

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

February 21, 2019 at 10:30 a.m.

1. [18-25001-E-7](#) **JOSEPH AKINS** **MOTION TO AVOID LIEN OF**
[RLF-2](#) **Sheila Nelson** **DOMINIC S. BLACK**
1-18-19 [[35](#)]

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 Not Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, and Office of the United States Trustee on January 18, 2019. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is ~~XXXXX~~.

INSUFFICIENT NOTICE OF MOTION

Pursuant to the Local Bankruptcy Rules, the following contents must be within the notice of hearing:

B) Notice.

(I) The notice of hearing shall advise potential respondents whether and when

written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition.

(ii) If written opposition is required, the notice of hearing shall advise potential respondents that the failure to file timely written opposition may result in the motion being resolved without oral argument and the striking of untimely written opposition.

(iii) The notice of hearing shall advise respondents that they can determine whether the matter has been resolved without oral argument or whether the court has issued a tentative ruling, and can view [any] pre-hearing dispositions by checking the Court's website at www.caeb.uscourts.gov after 4:00 P.M. the day before the hearing, and that parties appearing telephonically must view the pre-hearing dispositions prior to the hearing.

(iv) When notice of a motion is served without the motion or supporting papers, the notice of hearing shall also succinctly and sufficiently describe the nature of the relief being requested and set forth the essential facts necessary for a party to determine whether to oppose the motion. However, the motion and supporting papers shall be served on those parties who have requested special notice and those who are directly affected by the requested relief.

LOCAL BANKR. R. 9014-1(d)(3)(B)(I)-(iv). The Movant's Notice Of Hearing did not meet these requirements.

The Notice does not indicate when written opposition must be filed, or the deadline for filing and serving it. Unless considering the header or signature block, the names and addresses of the persons who must be served with any opposition are not included. Rather than state that untimely opposition may be stricken, the Notice states the court may award the relief prayed for. No reference is given to the tentative rulings available for viewing on the court's website. No essential facts are set forth.

At the hearing, **XXXXXXXXXXXXXXXXXX**.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Dominic S. Black ("Creditor")

against property of Joseph H. Akins (“Debtor”) commonly known as 1319 East Tennessee St., Fairfield, California (“Property”).

A judgment was entered against Debtor in favor of Creditor in the amount of \$323,804.85. Exhibit A, Dckt. 38. An abstract of judgment was recorded with Solano County on August 25, 2010, that encumbers the Property. *Id.*

Pursuant to Debtor’s Amended Schedule A, the subject real property has an approximate value of \$275,000.00 as of the petition date. Dckt. 27. The unavoidable consensual liens that total \$121,267.00 as of the commencement of this case are stated on Debtor’s Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$175,000.00 on Amended Schedule C. Dckt. 27.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Joseph H. Akins (“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 judgment lien of Dominic S. Black, California Superior Court for Marin County Case No. CIV 081975, recorded on August 25, 2010, Document No. 201000077465 , with the Solano County Recorder, against the real property commonly known as 1319 East Tennessee St., Fairfield, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

2. [17-22347-E-11](#) **UNITED CHARTER LLC**
[JJG-13](#) **Jeffrey Goodrich**

**MOTION TO EMPLOY REALTY
EXECUTIVES AS BROKER(S)**
2-7-19 [\[327\]](#)

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 creditors, parties requesting special notice, and Office of the United States Trustee on February 8, 2019. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required.

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

United Charter, LLC, Debtor in Possession (“ΔIP”) seeks to employ its lease listing broker, John Anderson of Realty Executives (“Broker”), pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. ΔIP seeks retroactive authorization to employ Broker for efforts performed to lease real property described as a 15+ acre industrial warehouse located in Stockton, California (the “Property”).

ΔIP states in the Motion that the Property was initially set for auction, which fell through. ΔIP then sought to lease the Property, filing a motion to employ John Anderson, a licensed real salesperson of The Virtual Realty Group for the period December 18, 2018 to March 18, 2018, which the court granted on January 26, 2018. Dckts. 113, 151, 155.

After the prior employment period expired, and in preparation for developing a confirmable plan, ΔIP requested that Anderson present a proposal to manage the DIP’s property post-confirmation. Anderson associated with Broker in performing those management and lease listing services. After plan confirmation was delayed, ΔIP failed to seek employment for Broker. However, at this point Broker had

already solicited, negotiated, and prepared several leases for the Property.

Based on Broker's valuable services and benefit provided to the Estate, ΔIP seeks an order authorizing Broker's employment *nunc pro tunc*, effective May 1, 2018.

John M. Anderson, a licensed real salesperson of Broker, testifies that he is currently employed by Broker as a sales agent. John M. Anderson testifies he and the firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

NUNC PRO TUNC

As a preliminary matter, ΔIP is seeking a "retroactive authorization" rather than *nunc pro tunc* authorization. The Ninth Circuit has noted that *nunc pro tunc* approval is not the proper name for seeking retroactive authorization of actions in a bankruptcy case. *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 515 n. 4 (9th Cir. 2007). *Nunc pro tunc* amendments are usually used to correct errors in the record and are extremely limited in scope. *Id.* The Ninth Circuit noted that while it is more accurate to call such after-the-fact authorizations "retroactive approvals," it is customary, but not necessarily correct, to refer to them generically as *nunc pro tunc* in bankruptcy practice. *Id.* The two names stand for the same set of standards and can be used interchangeably. *See, e.g., Atkins v. Wain*, 69 F.3d 970, 974–78 (9th Cir. 1995) (alternating between using *nunc pro tunc* and "retroactive approval" when determining whether a law firm had established exceptional circumstances allowing them to be paid for services to debtor not approved by the court).

