UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

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

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1. 13-91016-E-7 THA-5 | **MIGUEL/JOANN VALENCIA** | **MOTION FOR COMPENSATION FOR ATHERTON AND ASSOCIATES, LLP,**
Peter Koulouris
ACCOUNTANT(S)
2-4-15 [144]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditors, and Office of the United States Trustee on February 4, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

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

The period for which the fees are requested is for the period July 28, 2014 through December 8, 2014. The order of the court approving employment of Applicant was entered on August 16, 2014, Dckt. 120. Applicant requests fees in the amount of $1,187.00 and costs in the amount of $00.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

Even if the court finds that the services billed by professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A professional must exercise good billing judgment with regard to the services provided as the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign [sic] to run

up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing and filing a final tax return for the debtors. The estate has unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

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.

Efforts to Assess and Recover Property of the Estate: Applicant spent 7.9 hours in this category. Applicant prepared a final tax return for the debtors.

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**
Staff Accountant's time	4.5	$90.00	$405.00
Manager time	0	$0.00	$0.00
Partner time	3.4	$230.00	$782.00
	0	$0.00	$0.00
Total Fees For Period of Application			$1,187.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $1,178.00 pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$1,187.00

pursuant to this Application fees of $1,187.00 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Atherton and Associates, LLP ("Applicant"), Accountant for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Atherton and Associates, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Atherton and Associates, LLP, Professional Employed by Trustee
>
> Fees in the amount of $ 1,187.00
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $1,187.00 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

2. 13-91016-E-7 MIGUEL/JOANN VALENCIA
THA-6 Peter Koulouris

MOTION FOR COMPENSATION FOR THOMAS H. ARMSTRONG, TRUSTEES ATTORNEY
2-4-15 [149]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditors, and Office of the United States Trustee on February 4, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Thomas H. Armstrong, 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.

The period for which the fees are requested is for the period September 24, 2014 through February 3, 2015. The order of the court approving employment of Applicant was entered on November 5, 2013, Dckt. 36. Applicant requests fees in the amount of $29,589.75 and costs in the amount of $1,101.11.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

all relevant factors, including–

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing stipulations with the IRS for the Bolden "carve-out" and prompting of new negotiations with the debtor. Achieving the results required counsel to assist the Trustee in not only addressing the sale of the property, but the Debtors attempts on several occasions to have the case dismissed in response to the Trustee administering property of the estate.

The Trustee reports having received $100,000.00 from the sale of the Torrey Pines Way to the Property, the Debtor's having purchased the estate's interest in the property. Report, Dckt. 138; Order Approving Sale, Dckt. 135; Order Approving Stipulation for release of IRS lien, Dckt. 115. The estate has sufficient unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

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 7 hours in this category. Applicant assisted Client with legal research on priority of liens, discussing outcomes of hearings, and reviewing emails. Applicant's paraprofessional staff spent 3.35 hours in this category. Applicant's paraprofessional staff assisted Applicant with research on IRS liens and making changes to motions.

Efforts to Assess and Recover Property of the Estate: Applicant spent 8 hours in this category. Applicant reviewed mortgage statements, discussed the vale of the real property, inventory, list price and sale price.

Adversary Proceedings: Applicant spent 30 hours in this category. Applicant prepared motion to sell non-exempt equity to debtors, supporting documents, attended hearings, and prepared motion to approve stipulation. Applicant's paraprofessional staff spent 16.35 hours in this category and prepared draft objections, requests for judicial notice, declarations and points and authorities.

Significant Motions and Other Contested Matters: Applicant spent 33.95 hours in this category. Applicant drafted Oppositions to Motion to Convert the case, declaration and evidentiary objections.

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**
Applicant	77.95	$350.00	$27,282.50
Applicant's staff (paraprofessional)	16.35	$100.00	$1,635.00
Applicant's staff (paraprofessional)	.85	$85.00	$72.25
Applicant (final fee application preparation)	1	$350.00	$350.00
Applicant's staff (paraprofessional)(final fee application preparation)	2.50	$100.00	$250.00
	0	$0.00	$0.00
Total Fees For Period of Application			$29,589.75

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $1,101.11 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopies & printing	$0.10	$203.30
Postage	$122.31	$122.31
Envelopes	$19.70	$19.70
Label sheets	$1.35	$1.35
Court call fees	$41.20	$247.20
Large blue file	$4.50	$4.50
Filing fee for Motion to Sell	$176.00	$176.00
Final fee photocopies	$0.10	$168.00

Final fee postage	$1.61	$136.85
Final fee medium envelopes	$0.25	$21.00
Final fee label sheets	$0.15	$0.90
Total Costs Requested in Application		$1,101.11

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $29,589.75 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs and Expenses

Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as on-line access to bankruptcy and state law and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include court call fees. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be changed in additional to the professional fees requested as compensation. This court considers the cost of being able to appear at hearings telephonically to be a cost of the professional in marketing his or her services to a client over a much larger geographic area. The professional is paid his or her hourly fees sitting at his or her desk making the phone appearance, then incurring hours and hours of travel time (which will be compensated at a travel expense rate after allowing for a normal billing day of time). During the time in waiting to make the telephonic appearance, the professional is working on other files, being more effective in billing, and fully recovering all of his or her time. The court disallows $247.00 of the requested costs.

The First and Final Costs in the amount of $853.911 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$29,589.75
Costs and Expenses	$ 853.91

pursuant to this Application fees of $29,589.75 and costs of $853.91 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Thomas H. Armstrong ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Thomas H. Armstrong is allowed the following fees and expenses as a professional of the Estate:
>
> Thomas H. Armstrong, Professional Employed by Trustee
>
> Fees in the amount of $ 29,589.75
> Expenses in the amount of $ 853.91,
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $29,589.75 and costs of $853.91 are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

3. 14-91633-E-11 SOUZA PROPANE, INC.
FWP-2 David C. Johnston

FINAL HEARING RE: MOTION FOR ENTRY OF AN ORDER AUTHORIZING EXCLUSIVE SUPPLY AGREEMENT, MOTION FOR ENTRY OF AN ORDER AUTHORIZING POST-PETITION FINANCING AND MOTION FOR ENTRY OF AN ORDER AUTHORIZING OPTIONAL SERVICING AGREEMENT
1-30-15 [90]

Tentative Ruling: The Motion For Entry of an Order Authorizing (1) Exclusive Supply Agreement; (2) Post-Petition Financing; and (3) Optional Servicing Agreement was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

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

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

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

The Motion Order Authorizing (1) Exclusive Supply Agreement; (2) Post-Petition Financing; and (3) Optional Servicing Agreement **is granted**

David Flemmer, the Chapter 11 Trustee, ("Trustee") filed the instant

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

1. An exclusive supply agreement;

2. Secured post-petition financing from Turner to a maximum amount of $100,000.00 (but no more than $80,000.00 during the first 60 days); and

3. An optional servicing agreement for certain customers.

FN.1.

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

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Under the proposed agreement,

A. Turner will become the exclusive supplier for the Estates' propane needs to supply customers of the business which is in this Bankruptcy Estate for the next 60 days.

B. The supply Agreement is subject to automatic renewals for successive 30-day periods unless either Turner of the Trustee terminates the Agreement on at least 30-days' notice to the other party.

C. So long as the Agreement is in place, Turner will deliver as much propane as ordered by the Estate for $.145 over the daily per gallon rate as set forth in the Propane Price Index for Martinez. The Trustee represents that this Agreement guarantees the Estate has access to a sufficient supply of propane while the Trustee stabilized the Debtor's operations and possible prepares to market the business.

D. The Trustee will either pay cash-on-delivery ("COD") for the propane (to the extent sufficient cash flow exists) or, at the election of the Trustee, Turner will provide post-petition secured financing to the Trustee, up to a maximum of $100,000.00 (but no more than $80,000.00 during the first 60 days) with such credit to be paid in full no later than 50 days after the particular load of propane is delivered.

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

A. Lender: The lender providing credit to the Estate is Turner. According to the Debtor's schedules and filed UCC-1 financing statement, Turner is the senior lienholder on the Debtor's pre-petition accounts receivable, inventory, and equipment.

B. Amount: The maximum amount of the financing will be $100,000 (but no more than $80,000.00 during the first 60 days).

C. Terms: On the thirtieth (30th) day after delivery of a load of propane, not less than 25% of the outstanding amount owed for that delivery is due. On the 40th day after delivery of a load of propane, not less than a total of 50% of the outstanding amount owed for that delivery is due. All amounts owed for the delivery of a load will be due on the 50th day after delivery.

D. Interest Rate: No interest will accrue on the unpaid balance of the financing absent default. In the event of a default, interest will accrue at the rate of 18% annum from the date of default (when the payment was due).

E. Security Interests: All obligations owing pursuant to the financing will be secured by security interests in (I) the propane delivered by Turner under the Agreement; (ii) the post-petition cash payments and receivables resulting therefrom; and (iii) all of the Debtor's assets that secures Turner's pre-petition claim.

F. Administrative Claim: All credit advanced under the financing (but no other obligations of the estate under the Agreement) shall constitute an administrative claim under the provisions of section 503(b) of the Bankruptcy Code, with superpriority pursuant to section 507(b) of the Bankruptcy Code.

G. Carveout: The superpriorities granted to Turner shall be subject to a carveout for (I) fees payable to the United States Trustee; and (ii) the fees and expenses of any chapter 7 trustee to the extent approved by a final order or orders of the court.

H. Relief from Stay: An event of default under the Agreement shall constitute sufficient cause for termination of the automatic stay and Turner can seek relief from stay upon ten (10) calendar days' notice to the Trustee.

I. Court Approval: The Agreement is conditioned on, and subject to, the entry of an order authorizing the Trustee to enter into the Agreement.

Dckt. 93, Exhibit A.

In addition, the Agreement will provide Turner with the option of servicing certain designated customer accounts of the Debtor which have contracted for delivery of propane to their businesses. Specifically, Turner will deliver the propane and otherwise service the designated accounts customers and will pay the estate $0.10 per gallon for the propane delivered

unless the net profit margin is less than $0.20, in which case the estate will receive less. The proposed servicing option will permit the Trustee to continue servicing the designated accounts while the Trustee stabilizes the Debtor's operations. The proposed term of the servicing option would be the same as the Agreement, although the parties could subsequently agree for the servicing option to continue on a stand-alone basis should the Agreement terminate.

FEBRUARY 5, 2015 HEARING

At the hearing, the court issued an interim order approving the agreement. The court continued the hearing for final hearing to 10:30 a.m. on March 5, 2015. The court specifically ordered:

> 1. **IT IS ORDERED** that the Motion is granted and the Trustee is authorized to enter into the exclusive supply agreement, post-petition financing, and optional servicing agreement (the "Agreement") with Turner pursuant to the terms of the agreement, Exhibit A, Dckt. 93, except as expressly provided in this Order. To the extent objections are not addressed by this Order, they are overruled.
>
> 2. Trustee is authorized to, and under the Agreement does, grant Turner liens on Post-petition Assets pursuant to 11 U.S.C. section 364(c)(2), with the perfection date being December 17, 2014, the date the petition was filed in this bankruptcy case. "Post-petition Assets" shall mean all of the following assets of the Debtor and bankruptcy estate, acquired by the Debtor and bankruptcy estate at any time after the petition filing date of December 17, 2014 (collectively, the"Post-petition Collateral") wherever located, including Debtor's and bankruptcy estates' right, title and interest therein and thereto: (a) all of Debtor's accounts; (b) all of Debtor's inventory; (c) all of Debtor's equipment; (d) all of Debtor's assets which secure Turner's pre-petition claim in the Bankruptcy Case which are not included in the preceding items (a), (b), and/or (c), if any; and (e) all proceeds of any or all of the foregoing.
>
> 3. Trustee is authorized to, and under the Agreement does, grant Turner a lien on Pre-petition Assets pursuant to 11 U.S.C. § 364(c)(3), with the perfection date being December 17, 2014, the date the petition was filed in this bankruptcy case. "Pre-petition Assets" shall mean on all of the following assets of the Debtor acquired by the Debtor before the petition filing date of December 17, 2014 (collectively, the "Pre-Petition Collateral"), wherever located: (a) all of Debtor's accounts; (b) all of Debtor's inventory; (c) all of Debtor's equipment; (d) all of Debtor's assets which secure Turner's pre-petition claim in the Bankruptcy Case which are not included in the preceding items (a), (b), and/or (c), if any; and (e) all proceeds of any or all of the foregoing. (Pre-Petition Collateral and Post-petition Collateral are referred to collectively as "Collateral".)

4. The liens authorized under paragraphs 2 and 3 of this Order and granted in the Agreement, do not secure any pre-petition claims of Turner Gas.

5. The court does not authorize and Turner Gas is not given a lien in the pre-petition assets of the estate pursuant to 11 U.S.C. § 364(d).

6. The court does not authorize and Turner Gas is not granted a super-priority administrative expenses pursuant to 11 U.S.C. § 364(c)(1).

7. The Trustee may obtain secured post-petition credit from Turner to a maximum amount of $100,000 pursuant to the terms of the Agreement.

8. Turner's Post-Petition Liens on the Collateral shall be deemed valid and perfected by entry of this interim order. Turner shall not be required to file, register or publish any financing statements, mortgages, deeds of trust, notices of lien or similar instruments in any jurisdiction or filing or registration office, or to take possession of any Collateral or to take any other action in order to validate, render enforceable or perfect the Post-Petition Liens on Collateral granted by or pursuant to the Agreement or this interim order.

9. Proceeds of the Collateral shall constitute cash collateral pursuant to Bankruptcy Code Section 363(a) and are subject to the restrictions of Section 363(c). Trustee is authorized to use such cash collateral only with the consent of Turner or further order of the Court.

10. All obligations of the bankruptcy estate under the Agreement (a) shall constitute administrative expenses of the Debtor in the bankruptcy case pursuant to Bankruptcy Code Section 503(b)(1), and any other applicable provision of Section 503.

11. Time is shortened so that Turner shall be entitled to seek relief from the automatic stay in the Bankruptcy Case on ten (10) calendar days' notice to parties entitled to notice of a motion for relief from stay under Federal Rule of Bankruptcy Procedure 4001.

12. The authorization to obtain credit pursuant to the Agreement is approved on an interim basis for credit extended through and including March 31, 2015, to allow the court to conduct a final hearing on this Motion. Failure of the court to further authorize the use of credit pursuant to the terms of the Agreement does not alter or limit the rights, interests, and liens of Turner Gas or the Trustee under the Agreement, this Order or applicable law for credit.

