UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

February 6, 2020 at 10:30 a.m.

1.	**19-91012-E-7** **RDR-1**	**KATHLEEN MILBURN** **Robert Rodriguez**	**MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13** **1-18-20 [32]**

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

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and Office of the United States Trustee on January 18, 2020. By the court's calculation, 19 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice).

With respect to the short notice given, at the hearing, Counsel for Debtor **xxxxxxxxxx**

The Motion to Convert has not been properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, **----------**.

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

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

INSUFFICIENT NOTICE OF MOTION

Debtor provided 19 days' notice of this Motion. Federal Rule of Bankruptcy Procedure 2002(a)(4) requires a minimum of twenty-one days' notice of the hearing. Applicant has provided two (2) fewer days than the minimum. Therefore, the Motion is denied without prejudice.

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 to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 filed by Kathleen Lynore Milburn ("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 is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF APPLICANT PROVIDES SUFFICIENT NOTICE.

~~**The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is granted.**~~

Debtor asserts that the case should be converted because her case has not been previously converted and she is eligible for relief under the chapter for which conversion is requested.

Here, Debtor's case has not been converted previously, and Debtor qualifies for relief under Chapter 13. Notice was provided to the Chapter 7 Trustee, Office of the United States Trustee, and other interested parties. No opposition has been filed.

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 Kathleen Lynore Milburn ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Convert is granted, and the case is converted to a proceeding under Chapter 13 of Title 11, United States Code.

2.	**10-90281-E-7** **ADJ-8**	**LORRAINE/GARY ERWIN** **Martha Passalaqua**	**MOTION FOR COMPENSATION FOR ATHERTON & ASSOCIATES, LLP, ACCOUNTANT(S)** **12-30-19 [197]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 30, 2019. By the court's calculation, 38 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Allowance of Professional Fees is granted.

Atherton & Associates, LLP, Certified Public Accounts, the Accountant ("Applicant") for Michael D. McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period April 13, 2019, through April 24, 2019. The order of the court approving employment of Applicant was entered on April 29, 2019. Dckt. 197. Applicant requests fees in the amount of $500.00.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include assisting the Trustee in administration of this case by advising the Trustee of the income tax consequences, if any, related to the bankruptcy estate's receipt of settlement funds due to Debtor's personal injury claim. The Estate has $116,338.86 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Correspondence: Applicant spent 1.10 hours in this category. Applicant corresponded with the Trustee regarding income tax consequences of settlement.

Tax Preparation: Applicant spent 0.60 hours in this category. Applicant reviewed documents to determine if the subject settlement was a taxable event.

Fee Application: Applicant spent 0.30 hours in this category. Applicant prepared the time records (divided by project billing) and initial draft application for this fee application.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Maria Stokman	2.00	$250.00.00	$500.00

	0	$0.00	$0.00
Total Fees for Period of Application			$500.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $500.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees $500.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Atherton & Associates, LLP, Certified Public Accountants ("Applicant"), Accountant for Michael D. McGranahan, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Atherton & Associates, LLP, Certified Public Accountants is allowed the following fees and expenses as a professional of the Estate:
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> Atherton & Associates, LLP, Certified Public Accountants, Professional employed by the Chapter 7 Trustee
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> Fees in the amount of $500.00,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

3. 10-90281-E-7 ADJ-8 | **LORRAINE/GARY ERWIN** **Martha Passalaqua** | **MOTION FOR COMPENSATION FOR ANTHONY D. JOHNSTON, TRUSTEES ATTORNEY(S)** **1-8-20 [204]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 8, 2020. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, **----------**.

The Motion for Allowance of Professional Fees is granted.

Anthony D. Johnston of Fores, Macko, Johnston, Inc., the Attorney ("Applicant") for Michael D. McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 27, 2017, through January 8, 2020. The order of the court approving employment of Applicant was entered on September 1, 2017. Dckt. 143. Applicant requests fees in the amount of $9,047.50 and costs in the amount of $815.68.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

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

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

A review of the application shows that Applicant's services for the Estate include general case administration; preparation of employment application for special counsel; working with special counsel which resulted in a confidential settlement agreement; preparation the motion to approve settlement and motion to file the confidential agreement under seal; preparation of motion to approve compensation for special counsel; working with special counsel to confirm liens and other expenses; and preparation of Applicant's employment and fee applications. The Estate has $116,338.86 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 15.1 hours in this category. Applicant reviewed schedules, creditor claims, and exemptions; corresponded with Trustee's accountant regarding taxation of the settlement proceeds; prepared employment application and compensation approval for Trustee's special counsel; prepared the present application and all related documents; and anticipates attending the hearing on the present motion.

Litigation: Applicant spent 17.8 hours in this category. Applicant reviewed the settlement agreement for the personal injury claim and prepared addendum for Trustee to join the settlement; prepared ex-parte application to file confidential settlement agreement; worked with special counsel and prepared motion to approve settlement; and worked with special counsel to reconcile the medical liens and related expenses.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Anthony D. Johnston	32.90	$275.00	$9,047.50

	0	$0.00	$0.00
Total Fees for Period of Application			$9,047.50

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $815.68 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copies	N/A	$455.20
Postage		$360.48
		$0.00
Total Costs Requested in Application		$815.68

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $9,047.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate / Plan Funds in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $815.68 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees $9,047.50
Costs and Expenses $815.68

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Anthony D. Johnston of Fores, Macko, Johnston, Inc. ("Applicant"), Attorney for Michael D. McGranahan, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Fores, Macko, Johnston, Inc. is allowed the following fees and expenses as a professional of the Estate:
>
> Fores, Macko, Johnston, Inc., Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $9,047.50
> Expenses in the amount of $815.68,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

4.	**19-90400-E-7** **SSA-1**	**JUSTAN JOHNSON** **Steve Altman**	**CONTINUED MOTION TO DISMISS CASE** **8-9-19 [24]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Trustee's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 9, 2019. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss the Case is xxxxx.

JANUARY 23, 2020 HEARING

The parties reported that this matter is moving to a conclusion, with the Trustee and Debtor to structure the judicial methodology for the post dismissal documentation of the Trustee that the claims have been paid by the Debtor through the refinance and that documenting the allowance of Trustee and professional fees.

The parties requested and the court that the discharge of the Debtor's entered until after April 30, 2020.

October 17, 2019 Hearing Continuance

At the hearing, Counsel for the Debtor reported that the Parties want to keep this case open, with the hearing continued to January 2019. The Debtor will not be inheriting the property until December 2019. There is also a judgement obtained by a collection agency and the Debtor is working to make sure there is not an abstract of judgment that would complicate the financing to pay all creditors in full.

REVIEW OF MOTION

The debtor, Justan A. Johnson ("Debtor"), filed this Motion seeking to dismiss the Chapter 7 case pursuant to 11 U.S.C. § 707. Debtor's reason for wanting dismissal is straightforward: in less than a month after filing this case, Debtor's grandmother passed away, and Debtor learned he will inherit real property valued at approximately $300,000.00. Declaration, Dckt. 28.

The Debtor argues that with this significant change in financial circumstances, Debtor can procure a secured loan for roughly $50,000.00 to pay all claims in this case, as well as any administrative expenses the Chapter 7 trustee has incurred thus far.

In support of the Motion, Debtor filed the Declaration of Chris Harringfeld, the president and owner of California Mortgage Associates. Declaration, Dckt. 27. Harringfeld testifies that it will be difficult to obtain a loan on the Debtor's new property while in a Chapter 7, and that even in a chapter 13 it would take approximately one year before Debtor is eligible for a loan. *Id*.

CHAPTER 7 TRUSTEE'S OPPOSITION

Garry Farrar, the Chapter 7 Trustee ("Trustee") filed an Opposition on September 5, 2019. Dckt. 30. Trustee argues that despite the Debtor's representations, there is nothing requiring Debtor to pay creditors in the event the case is dismissed.

Trustee argues further that despite Debtor's arguments, Debtor could receive a loan despite being in bankruptcy. The Declaration of Trustee provides testimony that he would be able to get a loan secured by the property for $50,000.00 at 9.75% APR and 3 points over a 10 year term. Declaration, Dckt. 31.

Trustee concludes that allowing him to administer the property would pay all claims in this case and avoid "plain legal prejudice" to creditors.

DEBTOR'S REPLY

Debtor filed a Reply on September 11, 2019. Dckt. 34. Debtor argues the following:

1. Information about a potential loan brought in through Trustee's Exhibit B is inadmissable hearsay.

2. The loan proposed by Trustee is more akin to a "hard money loan."

3. There is no prejudice to any creditor through dismissal of the case because creditors are free to assert their rights outside of bankruptcy. No creditor has filed an opposition to the Motion.

4. Debtor wishes to proceed outside of bankruptcy to preserve his credit and to avoid further administrative costs.

SEPTEMBER 19, 2019 HEARING

At the September 19, 2019 hearing, the parties requested the hearing be continued so they can work out a stipulated order to address the Trustee's concerns. Civil Minutes, Dckt. 38.

DISCUSSION

The court may dismiss a case under Chapter 7 only after notice and a hearing and only for cause. 11 U.S.C. § 707. Colliers provides the following discussion regarding voluntary dismissal:

> When the debtor seeks dismissal of a voluntary case, the relevance of the "cause" requirement has been questioned. Most cases, however, seem to require some cause for dismissal even in this situation, although the cause may simply be that dismissal is in the best interest of the debtor and not prejudicial to creditors. The debtor's best interest lies generally in securing an effective fresh start upon discharge and in the reduction of administrative expenses, leaving resources to work out debts; for creditors, if delay is said to have prejudiced them, the court must determine whether, as section 707(a) provides, the delay has been unreasonable. Thus, for example, the Court of Appeals for the Second Circuit, in Smith v. Geltzer, held that the bankruptcy court must consider whether dismissal would benefit creditors and whether it would enable the debtor to secure an effective fresh start, as well as the costs to the debtor, both in administrative expenses and the possible harm to a debtor's ability to obtain credit or seek bankruptcy relief in the future.
>
> When the debtor seeks dismissal, courts must take care to assure that creditors will not be prejudiced by a dismissal. Debtors are not generally permitted to dismiss cases over the objections of creditors or the trustee in order to refile to gain the benefit of exemptions that had been improperly claimed in the first case. Some courts have refused dismissal of a voluntary petition when the primary purpose was to file a fresh petition that would include debts incurred since the petition sought to be dismissed was filed. Similarly, dismissal may be denied when it is sought because property has been obtained or is expected that could satisfy the debtor's debts, to transfer the case to a different district, to render dischargeable a previously nondischargeable debt, or because fraud on the part of the debtor is discovered. The fact that the debtor has changed his or her mind about invoking bankruptcy jurisdiction to seek relief from debts and giving up the Seventh Amendment right to a jury trial on a claim that has passed to the bankruptcy estate is not, by itself, cause for dismissal.
>
> Generally, it has been held that the trustee has standing to object on behalf of the unsecured prepetition creditors of the debtor, even if no creditor objects. However, some courts have held that the trustee may object only for the purpose of securing the trustee's own costs and expenses.

6 Collier on Bankruptcy P 707.03 (16th 2019).

Here, the cause for dismissal is arguably that payment of claims would be easier and cheaper outside of bankruptcy given Debtor's post-petition change in circumstances. This argument is well-taken.

Dismissing the bankruptcy would reduce administrative expense, avoid more significant detriment to Debtor's credit, and possibly allow for more favorable loan terms.

At the same time, allowing Debtor to dismiss the case would permit Debtor to increase the delay and expense to creditors before recovering on their claims (in the event creditors are forced to seek enforcement themselves, Debtor deciding not to voluntarily pay claims as represented).

Debtor commenced this case with the May 1, 2019 *pro se* filing of his Voluntary Petition. On Schedule D Debtor lists one creditor with a claim of ($13,384.00) secured by Debtor's vehicle stated to have a value of $14,000.00. Dckt. 1 at 19.

Debtor lists having general unsecured claims of ($30,447.00), of which ($17,433) is Capital Bank for credit card debt, ($5,751.00) to Chase Bank for credit card debt, and ($2,485.00) to Chase Card for credit card debt. Schedule D/E, *Id.* at 20-21. Thus, at least 84% of Debtor's unsecured obligations are for credit card debt.

Going to Schedule I Debtor listing having monthly take home income of $2,735. *Id.* at 26-27. On Schedule J Debtor lists having ($2,842.00) in month obligations, leaving him a negative ($106.21) a month after his reasonable and necessary expenses. This includes ($700) a month for rent.

In his Reply Debtor bemoans that the loan the trustee suggests is a "hard money loan" and not reasonable. Given Debtor's income, one questions what other loan he could obtain. This "get a loan and pay creditors" solution is the one given to the Debtor why the case should be dismissed and creditors be left to Debtor voluntarily paying everyone.

The Trustee filed a Reply Declaration to the Reply filed by the Debtor to the opposition addressing the lack of a declaration by a representative of the hard money lender. Dckt. 36. This provides confirmation of a loan to Debtor.

It appears that given Debtor having engaged experienced counsel and there being an experienced, reasonable Chapter 7 Trustee, a possible resolution based on a realistic repayment method could be established. It may be, if the Debtor investigates other lenders that his post-bankruptcy dismissal rate may be better, but only slightly better, given his income and expenses. It may be a year or two after dismissal he could refinance.

Or it may be that a lien or other encumbrance can be placed on the property to insure that the monies from the property, loan or sale, will be used to pay the claims that would be paid through this bankruptcy case filed by Debtor.

5. **19-90110-E-7** **CAMPBELL WINGS, INC.** **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH KEITH KEESLING**
ADJ-4 **Reno Fernandez** **12-26-19 [78]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Trustee's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on December 26, 2019. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Approval of Compromise is granted.

Irma C. Edmonds, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Keith Keesling, individually and as Successor Trustee of the Keesling Family Trust, and the Voytek Family Investment Company, LLC ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the rights of Campbell Wings, Inc. ("Debtor") in a civil case filed in Santa Clara Superior Court Case Number 18CV-330265 against Settlor.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 82):

A. The Settlor agrees to pay the Trustee for the benefit of the Debtor's estate $5,500 for Settling the 2018 Case and a general release.

B. The Settlor shall prepare all documents concerning or implementing this settlement.

C. The payment will occur within 10 days of the signing of the Agreement.

D. Within 10 days of the date the Settling Parties deliver the Settlement Sum of $5,500 to the Trustee, the Trustee's attorney will file a Motion and seek to have the Motion heard on the Bankruptcy Court's next available calendar for a hearing for such motions.

E. Within 10 days of the date the Approval Order becomes final, the parties will file a stipulation with instructions to have the State Court Case against Settlor dismissed.

F. The Trustee will not use or disburse the Settlement Sum for any purpose until (a) this Agreement is approved by the Bankruptcy Court and (b) the State Court Case against the Settlor is dismissed. Upon the occurrence of both of these events the Trustee shall be authorized to transfer the Settlement Sum to the Trustee's main account for the Debtor's estate.

