckt. 28.

In her Declaration, Counsel for the Trustee states that Debtor's Counsel told her that Debtor's son would supplement the short fall between the monthly net income and the required $700 a month payment. Based on the Schedules I and J actually filed, this requires a $600 a month payment, which over sixty (60) months, will total $36,000.

As noted by the Trustee, no declaration of the son has been provided. The son has not been identified, and it is unclear whether the son who is a dependant of the Debtor is the son who is to provide $36,000 in support to the Debtor.

Counsel for the Trustee then states that in a subsequent communication, Debtor's Counsel stated that it is the Debtor's mother who will be providing the $36,000 in support.

As an Exhibit filed with the Trustee's Response, Counsel for the Trustee authenticates an email thread concerning the shift to the mother as the source of the additional monies. In the email thread Debtor's Counsel states that a declaration to document such source of income was being prepared and it would hopefully be filed by January 8, 2019. A review of the Docket for this case discloses that no such declaration was filed as of 5:00 p.m. on January 22, 2019 (thirteen days later).

DEBTOR'S REPLY

On January 21, 2019, Debtor filed a Reply and Exhibits (which consist of declarations camouflaged as "exhibits"). There is no declaration of the mother who was to be the source of additional income. In the Reply, Debtor argues that Creditor's corporate powers have been suspended. No evidence of such is provided in support of such allegations.

In addition, Debtor argues that since the claim of creditor has not been reduced to a judgment, it does not count in computing the debt limits under 11 U.S.C. § 109(e). In support of this contention Debtor cites to *Comer v. Comer*, 723 F. 2d 737, 740 (9th Cir. 1984). Unfortunately, the ruling in that case is inapplicable to the federal statutory grounds for eligibility established by Congress in 11 U.S.C. § 109(e). The decision in *Comer* addressed the doctrine of *Res Judicata* and when a matter could not be relitigated in federal court on the issues of whether an obligation is nondischargeable.

The second authority cited by Debtor is equally without support for Debtor's contention that absent a judgment or adjudication of liability the asserted claim is excluded from inclusion in § 190(e) eligibility determination. Debtor does not provide the court with a quotation from either case, but merely a page citation. All the court sees discussed is well established law as to the effect of a default judgement under the doctrine of *Res Judicata* for issues of nondischargeability of a debt under 11 U.S.C. § 523.

It is argued that Debtor's Declaration, not a person who is the purported source of additional income, shows that a plan is feasible. Reply, p. 4:12-19. Debtor's Declaration, filed as an exhibit, states:

A. Debtor's income has not changed. Dec. ¶ 9.

B. Debtor's mother is willing to provide support in some non-specific amount, for a non-specific period of time, and without any showing of such ability. Dec. ¶ 10.

C. Debtor now thinks that she has $950 a month in net income. Dec. ¶ 11. No testimony is provided as to how such an amount now exists, as compared to the $102.77 stated under penalty of perjury on Schedule I. Dckt. 1.

Thus, it appears that Debtor is now saying that the support from her son/mother will be $850 a month for sixty (60) months, or $51,000 in total support.

It is telling that none of the support sources have come forward with declarations. No evidence is provided of such persons having an "extra" $51,000 to contribute into Debtor's plan. Rather, it appears that Debtor and Debtor's Counsel have carefully worked to shroud such evidence from the court and parties in interest.

DISCUSSION

Decision to Seek Conversion

Debtor filed this case as one under Chapter 7 seeking to discharge her debts. Based on the Schedules filed by Debtor, it appeared that there was not any recoverable value for a distribution to

creditors. After review, the Chapter 7 Trustee determined that there was value in Debtor's real property and on August 31, 2018, obtained authorization to employ a real estate broker to assist in the marketing and sale of the real property. Dckt. 21.

On September 6, 2018, Debtor filed a Motion to Convert this Case to one under Chapter 13. Dckt. 22. The Motion merely states that Debtor elects to convert this case. The court denied without prejudice Debtor's *ex parte* request to convert the case. Order, Dckt. 24. The court's Order directed Debtor to file a noticed motion to convert.