13. The final hearing on the Motion shall be

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

KIVA ENERGY, INC.'S OPPOSITION

Kiva Energy, Inc. ("Kiva") filed a partial opposition to the instant Motion on February 19, 2015. Dckt. 107. Kiva objects on the following grounds:

1. The "servicing option" should not be approved because it amounts to a sale of Kiva's collateral without compensation and because it has not been shown to be in the best interests of the estate. Kiva possess a perfected security interest in Debtor's accounts, contract rights, customer list, and intangibles including goodwill. By contrast, Turner's senior security interest is limited to Debtor's accounts receivable, inventory, equipment, and the proceeds thereof. The servicing option permits Turner to enter into servicing arrangements with the customers without needing to disclose or get the consent of Kiva. Kiva is concerned that there is no form servicing agreement so Kiva is uncertain to what extend those agreements would provide for termination of the relationship with the customer in the event that Debtor or its assets are sold to a third party. The Motion also does not contain any restrictions on Turner competing for those customers upon the termination of the servicing option or upon the sale or some or all of the Debtor's assets. Kiva argues that any servicing option is essentially a "disguised sale" since the designated accounts would need to presumably sign a new agreement with Turner. Kiva argues that the Trustee has failed to show that the servicing option is in the best interest of the estate or whether the Trustee would be able to obtain gas on credit from Turner without the option.

Kiva has offered to service Debtor's customers on terms similar to those of the servicing option, subject to mutual agreement on the accounts and subject to the customer executing a servicing agreement with Kiva, except that Kiva would remit a flat $0.10 for every paid gallon to the Trustee regardless of Kiva's margin.

Kiva alleges that Turner has so far declined to exercise the servicing option.

2. The exclusivity provided to Turner should not be approved to the extent that it would preclude Kiva from servicing designated accounts under terms similar to the servicing option. Kiva does not oppose the Trustee's request for authorization to purchase gas on credit from Turner or the exclusivity of Turner as the exclusive supplier of gas to Debtor , Kiva opposes the exclusivity if it is construed as prohibiting the Trustee from entering into an agreement with Kiva to service customers of Debtor directly, with its own gas.

Kiva argues that the proposed servicing of the customers directly would not run afoul the exclusivity agreement since Debtor would not be selling any of the contemplated products to Debtor. Rather, Kiva would be providing service to the customers directly, under agreement between that customer and Kiva, and would remit to Debtor a flat $0.10 for each gallon sold to the

customers upon payment to Kiva.

If the exclusivity agreement is read to prohibit direct servicing of Debtor's customers by anyone other than Debtor, Kiva argues that the court should not authorize that portion.

TRUSTEE'S REPLY

The Trustee filed a reply to Kiva's opposition on February 25, 2015. Dckt. 115. The Trustee replies as follows:

1. Kiva assumes that the servicing option is independent from the financing aspect of the agreement. The servicing option was negotiated as part of the post-petition financing with Turner and is integrated into the agreement. Merely because Turner and the Trustee agreed the servicing option might continue if the other aspects of the agreement were terminated does not mean the servicing option stands alone. Additionally, Kiva does not dispute the benefit of the agreement. Without the agreement, the Trustee would not be able to operate the Debtor's business at a maximum level.

2. Kiva assumes that Turner will enter into direct servicing agreements with the designated accounts. This is not so. There is no provision in the agreement for the Debtor's customers to enter into servicing agreements directly with Turner, and that is not what the Trustee envisions. The servicing option was proposed to allow the Trustee to continue servicing certain designated accounts that might otherwise not be able to be serviced by the Debtor, preserving Debtor's customer base while generating revenue for the estate. The Trustee argues that as a consequence of the financing, the estate has access to sufficient propane supply to service both its retail and commercial customers, making it unlikely the Trustee will in fact designate any accounts for potential inclusion in the servicing option.

3. Kiva's assumption that the designated accounts will become permanent customers of Turner is pure conjecture, based in part on Kiva's erroneous assumption that Turner will enter into new servicing agreements with the designated account customers. This is not the arrangement the Trustee has with Turner, and is highly unlikely to occur. Turner is an out-of-state gas wholesaler without a local retail distributorship. Kiva is a local commercial and retail distributor. Trustee argues that it is more likely that the Debtor's customers would become permanent customers of Kiva if Kiva were servicing the designated accounts under Kiva's asserted "proposal."

4. Kiva asserts that the proposed servicing option is the equivalent of a sale of the designated accounts to Turner. This is not the case. The servicing option is part of the agreement, which has an initial period of 60 days an dis automatically renewed for 30-day periods unless previously terminated on 30 days' notice. By definition, the proposed servicing option is terminable on 30-days' notice and is not a sale of the designated accounts.

5. Kiva asserts it possesses a perfect security interest in the Debtor's customer list and has some rights with respect to the designated accounts. The Trustee asserts that assuming arguendo that Kiva holds such rights, the Trustee through the servicing option seeks to have the designated accounts serviced and thereby retain the Debtor's customers. This is consistent with any interest Kiva may have in the designated accounts. To the extent the

opposition can be construed as a request by Kiva for adequate protection of its purported interest in the designated accounts as a custodian to use of those accounts by the estate under 11 U.S.C. § 363(e), the Trustee submits that the agreement taken as a whole preserves the Debtor's business as a going concern, thus enhancing, not degrading, the value of Kiva's customer list collateral.

APPLICABLE LAW

11 U.S.C. § 363

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

> (b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--
>
> (A) such sale or such lease is consistent with such policy; or
>
> (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--
>
> (I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
>
> (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.
>
> (c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.
>
> (2) The trustee may not use, sell, or lease cash

collateral under paragraph (1) of this subsection unless--

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section--

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

11 U.S.C. § 364

Pursuant to 11 U.S.C. § 364:

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt--

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d) (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if--

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

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

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. Id. at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

DISCUSSION

Here, Kiva has not persuaded the court that the Trustee, acting as a fiduciary of the estate with the duty to perform for the benefit of the estate, that the Agreement is not in the best interest of the estate. In the Trustee's sound business judgment, the Trustee came to an agreement with Turner to provide gas to the Debtor in order to make the Debtor profitable. It appears that Kiva is arguing on a "20/20 hindsight" basis, "offering" a possible counteroffer for that part of the supply contract Kiva wants. Kiva could have, and had the opportunity, to present a "better offer" to the Trustee was originally looking for a supplier, or even since the initial hearing on this Motion. Kiva is seeking to leverage the agreement between the Trustee and Turner to be exempt from the terms of the agreement and to essentially take what it wants from the Debtor – namely the designated accounts. Kiva is more than welcome to negotiate with the Trustee and the Trustee, as a fiduciary, may consider whether an agreement with Kiva is in the best interest of the Debtor. However, Kiva's argument that it may have better terms is not in fact a basis to deny the proposed agreement.

Kiva bases its entire objection on certain assumptions that, as the Trustee points out, are not necessarily true. Kiva is assuming that Turner would need to sign separate agreements with each customer and would essentially be buying these accounts. As the Trustee responded, this does not appear to be true under the terms of the agreement.

Reviewing Kiva's opposition, it appears that the concerns Kiva has with the proposed Agreement are the exact actions Kiva is attempting to get the court to authorized. Kiva is attempting to be the servicer for the alleged secured customers and is seeking exclusion from the exclusivity. If Kiva's true concern is the protection of the Debtor and Kiva's collateral, Kiva should recognize that the Trustee is seeking to have the agreement solidified to grow and benefit the Debtor, which will secure Kiva's security interest.

Most notably, Kiva is basing its objection on the premise that the Agreement is severable. There is no evidence in the language of the Agreement nor what was presented by the parties that Turner and the Trustee can pick and choose which parts of the fully integrated agreement are enforceable. Kiva assumes that by deleting the servicing option or limiting the exclusivity clause that the Agreement could still stand. This again is a false premise.

The court overruling Kiva's objection and finding that the proposed agreement in the best interest of the Debtor, estate, and creditors, the Motion is granted.

Therefore, the court grants the Motion, authorizing the extension of credit on the terms requested, except as expressly provided in the Order.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion For Entry of an Order Authorizing (1) Exclusive Supply Agreement; (2) Post-Petition Financing; and (3) Optional Servicing Agreement filed by David Flemmer, Chapter 11 Trustee, having been presented to the court, and upon

review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

IT IS FURTHER ORDERED that the court,

A. Grants Turner Gas a lien on pre-petition assets pursuant to 11 U.S.C. § 364(c)(3), with the perfection date being December 17, 2014, the date the petition was filed in this bankruptcy case. No new security agreement or UCC Financing Statement is required, with the court approving the grant of security by the Trustee to be on the terms of and by the pre-petition Security Agreement and perfected by the pre-petition UCC Financing Statement (with the priority of the lien for the post-petition credit obligation being December 17, 2014).

B. The court does not authorize and Turner Gas is not given a lien in the pre-petition assets of the estate pursuant to 11 U.S.C. § 364(d).

C. The court does not authorize and Turner Gas is not granted a super-priority administrative expense pursuant to 11 U.S.C. § 364(c)(1).

4. 14-91441-E-7 GARY/JEAN ROBERTS MOTION TO SELL
ADJ-2 Christian J. Younger 2-12-15 [26]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on February 12, 2015. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here Movant proposes to sell the "Property" described as follows:

A. 2213 McAllister Lane, Riverbank, California

The proposed purchaser of the Property is Vincent and Kirsten Suarez and the terms of the sale are:

1.Purchase price is $260,000.00.

2.$2,600.00 down payment, which will be applied to the purchase price at the close of escrow

3.The amount of $250,900.00 to be paid by Buyers through FHA loan at the close of escrow (the Purchase Agreement is subject to this loan contingency); and

4.The remaining balance of $6,500.00 to be paid by Buyers in cash at close of escrow.

The Trustee seeks authorization to pay each of the brokers, PMZ Real Estate and Berkshire Hathway, Drysdale Properties 3% of the gross sale price if the Buyers purchase the Property.

The Trustee also requests that the court waive the 14-day stay provision of Fed. R. Bankr. P. 6004(h) so as to allow the sale of the Property immediately upon entry of an order. The Property in encumbered by a deed of trust in the amount of approximately $206,000.00 in favor of Nationstar Mortgage, LLC. The bankruptcy estate will incur 14 days of interest on said debt, to no benefit to the bankruptcy estate. FN.1.

FN.1. The Trustee also proposes certain requirements if a prospective bidder wishes to make a higher offer. However, given that the Motion is on an Local Bankr. R. 9014-1(f)(2) basis and any prospective over bidder may not have received notice of the instant Motion, the court denies this request.

A review of the proposed sale terms as well as the instant Motion, it appears to be in the best interest of the Debtor, the estate, and creditors to authorize the sale of the Property.

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Michael D. McGranahan the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Michael D. McGranahan, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b)

to Vincent Suarez and Kirsten Suarez or nominee (“Buyer”), the Property commonly known as 2213 McAllister Lane, Riverbank, California (“Property”), on the following terms:

1. The Property shall be sold to Buyer for $260,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 29, and as further provided in this Order.

2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

4. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

5. The Trustee be and hereby is authorized to pay a real estate brokers' commission in a total amount equal to not more than six percent (6%) of the actual purchase price upon consummation of the sale. Three percent (3%) commission shall be paid to the Trustee’s Broker, PMZ Real Estate and three percent (3%) commission shall be paid to the Buyer’s Broker, Berkshire Hathway, Drysdale Properties.

6. The court waives the 14-day stay provision of Fed. R. Bankr. P. 6004(h) for cause

5. 13-90465-E-7 KIMBERLY VEGA
SSA-5 Thomas O. Gillis

MOTION FOR COMPENSATION FOR STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY
2-6-15 [109]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on February 6, 2015. By the court's calculation, 27 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing **on March 5, 2015.**

The Motion for Allowance of Professional Fees is granted.

Steven S. Altman, 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.

The period for which the fees are requested is for the period May 29, 2013 through March 5, 2015. The order of the court approving employment of Applicant was entered on June 17, 2013, Dckt. 29. Applicant requests fees in

the amount of $39,185.00 and costs in the amount of $518.33.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including. The estate has unencumbered monies to be administered as of the filing of the application. The legal services relate to assisting the Trustee recover the value of property of the estate for interests of the Debtor. This included prosecuting adversary proceedings.

Counsel has not identified the monies held by the Trustee for distribution in this case. The court notes that the Trustee recovered $27,500.00 in settlement to recover the Debtor’s interest in one parcel of property. The court also notes that the litigation with the Debtor in this case was extensive, requiring counsel to prosecute the rights of the estate for the Trustee, rather than merely giving up because the Debtor threw up roadblocks.

The court finds the services were beneficial to the Client and bankruptcy estate and 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 38 hours in this category. Applicant assisted Client with follow-up correspondence to Gillis’ Firm, and conducted extended case research.

Efforts to Assess and Recover Property of the Estate: Applicant spent 11 hours in this category. Applicant reviewed settlement agreements, made revisions to buy/sell agreements and conducted phone conferences with opposing counsel.

Adversary Proceedings: Applicant spent 61.40 hours in this category. Applicant reviewed opposing counsel's pleadings, prepared oppositions and responses and supporting documents.

Significant Motions and Other Contested Matters: Applicant spent 20 hours in this category. Applicant prepared of sale motions, motions for summary judgment, and preparation of points and authorities.

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**
Applicant	58.70	$250.00	$14,675.00
Applicant	81.70	$300.00	$24,510.00
	0	$0.00	$0.00
Total Fees For Period of Application			$39,185.00

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $518.33 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopies	$0.10	$289.70
Photocopies from Law Library	$0.25	$2.50
Photocopies of docket report	$0.05	$0.50
Photocopy from Bankruptcy Court	$12.50	$12.50
Postage	$64.35	$64.35
Postage	$0.69	$20.10
Postage	$29.24	$29.24
Postage	$2.03	$12.18

Postage	$0.66	$7.92
Postage	$0.46	$2.30
Postage	$5.20	$5.20
Postage	$0.86	$1.72
Postage	$0.52	$0.52
Postage	$3.18	$3.18
Postage	$7.60	$7.60
Postage	$0.48	$20.16
Postage	$0.90	$4.50
Postage	$2.09	$10.45
Postage	$0.69	$17.25
Postage	$2.66	$10.64
Total Costs Requested in Application		$522.51

FN.1. By the Court's calculations, the total expenses listed in Dckt. 113 add to the total of $522.51. As the amount requested by the applicant is $518.33, the Court will assume the applicant is applying to recoup expenses at a reduced rate.