G. The Agreement shall become effective only (a) if the Bankruptcy Court order approving of the Settlement is entered and it becomes final and non-appealable and (b) the Dismissal is filed or the Settlor are otherwise dismissed in the State Court action.

H. Upon the effective date, the Trustee, on behalf of the Debtor's estate, will release and forever discharge the Settling parties from any and all claims that Debtor has asserted or could assert against the Settling Parties in the State Court Case.

I. Upon the effective date, each Settling Defendant releases and forever discharges the Debtor and the Trustee from any and all claims, that Settling Defendant has asserted or could assert against the Debtor in the State Court Case.

J. The Agreement shall be binding on the Parties' predecessors, successors, and/or assigns.

K. No waiver or modification of any provision of the Agreement is valid unless in writing and signed by all parties to this Agreement.

L. The Parties irrevocably consent to the Bankruptcy Court's jurisdiction with respect to any action to approve or enforce this Agreement and expressly waive any right to commence any action in any other forum or to contest the Bankruptcy Court's jurisdiction. This Agreement shall be governed by the laws of the State of California, except with respect to matters as to which federal law is applicable without regard to any conflicts of law principles

M. It is understood and agreed that payment under this Agreement is not to be construed as an admission of liability on the part of either party.

N. The Parties are each responsible for their/its own costs and attorneys' fees incurred in connection with this Agreement.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met.

Under the terms of the settlement, all claims of the Estate, including any pre-petition claims of 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 Trustee asserts the probability of success is "small to non-existent" because Debtor operated the restaurant beginning in 2007 and should have known of the uses of the parking lot by the Dorsa parties from the start of the lease. Additionally, Trustee states that Debtor was "in control" of the property while the dispute over the easement rights arose.

The Trustee rejected the unexpired terms of the Lease so the Estate does not have an interest in the property or in the easements. Further, the Trustee does not believe this case can be "realistically prosecute[d]."

Thus, the probability of success for this claim is unlikely.

Difficulties in Collection

Without the Agreement, the Estate would have to pursue litigation against the Settlor. This would incur substantial attorney's fees that would outweigh the damages that could be collected.

Expense, Inconvenience, and Delay of Continued Litigation

Trustee contends the 2018 Case involves complicated facts and intricate legal issues, and the expenses that would be incurred to litigate these claims would prove too burdensome on the Estate. As the Trustee states, "[t]he Estate does not have the funds to finance litigation."

While a creditor, Mr. Rodarakis, stated he believed the 2018 Case had merit he also recognized through his experience as a litigator that Debtor would incur substantial legal fees to continue the litigation. Declaration, Dckt. 81.

The Agreement avoids expense, inconvenience and delay and most likely provides a larger return than if the Estate pursued the 2018 Case.

Paramount Interest of Creditors

Trustee asserts it is preferable for creditors to have the certainty of recovery under the Agreement rather than proceed with costly and uncertain litigation. That litigation would only increase expenses and not guarantee a successful result to creditors. Rather, the Agreement provides an efficient and cost effective resolution for creditors.

The Agreement combats the costs and uncertainty that will be faced in litigation. This Agreement provides funds for the Estate to pay creditors.

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it avoids the costs of litigation and is a business decision consistent with the Trustee's analysis of the probability of success for the Estate. Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Irma C. Edmonds, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Keith Keesling, individually and as Successor Trustee of the Keesling Family Trust, and the Voytek Family Investment Company, LLC ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms

set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 82).

6.	**19-90159-E-11** **RAC-3**	**BARRENO ENTERPRISES, LLC** **David Johnston**	**MOTION FOR COMPENSATION FOR RONALD A CLIFFORD, TRUSTEES ATTORNEY(S)** **1-9-20 [116]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on January 9, 2020. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is xxxxx.

Blakeley LLP, the Attorney ("Applicant") for David M. Sousa, the Chapter 11 Trustee ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period September 4, 2019, through December 27, 2019. The order of the court approving employment of Applicant was entered on September 11, 2019. Dckt. 60. Applicant requests fees in the amount of $25,707.00 and costs in the amount of $780.80.

U.S. TRUSTEE'S OPPOSITION

Tracy Hope Davis, U.S. Trustee ("U.S. Trustee") filed an opposition on January 23, 2020. Dckt. 125. U.S. Trustee requests that the fees be reduced or disallowed and awarded on an interim basis, asserting:

1. The request includes $6,551.00 for services rendered in connection with a motion to sell the estate's interest in certain assets for which the court raised significant concerns about the motion itself and related pleadings.

2. The request includes $987.50 for services described in vague time entries.

3. It is too early to fully assess the reasonableness of Applicant's fee request.

APPLICANT'S REPLY

Applicant filed a Reply on January 30, 2020. Dckt. 127. Applicant replies as follows:

1. The travel billing of 3.5 hours each way is reasonable because Applicant's reason for traveling for the meeting with Trustee and the asset buyer, and attending the hearing were important to the case. Furthermore, Applicant has only billed for this single instance of travel.

2. As for the nine (9) time entries objected to by U.S. Trustee totaling $987.50 because they were vague, Applicant clarifies and provides further descriptions for each of the nine (9) entries:

Date of Entry	Conversation With	Conversation About	Time Spent
9/4/2019	Chapter 11 Trustee	Appointment as Chapter 11 Trustee, current status of the case, and immediate next steps.	.40
9/5/2019	Chapter 11 Trustee	BLLP provided the Chapter 11 Trustee with the personal bankruptcy petition of the Debtor's insider.	.20
9/5/2019	Chapter 11 Trustee	Call with Chapter 11 Trustee to discuss the UCC-1 filings against the Debtor, including one as against the Debtor's use of cash.	.40
9/6/2019	Chapter 11 Trustee	Exchanged emails with the Chapter 11 Trustee regarding the response of lien claimant that filed the UCC-1.	.20
9/13/2019	Chapter 11 Trustee	Exchanged emails with the Chapter 11 Trustee regarding the operating reports that needed to be filed.	.20
10/2/2019	Chapter 11 Trustee	Exchanged emails with Chapter 11 Trustee regarding the sale of the Debtor's assets and the Debtor's counsel's motion to request fees from prior case.	.30

11/1/2019	Chapter 11 Trustee	Exchanged emails with the Chapter 11 Trustee regarding availability for a meeting to discuss the sale of assets, and a complaint filed against the Debtor by a personal injury claimant.	.30
11/7/2019	Chapter 11 Trustee	Call with the Chapter 11 Trustee regarding the sale of assets, operating reports filed in the case, and the exit strategy for the case.	.30
11/8/2019	Chapter 11 Trustee	Exchanged emails with the Chapter 11 Trustee regarding the asset sale.	.30

3. The filed Application is titled "First Interim" Application.

4. Regarding the Motion to Sell, Applicant argues that even though the court had issues with the motion, their effort resulted in negotiating, documenting, and closing a sale that kept a business open, maintained a customer for several of Debtor's creditors, maintained employees' jobs, resulted in the payment of secured claims related to sold collateral, and ensured that all post-petition administrative claims are paid.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include general case administration, analysis of secured claims, asset analysis and recovery, employment of professionals, asset disposition, bankruptcy litigation, and claims administration and objections. The court finds the services were beneficial to Client and the Estate and were reasonable.

DISCUSSION

U.S. Trustee's objections are well taken. The court indeed had concerns regarding the deficiencies present in the Motion to Sell and related documents filed by the Applicant on November 12, 2019. Dckt. 86.

The concerns were addressed and discussed at length at the hearing. Dckt. 105. The court concerns began with the Motion sought an order authorizing to sell property of the Debtor, which entity continued to exist post-petition and is a party in this Bankruptcy Case, and not property of the Bankruptcy Estate.

The Motion did not identify assets that were requested to be sold or otherwise provide the grounds with particularity (Fed. R. Bankr. P. 9013) that are required of motions filed in bankruptcy cases.

The Declaration prepared for and signed by the Chapter 11 Trustee expressly stated, under penalty of perjury, that the Trustee was seeking to sell assets of the Debtor. The Trustee then testified that he was seeking to sell these assets subject to liens.

The Exhibits filed with the Motion were not all correctly identified. Some of the exhibits were not authenticated.

The Purchase Agreement expressly stated that the Trustee would be selling only the "Debtor's" interest in the assets. The Purchase Agreement also stated that the assets were to be sold free and clear of liens, but no such relief was requested in the Motion.

See Civil Minutes, Dckt. 105 which addresses the above in detail.

While the court allowed counsel for the Trustee to make oral amendments to the Motion and the sale was approved, that does not rectify the grossly insufficient pleadings and the Trustee's presentation of unauthenticated exhibits. In responding to Applicant's defense of the Motion and supporting pleadings, the court stated:

> Counsel for the Trustee's response that attorneys and trustee commonly refer to property of the bankruptcy estate as "Debtor's Assets" was not persuasive. Counsel's statement that he used a twenty-four page purchase agreement for a relatively simple sale because he was comfortable with it was not credible.
>
> The court also did not find appropriate Counsel's argument that "all the other judges" allow Counsel and the Trustee to refer to property of the bankruptcy estate, allow Counsel and the Trustee to not comply with Federal Rule of Bankruptcy Procedure 9013, allow Counsel and the Trustee to ignore Federal Rules of Evidence 602 and have the Trustee provide testimony under penalty of perjury without having any personal knowledge of the facts and the truthfulness of the facts.

Civil Minutes, p. 2; Dckt. 105.

With respect to the complex Purchase Agreement, it appears to be a "form" which was used to "fit" the transactions, incorrect references and all.

Though the Motion to Sell was ultimately granted and Applicant is entitled to reasonable fees for providing legal services relating to the sale, both motion and the contract, such fees must be reasonable for the services actually provided.

In reviewing Exhibit 1, the breakdown of time and charges for services provided by Applicant, the court identifies the following as relating to the sale Motion, Agreement, and services leading up thereto.

10/23/2019 RAC	Review revised offer to purchase assets. (.3) Review timing of hearing on a sale motion. (.2) Research into ownership of the franchise agreement (.4) and the leasehold interest (.4). Begin drafting the asset purchase agreement for the Merced location. (3.0)	4.30 1,698.50 395.00/hr
10/28/2019 RAC	Complete the asset purchase agreement and forward to D. Sousa	2.40 948.00 395.00/hr
11/5/2019 VT	Begun drafted motion to sale assets and related documents	3.50 507.50 145.00/hr
11/12/2019 RAC	Finalize the notice of the motion to sell substantially all of the debtor's assets (.3), the motion to sell (.2), the declaration of D. Sousa in support of the sale motion (.2), the memorandum of points and authorities (.3), and the exhibits in support (.3). Forward filed sale docs to the trustee. (.1)	1.40 553.00 395.00/hr
12/16/2019 RAC	Draft supplemental declaration of D. Sousa regarding the sale motion. (.4) Draft email to D. Sousa regarding the matter. (.1)	0.50 197.50 395.00/hr
12/18/2019 RAC	Travel to sale hearing.	3.50 1,382.50 395.00/hr
12/19/2019 RAC	Meeting with D. Sousa and A. Barreno regarding the sale.	0.60 237.00 395.00/hr
	Finalize sale order.	0.30 118.50 395.00/hr
	Travel from sale hearing.	3.50 1,382.50 395.00/hr
	Attend sale hearing.	0.50 197.50 395.00/hr
12/20/2019 VT	Draft order regarding sales motion.	0.70 101.50 145.00/hr
12/24/2019 RAC	Revise the order granting the sale motion for filing. (.7) Review the exhibits to the order. (.6) Review local rules as to sale proceed disposition. (.2)	1.50 592.50 395.00/hr

The above fees totaling $7,916.50 relate only to the drafting of the Motion to Sell, supporting pleadings, and Purchase Agreement. There is additional time billed for negotiations, communications, and post-order services provided in closing the sale. The court does not reach out to tweak those fees, as the court's concerns are focused on the grossly inadequate Motion pleadings and that such Motion could have been denied without prejudice and counsel would have to start over and be paid $0.00 for the original Motion and Agreement.

The value of the services are not representative of a $395.00 an hour billing rate. Quite possibly, it is the $145.00 an hour rate of Mr. Trang or Mr. White that would be proper. Before adjusting such fee billing rate, the court looks to the charges for the hearing.

Applicant is an attorney located in Irvine, California. Using Google Maps, that is computed to be 357 miles from Modesto, California where the courthouse is located. Applicant made the determination that he could properly provide legal services to a Chapter 11 bankruptcy trustee from 357 miles away. The Chapter 11 Trustee made the determination in fulfilling his duties as the Trustee and as a fiduciary to the Bankruptcy Estate that this case supported such employment of an attorney 357 miles away from the courthouse.

At this juncture the judge in this case makes it clear that he does not believe in a parochial, closed, "only the local guys" get hired as attorneys in "our cases" attitude. As an attorney before coming on the bench, the judge represented clients in bankruptcy and other cases throughout the state of California. For each of those such representation, fees, and expenses were reasonable and the clients paid the bills.

In the late 20th Century and now in the 21st Century, such more remote representation can be successfully (and profitably) be done due to the internet, PACER, and the ability to make phone appearances for routine or "easy" matters. When travel is required, it can be cost effectively done and the attorney billing for a travel date rate (seven or eight hours of time) rather than billing all of the day (and night) while sitting in a train, plane or car.

For the December 19, 2019 hearing on the Motion to Sell, Applicant bills the Trustee and bankruptcy estate for seven hours of travel time to and from the Courthouse, for a total of $2,765.00 in travel time, with one day of travel being on December 18, 2019 and the other on December 19, 2019.

No expenses are sought for the method of travel, whether airfare, or driving. Given the distance between Irvine and Modesto, it appears that this would be air travel and drive time to and from the Courthouse in Modesto.

If necessary, such travel time, and the reimbursement of travel costs, would clearly be appropriate. However, it appears that the only reason Applicant had to be personally in court was because of the gross deficiencies in the Motion, Declaration, supporting pleadings, and Purchase Agreement. The court's Tentative Ruling posted the day before the hearing was to deny the Motion without prejudice due to the significant deficiencies in the Motion, Declaration, and supporting pleadings. Such would have necessitated Applicant having to start all over and redo the pleadings, not being able to recover fees for the deficient pleadings. Such denial may also have raised the specter of the buyer backing out, the Trustee losing the sale, and the finger pointing beginning at who was responsible for such lost sale.

If the Motion was properly drafted, the Declaration had provided actual personal knowledge testimony of the Trustee as required by the Federal Rules of Evidence, the Purchase Agreement had accurately provided for the sale of property of the Bankruptcy Estate, Applicant could have "phoned it in for the hearing" from his office in Irvine. The court would have posted a tentative ruling granting the motion, it being tentative only for the purpose of taking any overbids in open court (which were highly unlikely given the nature of the "stuff sold," its location, and the buyer being a family member who was "taking over the business."

The court disallows the seven hours of travel time as not being reasonable charges in light of the level of the legal service provided. Such travel was necessary for Applicant to address the gross shortcomings in the Motion, supporting pleadings, and Purchase Agreement.

