UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

MODESTO DIVISION CALENDAR

March 12, 2020 at 10:30 a.m.

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1. **19-90122-E-11** **MIKE TAMANA FREIGHT LINES, LLC** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION**
1 and 2 **2-8-19 [1]**

Debtor's Atty: Reno F.R. Fernandez

Notes:
Continued from 2/6/20 to be conducted in conjunction with other matters on calendar.

Operating Report filed: 2/24/20

[MF-34] Motion for Authority to Pay Post-Petition Retainer filed 2/13/20 [Dckt 456], set for hearing 3/12/20 at 10:30 a.m.

Status Conference Statement filed 2/27/20 [Dckt 465]

The Status Conference is continued to 2:00 p.m. on xxxxxxxxxx

2.	**19-90122-E-11 MF-34**	**MIKE TAMANA FREIGHT LINES, LLC Reno Fernandez**	**MOTION TO PAY 2-13-20 [456]**

Final Ruling: No appearance at the March 12, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on February 13, 2020. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 Pay Special Counsel for the Debtor in Possession a $15,000.00 retainer is granted.

The debtor in possession, Mike Tamana Freight Lines, LLC ("Debtor in Possession"), seeks authorization to pay a post-petition retainer to Timothy Bowles dba Law Offices of Timothy Bowles as special counsel ("Special Counsel") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession filed an *Ex Parte* Application for Employment of Special Counsel on February 6, 2020. Dckt. 447. Pursuant to Order the Application was granted on February 16, 2020. Dckt. 462.

Debtor in Possession argues that Special Counsel's appointment and retention is necessary to defend Debtor in Possession against claims raised by a former worker of the Debtor in Possession, Virginia Samuels-Aguero ("Petitioner") and limited to advising and defending Debtor in Possession to resolution, whether by negotiation and settlement or by formal litigation. Specifically, this case requires the experience of special employment litigation counsel to address Petitioner's counsel California Labor Code-based demands in her correspondence for the production of Petitioner's pay and personnel records which carry statutory deadlines with limited rights to extend response and up to $1,500.00 in penalties.

Special Counsel requires that the Debtor in Possession pay a post-petition retainer of $15,000.00. The Debtor in Possession agrees to pay Special Counsel a post-petition retainer in the amount of $15,000.00. Prior to case filing on February 7, 2019, Mike Tamana Freight Lines, LLC, deposited a portion of a mediator's fee in the amount of $1,500.00 for the defense in the PAGA lawsuit of Susan Ryan (Superior Court of California, County of Stanislaus, Case No. CV18002080) ("Ryan State Action") into Bowles' client trust account. Bowles requests the held mediation fee be applied as part of the post-petition retainer. Said retainer is appropriate considering the size and complexity of the case.

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

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

The Motion is granted and the Debtor in Possession is authorized to pay the $15,000.00 retainer to Special Counsel, which monies shall be held in the Special Counsel client trust account and not disbursed except upon further order of this court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion/Application to Pay filed by Mike Tamana Freight Lines, LLC ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Pay Timothy Bowles, who has previously been authorized to be employed as Special Counsel for Debtor in Possession, a $15,000.00 retainer, which monies shall be held in the Special Counsel client trust account and not disbursed except upon further order of this court, is granted.
>
> The $15,000.00 payment shall be made by the reallocation of $1,500.00 held in Special Counsel's trust account for prior mediation to this retainer and the payment of $13,500.00 of unencumbered monies by the Debtor in Possession to Special Counsel.

3. 15-90811-E-7 NB-4 | **ASSN., GOLD STRIKE HEIGHTS HOMEOWNERS** **Peter Macaluso** | **MOTION TO ABANDON 2-7-20 [173]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on February 7, 2020. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Abandon is granted.

