

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

February 5, 2015 at 10:30 a.m.

-
1. [13-29803-E-7](#) SPENCER ROBBINS AND MOTION FOR COMPENSATION FOR
KJH-3 MONICA IBARRA-ROBBINS KIMBERLY J. HUSTED, CHAPTER 7
Holly S. Burgess TRUSTEE
12-31-14 [[112](#)]

Final Ruling: No appearance at the February 5, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 31, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Trustee Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Trustee Fees is granted.

Kimberly J. Husted ("Applicant"), the Chapter 7 Trustee for the bankruptcy estate of Spencer Robbins and Monica Ibarra-Robbins ("Debtors"), makes a first and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period August 28, 2013 through December 4, 2014. The order of the court approving employment of Applicant was entered on August 28, 2013, through the notice of appointment of interim trustee Dckt. 24. Applicant requests fees in the amount of \$10,082.26 and costs in the amount of \$329.26.

February 5, 2015 at 10:30 a.m.

STATUTORY BASIS FOR TRUSTEE FEES

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

Benefit to the Estate

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

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

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits income from sale of properties. The estate has \$136,645.15 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

The Bankruptcy Code limits the maximum amount of fees which a Chapter a Chapter 7 or Chapter 11 trustee may be paid in a bankruptcy case. Pursuant to 11 U.S.C. § 326(a),

In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25% on the first \$5,000 or less, 10% on any amount in excess of \$5,000 but not in excess of \$50,000, 5% on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3% of such monies in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by th trustee to parties in interest, excluding the debtor, but including holders of secured claims.

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 33.5 hours in this category. Applicant assisted Client with reviewing and updating files.

Efforts to Assess and Recover Property of the Estate: Applicant spent 4.0 hours in this category. Applicant researching asset value changes.

Adversary Proceedings: Applicant spent 2.5 hours in this category. Applicant reviewed oppositions and stipulations.

Significant Motions and Other Contested Matters: Applicant spent 2.0 hours in this category. Applicant approving accountant compensation and compiling distributions.

Trustee requests the following fees:

25% of first \$5,000.00	\$1,250.00
10% of next \$45,000.00	\$4,500.00
5% of next \$86,645.15	\$4,332.26
3% of next \$0.00	\$0.00
Calculated Total Compensation	\$10,082.26
Plus Adjustment	\$0.00
Total Compensation	\$10,082.26
Less Previously Paid	\$0.00
Total Requested Compensation	\$10,082.26

The Fees are computed on a distribution of \$136,645.15 by the Chapter 7 Trustee, which excludes any surplus monies which are being distributed to the Debtors.

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$329.26 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Mileage	\$0.54	\$18.90
Postage	\$10.90	\$10.90
Postage	\$0.59	\$7.67
Motion	\$75.00	\$75.00
Paralegal	\$5.29	\$5.29
Other	\$10.00	\$10.00
Paralegal	\$75.00	\$187.50
Clerical	\$35.00	\$14.00

Total Costs Requested in Application	\$329.26
---	-----------------

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. §326(a) and that Applicant effectively used appropriate rates for the services provided. and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

In this case, the Chapter 7 Trustee has \$136,645.15 of unencumbered monies to be administered. The Chapter 7 Trustee investigated and recovered unscheduled assets, which consisted of 100% ownership interest in limited liability companies which owned fractional interests commercial property in New York and Oklahoma. These interests were subject to rights of first refusal, and the normal impediments with someone holding 3.797% and 2.938% fractional interests commercial real property. The Debtors incorrectly stated under penalty of perjury that they had only a fractional interest in "Investment Contracts" on Schedule G and failed to list the 100% ownership of the two limited liability companies on Schedule B. (Debtors affirmatively states "none" under penalty of perjury on Schedule B. Dckt. 1 at 5.)

After the Trustee discovered the undisclosed assets and was proceeding with the sale, Debtors attempted to reconvert the case. The court denied that motion, finding the Debtors were not proceeding in good faith. Civil Minutes, Dckt. 87.

This case required significant work by the Trustee, with the full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowed as a commission to the Chapter 7 Trustee.

Costs and Expenses

Non-Recoverable "Costs"

Applicant, as part of her percentage commission for serving as Trustee, provides the necessary and proper basic office and business support to fulfill her duties. These basic resources include, but are not limited to, phone, email, facsimile and clerical support. The costs requested by Applicant include "clerical," "Paralegal," "Motion," and "Other" \$291.79. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant to be changing the bankruptcy estate. The Trustee is represented by counsel which has billed the Trustee, and has been paid by the estate, for legal and paralegal services which would be provided. Though the Trustee states under penalty of perjury in her declaration that the detail for the expenses is set forth in Exhibit A (as opposed to the summary in the declaration), the information in Exhibit A is merely the same summary. Exhibit A, Dckt. 115 at 3. The court disallows \$291.79 of the requested costs.

Therefore, the court will allow \$37.47 in costs.

The final fees in the amount of \$10,082.26 and costs in the amount of \$37.47 pursuant to 11 U.S.C. § 330 and 11 U.S.C. § 326(a) and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$10,082.26
Costs and Expenses	\$37.47

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 Kimberley Husted ("Applicant"), Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Kimberley Husted is allowed the following fees and expenses as a professional of the Estate:

Fees in the amount of \$ 10,082.26
Expenses in the amount of \$ 37.47,

IT IS FURTHER ORDERED that the costs of \$291.79 are not allowed by the court.

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$10,082.26 and costs of \$37.47 pursuant to 11 U.S.C. §326(a) and 11 U.S.C. § 330.

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

2. [14-29231](#)-E-11 MIZU JAPANESE SEAFOOD MOTION TO SET ADMINISTRATIVE
RLC-8 BUFFET, INC. CLAIMS BAR DATE
Stephen M. Reynolds 12-18-14 [[97](#)]

Final Ruling: No appearance at the February 5, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on December 18, 2014. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

The Motion to Set Administrative Claims Bar Date has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Set Administrative Claims Bar Date is granted.

Mizu Japanese Seafood Buffet, Inc. ("Debtor-in-Possession") filed the instant Motion to Set Administrative Claims Bar Date on December 18, 2014. Dckt. 97.

Debtor-in-Possession requests that the court set the deadline to file Chapter 11 administrative claims as March 2, 2015, pursuant to Fed. R. Bankr. P. 3003(c)(3). Debtor-in-Possession argues that this is to understand the magnitude and the amount of the administrative expenses that have been incurred in ordered to determine the distributions to creditors holding allowed claims.

Debtor-in-Possession states that counsel would provide notice to interested parties stating that no claim that is based upon rights accruing during the period that the above-captioned case has been pending under chapter 11, i.e. since September 15, 2014, shall be allowed against the estate unless it is the subject of a proof of claim filed on or before March 2, 2015. The notice would also state that the deadline to file a motion seeking chapter 11 administrative priority for any such proof of claim is March 2, 2015.

APPLICABLE LAW

Fed. R. Bankr. P. 3003(c) provides:

(c) Filing of proof of claim

(1) Who may file

Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

(2) Who must file

Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) Time for filing

The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).

DISCUSSION

A review of the docket shows that the Debtor-in-Possession has filed a proposed Plan of Reorganization that contemplates an initial distribution in March 2015. Dckt. 111.

The court finds that, in order to allow the Debtor-in-Possession to learn of the scope of possible administrative claims, March 2, 2015 provides sufficient time for any creditor or indenture trustee to file a proof of claim. The Debtor-in-Possession shall provide notice to all interested parties of this deadline to file an administrative proof of claim and/or motion seeking chapter 11 administrative priority for any such proof of claim.

Therefore, the Motion is granted and the court sets the date for creditors or indenture trustee to file a proof of administrative claim for March 2, 2015.

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 Set Administrative Claims Bar Date filed by Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of

counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the date to file a proof of administrative claim is March 2, 2015.

IT IS FURTHER ORDERED that on or before February 9, 2015, Debtor in Possession shall mail a Notice of Administrative Expense Bar Date to all parties in interest.