Reducing the fees relating to the Motion and Agreement being presented to the court by the $2,765.00, there remains $5,151.50 in fees being sought for which a total of 15.7 hours worked. These include .5 hours for the actual hearing (which Applicant would have had to do and billed for even when appearing telephonically). Of these, 4.2 hours were provided by VT, with a billing rate of $145.00, and 11.5 hours by Applicant with a billing rate of $395.00. This results in a blended billing rate of $328.12 ($5,151,50/15.7 hours).

By personally attending the hearing to rectify the Motion, supporting pleading, and Purchase Agreement shortcomings, Applicant was able to save the sale. Though this court could reduce the $5,151.50 based on the quality of the work and the court having to fix the pleadings and Agreement in the order, it does not. The $5,151.50 adequately compensates Applicant for the services relating to the Motion and Purchase Agreement, even including the 7 hours of travel time for which no billing at $395.00 is allowed.

As for the fees for services described in vague terms, Applicant's supplemental billing descriptions provide additional information and as such are accepted by the court.

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 15.4 hours in this category. Applicant reviewed operation reports; communicated with Trustee on various matters including the petition, filings, insurance and unscheduled storage unit, trustee payments, next steps in the case, turnover of retainer, and operations through closing; drafted Trustee's initial report; reviewed tentative rulings; and communicated with U.S. Trustee regarding fees.

Claims Administration: Applicant spent 0.6 hours in this category. Applicant reviewed proofs of claim; reviewed UCC-1 documents; reviewed termination of UCC-1 Statement; and communicated with Trustee regarding the use of cash collateral.

Litigation: Applicant spent 6.5 hours in this category. Applicant communicated with state court action counsel on a personal injury claim, notice of automatic stay, and dismissal of the complaint; reviewed personal injury complaint; and reviewed §547 causes of action for bankruptcy litigation.

Employment of Professionals: Applicant spent 7.9 hours in this category. Applicant drafted employment applications and declarations for Trustee and Applicant; and reviewed, drafted supplemental order and appeared at hearing related to U.S. Trustee's motion to disgorge counsel's fees.

Asset Administration: Applicant spent 41.2 hours in this category. Applicant reviewed the franchise agreement; communicated with Trustee on whether the agreement was an asset of the estate; researched the online order and payments owed to the estate; drafted demand letters to Dickey's counsel;

communicated with Trustee and counsel on all maters related to debtor's online ordering sales proceeds; completed asset purchase agreement and forwarded to Trustee; communicated with Trustee and regarding auctioning debtor's assets; drafted motion to sell and attended hearing; communicated with various parties regarding the motion to sell; communicated with Trustee on sale matters; and reviewed, revised and finalized all documents related to the sale.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Ronald A. Clifford, Partner	61.3	$395.00	$24,213.50
Brandon White, Law Clerk	3.1	$145.00	$449.50
Vincent Trang, Law Clerk	7.2	$145.00	$1,044.00
	0	$0.00	$0.00
Total Fees for Period of Application			$25,707.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $780.80 pursuant to this application.

The interim costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
UCC Search		$15.00
Postage		$157.60
Court Fees		$34.00
PACER Research		$33.80
PACER Document Search		$59.60
Photocopies	$0.20 per page	$480.80
Total Costs Requested in Application		$780.80

In looking at the costs, Applicant states that he charges clients $0.20 a page for photo copies. Commonly, a cost of $0.10 per page is allowed. Applicant has not provided the court with evidence that his actual cost of photo copies is $0.20 a page in 2019.

Applicant also seeks to bill and recover from the Bankruptcy Estate $93.40 for his office having PACER access to court files. In the late 20th and now 21st Century, there is nothing exotic or unique about a attorney appearing in federal court having PACER access as part of his or her basic services for a client. Whether the attorney has an office across the street from the courthouse (as was commonly done before the internet services, PACER, and telephonic appearances) or 357 miles away, each attorney pulls up and reviews the court's files with PACER. The days of an attorney having to schlep over to the courthouse, pull a paper file, and wade through the paper have long past (at least in federal court). Now, from the comfort of the attorneys' office he or she can impress clients by having the court's files a mere fingertip away. Just as the attorney does not make his client pay a separate expense for having a file server where the client's file is kept, a phone fee for when the receptionist answers a call from the client, or a fee for the square footage where the attorney's legal assistant has his or her desk, the attorney having access to PACER is included in the attorney's hourly rate. The attorney does charge for his or her time reviewing the court file and documents on PACER.

The court does not allow the $93.30 in PACER Fees.

On an interim fee basis, the court reduces the photocopy charge to $0.10 a page, to $240.40. This is without prejudice to Applicant documenting in the final fee application that the actual cost for photocopies is more than $0.10 a page and that such higher amount is reasonable. [FN.1]

FN. 1. The court recalls a case from a few years back where the attorney asserted that the $0.25 a page copy fee was the actual cost he paid a third party to generate the copies. The third-party was the attorney's wife, who would come into the attorney's office, use the attorney's copy machine and paper, and then "bill" the attorney $0.25 a page for her time and effort in operating the copy machine. Not surprisingly, that $0.25 a page expense was not approved.

With the adjustment for the PACER fees and one-half of the photocopy charges, the expenses approved in this First Interim Application are $449.70.

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds the following as reasonable fees for this Interim Application with the court adjusting the rate for the Motion to Sell and related documents:

Description of Services	Time / Hourly Rate	Total Fees

Fees Requested	Clifford: 61.3 hours x $395.00 Trang: 3.1 hours x $145.00 White: 7.2 hours x $145.00	$25,707.00
Adjustment for the Disallowed Time and Requested Fees Relating to Motion to Sell and Purchase Agreement		($2,765.00)
Total Interim Attorneys Fees Allowed For First Interim Application		$22,942.00

First Interim Fees in the amount of $22,942.00 are approved pursuant to 11 U.S.C. § 331, and subject to final review pursuant to 11 U.S.C. § 330, and authorized to be paid by the Chapter 11 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Costs & Expenses

First Interim Costs in the amount of $449.70 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Chapter 11 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Applicant is allowed, and the Chapter 11 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$22,942.00
Costs and Expenses	$ 449.70

pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Blakeley LLP ("Applicant"), Attorney for David M. Sousa, the Chapter 11 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Blakeley LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Blakeley LLP, Professional employed by the Chapter 11 Trustee
>
> Fees in the amount of $22,942.00

Expenses in the amount of $449.70,

as an interim allowance of fees and expenses pursuant to 11 U.S.C. § 331 and subject to final review and allowance pursuant to 11 U.S.C. § 330.

7. **19-90122-E-11 MF-32**

MIKE TAMANA FREIGHT LINES, LLC
Reno Fernandez

CONTINUED MOTION FOR APPROVAL OF ADEQUATE PROTECTION STIPULATION WITH VOLVO FINANCIAL SERVICES, A DIVISION OF VFS US LLC
12-19-19 [416]

Tentative Ruling: The Motion For Approval of Adequate Protection Stipulation 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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on December 19, 2019. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion for Approval of Adequate Protection Stipulation with Volvo Financial Services is approved on an interim basis, **with the hearing continued to 10:30 a.m. on March 12, 2020.**

The debtor in possession, Mike Tamana Freight Lines, LLC ("ΔIP") filed this Motion seeking approval of Stipulation to set adequate protection payments to creditor Volvo Financial Services, a division of VFS US, LLC ("Creditor"), holding a claim secured by several of ΔIP's day cabs (listed fully in the Motion (Dckt. 416)).

The Motion is supported by the Declaration of Amanjot Tamana, the Responsible Individual for the ΔIP. Dckt. 418. The Tamana Declaration states Creditor's collateral here is essential to the operation of ΔIP's business. *Id.*, ¶ 8.

As of the Petition date, Volvo Financial Services contends that the Debtor owes Volvo Financial Services a combined monthly amount of $49,534.21 under the MLS Agreement, July 2015 Loan Documents, Second July 2015 Loan Documents, December 2015 Loan Documents, May 2016 Loan Documents and July 2016 Loan Documents, and all related documents thereto (collectively, the "Loan Documents"), with a combined accelerated balance due of $958,704.56 under the Loan Documents.

Key provisions of the Stipulation (Dckt. 420) include the following terms and conditions:

A. The first paragraph of the Stipulation (p. 1, emphasis added) identifies the parties to the Stipulation:

> Volvo Financial Services, a division of VFS US LLC ("Volvo Financial Services"), by and through its counsel, Gordon Rees Scully Mansukhani LLP, and Mike Tamana Freight Lines, LLC (**"Debtor"**), by and through its counsel, hereby enter into this **Stipulation for Debtor's Payment of Adequate Protection** Payments to Volvo Financial Services (this "Stipulation") and agree as follows: . . .

On its face, the only parties to the Stipulation are Volvo, a creditor (11 U.S.C. § 101(10)) and Mike Tamana Freight Lines, LLC stated to be the Debtor, see 11 U.S.C. § 101(13), which defines the word "Debtor" as: "(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced." The Stipulation goes further, stating that it is the Debtor who will make the adequate protection payments.

B. However, at the start of the portion of the Stipulation that states the agreed terms, it states that the parties to and agreeing to the terms of the Stipulation are stated to be the Debtor in Possession and Volvo Financial Services.

> NOW, THEREFORE, in consideration of the foregoing, **Debtor in Possession** and Volvo Financial Services hereby **agree** as follows

Stipulation, p. 9 (emphasis added).

C. Paragraph 1 of Stipulation, p. 9 (emphasis added) provides for adequate protection payments to be made as follows:

> 1. As adequate protection of Volvo Financial Services' interest in the Collateral, beginning immediately upon entry of an order approving this Stipulation, **Debtor shall pay** Volvo Financial Services the amounts

> coming due under the Loan Documents on and after the date the Court approves this Stipulation in accordance with the contractual due dates imposed by the Loan Documents (the "Adequate Protection Payment"), and any amount due under the Loan Documents between the date of this Stipulation and the date the Court approves this Stipulation, and each month thereafter shall continue to make the Adequate Protection Payment to Volvo Financial Services on the date that such payment is due pursuant to the Loan Documents until (I) Debtor's case is converted or dismissed; (ii) Debtor confirms a plan of reorganization; (iii) the obligations due to Volvo Financial Services are satisfied; (iv) Debtor surrenders the Collateral or (v) further order of this Court; and . . . .

Thus, the Debtor in Possession agrees with Volvo that the Debtor itself will make the adequate protection payments.

D. In Paragraph 2 of the Stipulation, p. 9-10 (emphasis added) provides for additional obligations to be performed by the Debtor, stating:

> 2. At all times, **Debtor shall**: (I) **maintain** adequate property and **liability insurance** with respect to the Collateral, naming VFS US LLC as loss payee, in amounts and under such insurance policies as are required by the Loan Documents and applicable schedules and Debtor upon Volvo Financial Services' request shall immediately provide Volvo Financial Services with copies of documentation evidencing the existence of such insurance policies; (ii) **maintain the Collateral** in good repair and cause such maintenance and repairs to be performed with respect to the Collateral as are customarily performed in connection with property of this type and as required under the Loan Documents; and (iii) **permit Volvo** Financial Services or its agents **access to the Collateral** to conduct an appraisal or inspect the Collateral within four calendar days' notice . . . ; and . . . .

E. Paragraph 4 of the Stipulation, p. 10 (emphasis added) has the Debtor making a representation concerning the ownership of the Collateral which, in light of 11 U.S.C. § 541(a), appears problematic:

> 4. **Debtor affirms** and agrees that **it is and shall remain the sole owner of the Collateral** and Volvo Financial Services holds a valid, properly perfected, first-priority lien against the Collateral. **Nothing contained in this Stipulation shall preclude or prohibit Volvo** Financial Services from **exercising and enforcing such rights** and remedies as are necessary for Volvo Financial Services to protect and preserve its claims pursuant to the Loan Documents and applicable law **against (I) Debtor**, (ii) any guarantor of the repayment of the amounts owed under the Loan Documents, and **(iii) Debtor's bankruptcy estate** including, but not limited to, filing a proof of claim in this bankruptcy case; and . . .

F. Moving to Paragraph 6 of the Stipulation, p. 11 (emphasis added), provision is made for defaults by Debtor.

> 6. Upon the occurrence of a default under this Stipulation, **Volvo Financial Services shall provide Debtor with notice of the default** via email to Matthew J. Olson and Daniel E. Vaknin, Debtor's counsel, at matt@macfern.com and daniel@macfern.com. **Debtor shall have ten calendar days** (the "Cure Period") after the email is sent to Debtor's counsel **to cure such default**. If **Debtor does not cure** the default within the Cure Period, Volvo Financial Services **may file an affidavit of default** and submit an order granting Volvo Financial Services relief from stay, and such order may be entered by the Court without any further proceedings, to allow Volvo Financial Services to pursue its legal and contractual remedies, including repossession and foreclosure of the Collateral. **Debtor shall only have the opportunity to cure two defaults** and the automatic stay shall be lifted upon filing of an affidavit of default and submission of an order to the Court upon Debtor's third default and Volvo Financial Services may pursue its legal and contractual remedies, including repossession and foreclosure of the Collateral, without further notice to Debtor; and . . . .

In addition to the Debtor being the person who is made to appear as responsible for property of the bankruptcy estate in this case, it also includes a provision outside of the Federal Rules of Bankruptcy Procedure and tries to have an "affidavit" procedure to get an order.

This court has long used an *ex parte* motion procedure for such adequate protection stipulations, which complies with the Federal Rules of Bankruptcy Procedure as adopted by the United States Supreme Court, and also creates a low cost, streamline process for getting such post-stipulation default orders. No basis has been shown for this court overruling the procedures adopted by the Supreme Court for issuing orders.

G. In paragraph 7 of the Stipulation, p. 11 (emphasis added), the Debtor only binds the Debtor, and Debtor's successors and assigns, stating:

> 7. By executing this Stipulation**, Debtor, for itself and its successors and assigns**, but not including any subsequently appointed Trustee: (a) specifically acknowledges that Volvo Financial Services holds a valid, perfected, first-priority, non-avoidable security interest and lien in the Collateral and (b) specifically acknowledges and agrees to the validity and enforceability of the Loan Documents; and . . .

As of the signing of the Stipulation, the Bankruptcy Estate in this case has existed for three hundred and forty nine (349) days. The Bankruptcy Estate is not a future successor or assign, and the court is not aware of a legal basis for an assignee of rights and interests in the past, can then in the future retroactively alter those rights or interests. It is unclear whose rights and interests are being altered.

According to Debtor, Volvo has applied the Debtor in Possession's post-petition payments to the Debtor in Possession's pre-petition balance. Volvo has assured the Debtor in Possession that it cannot declare a default to obtain relief from stay if payments by the Debtor in Possession are timely made despite Volvo's application of such payments. This is so because Volvo explained to the Debtor in Possession that the adequate protection stipulation governs the submission, not application, of payments, i.e., that payments will be made by a date certain and amount certain.