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

The Motion filed by Gary Farrar ("the Chapter 7 Trustee") requests that the court authorize him to abandon property commonly known as Lot Nos. 4, 9, and 10 of the Gold Strike Heights HOA Subdivision, also described in Creditor's Motion for Relief from the Automatic Stay as:

> (1) Parcel One: Lots 4, 9, and 10, as shown on that certain map entitled, 'Final Map of Gold Strike Heights, Unit 1, Tract 91-524', filed in the office of the Recorder of the County of Calaveras, State of California on July 13, 2001 in Book 7 of Subdivision Maps, Page 62, Calaveras County Records.
>
> (2) Parcel two: A non-exclusive easement for road purposed and incidental rights thereto on, over, across and through all those portions designated as 'Trout Drive', 'Jasper Way', 'Gold Strike Heights, Unit 1, Tract 91-524', filed in the Office of the Recorder of the County of Calaveras, State of California on July 13, 2001 in Book 7 of Subdivision Maps, Page 62, Calaveras County Records.

Assessors Parcel Nos. 044-030-11, 044-030-16, and 044-030-17. (Collectively, the"Property").

The Property is encumbered by the liens of Creditor Hong Yu Shao. The Declarations of Ricardo Z. Aranda and Gary Farrar have been filed in support of the Motion and provide testimony that the value of the Property is $60,000.00.

On December 19, 2019, the court granted Creditor's Motion for Relief. *See* Dckt. 172. On January 8, 2020, Creditor commenced non-judicial foreclosure proceedings on the Property. The Property is encumbered in the amount of $75,855.17, while Debtor's Schedules value the Property at $60,000.00. Thus, the Property has no equity for the benefit of the estate.

The court finds that the Property secures claims that exceed the value of the Property, and there are negative financial consequences for the Estate if it retains the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and authorizes the Chapter 7 Trustee to abandon the Property.

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

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

The Motion to Abandon Property filed by Gary Farrar ("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 Compel Abandonment is granted, and the Property identified as

> (1) "Parcel One Lots 4, 9, and 10, as shown on that certain map entitled, 'Final Map of Gold Strike Heights, Unit 1, Tract 91-524', filed in the office of the Recorder of the County of Calaveras, State of California on July 13, 2001 in Book 7 of Subdivision Maps, Page 62, Calaveras County Records."
>
> (2)" Parcel two: A non-exclusive easement for road purposed and incidental rights thereto on, over, across and through all those portions designated as 'Trout Drive', 'Jasper Way', 'Gold Strike Heights, Unit 1, Tract 91-524', filed in the Office of the Recorder of the County of Calaveras, State of California on July 13, 2001 in Book 7 of Subdivision Maps, Page 62, Calaveras County Records'"

is abandoned to Gold Strike Heights Homeowners Association by this order, with no further act of the Chapter 7 Trustee required.

4. **17-90516-E-7** **VERA JOHNSON** **MOTION FOR APPROVAL OF**
SSA-2 **Thomas Hogan** **STIPULATION**
2-19-20 [119]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 19, 2020. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

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

The Motion for Approval of Stipulation to Allow Trustee to Partially Disburse and to Partially Segregate Homestead Monies and any Excess Monies Returned to Debtor in the Administration of Debtor's Bankruptcy Estate ~~is granted.~~

Michael Johnson, Chapter 7 Debtor's ex-spouse, ("Movant / Claimant") seeks approval of a stipulation between Debtor and Claimant who have stipulated to partially disburse and partially segregate $75,000.00 of homestead monies and any excess monies returned to Debtor in administration of Debtor's bankruptcy case. The monies are a result of real property sold in court with consent from both Debtor and ex-spouse Claimant. The subject monies were derived from community property funds of Debtor and Claimant.

STIPULATION

Claimant and Debtor stipulate to the disbursement and segregation of funds of the homestead monies of $75,000.00, subject to approval by the court upon the following facts (the full terms of the Stipulation are set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 122):

A. The sum of $8,594.00 shall be disbursed by the Trustee to the law offices of Thomas Hogan for previous legal fees incurred on behalf of the Debtor. The foregoing sum shall be remitted as follows: at his office address 1207 13th Street, Suite 1, Modesto, CA 95354.

B. The sum of $20,000.00 shall be disbursed by the Trustee as and for living expenses for Debtor Vera June Johnson in care of her counsel Thomas Hogan at his office address: 1207 13th Street, Suite 1, Modesto, CA 95354.