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $39,185.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs and Expenses

The final Costs in the amount of $518.33 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$39,185.00
Costs and Expenses	$ 518.33

pursuant to this Application fees of $39,185.00 and interim costs of $518.33 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Steven S. Altman ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Steven S. Altman is allowed the following fees and expenses as a professional of the Estate:
>
> Steven S. Altman, Professional Employed by Trustee
>
> Fees in the amount of $ 39,185.00
> Expenses in the amount of $ 518.33,
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $39,185.00 and costs of $518.33 are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

6. 13-90465-E-7 KIMBERLY VEGA
SSA-6 Thomas O. Gillis

MOTION FOR COMPENSATION FOR ATHERTON AND ASSOCIATES, LLP, ACCOUNTANT(S)
2-6-15 [103]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on February 6, 2015. By the court's calculation, 27 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing **on March 5, 2015.**

The Motion for Allowance of Professional Fees is granted.

Atherton and Associates, LLP, 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.

The period for which the fees are requested is for the period October 9, 2014 through December 12, 2014. The order of the court approving employment of Applicant was entered on October, 2014, Dckt. x94. Applicant requests fees in the amount of $697.00 and costs in the amount of $00.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including tax analysis and preparation of tax returns. The estate has unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

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.

Efforts to Assess and Recover Property of the Estate: Applicant spent 2.6 hours in this category. Applicant reviewed information received , sent pending list to Trustee, summarized data for tax return preparation, and reviewed 2014 tax returns. Applicant's staff accountant spent 1.1 hours in this category. Applicant's staff accountant prepared the final 2014 tax returns.

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
Applicant	2.6	$230.00	$598.00
John Hubbard (staff accountant)	1.1	$90.00	$99.00
	0	$0.00	$0.00

Total Fees For Period of Application	$697.00

Costs and Expenses

Applicant does not seek the allowance and recovery of costs and expenses pursuant to this applicant.

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $697.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees $697.00

pursuant to this Application $697.00 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Atherton and Associates, LLP (“Applicant”), Accountant for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Atherton and Associates, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Atherton and Associates, LLP, Professional Employed by Trustee
>
> Fees in the amount of $ 697.00
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $697.00 are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of

the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

7.	**14-91565-E-11 HAR-2**	**RICHARD SINCLAIR Pro Se**	**OBJECTION TO HOMESTEAD EXEMPTION 1-22-15 [60]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 22, 2015. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The objection to homestead exemptions is overruled.

Andrew Katakis, California Equity Management Group, Inc., and Fox Hollow of Turlock Owners' Association ("Creditors") filed the instant Objection to Claim of Exemption of Homestead on January 22, 2015. Dckt. 60.

The Creditors allege that Richard Sinclair ("Debtor-in-Possession") resides at 8212 Oak View Drive, Oakdale, California ("Property"). At the First Meeting of Creditors, Debtor-in-Possession testified that his interest in the Property is a 20 year oral lease. Debtor-in-Possession further testified that he transferred the Property into the Richard Sinclair Trust, which is an

irrevocable trust.

As to the homestead exemption, Debtor-in-Possession testified that he filed the homestead exemption before 1994 and has not filed another one since. The Debtor-in-Possession testified that he had moved out of the Property but moved back in October or November of 2014.

To summate, the Creditors argue that Debtor-in-Possession transferred the Property to an irrevocable trust in which he was no longer the trustee or the beneficiary in roughly 2012. Following his wife filing a dissolution proceeding, Debtor-in-Possession moved out and returned to the Property in October/November 2014. His homestead terminated when Debtor-in-Possession no longer had an interest in the property.

California Code of Civil Procedure § 704.960 provides that a voluntary conveyance of the property subject to a declared homestead results in the homestead transferring to the proceeds of such conveyance for a period of six months in which time the proceeds must be invested in a new property to which the homestead exemption would transfer. Debtor-in-Possession testified that the property was transferred to the trust around 2012 or early 2013 and as a result, the declared homestead from 1994 terminated. The subsequent leasing of the Property does not transfer the declared homestead to the lease of the property under any legal theory.

DEBTOR-IN-POSSESSION'S REPLY

Debtor-in-Possession filed a reply on January 30, 2015. Dckt. 81. Debtor-in-Possession states that the he "transferred to his trust in 209 and [Creditor Katakis] objected, but the court said [Debtor-in-Possession] had ample assets remaining." Debtor-in-Possession alleges that the trust became irrevocable and elected an independent trustee by 2012. Thereafter, the Debtor-in-Possession states that even though he did not own it or have a lease, Creditor Katakis licensed the Property, which is a void action. Debtor-in-Possession allegedly informed Creditor Katakis' counsel to remove the lien since Debtor-in-Possession did not own the Property, but Debtor-in-Possession argues that counsel refused to. Debtor-in-Possession concludes by stating that leases for more than one year must be in writing pursuant to the Statute of Frauds and therefore his 20 year lease is not valid, making Creditor's Katakis' lien unlawful.

CREDITORS' RESPONSE

Creditors filed a response on February 25, 2015. Dckt. 111. Creditors state that Debtor-in-Possession is confusing the validity of his homestead exemption with the effect of the recording of an abstract of judgment.

Debtor-in-Possession does not dispute that his current residence is at the Property which the Debtor-in-Possession claims was conveyed to the trust in 2009 which became irrevocable in 2012. The Creditors re-allege that the homestead exemption terminated when he no longer had an interest in the Property, California Code of Civil Procedure § 704.960. Creditors also assert that Debtor-in-Possession admits that the transfer to the trust was for no consideration and that the conversion of the trust to an irrevocable trust and his withdrawal as beneficiary and trustee was also without consideration. Dckt. 57.

The Creditors allege that the transfer of the Property to the trust and/or making the trust irrevocable was a fraudulent conveyance either because it was transferred with the intent to hinder, delay, and defraud the Creditors who at the time held a claim in excess of $1,200,000.00 or the transfer was for no consideration rendering the Debtor-in-Possession insolvent. The Creditors recorded an abstract of judgment in Stanislaus County on April 11, 2013, Document No. 2013-0031138. Dckt. 111, Exhibit A.

Creditors allege that the Debtor-in-Possession cannot claim a homestead in the Property that was fraudulently conveyed. Furthermore, Creditors argues that any transfer by a judgment debtor that is a fraud on creditors is void on them.

Creditors argue that the alleged fraudulent conveyance of the Property to the trust has two consequences: (1) Debtor-in-Possession abandoned his homestead exemption and (2) the conveyance is void and the Creditor's Abstract of Judgment attached to the Property, notwithstanding that the conveyance took place prior to the recording of the Abstract. Creditors argue that means that the Property is encumbered by the Abstract that is only junior to the fist deed of trust held by Ocwen.

Creditors performed a search or records of Stanislaus County and could not find a declared homestead filed by either Richard Sinclair or Richard C. Sinclair. Dckt. 111, Exhibit B. Creditors argue that this, in conjunction with the fact the lease is not valid, shows that Debtor-in-Possession has no interest in the Property other than a mere right of possession.

Creditor requests that the court enter an order that Debtor-in-Possession has no homestead exemption in the pending case and that Debtor-in-Possession is precluded from asserting any homestead exemption on the Property by virtue of the recording the Creditors' abstract.

DISCUSSION

It is well established in the Ninth Circuit that a claimed exemption is presumptively valid. *In re Carter*, 182 F.3d 1027, 1029 n.3 (9th Cir. 1999). The objecting party has the burden of proving that the exemptions are not properly claimed, requiring the objecting party to produce evidence rebutting the presumption and ultimately bear the burden of persuasion. Fed. R. Bankr. P. 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. BAP 2005); *In re Carter*, 183 F.3d at 1029 n. 3.

On Schedule C the Debtors have claimed an exemption in the amount of California Code of Civil Procedure § 704.730 in the amount of $175,000.00. That section protects a homestead from a judgment lien when a declared homestead is recorded. No evidence of a declared homestead having been executed and recorded has been presented to the court. However, California Code of Civil Procedure § 704.730 provides for the "automatic" homestead exemption in California.

The automatic homestead exemption, applies when a party has continuously resided in a dwelling from the time that a creditor's lien attaches until a court's determination that the exemption applies. See Cal. Code Civ. Proc. § 704.710(c). The filing of a bankruptcy petition constitutes such a "forced sale" to trigger the application of the automatic homestead exemption. *In re*

Elliott, 523 B.R. 188, 195 (B.A.P. 9th Cir. 2014). The automatic homestead exemption does not need to be recorded in a homestead declaration. *Wells Fargo Fin. Leasing, Inc. v. D & M Cabinets*, 177 Cal.App.4th 59, 68, 99 Cal.Rptr.3d 97 (2009). Pursuant to California law, the factors a court should consider in determining residency for homestead purposes are physical occupancy of the property and the intention with which the property is occupied. See *Ellsworth v. Marshall*, 196 Cal.App.2d 471, 474, 16 Cal.Rptr. 588 (1961). The crux of the determination of whether the automatic homestead exemption applies is whether there has been continuous residency.

The only exemption claim in the real property has been the automatic homestead exemption arising under California Code of Civil Procedure § 704.730. Schedule C, Dckt. 42. This code section merely states the amount of the homestead exemption when it is properly asserted. It does not state an entitlement to a homestead exemption.

As set forth in Schedule C, Debtor has not claimed a homestead exemption under California law. He merely states an amount of a homestead exemption, if he identified any applicable statutory basis was identified.

Additionally, as Creditors argue and Debtor admits, he has no interest in the real property in which to claim an interest. Debtor admits in his Reply,

> "3. Thereafter, even though DEBTOR did not own it, or have a lease, ANDREW KATAKIS liened the property. The action is void.
> ...
> 5. Leases for more than one year MUST be in writing pursuant to the Statute of Frauds - Civil Code 1624. Therefore the 20 year lease is not valid until put in writing and the ANDREW KATAKIS LIEN is still unlawful."

Reply, Dckt. 81.

As a condition precedent to claiming an exemption in an asset, the asset must be property of the bankruptcy estate. 11 U.S.C. § 522(a). Property of the estate includes all "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Debtor admits that he has no rights and that when Creditors attempted to lien such rights, none existed. FN.1.

FN.1. The Debtor has represented to the court that he is an experienced attorney and that his plan of reorganization will be built around a successful restarting of his law practice. With such a party, the court does not have the concern as with a non-lawyer pro se who may not understand the legal significance of making statements in open court and pleadings.

This is consistent with Creditors' contention that Debtor has transferred his rights away, contending that such transfers could be avoided as a fraudulent conveyance.

The issue the court has before it is whether the exemption, claimed by the Debtor on Schedule C, should be disallowed. The answer to that is yes. Debtor admits that he has no interests in the Property in which an exemption may be claimed. The court does not make a determination that what interest the estate

may, or may not have, or what rights that the Debtor in Possession, as the fiduciary of the estate, or a trustee would have the right (and fiduciary obligation) to avoid or recover for the estate. Such would be determined in an adversary proceeding, if any. Fed. R. Bank. P. 7001.

Therefore, the objection is sustained and the Debtor's claim of exemption in 8212 Oak View Drive, Oakdale, California is disallowed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Debtor's Claim of Exemptions filed by Andrew Katakis, California Equity Management Group, Inc., and Fox Hollow of Turlock Owners' Association having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained and the homestead exemption claimed by the Debtor in the real property commonly known as 8212 Oak View Drive, Oakdale, California is disallowed in its entirety.

8. 10-94467-E-7 TINA BROWN CONTINUED MOTION FOR CONTEMPT
CWC-4 Michael R. Germain 7-11-13 [63]

Proper Service: The Order to Appear was served through the Bankruptcy Noticing Center on February 19, 2015. Cert. of Service, Dckt. 165. The court computes that 17 days notice of the hearing was provided to David Foyil and Timothy Brown.

The hearing is xxxxxx.

In connection with Adversary Proceeding 12-9003 entered a judgment; which is final, no appeal taken; determining that the bankruptcy estate owned three vehicles which were in the possession of Timothy Brown. Mr. Brown was ordered to turn over the vehicles. When he failed to do so, corrective sanctions were ordered. When he repeatedly violated the court's order to turn over the vehicles, the Trustee obtained a monetary judgment for the value of the vehicles, in addition to the corrective sanctions previously ordered by the court.

CHAPTER 7 TRUSTEE'S DECEMBER 11, 2014 STATUS REPORT

The Chapter 7 Trustee filed a status report on December 11, 2014. Dckt. 157.

In the status report, the Trustee states that as of December 10, 2014, the Debtor has failed to comply with the court's order. No vehicles or required documents or information has been turned over to the Trustee. No monetary sanctions have been paid to the Trustee.

On August 6, 2014, the court entered a supplemental Order for Election of Monetary Damages under Judgment (Dckt. 41) and Authorized Enforcement of Monetary Sanctions (10-49477, DCN: CWC-4) and Judgment Through Combined Writ of Execution and Other Judgment Enforcement ("Supplemental Order"). This Supplemental Order was forwarded to the Trustee's Special Counsel, David Cook, on August 11, 2014. On November 10, 2014, the court entered an Order Granting Motion for Assignment of Rights, Restraining Order and Turnover (12-09003; DCN: CCA-1).

On November 18, 2014, the court entered an Order Authorizing Process Server to Levy Execution (12-09003; Dckt. 72). On December 2, 2014, Bank of America advised David Cook of a safe deposit box in the name of Debtor, Tim Brown, which they had frozen pursuant to the Temporary Restraining Order.

On December 4, 2014, Defendant Timothy Brown filed a Chapter 13 case, Case No. 14-91596, in the Eastern District of California, Modesto Division, assigned to Judge Bardwil.

Special counsel, David Cook and Defendant's counsel, David Foyil, have

entered into a Stipulation to Modify Automatic Stay to Continue Freeze Upon Safety Deposit Box Pending Further Order of the Court.

DECEMBER 18, 2015 HEARING

The court continued the hearing to February 12, 2015. Dckt. 159.

FEBRUARY 6, 2015 HEARING

Since the December 18, 2015 hearing, no supplemental pleadings have been filed.

At the hearing, the court reviewed the Schedules filed by Tim Brown in the Chapter 13 Case. In those Schedules, Mr. Brown states under penalty of perjury that he has possession of the 1997 Harley Davidson Red Fat Boy and the 2007 Chevrolet Corvette which he was previously ordered to turn over. In addition, he states under penalty of perjury that he has the 2008 Harley Davidson Crossbones which was the subject of this court's prior orders. On Schedule B Debtor states under penalty of perjury that all three of the vehicles are "Asset of Related Chapter 7 Bankruptcy Estate In re Brown, Tina." 14-91596; Amended Schedule B, Dckt. 40

Mr. Brown is represented by David Foyil in the Chapter 13 case. Mr. Foyil represented Mr. Brown in earlier contempt proceeding and Mr. Foyil was ordered, and did pay, sanctions to the Trustee. Mr. Foyil also represented Mr. Brown when he stated to the court that all of the vehicles would be turned over to the Trustee in this case in September 2013. Civil Minutes, Dckt. 76, and Order, Dckt. 78.