The Motion has been filed for the Debtor in Possession by the attorneys authorized to be employed by the Debtor in Possession, and who are not attorneys for the "Debtor."

The court also notes that it is not the designated representative for the Debtor in Possession that has signed the Stipulation, but the attorney authorized to be employed by the Debtor in Possession.

DISCUSSION

The Stipulation here provides for $47,077.63 per month to be paid by ΔIP each month. The Stipulation will allow ΔIP to retain the collateral described as a series of day cabs (Motion, Dckt. 416), which are essential to ΔIP's continued business operations.

While on its face an adequate protection stipulation with these terms may be financially reasonable, it appears that the necessary parties, if this Stipulation is to relate to property of the Bankruptcy Estate and future relief is to be obtained against property of the Bankruptcy Estate, are not parties to this Stipulation.

At the hearing, counsel the Debtor in Possession appeared and offered several solutions. The first was for the court to issue an order rewriting the Stipulation to be between the Debtor in Possession, rather than the Debtor, and Creditor. The court declined the request.

Next, counsel for the Debtor in Possession directed the court to 11 U.S.C. § 1101(1), stating that it defines the Debtor to be the "debtor in possession." That definition provision states that when the Code references the "debtor in possession," that is the debtor who is serving in the fiduciary role of the debtor in possession. It does not say that the "debtor" and "debtor in possession" are synonymous and "really just one person." One is the debtor and the other is a fiduciary exercising the powers of a bankruptcy trustee. In 11 U.S.C. § 1107 Congress expressly states the powers and rights of a "debtor in possession" in Chapter 11, which are powers must necessarily be exercised for this proposed Stipulation. It is not the rights, powers, and duties of a "mere" "debtor" in a Chapter 11 case.

Non-Appearance of Creditor

At the hearing, counsel for the Debtor in Possession represented to the court that the changes made to the Stipulation to have it state that the agreement was with the Debtor and that the Debtor would perform the duties under the Stipulation were made by Creditor.

The court posted its tentative ruling raising the proper party issue the day before the hearing. Though aware of the issue (presumably Creditor's counsel reads a court's tentative ruling on matters concerning creditor), no appearance was made by counsel for Creditor.

The court has determined it necessary to have Creditor and its counsel at the continued hearing to address these issues.

Continuance of Hearing to February 6, 2020.

The court concurs with Debtor in Possession's counsel's request to have a short continuance to allow the parties to file a corrected stipulation. If such quick hearing impedes Creditor and Creditor's counsel from having an officer and counsel at the continued hearing, the court can approve the corrected stipulation on an interim basis and set the hearing for a later date for the attendance and participation of Creditor and Creditor's counsel.

CORRECTED STIPULATION
AND
REQUEST FOR CONTINUANCE TO FINAL HEARING DATE

On February 4, 2020, the Parties filed a Corrected Stipulation and Joint Motion for interim approval of the Corrected Stipulation and continue the matter for a final hearing to reasonably accommodate the schedules of the Parties. This is consistent with the court's prior order setting the February 6, 2020 hearing.

The Corrected Stipulation, Dckt. 445, identifies the Debtor in Possession who is stipulating to modify the rights and interests of the Bankruptcy Estate, committing to making adequate protection payments, and provide conditions for prospective relief from the automatic stay. [FN. 1.]

Terms of Stipulation

The Parties and their respective counsel have provided clear terms for the Corrected Stipulation, which include (identified by Corrected Stipulation paragraph number):

1. The Stipulation is to provide adequate protection for Creditor, with specified adequate protection payments from the Bankruptcy Estate required. The monthly adequate protection payment is the monthly contract payment for each of the claims.

2. The Debtor in Possession shall maintain insurance, repair of the collateral, and permit inspect of the collateral by Creditor.

4. The Bankruptcy Estate shall remain the owner of the collateral, until and if it revests in the Debtor. The court does not read this as the Debtor in Possession waiving rights under the Bankruptcy Code for a sale of the collateral, after notice and hearing, which provisions include 11 U.S.C. § 363.

5. Default provisions relating to failure to make the adequate protection payments, conversion, dismissal, or the appointment of a Trustee.

As to this final point, the court will retain for final determination at the final hearing whether the "mere" appointment of a replacement fiduciary in the form of a Chapter 11 trustee is a proper default provision.

6. Notice of Default provisions.

9. Expressly authorization for Creditor to use GPS or other electronic geo-location technology to keep track of the location of its collateral, including in the event of a default and Creditor may repossess the collateral.

FN. 1. The court relegates to a footnote a comment of the use of the terms "debtor" and "debtor in possession" in the Corrected Stipulation. In their efforts to clearly identify the Debtor in Possession, as the fiduciary of the Bankruptcy Estate as the party to the Corrected Stipulation, they went a little too far. There exists as separate legal persons the Debtor, the entity that filed bankruptcy and continues to exist position, and the Debtor in Possession, which is the Debtor as the fiduciary of the Bankruptcy Estate. This is akin to one of several siblings who are beneficiaries to a family trust. As beneficiaries, they are their own, individual, self-interested person. However, when if one of them, say Tommy, also chooses to serve as the trustee of the family trust, in addition to being Tommy the beneficiary, he is Tommy, Trustee, and when he acts as Trustee, he is identified as such and has the fiduciary duties as the Trustee, even though he still has his personal rights as Tommy, who is a beneficiary of the trust.

In the Corrected Stipulation, it states that the Debtor in Possession executed the Master Loan Agreement with Creditor in 2013 (Stip. ¶ D), a Master Loan Agreement loan agreement in 2015 (Stip. ¶ G), a Master Loan Agreement in 2015 (Stip. ¶ L), A Master Loan Agreement in 2015 (Stip. ¶ Q), a Master Loan Agreement in 2016 (Stip. ¶ V), and a Master Loan Agreement in 2016 (Stip. ¶ AA). Clearly this a mere clerical error, as it necessarily had to be the Debtor who would have entered into these contracts prior to the February 8, 2019 commencement of this Chapter 11 bankruptcy case. The fiduciary Debtor in Possession, who stands in the place of a bankruptcy trustee to exercise control over the rights, interests, and property of the Bankruptcy Estate did not exist until the February 8, 2019 commencement of this case.

This clerical error being obvious, it is unnecessary for the Parties be required to fix this clear typo.

INTERIM APPROVAL OF STIPULATION

The court approves the Stipulation on an interim basis, with the final hearing to be conducted at 10:30 a.m. on March 12, 2020. The final hearing will be conducted to insure that the court correctly understands the terms, and that the Parties do not disagree with the court's understanding (such as the Debtor in Possession not waiving rights under the Bankruptcy Code for the sale of property of the Bankruptcy Estate after notice and hearing pursuant to an order of the court.

In continuing the hearing, the court determines that while is appropriate to have representative of the Parties and their counsel in attendance, Telephonic Appearance will be appropriate and permitted. The court does not require their in courtroom personal appearance.

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

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

The Motion for Approval of Adequate Protection Stipulation filed by 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 Motion to Approve Adequate Protection Stipulation between the Debtor in Possession and Volvo Financial, Services, A Division of VFS US LLC ("Creditor") is granted on an interim basis pending final hearing, on the terms and conditions stated in the and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed on February 4, 2020, Dckt. 445, which terms and conditions are in full force and effect pending the final hearing on the Motion.

IT IS FURTHER ORDERED that the final hearing on this Motion shall be conducted at 10:30 a.m on March 12, 2020.

IT IS FURTHER ORDERED that the appearance of all parties ordered to appear in this court's prior order, Dckt. 436, who are identified as: (1) managing member or supervisorial employee of Creditor with personal knowledge of the Stipulation; (2) Megan Adeyemo, Esq. and Jeffrey Cawdrey, Esq., attorneys for Creditor; Amanjot Tamana, Responsible Representative for the Debtor in Possession; and Daniel E. Vaknin, Esq., and each of them **May Appear Telephonically for the March 12, 2020 hearing**, the court vacating that portion of the prior order which required their physical appearance personally in the courtroom.

8. **18-90029-E-11 NAR-5** | **JEFFERY ARAMBEL** **Matt Olson** | **MOTION TO FILE CLAIM AFTER CLAIMS BAR DATE** **12-12-19 [1067]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on December 12, 2019. By the court's calculation, 56 days' notice was provided. 28 days' notice is required.

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

The Motion to File Claim After Claims Bar Date is xxxxx.

El Che Corporation, Creditor of Jeffery Edward Arambel ("Creditor") requests that the court allow Creditor's late filed claim to be treated as timely filed. Creditor filed Proof of Claim Number 38 on December 10, 2019, substantially after the claims bar date expired in this case.

The Claim is asserted to be unsecured in the amount of $541,842.32. The deadline for filing proofs of claim in this case is May 16, 2018. Notice of Bankruptcy Filing and Deadlines, Dckt. 11.

REVIEW OF THE MOTION

Creditor asserts the following:

A. Creditor filed a lawsuit in the Stanislaus County Superior Court, case number 2021033, in July 2016 for the collection of money due to it from Jeffrey Arambel, and others, arising from services Creditor provided.

B. Creditor was represented in that litigation by the Law Offices of Brunn & Flynn, ("Brunn & Flynn / Prior Counsel").

C. The notice of this bankruptcy proceeding was apparently mailed, care of Brunn & Flynn as reflected on the Debtor's March 1, 2018 amended schedules.

D. However, Brunn & Flynn did not file a claim on behalf of Creditor.

E. Creditor never received any filings from this bankruptcy court, until Brunn & Flynn filed a notice of change of address with this court on May 31, 2018, after the claims bar date.

F. On August 1, 2018, Brunn & Flynn filed a motion to be relieved as counsel from the State Court.

G. When Creditor's new counsel communicated with Brunn and Flynn as to whether or not a claim was filed, Brunn and Flynn adopted the position that it did not represent Creditor in the bankruptcy case.

H. On July 19, 2019, the Debtor filed an Amended Proposed Plan of Reorganization.

I. The Order confirming Debtor's Plan of Reorganization was entered on September 15, 2019.

J. Creditor is informed that no other distributions have been made, and this motion as well as Creditor's Proof of Claim is filed in time to permit payment of such claim without prejudice to any other creditors, nor the Debtor.

K. Creditor employed approximately 80 to 120 employees who worked on Debtor's orchards.

L. Debtor paid Creditor with checks but the checks were returned due to insufficient funds to deposit the checks for the entire amount of $112,000, and Creditor's payroll checks bounced as a result, incurring a fee to Creditor of $2,000 for insufficient funds.

M. Creditor was forced to obtain a loan to meet its payroll obligations to compensate employees, incurring significant interest charges on such loan.

N. Debtor continued to fail to pay Creditor for its services, and Creditor was forced to retain Brunn & Flynn for the purpose of filing a civil complaint for breach of contract against Debtor.

O. After trial in the state court action commenced and the state court took the matter under submission, Creditor learned that Debtor was in bankruptcy.

P. Brunn & Flynn advised Creditor it could file a motion for relief from the automatic stay to continue with the litigation in the state court matter.

R. Brunn & Flynn demanded a significant retainer that Creditor was unable to afford in order to prepare and appear for the motion for relief.

S. Creditor was not advised that Brunn & Flynn was not filing a claim in the bankruptcy case, that a claims bar date had been set, or that Creditor was required to file a proof of claim in order to preserve its claim.

T. Creditor was eventually referred to its current counsel for the purpose of filing a Proof of Claim, and pursuing the matter in bankruptcy court.

U. In the present action, Debtor did not list Creditor's address, and failed to correctly identify Creditor in his Schedules D, E/F, G, and/or H, as required by F.R.B.P. 1007(a), as Creditor's address as reflected on the invoices mailed to Debtor was not listed.

V. The bankruptcy filings were mailed to Brunn & Flynn, who subsequently advised it did not represent Creditor in this bankruptcy matter, who stated they were not retained for such purposes, and who failed to advise Creditor that it needed to file a proof of claim or of a claims bar deadline.

W. No notice of this bankruptcy proceeding was mailed to Creditor at any time prior to the claims bar deadline, until after Brunn & Flynn filed a notice of change of address listing Creditor's address following the expiration of the deadline.

X. Thus, notice was insufficient throughout the present bankruptcy to give Creditor reasonable notice of the necessity of filing a claim, nor reasonable time to file a Proof of Claim.

Y. Moreover, Federal Rule of Bankruptcy Procedure 9006(b)(1) allows the claims bar date to be extended where the failure to timely act "was the result of excusable neglect."

Z. Creditor directs the court's attention to *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, (1993) 507 U.S. 380, explaining that a court's determination of whether the neglect is "excusable" should be an equitable one, whereby a court should "tak[e] account of all relevant circumstances surrounding the party's omission." Id. at 395.

AA. Adding that courts have found excusable neglect and determined that creditors have a right to file late claims where they have not received actual notice of the bankruptcy. See, e.g., *In re Anchor Glass Container Corp.*, (2005) 325 B.R. 892, 897.

BB. In the instant case there is no danger of prejudice to the Debtor or his bankruptcy estate in deeming the Creditor's claims as timely filed because no distributions have been made pursuant to the terms of the Chapter 11 Plan of Reorganization on file with this Court, with the exception of possible payments to professionals made pursuant to motion for compensation.

CC. Moreover, the Debtor had adequate notice of this claim, due to the extensive civil litigation in the State Court Action, and the fact that Debtor filed his bankruptcy after the commencement of the trial.

DD. The Debtor was well aware of the extent and nature of the claim well before the claim was filed.

EE. Finally, Creditor did not receive any bankruptcy filings until after Brunn & Flynn filed a notice of change of address with the bankruptcy court, at which time, Creditor was unaware that the Claims Bar Date had already passed, or that a claim needed to be filed, after it had already filed litigation in the State Court, which proceeded to trial.

FF. Creditor acted in good faith to seek bankruptcy counsel to file a Proof of Claim on his behalf once it learned of the bankruptcy case, that Brunn & Flynn did not timely file an claim and that the Claims Bar Date had passed.

In support of the Motion, Creditor filed the Declarations of Natali A. Ron and Jose Manuel Eguiluz and properly authenticated Exhibits A and B.

Declarations

Natali A. Ron is an attorney with the Law Offices of Hastings and Ron, current attorneys for Creditor. She testifies under penalty of perjury in her Declaration (identified by paragraph number of the Declaration) to the following:

2. Jose Manuel Eguiluz consulted with our firm in approximately July 2019, to discuss representation of his corporation with respect to the present bankruptcy case.

3. " I am informed and believe that the notice of this bankruptcy proceeding was mailed, care of the Law Offices of Brunn & Flynn, with respect to the creditor El Che Corporation . . . ."

4. "I am informed and believe, based on my review of court filings, that El Che Corporation filed a lawsuit in the Stanislaus County Superior Court, case number 2021033, in July 2016 for the collection of money due to it from Jeffrey Arambel, and others, arising from services El Che Corporation provided. . . ."

5. "I am informed and believe, based on my review of court filings, that Brunn & Flynn filed a motion to be relieved as counsel from the State Court."