A bankruptcy court can exercise its equitable discretion to grant retroactive authorizations when it is appropriate to carry out the Bankruptcy Code and when the approval benefits the debtor's estate. *In re Harbin*, 486 F.3d at 522. Retroactive approvals should only be used in "exceptional circumstances." *Atkins*, 69 F.3d at 974.

DISCUSSION

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse

interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Realty Executives as Broker for the Chapter 11 Estate on the terms and conditions set forth in the Lease Listing Agreement filed as Exhibit A, Dckt. 331. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

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

The Motion to Employ filed by United Charter, LLC (“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 Employ is granted, and the Debtor in Possession is authorized to employ its lease listing broker, John Anderson of Realty Executives Realty Executives as Broker (“Broker”) for the Debtor in Possession, effective May 1, 2018, on the terms and conditions as set forth in the Lease Listing Agreement filed as Exhibit A, Dckt. 331.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

3. [19-20149-E-7](#) **RANDY MIDSON**
Dean Feldman

**MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER
FEE
1-10-19 [2]**

An Application for Waiver of Chapter 7 filing fee has been filed by Randy Midson (“Debtor”). The Debtor’s family unit consists of one person (Debtor). Debtor’s gross income is \$1,165 (Schedule I, Social Security).

The First Meeting of Creditors has been concluded and the Trustee has filed his report of there being no assets to be distributed in this case. Trustee’s February 8, 2019 Docket Entry Report.

The court finding that Debtor does meet the financial guidelines for a fee waiver (\$1,517.50), upon consideration of the Debtor’s income, assets, the Schedules in this case, and the additional information provided at the hearing, **the court grants the application for waiver of the Chapter 7 filing fees.**

4. [18-27564-E-7](#)
[MS-1](#)

COLTON MINCHEW
Mark Shmorgan

MOTION TO COMPEL
ABANDONMENT
1-7-19 [12]

Final Ruling: No appearance at the February 21, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, and Office of the United States Trustee on January 7, 2019. By the court’s calculation, 45 days’ notice was provided. 28 days’ notice is required.

The Motion to Compel Abandonment 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 to Compel Abandonment is granted.

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

The Motion filed by Colton Minchew (“Debtor”) requests the court to order the Chapter 7 Trustee, Michael Hopper (“the Chapter 7 Trustee”), to abandon property commonly known as 5372 Vichy Circle Antelope, California (“Property”). The Property is encumbered by the lien of Colonial Savings & Loan, securing a claim of \$193,994.00. The Declaration of Colton Minchew has been filed in support of the Motion and values the Property at \$262,000.00. Dckt. 15; *See Also*, Schedule A, Dckt. 1. On Debtor’s Amended Schedule C, Debtor claims an exemption in the Property of \$75,000.00. Dckt. 18.

Therefore, there is no equity in the Property.

The Chapter 7 Trustee, Michael Hopper, entered a statement of non-opposition on to the docket on February 4, 2019.

The court finds that the debt secured by the Property exceeds the value of the Property and that there are negative financial consequences to the Estate caused by retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

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

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

The Motion to Compel Abandonment filed by Colton Minchew (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted, and the Property identified as 5372 Vichy Circle Antelope, California and listed on Schedule A / B by Debtor is abandoned by Michael Hopper (“the Chapter 7 Trustee”) to Colton Minchew by this order, with no further act of the Chapter 7 Trustee required.

5. [19-20079-E-7](#) DAYMAN HICKISON
[MJD-1](#) Matthew DeCaminada

MOTION TO REDEEM
1-24-19 [\[11\]](#)

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, and Office of the United States Trustee on January 24, 2019. By the court’s calculation, 28 days’ notice was provided. 28 days’ notice is required.

The Motion to Redeem 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 Redeem is denied without prejudice.

Dayman Deon Hickison (“Debtor”) seeks to redeem a 2001 Mercedes-Benz CL-55 AMG (“Property”) from the claim of OneMain Financial Group, LLC (“Creditor”) pursuant to 11 U.S.C. § 722. Under that provision of the Bankruptcy Code, Debtor is permitted to redeem tangible personal property intended primarily for personal, family, or household use from a lien securing a dischargeable consumer debt, so long as the property is exempted under 11 U.S.C. § 522 or has been abandoned under 11 U.S.C. § 554. 11 U.S.C. § 722. The right to redeem extends to the whole of the Property, not just to Debtor’s exempt interest in it. *See* H.R. Rep. No. 95-595, at 381 (1977). To redeem the Property, Debtor must pay the lien holder “the amount of the allowed secured claim of [the lien] holder that is secured by such lien in full at the time of redemption.” 11 U.S.C. § 722. Payment must be made by a lump sum cash payment, not installment payments. *In re Carroll*, 11 B.R. 725 (B.A.P. 9th Cir. 1981). The court looks to 11 U.S.C. § 506 to determine the amount of the secured claim.