3. [14-29231](#)-E-11 MIZU JAPANESE SEAFOOD MOTION TO SELL
RLC-9 BUFFET, INC. 12-22-14 [[102](#)]
Stephen M. Reynolds

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on December 22, 2014. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Mizu Japanese Seafood Buffet, Inc., Debtor in Possession ("Movant") to sell property of the estate after a noticed

hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

- a. Mizu Japanese Seafood Buffet, Inc. (Identified, including equipment, fixtures, goodwill, intellectual property, inventory, accounts receivable, trademarks, website, url's, names, phone numbers, fax numbers, transferable licenses, franchises, lease rights and improvements) located at 3636 N. Freeway Blvd., Sacramento, California

The proposed purchaser of the Property is Tony Lin or assign and the terms of the sale are:

1. Purchase Price = \$127,600.00
2. "Paragraph 4 of the Agreement shall read, 'The total price shall include approximately a) \$0 inventory, b) \$0 accounts receivable, c) \$0 work in progress, less accounts payable, d) \$0 for a total, a)+b)+c)+d), \$0.00 (Total). Inventory shall be assessed just prior to close of escrow, and the agreed inventory value shall be paid for through escrow in addition to the purchase price stated in paragraph 2 of the agreement.'"
3. "The ABC liquor license will not be included in the sale of the business opportunity outlined in this Offer and Agreement to Buy."
4. "Brokers commission shall be paid by the Buyer, in the amount of \$17,400.00 and paid through the escrow holder, by check, payable to Fidelity National Title Company, to be released to Broker upon the close of escrow."

SALE FREE AND CLEAR OF LIENS

The Motion seeks to sell Property free and clear of the liens of Maggie Chan, Hui Long, and Wan Fang Fu ("Creditor"). The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

"(f) The trustee [debtor in possession or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f).

Hui Long's judgment was filed on July 21, 2014 in the amount of \$73,142.42 by the Secretary of State in the Superior Court of California, County of Sacramento, Document number 14-7421201496. Wan Fang Fu's judgment as filed on July 21, 2014 in the amount of \$30,982.52 by the Secretary of State in the Superior Court of California, County of Sacramento, Document number 14-7421201517. Maggie Chan's judgment was filed on June 19, 2014 in the amount of \$70,613.61 by the Secretary of State in the Superior Court of California, County of Sacramento. The liens are pursuant to Labor Code § 98.2(g)(1).

Movant states that these liens are avoidable by operation of 11 U.S.C. § 547(b). The liens were placed for the benefit of the three lien Creditors, on account of an antecedent deb, made when the Debtor-in-Possession was insolvent, made within 90 days of the filing of the present case and would allow the Creditors to receive more than they would had the transfer not been made. The Movant argues that the three lien claims are therefore in bona fide dispute as contemplated by 11 U.S.C. § 363(f)(4).

Additionally, the Movant argues that under 11 U.S.C. § 363(f)(2) that the failure of the three Creditors to timely object after receiving proper notice thereof should be held to be satisfactory consent.

For this Motion, the Movant has established that the three judgment liens constitute a bona fide dispute and the failure of any objections is implicit consent by the parties. Furthermore, the sale of the property free and clear of the liens appears to be consistent with the proposed Plan and Disclosure Statement.

DECISION

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

The Agreement contemplates that the inventory to be sold shall be determined prior to closing. While the Movant has not provided this list yet, it appears consistent with the proposed Plan and Disclosure Statement that the sale of the Property is in the best interest of the estate and creditors. The Movant shall file a supplemental, itemized list of the inventory to be sold under the Agreement and the agreed additional purchase price of such.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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 Sell Property filed by Mizu Japanese Seafood Buffet, Inc. the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Mizu Japanese Seafood Buffet, Inc. the Debtor in Possession, is authorized to sell pursuant to 11 U.S.C. § 363(b) and (f)(2) and (4) to Tony Lin or nominee ("Buyer"), the Property commonly known as [Street Address, California/description of personal property]("Property"), on the following terms:

1. The Property shall be sold to Buyer for \$127,600.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit 1, Dckt. 107, and as further provided in this Order.
2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
3. The Property is sold free and clear of the lien of Maggie Chan, Hui Long, and Wan Fang Fu, creditors asserting a secured claim, pursuant to 11 U.S.C. § 363(f)(4), with the lien of such creditor attaching to the proceeds. The Debtor-in-Possession shall hold the sale proceeds; after payment of the closing costs, other secured claims, and amount provided in this order; pending further order of the court.
4. The Debtor-in-Possession be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
5. The Inventory sold under the Agreement is listed on Addendum A to this Order, which list has been filed by the Debtor in Possession as a Supplemental Pleading, and the agreed additional purchase price for such Inventory is \$xxxxxx.

4. [14-23471](#)-E-11 ERROL/SUZANNE BURR
DNL-8 Iain A. MacDonald

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH GARY ZOLLDAN AND
LINDA ZOLLDAN
1-8-15 [[216](#)]

Tentative Ruling: The Motion to Approve Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on January 8, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion For Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The Motion for Approval of Compromise is granted.

Susan Smith, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Gary and Linda Zolldan ("Settlors"). The claims and disputes to be resolved by the proposed settlement are a boundary dispute case, subsequent appeals, a release of all claims held by the Settlers against the estate, including Proofs of Claim No. 1-1 and 2-1. This includes the award of \$525,325.00 attorneys' fees to Settlers which is also the subject of the appeal. This Settlement addresses the Debtors' \$175,000.00 homestead exemption, and allows the Trustee to maximize the value of the estate's remaining assets.

February 5, 2015 at 10:30 a.m.

- Page 13 of 54 -

Movant and Settlers has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit C in support of the Motion, Dckt. 220):

- A. Settlers shall pay the Movant \$175,000.00 within 30 calendar days of entry of a final and non-appealable order of the Bankruptcy Court approving the settlement
- B. Upon the Movant's receipt of the \$175,000.00 and entry of a final and non-appealable order of the Bankruptcy Court approving the settlement, the Movant shall immediately quitclaim to the Settlers, or their assignee, the bankruptcy estate's interest in the Debtor-in-Possession's parcel, APN # 002-150-013-0 and #002-170-006-0, Settlers' parcels, APN #002-160-073-0, #002-170-008-0, #002-170-007-0, and #002-160-074-0. The Movant shall also cause to be filed and recorded a release of any Notice of Pendency of Action affecting the Debtor-in-Possession's parcels and Settlers' parcels.
- C. Upon the Movant's conveyance of the estate's interest in the Debtor-in-Possession's parcels and the Settlor's parcels, the Movant and the Settlers shall cause the Boundary Case (Sierra County Superior Court Case No. 6310) and the Appeals (Third District Court of Appeals Case Nos. C076451 and C076373) to be dismissed with prejudice, with the parties bearing their own attorney fees and costs.
- D. The parties shall exchange mutual releases of all known and unknown claims in whatever legal theory or form. The Settlers' releases includes all Proofs of Claims that have been filed or could be filed against the estate, including Proofs of Claim No. 1-1 and 2-1. The Movant's release includes any and all claims by the Debtors-in-Possession against the Settlers, which are part of the bankruptcy estate, as of the date of the Settlement.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

- 1. The probability of success in the litigation;
- 2. Any difficulties expected in collection;
- 3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
- 4. The paramount interest of the creditors and a proper deference

to their reasonable views.

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

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

Probability of Success

The Movant argues that this factor weighs in favor of settlement because judgment has been entered against the Debtors-in-Possession on their supplemental complaint against the Settlers, resulting in the Settlers' \$523,325.00 attorney's fee award. A successful appeal is unlikely and it resolves the prolonged litigation that has resulted in substantial costs to all parties.

Difficulties in Collection

Movant argues that this factor is neutral because the estate is in a defensive position with respect to Settlers' damage claims and attorney's fee award.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that continued litigation and prosecution of the Appeals would further delay resolution of the disputes and would result in substantial administrative claims against the estate.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The motion is granted.