6. "I am informed and believe that based on my review of the court docket filings, that on or about July 19, 2019, the Debtor filed an Amended Proposed Plan of Reorganization dated July 19, 2019 (hereinafter referred to as the "Proposed Plan")."

7. "I am informed and believe, based on the Court's docket in this matter, that since the date of plan confirmation, the Debtor has filed motions for compensation of certain professionals, and for payment of certain administrative expenses. I am informed and believe that no other distributions have been made."

8. Creditor retained Hastings and Ron to pursue this bankruptcy matter, and she filed a proof of claim on behalf of Creditor on December 10, 2019, while preparing this motion.

In reviewing this Declaration, in which counsel provides testimony under penalty of perjury, states by counsel cause the court significant concern. These statements under penalty of perjury and supposedly in compliance with Federal Rule of Evidence 601 and 602 (and subject to the certifications made pursuant to Fed. R. Bankr. P. 9011), counsel's testimony as to most of the above is based solely on "information and belief."

One of the fundamental principles of testifying under penalty of perjury is that the witness must testify based upon personal knowledge. Federal Rule of Evidence 602 states (emphasis added):

> A **witness may testify** to a matter **only if evidence is introduced** sufficient to **support a finding** that the **witness has personal knowledge of the matter**. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

The use of "information and belief" is not a device to testify under penalty of perjury. Here, counsel has no personal knowledge, but states that she has read and wants now to tell the court what the other documents say. In effect, counsel is wanting to tell the court what she "heard" the written words "say" when she read them. Being an attorney is not a license to provide her opinion of what she read and what she wants to tell the court she believes (especially when counsel is doing it to enhance the case she is seeking to advocate for as an officer of the court for her client). When reviewing Weinstein's Federal Evidence, § 602, the phrases "information and belief" and "informed and believe" are not used in addressing what is "personal knowledge" necessary for testifying under penalty of perjury.

Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 discuss how and when a person may use information and belief in a complaint. As discussed in 2 Moore's Federal Practice, Civil § 8.04(4):

> [4] Allegations Supporting Claims for Relief May Be Made on Information and Belief
>
> Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief (see § 8.06[5]). However, Rule 11 permits a pleader, after reasonable inquiry, to **set forth allegations** that "will **likely have evidentiary support** after a reasonable opportunity for further investigation or discovery" (see Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions). Courts have read the policy underlying Rule 8, together with Rule 11, to **permit claimants to aver facts that they believe to be true, but that lack evidentiary support** at the time of pleading. Generally, however, such averments are allowed only when the facts that would support the allegations are solely within the defendant's knowledge or control.

In stating that something is on "information and belief," one necessarily is stating that they don't know it to be true, but believe, if they can conduct discovery or investigate, they can come up with some evidence, in the future, to show that it is true. [FN. 1.]

FN. 1. To the extent that counsel is informed and believes based on documents filed with the court, other court's, or other documents, counsel could have them properly authenticated, presented them as the evidence, and then counsel structure the grounds in the motion or argument in the points and authorities using that evidence. But counsel cannot "create" evidence based on her information and belief and then assert that her information and belief is the evidence upon which she is informed and believes.

Jose Manuel Eguiluz is the principal for Creditor ("Principal"). He testifies under penalty of perjury to the following:

A. From approximately 2012 through 2016, Creditor provided harvesting and pruning services for Debtor.

B. In 2016, Debtor became delinquent on payments to Creditor.

C. Invoices with a past due amount of $21,163.16 were sent to Debtor referencing the work and outlining the amounts due and terms of payment. Each invoice included Creditor's address and/or post-office box address.

D. Debtor issued a partial payment by check but it bounced due to insufficient funds and Creditor was forced to obtain a loan (for $75,000 plus interest, for a total of $108,000.00) in order to pay his employees.

E. Creditor continued borrowing in order to pay back the loans and has incurred $100,000.00 in additional interest.

F. Creditor has also incurred $2,000.00 in insufficient funds bank fees.

G. Principal hired Brunn & Flynn to file a complaint against Debtor in state court to collect past-due payments and recover damages for incurred interest.

H. Close to the date for the state court trial, Principal learned that Debtor had filed for bankruptcy.

I. Principal incurred approximately $60,000.00 in attorneys' fees and $10,000 in costs to pay an interpreter to communicate with prior counsel.

J. Invoices mailed to debtor include a provision for attorneys' fees in the event of litigation is instituted to collect on any outstanding sum of money.

K. Prior Counsel apparently did not do anything in the bankruptcy court to preserve his claim.

L. Prior Counsel discussed filing a motion for relief from the automatic stay but requested a retainer to pursue the matter but principal could not afford it.

M. Principal was not advised that he needed to file a claim with the bankruptcy court in order to preserve said claim.

N. Principal is informed that prior counsel filed a change of address with the bankruptcy court removing the firm's address and substituting to Creditor's company address.

O. Eventually, but after the claim bar date, Principal began receiving mail from the bankruptcy court regarding Debtor's bankruptcy case.

P. In July 2019, Principal contacted Hastings and Ron for the purpose of pursuing the claim in bankruptcy court, who in turn filed a Proof of Claim on December 2019.

Summary of Exhibits

Exhibit A: Invoices

Exhibit A is 70 pages worth of past due invoices for 2016 (April and May 2016), Debtor's checks for payment, and bank records regarding the checks with insufficient funds.

Exhibit B: Proof of Claim Number 38

Exhibit B is Creditor's Proof of claim filed on December 10, 2020 attaching the same invoices and checks submitted as Exhibit A.

DEBTOR'S OPPOSITION

Jeffery Edward Arambel, the Reorganized Debtor under the Confirmed Chapter 11 Plan, ("Debtor") filed an Opposition on January 23, 2020. Dckt. 1087. Debtor requests that the court disallow Creditor's claim on the basis that:

A. Creditor received proper actual notice of the claims bar date and it did not act. Its failure to file a timely claim is its own fault, and it has not shown a basis for allowance of a late-filed claim under the Bankruptcy Rules 3002 and 3003.

B. In *Lompa v. Price* (*In re Price*), 871 F.2d 97 (9th Cir. 1989), the Ninth Circuit held that notice to an attorney representing a claimant in a state-court proceeding would apprise a creditor of a bankruptcy and related deadlines. The creditor was not directly notified by the bankruptcy court of the bar date for filing dischargeability complaints under 11 U.S.C. § 523(c) because he was not listed by the debtor, and creditor's motion for extension was not made before the time had expired under Bankr. R. 4007(c). *Id.* at 98. The Bankruptcy Appellate Panel held that notice to creditor's counsel constituted notice to appellant, and that it would apprise the creditor of the pendency of the dischargeability deadline date. *Id.* The Ninth Circuit affirmed. *Id.* at 99.

C. The Ninth Circuit's earlier decision in *Lawrence Tractor Co. v. Gregory* (*In re Gregory*), 705 F.2d 1118 (9th Cir. 1983) is in accord. In *Gregory*, a creditor argued that its claim in bankruptcy should not be discharged because it had received inadequate notice of the debtor's bankruptcy plan. *Id.* at 1120. The Ninth Circuit rejected the creditor's constitutional challenge, holding that "[w]hen the holder of a large, unsecured claim [in bankruptcy] . . . receives any notice from the bankruptcy court that its debtor has initiated bankruptcy proceedings, it is under constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril." *Id.* at 1123. Adding that "[i]f [the creditor] had made any inquiry following receipt of the notice, it would have discovered that it needed to act to protect its interest." *Id.*

D. It is undisputed that as of the Petition Date, Brunn & Flynn represented Creditor in its claim in state court; that Creditor was actively litigating the claim with Debtor when the bankruptcy case was filed; that Creditor knew of the bankruptcy case by virtue of the notice of stay filed with the Superior Court, that Brunn & Flynn was served with a copy of the Notice of Bankruptcy Case and Deadlines as required by F.R.B.P. 2002(a)(7) that Brunn & Flynn did not withdraw from the representation until after the claim bar date had passed.

E. Thus, under *Price*, notice to Brunn & Flynn constituted notice to Creditor to timely file its claim. Further, Creditor (holder of one of the 20 largest unsecured claims) was in inquiry notice after he received dozens of notices,

including the Plan disallowing its claim, regarding the bankruptcy after the change of address.

F. Creditor failed to show excusable neglect.

G. The existence of excusable neglect is determined by considering the totality of the circumstances, including these factors: (1) the reason for the delay; (2) the danger of prejudice to the debtor; (3) the length of delay and its impact on judicial proceedings; and (4) whether the claimant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Co.*, 507 U.S. 380, 395 (1993). The burden of presenting facts to establish excusable neglect is on the moving party. *Key Bar Invs., Inc. v. Cahn* (*In re Cahn*), 188 B.R. 627, 631 (B.A.P. 9th Cir. 1995); see also *In re Pac. Gas & Elec. Co.*, 311 B.R. 84, 89 (Bankr. N.D. Cal. 2004). Pioneer mandated a balancing test for determining excusable neglect, but did not assign the weight to be given to each of its nonexclusive factors in arriving at an equitable determination. *Pincay*, 389 F.3d at 860.

H. Creditor does not meet its burden in its analysis of the *Pioneer* factors. Creditor's main argument is that, because it did not receive actual notice of the bankruptcy case, its failure to file a timely claim was excusable. Motion at 5:7–6:9.

I. However, as discussed, Creditor received actual notice through its counsel in the state court proceeding. Ordinarily, a lawyer is a client's agent and, consistent with agency law, clients "are considered to have notice of all facts known to their lawyer-agent." *Ringgold Corp. v. Worrall*, 880 F.2d 1138, 1141–42 (9th Cir.1989).

J. Creditor contends that no party will be prejudice but in reality all creditor holding unsecured claims will be prejudiced by the reduction in the interim Plan payments.

K. Even assuming that Creditor did not receive notice, Creditor knew of the Claims Bar Date by June 2019 yet did not file the present Motion for another six (6) months. Creditor has not behaved in good faith and by delaying to file his claim, Creditor has prejudiced other parties. This is not excusable neglect. Creditor fails to explain why it waited six months after the alleged discovery of the Claims Bar Date. This is inexcusable neglect and the Motion should be denied.

L. Creditor is bound by the Confirmed Plan and cannot collaterally attack the Confirmation Order.

M. Creditor ignores that the Plan confirmed controls and it is bound by the Plan, including the provision disallowing its claim as untimely. Creditor contends that the Plan provided it with notice of the Claims bar Date. Yet, did nothing to stop its confirmation on September 15, 2019.

N. Where a creditor has notice, a plan is *res judicata* to all issues that could have been raised at the time of confirmation. *Great Lakes Higher Educ. Corp. v. Pardee* (*In re Pardee*), 218 B.R. 916, 924, aff'd 193 F.3d 1083 (9th Cir.1999); see also *Lawrence Tractor Co. v. Gregory* (*In re Gregory*), 705 F.2d 1118, 1121 (9th Cir. 1983) (confirmation of an unopposed plan that provided for no payment to unsecured creditors and discharge of all debts could not be challenged post-confirmation).

O. It is undisputed that Creditor received notice of the Plan, of its disallowance of Creditor's claim and Creditor did not object to the Plan or the disallowance. Creditor failed to act and it now bound by the confirmed Plan.

P. Creditor's Proof of Claim should be disallowed in its entirety because it was not timely filed.

Q. Debtor submits his counter-motion under BLR9014-1(i) to disallow the claim filed by Creditor as untimely under 11 U.S.C. § 502(b)(9) and F.R.B.P. 3003(c)(3). Creditor's Proof of Claim was filed 573 days after the Claims Bar Date. Thus, as untimely, the claim should be disallowed in its entirety.

PLAN ADMINISTRATOR'S OPPOSITION

Focus Management Group USA, Inc., Plan Administrator, ("Plan Administrator") filed an Opposition on January 23, 2020. Dckt. 1091. Plan Administrator opposes on the basis that:

A. The Confirmed Plan expressly disallowed Creditor's claim.

B. Creditor received notice of the proposed plan that disallowed its claim in time to file a motion to allow a late-filed claim or otherwise object to disallowance of its claim prior to confirmation of the plan and did not do so.

C. Confirmation of the Plan precludes the relief requested by Creditor.

D. The Motion is an improper collateral attack on a confirmed Plan.

E. Under Ninth Circuit authority Creditor cannot relitigate the disallowance as the Plan has been confirmed. In *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995), the Ninth Circuit held that "Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect." Furthermore, "A final order confirming a Chapter 11 plan bars litigation of all issues that could have been raised in connection with confirmation. This res judicata effect extends to both claims that were actually litigated and claims that could have been raised in the confirmation proceedings." *In re Landmark West*, LLC, 2015 Bankr. LEXIS 4081 (Bankr. N.D. Cal. Dec. 2, 2015) (citations omitted).

F. Creditor acknowledges it contacted current counsel in July 2019. It did not object to the Plan, which expressly disallows it claim, prior to its confirmation on September 15, 2019.

G. Creditor now requests to have its claim deemed timely notwithstanding that Creditor was properly and timely served with the proposed Plan and disclosure statement, received proper and timely notice of the confirmation hearing, had sufficient time to oppose the plan and its disallowance of the claim, and did not object to the disallowance. The Motion should be denied because Creditor cannot relitigate the disallowed claim.

H. Even if confirmation of the Plan does not preclude the relief requested, Creditor has not shown excusable neglect.

I. Citing *Pioneer,* the Ninth Circuit stated that "[t]o determine whether a party's failure to meet a deadline constitutes 'excusable neglect,' courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Ahanchian c. Xenon Pictures, Inc.*, 624 D.3d 1253, 1261 (9th Cir. 2010)

J. The motion fails to show excusable neglect on the basis that Creditor states that current counsel was contacted in July 2019, yet nothing was done for five (5) months and allowing Creditor's claim would material impact other unsecured creditors under the Plan as it is approximately 9% of the current general unsecured claim pool.

CREDITOR'S REPLY

Creditor filed a Reply on January 30, 2020. Dckt. 1096. In its reply, Creditor addresses the delay in filing the proof of claim discussed by both Debtor and Plan Administrator in their oppositions. Creditor explains that after contacting current counsel he had to withdraw his retainer because one of his 12-year old twin daughters had been detained in Mexico. This meant that he had to send money to Mexico to support her and was forced to hire an immigration attorney. This went on for approximately 16 months, simultaneously with the present bankruptcy case. The daughter was allowed to return home with Creditor's family in August 2019, one month before the plan was confirmed.

Additionally, Creditor asserts in the Response that Creditor's Principal is unable to read or speak English. For both Declarations (Dckts. 1069 and 1097) certifications of translators are attached.

Creditor's prior counsel apparently received notice of the bankruptcy but not file a claim on its behalf nor did they advise Creditor that he needed to preserve its claim through the bankruptcy proceeding. At the same time, Creditor's company was going through financial difficulties, trying to pay his employees and his family suffering from the stress and devastation of the family separation with no definitive time frame or if his daughter would be allowed to return home.