Debtor has filed her noticed Motion to Convert (Dckt. 26), which is supported by her Declaration (Dckt. 28). In the Declaration Debtor states that she is seeking the conversion because she wants to pay her vehicle loan through a plan. Declaration ¶ 7, Dckt. 28. This is a bit "curious" in light of the *Ex Parte* Motion to Dismiss having been filed just days after the court granted the Chapter 7 Trustee's Motion to Employ the Real Estate.

Debtor has also provided financial information and a draft Chapter 13 Plan as Exhibit A, Dckt. 29. The draft Chapter 13 Plan provides for a 6% dividend for creditors holding general unsecured claims. The additional provisions (improperly typed above the signature line of the Plan instead of the required separate page) provide for the payment of Chapter 7 Trustee fees, Chapter 7 Trustee's Attorney's fees, and the Chapter 7 Trustee's Realtor fees. Presumably, the 6% dividend is being computed after the Debtor paying approximately $3,400.00 in these Chapter 7 administrative expenses.

If the Chapter 7 administrative expenses were not being paid, then there would be an additional $3,400.00 for creditors holding general unsecured claims. This would be an additional 16.3% dividend to creditors holding general unsecured claims.

The Debtor sought after dismissal/conversion days after learning of the Chapter 7 Trustee's intention to liquidate the real property and pay creditors appears to be a strategy resulting from Debtor's discovery that the real property would not slip through the Chapter 7 case, and the expense of the Chapter 7 Trustee would be incurred. Now, Debtor wants the creditors holding the unsecured claims to pay the administrative expenses caused by the Debtor's strategy.

In some cases, the court when converting such a case expressly conditions it on the Debtor paying the Chapter 7 administrative expenses and the unsecured dividend computed without regard to such expenses. It is not clear in this case whether such full amount, or what amount, if any, should be shouldered by the Debtor for his case filing and conversion strategies.

From the grounds stated, evidence presented, arguments made, and legal authorities cited, Debtor has established that there is not a good faith intention of prosecuting a Chapter 13 case. As discussed above, the legal authorities cited are without merit. Debtor has hidden form the court the purported sources of up to $51,000 of additional purported income. Debtor and Counsel have done this repeatedly, and though afforded the opportunity to provide evidence of how Debtor's monthly net income jumps from $102 to a now purported $950, no evidence is provided. Merely, Debtor's Counsel's arguments and Debtor's dictation of such "fact" to the court. Such shortcomings clearly are not inadvertent, but part of an intentional, planed, and executed scheme.

Eligibility for Chapter 13 Relief

Since the last hearing, it has come to light that Debtor likely owes significantly more in unsecured claims that disclosed on her Schedules E/F. While Creditor is listed, the amount of Creditor's claim is stated to be "unknown." Creditor asserts this claim to be in the amount of $419,268.65. Under 11 U.S.C. § 109(e) the fact that a debtor disputes the asserted claim does not exclude it from the calculation of eligibility. The unsecured claim must merely be: (1) noncontingent (here no contingencies are asserted), and (2) liquidated (here, specific amounts are stated for specific acts).

As discussed above, Debtor's citation to the doctrine of *Res Judicata* and how it applies in nondischargability adversary proceedings does not effect the plan language enacted by Congress in 11 U.S.C. § 109(e) for the monetary limits. The claim being asserted is liquidated (the amounts of damages known) and not contingent (not subject to a condition in the future). Merely because the Debtor wants to dispute the liability and amount does not remove it from consideration.