Counsel for the Trustee Movant shall prepare and lodge with the court a proposed order consistent with this Ruling.

5. [13-29073-E-7](#) AARON/JOLINE ROBERTSON MOTION FOR COMPENSATION FOR
MPD-3 Bruce Charles Dwiggins MICHAEL P. DACQUISTO, CHAPTER 7
TRUSTEE
1-7-15 [[112](#)]

Tentative Ruling: The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers 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.

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)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on January 7, 2015. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing **on February 3, 2015.**

The Motion for Allowance of Professional Fees is granted.

Michael P. Dacquisto, the Chapter 7 Trustee ("Applicant") for the estate of Aaron Robertson and Joline Roberston Request for the Allowance of Fees and Expenses in this case.

Applicant requests fees in the amount of \$13,356.61 and costs in the amount of \$283.25.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

Benefit to the Estate

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the trustee must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A professional must exercise good billing judgment with regard to the services provided as the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals

for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including various property sales and rental income received. The estate has \$202,132.22 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

The Bankruptcy Code limits the maximum amount of fees which a Chapter 7 or Chapter 11 trustee may be paid in a bankruptcy case. Pursuant to 11 U.S.C. § 326(a),

In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25% on the first \$5,000 or less, 10% on any amount in excess of \$5,000 but not in excess of \$50,000, 5% on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3% of such monies in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

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 9.30 hours in this category. Applicant assisted Client with requesting certified copies from court and reviewing motions.

Efforts to Assess and Recover Property of the Estate: Applicant spent 30.00 hours in this category. Applicant reviewed preliminary title reports, reviewed corporate records, met with broker to review contracts and review lien avoidance motions.

Adversary Proceedings: Applicant spent 0.80 hours in this category. Applicant wrote letters to debtors and counsel and met with debtors attorney.

Significant Motions and Other Contested Matters: Applicant spent 2.50 hours in this category. Applicant prepared and filed declaration for motion to compel abandonment and appeared at motion to abandon and motion to avoid judicial lien.

Trustee requests the following fees:

25% of first \$5,000.00	\$1,250.00
10% of next \$45,000.00	\$4,500.00
5% of next \$152,132.22	\$7,606.61
3% of next \$0.00	\$0.00
Calculated Total Compensation	\$13,356.61
Plus Adjustment	\$0.00
Total Compensation	\$13,356.61
Less Previously Paid	\$0.00
Total Requested Compensation	\$13,356.61

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$283.61 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
copies	\$0.20	\$0.40
Postage	\$0.50	\$1.00
Copies	\$0.20	\$0.40
Postage	\$0.50	\$1.00
Copies	\$0.20	\$5.60
Postage	\$0.75	\$1.50
Fax	\$0.20	\$0.40
Copies	\$0.20	\$21.00
Postage	\$0.50	\$10.50
Copies	\$0.20	\$0.40

Postage	\$0.50	\$1.00
Copies	\$0.20	\$0.80
Postage	\$0.50	\$1.00
Copies	\$0.20	\$22.80
Postage	\$11.00	\$11.00
Copies	\$0.20	\$1.80
Postage	\$0.75	\$0.75
Certified copy from court	\$12.50	\$12.50
Courtcall	\$30.00	\$30.00
Certified copy from court	\$12.50	\$12.50
Copies	\$0.20	\$5.40
Postage	\$1.00	\$3.00
Copies	\$0.20	\$0.40
Fax	\$0.20	\$0.40
Copies	\$0.20	\$21.00
Postage	\$0.50	\$10.50
Copies	\$0.20	\$0.80
Postage	\$0.50	\$1.00
Fax	\$0.20	\$0.40
Fax	\$0.20	\$0.40
Copies	\$0.20	\$10.00
Copies	\$0.20	\$14.00
Copies	\$0.20	\$8.00
Copies	\$0.20	\$8.00
Copies	\$0.20	\$1.20
Courtcall	\$41.20	\$41.20
Postage	\$3.00	\$3.00
Postage	\$0.50	\$7.00
Postage	\$5.60	\$5.60

Postage	\$5.60	\$5.60
Total Costs Requested in Application		\$283.25

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. §326(a) and that Applicant effectively used appropriate rates for the services provided. and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

This case required significant work by the Trustee, including determining abandonment of property, valuable assets of the estate, and lien avoidances, with the full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowed as a commission to the Chapter 7 Trustee.

Costs and Expenses

Non-Recoverable "Costs"

Applicant, as part of her percentage commission for serving as Trustee, provides the necessary and proper basic office and business support to fulfill her duties. These basic resources include, but are not limited to, phone, email, facsimile and clerical support.

The costs requested by Applicant includes copying costs which double the standard rate. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be changed in additional to the professional fees requested as compensation.

The court disallows \$61.80 of the requested costs and allows costs in the amount of \$221.45.

The final fees in the amount of \$13,356.61 and costs in the amount of \$221.45 pursuant to 11 U.S.C. § 330 and 11 U.S.C. § 326(a)and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case

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

Fees	\$13,356.61
Costs and Expenses	\$ 221.45

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 Michael P. Dacquisto ("Applicant"), Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Michael P. Dacquisto is allowed the following fees and expenses as a professional of the Estate:

Fees in the amount of \$13,356.61
Expenses in the amount of \$221.45

IT IS FURTHER ORDERED that the costs of \$61.80 are not allowed by the court.

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$13,356.61 and costs of \$221.45 are approved as final fees and costs pursuant to 11 U.S.C. § 330.

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

6. [14-25376-E-7](#) KEVIN/BREE SEARS MOTION TO DISMISS CASE
AJP-4 Douglas B. Jacobs 1-14-15 [[134](#)]

Tentative Ruling: The Motion to Convert the Bankruptcy Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers 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.

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)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on January 13, 2015. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. Fed. R. Bank. P. 2002(a)(4) 21-day notice for Chapter 7, 11, and 12 cases.

The Motion to Convert the Bankruptcy Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

The Motion to Dismiss the Chapter 7 Bankruptcy Case is granted and the bankruptcy case is dismissed.

Cory Adams ("Movant"), filed the instant Motion to Dismiss on January 14, 2015. Dckt. 134. Movant argues that dismissal is proper as an abuse of the provisions of Chapter 7 pursuant to 11 U.S.C. § 707.

Keven A. Sears and Bree Lynn Sears ("Debtors") filed a prior chapter

13 Petition (Case No. 13-27044-E-13C) on May 23, 2013. That case was dismissed on May 18, 2014, with no proposed Plans being confirmed.

The Debtors filed another Chapter 13 on May 21, 2014. The Debtors proposed a Chapter 13 Plan and filed it with the voluntary petition. Dckt. 5. However, upon objections by the Movant and Chapter 13 Trustee, the court denied confirmation of the Debtors' Plan. Dckt. 53 & 54.

The Movant filed a motion to dismiss the second Chapter 13 case. Dckt. 55. The court's pre-hearing determination was to tentatively grant the motion. However, the Debtors converted to the instant case to a Chapter 7 one day before the hearing.

The Movant argues that the Debtors' Form 22A (Means Test Calculation) filed on December 4, 2014 (Dckt. 126) contains incorrect information. The Movant believes that a correct Form 22A will demonstrate that a presumption of abuse does arise pursuant to 11 U.S.C. § 707(2)(A)(I).

The Movant has provided a Form 22A for the Debtors that the Movant argues correctly and accurately reflects Debtors' income and expense. Exhibit A, Dckt. 137. The court has categorized the Movant's grounds as such:

Income from the Operation of a Business, Profession, or Farm

The Debtors' Form 22A (Dckt. 126) listed gross receipts of \$11,527.00 and business expenses of \$6,575. This income is what the Debtor-Husband receives from his public defender contract with the County of Butte. However, Movant argues that the Debtors did not include \$3,835.00 from his non-public defender business receipts which was listed on his Chapter 13 Form 22C filed August 7, 2014 (Dckt. 48). Understating his income by \$3,835.00 without any explanation or amendments to Schedule I to disclose this income.