Creditor contends that looking at the totality of the circumstances, mainly Mr. Eguiluz's personal and financial issues, there is excusable neglect and the court should allow the claim. Further arguing that there is no prejudice that warrant denial of th emotion because no interim distributions have been made and Creditor should be compensated for all the expenses Creditor has had to incur after Debtor; failed to pay for work Creditor's employees completed.

Creditor argues that the only possible prejudice would be that allowing the claim would result in Debtor's reduction of surplus dividend after the sale of sufficient property to pay the claims.

Creditor argues that his request to allow the claim is not bar by *res judicata* because under that doctrine the judgment must involve the same parties. Creditor was not represented in the bankruptcy until after the Plan was confirmed. Creditor did not participate and did not have reasonable opportunity to object. Moreover, Creditor is not challenging the Plan but requesting that its claim be allowed as timely filed so that it may be included under the general unsecured claims class.

Creditor further asserts that neither Debtor nor Plan Administrator cite any case in which a late claim should not be allowed to be filed where the confirmed plan provides for unsecured claims to be paid in full and there are millions of dollars in excess property to be distributed to the debtor as surplus.

Finally, Creditor argues that the interests of equity and justice require that the court allow the late claim based on since excusable neglect of the creditor, since there will be no prejudice to the other creditors.

APPLICABLE LAW

Rule 3003 provides for the Filings of Proofs of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases. Specifically, Rule 3003(c) states the following:

> (c) Filing Proof of Claim.
>
> > [. . .]
> >
> > (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).

F.R.B.P. 3003.

As discussed in 9 Collier on Bankruptcy P 3003.03 (16th 2019), the Supreme Court has placed the Federal Rule of Bankruptcy Procedure 9006(b) excusable neglect standard as an overlay to the Rule 3003(c)(3) relief:

> Likewise, after the passage of the bar date, an extension may be granted upon a showing of cause. Although Rule 3003(c)(3) specifies that the time for filing a proof of claim may be extended for cause, the Supreme Court (in *Pioneer Inv. Servs.*) has adopted the excusable neglect standard without considering whether Rule 3003(c)(3) provides for a test different from Rule 9006(b). However, as interpreted by the

> Court, application of the excusable neglect standard includes consideration of factors, such as prejudice to the debtor, which some courts had previously determined to be beyond the scope of the Rule 9006(b) analysis.

9 Collier on Bankruptcy P 3003.03[b].

In *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489 (1993), affirming the Court of Appeals for the Sixth Circuit, the Supreme Court, in a five-to-four decision, ruled that a court may find that a creditor's failure to file a proof of claim by the bar date was due to excusable neglect when it has considered all of the relevant circumstances, including danger of prejudice to the debtor; the length of the delay; the reason for the delay and whether such delay was in the control of the party filing the late claim; the possible impact of the delay on the judicial proceedings; and whether the party filing the late claim acted in good faith.

DISCUSSION

The deadline for filing a proof of claim in this matter was May 16, 2018. Creditor's Proof of Claim was filed on December 10, 2019 - nineteen months later. A look at what happened between those two dates should provide some clarity.

Creditor confirms that it was aware of Debtor's bankruptcy sometime on or around March 2018, when it received notice of the bankruptcy's automatic stay on the eve of trial. *See* Eguiluz Declaration, ¶9 and Motion, ¶4. Moreover, Creditor's Principal testifies that Prior Counsel, Brunn and Flynn, informed him of the bankruptcy and that they should act by filing for relief from the automatic stay. *Id.* Creditor testifies that Brunn & Flynn requested a retainer but they did not hire them because Creditor could not afford it. *Id.* Nevertheless, this constitutes notice. Debtor was told that Debtor's bankruptcy and that actions needed to be taken.

What is not discussed is whether Prior Counsel Brunn and Flynn addressed with Creditor the simple filing of a proof of claim.

Thus, the evidence presented by Creditor is that it and its Prior Counsel had actual notice of the Bankruptcy Case. Further, that some action needed to be taken in light of the Bankruptcy Case being filed.

Then, Prior Counsel filed a change of address for Creditor in Debtor's bankruptcy case. Creditor directly received notices regarding Debtor's case following the May 31, 2018, change of address filed for Creditor by Prior Counsel. Dckt. 368. Creditor's Principal testifies that after this change of address he began to receive mail from the bankruptcy court regarding Debtor's case. Eguiluz Declaration, ¶10. Therefore, as early as May or June of 2018, Creditor had notice not only of this Bankruptcy Case, but service of motions, plans, and other pleadings. Creditor undisputedly had actual notice of this Bankruptcy Case. This constitutes actual notice of the bankruptcy case.

Looking at the post-May 31, 2018 pleadings filed and served on Creditor in this Bankruptcy Case, these pleadings include:

> Proposed Plan, Proposed Disclosure Statement and Notice of July 18, 2019 Hearing on approval of Disclosure Statement

Certificate of Service filed on June 6, 2019; Dckts. 828, 829.

Notice of September 10, 2019 Hearing on Confirmation of Proposed Plan, Order Approving Disclosure Statement, Disclosure Statement, and Proposed Plan.

Certificate of Serviced filed on July 30, 2019; Exhibit M, Dckt. 871.

The Disclosure Statement and Proposed Chapter 11 Plan served on Creditor specifically stated that the Plan disallowed Creditor's claim in its entirety for failure to timely file a claim. This Disclosure Statement and Chapter 11 Plan were received by Creditor first in June 2019, and then in August 2019 with the notice of the September 2019 confirmation hearing. Yet, Creditor did nothing for six months from first having notice of the Chapter 11 Plan and the terms disallowing its claim, and three months after the Chapter 11 Plan was confirmed.

Creditor argues that there was excusable neglect on their part. Creditor seems to shift the blame to Prior Counsel, stating that the Prior Counsel requested a retainer to represent Creditor in the Bankruptcy Case. Creditor's principal testifies that Prior Counsel "apparently did not do anything in the bankruptcy court to preserve my claim." Eguiluz Declaration, ¶9.

Creditor's Principal further testifies that Prior Counsel did not advise him that he needed to file a claim in the bankruptcy court in order to preserve his claim. *Id.* Principal also testifies that he did not know that there was a claim bar date. *Id.*

In *Pioneer*, the Court considered several factors, one of which is the reason for the delay and whether such delay was in the control of the party filing the late claim. Here, as explained above, Creditor had notice. Creditor took at the very least six months to assert its rights after receiving actual notice of Debtor's bankruptcy. Creditor had control over this delay as it knew of the bankruptcy, contacted current counsel, but yet, the proof of claim was not failed until five months later. What the court sees is Creditor's inexcusable neglect at allowing time to pass without asserting its rights.

Creditor further asserts that its more than $500,000 claim is of small consequence to this case as this will be a surplus case. $500,000 is not a "small consequence."

Consideration of Excusable Factors

In *Pioneer Inv. Servs. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), the Supreme Court discussed some general factors used in considering in allowing the late filing of claims. These include:

(1) whether granting the delay will prejudice the debtor;

On this factor, there is a confirmed Chapter 11 Plan in this case. The terms of the Plan, for which Creditor had notice, that the asserted claim of Creditor is disallowed as a matter of the Federal Rule of Bankruptcy Procedure, stating in Footnote 2 on page 19 of the sixty-three page Plan, to which an additional seventy-three pages of exhibits are attached:

2 The Claim of the El Che Corporation was scheduled as disputed, the El Che Corporation did not timely file a proof of Claim, and the El Che Corporation has not yet filed a proof of Claim. Hence, the Claim is disallowed. See Fed. R. Bankr. P. 3002(a), 3003(c)(2).

Chapter 11 Plan, Dckt. 860 at 19 (in the same 10 point font as used in the plan footnote).

Debtor scheduled Creditor's claim. Debtor disputed creditor's claim. Debtor had notice sent to Creditor through the attorneys representing Debtor in the state court action. Notices and information about the bankruptcy case continued to go to Creditor's counsel until a change of address was fled. After that, Debtor continued to receive notices, motions, and pleadings, including the proposed Plan and Disclosure Statement and the approved Disclosure Statement and Plan set for confirmation, all of which include the language that Creditor's claim was disallowed as provided in the Federal Rule of Bankruptcy Procedure.

Debtor sought, litigated, and confirmed the Chapter 11 Plan. Three months after confirmation is concluded and six months after unequivocally receiving notice of the Plan and that its claim was disallowed by operation of law, Creditor comes in to assert the right to be paid more than $500,000.

In the Opposition, the Debtor states that the prejudice consists of:

> 1. All creditors with unsecured claims will have their interim payments reduced if Creditor also receives interim payments.
>
> 2. Creditor has been dilatory in prosecuting its rights, therefore such is "to the prejudice of all other parties."

Opposition, p. 7:25-27, 8:3-5; Dckt. 1087.

In the Opposition filed by Focus Management Group, USA, Inc., the Plan Administrator, the prejudice to the Debtor, Plan or other creditors is not articulated.

As to this factor, it may tip slightly in favor of the Debtor in that the time, money, and expense has gone into a Plan. Creditors moved forward with voting based on there being no claim from Creditor, it appearing that Creditor was not challenging the scheduling of the claim as disputed.

If allowed, then monies will be diverted from the Plan distribution to the claim objection litigation (presuming that the Debtor still disputes the obligation) reducing the payments to creditors, as well as ultimate surplus to Debtor at the end of the day.

> (2) the length of the delay and its impact on efficient court administration;

The evidence is undisputed that Creditor acknowledges having actual knowledge of the bankruptcy case as early as March 2018 when the filing of the bankruptcy case disrupted the state court litigation. This actual knowledge was not merely to the principal of the Creditor, but Creditor's Prior Counsel prosecuting the civil action against the Debtor. The bankruptcy case was expressly discussed and the need for Creditor to take action in the case advised by Creditor's Prior Counsel. Though evidence is presented that Prior Counsel addressed the issue of the relief from the automatic stay being necessary to continue in the state court action, no mention is made of the "simple task" of such counsel completing a

proof of claim form and attaching a copy of the state court complaint to be filed within the deadline for filing claims.

Creditor's Principal acknowledges that he consciously did not take action in light of the demands for fees from his Prior Counsel. Creditor's Principal also discusses serious life events which strained his finances further from the strain he states from the asserted obligation owed by Debtor.

But this does not change that twenty-one months and the confirmation of the Chapter 11 Plan floated by before Creditor took any action. During this time not only the Debtor in Possession, prior to confirmation, and the Debtor, after confirmation, were moving forward and making decisions, but other creditors were making decisions on the Plan and there not being a $500,000+ claim being asserted by Creditor.

> (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;

Creditor argues that it did not have or did not want to pay the fees for counsel to represent it in the bankruptcy case. Though Creditor had actual knowledge to timely file its claim, it failed to act. It appears that Creditor did not seek out or ask its Prior Counsel to refer it to a bankruptcy attorney to see what needed to be done so its asserted right to $500,000+ did not get lost. Such was a very simple act, filing a proof of claim.

> (4) whether the creditor acted in good faith;

From the evidence presented, it does not appear that Creditor acted with an evil, malevolent intent. Creditor's Principal was distracted by family events, but appears to have been able to keep the Creditor's business running. Creditor's failure to file the proof of claim was not merely inadvertent, but done consciously disregarding the Bankruptcy Case and its asserted right to be paid more than $500,000.

and

> (5) whether clients should be penalized for their counsel's mistake or neglect

On this point, Creditor did not engage counsel to represent it in the Bankruptcy Case. Creditor did not want to pay the retainer (of some unstated amount). The Motion does not assert that there was a mistake or neglect by Creditor's counsel. Presumably, such would be the Prior Counsel who advised Creditor that relief from the stay would be needed.

Ruling on Motion to File Late Claim

Weighing the above factors and considering evidence in this case, **xxxxxxxxxx**

Denial Without Prejudice of Countermotion

As for Debtor's "Countermotion" to disallow the claim section of his Opposition, the court first notes that a "countermotion" must be filed as a separate matter with its own docket control number. L.B.R. 9014-1(c)(4), (i). To the extent this is a Countermotion, it needs to be filed as a separate pleading and contested matter.

However, this requested relief, disallowance of a claim, does not sound in the nature of a countermotion, but an objection to claim. Objections to claim are governed by Federal Rule of Bankruptcy Procedure 3007 and Local Bankruptcy Rule 3007-1. If such relief is necessary, it can be sought by such an objection.

Based on the evidence before the court, Creditor's claim is disallowed in its entirety as untimely having failed to show cause for excusable neglect.

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 File Claim After Claims Bar Date of El Che Corporation filed in this case by El Che Corporation, Creditor of Jeffery Edward Arambel ("Creditor") 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 File Claim After Claims Bar Date of El Che Corporation is **xxxxxxxxxx**

9.	**18-90029-E-11 NAR-5**	**JEFFERY ARAMBEL Matt Olson**	**OPPOSITION TO MOTION TO FILE CLAIM AFTER CLAIMS BAR DATE 1-23-20 [1087]**

Final Ruling: No separate hearing will be conducted for the Opposition to Motion to File Claim After Claims Bar Date and Counter Motion.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims and creditors on January 23, 2020. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Opposition to Creditor's Motion to Allow Late File Claim to be Treated as Timely and Counter Motion to Allow Late Filed Claim is an Opposition to the pending Motion to Allow Late File Claim After Claims Bar Date (DCN: NAR-5, Dckt. 1067) that was filed on December 12, 2020 and addressed in connection with that Contested Matter.

10. 19-90382-E-7 TRACY SMITH
19-9018
U.S. TRUSTEE V. SMITH

MOTION FOR ENTRY OF DEFAULT JUDGMENT
1-6-20 [17]

Final Ruling: No appearance at the February 6, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor, Chapter 7 Trustee, and Interested Party on January 6, 2020. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Default Judgment is granted.

The United States Trustee ("Plaintiff") filed the instant Motion for Default Judgment on January 6, 2020. Dckt. 17. Plaintiff seeks an entry of default judgment denying Tracy Emery Smith ("Defendant-Debtor") discharge in the underlying bankruptcy case under 11 U.S.C. §§ 727(a)(4)(A), 727(a)(3), and 727(a)(5) in the instant Adversary Proceeding No. 19-09018.

The instant Adversary Proceeding was commenced on October 24, 2019. Dckt. 1. The reissued summons was issued by the Clerk of the United States Bankruptcy Court on October 28, 2019. Dckt. 6. The complaint and summons were properly served on Defendant-Debtor. Dckt. 7.

Defendant-Debtor failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant-Debtor pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on December 12, 2019. Dckt. 10.

SUMMARY OF COMPLAINT

The Complaint alleges the following:

Defendant's Prior Bankruptcy Cases

A. Defendant has filed two prior bankruptcies: (1) Case No. 16-90856-E-7 (filed on September 19, 2006) and (2) Case No. 18-90104-E-7(filed on February 20, 2018). Complaint at ¶¶ 9-11. Both of these cases were dismissed. *Id.* at ¶¶ 10-11.