The Motion is accompanied by the declaration of the Debtor. Debtor seeks to value the Property at a replacement value of \$1,400.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the Property’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash.*

Mut. Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien perfected on the Property secures Creditor's claim with a balance of approximately \$6,500.72. Therefore, Creditor's claim secured by the lien is under-collateralized, and pursuant to 11 U.S.C. § 506(a), the court determines Creditor's secured claim to be in the amount of \$1,400.00.

On February 13, 2019, Hank Spacone the Chapter 7 Trustee entered a Trustee Report on the docket indicating this would be a no distribution bankruptcy case.

**Failure to Claim Exemption or
Compel Abandonment**

11 U.S.C. § 722 provides a Debtor may redeem tangible personal property only if such property is exempted under 11 U.S.C. § 522 or has been abandoned under 11 U.S.C. § 554. The Motion does not allege Debtor claimed an exemption, or that the Property was abandoned. A review of Schedule C shows no exemption claimed in the Property.

Based on the foregoing, the Motion is denied without prejudice.

The court shall issue an order in 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 Redeem filed by Dayman Deon Hickison ("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.

6. [16-21585](#)-E-11 AIAD/HODA SAMUEL
[FWP-40](#) Pro Se

CONTINUED MOTION FOR
ADMINISTRATIVE EXPENSES
11-9-18 [[1292](#)]

Final Ruling: No appearance at the February 21, 2019 Hearing is required.

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, parties requesting special notice, and Office of the United States Trustee on November 9, 2018. By the court’s calculation, 31 days’ notice was provided. 28 days’ notice is required.

The Motion for Allowance of Administrative Expenses 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 hearing on the Motion for Allowance of Administrative Cost is continued to 10:30 a.m. on May 30, 2019.

Scott M. Sackett, the duly appointed Chapter 11 Trustee (“Movant”) requests payment of future expenses that are anticipated to be incurred as administrative expenses. Specifically, the Motion is based upon to-be-determined fees, costs, damages, time or other expenses projected to be incurred by the Trustee related to the civil complaint filed by Debtor, Hoda Samuel on August 28, 2018 in the United States District Court, Eastern District of California, Sacramento Division, Case No. 18-cv-02343.

REVIEW OF MOTION

The Motion (Dckt. 1292) sets forth and states with particularity (Fed.R. Bankr. P. 9013) the following grounds and relief requested from the court:

- A. The asserted administrative expenses are those for “fees, costs, damages, time or other expenses projected to be incurred by the Trustee related to the civil complaint filed by Debtor, Hoda Samuel on August 28, 2018 in the United States District Court, Eastern District of California, Sacramento Division, Case No. 18-cv-02343.”

February 21, 2019 at 10:30 a.m.

Motion, p. 1:21-24; Dckt. 1292.

- B. The amount is not liquidated at this time.
- C. Because the amount is unlimited, the Trustee requests that the court have all otherwise surplus funds of the estate reserved and no distributed to Debtor Hoda Samuel.

Id., p. 1:24-26.

- D. The Trustee was appointed on May 6, 2016.

Id. ¶ 3.

- E. The attorneys of Felderstein, Fitzgerald, Willoughby, and Pascuzzi (“FFWP”) were authorized to be employed as counsel for Trustee effective May 10, 2016.

Id. ¶ 4.

- F. On August 28, 2018, Debtor Hoda Samuel filed a pro se complaint in the United States District Court (“District Court Complaint”). In that action, on October 9, 2018, Debtor Hoda filed a motion to amend the District Court Complaint. Trustee is named as a defendant in the District Court Complaint. Debtor Hoda Samuel has filed a motion to amend the District Court Complaint to add FFWP and attorneys in that firm to a first amended complaint.

Id. ¶¶ 5, 8; and Exhibit 1, Dckt. 1294.

- G. The Trustee requests allowance and payment of all fees, costs, damages, time, or other expenses (collectively defined as “Recoverable Amounts) that the Trustee incurs in responding to the District Court Complaint action. FFWP and its attorneys have filed a similar motion.

Motion ¶ 11, Dckt. 1292.

- H. On September 27, 2018, the court entered its order confirming the Trustee’s First Amended Chapter 11 Plan of Liquidation in this bankruptcy case.

Id. ¶ 6.

- I. No stay pending appeal of the order confirming the First Amended Plan of Liquidation has been issued.

Id. ¶ 7.

- J. Debtor Aiad Samuel filed an attachment to another notice of appeal which makes reference to it supporting an appeal of the bankruptcy judge confirming the First Amended Plan of Liquidation in this bankruptcy case. ^{FN. 1}

Id.

FN. 1. A review of the Docket in this case discloses that on November 29, 2018, the Bankruptcy Appellate Panel issued Orders dismissing appeals as untimely, but further states that with respect to the order confirming the Chapter 11 Plan:

Appellant submits that with respect to timeliness, "[t]his issue has now been settled by an Amendment made by Mr. Aiad Samuel to include the proposed Plan in the appeal BAP #18-1252." See Response at 2. A review of the bankruptcy courts docket indicates that on October 11, 2018, Aiad Samuel filed a document stating that he intended to appeal the order denying recusal as well as the plan confirmation order. Bankruptcy Court Docket at 1263 (Document Filed Debtor Aiad Samuel) •1 We disagree. The October 11, 2018 paper does not save these appeals.