Furthermore, the Debtor-Spouse discloses gross receipts of \$2,941 and ordinary business expenses of \$865.00 on Form 22A. However, in the Debtors' Chapter 13 Form 22C, the Debtor-Spouse income was only \$2,846.00, without the deduction of \$865.00 or any other expense. Furthermore, there is no explanation or amendments to Schedule J or I to disclose these expenses.

The Movant then sought informal discovery from the Debtors seeking all documents in support of their Form 22A contentions. Exhibit B Dckt. 137. In response the Debtor-Husband provided copies of checks and one page from a bank statement; summarized in Exhibit C (Dckt. 137).

Additionally, the Debtor-Spouse supplied statements that included invoices and credit card records; summarized in Exhibit D (Dckt. 137).

From the information provided by the Debtor-Husband, the Movant believes that the Debtor-Husband's business expenses are slightly under \$3,000.00 per month. Moreover, the Movant believes that from the documents provided by the Debtor-Spouse her month business expenses are approximately \$88.00. However, the Movant does address the fact that the Debtor-Spouse claims a travel expense of \$6,854.00 by applying the IRS standard mileage deduction rate of \$.56 per mile.

Subtotal of Current Monthly Income for § 707(b)(7)

Based on information provided to the Movant they claim that the Debtors' Current Monthly Income for 11 U.S.C. § 707(b)(7) should combine to equal a monthly total income of \$18,208.00. \$15,362.00 for Debtor-Husband and \$2,846.00 for Debtor-Spouse. Furthermore, Movant still believes that Debtors' respective business expenses are questionable.

Local Standards: Housing and Utilities; Mortgage/Rent Expense

Under Subpart C line 42 the Debtors deduct the average monthly payment to Bank of America for the first deed of trust on their house of \$3,255.00. On line 43, the Debtors deduct the second deed of trust to Bank of America of \$850.00. The holder of the first trust deed filed a Proof of Claim on July 13, 2014 (Proof of Claim No. 8) reporting the arrearage on the obligation to be \$51,037.00.

The remaining payment on secured claims deducted in Subpart C line 42 is the car loan on the 2007 BMW 328i in the amount of \$189.00 per month. The Debtors' Form 22A reports this amount at \$436.00. That lender filed a Proof of Claim on June 23, 2014 (Proof of Claim No. 5) indicating the arrearage on the obligation was \$2,815.00.

However, the Debtors did not file a Statement of Intention in regards to these secured assets within thirty (30) days of conversion to Chapter 7 as required by Fed. R. Bankr. P. 1019(1)(B).

Therefore, the Debtors will not be able to retain these assets due to the arrearages presently encumbering them. Thus, the Debtors should not be permitted to deduct these secured monthly payments from income. Instead, they should be granted a Form 22A line 20B mortgage/rental expense of \$1,409.00 and a transportation ownership expense for their two vehicles other than the BMW in the amount of \$517.00 on lines 23 and 24.

Other Necessary Expenses: Life Insurance

According to the Debtors' Form 22A, the Debtors deduct \$100.00 from income as the total average monthly premium for term life insurance. However, none of the Debtors' Schedule Bs filed to date in either Chapter 13 case discloses the existence of any life insurance; term or otherwise.

Other Necessary Expenses: Telecommunication Services

According to the Debtors' Form 22A, Debtors deduct \$37.00 per month for telecommunication services to the extent necessary for health and welfare.

Summation

Movant's self-prepared Form 22A (Exhibit A Dckt. 137) reflects at Line 48 the Debtors' current monthly income is \$11,633.00, at Line 49 that the Debtors' total deductions from income are \$8,389.75, and at line 50 their monthly disposable income for 707(b)(2) is \$3,243.25.

The Movant finds this number much more accurate than the Debtors' Form 22A and is consistent with their prior reporting. Using the Movant's Form 22A the 60-months disposable income (line 51) exceeds \$12,475.00 pursuant to 11 U.S.C. § 707(b)(2)(A)(i)(II). Therefore, the presumption of abuse arises.

The Movant also notes that even if the Debtors' claim of business expenses in line 56 are allowed in full, the 60-month disposable income would still far exceed \$12,475.00.

Additionally, the Debtors have not filed revised schedules post-conversion from Chapter 13 to Chapter 7. Therefore, in the instant case the Debtors have not reported what happened to the Chapter 13 refund they received on or after August 15, 2014, in the amount of \$15,427.88. The Movant states the Debtors claimed to have set aside these funds to pay tax estimates. However, the Movant believes these funds should be disclosed as an asset of the bankruptcy estate.

The Movant further notes that Debtors will receive a refund of the funds held by the Chapter 13 Trustee in the Debtors' second case.

APPLICABLE LAW

11 U.S.C. § 707 provides in relevant part:

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of--

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$7,4751, whichever is greater; or

(II) \$12,4751.

(ii) (I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the

Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 302 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed \$1,8751 per year per child, to attend a private or public

elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of--

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B) (i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide--

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special

circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of--

(I) 25 percent of the debtor's nonpriority unsecured claims, or \$7,4751 , whichever is greater; or

(II) \$12,4751.

(C) As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated. . .

(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider--

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

DISCUSSION

The Movant's grounds are well-taken. The comparison of the Form 22As between the Debtors' filed one and the information provided by the Movant highlights many issues as to whether there is a presumption of abuse.

Comparing the listed amounts in the Debtors' Form 22A and the original filings of the Debtors when the case was a Chapter 13 shows that there may be unreported expenses and some "fudging" in order for the Debtors to qualify under Chapter 7.

Finally, these Debtors have significant monthly income (exceeding \$140,000 annually) and have twice failed to prosecute Chapter 13 cases in good faith. It appears that the Chapter 7 Trustee can, at best, generate *di minimis* monies for creditors. These Debtors' obligation are primarily consumer debts, with the one exception to that for the one active creditor in this case, Cory Adams. The obligation to Cory Adams is that as determined by the California

State Bar for monies which Debtor Kevin Sears improperly disbursed from his trust account. Since filing the first Chapter 13 case on May 23, 2013, the Debtors have exhausted more than 20 months of time, money, and resources in trying to not pay Mr. Adams. Along the way the Debtors, though representing to the court in the Chapter 13 cases that they were paying their taxes, managed to build up post-petition tax defaults.

For the court not to dismiss the Chapter 7 case, in light of the one active creditor desiring not to prosecute a nondischargeability action, would further the abuse of the bankruptcy process and federal courts by these Debtors.

Under 11 U.S.C. § 707(b), that the presumption of bad faith does in fact exist. The Debtors have not filed any supplemental Schedules in order to reflect a new financial reality. The court only has the Schedules filed by the Debtors on August 7, 2014 to determine and analyze the Debtors' finances. Using those, it the presumption of abuse does arise.

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 Dismiss filed by Cory Adams 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 Dismiss is granted.

7. [14-25376-E-7](#) KEVIN/BREE SEARS
DBJ-6 Douglas B. Jacobs

MOTION TO COMPEL ABANDONMENT
12-22-14 [[127](#)]

Tentative Ruling: The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 6, 2015. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Motion to Abandon Property is denied without prejudice.

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

The Motion filed by Kevin and Bree Sears ("Debtor") requests the court to order the Trustee to abandon the business, known as Law Office of Kevin Sears (the "Property").

John Regner, the Chapter 7 Trustee, filed a Consent to Abandon Property on December 22, 2014. Dckt. 130. The Trustee states that after reviewing the Debtor's petition, schedules, and statement of financial affairs, that there

is no value in the Property, other than which has been exempted. The Trustee states he consents to the abandonment of the Property.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. Notice is given that debtors, by and through Douglas B. Jacobs, their attorney of record, has filed a notice requesting the abandonment of property by the Court in their bankruptcy case.
- B. The business, known as Law Office of Kevin Sears has very little value to the estate and all assets of the business were listed on the petitioners' bankruptcy schedules as exempt. Thus, the court is requested, pursuant to 11 U.S.C. § 554(b), to abandon the property back to the debtors
- C. John W. Reger, the trustee of the bankruptcy estate has agreed to the abandonment of the above business.