Consolidated Reliance, Inc. Bankruptcy Case

B. On September 16, 2015, Consolidated Reliance, Inc. ("Reliance") filed for relief under Chapter 11, Case No. 15-27284-D-11. *Id.* at ¶ 12. Defendant owned 70% of the equity in debtor Reliance. *Id.* at ¶ 14. Debtor Reliance owned real property worth more than $11 million and personal property worth more than $6.6 million but their scheduled liabilities exceeded $10 million. *Id.* at ¶ 15. This case was dismissed on the debtor's motion by an Order dated April 7, 2016. *Id.* at ¶ 17.

Spyglass Equities, Inc. Bankruptcy Case

C. On November 10, 2015, Spyglass Equities, Inc. ("Spyglass") filed for relief under Chapter 11, Case No. 15-91087-D-11. Spyglass was a wholly-owned subsidiary of Reliance. *Id.* at ¶ 19. Defendant was the CEO of debtor Spyglass. *Id.* Spyglass owned real property worth more than $3.5 million and their scheduled liabilities exceeded $4.9 million. *Id.* at ¶ 20. This bankruptcy was dismissed on May 4,2016. *Id.* at ¶ 22.

The Petition in the Underlying Case

D. Defendant, while under the penalty of perjury, did not disclose his previous two bankruptcies on his Petition. *Id.* at ¶¶ 23-24.

E. On Section 15 of the Petition, Defendant stated that he received a briefing from an approved credit counseling agency within the 180 days before the filing of the bankruptcy petition but did not have the certificate of completion. *Id.* at ¶ 25. Defendant has not filed a certificate of completion which Section 15 instructs Defendant to file within 14 days of filing the Petition. *Id.* at ¶¶ 26-27. Defendant did not receive a briefing from an approved credit counseling agency during the 180 days preceding the Petition Date. *Id.* at ¶ 28.

Schedules filed in the Underlying Case

F. On Defendant's Schedule A/B Defendant stated he did not own any legal or equitable interests in real property and owned personal property valued

at $65,636.05. *Id.* at ¶¶ 30-31. He also declared: (a) he owned 100% of Sharp Investor, Inc., (b) he owned 30% of Downkicker, Inc., (c) he owned 100% of Downkicker Investments, Inc., and (d) the value of each of the foregoing interest was $0.00. *Id.* at ¶ 32.

G. On Schedule E/F Defendant disclosed 6 general unsecured claims in the aggregate amount of $1,555,214.88. *Id.* at ¶ 33. Defendant stated on his Schedule I he had a monthly net income of $4,510.78. *Id.* at ¶ 34.

The Statement of Financial Affairs filed in the Underlying Case

H. On Defendant's "Statement of Financial Affairs," ("SOFA") he gave a false statement by listing his income as $44,725 for 2019 (he did not disclose income for 2017 and 2018) and not disclosing he was party to a lawsuit, court action or administrative proceeding during the year preceding the Petition Date. *Id.* at ¶¶ 35-39.

Defendant also gave a false statement by stating he did not have any connections to any businesses within 4 years prior to the Petition Date, which includes being an officer of the corporation or holding at least 5% of the voting or equity securities. *Id.* at ¶¶ 40-41.

Official Form 122A-1

I. On Defendant's "Statement of Your Current Monthly Income" he substantially understated his income by claiming he had an income of only $5,172.28.*Id.* at ¶¶ 42-47.

Defendant's Testimony at the Meeting of Creditors

J. At the Meeting of Creditors Defendant testified:

(a) he had read and signed his Petition and schedules and the information was correct;

(b) he had listed all his assets and creditors;

(c) Sharp Investor, Inc. was still operating;

(d) Downkicker, Inc. was still operating in the sense it was wrapping up its business;

(e) he earned no income from Sharp Investor, Inc. Downkicker Inc., or Downkicker Investments, Inc.;

(f) he started a consulting business in January 2019 which is a sole proprietorship;

(g) the income on Schedule I and SOFA was from his new consulting business. *Id.* at ¶ 50.

Defendant Fails to Provide Corporate Books and Records

K. During the Meeting of the Creditors on June 25, 2019, the Chapter 7 Trustee requested Defendant provide corporate tax returns and balance sheets ("corporate books and records") for Sharp Investor, Inc., Downkicker, Inc., and Downkicker Investments, Inc. *Id.* at ¶ 51.

As a result, the Meeting of the Creditors was continued to July 9, 2019, when Defendant failed to appear to this meeting, it was continued to July 23, 2019. *Id.* at ¶¶ 52-53. On July 10, 2019, the Trustee again requested Defendant provide the corporate books and records. *Id.* at ¶ 54.

At the continued Meeting of the Creditors on July 23, 2019, Defendant failed to provide the corporate books and records, thus the Trustee set a deadline of August 30, 2019 for production of the corporate books and records. *Id.* at ¶ 55-57.

The Meeting of Creditors was continued to October 1, 2019 and October 15, 2019, Defendant failed to appear and provide the corporate books on both dates. *Id.* at ¶¶ 58-60. Defendant has never provided Chapter 7 Trustee with the requested documents. *Id.* at ¶ 60.

Bank Account Activity for Sharp Investor, Inc.

L. Between approximately December 17, 2018 and January 24, 2019, Sharp Investor, Inc. maintained a bank account at U.S. Bank National Association that ended with the digits 0003; during this period there were $71,000.00 in deposits and $71,000.00 withdrawals. *Id.* at ¶¶ 61-63. Between January 15, 2018 and June 30, 2019 Sharp Investor, Inc. maintained a bank account at Capital One that ended with digits 8122; during this period there was more than $880,000.00 of deposits and $880,000.00 of withdrawals. *Id.* at ¶¶ 64-66.

Bank Account Activity for Downkicker Investments, Inc.

M. Between approximately August 22, 2017 and May 1, 2019, Downkicker Investments, Inc. maintained a bank account at U.S. Bank National Association that ended with the digits 3037; during this period there were $436,000.00 in deposits and $436,000.00 withdrawals. *Id.* at ¶¶ 67-69. Between approximately August 22, 2017 and April 5, 2019, Downkicker Investments, Inc. maintained a bank account at U.S. Bank National Association that ended with the digits 3045; during this period there were $271,000.00 in deposits and $271,000.00 withdrawals. *Id.* at ¶¶ 70-72.

Bank Account Activity for Downkicker, Inc.

N. Between approximately March 30, 2017 and December 5, 2018, Downkicker, Inc. maintained a bank account at U.S. Bank National Association that ended with the digits 3872; during this period there were $1.9 million in deposits and $1.9 million in withdrawals. *Id.* at ¶¶ 73-75.

Defendant's Connection to DKI Situational Fund #3, LLC

O. Within four years of the Petition Date, the Defendant was a member of DKI Situational Fund #3, LLC ("Fund"). Defendant was the organizer and registered agent for the Fund. *Id.* at ¶¶ 76-77. The Fund through its own bank account deposited $12,000.00 into the Downkicker Investments, Inc. U.S. Bank account ending with the digits 3037. *Id.* at ¶ 81. Defendant did not disclose this connection on his SOFA. *Id.* at ¶ 82.

Defendant's Corporate Income

P. During the applicable period, Defendant used approximately $90,000.00 from corporate accounts for personal expenses, thus Defendant's net monthly income was at least $15,000.00, which is higher than the $4,510.78 amount stated on his Schedule J. *Id.* at ¶¶ 83-89.

Q. Further, between January 1, 2019 and the Petition date, Defendant used approximately $36,000.00 from corporate accounts for personal expenses; thus, Defendant's net monthly income was at least $9,000.00. *Id.* at ¶¶ 90-91.

R. Defendant stated he had a gross income of only $44,725.00 for operating a business from January 1, 2019 through the Petition Date, this amounts to approximately a gross income of $11,000.00 per month. *Id.* at ¶¶ 92-93. According to the CMI Form, Defendant's operating expenses exceed $10,000.00 per month. *Id.* at ¶ 94.

Defendant's Connection to 2006 Catalina, LLC

S. When 2006 Catalina, LLC ("Catalina") acquired real property, Defendant signed the grant deed on behalf of Catalina and on the grant deed Defendant indicated he was the President of Downkicker, Inc., the purported manager of Catalina. *Id.* at ¶¶ 95-100. Defendant did not disclose this connection on his SOFA. *Id.* at ¶ 100.

Defendant's Connection to 2006 Catalina Fund, LLC

T. Within four years of the Petition Date, Defendant was a member of 2006 Catalina Fund, LLC and according to its Articles of Incorporation, he was the organizer and registered agent for the 2006 Catalina Fund, LLC. *Id.* at

¶¶ 101-104. Defendant did not disclose this connection in his SOFA. *Id.* at ¶ 105.

U. In February 2018, 2006 Catalina Fund, LLC acquired the Catalina Blvd Property from 2006 Catalina LLC. *Id.* at ¶ 104.

Defendant's Connection to 574 Mariscal, LLC

V. 574 Mariscal, LLC ("Mariscal") transferred its interest in real property to an entity titled 574 Mariscal Fund, LLC. Defendant signed the grant deed on behalf of Mariscal and on the grant deed Defendant indicated he was the President of Downkicker, Inc., the purported manager of Mariscal. *Id.* at ¶ 106-110. Defendant did not disclose this connection on his SOFA. *Id.* at ¶ 111.

Defendant's Connection to 574 Mariscal Fund, LLC

W. Within four years of the Petition Date, Defendant was a member of 574 Mariscal Fund, LLC because as was reflected on its Articles of Incorporation, he was the organizer and registered agent for the 574 Mariscal Fund, LLC. *Id.* at ¶ 112-115. Defendant did not disclose this connection in his SOFA. *Id.* at ¶ 116.

Barbara Holdings, Inc. v. Tracy Smith

X. On or about December 11, 2017 Defendant was named as a defendant in the matter of *Barbara Holdings, Inc. v. Tracy Smith et al*, Case No. 17-CV-320282, which is pending in the Superior Court of California. *Id.* at ¶ 117. The Defendant was personally served with the complaint and summons on January 31, 2018 and Defendant did not disclose this litigation on his SOFA. *Id.* at ¶ 118-121.

The Uniform Residential Loan Application

Y. Defendant executed a uniform residential loan application on September 5, 2017 (in connection with the transactions at issue in the State Court Action) where he stated his net worth was more than $430,000.00. *Id.* at ¶ 122-124.

Claim 1: False Oaths - Denial of Discharge under 11 U.S.C.§ 727 (a)(4)(A)

A. Defendant falsely stated on his Petition that he received a briefing from an approved credit counseling agency during the 180 days preceding the Petition date.

B. Defendant failed to disclose Case No. 18-90104-E-7 in which he was a party.

C. Defendant failed to disclose his connections to several business entities and corporate income received from Corporate Accounts, understating his income.

D. Defendant testified at the June 25, 2019 Meeting of Creditors that everything in his Petition and Schedules was true and correct.

Claim 2: Failure to Keep Adequate Books and Records - Denial of Discharge under 11 U.S.C.§ 727 (a)(3)

A. The Corporate Accounts of Sharp Investor, Inc., Downkicker, Inc., and Downkicker Investments, Inc. reflect substantial activity, and upon information and belief, they may own interests in other business entities.

B. Defendant has not produced requested books and records for each aforementioned entity to the Chapter 7 Trustee.

C. It is believed Defendant has failed to keep or preserve recorded information from which his financial condition or business transactions might be ascertained.

D. Failure to keep or preserve such recorded information is not justified under the circumstances of this case.

Claim 3: Failure to Satisfactorily Explain Deficiency of Assets to Meet Liabilities - Denial of Discharge under 11 U.S.C.§ 727 (a)(5)

A. Upon information and belief, Defendant executed a uniform residential loan application on or about September 5, 2017 listing his net worth over $430,000.00.

B. Defendant's Schedule A/B in the Underlying Bankruptcy Case reflects property worth only $65,636.05.

C. Defendant's schedules and statements in the Underlying Bankruptcy Case do not reflect a satisfactory explanation for the loss or decline in asset values between September 5, 2017 and the Petition date.

D. Defendant has not complied with the Chapter 7 trustee to produced books and records for Sharp Investor, Inc., Downkicker, Inc., and Downkicker Investments.

Prayer for Relief:

A. Plaintiff requests that the court deny Defendant's discharge, and

B. Grant such other relief as it deems just and proper.

SUMMARY OF MOTION

Plaintiff, U.S. Trustee, filed the present Motion on January 6, 2020. Dckt. 17. The Motion requests the court grant default judgment on the following grounds:

A. Plaintiff filed a Complaint commencing this adversary proceeding on October 24, 2019.

B. The Complaint seeks judgment denying Defendant's discharge pursuant to 11 U.S.C. §§ 727(a)(4)(A), 727(a)(3), and 727(a)(5).

C. For Plaintiff's First Claim for Relief under 11 U.S.C. § 727(a)(4)(A), the Complaint alleges the following:

1. Defendant failed to disclose that he had been a debtor in a previous case– Case No. 18-90104-E-7. *See* Complaint, at ¶¶ 11, 24, 126a. *See also* Declaration of Tina Spyksma ("Spyksma Declaration") at ¶¶ 11, 14; Exhibit 1 and Exhibit 4.

2. Defendant falsely stated in Petition that he had received a briefing from an approved credit counseling agency during the 180 days preceding the Petition Date. *See* Complaint, at ¶¶ 25-28, 126b. *See also* Spyksma Declaration at ¶¶ 11, 19; Exhibit 1.

3. Defendant failed to disclose on the Statement of Financial Affairs (ECF No. 17) his connections to several business in response including Consolidated Reliance, Inc., DKI Situational Fund #3, LLC, 2006 Catalina Fund, LLC, and 574 Mariscal Fund, LLC. *See* Complaint, at ¶¶ 12-17, 76-82, 101-105, 112-16, and 126.d. *See also* Spyksma Declaration, at ¶¶ 15-18; Exhibits 5 through 8.

4. Defendant understated his income on Schedule I (ECF No. 17) and on Official Form 122A-1 (ECF No. 18) and failed to disclose income he received through bank accounts held in the names of Sharp Investor, Inc., Downkicker, Inc., Downkicker Investments, Inc., and/or DKI Situational Fund #3, LLC. *See* Complaint, at ¶¶ 34, 42-47, 61-94, 126e, and 126f. *See also* Declaration of Teresa B. Field ("Field Declaration"), at ¶¶ 3-5; Exhibits 2 and 3.

D. For Plaintiff's Second Claim for Relief under 11 U.S.C. § 727(a)(3), the Complaint alleges the following:

1. Defendant disclosed ownership interests on Schedule A/B (ECF No. 17) in each of Sharp Investor, Inc., Downkicker, Inc., and Downkicker Investments, Inc. *See* Complaint, at ¶ 32.

2. Defendant failed to comply with Chapter 7 Trustee's request that he produce books and records for each of Sharp Investor, Inc.,

Downkicker, Inc., and Downkicker Investments, Inc. *See* Complaint, at ¶¶ 51-60; *see also* Declaration of Michael D. McGranahan ("McGranahan Declaration"); Exhibit 9 (email regarding document request).