Tim Brown having lists on Schedule three vehicles which he admits are property of this Bankruptcy Estate, the court is at a loss as to why said vehicles have not been turned over to this Chapter 7 Trustee. Given that Debtor is represented by counsel, David Foyil, the continued improper possession of property of this bankruptcy estate is mystifying.

The court continued the hearing and ordered David Foyil to appear at the continued hearing to address the admitted possession and control of property of this Bankruptcy Estate by Tim Brown.

FEBRUARY 13, 2015 ORDER

On February 13, 2015, the court issued the following order:

> The court conducted a continued hearing on this Motion for Contempt relating to the failure of Tim Brown to comply with prior orders of this court. The court noted that in Tim Brown's current bankruptcy case he lists three vehicles which have previously been determined to be property of the Tina Brown estate to be property in which he has an interest and lists on Schedule B of his Chapter 13 Petition. Case N. 14-91596. Further, Tim Brown states under penalty of perjury on such Schedule B that the vehicles are property of the Tina Brown bankruptcy estate. David Foyil, Tim Brown's attorney in this bankruptcy case is also Tim Brown's attorney in his Chapter 13 case. Tim Brown stating under penalty of perjury

that the vehicles are property of the Tina Brown bankruptcy estate, cause exists for an explanation as to why he continues in possession or control of such property which he lists on his Schedule B under penalty of perjury.

Therefore, upon review of the current motion, files in this case, the statements of penalty of perjury by Tim Brown on his Schedule filed in his Chapter 13 case, and good cause appearing;

IT IS ORDERED that the hearing on the Motion is continued to 10:30 a.m. on March 5, 2015.

IT IS FURTHER ORDERED that David Foyil, who has appeared previously appeared in this case as counsel for Tim Brown and is currently Tim Brown's attorney of record in Chapter 13 case 14-91596, to address the following:

A. That under penalty of perjury Tim Brown states on Amended Schedule B in Chapter 13 case 14-91596 that 1997 Harley Davidson Red Fat Boy Motorcycle, 2007 Chevrolet Corvette, and 2008 Harley Davidson Crossbones are each "Asset of Related Chapter 7 Bankruptcy Estate in re Brown, Tina,"

B. Admitting that the property is not Tim Brown's, why he lists the property on his Schedules, admits that they are owned by the Tina Brown bankruptcy estate, and has failed to turn over such property to the Trustee in the Tina Brown case; and

C. Provide the name, address, and relationship to Tim Brown of any person that Tim Brown asserts is in possession of each of the above vehicles.

IT IS FURTHER ORDERED that David Foyil shall appear at the March 5, 2015 hearing in person, no telephonic appearance permitted.

IT IS FURTHER ORDERED that Tim Brown and David Foyil, and each of them, shall file a written response listing the names, addresses, and relationship of each person who is in possession of each of the vehicles shall be filed and served on or before February 28, 2015.

Dckt. 162.

MARCH 5, 2015 HEARING

No supplemental pleadings have been filed in connection with the instant Motion since the prior hearing.

At the hearing, -------

9. 12-92570-E-12 COELHO DAIRY
DJD-6 Thomas O. Gillis

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF DYER LAW FIRM FOR MICHAEL J. DYER, CREDITORS ATTORNEY(S)
12-22-14 [564]

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

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

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

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

Correct Notice Not Provided. Movant failed to provide a Proof of Service. Without a Proof of Service, the court cannot determine if proper notice was given to necessary parties. 28 days' notice is required. L.B.R. 9014-1(f)(1); (f)(2)(A).

The Motion for Prevailing Party Attorneys' Fees was properly set for hearing on 15 days notice. The Plan Administrator/Debtor filed an Opposition on January 23, 2015. In light of the tremendous amount of attorneys' fees and time expended by both sides and the need for additional information, rather than denying the motion without prejudice, the court sets a briefing schedule to afford all parties a fair opportunity to address these issues.

The hearing on the Motion for Attorney Fees Pursuant to Contract is granted.

Black Rock Milling Co., LLC ("Creditor") filed the instant Motion for Attorney Fees pursuant to the contract between the parties. Dckt. 564. FN.1.

FN.1. While titled as a Motion for Attorneys Fees Pursuant to California Civil Code § 1717, that Civil Code Section does not grant the right to attorneys' fees. That code section merely states that when a contract specially provides that attorneys' fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or the prevailing party," then

which ever party is the prevailing party (even if the contract does not provide for that party to receive attorneys' fees) shall have the right to the contractual attorneys' fees. While a fine point, and Movant does correctly identify for the court the contractual basis, such a distinction is important in considering the actual right to attorneys' fees.

Creditor is seeking reimbursement of reasonable attorneys' fees and costs incurred by Creditor in the legal representation by its counsel in Evidentiary Hearing regarding Creditor's claim in this case against Coelho Dairy ("Plan Administrator/Debtor") both prior to and in this bankruptcy case and in the representation of Creditor in connection with the related state court action.

Creditor is seeking total fees and expenses in the amount of $127,313.00.

BACKGROUND

Creditor is an organic feed supplier. Beginning in 2002, Creditor began providing feed to Debtor-in-Possession. From 2002 to 2010 Creditor provided Debtor with feed for their cows. Creditor alleges that it continually worked with Debtor on its outstanding balance, even allowing Debtor to accumulate an unpaid balance of over $400,00.00 before Creditor ceased providing feed to the Debtor.

In 2012, Creditor filed the a lawsuit in California State Court against Debtor. Soon after, the Debtor filed the instant bankruptcy case.

On or about February 11, 2014, Debtor-in-Possession filed an objection to Creditor's claim. Debtor-in-Possession argued that Creditor was not entitled to any additional funds from the Debtor and that Debtor had, in fact, overpaid creditor in the amount of $129,219.68.

On November 5, 2014, the court held an evidentiary hearing regarding Creditor's claim and Debtor-in-Possession's objection. On November 25, 2014, the court issued a ruling finding that Debtor-in-Possession owed Creditor a principal amount of $114,281.22 as well as interest in the amount of $246,009.58 for a total of $360,290.80. Dckt. 558. The court noted that the total amount does not include attorneys' fees and that such fees would be determined by post-hearing motion.

REVIEW OF MOTION

Creditor argues that it is entitled to attorney's fees based on the following arguments: (1) the action is based on a contract because the current debt and resulting litigation is based on a contract; (2) Creditor is the prevailing party because the court found that Creditor had a legitimate claim against Debtor-in-Possession and as a result suffered damages in excess of $360,000.00; (3) the fees requested are reasonable under 11 U.S.C. § 330 because they reflect the reasonable market value of the services provided.

Creditor provides the following break down of the fees and costs that arose in connection with the civil state case and the bankruptcy case:

Civil Case Cost	$1,635.00
Civil Attorney's Fees	$32,372.00
Bankruptcy Case Cost	$7,756.00
Bankruptcy Case Attorney's Fees	$85,550.00
TOTAL FEES AND COSTS	$127,313.00

Attached to Creditor's Motion is the raw data time sheets, separated by the civil and bankruptcy action. Creditor does not provide task billing for the services rendered.

PLAN ADMINISTRATOR/DEBTOR LIMITED NON-OPPOSITION

Debtor-in-Possession filed a limited non-opposition to instant Motion on January 23, 2015. Dckt. 570. Debtor-in-Possession objects on the following basis:

A. The format of the fee claim does not comply with federal rules, in that the attorney fees are not broken down into categories.

B. The attorney fees for litigating issues of bankruptcy law should be disallowed pursuant to 11 U.S.C. § 506(b).

C. It is bad policy for the court to allow an unsecured creditor to accumulate $85,550 in attorney fees and $7,756.00 in costs for a half day hearing on proof of their unsecured claim in bankruptcy.

D. The Creditor's itemization on numerous tasks are improperly grouped and thus cannot be dissected to determine the time allocated to each separate task.

E. The multiple "legal research" entries should be disallowed or limited to the research performed related to the issues litigated at the hearing on the objection to the claim.

F. The client conferences were unnecessary and unreasonable. Debtor-in-Possession argues that the conferences should be stricken because most do not state the subject of these long conferences.

G. The review of document fees are excessive.

H. With the exception of the hearings directly related to the objection to the claim objection, attorney fees should be disallowed as not necessary and not productive.

I. The costs are not reasonable or legally justified. There is no itemization of time, invoices, experience, qualifications, necessity, proof of payment, or other evidence to support these costs. It should be noted that only the Debtor-in-Possession produced an expert witness at the Evidentiary Hearing.

Debtor-in-Possession concludes by stating that the Creditor has the burden of proof of his claim and that the attorney fee and cost claim should be greatly reduced as not proven.

JANUARY 29, 2015 HEARING

At the hearing, the parties agreed to the briefing schedule. The court issued the following order:

> **IT IS ORDERED** that the hearing on the Motion is continued to 10:30 a.m. on March 5, 2015.
>
> **IT IS FURTHER ORDERED** that on or before February 6, 2015, Black Rock Milling, Co. shall filed and serve supplemental pleadings providing a task billing analysis, and on or before February 20, 2015, the Plan Administrator/Debtor shall file and serve a Reply, if any, to the supplemental pleading.

Dckt. 576.

CREDITOR'S SUPPLEMENTAL BRIEF

Creditor filed a supplemental brief on February 10, 2015. Dckt. 579. The Creditor makes the following arguments in support for attorneys' fees:

Creditor's Fees Claimed is Permitted by 11 U.S.C. § 502(b) and Travelers Cas. & Sur. Co. Of America v. PG&E

Creditor argues that pursuant to *Travelers Cas. & Sur. Co. Of America v. PG&E*, 127 S.Ct. 1199 (2007), and *SNTL Corp. V. Ctr. Ins. Co. (In re SNTL Corp.)*, 571 F.3d 826 (9th Cir. 2009), that 11 U.S.C. § 506(b) does not apply and § 502(b) allows for post-petition attorney's fees.

Creditor's Claim for Attorneys' Fees is Based on a Contract with an Attorneys' Fees Provision

Creditor argues that it is undisputed that the current debt and resulting litigations between Creditor and Debtor-in-Possession are based on a contract for feed. Creditor alleges that Debtor-in-Possession failed to make full and complete payments for the feed which resulted in Creditor having to litigate to seek full payment. The contract at issue specifically allows for the recovery of attorneys' fees.

The Attorneys' Fees Accumulated by Creditor were a Result of the Actions of Debtor-in-Possession Through Out the Litigation

Creditor alleges that Debtor-in-Possession and Debtor-in-Possession's counsel took unnecessary and evasive actions that led to high attorneys' fees. The Creditor lists the following as actions taken by the Debtor-in-Possession that caused the high amount of attorneys' fees:

(1) Debtor-in-Possession attempted to argue that the bankruptcy included individuals Frank and Bernadette Coelho as debtors;

(2) Debtor-in-Possession filed multiple bankruptcy plans that were deficient on their face. At the hearings, Debtor-in-Possession's attorney admitted the deficiency of the plans and requested to file an amended plan;

(3) Creditor was given numerous false promises of refinancing and repayment;

(4) Creditor attended multiple settlement discussions with Debtor-in-Possession's counsel, including a mediation where settlement was discusses. A settlement was reached but Debtor-in-Possession withdrew by failing to perform;

(5) Debtor-in-Possession attempted to enforce a settlement between Debtor-in-Possession and Creditor despite the language of the settlement being impossible given the time for payments by Debtor-in-Possession had already lapsed;

(6) Debtor-in-Possession's attorney filed a motion of compensation which did not accurately reflect the services provided.

Creditor also argue that appearances at relief from stay and other related motions were necessary because Creditor gained information regarding the facts of Debtor-in-Possession's business as well as the competency of Debtor-in-Possession's counsel and accounting expert.

Lastly, the Creditor argues that it incurred further fees due to the baseless arguments bade by Debtor-in-Possession concerning the debts owed to Creditor and whether they were proper.

Creditor is the Prevailing Party

In balancing the claims, Creditor is the prevailing party. The Creditor argues that because the Debtor-in-Possession lost on their objection to claim that not only was Creditor not entitled to any money but Creditor was overpaid, the Creditor is the prevailing party. Creditor also asserts that it is the prevailing party because the court found that the interest rate charged by the Creditor was not usury. Lastly, the Creditor argues that it is the prevailing party because the court denied the Debtor's objection that Creditor was charging compound interest.

The Creditor states that the Debtor may have prevailed on the issue concerning post-petition interest, the fact Creditor prevailed on the pre-petition interest and balancing of the factors, Creditor is still the prevailing party.

Creditor's Attorneys' Fees in the Litigation is Reasonable

Creditor argues that the attorneys' rates ($250.00 for Dustin Dyer and $295.00 for Michael J. Dyer) are reasonable in light of the firm's skill, reputation, and experience. Creditor notes that the attached fee schedule (Dckt. 580) does not change the services and hours worked, some of the charges have been changed due to accidently undercharging some items. Exhibit 1 is the attorney's fees incurred in collecting on the contract between Debtor-in-Possession and Creditor. The reason all fees were charged to Debtor-in-Possession because Debtor-in-Possession was the primary defendant in the civil action until bankruptcy and all attorneys' fees were expanded in an effort to

get Debtor-in-Possession to pay the outstanding balance to Creditor. After the bankruptcy was filed, all civil court attorneys' fees were attributed to the general partners of the Debtor-in-Possession. The total attorneys' fees attributed to Debtor-in-Possession are $93,684.00.

Exhibit 2 is the costs incurred in collecting on the contract between Debtor-in-Possession and Creditor. In order to efficiently break up the costs it was determined that all bankruptcy related costs would be attributed to Debtor-in-Possession and all civil costs would be attributed to the general partners. The total bankruptcy costs incurred are $7,756.00.

The Creditor also attached as Exhibit 3 and 4 the fees and costs allocated to the Debtor-in-Possession's general partners. The Creditor requests that the court issue a statement of deferral in determining the fees and costs owed by the Debtor-in-Possession's general partners so the civil court can make such determination.

In sum, the Creditor is seeking attorneys' fees and costs in the amount of $101,440.00.

DEBTOR-IN-POSSESSION LIMITED NON-OPPOSITION

Debtor-in-Possession filed a limited non-opposition on February 20, 2015. Dckt. 584. The Debtor-in-Possession objects on the following grounds:

The "Delay" Alleged by Creditor in Confirming a Plan and Settling Creditor's Claim was Not the Fault of the Debtor-in-Possession

Debtor-in-Possession states that while negotiating a refinance with Bank of West, Debtor-in-Possession arranged a private mediation with Creditor to settle their claim. A settlement was reached in mediation for $260,000.00. However, Debtor-in-Possession was late in obtaining the down payment and later attempted to enforce the settlement (Dckt. 171 and 213). That motion was denied. Debtor in Possession argues that it tried its best to settle with Creditor as soon as possible.