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that the business known as Law Office of Kevin Sears, should be abandoned. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for

motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities - buried between extensive citations, quotations, legal

arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

The Debtors do not specify what of the business should be abandoned. A review of the schedules show that the Debtors list "Office equipment and supplies" on Schedule B with a value of \$300.00 and exempt it on Schedule C under California Code of Civil Procedure § 703.140(b)(5) in its entirety. Dckt. 48. However, the Debtors do not list the interest in the business itself on Schedule B nor do the Debtors list the exact property to be abandoned.

The court does not know whether the "Law Offices of Kevin Sears includes the general "office equipment and supplies" or the "Business Checking Account." FN.1.

FN.1. This court addressed a similar issue with two Chapter 7 Trustees in related cases in the Modesto Division. In those cases, each estate had a 50% interest in a jewelry business. The Trustee's sought an order merely stating that "all inventory" was sold. When asked if they had an actual inventory list, the Trustees said yes, but it was not part of the contract and "did not need to be part" of the court's order. The court then posited the question to the two trustee, "if it turns out that in a hidden wall safe there is \$25,000.00 of additional gold "inventory," have you sold that as part of the \$15,000.00 sales price?" At that point the two trustee's requested a continuance to file a supplement to the motion and contract, adding the inventory list.

Here, the court has no idea of what is being abandoned. It may be beaten up office equipment, but there may be valuable equipment located in the closet or "off site." If the court issues an order abandoning property, the property is identified, even if the trustee is willing to take the risk that valuable "equipment" or "inventory" has escaped his or her attention.

Therefore, because of the Debtors' failure to plead with particularity, 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 Abandon Property filed by Kevin and Bree Sears ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is denied without prejudice

8. [13-21878-E-7](#) THOMAS EATON MOTION TO DISMISS ADVERSARY
[14-2106](#) LR-4 PROCEEDING
RICE V. EATON 12-15-14 [[37](#)]

Final Ruling: No appearance at the February 5, 2015 hearing is required.

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on December 15, 2014. By the court's calculation, 52 days' notice was provided. 14 days' notice is required.

The Defendant having filed a statement of non-opposition, and upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The Motion to Dismiss is granted and the Adversary Proceeding No. 14-2106 is dismissed.

Lorain Rice ("Plaintiff") filed the instant Motion for Voluntary Dismissal Without Prejudice on December 15, 2014. Dckt. 37. The Plaintiff makes the instant Motion pursuant to Fed. R. Civ. P. 41(a)(2).

Plaintiff states that the instant Adversary Proceeding No. 14-2106 was filed on April 16, 2014. The claims for relief raised in the complaint were: (1) objection to Thomas Eaton Defendant-Debtor's discharge; (2) dischargeability of domestic support obligation; (3) priority of creditor; and (4) interest in exempt property. Plaintiff sought to revoke Defendant-Debtor's Chapter 7 discharge.

Plaintiff filed a Proof of Claim and obtained an order not to approve the Trustee's final accounting until the Plaintiff's domestic support obligation is listed. Dckt. 155. Defendant-Debtor has obtained an order compelling abandonment of his exempt assets. Dckt. 154. The assets which Plaintiff claims should have gone to her as the first priority creditor were distributed June 14, 2014. Defendant-Debtor omitted the Plaintiff's domestic support obligation claim. The Trustee omitted the claim and distributed the assets to another creditor. Plaintiff was not noticed, was unable to examine the Defendant-Debtor, object to the exemption, or object to the distributions.

Plaintiff asserts that the \$11,702.19 paid to various tax entities should have gone towards her domestic support obligation claim pursuant to 11 U.S.C. § 507(a)(1)(A).

February 5, 2015 at 10:30 a.m.

Plaintiff is seeking voluntary dismissal because the Trustee has already distributed the assets that would have been distributed to her for the domestic support obligation. Plaintiff states that while the court has found Plaintiff's domestic support obligation claim to be non-dischargeable, the pendency of the instant Adversary proceeding prohibits her from utilizing a Rule 2004 examination.

Plaintiff further argues that the dismissal of the Adversary Proceeding would not prejudice the Defendant. No trial date has been set, no discovery has ensued, and there have been only status conferences. Though the Plaintiff notes that the Defendant-Debtor did file an answer to to complaint, the Defendant-Debtor's answer did not comply with Fed. R. Civ. P. 7(a). Furthermore, the Plaintiff argues that Defendant-Debtor has not incurred expense in discovery or preparing for trial.

DEFENDANT-DEBTOR'S NON-OPPOSITION

On January 6, 2015, the Defendant-Debtor filed a non-opposition to the instant Motion. Dckt. 55. The Defendant-Debtor states that he does not oppose the dismissal of the instant Adversary Proceeding.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 7041 states:

Rule 41 F.R.Civ.P. applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper.

Federal Rule of Civil Procedure 41 states in relevant part:

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without

prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

- (2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

DISCUSSION

A review of the Adversary Proceeding, the instant Motion, and Defendant-Debtor's non-opposition, the court finds that dismissal of the Adversary Proceeding is proper.

While the Defendant-Debtor has filed an answer to the complaint, the bare-bones answers in conjunction with the Defendant-Debtor's explicit non-opposition to the dismissal of the case would not prejudice the Defendant-Debtor. Furthermore, the Plaintiff appears to have considered the ramifications of dismissing the Adversary Proceeding.

Therefore, the court finds that it is proper to dismiss the instant Adversary Proceeding No. 14-2106, pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 7041.

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 Lorain Rice 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 Dismiss is granted and the adversary Proceeding No. 14-2106 is dismissed.

9. [13-21878-E-7](#) THOMAS EATON
[14-2106](#)
RICE V. EATON

CONTINUED STATUS CONFERENCE RE:
AMENDED COMPLAINT
9-9-14 [[15](#)]

Final Ruling: No appearance at the February 5, 2015 Status Conference is required.

Plaintiff's Atty: Pro Se
Defendant's Atty: David Foyil

Adv. Filed: 4/16/14
Summons Reissued: 4/30/14
Answer: 7/3/14

Amd Cmplt Filed: 9/9/14
Reissued Summons: 9/11/14
Answer: 10/8/14

The court having granted Plaintiff's Motion to Dismiss this Adversary Proceeding, **the Status Conference is removed from the Calendar.**

Nature of Action:
Dischargeability - domestic support
Recovery of money/property - preference
Objection/revocation of discharge
Validity, priority or extent of lien or other interest in property

Notes:

Continued from 12/16/14 to be heard in conjunction with the motion to dismiss.

10. [13-21878-E-7](#) THOMAS EATON MOTION TO DISMISS ADVERSARY
[14-2106](#) LR-2 PROCEEDING
RICE V. EATON 12-15-14 [[40](#)]

Final Ruling: No appearance at the February 5, 2015 hearing is required.

The court having dismissed this Adversary Proceeding pursuant to Plaintiff's Motion to Dismiss (DCN: LR-4), **this Motion is dismissed without prejudice as moot.**

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 Strike having been presented to the court, the Adversary Proceeding having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed without prejudice.

11. [13-21878-E-7](#) THOMAS EATON CONTINUED MOTION TO STRIKE
[14-2106](#) LR-2 10-28-14 [[30](#)]
RICE V. EATON

Final Ruling: No appearance at the February 5, 2015 hearing is required.

The court having dismissed this Adversary Proceeding pursuant to Plaintiff's Motion to Dismiss (DCN: LR-4), **this Motion is dismissed without prejudice as moot.**

The Defendant has filed a Statement of Non-Opposition to the dismissal of the Adversary Proceeding without prejudice. This renders the Motion to Strike moot.

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 Strike having been presented to the

February 5, 2015 at 10:30 a.m.

court, the Adversary Proceeding having been previously dismissed, Defendant having filed a statement of Non-Opposition to the dismissal of the Adversary Proceeding, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed without prejudice.