1 However, we construe this document as a timely appeal by Mr. Samuel from the September 27, 2018 order confirming the Chapter 11 plan and will open this notice of appeal as BAP Appeal No. EC-18-1318.

BAP Orders Denying Motion for Stay Pending Appeal and Dismissing Appeals (August 8, 2018 Order denying motion to recuse), p. 5; Dckts. 1333 and 1335.

Thus, it appears that the Bankruptcy Appellate Panel indicates that an appeal of the order confirming the plan is pending.

- K. Several different legal grounds are asserted for the right to recover legal fees and expenses as administrative expenses, including:

1. California Code of Civil Procedure §§ 425.16 et seq. (Anti-SLAPP statute);
2. Federal Rule of Civil Procedure 11;
3. The case law setting for the principles requiring leave before commencing litigation against a receiver or bankruptcy trustee or other officers appointed in bankruptcy cases; and
4. The court's inherent powers.

Id., p. 3:25-28, 4:1-7.

- L. Because the amount of the administrative expenses has not been determined and the litigation is pending, the Trustee requests that final hearing on this Motion be continued until the District Court Complaint and action relating thereto is completed.

Id., p.3:8-13.

- M. Because the amount could exceed any surplus in the bankruptcy case (which amount is not stated in the Motion), none of the surplus should be disbursed to the Debtors in this case until the final amounts of the requested administrative expenses are determined.

Id., p. 5:14-21.

Whether an administrative expense exists at this point is speculative. The potential for such expense is shown, but such is a “potential” based on future events which the court cannot evaluate as an administrative expense, Anti-SLAPP damages, Rule 11 sanctions from the district court, or damages flowing from unauthorized litigation against an officer or authorized professional representing such officer in a bankruptcy case.

The court cannot “allow” such an expense today. Movant recognizes this in the Motion, noting that at this time administrative expenses are an open issue, the amount of surplus under the Chapter 11 Plan of Liquidation cannot be determined, and therefore requests that the court authorize the Plan Administrator to hold all potential surplus monies generated under the Plan until the final determination of the requested administrative expenses are finally determined.

However, the Plan Administrator cannot disburse purported “surplus monies” in light of the possible administrative expenses.

The Motion does not assert the amount of such potential surplus and how a proper reserve can be determined. Neither of the two Debtors have filed any opposition to the Motion and the request to delay any potential surplus disbursements prior to any required priority administrative expenses be finally determined.

SUPPLEMENTAL MOTION FOR ALLOWANCE OF ADMINISTRATIVE CLAIMS

Scott Sackett, the Chapter 11 Trustee (“Trustee”) filed a Supplemental Motion on January 10, 2019. Dckt. 1355. Trustee states the amount of the claim is unliquidated at this time, and requests that the court defer determination of the amount of this claim until the litigation is completed and that the Estate reserve all funds and other assets that might otherwise be distributed to the Debtors pending determination.

Trustee argues in the Supplemental Motion that notwithstanding the Motion Debtors do not actually have a surplus, because any surplus is contingent on the litigation yet to be resolved. Trustee relies on the Plan, which states “In no event shall any distribution to the Debtors be made prior to the Court having approved the Plan Administrator’s and the Professional Persons’ final fee applications, the Plan Administrator’s final accounting, and the payment of all allowed fees and all Allowed Claims.” Plan, Section 6.6, p. 22:17-19. The Trustee further identifies “at least” 10 items to be resolved that will require further expenditure of Estate funds, including:

- Completing final tax returns and potential tax refunds
- Resolving the cure amount for 209 Prairie Circle
- Brake Master Class 3A Claim
- Debtors’ Bankruptcy Appeal
- Litigation in the district court (referenced as “Samuel Litigation”)
- USA Class 2A secured claim
- Claim objections
- Reporting
- Administration of final assets
- Final reports and fee applications

Along with Trustee’s Supplemental Motion, filed as Exhibit C, is a claims payment projection sheet. Exhibit C, Dckt. 1358. The Exhibit provides an overview of claims paid, cash on hand, remaining claims to be paid, post confirmation expenses, and estimated litigation costs (though merely stating “amount unknown” as to the litigation).

DISCUSSION

The court has by prior Order continued the hearing. The grounds for the continuance are stated in the Order.

7. [16-21585-E-11](#) AIAD/HODA SAMUEL
[FWP-41](#) Pro Se

CONTINUED MOTION FOR
ADMINISTRATIVE EXPENSES
11-9-18 [[1298](#)]

Final Ruling: No appearance at the February 21, 2019 Hearing is required.

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, parties requesting special notice, and Office of the United States Trustee on November 9, 2018. By the court’s calculation, 31 days’ notice was provided. 28 days’ notice is required.

The Motion for Allowance of Administrative Expenses 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 hearing on the Motion for Allowance of Administrative Cost is continued to
is continued to 10:30 a.m. on May 30, 2019.**

Felderstein Fitzgerald Willoughby & Pascuzzi LLP (“FFWP”), the bankruptcy attorneys for Scott M. Sackett, the duly appointed Chapter 11 Trustee (the “Trustee”) requests payment of administrative expenses that are anticipated to be incurred. Specifically, the Motion is based upon to-be-determined fees, costs, damages, time or other expenses projected to be incurred by the Trustee related to the civil complaint filed by Debtor, Hoda Samuel on August 28, 2018 in the United States District Court, Eastern District of California, Sacramento Division, Case No. 18-cv-02343.