C. The residual balance of homestead monies not disbursed, that being the sum of $46,406.00 and any excess monies returned to Debtor by the Trustee in the administration of the bankruptcy case, shall be disbursed by the Trustee to be held in a segregated account at the law offices of Thomas Hogan, not to be disbursed absent further court order of the Merced Superior Court or duly approved court order following stipulation of parties (Vera Johnson and Michael Johnson) and their respective counsel, if any, by the Superior Court of Merced in the pending domestic case as *Johnson v. Johnson*, Merced County Superior Court, Case No. FLM-58433 and the holding of their right to continue to litigate reimbursement claims as set forth in the holding of *In re Marriage of Vaughn* (2018) 29 Cal. App. 5th. 451.

D. Pursuant to stipulation of the parties, their executed stipulation shall be treated in accordance with BR 4001 and noticed out to creditors and other parties in interest inn the present bankruptcy proceeding by bankruptcy counsel for Mr. Johnson the law office of Steven Altman, PC.

E The parties stipulate that either the United States Bankruptcy Court or Merced Superior Court shall have continuing jurisdiction to enforce the provisions set forth in this stipulation and resulting order.

F. The parties further stipulate that due to the pecuniary situation of Mrs. Johnson and the need to resolve the outstanding issue of attorney's fees and costs to her counsel, request for waiver of BR 8002(1) and, if applicable, the provisions set forth under BR 4001(a)(3) as well, to the Bankruptcy Court is appropriate in this regard.

G. The parties further stipulate that the Bankruptcy Court can issue any further order necessary or consistent with carrying out the terms and conditions of this Stipulation.

DISCUSSION

Movant asserts that in lieu of additional long term litigation concerning the homestead monies and the related legal costs and fees, Debtor and Claimant have stipulated to the terms above. Further, Movant adds that the present estate is fully solvent and creditors will be receiving 100% on the dollar for their claims. Movant also argues that the Stipulation will facilitate the parties in the next stage of their divorce proceedings. Additionally, Movant contends that Trustee has voiced support of the Stipulation to aid in the administration of the present bankruptcy estate.

Movant requests the court to waive the fourteen-day stay of enforcement. Movant contends that Debtor is suffering from financial issues and it seems the disbursement agreement would provide some alleviation from this and would also resolve issues related to attorney's fees and costs to her counsel. Movant has provided sufficient grounds to support the court waiving the stay required under F.R.B.P. 4001(a)(3), and this part of the requested relief is granted.

Movant also requests waiver of BR 8002(1). Unfortunately for Movant, BR 8002(1) does not exist. The Rules include 8002(a)(1), 8002(b)(1), 8002(c)(1), and 8002(d)(1).

Rule 8002 in general specifies the time for filing a Notice of Appeal. While asking for waiver of this Rule, the Motion does not state legal basis for and the grounds upon which the court would be justified in "waiving" the right of someone to appeal a decision of the court.

At the hearing, counsel for Movant provided the court with the following explanation of the grounds, subject to the certifications made by Movant and counsel pursuant to Federal Rule of Bankruptcy Procedure 9011, stating **xxxxxxxxxx**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Stipulation filed by Michael Johnson, Chapter 7 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Stipulation between Movant and Michael Johnson is granted, ~~and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Stipulation filed as Exhibit 1 in support of the Motion (Dckt. 122).~~
>
> ~~**IT IS FURTHER ORDERED** that Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived.~~
>
> No other relief is granted.

5.	**12-91222-E-7 MRG-2**	**HENRY MALLARI AND TERRI CANGIAMILLA Michael Germain**	**MOTION TO AVOID LIEN OF AMERICAN EXPRESS CENTURION BANK 2-26-20 [21]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, American Express Centurion Bank, creditors, and Office of the United States Trustee on February 26, 2020. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of American Express Centurion Bank ("Creditor") against property of the debtor, Henry Mangaoang Mallari and Terri Lynn Cangiamilla ("Debtors") commonly known as 1432 Inspiration Drive, Modesto, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $33,366.38. Exhibit 1, Dckt. 24. An abstract of judgment was recorded with Stanislaus County on October 6, 2011, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $257,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $364,317.24 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 28. However, according to Debtor's Declaration, C.C.P. Section 703.140(b)(1) allowed Debtor to claim an exemption in the Property in the "hypothetical" amount of $24,060.00.