12. [13-21878-E-7](#) THOMAS EATON MOTION TO DISMISS ADVERSARY
[14-2106](#) LR-2 PROCEEDING
RICE V. EATON 12-15-14 [[45](#)]

Final Ruling: No appearance at the February 5, 2015 hearing is required.

The motion appearing to be a erroneous duplicate docket entry, **this matter is removed from calendar.**

13. [14-29284-E-7](#) CHARLES MILLS MOTION TO EXTEND DEADLINE TO
KMT-1 Lucas B. Garcia FILE A COMPLAINT OBJECTING TO
DISCHARGEABILITY OF A DEBT
12-11-14 [[119](#)]

Final Ruling: No appearance at the February 5, 2015 hearing is required.

The court having already issued the Order Extending Deadline to File A Complaint to Determine Dischargeability of Debt (Dckt. 131) requested by this Motion, **the matter is removed from the calendar.**

14. [12-34690-E-7](#) FAUSTO VILLALOBOS
DNL-7 Scott J. Sagaria

MOTION TO EMPLOY DEAN CHAPMAN &
ASSOCIATES AS APPRAISER(S)
1-14-15 [[142](#)]

Tentative Ruling: The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers 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.

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)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter [7/11/12/13] Trustee,, parties requesting special notice, and Office of the United States Trustee on January 14, 2015. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----
-----.

The Motion to Employ is granted.

Chapter 7 Trustee, Thomas Aceituno, seeks to employ Dean Chapman & Associates ("Appraiser"), pursuant to Local Bankruptcy Rule 9014-1(f)(2) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Counsel to assist the Trustee in: (1) appraising the real property commonly known as 6301 Franklin Boulevard, Sacramento, California in order to determine just compensation for the taking of a portion of the property for the County of Sacramento's Franklin Boulevard Streetscape Improvement Project and (2) providing testimony related to the appraisal.

The Trustee argues that Appraiser's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate

regarding present taking of the Debtor's property. The agreement is a hybrid agreement consisting of (1) a flat fee of \$5,000.00 for services related to preparing the appraisal and (2) an hourly fee agreement for services relating to providing the testimony.

Michelle Sturtevant, a general real estate appraiser and member of Appraiser, testifies that the Appraiser will appraise the Debtor's property and provide a report of such. Ms. Sturtevant testifies she and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Appraiser, considering the declaration demonstrating that Appraiser does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Dean Chapman & Associates as appraiser for the Chapter 7 estate on the terms and conditions set forth in the Agreement filed as Exhibit A, Dckt. 145. The approval of the flat fee and hourly fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

REQUESTED COMPENSATION

The Trustee further requests that compensation for the Appraiser be a flat \$5,000.00 fee. Employment of professionals may be approved by the court to include the method of compensation. While the use of a lodestar billing method is the most common, flat fee for some professionals and contingent fee for attorneys are also used.

Here, the proposed fee arrangement is \$5,000.00 as a flat fee for the appraisal fo the 6301 Franklin Boulevard, Sacramento, California property. If there should be litigation in which testimony of the appraiser is required, that additional time will be billed at an hourly (not pre-authorized) rate.

The real property to be appraised is the subject of an eminent domain action with Sacramento County. Superior Court Case No. 34-2012-00135789. The Appraiser is to be hired in both this case and the related Ernest Villalobos case (12-33610), in which the existence of this asset had not been disclosed.

Each estate asserts a 50% interest in the Property.

In light of the circumstances in which the Trustee is facing an eminent domain action and the property cannot be presented to the market through a real estate broker, the hiring of an appraiser is appropriate. The Motion and support evidence present little basis for consideration of the \$5,000.00 flat fee amount. However, for this motion, and because any pre-approved fee amount is subject to review under 11 U.S.C. § 328, the \$5,000.00 amount does not shock the court.

Therefore, the court will grant the Motion approving the employment of the Appraiser, pursuant to the Agreement filed as Exhibit A, Dckt. 145, and the \$5,000.00 flat fee. The Estate retains all rights to recover 50% of the flat fee and other expenses from the Ernest Villaobos estate or holding or such 50% interest therefrom.

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 Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ Dean Chapman & Associates as appraiser for the Chapter 7 Trustee on the terms and conditions as set forth in the Employment Agreement filed as Exhibit A, Dckt. 145.

IT IS FURTHER ORDERED that compensation for the appraisal for the flat fee amount of \$5,000.00 is approved as part of the employment. Such flat fee amount is subject to the provisions of 11 U.S.C. § 328. The Estate in this case retains all rights to recover the proportionate share of the flat fee and other related fees from the Ernest Villalobos bankruptcy estate or other person holding an interest in the real property being appraised.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing

disbursement of a specific amount.

15. [14-91633-E-11](#) FWP-2 SOUZA PROPANE, INC.
David C. Johnston
- MOTION FOR ENTRY OF AN ORDER
AUTHORIZING EXCLUSIVE SUPPLY
AGREEMENT , MOTION FOR ENTRY OF
AN ORDER AUTHORIZING
POST-PETITION FINANCING AND
MOTION FOR ENTRY OF AN ORDER
AUTHORIZING OPTIONAL SERVICING
AGREEMENT O.S.T.
1-30-15 [[90](#)]

Tentative Ruling: The Motion For Entry of an Order Authorizing (1) Exclusive Supply Agreement; (2) Post-Petition Financing; and (3) Optional Servicing Agreement was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers 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.

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)(iii).

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on January 30, 2015. By the court's calculation, 6 days' notice was provided. The court issued an Order Shortening Time on February 2, 2015. Dckt. 98.

The Motion For Entry of an Order Authorizing (1) Exclusive Supply Agreement; (2) Post-Petition Financing; and (3) Optional Servicing Agreement was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

The Motion Order Authorizing (1) Exclusive Supply Agreement; (2) Post-Petition Financing; and (3) Optional Servicing Agreement **is granted on an interim basis, with final hearing on the motion to be conducted at 10:30 a.m. on March 5, 2015.**

David Flemmer, the Chapter 11 Trustee, ("Trustee") filed the instant Motion For Entry of an Order Authorizing (1) Exclusive Supply Agreement; (2) Post-Petition Financing; and (3) Optional Servicing Agreement on January 30, 2015. Dckt. 90. The Trustee is seeking an order authorizing the Trustee to enter into an agreement with Turner Gas Company ("Turner") that provides the following:

1. An exclusive supply agreement;
2. Secured post-petition financing from Turner to a maximum amount of \$100,000.00 (but no more than \$80,000.00 during the first 60 days); and
3. An optional servicing agreement for certain customers.

FN.1.

FN.1. The court notes that while the title of the Motion could appear to be seeking relief under multiple claims, the Motion does not run afoul Fed. R. Civ. P. 18 not being incorporated into contested matter practice by Fed. R. Bankr. P. 9014 because each mentioned item is part of the single claim for relief, the requested post-petition credit. The description in the title appears to be a "better practice" disclosure to highlight the complex credit transaction for all parties in interest

Under the proposed agreement,

- A. Turner will become the exclusive supplier for the Estates' propane needs to supply customers of the business which is in this Bankruptcy Estate for the next 60 days.
- B. The supply Agreement is subject to automatic renewals for successive 30-day periods unless either Turner or the Trustee terminates the Agreement on at least 30-days' notice to the other party.
- C. So long as the Agreement is in place, Turner will deliver as much propane as ordered by the Estate for \$.145 over the daily per gallon rate as set forth in the Propane Price Index for Martinez. The Trustee represents that this Agreement guarantees the Estate has access to a sufficient supply of propane while the Trustee stabilized the Debtor's operations and possible prepares to market the business.
- D. The Trustee will either pay cash-on-delivery ("COD") for the propane (to the extent sufficient cash flow exists) or, at the election of the Trustee, Turner will provide post-petition

secured financing to the Trustee, up to a maximum of \$100,000.00 (but no more than \$80,000.00 during the first 60 days) with such credit to be paid in full no later than 50 days after the particular load of propane is delivered.