REVIEW OF THE MOTION

The Motion (Dckt. 1298) sets forth and states with particularity (Fed.R. Bankr. P. 9013) the following grounds and relief requested from the court:

- A. The asserted administrative expenses are those for “fees, costs, damages, time or other expenses projected to be incurred by the Trustee related to the civil complaint filed by Debtor, Hoda Samuel on August 28, 2018 in the United States District Court, Eastern District of California, Sacramento Division, Case No. 18-cv-02343.”

Motion, p. 1:22-25; Dckt. 1292.

- B. The amount is not liquidated at this time.
- C. Because the amount is unlimited, the FFWP requests that the court have all otherwise surplus funds of the estate reserved and no distributed to Debtor Hoda Samuel.

Id., p. 1:25-27.

- D. The Trustee was appointed on May 6, 2016.

Id. ¶ 3.

- E. The attorneys of Felderstein, Fitzgerald, Willoughby, and Pascuzzi (“FFWP”) were authorized to be employed as counsel for Trustee effective May 10, 2016.

Id. ¶ 4.

- F. On August 28, 2018, Debtor Hoda Samuel filed a *pro se* complaint in the United States District Court (“District Court Complaint”). In that action, on October 9, 2018, Debtor Hoda filed a motion to amend the District Court Complaint. Trustee is named as a defendant in the District Court Complaint. Debtor Hoda Samuel has filed a motion to amend the District Court Complaint to add FFWP and attorneys in that firm to a first amended complaint.

Id. ¶¶ 5, 8; and Exhibit 1, Dckt. 1300.

- G. The FFWP requests allowance and payment of all fees, costs, damages, time, or other expenses (collectively defined as “Recoverable Amounts) that FFWP incurs in responding to the District Court Complaint action. The Trustee has filed a similar motion.

Motion ¶ 11, Dckt. 1292.

- H. On September 27, 2018, the court entered its order confirming the Trustee’s First Amended Chapter 11 Plan of Liquidation in this bankruptcy case.

Id. ¶ 6.

- I. No stay pending appeal of the order confirming the First Amended Plan of Liquidation has been issued.

Id. ¶ 7.

- J. Debtor Aiad Samuel filed an attachment to another notice of appeal which makes reference to it supporting an appeal of the bankruptcy judge confirming the First Amended Plan of Liquidation in this bankruptcy case. ^{FN. 1}

Id.

FN. 1. A review of the Docket in this case discloses that on November 29, 2018, the Bankruptcy Appellate Panel issued Orders dismissing appeals as untimely, but further states that with respect to the order confirming the Chapter 11 Plan:

Appellant submits that with respect to timeliness, "[t]his issue has now been settled by an Amendment made by Mr. Aiad Samuel to include the proposed Plan in the appeal BAP #18-1252." See Response at 2. A review of the bankruptcy courts docket indicates that on October 11, 2018, Aiad Samuel filed a document stating that he intended to appeal the order denying recusal as well as the plan confirmation order. Bankruptcy Court Docket at 1263 (Document Filed Debtor Aiad Samuel) •1 We disagree. The October 11, 2018 paper does not save these appeals.

1 However, we construe this document as a timely appeal by Mr. Samuel from the September 27, 2018 order confirming the Chapter 11 plan and will open this notice of appeal as BAP Appeal No. EC-18-1318.

BAP Orders Denying Motion for Stay Pending Appeal and Dismissing Appeals (August 8, 2018 Order denying motion to recuse), p. 5; Dckts. 1333 and 1335.

Thus, it appears that the Bankruptcy Appellate Panel indicates that an appeal of the order confirming the plan is pending.

- K. Several different legal grounds are asserted for the right to recover legal fees and expenses as administrative expenses, including:

1. California Code of Civil Procedure §§ 425.16 et seq. (Anti-SLAPP statute);
2. Federal Rule of Civil Procedure 11;
3. The case law setting for the principles requiring leave before commencing litigation against a receiver or bankruptcy trustee or other officers appointed in bankruptcy cases; and
4. The court's inherent powers.

Id., p. 3:25-28, 4:1-7.

- L. Because the amount of the administrative expenses has not been determined and the litigation is pending, the Trustee requests that final hearing on this Motion be continued until the District Court Complaint and action relating thereto is completed.

Id., p.3:8-13.

- M. Because the amount could exceed any surplus in the bankruptcy case (which amount is not stated in the Motion), none of the surplus should be disbursed to the Debtors in this case until the final amounts of the requested administrative expenses are determined.

Id., p. 4:14-20.

Whether an administrative expense exists at this point is speculative. The potential for such expense is shown, but such is a “potential” based on future events which the court cannot evaluate as an administrative expense, Anti-SLAPP damages, Rule 11 sanctions from the district court, or damages flowing from unauthorized litigation against an officer or authorized professional representing such officer in a bankruptcy case.

The court cannot “allow” such an expense today. FFWP recognizes this in the Motion, noting that at this time since should administrative expenses are an open issue, the amount of surplus under the Chapter 11 Plan of Liquidation cannot be determined, and therefore requests that the court authorize the Plan Administrator to hold all potential surplus monies generated under the Plan until the final determination of the requested administrative expenses are finally determined.