It is Bad Policy for the Court to Allow an Unsecured Creditor to Accumulate $101,440.00 in Attorney Fees and Costs for a Half Day Hearing on Proof of their Unsecured Claim

Debtor-in-Possession argues that allowing an unsecured creditor to recover fees and costs to attend all hearings, charge for lengthy client-attorney conferences, charge for attorney research on issues is bad policy and result in Chapter 11 and 12 debtors not being able to complete a plan.

The Multiple "Legal Research" Entries Claimed by Creditor Should be Disallowed or Limited to the Research Performed Related to the Issues Litigated at the Hearing on the Objection to the Claim

Debtor-in-Possession argues that most of the legal research claimed is not reasonable, productive, or necessary. Creditor's attorney claimed 81.7 hours of legal research for a fee of $19,689.00. Debtor-in-Possession argues that the research was on garden variety motions which would not be necessary for an experienced attorney. Debtor-in-Possession alleges that if the attorney had to conduct that much research, he was not qualified to handle bankruptcy matters

and should have associated with a bankruptcy attorney or referred the case to a qualified attorney.

Debtor-in-Possession further argues that the legal research claim has been changed by the Creditor from the prior itemization produced for the January 29, 2015 hearing, pointing out certain items that were omitted, listed on a different date, and different amount listed. The Debtor-in-Possession argues that the new research items listed on the new itemization account for 57.15 hours of the 81.7 hours total.

The Debtor also argues that the review of document fees are excessive.

With the Exception of the Hearings Directly Related to the Objection, Attorney Fees Should be Disallowed as Not Necessary and Not Productive

The Debtor-in-Possession argues that if the court allows fees, the court should restrict the fees to reasonable preparation civil fees and reasonable post petition fees that are directly related to proving Creditor's unsecured claims. Debtor-in-Possession argues that fees for appearing at the 341 Meeting, Motion for Relief from Stay, Motion to Confirm, Status Conferences, Objection to Attorney Fees for Debtor, and other hearings should be disallowed.

In the Bankruptcy Proceeding, Creditor was the "Prevailing Party" Only on the Objection to Claim Litigation

The Debtor-in-Possession concedes that Creditor was the prevailing party as to the objection to claim.

Debtor-in-Possession also concedes the necessity of Creditor's fees and expenses related to a mediation conducted by a mediator since the Debtor-in-Possession's counsel had arranged the mediation.

Debtor-in-Possession further concedes that the Creditor should be paid for resisting Debtor-in-Possession's Motion to Enforce the Settlement (Dckt. 171 and 213). Lastly, Debtor-in-Possession agrees that some of the pre petition legal fees are compensable.

The Costs are Not Reasonable or Legally Justified

Creditor listed bankruptcy costs of $7,756.00. Most of the costs are for "professionals." The fees for professionals are not still supported by evidence. There is no itemization of time, invoices, experience, qualifications, necessity, proof of payment or other evidence to support these costs. Debtor-in-Possession notes that only the Debtor-in-Possession produces an expert witness at the evidentiary hearing. Creditor called only the claimant to testify.

Debtor-in-Possession argues that only the cost of $800.00 for mediation should be allowed

APPLICABLE LAW

The right to attorneys' fees begins (but does not end) with the contract between the parties. In connection with this claim, the contract states,

"2. Customer agrees to pay all costs and attorney fees incurred of all past due invoices and accounts."

Credit Information, Terms and Conditions; Exhibit 4, Dckt. 565. FN.2.

FN.2. The court notes that Movant has attached the exhibits to a declaration, creating a 35 page electronic document. This is not the practice in the Bankruptcy Courts in the Eastern District of California. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents,¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1).

This Rule exists for a very practical reason. The court, operating in a near paperless environment cannot be wading through one electronic document, hundreds of pages in length, consisting of multiple documents. Filing the pleading as Movant does makes it all but unreadable without creating significant otherwise necessary work for the court and staff. While on any given motion an attorney might argue, "but it's really simple here, the court does not need to enforce the rule," the court does not leave attorneys guessing when rules will be ignored and when they will jump up and bite them.

Again in light of the fees and costs expended by the parties to date in connection with this claim, the court waives this minor noncompliance with the document requirements.

California Civil Code § 1717

California Civil Code § 1717, in pertinent part, [emphasis added] states:

> (a) In any action on a contract, **where the contract specifically provides** that **attorney's fees** and costs, which are **incurred to enforce that contract**, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be **the party prevailing** on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.
>
> Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.
>
> ...
>
> (b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract

> for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the **party prevailing** on the contract shall be the party **who recovered a greater relief in the action on the contract**. The court may also determine that there is no party prevailing on the contract for purposes of this section.
>
> ...

Prevailing Party Attorneys' Fees

Unless authorized by statute or contractual provision, attorney fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). The California Supreme Court has offered guidance on determining who is the "prevailing party:"

> "Accordingly, we hold that in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by a comparison of the extent to which each party has succeeded and failed to succeed in its contentions."

Hsu v. Abbara, 9 Cal.4th 836, 876 (1995) (internal citations omitted).

In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

11 U.S.C. § 502(b)

Section 502(b) provides that a court is to determine the amount of a pre-petition claim "as of the date of the filing of the petition, and. . . allow such claim in such amount." The Bankruptcy Code defines "claim" broadly and includes a right to payment or equitable remedy "whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). The purpose of the broad definition is to ensure that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." *Cal. Dep't of Health Servs. v. Jensen (In re Jensen)*, 995 F.2d 925, 929-30 (9th Cir. 1993).

Under § 502(b)(1), a claim is not allowed if it is unenforceable under the applicable agreement of law "for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). Therefore, contingent claims are allowed under § 502(b).

Following the Supreme Courts decision in *Travelers Cas. & Sur. Co. Of America v. PG&E*, 127S.Ct. 1199, the Ninth Circuit found that a creditor holding an unsecured claim may be entitled to add its post-petition attorneys' fees. *SNTL Corp v. Ctr. Ins. Co. (In re SNTL Corp.)*, 571 F.3d 826 (9th Cir. 2009). The Ninth Circuit specifically stated that "if section 506(b) is . . .irrelevant to determining the allowability of an unsecured claim, we must look to section 502 to determine allowability" and "section 502(b) does not specifically disallow such fees." *Id.* at 843. Specifically, the Ninth Circuit stated that "[p]ostpetition fees can be fairly contemplated when the parties have provided for them in their contracts and thus are contingent claims as of the petition date. The cannot be disallowed merely because they are contingent." *Id.* at 844.

DISCUSSION

Contract Provision

Prior to even getting to the determination if the Creditor is the prevailing party, the court first must look at the underlying contract to determine if there is, in fact, a provision for attorneys' fees. As noted supra, the contract between the Creditor and the Plan Administrator/Debtor states, in relevant part:

> "2. Customer agrees to pay all costs and attorney fees incurred of all past due invoices and accounts."

Credit Information, Terms and Conditions; Exhibit 4, Dckt. 565.

Facially, the plain language of the sentence does not make sense. The court is challenged to understand what Creditor meant in providing "incurred of," as well as the scope of "all past due invoices and accounts" includes. California law construes an attorneys' fees provision against the drafter when the provision is ambiguous. *International Billing Services v. Emigh* (2000) 84 C.A.4th 1175, 1184.

The language used in the contract is most reasonably interpreted by the court to be,

2. Customer agrees to pay all costs and attorney fees incurred [by Creditor] ~~of~~ [in enforcing the obligation of Debtor for] all past due invoices and accounts.

In light of the Supreme Court ruling in *Travelers* and the Court of Appeal ruling in *International Billing Services*, if Creditor wanted a contractual attorneys' fees provision that provided for the above, "and all legal fees and expenses incurred by Creditor in asserting rights arising under the Bankruptcy Code in connection with obligations owed by [Debtor]," the contract used by Creditor could have so provided.

Prevailing Party

Because of the variety of issues and legal services rendered in connection with this bankruptcy case, the task billing and consideration of the various contested matters and actions is necessary. Merely because Creditor asserts it prevailed on the objection to claim, that does not mean it was the "prevailing party" on the other matters for which payment of legal fees is requested.

A bankruptcy case, as compared to a district court or superior court case, consists of many different "actions," consisting of applications and motions, which are contested matters (Fed. R. Bank. P. 9014) and adversary proceedings (Fed. R. Bank. P. 7001). Some matters may relate to a creditor "enforcing the debt." Others may concern rights and interests asserted by other parties in interest, but not the enforcement of obligation owed under the contract. Others will be "housekeeping" or required hearings and meetings. The court considers each of these separately to determine whether the attorneys' fees requested are provided by the contract.

The parties both agree that Creditor was the prevailing party to the Plan Administrator/Debtor's Objection to Claim. This is consistent with the court's ruling after the evidentiary hearing. In the Objection to Claim, the Plan Administrator/Debtor asserted that "BlackRock Milling has overcharged the Debtor by $129,219.68" on the original filed claim in the amount of $332,608.51. Proof of Claim No. 24. By the time of the evidentiary hearing, with the asserted post-petition interest and additional amounts, Creditor asserted that the claim had increased to $421,074.02.

The court ultimately determined that the amount of Creditor's claim in this case was $360,290.80. Order, Dckt. 558. The parties stipulated at the hearing to the principal amount of the claim to be $114,281.22. The court overruled the Objection to Claim on all substantive federal and state law issues (including the assertion that the contract rate of interest violated the California usury limitations), except the court disallowed $60,783.23 of the post-petition finances charges for the unsecured claim.

The Plan Administrator/Debtor asserted that all interest should be disallowed as usurious. The court rejected that argument, finding that the Plan Administrator/Debtor's expert's testimony to not be credible or well founded based on the evidence presented - including the evidence presented by the expert.

The $360,290.02 allowed claim is $246,008.80 greater than the principal

only claim of $114,281.22 (interest being void under the usury law) and $70,354.06 greater than the principal and interest as computed by the Plan Administrator/Debtor's expert.

Further, the parties agree that Creditor is "prevailing party" for Plan Administrator/Debtor's Motion to Enforce Settlement. Dckt. 171 and 213.

However, the issue is what is the scope of services and fees that are recoverable as a "prevailing party." The Creditor attempts to collect fees for appearances at motions for relief from stay and other related motions hearings. The Creditor argues that due to the Plan Administrator/Debtor "unnecessary and evasive actions" it was necessary for the Creditor to "expend fees that would not ordinary be expended in a typical collection matter." Dckt. 579, pg. 4, line 13-14.

However, the Creditor does not explain how the appearances at these hearings are provided for in the contractual attorneys' fees provision. As discussed below, some of these proceedings are bankruptcy proceedings outside the scope of the contractual provision in Creditor's contract. The Debtor in Possession allegedly engaging in "unnecessary and evasive actions" does not create an addendum to Creditor's contractual attorneys' fees provision. Creditor would have to present some other basis for recovering fees. FN.2.

FN.2. Creditor's contentions are consistent with the court's ruling not only on the merits of the objection to claim, but with the court's rulings on other conduct of the Debtor in Possession and its counsel in this case. The objection to claim, as advanced by the Debtor in Possession/Plan Administrator at the evidentiary hearing, failed to present a basis for the court disallowing the claim. The court placed some very direct comments in the record concerning the failure of the expert presented by the Debtor in Possession/Plan Administrator and its counsel to provide any credible testimony. The court found that his "opinion" was defective on the fundamental level of understanding the computation of interest on a debt. In other proceedings in the bankruptcy case, the Debtor in Possession and its counsel misrepresented who was the debtor in this case and the property of the bankruptcy estate (misrepresenting that the Debtor's partners were also debtors and that property owned by the partners was property of the estate).

For purposes of the prevailing party determination and weighing the considerations of *Hsu*, the court finds that the Creditor is the "prevailing party" as to the enforcement and collection of the past due invoices and accounts, which includes the services and costs expended in defense of the claim, whether attacked directly in an objection to claim or to modify Creditor's rights through the terms of a bankruptcy plan.

Review of Time Sheets

Seeing that the court has found that the Creditor is the "prevailing party," the court now must examine what fees shall be reimbursed in the enforcement and collection efforts of the Creditor. Unfortunately, the Creditor did not provide task billing breaking down the tasks by separate "actions" (each contested matter or proceeding). Instead, Creditor has provided a more generic spreadsheet separated in non-contested matter or proceeding "tasks."

The court has constructed a matrix of contested matters and proceedings to consider: (1) whether the contract provides for prevailing party attorneys' fees and, if so, (2) whether Creditor was the prevailing party.

Contested Matters to Enforce the Obligation For Unpaid Invoices

Creditor's counsel expended a total of 235.65 hours in this category (25.2 MJD and 211.45 DJD). Services in this category contested matters and related proceedings consisting of:

(1) mediation of objection to claim;

(2) responding to objections to claim;

(3) drafting responses to objection to claim;

(4) communicating with Creditor and Plan Administrator/Debtor concerning the objection to claim;

(5) appearing at the hearing on objection and evidentiary hearing; research objection to claim; and motion for attorneys' fees.

Services Concerning Plan and Plan Confirmation

Creditor's counsel expended a total of 79.3 hours in this category (77.4 DJD 1.9 MJD). Services in this category include:

(1) drafting objections to confirmation; researching and reviewing proposed plans filed by Plan Administrator/Debtor;

(2) legal research concerning different grounds for objections to confirmation;

(3) attending confirmation hearings; and

(4) correspondences with Creditor concerning confirmation and objections.

General Bankruptcy Services

Creditor's counsel expended a total of 122.1 hours in this category (115.1 DJD and 7 MJD). Services included items such as:

(1) reviewing bankruptcy petition,

(2) general research on Chapter 12 bankruptcies;

(3) research and attendance at other hearings on motions such as motions for relief, cash collateral, and compensation;

(4) correspondences concerning "global bankruptcy" plans;

(5) discussions with clients about other motions filed by other

parties;

(6) reviewing docket entries; and

(7) reviewing other motions.

FEES ALLOWED

After reviewing the categories, the time expended by the Creditor in enforcing and collecting on the past due invoices and accounts were only reasonable as to the efforts to enforce claim and services concerning plan and plan confirmation. The court does not find the Creditor's argument persuasive that attending nearly every hearing in the underlying case and general legal research as to bankruptcy was reasonable nor necessary in enforcing and collecting on the Creditor's claim. Applying the loadstar method for attorney's fees, it appears that Creditor is initially entitled to 314.95 hours.