The basic terms of this Agreement for post-petition credit are as follows:

- A. Lender: The lender providing credit to the Estate is Turner. According to the Debtor's schedules and filed UCC-1 financing statement, Turner is the senior lienholder on the Debtor's pre-petition accounts receivable, inventory, and equipment.
- B. Amount: The maximum amount of the financing will be \$100,000 (but no more than \$80,000.00 during the first 60 days).
- C. Terms: On the thirtieth (30th) day after delivery of a load of propane, not less than 25% of the outstanding amount owed for that delivery is due. On the 40th day after delivery of a load of propane, not less than a total of 50% of the outstanding amount owed for that delivery is due. All amounts owed for the delivery of a load will be due on the 50th day after delivery.
- D. Interest Rate: No interest will accrue on the unpaid balance of the financing absent default. In the event of a default, interest will accrue at the rate of 18% annum from the date of default (when the payment was due).
- E. Security Interests: All obligations owing pursuant to the financing will be secured by security interests in (I) the propane delivered by Turner under the Agreement; (ii) the post-petition cash payments and receivables resulting therefrom; and (iii) all of the Debtor's assets that secures Turner's pre-petition claim.
- F. Administrative Claim: All credit advanced under the financing (but no other obligations of the estate under the Agreement) shall constitute an administrative claim under the provisions of section 503(b) of the Bankruptcy Code, with superpriority pursuant to section 507(b) of the Bankruptcy Code.
- G. Carveout: The superpriorities granted to Turner shall be subject to a carveout for (I) fees payable to the United States Trustee; and (ii) the fees and expenses of any chapter 7 trustee to the extent approved by a final order or orders of the court.
- H. Relief from Stay: An event of default under the Agreement shall constitute sufficient cause for termination of the automatic stay and Turner can seek relief from stay upon ten (10) calendar days' notice to the Trustee.
- I. Court Approval: The Agreement is conditioned on, and subject to, the entry of an order authorizing the Trustee to enter into the Agreement.

Dckt. 93, Exhibit A.

In addition, the Agreement will provide Turner with the option of servicing certain designated customer accounts of the Debtor which have contracted for delivery of propane to their businesses. Specifically, Turner will deliver the propane and otherwise service the designated accounts customers and will pay the estate \$0.10 per gallon for the propane delivered unless the net profit margin is less than \$0.20, in which case the estate will receive less. The proposed servicing option will permit the Trustee to continue servicing the designated accounts while the Trustee stabilizes the Debtor's operations. The proposed term of the servicing option would be the same as the Agreement, although the parties could subsequently agree for the servicing option to continue on a stand-alone basis should the Agreement terminate.

APPLICABLE LAW

11 U.S.C. § 363

11 U.S.C. § 363 provides in relevant part:

- (b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--
 - (A) such sale or such lease is consistent with such policy; or
 - (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--
 - (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
 - (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.
- (c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or

1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

- (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--
 - (A) each entity that has an interest in such cash collateral consents; or
 - (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.
 - (3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.
 - (4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.
- (d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section--
- (1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and
 - (2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

11 U.S.C. § 364

Pursuant to 11 U.S.C. § 364:

February 5, 2015 at 10:30 a.m.

- Page 48 of 54 -

- (a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.
- (b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.
- (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt--
 - (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
 - (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
 - (3) secured by a junior lien on property of the estate that is subject to a lien.
- (d)
 - (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if--
 - (A) the trustee is unable to obtain such credit otherwise; and
 - (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.
 - (2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

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

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including

interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. Id. at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

DISCUSSION

Pursuant to 11 U.S.C. §§ 363 and 364, the Trustee sought and acquired a business agreement with Turner to continue the operation of the Debtor while the Trustee attempts to stabilize the Debtor. Under the relevant code sections, the court finds that the Trustee exercised sound business judgment in seeking the financing for the benefit of the estate, Debtor, and creditors. The terms of the Agreement provide for the exclusive supply of propane, post-petition financing, and an optional servicing agreement which would all lead to a benefit to the estate.

The court finds that the proposed Agreement, based on the unique facts and circumstances of this case, to be generally reasonable, with two exceptions. Turner is providing post-petition credit to the Estate. Turner is dealing with the Chapter 11 Trustee, the independent fiduciary of the estate (not the principal of the Debtor trying to fulfill the duties of a fiduciary debtor in possession). Turner is being granted a first priority lien on the post-petition accounts receivables created from selling the very gas that is being financed by Turner (as well as other post-petition accounts receivable).

Terms Not Authorized by the Court

In addition, the Motion states that in addition to the lien on the new accounts receivables and receipts from the sale of gas, "all of the Debtor's assets that secures' Turners's pre-petition claim." Motion pg. 5:23-24. The Motion then states, in another part, that authorization is requested to obtain credit pursuant to 11 U.S.C. § 362(d)(1) - the granting of a priming lien. The Motion does not clearly state whose lien will be primed.

Under these circumstances, the court concludes that the Trustee has not shown a proper basis for the granting of a lien on all of the pre-petition assets of the bankruptcy estate senior in priority to other creditors. Turner is being given a first priority lien on all post-petition accounts receivable and receipts. The credit Turner is providing is to buy gas **exclusively from Turner**. No other post-petition supplier is competing with Turner for payment of product being delivered to the Estate. There is no showing that a bona fide business reason exists for allowing Turner and the Trustee to prime other creditors. Both the Trustee and Turner should be focused on (1) operation of the business in a manner that the sale of gas generates sufficient revenues to pay for the product supplied and (2) making sure that the Trustee uses the proceeds from the sale of the gas purchased to pay for that gas (not divert the money to other expenses, with neither the Trustee nor Turner concerned since the post-petition creditor will be paid from other pre-petition creditor's collateral).

As discussed in Collier on Bankruptcy, Sixteenth Edition, ¶ 364.05,

"The purpose of such a priming lien is well illustrated by

Olde Prairie Block Owner, LLC, where the existing lien was well oversecured and a relatively small amount of additional capital was required to complete the project, which was expected to enhance its value substantially.³

...
The ability to prime an existing lien is extraordinary, and in addition to the requirement that the trustee be unable to otherwise obtain the credit,⁴ the trustee must provide adequate protection for the interest of the holder of the existing lien or obtain such lien holder's consent.⁵

Footnote 3. *In re Olde Prairie Block Owner, LLC*, 65 C.B.C.2d 986, 2011 Bankr. LEXIS 936 (Bankr. N.D. Ill. Mar. 11, 2011) , amended, 448 B.R. 482 (Bankr. N.D. Ill. 2011), appeal dismissed, *Centerpoint Props. Trust v. Olde Prairie Block Owner, LLC (In re Olde Prairie Block Owner, LLC)*, 2011 U.S. Dist. LEXIS 112826 (N.D. Ill. Sept. 30, 2011) .

Footnote 4. *Suntrust Bank v. Den-Mark Constr., Inc. (In re Den-Mark Constr., Inc.)*, 406 B.R. 683, 689-90 (E.D.N.C. 2009)

Footnote 5. See, e.g., *Resolution Trust Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 564-65, 30 C.B.C.2d 1034, 1048-49 (3d Cir. 1994) ; *In re First South Sav. Ass'n*, 820 F.2d 700, 17 C.B.C.2d 31 (5th Cir. 1987) ; *Snowshoe Co. v. Bray (In re Snowshoe Co.)*, 789 F.2d 1085 (4th Cir. 1986) .

-----"

The Trustee argues that the interests of the lien holders to be primed are adequately protected, presumably its because the credit will generate new accounts receivable which would not otherwise exist and will be used to pay the post-petition credit. This shows that the priming lien is not necessary or appropriate. The post-petition credit does not enhance or preserve the existing collateral, but creates only new post-petition assets in which the pre-petition creditors do not share.