However, the Plan Administrator cannot disburse purported “surplus monies” in light of the possible administrative expenses.

The Motion does not assert the amount of such potential surplus and how a proper reserve can be determined. Neither of the two Debtors have filed any opposition to the Motion and the request to delay any potential surplus disbursements prior to any required priority administrative expenses be finally determined.

SUPPLEMENTAL MOTION FOR ALLOWANCE OF ADMINISTRATIVE CLAIMS

Scott Sackett, the Chapter 11 Trustee (“Trustee”) filed a Supplemental Motion on January 10, 2019. Dckt. 1355. Trustee states the amount of the claim is unliquidated at this time, and requests that the court defer determination of the amount of this claim until the litigation is completed and that the Estate reserve all funds and other assets that might otherwise be distributed to the Debtors pending determination.

Trustee argues in the Supplemental Motion that notwithstanding the Motion Debtors do not actually have a surplus, because any surplus is contingent on the litigation yet to be resolved. Trustee relies on the Plan, which states “In no event shall any distribution to the Debtors be made prior to the Court having approved the Plan Administrator’s and the Professional Persons’ final fee applications, the Plan Administrator’s final accounting, and the payment of all allowed fees and all Allowed Claims.” Plan, Section 6.6, p. 22:17-19. The Trustee further identifies “at least” 10 items to be resolved that will require further expenditure of Estate funds, including:

- Completing final tax returns and potential tax refunds
- Resolving the cure amount for 209 Prairie Circle
- Brake Master Class 3A Claim
- Debtors’ Bankruptcy Appeal
- Litigation in the district court (referenced as “Samuel Litigation”)
- USA Class 2A secured claim
- Claim objections
- Reporting
- Administration of final assets
- Final reports and fee applications

Along with Trustee’s Supplemental Motion, filed as Exhibit C, is a claims payment projection sheet. Exhibit C, Dckt. 1358. The Exhibit provides an overview of claims paid, cash on hand, remaining claims to be paid, post confirmation expenses, and estimated litigation costs (though merely stating “amount unknown” as to the litigation).

DISCUSSION

The court has by prior Order continued the hearing. The grounds for the continuance are stated in the Order.

8. [09-34888-E-7](#) **DOUGLAS STERLING AND** **MOTION TO AVOID LIEN OF FORD**
[RWH-2](#) **KIMBERLY WALLS-STERLING** **MOTOR CREDIT**
 Ronald Holland **1-16-19 [37]**

Final Ruling: No appearance at the February 21, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, creditors, and Office of the United States Trustee on January 16, 2019. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Ford Motor Credit ("Creditor") against property of Douglas John Sterling and Kimberly Ann Walls-Sterling ("Debtor") commonly known as 4135 Beasley Drive Cameron Park, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$7,241.00. An abstract of judgment was recorded with El Dorado County on March 31, 2009, that encumbers the Property.

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of \$396,500.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$417,360.11 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 35. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of \$1.00 on Amended Schedule C. Dckt. 35.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no

equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Douglas John Sterling and Kimberly Ann Walls-Sterling ("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 judgment lien of Ford Motor Credit, California Superior Court for San Mateo County Case No. CLJ477257, recorded on March 31, 2009, Document No.2009-0014499-00, with the El Dorado County Recorder, against the real property commonly known as 4135 Beasley Drive Cameron Park, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

9. [18-26393-E-7](#) **JOHNNY/DIANE MCCOY**
[HSM-1](#) **Nikki Farris**

**MOTION TO EMPLOY HOWARD S.
NEVINS AS ATTORNEY**
1-25-19 [19]

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 25, 2019. By the court’s calculation, 27 days’ notice was provided. 14 days’ notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 Employ is granted.

Michael Dacquisto (“the Chapter 7 Trustee”) seeks to employ Howard S. Nevis, Esq. (“Counsel”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. The Chapter 7 Trustee seeks the employment of Counsel to assist Trustee in pursuing rights of the Estate in insurance proceeds after a fire caused Debtor loss of real and personal property. Counsel would also assist with general case administration.

The Flat Fee Agreement provides for a fee of \$8,000.00 in connection with Counsel’s services. Trustee argues this will reduce expenses of the Estate and is in the best interest of the Estate and its creditors.

Howard S. Nevis, Esq., an attorney of Counsel, testifies that he has represented Chapter 11 and 7 Trustees, debtors in Chapter 11 and 7 cases, creditors holding secured claims, and creditors holding unsecured claims. Nevis testifies he and the firm do not represent or hold any interest adverse

to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

REQUEST FOR APPROVAL OF FLAT FEE

The court has been presented with a Motion for Authorization to Employ Counsel, to set compensation at a flat rate for services to be provided, and for the court to issue final approval of such fees. While the court does not question the Trustee or Counsel as to ability, good faith, or acting in the best interests of the Bankruptcy Estate, the employment and compensation framework enacted by Congress constrains the granting of a request for fees, whatever may happen, are final and paid before the actual work is done.