Declaration, Dckt. 23. That amount of an exemption is not "hypothetical," but the actual maximum exempt amount that could be claimed.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Henry Mangaoang Mallari and Terri Lynn Cangiamilla ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of American Express Centurion Bank, California Superior Court for Stanislaus County Case No. 664854, recorded on October 6, 2011, Document No. 2011-0083059-00, with the Stanislaus County Recorder, against the real property commonly known as 1432 Inspiration Drive, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

6. **19-91034-E-11** **LORENA ALVARADO** **MOTION FOR ENTRY OF ORDER**
UST-1 **Anh Nguyen** **PURSUANT TO STIPULATION**
2-25-20 [31]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, and parties requesting special notice on February 25, 2020. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

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

The Motion for Entry of Order Pursuant to Stipulation is granted.

Tracy Hope Davis, United States Trustee, ("U.S. Trustee") requests that the court approve a stipulation with Anh V. Nguyen ("Debtor's Counsel") who has stipulated to the entry of an order with respect to Mr. Nguyen's failure to comply with Eastern District Local Bankruptcy Rule 9004-1(c)(1)(D) and the disgorgement of fees pursuant to 11 U.S.C. § 329(b).

STIPULATION

U.S. Trustee and Debtor's Counsel stipulate to an order regarding Debtor's Counsel, subject to approval by the court upon the following facts (the full terms of the Stipulation are set forth in the Stipulation filed in support of the Motion, Dckt. 33):

A. Mr. Nguyen agrees to the entry of an Order prohibiting him from using electronic signatures (i.e., from using the "/s/ name" convention) to indicate signatures other than his own on documents filed with the Court

during the period commencing on March 12, 2020 and continuing through March 11, 2022 (the "Applicable Period"). During the Applicable Period, Mr. Nguyen shall instead file documents bearing the images of original "wet ink" signatures.

B. The Order shall require Mr. Nguyen to refund $4,000.00 of the Retainer Payment to Ricardo Castro, pursuant to 11 U.S.C. § 329(b). Mr. Nguyen shall provide proof of such refund to the U. S. Trustee within ten (10) days of entry of the Order.

C. Mr. Nguyen waives all rights to appeal the entry of the Order.

D. This Stipulation may be changed, modified or otherwise altered only by a writing executed by all parties hereto. Oral modifications are not permitted.

E. This Stipulation may be executed in counterparts, each of which is deemed an original, but when taken together shall constitute one and the same document.

DISCUSSION

Here, Debtor's Counsel has stipulated the order with the U.S. Trustee. The Motion to Approve the Stipulation was filed and was set for hearing. A total of 16 days notice was provided with oppositions and responses to be heard at the hearing. The Motion's Certificate of Service provides for all who received notice of this Stipulation.

The Stipulation is based on Debtor's Counsel filing of Debtor's documents related to Debtor's bankruptcy case. The documents were filed using electronic signatures instead of original "wet ink" signatures. Counsel mistakenly filed under Chapter 11 when he intended to file it as a Chapter 13. Counsel acknowledges that he does not currently have in his possession originally signed copies of the petition's documents. The Stipulation addresses these issues.

Counsel and the U.S. Trustee have responsibly addressed these issues, allowed Counsel to participate in the solution, and have presented a Stipulation that constructively protects debtors and the judicial process.

The Motion is granted.

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

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

The Motion to Approve Stipulation filed by Tracy Hope Davis, United States Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Approval of Stipulation between Movant and Anh V. Nguyen ("Debtor's Counsel") is granted, and the respective rights and interests of the parties are settled on the terms set forth in Stipulation filed in support of the Motion, Dckt. 33.

IT IS FURTHERED ORDERED that Anh V. Nguyen from using electronic signatures (i.e., from using the "/s/ name" convention) to indicate signatures other than his own on documents filed with the Court during the period commencing on March 12, 2020 and continuing through March 11, 2022 (the "Applicable Period"). During the Applicable Period, Mr. Nguyen shall instead file documents bearing the images of original "wet ink" signatures.