In researching this issue and the contentions stated in the Reply (which are subject to the certifications arising under Fed. R. Bankr. P. 9011), the following information is readily available to any counsel on this point:

> 2 Collier on Bankruptcy P 109.06 (16th 2018)
>
> [b] Only Noncontingent Debts Counted Toward Chapter 13 Limitations
>
> In deciding whether a claim is noncontingent, and therefore counted toward the debt limits, courts have generally ruled that **if a debt does not come into existence until the occurrence of a future event, the debt is contingent.** A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event. Thus, a creditor's claim is not contingent when the "triggering event" occurred before the filing of the chapter 13 petition. In some cases, there may be a dispute regarding whether the "triggering event" has occurred—for example, because the party whose debt the debtor guaranteed raises defenses to the principal debt. In others, the debtor may be found to be jointly and severally liable under state law, and no prior recourse to the principal debtor is required.
>
> In certain circumstances, a criminal conviction may support a claim that is noncontingent and thus must be included in the section 109(e) calculations. However, a criminal conviction does not allow the court to impute civil liability stemming from the same occurrence, and therefore a pending tort claim is contingent. A disputed debt can be a noncontingent debt within the meaning of section 109(e), although it may be unliquidated, as discussed below.
>
> [c] Only Liquidated Debts Counted Toward Chapter 13 Limitations
>
> A debt must also be liquidated to count toward the debt limits. Although for purposes of this section, "liquidated" is not defined, **courts have generally held that a debt is liquidated if its amount is readily and precisely determinable,** as where the claim is determinable by reference to an agreement or by a simple

> computation. For example, a tort cause of action against the debtor for personal injuries, pain and suffering would obviously be an unliquidated claim, and not counted no matter how large the potential damages. In *In re Wenberg*, the Court of Appeals for the Ninth Circuit held that when a creditor's claim was unliquidated, but an award of attorney's fees to the creditor was readily ascertainable, the attorney's fees were liquidated but the damages were not. If a judgment has already been entered in excess of the eligibility limits, the debtor is ineligible even if there remains additional litigation about punitive damages. In *In re Nikoloutsos*, the Court of Appeals for the Fifth Circuit held that a debtor was ineligible to convert his case to chapter 13 because at the time of his petition there had already been a judgment for compensatory damages entered against him in excess of $600,000.

For Creditor's claim, the dollar amounts at issue are known, and not in the nature of future pain and suffering, loss of consortium, loss of future business, future fuel/power costs, and the like. The dollars are set, even if disputed.

This concept was discussed by the Eleventh Circuit Court of Appeals in *United States v. Verdunn*, 89 F.3d 799, 802 (11th Cir. 1996), in which the court stated:

> A liquidated debt is that which has been made certain as to amount due by agreement of the parties or by operation of law. Id. Therefore, the concept of a liquidated debt relates to the amount of liability, not the existence of liability. See In re McGovern, 122 Bankr. 712, 715 (Bankr.N.D.Ind.1989); [**9] see also C. McCormick, Handbook on the Law of Damages, § 54 at 213 (1935). If the amount of the debt is dependent, however, upon a future exercise of discretion, not restricted by specific criteria, the claim is unliquidated. See 1 T. Sedgwick, Measure of Damages, § 300 at 570 (9th ed. 1912).
>
> Here, the amounts asserted in Creditor's claim are:
>
> A. Excess Regular Pay.....$220,442.37
>
> B. Unauthorized Overtime Pay.....$ 504.72
>
> C. Excess Vacation Pay.....$ 72,394.51
>
> D. Unauthorized Credit Card Charges.....$ 13,588.66
>
> E. State Tax Penalties and Interest.....$ 12,113.93

Motion, ¶ 6, Dckt. 43.

In the nondischargeability action filed by Creditor, in support of a Motion for Entry of Default Judgment, the Declaration of Michelle Gallagher has been filed. 18-9015, Dckt. 14. In it she testifies as to the computation of the above amounts based on the payroll and credit card records for the amounts claimed.

While Creditor has sought to depose Debtor and her husband, neither has appeared at noticed depositions. That dispute rages between the parties.

Based on the evidence presented, Debtor's unsecured claims exceed $394,725.00 and therefore Debtor is not eligible for Chapter 13 relief.

At the hearing, **XXXXXXXXXXX**.

The Motion is denied without prejudice.

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 Convert filed by Melinda Broome ("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 Convert is denied.