The services to be performed for the flat fee of \$8,000.00 are stated in the Motion to be defined as:

Specifically, the Trustee wishes to engage Counsel to assist him in

- ◆ resolving issues in connection with the estate's interest in and rights to certain insurance proceeds obtained by the Debtors from loss of real and personal property due to fire,
- ◆ the Debtors' claims of exemptions as to such assets and insurance proceeds therefrom, and in connection with the payment of claims of creditors.
- ◆ Counsel also will assist the Trustee with limited incidental general bankruptcy services as are required in the case, including seeking Counsel's employment and compensation pursuant to this Motion.

Motion ¶ 6, Dckt. 19 (with the court having restructured the paragraph to specific bullet point service items of service).

The Motion does not provide the court with any grounds identify the scope of such services, the anticipated work, and facts that put the \$8,000.00 flat fee in the context of the services to be provided.

The Trustee's Declaration does not provide any further information. Dckt. 22.

The Trustee and Counsel has sought authorization for employment pursuant to 11 U.S.C. § 327. While authorizing employment, that section does not specify the terms of compensation. Congress provides in 11 U.S.C. § 328(a) that employment of a professional, such as Counsel, can be on any reasonable terms, including a fixed fee. However, as part of the "reasonable" compensation to be allowed, 11 U.S.C. § 328(a) further provides:

Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

Thus, merely authorizing the terms is not the “final” allowance of the compensation.

For the final allowance of compensation, relief pursuant to 11 U.S.C. § 330 is to be sought by the professional. In making the final allowance of compensation, the court does not write on a clean slate, but does so in the context of the fee arrangement as granted pursuant to 11 U.S.C. § 328.

Counsel and Trustee have provided a points and authorities addressing the 11 U.S.C. § 328 and § 330 requirements, but do not address how the court prospectively gives “final” approval for a fixed fee for non-specific work.

While in both the Motion and Trustee’s Declaration the argument is advanced that by the court giving “final” approval now, the expenses to the estate will be reduced, presumably because Counsel would not file a final fee application. However, that can be said in any case, for any professional, for any fees sought to be paid.

Approval of Employment and Fixed Fee and Setting Procedure For Final Hearing

The court has no questions about the Trustee or Counsel in proposing this fixed fee of \$8,000 being financially reasonable for the Estate and Counsel, about Counsel’s good faith in being willing to accept such fee, or Counsel being able to provide the services in a efficient and effective manner. However, people seeking relief from the court must always realize, “the judge is enforcing the rules and maintaining a transparent judicial process not because (s)he questions my ethics, but to maintain the integrity of the judicial system.” Also, such persons can imagine those who they have observed over the years might use such a process to the disadvantage of the bankruptcy estate and creditors, and to the advantage of the “good old boys.” (Which, as the court has stated, is not the situation here.)

The Motion is granted and the employment is approved on a fixed fee of \$8,000.00. Upon completion of the services provided under the terms of this employment, Counsel shall file a short (not to exceed three pages, and Counsel should be able to keep it to two pages) declaration in which Counsel provides a brief narrative (broken into numbered paragraphs) description of the actual services provided. Counsel then shall give notice pursuant to Local Bankruptcy Rule 9014-1 of a supplemental hearing on the final compensation as previously approved by the court.

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 (1) Authorization to Employ Howard S. Nevis, Esq. (“Counsel”) as counsel for Michael Dacquisto, the Chapter 7 Trustee, (2) Approval of an \$8,000.00 Fixed Fee Compensation, and (3) Final Approval of Fees 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 granted and:

(1) The Chapter 7 Trustee is authorized to employ Howard S. Nevins, Esq., as counsel for the Chapter 7 Trustee to provide the following services -

- ◆ resolving issues in connection with the estate's interest in and rights to certain insurance proceeds obtained by the Debtors from loss of real and personal property due to fire,
- ◆ the Debtors' claims of exemptions as to such assets and insurance proceeds therefrom, and in connection with the payment of claims of creditors.
- ◆ Counsel also will assist the Trustee with limited incidental general bankruptcy services as are required in the case, including seeking Counsel's employment and compensation pursuant to this Motion.;

and

(2) The compensation for such services pursuant to 11 U.S.C. § 328(a) is a Fixed Fee of \$8,000.00, which includes costs and expenses in providing such services. The Chapter 7 Trustee is authorized to make disbursements from unencumbered monies of the estate, consistent with the statutory distribution scheme in a Chapter 7 case, to Counsel as the Trustee determines proper, with such disbursements subject to final review and order as provided below.

IT IS FURTHER ORDERED that the Fixed Fee of \$8,000.00 shall be allowed as the final compensation for the services to be provided, subject to a final review at a Supplemental Hearing on this Motion which shall be set for hearing by Counsel when the services under the terms of the Fix Fee Agreement have been completed. When said services have been completed Counsel shall file a short Supplemental Declaration in which Counsel provides a brief narrative (broken into numbered paragraphs) description of the actual services provided. Counsel then shall give notice pursuant to Local Bankruptcy Rule 9014-1 of a supplemental hearing on the final compensation as previously approved by the court (service of the Supplemental Declaration is not required).

10. [15-28797-E-7](#)
[HCS-1](#)

NATALIE GEOFFROY
Pro Se

MOTION TO EMPLOY DANA A.
SUNTAG AS ATTORNEY
1-4-19 [35]

Final Ruling: No appearance at the February 21, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 4, 2019. By the court’s calculation, 48 days’ notice was provided. 28 days’ notice is required.

The Motion to Employ 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 to Employ is granted.