E. For Plaintiff's Third Claim for Relief under 11 U.S.C. § 727(a)(5), the Complaint alleges the following:

1. Defendant executed a uniform residential loan application on September 5, 2017. In that document, Defendant stated that his net worth was more than $430,000. *See* Complaint, at ¶¶ 122-124.

2. Defendant's Schedules in the Underlying Case reflect general unsecured claims totaling more than $1.5 million, while Defendant's Schedule A/B reflects property worth only $65,636.05. *See* Complaint, at ¶¶ 31, 33.

3. Defendant's Schedules and Statements in the Underlying Case do not provide a satisfactory explanation for the loss or decline in asset values between September 5, 2017 and the Petition Date. *See* Complaint, at ¶ 141.

F. On October 28, 2019, the Clerk of the U.S. Bankruptcy Court reissued a summons requiring Defendant to file a motion or answer to the Complaint within 30 days with a deadline of November 27, 2019. Dckt. 6.

G. On October 31, 2019, Plaintiff served Defendant with the Complaint and reissued Summons by first class mail at the street address listed on the Petition for the Underlying Case.

H. Defendant failed to file an answer or motion to the Complaint.

I. Defendant's default was entered on December 12, 2019. Dckt. 10.

J. Defendant is not an infant. Plaintiff has no reason to believe that Defendant is an incompetent person. *See* Spyksma Declaration at ¶¶ 8-9.

K. Defendant is not currently on active duty with the military service of the United States and thus not entitled to the benefits of the Servicemembers Civil Relief Act of 2003 (50 App. U.S.C.A. § 501 et seq.). *See* Spyksma Declaration at ¶ 10.

L. Entry of Default Judgment is appropriate based on the allegations and facts set worth in the Complaint and Defendant's failure to file a responsive pleading to the Complaint.

M. Plaintiff requests entry of default judgment against Defendant and to grant Plaintiff's claims for relief. *See Televideo Systems, Inc. v. Heidenthal*, 826

F.2d 915, 917-18 (9th Cir. 1987) (holding that, upon default, the factual allegations of the complaint, except those relating to amount of damages, will be taken as true).

In support of the Motion, Plaintiff filed the Declarations of Teresa B. Field, Michael D. McGranahan, and Tina Spyksma. Plaintiff also filed nine (9) properly authenticated exhibits.

The Exhibits are:

(1) Defendant's Petition for Case No. 19-90382;

(2) Defendant's Schedules and Statements for Case No. 19-90382;

(3) Official Form 122A-1 for Case No. 19-9038;

(4) Docket for Case No. 18-90104,

(5) Petition for Case No. 15-27284,

(6) Articles of Organization for DKI Situational Fund #3 listing Defendant-Debtor as agent for service and as CEO of Downkicker, Inc.,

(7) Articles of Organization for 2006 Catalina Fund, LLC listing Defendant-Debtor as agent for service and as CEO of Downkicker, Inc.,

(8) Articles of Organization for 574 Mariscal Fund, LLC listing Defendant-Debtor as agent for service and as CEO of Downkicker, Inc., and

(9) Chapter 7 Trustee's email (dated July 10, 2019) to Defendant-Debtor requesting corporate documents for the August 2019 Meeting of Creditors.

Summary of Declarations

Declaration of Teresa B. Field

Teresa B. Field is an analyst/auditor employed by the U.S. Department of Justice, office of the United States Trustee, Sacramento, California. Ms. Field reviewed bank account statements covering October 1, 2018 through March 31, 2019 ("Applicable Period") for accounts:

a. In the name of Sharp Investor, Inc. at U.S. Bank National Association ending in 0003 ("USB Account 0003)

b. In the name of Sharp Investor, Inc. at Capitol One ending in 8122 ("Cap One Account 8122")

c. In the name of Downkicker Investments, Inc. at U.S. Bank National Association ending in 3037 ("USB Account 3037"), and together USB Account 0003 and Cap One Account 8122, the "Corporate Accounts"

During the Applicable Period:

There were approximately $19,462.00 of ATM withdrawals from Cap One Account 8122;

Checks in the approximate amount of $55,050.00 were written to Defendant from USB Account 3037; and

In total, Defendant used approximately $90,000.00 of funds from the Corporate Accounts for personal expenses and/or personal purposes.

Review of Defendant's Official Form 122A-1 filed in the Underlying Bankruptcy Case as ECF No.18 ("CMI Form") indicates a net income of $4,510.78 from a "business, profession, or farm." Other income disclosed on the CMI Form was $661.50 for the employment income of Defendant's non-filing spouse. On the CMI Form Defendant listed current monthly income during the Applicable period as $5,172.28.

Defendant's Schedule I filed in the Underlying Bankruptcy Case states a net monthly income of $4,510.78 from "rental property and from operating a business, profession, or farm."

Declaration of Michael D. McGranahan

At the Meeting of Creditors on June 25, 2019, Mr. McGranahan ("Trustee") requested that defendant provide corporate tax returns and balance sheets for Sharp Investor Inc., Downkicker, Inc., and Downkicker Investments, Inc.

On July 10, 2019, Trustee requested by email that Defendant provide last filed tax returns, and current balance sheets and income statements for the aforementioned business entities.

At the July 23, 2019, Trustee again requested the corporate books and records. Trustee set a deadline of August 30, 2019 for production of the documents. Meeting of Creditors was continued to October 1, 2019.

Defendant did not appear at the October 1, 2019 meeting, and Trustee continued the meeting to October 15, 2019.

Defendant failed to appear at the October 15, 2019 meeting, and has never provided Trustee with the requested records.

Declaration of Tina Spyksma

Ms. Spyksma testifies as to Defendant-Debtor's service of the Complaint and reissued Summons. She also testifies that she searched and discovered that Defendant is not an infant and not in military service. She further testifies that she accessed the court's database and downloaded all the referred to exhibits related to Defendant-Debtor's Petition and Schedules in the underlying case, and past bankruptcy case and qualifies them as true and correct copies. She also downloaded copies of the various articles of organization cited in the Complaint and Motion for Entry of Default Judgment. Finally, Ms. Spyksma testifies that she reviewed Defendant-Debtor bankruptcy case and as of January 6, 2020, he had not filed a certificate of completion for the mandatory credit counseling.

APPLICABLE LAW

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

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

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

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

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

11 U.S.C. § 727(a)(4)(A)- False Oaths

Section 727 of the Code provides for exceptions to discharge. Specifically, 11 U.S.C. § 727(a)(4)(A) provides:

> (a) The court shall grant the debtor a discharge, unless—
>
> [. . .]
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> (A)made a false oath or account[.]

11 U.S.C. § 727(a)(4)(A).

The false oath that is a sufficient ground for denying a discharge may consist of (1) a false statement or omission in the debtor's schedules or (2) a false statement by the debtor at an examination during the course of the proceedings.

6 Collier on Bankruptcy P 727.04 (16th 2019).

The false oath must have related to a material matter. *Retz v. Samson* (*In re Retz*), 606 F.3d 1189 (9th Cir. 2010); *Coccia v. Fischer* (*In re Fischer*), 2 C.B.C.2d 305, 4 B.R. 517 (Bankr. S.D. Fla. 1980) ("[a] bankruptcy discharge may be denied under § 727(a)(4)(a) only if the false oath related to a … matter … material to the condition of the estate or the debtor's entitlement to discharge").

The subject matter of a false oath is material and warrants a denial of discharge if it is related to the debtor's business transactions, or if it concerns the discovery of assets, business dealings, or the existence or disposition of the debtor's property. *Van Robinson v. Worley*, 849 F.3d 577 (4th Cir. 2017) (valuation of only significant nonexempt asset at less than one fifth its value was material); *Chalik v. Moorefield* (*In re Chalik*), 748 F.2d 616, 11 C.B.C.2d 1159 (11th Cir. 1984); *In re Weiner,* 208 B.R. 69 (B.A.P. 9th Cir. 1997) (undervaluation of assets intended to keep property from creditors).

11 U.S.C. § 727(a)(3)- Failure to Keep Adequate Books and Records

Section 727 of the Code provides for exceptions to discharge. Specifically, 11 U.S.C. § 727(a)(3) provides:

> (a) The court shall grant the debtor a discharge, unless—
>
> > [. . .]
> >
> > (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]

11 U.S.C. § 727(a)(3).

11 U.S.C. § 727(a)(5)- Failure to Satisfactorily Explain Deficiencies of Assets to Meet Liabilities

Section 727 of the Code provides for exceptions to discharge. Specifically, 11 U.S.C. § 727(a)(5) provides:

> (a) The court shall grant the debtor a discharge, unless—
>
> > [. . .]
> >
> > (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]

Section 727(a)(5) must be read in conjunction with Federal Rule of Bankruptcy Procedure 4005, which imposes on the plaintiff the burden of "proving the objection." *In re LaBonte*, 5 C.B.C.2d 181, 13 B.R. 887 (Bankr. D. Kan. 1981) (plaintiffs' attempt to present a prima facie case under section 727(a)(5) by pointing to discrepancies in inventory valuations and fluctuations in inventory value each month held insufficient to prevent discharge). The initial burden of going forward with evidence is on the objector, who must introduce more than merely an allegation that the debtor has failed to explain losses.

6 Collier on Bankruptcy P 727.08 (16th 2019).

DISCUSSION

11 U.S.C. § 727(a)(4)(A)- False Oaths

Here, Defendant-Debtor submitted his Petition on April 29, 2019. A bankruptcy petition is filed under penalty of perjury. Plaintiff U.S. Trustee has shown that Defendant-Debtor made false representations on his Petition and Schedules. There is a detailed list of the false statements listed in the Complaint.

First, Debtor failed to disclose that he had a previous bankruptcy, Case No. 18-90104. Second, Defendant-Debtor stated that he had taken the credit counseling briefing. Yet, as of February 5, 2020, no credit counseling certification has been filed in the underlying bankruptcy case. A look at Defendant-Debtor's Statement of Financial Affairs fails to list his ownership or interest in any of the three corporations connected to Defendant-Debtor. Additionally, Defendant-Debtor failed to disclose that he was party to a State Court Action, *Barbara Holdings, Inc. v. Tracy Smith*.

Finally, Defendant-Debtor failed to disclose income that he received through bank accounts of his three corporations as shown by U.S. Trustee's investigation of Defendant-Debtor's financial reality.

Petitions being under penalty of perjury, Defendant-Debtor gave a false oath knowingly and fraudulent by failing to disclose information that he personally knew and should have been included in his Petition.

The Plaintiff U.S. Trustee has established grounds for denial of discharge pursuant to 11 U.S.C. § 727(a)(4)(A).

11 U.S.C. § 727(a)(3)- Failure to Keep Adequate Books and Records

Here, Defendant-Debtor has failed to keep adequate records regarding his businesses, namely Sharp Investor, Inc., Downkicker, Inc., and Downkicker Investment, Inc.

Chapter 7 Trustee has made several requests for said documents and Defendant-Debtor has failed to submit them. The first request occurred on June 25, 2019 when Chapter 7 Trustee requested corporate tax returns and balance sheets for all three corporations at the Meeting of Creditors. Again, by email, on July 10, 2019, Chapter 7 Trustee provide these documents. Then again, at the July 23, 2019 meeting of creditors, Chapter 7 Trustee requested corporate books and records and gave Defendant-Debtor a deadline of August 30, 2019. The Meeting was continued to October 1, 2019. Defendant failed to appear at the October meeting, which was continued, yet again, to October 15, 2019. Defendant failed to attend this one as well and Chapter 7 Trustee concluded the Meeting of Creditors. To this day, Defendant has not provided any records to Chapter 7 Trustee. McGranahan Declaration, ¶7.

Here, though having extensive business operations, multiple entities, and hundreds, if not millions, of dollar flowing through bank accounts, the U.S. Trustee has demonstrated that Defendant-Debtor has produced no books and records. Defendant-Debtor offers no explanation or defense of the failure to have and produce business records, books, papers, and other documentation of Debtor's financial conditions and business transaction.

By not answering to this adversary proceeding, Defendant-Debtor has failed to explain the court if it has a justified reason for not providing corporate documents to Chapter 7 Trustee.

The Plaintiff U.S. Trustee has established grounds for denial of discharge pursuant to 11 U.S.C. § 727(a)(3).

11 U.S.C. § 727(a)(5)- Failure to Satisfactorily Explain Deficiencies of Assets to Meet Liabilities

Here, Defendant-Debtor has failed to explain the discrepancy between his worth according to a loan application filed in September 2017 and his present bankruptcy Petition. According to the loan application, Defendant-Debtor stated having a net worth of more than $430,000.00. Defendant-Debtor's Schedule A/B reflects property worth $65,636.05. Yet, Defendant-Debtor's Schedules state general unsecured claims totaling $1.5 million.

Chapter 7 Trustee has requested several times for Defendant-Debtor to produce business documents related to his three companies, which Defendant-Debtor has failed to produce. Therefore, Defendant-Debtor has failed to adequately explain the discrepancy in assets and thus failed to explain the deficiencies of assets to meet the $1.5million liability in general unsecured claims.

The Plaintiff U.S. Trustee has established grounds for denial of discharge pursuant to 11 U.S.C. § 727(a)(5).

The court finds that Defendant-Debtor has made false oaths as it pertains to his Petition and Schedules; has failed to produce business documents, and has failed to adequately explain deficiencies of assets.

The court grants default judgment in favor of Plaintiff and against Defendant-Debtor Tracy Emery Smith for the denial of discharge pursuant to 11 U.S.C. § 727(a)(4)(A), § 727(a)(3), and § 727(a)(5), and each of them as separate and independent grounds for such denial of discharge. Upon successful administration and the completion of the Defendant-Debtor's Bankruptcy Case, 19-90382-E-7, the Bankruptcy Case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in that Bankruptcy Case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by the United States Trustee ("Plaintiff") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Entry of Default Judgment is granted and judgment shall be entered for Plaintiff U.S. Trustee and against Defendant-Debtor Tracy Emery Smith denying Defendant-Debtor his discharge pursuant to 11 U.S.C. § 727(a)(4)(A), § 727(a)(3), and § 727(a)(5), and each of them as separate and independent grounds for such denial of discharge in his Chapter 7 bankruptcy case, 19-90382-E-7, and that said bankruptcy case shall be closed without the entry of a discharge for Defendant-Debtor.

Requests for costs and attorneys' fees, if any, shall be made as provided in Federal Rule of Civil Procedure 54(b) and Federal Rule of Bankruptcy Procedure 7054.

FINAL RULINGS

11. 19-91119-E-7 **ERIK/ILIANA CLAROS** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Brian Haddix **1-13-20 [21]**

Final Ruling: No appearance at the February 6, 2020 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, Creditors, Parties Requesting Special Notice and Chapter 7 Trustee as stated on the Certificate of Service on January 15, 2020. The court computes that 22 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $181.00 due on December 28, 2019.

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

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.