However, a review of the specifics in each of the two allowed categories shows some services, such as multiple entries for research to the viability of the plans and multiple reviews of other parties objections, that are not reasonable nor necessary. Based on this review, the court further reduces the allowed fees another 14.9 hours (14.7 DJD and .2 MDJ).

The court agrees that the fees charge by Creditor's attorneys ($250.00 for Dustin Dyer [DJD] and $295.00 for Michael J. Dyer [MJD]) are reasonable and are within the community standard. In fact, the rates charged by the two attorneys are less than experienced bankruptcy litigation attorneys would charge. (This is not to say that Creditor's attorneys are not experienced, but that their practice does not appear to include regularly litigating in bankruptcy court.) While this necessitated the attorneys spend more research time than the "experienced bankruptcy attorney," the hourly rates charged offset some of the additional research and investigation time billed.

The Objection to Claim itself was filed on February 11, 2014, and the evidentiary hearing conducted on November 20, 2014. However, the bankruptcy case was filed on September 28, 2012. The attorneys' fees, to the extent that they are provided for by the contract, in this bankruptcy case cover a two-year period.

In reviewing the pleadings filed in this case, the court concludes that Creditor's actions in opposing confirmation of the various plans proposed by the Debtor in Possession were necessary and part of enforcing the obligation owed by the Debtor for unpaid invoices. In objecting to the Chapter 12 Plan being advanced by the Debtor in Possession, Creditor was forced to oppose a plan which reduced its claim to $120,000.00. Opposition, filed March 7, 2013, Dckt. 8; Chapter 12 Plan, Class 5, Filed December 27, 2012, Dckt. 61. The court denied confirmation of the proposed plan. Order, Dckt. 109; Civil Minutes, Dckt. 105.

On June 21, 2013, Debtor in Possession filed an Amended Chapter 12 Plan. Dckt. 147. In this Plan, the Debtor in Possession provided for Creditor to be paid consistent with the agreement reached in mediation. Plan, Class 2.4; *Id.* The Debtor in Possession filed a motion for authorization to borrow and motion to approve the settlement with Creditor. Motions, Dckts. 167, 171. Creditor

filed an opposition to approval of the settlement because the Debtor in Possession and partners were already in default under the terms they had agreed to with Creditor. Opposition, Dckt. 186. The court denied the Debtor's in Possession motion. Civil Minutes, Dckt. 234. This necessitated Creditor opposing confirmation of the Amended Chapter 12 Plan, which was based on the Debtor in Possession and partners performing the settlement, which the court did not approve because of the default. Civil minutes, Dckt. 247.

The Debtor in Possession filed another Chapter 12, this time providing for a $0.00 payment to Creditor. Plan, Dckt. 394. Further, the Debtor in Possession asserted that Creditor owed the estate money from the transaction covered by the contract. This led to Creditor opposing confirmation of the Plan. Only after the Debtor in Possession amended the Plan to provide for Creditor's claim did the court confirm the Plan. Civil Minutes, Dckt. 478.

Prior to and during the two years of the bankruptcy case, Creditor's counsel has billed 315.95 in fees relating to enforcing the obligation through the state court, claim objection, and plan confirmation. The fees billed by attorney and hourly rate are:

Attorney	**Time (Hours)**	**Rate**	**Fees**
Dustin Dyer	288.85	$250.00	$72,212.50
Michael J. Dyer	27.10	$295.00	$7,994.50

These fees total $80,207.00, for 315.95 hours billed. This averages out to be an effective billing rate of $253.85 per hour.

The court finds that the hourly rates of $295.00 and $250.00 are reasonable for the two attorneys in this litigation. As discussed above, the court takes the reasonableness of the rates into account in considering the amount of time expenses on research in connection with the bankruptcy issues in this case.

The Debtor in Possession/Plan Administrator argument that it's unfair to allow $80,207.00 in fees for "only" a half-day objection to claim trial misses the mark. The enforcement of the obligation required two years worth of legal work, spanning two courts and multiple contested matters.

Creditor did not "accumulate" over $100,000.00 in legal fees, but incurred them in enforcing the obligation. Much of this was in response to the strategy implemented by the Debtor in Possession to try and discount the claim of Creditor. The "discount" extended to the Debtor in Possession reducing the claim amount to zero ($0.00) in the final version of the proposed plan and asserting that Creditor owed it money. Instead of having a plan process in which the Debtor in Possession provided for paying Creditor's claim, however it was determined in a claims objection, the Debtor in Possession advanced plans which purported to reduce, or do away with, Creditor's claim.

Further, the Debtor in Possession failed at the hearing to present credible evidence in support of its objection. The only portion of the claim allowed was the post-petition interest being asserted on top of the claim as filed. The court disallowed that amount since this was an unsecured claim. 11 U.S.C. § 506(b). In substance, Creditor obtained judgment for the full

amount of its claim.

Debtor in Possession also misses the mark in contending that the fees are unreasonable for enforcing a claim determined by the court to be $360,290.80. Proof of Claim No. 24 filed on January 28, 2015, asserted a general unsecured claim of $332,608.51. The Objection to Claim (Dckt. 398) sought to reduce it to $203,388.83. Subsequently, Debtor in Possession contended in an amended Chapter 12 Plan that it was $0.00.

The Debtor in Possession/Plan Administrator cannot engage Creditor in an extended, expensive battle and then feign shock at the cost to Creditor. Much of what the Debtor in Possession/Plan Administrator did in engaging Creditor was not supported by the law or evidence presented to the court. The Debtor in Possession/Plan administrator and its partners purported to enter into a settlement with Creditor, and then defaulted on the settlement terms even before the court could have a hearing on the motion to approve the settlement. Much of the Debtor in Possession/Plan Administrator's argument on this point sounds like the old story about the kid who was pleading for the mercy of the court because he was an orphan.....while on trial for killing his parents. To deny Creditor reasonable attorneys' fees for battles initiated by the Debtor in Possession/Plan Administrator would turn the judicial process into one of abuse for one party over the other.

Balance of Fees Not Subject to Attorneys' Fees Contract Provision

Creditor seeks an additional $21,233.00 in legal fees. These services relate to the general review of the bankruptcy case, general bankruptcy research, attending the First Meeting of Creditors, attending hearings for motions involving other parties, and monitoring of the bankruptcy case. These bankruptcy issues are beyond the scope of the attorneys' fees clause in the contract. As with all other parties in the case, Creditor was spending the time and money, required to address Bankruptcy Code issues, not the enforcement of obligation.

COSTS ALLOWED

The Creditor also requests costs in the amount of $7,757.00. The costs the Creditor seeks to recover include:

Mediation Costs and Deposit	$800.00
Payment to Ellison for Professional Services	$1,600.00
Payment to Karsting for Professional Services	$1,300.00
Delivery to Sacramento Bankruptcy Court	$100.00
Copying of invoices and statements for hearing	$56.00

Payment to Karsting for Professional Services	$1,400.00
Payment to Ellison for Professional Services	$2,400.00
Delivery to Sacramento Bankruptcy Court	$100.00

Some of the costs above are obvious. However, costs of $4,000.00 to Ellison and $2,700.00 for Karsting for professional services are requested. On Exhibit 2, Dckt. 580, bankruptcy litigation costs, are explained as follows:

Payment to Ellison for Professional Services	$1,600.00	Cost to retain Ellison for Expert Accounting services. Services spent analyzing bookkeeping and on declaration.
Payment to Karsting for Professional Services	$1,300.00	Cost to retain Karsting for Expert Accounting services. Services spent analyzing accounting
Payment to Karsting for Professional Services	$1,400.00	Costs to services performed by Karsting in analyzing accounting documents and alternative direct testimony.
Payment to Ellison for Professional Services	$2,400.00	Costs of services performed by Ellison in going through Black Rock’s statements and Invoices alternative direct testimony.

Both of the above provided testimony for Creditor in defending the Objection to Claim. Both are certified public accountants. The testimony of both was fairly short and succinct. See Direct Testimony Statements presented for the Evidentiary Hearing. In light of the contention of Debtor in Possession/Plan Administrator that interest sought by Creditor was compounded and usurious, it is not unreasonable for Creditor to have responding experts. No explanation, other than the above on the Exhibit, is provided for this expense or why two CPAs were required. It appears that part of the services were required to organize Creditor’s records and provide them in a presentable form.

For the half-day of trial (which the court projects cost a day of time for each witness), reasonable preparation for the hearing, and due investigation to form expert opinions, the court allows $6,500.00 in expenses. The balance appears to relate to internal work that Creditor had to do as part of its regular bookkeeping and records maintenance business practices.

Therefore, the court allows $7,556.00 in costs to Creditor.

In conclusion, the Creditor is granted, and the Plan Administrator under the confirmed plan is authorized to pay, the following amounts as compensation to the Creditor as the prevailing party:

Fees	$80,207.00
Costs and Expenses	$7,556.00.

FEES AND COSTS OF OTHER PARTIES

Creditor is also asserting the right to be paid the obligation, including fees and costs from the Debtor's general partners. This court does not make any determination as to the obligations, if any, of those general partners. The court leaves it to the trial judge in the state court proceeding and the general partners to determine what portion of the fees and costs are provided in this ruling, what additional amounts relate just to the partners, the rights of the partners (if any) for payment of Debtor's obligation to Creditor, and what fees and costs are ultimately paid through the confirmed Plan.

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 Attorney Fees Pursuant to California Code of Civil Procedure § 1717 filed by Black Rock Milling Co., LLC ("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 Black Rock Milling Co., LLC is allowed the following fees and expenses as the prevailing party pursuant to California Code of Civil Procedure § 1717 and the contract:
>
> | | |
> |---|---|
> | Fees | $80,207.00 |
> | Costs and Expenses | $7,556.00. |
>
> **IT IS FURTHER ORDERED** that the Plan Administrator under the confirmed plan is authorized to pay the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 11 case under the confirmed Plan.
>
> The award of fees and costs to Creditor is for those owed by the Coelho Dairy, the Debtor, and this court does not make any determination as to the obligations, if any, of those general partners. The judge in the state court proceeding between Creditor and the general partners, Creditor, and the general partners shall determine what portion of the fees and costs are provided in this ruling are duplicative of any fees and costs sought against the general partners, what additional amounts relate just to the partners, and what fees and costs are ultimately paid through the confirmed Plan.

10. 14-91385-E-7 EUGENE/VICKI DEHERRERA
UST-1 David Foyil

MOTION TO DISMISS CASE PURSUANT TO 11 U.S.C. SECTION 707(B)
1-14-15 [19]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Creditors on January 14, 2015. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Motion of Dismiss Case Pursuant to 11 U.S.C. Section 707(B) has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Dismiss Case Pursuant to 11 U.S.C. Section 707(B) is granted and the case is dismissed.

Tracy Hope Davis, the United States Trustee, filed the instant Motion to Dismiss pursuant to 11 U.S.C. § 707(b). The UST makes the following arguments:

1. The Debtors' Chapter 7 case is presumptively abusive under 11 U.S.C.§ 707(b)(2)(A)

The Debtors allege on their Means Test that the "presumption does not arise." *See id.* However, the Debtors' Means Test contains inaccurate income information and unsupported monthly expense deductions. The United States Trustee's Office prepared a Means Test containing corrections to the Debtor's Means Test. (See Dckt. 23. United States Trustee's Exhibit 12.) The presumption of abuse arises, and the case should be dismissed.

The Debtors' "Current Monthly Income" of their Means Test is Incorrect and Should be Increased by $340.55

The Debtors' pay advices, which they provided to the United States Trustee, show that the debtor Eugene Deherrera's average monthly income from April 1, 2014 to September 30, 2014 was $5,172.91 per month; and that the debtor Vicki Deherrera's average monthly income, including commissions, was $10,350.64 per month. *See* Dckt. 21, ¶ 13. Pursuant to the calculations by the US Trustee, Debtors "currently monthly income" on Line 18 of their Means Test should be $15,523.55.

However, the Debtors stated on their Means Test that their "currently monthly income" was $15,183. Accordingly, Line 18 of their Means Test should be increased by $340.55.

The Debtors' "Total Deductions from Income," on Line 47 of their Means Test is overstated and should be reduced by $1,579

The following deductions in the Debtors' Means Test should be disregarded, because they are unsupported by documents provided to the United States Trustee: health care expenses, $1,345 per month; and charitable contributions, $225 per month. *See* Dckt. 1, Means Test, Lines 31and 40, respectively.

Because of this lack of support, the Debtors' "Total Deductions from Income" on Line 47 of the Means Test should be $13,964.79. However, the Debtors stated the amount of $15,534.79 on Line 47. Therefore, that amount should be reduced by $1,579.

The Debtors' "monthly disposable income under 707(b)(2)" on Line 50 of their Means Test is inaccurate and should be $1,558.76, not (351.79)

In this case, the Means Test, Line 50, shows that the Debtors' "monthly disposable income under § 707(b)(2)" is (351.79). See Dckt. 23., United States Trustee's Exhibit 4. Based on corrections made by the US Trustee, the Debtors' "monthly disposable income under 707(b)(2)" on Line 50 of their Means Test should be $1,558.76, i.e., $15,523.55 minus $13,964.79. Hence, the Debtors' monthly disposable income exceeds the $207.92 benchmark for determining "presumed abuse" under the Bankruptcy Code. See 11 U.S.C. § 707(b)(2)(A)(i)(II). The case should therefore be dismissed, pursuant to 11 U.S.C. § 707(b)(1).

2. Debtors filed their petition for relief under Chapter 7 in bad faith, pursuant to 11 U.S.C. §707(b)(3)(A)

The Debtors' filed their petition for relief under Chapter 7 in bad faith. Debtors' have acted egregiously by including clearly erroneous and misleading information in their Means Test, to support their Chapter 7 Petition. As explained above, Debtors under-reported the amount of their "current monthly income" by $340.55, while inflating deductions by $1,579.00 for monthly expenses (health care and charitable contributions) that are unsupported.

Secondly, Debtors' include false and misleading information in Schedules I and J. In Schedule J, the Debtors included medical and dental expenses in the amount of $2,300.00 per month; childcare and children's education costs,

$1,300.00 per month; and charitable contributions, $500.00 per month. The United States Trustee requested, but the Debtors failed to provide, documents to support the aforementioned expenses on Schedule J. See Dckt. 21, ¶ 14.

The Debtors' alleged, medical and dental expenses in the amount of $2,300 per month are incorrect and misleading. The Debtors provided the United States Trustee's Office documents of their medical expenses totaling $3,474.52 for the months of September, October, November, and December 2014. *See* Dckt. 21, ¶ 10., Dckt. 23, United States Trustee's Exhibit 7, pp. 28-46. Spread out over a 12-month period, $3,474.52 equates to approximately $289 per month, not close to $2,300 per month as the Debtors alleged in Schedule J.