Geoffrey Richards (“the Chapter 7 Trustee”) seeks to retroactively employ Dana Suntag (“Counsel”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. The Chapter 7 Trustee seeks the employment of Counsel to assist with legal issues in the case, including avoidance, exemption issues, turnover of property of the estate, sale of property of the estate, or claims issues.

The Chapter 7 Trustee further states that Counsel has already assisted Trustee in negotiating the terms of employment for Alford Elliott, an asset recovery specialist. Because it was not clear hiring Counsel would not be necessary without first negotiating terms with Mr. Elliott, Trustee did not previously seek authorization for Counsel’s employment. Therefore, Trustee now seeks authorization “*nunc pro tunc*” effective November 16, 2018.

Counsel, an attorney with Herum\Crabtree\Suntag, a California Professional Corporation, testifies that she is qualified to perform the tasks required and has substantial experience with similar

cases. Counsel testifies she and the firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Counsel states her firm's rates are as follows:

| <u>Professional</u> | <u>Hourly Rate</u> |
|---------------------|--------------------|
| Partners | \$375-\$395 |
| Associates | \$150-\$295 |
| Paralegals | \$90-\$125 |

Dckt. 37, ¶ 5.

NUNC PRO TUNC

As a preliminary matter, Trustee is seeking a “retroactive authorization” rather than nunc pro tunc authorization. The Ninth Circuit has noted that nunc pro tunc approval is not the proper name for seeking retroactive authorization of actions in a bankruptcy case. *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 515 n. 4 (9th Cir. 2007). Nunc pro tunc amendments are usually used to correct errors in the record and are extremely limited in scope. *Id.* The Ninth Circuit noted that while it is more accurate to call such after-the-fact authorizations “retroactive approvals,” it is customary, but not necessarily correct, to refer to them generically as nunc pro tunc in bankruptcy practice. *Id.* The two names stand for the same set of standards and can be used interchangeably. *See, e.g., Atkins v. Wain*, 69 F.3d 970, 974–78 (9th Cir. 1995) (alternating between using nunc pro tunc and “retroactive approval” when determining whether a law firm had established exceptional circumstances allowing them to be paid for services to debtor not approved by the court).

A bankruptcy court can exercise its equitable discretion to grant retroactive authorizations when it is appropriate to carry out the Bankruptcy Code and when the approval benefits the debtor's estate. *In re Harbin*, 486 F.3d at 522. Retroactive approvals should only be used in “exceptional circumstances.” *Atkins*, 69 F.3d at 974.

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

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

Taking into account all of the relevant factors in connection with the employment and

compensation of Counsel, considering the declaration demonstrating that Counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Dana Suntag as Counsel for the Chapter 7 Estate. Approval of the hourly fees is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

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

The Motion to Employ filed by Geoffrey Richards (“the Chapter 7 Trustee”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted, and the Chapter 7 Trustee is authorized to employ Dana Suntag as Counsel for the Chapter 7 Trustee effective November 16, 2018.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

11. [18-90029-E-11](#) **JEFFERY ARAMBEL MOTION TO USE CASH COLLATERAL**
[MF-37](#) **O.S.T.**
 2-12-19 [740]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on February 14, 2019. By the court’s calculation, 7 days’ notice was provided. The court set the hearing for February 21, 2019. Dckt. 744.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, 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 hearing on the Motion for Authority to Use Cash Collateral was continued by prior Order of the court to February 28, 2019 at 10:30. The court inadvertently entered that Order, believing it related to an earlier request.

Jeffery Edward Arambel (“Debtor in Possession”) filed this Motion seeking an order approving the use of cash collateral on February 12, 2019. Dckt. 740. The Motion states During the period of September 2018 through December 2018, the Debtor in Possession received approximately \$254,864 in rents for cattle grazing lands. The Debtor in Possession proposes to use the Cash Collateral to his month-to-month living expenses and maintain the farming operations consistent with budget previously approved by the Court.

**INTERIM ORDER GRANTING MOTION
AND CONTINUING HEARING**

On February 18, 2019, the court issued an Interim Order granting the Motion and authorizing use of cash collateral to pay expenses to prevent irreparable harm to the estate for the period of February 12, 2019 through February 28, 2019. Dckt. 748. The court authorized payment of the following expenses with a 10 percent variance:

| | |
|-------------------------------|--------|
| Water and Power | 4,500 |
| Insurance | 10,091 |
| Contract labor (office) | 1,000 |
| Pharmacy | 300 |
| Home Mortgage & Escrow | 6,142 |
| Food, clothing, and household | 1,350 |
| Utilities (includes water) | 1,500 |
| Transportation/gas | 400 |
| Total Cash Out Interim Period | 25,283 |

The court ratifies that prior order which was inadvertently entered.

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 Use Case Collateral filed by Jeffery Arambel 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 Court's interim Order authorizing Interim Use is ratified after this Initial Hearing on February 21, 2019.

IT IS FURTHER ORDERED that the clerical error in the Interim Order specifying the date of February 28, 2018 is corrected, with the interim use of Cash Collateral authorized for the period February 12, 2019 through February 28, 2019.

~~**IT IS FURTHER ORDERED** that the Debtor in Possession is not authorized to use cash collateral in which American AgCredit, FLCA has a security interest.~~