The second demand of Turner and request of the Trustee is that Turner be granted not only a first priority lien on the post-petition accounts receivable and receipts, and not only have an administrative expense if for some reason the gas sold by Turner cannot be sold by the Estate, if the gas is sold the Estate does not obtain payment from the customers, or if the Estate obtains payment from the customer the Trustee diverts the monies to something other than paying for the gas which he purchased for the Estate under the court approved post-petition credit agreement. Each of these rationales, if accepted by the court, would warrant denying the motion and not authorizing the Trustee to enter into such a credit agreement with Turner.

The Trustee argues that giving the super-priority administrative expense is "appropriate" because that agreement is both limited to the outstanding amount of credit advanced by Turner under the Financing as well as subject to a carveout for U.S. Trustee fees and expenses of a chapter 7 trustee." Motion, pg. 9:12-14, Dckt. 90. Merely because the Trustee protects the fees of a fellow Trustee and the U.S. Trustee is not an appropriate basis

for causing all of the other administrative expense claimants (including the Chapter 11 Trustee, the professionals he is hiring, and all other Chapter 7 administrative expense claimants).

The use of this special advantage given a post-petition lender is discussed in Collier on Bankruptcy, Sixteenth Edition, ¶ 3-264, as follows,

"The court may authorize borrowing with a priority over "any or all" administrative expenses. A "superpriority" claim is not, however, properly treated as an administrative expense, because it has priority over administrative expenses and is permitted only if the debtor "is unable to obtain unsecured credit allowable ... as an administrative expense." ⁸ When such borrowing is authorized, the extent of the priority must be dealt with specifically in the court order and the notice of the hearing in order to provide appropriate protection to other priority claimants. ⁹ The order should be clear about whether the priority given is over all administrative claims and section 507(b) claims. Borrowing under section 364(c)(1), of course, remains subordinate to both preexisting secured claims and charges against secured creditors' collateral under section 506(c). ¹⁰

Footnote 8. See *In re Mayco Plastics, Inc.* 379 B.R. 691 (Bankr. E.D. Mich. 2008) (post-petition lender with superpriority claim under section 364(c)(1) lacked standing to object to confirmation as an administrative expense claimant under section 1129(a)(9)(A)); see also *Official Comm. Unsecured Creditors v. Bank of Am., N.A. (In re Fleetwood Enters.)*, 471 B.R. 319 (B.A.P. 9th Cir. 2012) (holding court-authorized superpriority claim for lender's commitment fee under 364(c)(1) was not an administrative claim requiring lenders to prove their claim qualified independently under section 503(b) as an actual and necessary expense of preserving the estate); *In re American Resources Mgmt. Corp.*, 51 B.R. 713, 719 (Bankr. D. Utah 1985) ("The superiority in rank and position of Section 364(c)(1) claims does not require that all such claims be paid in full before any part of a Section 503(b) claim may be paid.").

Footnote 9. *In re Sobiech*, 125 B.R. 110 (Bankr. S.D.N.Y.) , aff'd, 131 B.R. 917 (S.D.N.Y. 1991) . The extent of the priority (or lien) is limited to the credit extension approved by the court. *William B. Schnach Retirement Trust v. Unified Capital Corp. (In re Bono Dev., Inc.)*, 8 F.3d 720, 29 C.B.C.2d 1634 (10th Cir. 1993) .

10. See *Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp. (In re Debbie Reynolds Hotel & Casino, Inc.)*, 255 F.3d 1061 (9th Cir. 2001).

-----"
The alternative protections to be granted a post-petition lender under 11 U.S.C. § 362(c) and (d) are not mutually exclusive. However, neither are they routinely given without regard to the impact on the estate and whether such demands are reasonably requested by the proposed lender. Here, if the court accepts as true the representations of the Trustee and the bona fides of Turner in entering into a good faith credit transaction by which Turner obtains the exclusive right to sell gas to the bankruptcy estate, sets the price for the gas, provides for an 18% interest rate if the Trustee fails to pay for the gas purchased (which high interest rate insures that an independent fiduciary of the estate will not divert monies to other purposes), gives Turner a first priority lien on the gas itself before it is resold and all accounts receivable

and receipts therefrom, and a junior lien on all of the assets subject to Turner's pre-petition lien, there is no reason for authorizing the super-priority administrative expense. As with the priming lien, such authorization could be misperceived as a green light for the Trustee and Turner to ignore the normal business terms, Turner not properly act to protect its rights, and allow for the "wasting" of estate assets to the detriment of other creditors.

The court also notes that Turner, in providing this post-petition credit, secured by a senior lien against the gas sold (before it is resold to the customers), the post-petition accounts receivable, all post-petition receipts, and a junior lien on all other estate assets, is protected in the bosom of the bankruptcy process. No other creditors can be suing the estate, obtain prejudgment attachments, or leverage desperate debtors to divert monies to keep the doors open one more day (when everything will magically become "ok"). There is no debtor who can gamble with no downside by diverting Turner's collateral hoping that the next day will bring the big score and the debtor can make a lot of money (or divert the monies to an offshore account which would be outside the reach of Turner). Turner is protected by the automatic stay and the post-petition senior lien. Turner is protected by having an independent fiduciary (the Chapter 11 Trustee) who cannot divert monies or mishandle Turner's collateral. Hanging the 18% interest rate over the Trustee's head is a huge "incentive" to make sure that the Trustee pays the post-petition credit rather than explaining to other creditors and the court how the money from the sale of the gas to timely pay the bill was spent elsewhere and there is a corresponding benefit to paying Turner 18% interest from the remaining accounts receivable.

The court grants the Motion on an interim basis, authorizing the extension of credit on the terms requested with two modifications,

- A. The lien granted on the pre-petition assets is pursuant to 11 U.S.C. § 364(c)(3), with the perfection date being December 17, 2014, the date the petition was filed in this bankruptcy case. No new security agreement or UCC Financing Statement is required, with the court approving the grant of security by the Trustee to be on the terms of and by the pre-petition Security Agreement and perfected by the pre-petition UCC Financing Statement (with the priority of the lien for the post-petition credit obligation being December 17, 2014).
- B. The court does not authorize and does not grant Turner a super-priority administrative expense pursuant to 11 U.S.C. § 364(c)(1).

CHAMBERS PREPARED ORDER

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

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

The Motion For Entry of an Order Authorizing (1) Exclusive Supply Agreement; (2) Post-Petition Financing; and (3) Optional Servicing Agreement filed by David Flemmer, Chapter

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

IT IS ORDERED that the Motion is granted and the Trustee is authorized to enter into the exclusive supply agreement, post-petition financing, and optional servicing agreement with Turner Gas Company pursuant to the terms of the agreement, Exhibit A, Dckt. 93, except as expressly provided in this Order.

IT IS FURTHER ORDERED that the court,

- A. Grants Turner Gas a lien on pre-petition assets pursuant to 11 U.S.C. § 364(c)(3), with the perfection date being December 17, 2014, the date the petition was filed in this bankruptcy case. No new security agreement or UCC Financing Statement is required, with the court approving the grant of security by the Trustee to be on the terms of and by the pre-petition Security Agreement and perfected by the pre-petition UCC Financing Statement (with the priority of the lien for the post-petition credit obligation being December 17, 2014).
- B. The court does not authorize and Turner Gas is not given a lien in the pre-petition assets of the estate pursuant to 11 U.S.C. § 364(d).
- C. The court does not authorize and Turner Gas is not granted a super-priority administrative expense pursuant to 11 U.S.C. § 364(c)(1).

IT IS FURTHER ORDERED that the Authorization to Obtain such credit pursuant to the Agreement is approved on an interim basis for credit extended through and including March 31, 2015, to allow for the court to conduct a final hearing on this Motion. Failure of the court to authorize the use of credit pursuant to the terms of the Agreement does not alter or limit the rights, interests, and liens of Turner Gas or the Trustee under the Agreement or applicable law for credit

IT IS FURTHER ORDERED the Final Hearing on the Motion shall be conducted at 10:30 a.m. on March 5, 2015 at the Modesto Division Courthouse. Written Oppositions, if any, to the Motion shall be filed and served on or before February 19, 2015, and Replies, if any, filed and served on or before February 26, 2015.