The Debtors' alleged childcare and children's education costs of $1,300 per month are incorrect and misleading. The Debtors did not provide the United States Trustee's Office any documents to support such childcare and children's education costs. See Dckt. 21, ¶ 11. Actually, their Means Test shows that childcare and education expenses are $0.00 *See* Dckt. 23, United States Trustee's Exhibit 4, Means Test, Lines 30 and 38.

The Debtors' alleged, charitable contributions of $500 per month are incorrect and misleading. The Debtors provided the United States Trustee's Office a tax document showing charitable contributions, not of money, but of items with a total value $486 during the entire year of 2013. *See* Dckt. 21, ¶ 10, Dckt. 23, United States Trustee's Exhibit 6, pp.23, 24.

An employee of the Debtors' counsel admitted, "it appears the educational and charitable expenses may have been erroneously entered as monthly expenses which were pulled from [the Debtors'] 2013 tax returns." *See* Dckt. 21, ¶ 12., Dckt. 23 United States Trustee's Exhibit 6, p.20.

Thirdly, the Debtors' income information in Schedule I is inaccurate and misleading. The case was filed on October 10, 2014. The debtor Eugene Deherrera's two paychecks immediately preceding the filing date shows that he was paid $2,411.37 on September 19, 2014 and $2,637.94 on October 3, 2014, or a total $5,049.31. *See* Dckt. 21, ¶ 14. United States Trustee's Exhibit 8, pp.62, 63. Instead, on Schedule I, the Debtors stated that Mr. Deherrera's gross monthly income was $4,407, a difference of $642.31 ($5,049.31 minus $4,407). *See* Dckt. 23, United States Trustee's Exhibit 3, Schedule I.

3. Debtors' financial situation demonstrates "abuse" pursuant to 11 U.S.C. §707(b)(3)(B)

The Debtors' have the ability to repay all of their general unsecured debt. As earlier stated, debtors' under-reported their monthly income as well as provided no support for certain monthly expenses. Debtors' combined income should be $12,883.73 with monthly expenses at $9,043.72. As a result, Debtors' monthly net income should be $3,840.01.

With the Debtors' general unsecured debts totaling $78,696.00, under the terms of a hypothetical 60-month, Chapter 13 plan, and assuming a 10% Chapter 13 administrative fee, the debtors would have the ability to pay a 100% dividend to the general unsecured claims in this case. *i.e.* $3,840.01 multiplied by .90, multiplied by 60, divided by $78,696.00.

Therefore, the Trustee states when evaluating the "totality of the

circumstances," of the Debtors' financial situation demonstrates abuse. The Debtors have the ability to repay 100% of their general unsecured debts, totaling $78,696.00, under a hypothetical Chapter 13 Plan.

APPLICABLE LAW

11 U.S.C. § 707(b) allows for the court on its own motion or on motion by a party in interest to dismiss a case when there is cause. Specifically, 11 U.S.C. § 707(b) provides, in relevant part:

> (b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. . .
>
> (2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of--
>
> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $7,4751, whichever is greater; or
>
> (II) $12,4751. . .
>
> (B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.
>
> (ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide--
>
> (I) documentation for such expense or adjustment to income; and
>
> (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

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

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

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

(II) $12,4751. . .

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

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

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

DISCUSSION

The United States Trustee’s points are well-taken.

By under-accounting their monthly income and simultaneously inflating their monthly expenses, the Debtors manipulated the Means Test to evade the presumption of abuse under 11 U.S.C. § 707(b)(2), and manipulated their Schedules I and J to shield available disposable income to repay creditors. By “playing with the numbers,” the Debtors attempted to avoid a potential dismissal of their Chapter 7 case. At the same time, claiming to have no disposable income, the Debtors seek to reaffirm secured debt on a boat. In so doing, they unfairly manipulated the Bankruptcy Code. A review of the attached exhibits and the Debtors’ financial information, it is blatantly apparent that the Debtors and Debtors’ counsel “fudged” the numbers in an attempt to qualify under the extraordinary relief of Chapter 7 but still retain luxury goods. The court is unsure whether the Debtors thought the court and the UST would not evaluate their finances, but a simple review show large discrepancies in what is listed even between Schedule I and Schedule J and the Means Test.

Notably, the Debtors have failed to file a response to the Motion. The Debtor has failed to provide any evidence, testimony, or argument to rebut the presumption of bad faith which, after reviewing the Debtors’ finances, is attached pursuant to 11 U.S.C. § 707(b).

Furthermore, the presumption of abuse arises in this case under 11 U.S.C. § 707(b)(2). The totality of the circumstances of the Debtors’ financial

situation demonstrates abuse under 11 U.S.C. § 707(b)(3)(B). The case was filed in "bad faith" under 11 U.S.C. § 707(b)(3)(A). Such abuse and such "bad faith" warrant dismissal of the case under 11 U.S.C. § 707(b)(1). The fact that the Debtors are attempting to retain a luxury boat while seeking discharge to other unsecured debts without any explanation is prima facie bad faith.

Accordingly, cause exists to dismiss this case. The motion is granted and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 7 case filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

11. 13-91189-E-11 MICHAEL/JUDY HOUSE
RMY-14 Robert M. Yaspan

CONTINUED MOTION FOR APPROVAL OF STIPULATION TO EXTEND ORDER ON MOTION TO AUTHORIZE USE OF CASH COLLATERAL THROUGH DECEMBER 31, 2014
9-18-14 [200]

Tentative Ruling: The Motion for Approval of Stipulation to Extend Order on Motion to Authorize Use of Cash Collateral Through December 31, 2014 was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice, creditors and Office of the United States Trustee on February 19, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Approval of Stipulation to Extend Order on Motion to Authorize Use of Cash Collateral Through December 31, 2014 was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

No opposition was presented at the hearing. The Defaults of the non-responding parties are entered by the court.

The Motion to Authorize Use of Cash Collateral Through June 30, 2015 is granted.

Debtors-in-Possession Michael House and Judy House ("Debtors-in-Possession") request an interim order authorizing Debtor-in-Possession to continue to use the cash collateral through June 30, 2015, (b) granting

adequate protection to certain pre-petition secured parties for the use of their cash collateral, (c) prescribing the form and manner of notice and setting the time for further hearings regarding the continued use of cash collateral. FN.1.

FN.1. The court notes that the Debtors-in-Possession yet again filed this Motion under the wrong DCN. The court *sua sponte* corrects this oversight and analyzes the request under the correct docket control number ("RMY-14") to ensure consistency on the docket. The court reminds Debtor-in-Possession and Debtor-in-Possession's counsel that any further Motion for continued use of cash-collateral shall use the docket control number RMY-14 so that there is a connection between the previous granting of use. That is why the court has continued the instant Motion to allow the Debtor-in-Possession to request further use under the same DCN.

PRIOR ORDERS

Through the Amended Order entered on September 9, 2013, the court authorized the use of cash collateral through February 28, 2014, including the required adequate protection payments. The court granted the payment of expenses, and provided that the cash collateral may be used monthly, commencing July 1, 2013, through and including February 28, 2014.

The court set a further hearing on the Motion for 10:30 a.m. on February 13, 2014. The Debtors in Possession were ordered to file and serve any new proposed budget and supplemental pleadings for any further use of cash collateral on or before January 13, 2014.

On October 6, 2014, the court authorized the use of cash collateral through December 31, 2014. Dckt 231.

On January 7, 2015, the court authorized the use of cash collateral through and including March 31, 2015. Dckt. 251. The court also continued the hearing to March 5, 2015 to allow for further request.

Current Motion

Debtor-in-Possession states that the approval of the use of cash collateral will enable Debtor-in-Possession to pay expenses necessary to personal and business related expenses. Debtor-in-Possession alleges that without the use of cash collateral, Debtor-in-Possession's property may be lost, utilities can be discontinued, and Debtor-in-Possession will not be able to pay for certain personal expenses.

Debtor-in-Possession has pledged the rental income as collateral on the farm-rental properties located at 6231 Smith Road, Oakdale, California ("Smith Ranch"), and 2107 South Stearns Road, Oakdale, California ("Triumph Ranch")(collectively the "Properties"). Debtor-in-Possession will be setting up cash collateral accounts for each of the Properties, and the income for each property will be allocated to the cash collateral account.

The accompanying Memorandum of Points and Authorities states that Debtors-in-Possession own the subject properties that generate rental income. The

amounts claimed pursuant to the deeds of trust against each of the Properties as of June 13, 2013, are as follows:

Property Description	Position	Lienholder	Amount Claimed Due as of June 25, 2013	Assignment of Rents	Exhibit
Smith Ranch	1st	Oak Valley Community Bank	$103,690.98	Yes	A
Smith Ranch	2nd	Arthur and Karen House Trust	In dispute	Yes	B
Triumph Ranch	1st	American AG Creditor	$383,618.93	Yes	C
Triumph Ranch	2nd	Arthur and Karen House Trust	In dispute	Yes	D
Smith Ranch/Triumph Ranch (lien amounts against both properties)	3rd on Smith Ranch; 3rd on Triumph Ranch	Petaluma Acquisition	$851,497.31	Yes	E and F, respectively

Debtors-in-Possession Michael and Judy House ("Debtors-in-Possession") move the court for entry of an interim order and final order (a) authorizing Debtors-in-Possession to use cash collateral, (b) granting adequate protection to certain pre-petition secured parties for the use of their cash collateral and (c) prescribing the form and manner of notice and setting the time for the final hearing on the Motion.

The Creditors claiming an assignment of rents are:

A.Arthur and Karen House Trust by virtue of its first position deed on Smith Ranch.

B.Oak Valley Community Bank by virtue of its second position deed of trust on the Smith Ranch.

C.American AG Credit by virtue of its first position deed of trust on the Triumph Ranch.

D.Arthur and Karen House Trust by virtue of its second position deed of trust on the Triumph Ranch.

E.Petaluma Acquisition by virtue of its third position deed of trust on the Smith Ranch and its third position deed of trust on the Triumph Ranch.

It is anticipated that all secured parties will consent to the use of the cash collateral subject to Debtor-in-Possession continuing to pay all of the contractually due payments and subject to the following budget (with a 20% line

by line potential variance):

Income	Expense	Amount
Rental income from Smith and Triumph Properties		26,210.00
Other Income (no subject to cash collateral) including, but not limited to real estate commissions, Valk Care, pasture rent, Disney Store income and School Board stipend		4,300.00
	Payment to Petaluma	(6,275.72)
	Payment to AG Credit	(4,223.98)
	Payment to Oak Valley Community Bank	(1,704.76)
	Payment to Arthur and Karen House Trust (Triumph Ranch)	(5,516.74)
	Payment to Arthur and Karen House Trust (Smith Ranch)	(1,200.00) shall be paid to the trust account of Steven Altman, Esq., attorney for the Trust
	Expenses for Ranches	(1,370.00)
	Rent	(1,500.00)
	Utilities	(500.00)
	Home Maintenance	(25.00)
	Food	(500.00)
	Clothing	(100.00)
	Medical and Dental	(50.00)
	Transportation	(250.00)
	Recreation	(50.00)
	Charitable Contributions	(30.00)
	Life Insurance	(920.00)
	Health Insurance	(1,100.00)
	Insurance for Ranch, Auto and House	(2,500.00)
	Income Tax	(500.00)
	Photography Expenses	(200.00)
	Trustee's Fees	(325.00)

	Payments for Additional Dependents not living at home	(200.00)
	Attorneys' Fees Carve Out (to be paid only after court approval)	(1,000.00)
	Monthly Cash Flow Profit	**468.80**

DISCUSSION

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

Debtors-in-Possession state that they are current on the payments under the current order authorizing their use of cash collateral, and are current on their compliance obligations with the United States Trustee.

The only difference in the instant request to the previous is the $11.66 increase in payment to Oak Valley Community Bank.

Debtor-in-Possession seeks authorization to use cash collateral to pay personal expenses post petition taxes, utilities, insurance and maintenance on the rental properties pursuant to the above-referenced budget. Debtor-in-Possession will pay the contractual amounts due on the secured loans for the institutional lenders and payments to the Arthur and Karen House Trust as set forth in the Budget, except as to the Smith Property. The adequate protection payment to the Trust for Smith Ranch in the sum of $1,200.00 per month shall be paid to the trust account of Steven Altman, Esq., attorney for the Trust. The adequate protection payments will be held in Mr. Altman's trust account subject to further court order.

The court authorizes the use of cash collateral, pursuant to the order of the court, for the period March 31, 2015 through June 30, 2015, including the required adequate protection payments. Only expenses relating to the property from which the cash collateral is generated may be paid with cash collateral for that property. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by the Debtor in Possession. All surplus Cash Collateral from each property shall be held in a cash collateral account and separately accounted for by the Debtor in Possession. The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). Here, the existence of a substantial equity cushion and the adequate protection payment protect the creditors' (namely the Arthur and Karen House Trust by virtue of their second position deed of trust on the Smith Ranch, the Oak Valley Community Bank, American AG Credit, and Petaluma Acquisition) interests.

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 Authorize Use of Cash Collateral filed by the Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Use Cash Collateral is granted, pursuant to this order, for the period February 19, 2015, through June 30, 2015, and the cash collateral may be used, through an including June 30, 2015, to pay the following monthly expenses:

Expense	Amount
Payment to Petaluma	(6,275.72)
Payment to AG Credit	(4,223.98)
Payment to Oak Valley Community Bank	(1,706.76)
Payment to Arthur and Karen House Trust (Triumph Ranch)	(5,516.74)
Payment to Arthur and Karen House Trust (Smith Ranch)	(1,200.00)
Expenses for Ranches	(1,370.00)
Rent	(1,500.00)
Utilities	(500.00)
Home Maintenance	(25.00)
Food	(500.00)
Clothing	(100.00)
Medical and Dental	(50.00)
Transportation	(250.00)
Recreation	(50.00)
Charitable Contributions	(30.00)
Life Insurance	(920.00)
Health Insurance	(1,100.00)
Insurance for Ranch, Auto and House	(2,500.00)
Income Tax	(500.00)
Photography Expenses	(200.00)
Trustee's Fees	(325.00)
Payments for Additional Dependents not living at home	(200.00)

Attorneys' Fees Carve Out (to be paid only after court approval)	(1,000.00)

IT IS FURTHER ORDERED that only expenses relating to the property from which the cash collateral is generated may be paid with cash collateral for that property. No use of cash collateral is authorized for any other purposes, including plan payments or use of any "profit" by the Debtors in Possession. All surplus Cash Collateral from each property shall be held in a cash collateral account and accounted for by the Debtors in Possession.

IT IS FURTHER ORDERED the hearing on the Motion is continued to 10:30 a.m. on March 5, 2015, to consider a supplemental to the Motion to extend the authorization to use cash collateral. On or before February 19, 2015, the Debtors in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the March 5, 2015 hearing. Any opposition to the requested use of cash collateral shall be filed and served on or before February 26, 2015.

12. 13-91189-E-11 MICHAEL/JUDY HOUSE
RMY-15 Robert M. Yaspan

MOTION TO USE CASH COLLATERAL, MOTION FOR ADEQUATE PROTECTION AND MOTION SCHEDULING FURTHER HEARINGS
2-19-15 [258]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on February 19, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion for Entry of Interim Orders Authorizing the Continued Use of Cash Collateral, Motion for Granting Adequate Protection to Pre-petition Secured Parties, and Motion for Scheduling further Hearing is dismissed as moot.

Debtors-in-Possession Michael House and Judy House ("Debtors-in-Possession") request an interim order authorizing Debtor-in-Possession to continue to use the cash collateral through June 30, 2015, (b) granting adequate protection to certain pre-petition secured parties for the use of their cash collateral, (c) prescribing the form and manner of notice and setting the time for further hearings regarding the continued use of cash collateral.

However, the Debtors-in-Possession have improperly used “RMY-15." The proper docket control number for the instant Motion is “RMY-14". The court has *sua sponte* corrected this oversight and discuss the instant Motion under the correct docket control number.

The court once again urges Debtor-in-Possession and Debtor-in-Possession’s counsel to use the correct docket control number to avoid repetitive calendar entries and to allow consistency in the orders concerning use of cash collateral. This is why the court **continues** the Motion.

Therefore, the Motion is dismissed as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Authorize Use of Cash Collateral filed by the Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot.

13. 13-90090-E-7 JORGE PEREZ
JES-2 Maria C. Jaime

MOTION FOR COMPENSATION FOR JAMES E. SALVEN, ACCOUNTANT(S)
1-14-15 [81]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on January 14, 2015. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

James Salven, the Accountant ("Applicant") for Irma C. Edmonds the Chapter 7 Trustee ("Client"), makes a first and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period April 4, 2014 through January 7, 2015. The order of the court approving employment of Applicant was entered on April 4, 2014, Dckt. 64. Applicant requests fees in the amount of $1,170.00 and costs in the amount of $176.86.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing employment application and conflict review, deed of trust tax determination basis, computing basis and completing withholding exemption form, and tax return preparation and processing. The court finds the services were beneficial to the Client and bankruptcy estate and 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.

Accountant Services: Applicant spent 3.2 hours in this category. Applicant assisted Client with determining tax basis, completing withholding exemption form, preparing tax return and processing.

Employment and Fee Application: Applicant spent 2 hours in this category. Applicant prepared and filed employment application and fee application for this court.

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**
Prepared employment app and conflict review	1.0	$225.00	$225.00
Tax determination basis	0.6	$225.00	$135.00
Compute basis and complete withholding exemption form	0.5	$225.00	$112.50
Compile data for completion return	0.6	$225.00	$135.00
Tax return preparation and processing	1.0	$225.00	$225.00
Tax clearance letters	0.5	$225.00	$112.50
Prepare and file fee application	1.0	$225.00	$225.00

Total Fees For Period of Application	$1,170.00

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $176.86 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copies	$0.10	$21.20
Envelopes	$0.20	$0.80
Tax Return Processing	$120.96	$120.96
Passport Print	$10.00	$10.00
Return Postage	$6.65	$6.65
Sever Fee	$0.94	$6.65
Total Costs Requested in Application		$166.26

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Awarding first and final Fees in the amount of $1,170.00 subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter.

Costs and Expenses

The first and final Costs in the amount of $166.26 subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

Fees $1,170.00
Costs and Expenses $166.26

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by James Salven ("Applicant"), Accountant for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that James Salven is allowed the following fees and expenses as a professional of the Estate:
>
> James Salven, Professional Employed by Trustee
>
> Fees in the amount of $1,170.00
> Expenses in the amount of $166.26,
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

14. 14-90491-E-7 SEBASTIAN GUERRERO
UST-3 Thomas O. Gillis

MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
1-27-15 [48]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 7 Trustee on January 27, 2015. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

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

The Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor is granted.

Tracy Hope Davis, the United States Trustee for the Eastern District of California, filed the instant Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor on January 27, 2015. Dckt. 48.

The UST states that she has information indicating that Sebastian Guerrero ("Debtor") has a legal or equitable interest in real property located in Zacatecas, Mexico and had such an interest before he filed this case. The UST alleges that the Debtor did not disclose the foregoing real property in Schedule A.

In Schedule F, the Debtor seeks to discharge $150,571.00 in general unsecured debt. The deadline for filing a complaint objecting to the discharge is not later than sixty days after the first date set for the meeting of creditors under 11 U.S.C. § 341(a).

The court had previously extended the deadline for filing a complaint objecting to the discharge to February 6, 2015.

The Debtor filed a non-opposition on January 27, 2015. Dckt. 50

The UST requests that the deadline to object to the Debtor's discharge be extended to June 4, 2015, so that the UST can: (1) conclude her investigation into the Debtor's financial affairs; (2) determine if the Debtor made accurate and complete disclosure of his assets, liabilities, income, expenses, and financial affairs; and (2) whether grounds exist to file a complaint objecting to the discharge, in connection with the case.

The court finds the UST needs to perform further investigation of the Debtor's assets, liabilities, and pre-petition use of Estate property to be sufficient cause. Therefore, the motion is granted and the deadline for the United States Trustee to object to Debtor's discharge is extended to June 4, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Time to File an Objection to Discharge filed by the United States Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the deadline for the Chapter 7 Trustee, United States Trustee, and all parties in interest to object to Debtor's discharge is extended to June 4, 2015.

15. 12-92723-E-7 JOHN/KRISTINE ROBINSON **MOTION TO STAY O.S.T.**
13-9004 **3-3-15 [78]**
WMW-3
GRANT BISHOP MOTORS, INC. V.
ROBINSON, IV ET AL

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's counsel on March 3, 2015. By the court's calculation, 2 days' notice was provided. The court granted an order shortening time on March 3, 2015, setting the hearing for 10:30 a.m. on March 5, 2015.

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

The Motion to Stay Adversary Proceeding is denied without prejudice.

John and Kristine Robinson (Defendant-Debtors) filed the instant Motion to Stay Adversary Proceeding on March 3, 2015. Dckt. 78. The Defendant-Debtors are requesting a stay of three months, six months, or a year due to a pending criminal investigation.

On March 3, 2015, the court issued an order shortening time and set the instant Motion for hearing at 10:30 a.m. on March 5, 2015. Dckt. 85.

FAILURE TO PROPERLY FORMAT NOTICE

Defendant-Debtors failed to follow Local Bankr. R. 9014-1(d)(2). The simple local rule requires that "[e]very motion shall be accompanied by a separate notice of hearing stating the Docket Control Number, the date and time of the hearing, the location of the courthouse, the name of the judge hearing the motion, and the courtroom in which the hearing will be held."

The Defendant-Debtors have failed to follow the requirement to file a separate notice from the motion. Instead, the Defendant-Debtor filed a combined Notice and Motion. The court does not understand how Defendant-Debtors' counsel, who is admitted to practice in the Eastern District, was unable to follow the simplest of requirements.

Furthermore, Defendant-Debtors "motion" fails to provide a prayer for relief and instead instructs the court that "[t]his motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith; the supporting Declarations of William M. Woolman and William C. Hahesy; the pleadings, records and papers filed herein, and such other and further oral and documentary evidence and legal memoranda as may be presented at or by the hearing of said Motion." Again, Defendant-Debtors failed to follow Local Bankr. R. 9014-1(d)(5) by not providing legal authority that was relied upon by the filing party.

GROUNDS STATED IN MOTION

The Motion states the following grounds with particularity, upon which the request for relief is based:

A. Defendant-Debtor seek a stay of three months, six months or a year of this adversary proceeding to allow a parallel Federal criminal investigation that overlaps with this case to conclude. A stay is necessary as the adversary proceeding concerns some of the same matters at issue in a Federal Bureau of Investigation and United States Attorney's Office, Eastern District of California criminal investigation in which Defendant-Debtor John Robinson is a subject.

B. A stay is necessary to protect Defendant-Debtors' constitutional rights and to make sure that the civil adversary proceeding does not interfere with the criminal investigation. Absent a stay, Defendant-Debtors will have to make a decision whether or not to forego their constitutional rights and defend this case despite the pending criminal investigation.

While the Motion states that the Defendant-Debtors want a stay so they do not have to address the civil law issues while a federal criminal investigation is ongoing, nothing else is stated.

DEFICIENCIES WITH DECLARATION

The declaration provided by Mr. William Hahesy states that he provides his testimony under penalty of perjury based on "personal knowledge of the following matters, except those stated on information and belief, and as to those matters [Mr. Hahesy] believe true." Dckt. 82. In substance, Mr. Hahesy is stating "I hope the information is true and correct, and though I don't' know, I'm informed by someone else and believe (because it lets me win) that

what I've said above is true and correct."

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides,

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
>
> (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

This does not provide for any qualification on stating that the information is true and correct, or let the witness provide a declaration based on information and belief. Stating that the information is true and correct, only to the extent that I actually know or believe it to be true, is not substantially in compliance with this section.

Defendant-Debtor has failed to provide the court with competent evidence of the obligation and Movant's interests. FN.1.

FN.1. Given that the proper form of the declaration is, and has long been specified by statute, and is one of the simplest things which counsel can do, there is no basis for continuing the hearing to allow the preparation of a new declaration.

DISCUSSION

This adversary proceeding was commenced on January 17, 2013. Plaintiff alleges that Defendant John Kelly Robinson, as the General Manager of Plaintiff, committed fraud, defalcation, embezzlement and tortious conduct

against plaintiff and its property while in its employ, which resulted in damages in excess of $348,550.00. Dckt. 1.

The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. Cal. 1989). However, a court may, in its discretion, decide to stay civil proceedings when the interests of justice require such action. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995)(citing *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980)).

A court must decide whether to stay civil proceedings in the face of parallel criminal proceedings in light of the particular circumstances and competing interests involved in the case, as well as the extent to which the defendant's fifth amendment rights are implicated. *Molinaro*, 889 F.2d at 902. Other factors the court should consider include:

> (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Id. at 903.

Generally, the strongest case for a stay is made where the civil and criminal cases involve the same subject matter. *SEC v. Dresser Industries*, Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980). In such situations, "[t]he noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of [federal discovery rules], expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." *Id.*

The Fifth Amendment of the United States Constitution states (emphasis added),

> **No person** shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor **shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

A witness has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding or when it might be exploited to uncover other evidence against him. *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

However, a defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. *Keating*, 45 F.3d at 326. As stated by the United States Supreme Court, not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even necessitating invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in that civil proceeding. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

The Complaint in this Adversary Proceeding seeks the following relief,

A. The Defendant-Debtors should be denied their discharge pursuant to 11 U.S.C. § 727(a)(4) for failure to accurately disclosed all of the income they received from the Plaintiff.

B. The Defendant-Debtors obligations to Plaintiff should not be discharged pursuant to 11 U.S.C. § 523(a)(2)(A) and 2(B)(i)-(iv), (a)(3), (a)(4), (a)(6) because they improperly and without authorization withdrew monies from the Plaintiff's bank accounts.

C. Plaintiff also seeks the creation of a trust over the monies allegedly improperly taken and the proceeds thereof.

Here, the court begins with the fact that the only evidence it has been presented is that a criminal *investigation* is pending. It does not appear that any criminal charges or an indictment have been made or that a criminal trial is underway. Additionally, Defendants have not provided any evidence or argument as to what facts, if any, would overlap with this potential criminal case and this current civil proceeding. This may be due to the fact that no criminal charges have been made, making it difficult to identify issues that overlap, when none currently exist on the criminal side.

Equally important is the fact that Defendant John Robinson is currently a subject, rather than a suspect, in this criminal investigation, based on Defendant's own evidence provided to this court. Hahesy Declaration, Dckt. 82. However, this court recognizes that law enforcement and investigatory agencies do not immediately run out and broadcast that someone is a "suspect" before properly investigating the matter.

Mr. Hahsey testifies in his deficient declaration that Mr. Robinson has been aware of being a "subject" of an investigation since at least April 2013 when Mr. Hahsey was engaged as counsel. Putting the brakes on any proceedings in this case would effectively create a hiatus for more than two years from when Mr. Robinson was aware of the criminal investigation.

This adversary has already been stayed previously based on the stipulation of the parties. Dckt. 47 and 48. It appears now that the only reason for the instant Motion is because of the schedule deposition of Defendant-Debtor on March 6, 2015 and written discovery responses being due March 20, 2015. Dckt. 80.

The only new development offered by the Defendant-Debtors is the correspondence with Assistant United States Attorney Brian Enos on February 27, 2015 with Mr. Hahsey. Dckt. 82. Mr. Hahsey testifies in his declaration that

he was advised that the investigation remains ongoing and that a new investigator had been assigned. Mr Hahsey further testifies that he was advised that Mr. Enos had a trial starting soon but that Mr. Enos planned to focus on this investigation after his trial is completed on or before April 2015.

The evidence presented to the court regarding the potential criminal investigation and Mr. Robinson's potential involvement is too attenuated for the court to grant a six month stay. Furthermore, the court draws no negative inferences from a party electing to avail themselves of their Fifth Amendment Rights, if Defendant chooses to do so.

Given the fact that this Motion is on shortened time and the hearing was only set two days following service, the Plaintiff was not required to filed a response.

Defendant-Debtors assert that there is no prejudice to the Plaintiff by further delaying these proceedings. Defendant-Debtors filed their voluntary Chapter 7 bankruptcy case on October 16, 2012. Case No. 12-912723. This Adversary Proceeding was filed on January 17, 2013. Now more than two years later Plaintiff has not had its day in this court. On Schedule I the Defendant-Debtors reported having monthly gross income of $145,273.00 as of October 2012. 12-92723; Schedule I, Dckt. 1 at 40. Because of the automatic stay in the voluntary Chapter 7 case, Plaintiff cannot pursue the ability to enforce any nondischargeable obligation. In the two years since this case was filed, that's $290,546.00 in potential assets against which a judgment could be enforced.

In light of the nature of the criminal investigation, the lack of specific evidence outside of generic existence of a criminal investigation, the extended delay imposed on Plaintiff by the filing of the bankruptcy case, and the possible prejudice to Plaintiff by the delay, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Stay Adversary Proceeding filed by Defendant-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.