IT IS FURTHER ORDERED that Anh V. Nguyen shall pay to Ricardo Castro $4,000.00 on or before noon on Friday April 20, 2020, which is the court ordered disgorgement of that amount paid to Anh V. Nguyen for legal fees to represent Lorena Alvarado, the Debtor in this bankruptcy case.

IT IS FURTHER ORDERED that Anh V. Nguyen shall provide documentation of the above payment by noon on Tuesday April 25, 2020.

7. 19-91034-E-11 LORENA ALVARADO ORDER TO SHOW CAUSE
RHS-1 Anh Nguyen 1-30-20 [28]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, and Office of the United States Trustee on January 30, 2020. By the court's calculation, 42 days' notice was provided. The court set the hearing for March 12, 2020. Dckt. 28.

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

The Order to Show Cause is xxxxx.

On November 22, 2019, Lorena Alvarado, the Debtor in Possession, commenced this voluntary Chapter 11 case. Petition, Dckt. 1. The court issued its Order to (1) File Status Report and (2) Attend Status Conference (Dckt. 12). By that Order, the Debtor in Possession and her counsel were required to file a Chapter 11 Status Report and attend the January 9, 2020 Status Conference. The court continued the Status Conference until 10:30 a.m. on January 23, 2020 to be conducted in conjunction with a Motion by the Debtor in Possession to convert this case to one under Chapter 13.

No appearance was made by either the Debtor in Possession or counsel for Debtor in Possession at the January 23, 2020 Status Conference or for the Motion to Convert. As stated in the ruling on the Motion to Convert, there exists significant issues with respect to converting this case to one under Chapter 13.

As set forth in this court's Status Conference Order requiring the Debtor in Possession to attend the Status Conference:

> Sanctions for Failure to Comply. Failure to comply with this order may result in sanctions including dismissal, conversion, or the appointment of a trustee. Filing a status report with perfunctory conclusions and no meaningful factual detail does not comply with this order. The court expects to receive sufficient information to understand the current status of the case, the Debtor-in-Possession's anticipated plan of reorganization, and the types of contested matters and adversary proceedings that will likely be filed. With this information the court may set the deadlines described below.

Order, p. 2:9-12.5; Dckt. 12.

The failure of the Debtor in Possession and counsel to appear at the Status Conference as ordered could have resulted in the immediate conversion of this case to one under Chapter 7. The court elected to not do so, and is issuing an order to show cause why the case should not be converted to one under Chapter 7.

The December 30, 2019 Docket Entry Report by the U.S. Trustee states that neither the Debtor (who is serving as the fiduciary to the bankruptcy estate debtor in possession) nor Debtor's counsel appeared at the required First Meeting of Creditors.

Prior Bankruptcy Case

Debtor has a prior Chapter 11 bankruptcy case in which she was represented by the same counsel as in this case. 18-90123 ("Prior Case"). In the Prior Case, Ms. Alvarado, as the Debtor in Possession ("Prior DIP"), filed a motion requesting that the court impose a § 362 stay as provided in 11 U.S.C. § 362(c)(4)(B). Prior Case, Dckt. 20. Such is required only after a debtor has had two prior cases pending and dismissed within a year of the case then before the court.

In the Motion to Impose the Stay in the Prior Case, the Prior DIP asserts that an employee (Efrain Ramirez) of her attorney (Thomas Gillis) in an earlier Chapter 13 case, 13-90863 (husband's case), filed by her late husband (Leoncio Alvarado) stole the money that was to be the plan payments which would have fully funded the plan in her late husband's case. It is asserted that Debtor lost more than $120,000.00 to this theft.

The Prior DIP asserts that her husband's prior counsel was filing documents purporting to have been signed by her late husband eleven months after his death.

The Debtor states that she then filed a prior Chapter 7 case on December 8, 2017, because she needed to stop a foreclosure sale that had been caused by the theft of the plan payments and other monies from Debtor by the employee of her late husband's former attorney. This is Chapter 7 case No. 17-25913, which was dismissed on September 25, 2017. In that case, Debtor was represented by the same attorney as in her current case. Chapter 7 case No. 17-25913 was dismissed due to the failure of Debtor to file the basic required documents of schedules and statement of financial affairs.

Debtor states that she then, in *pro se*, filed another Chapter 7 case on December 13, 2017, because of a pending foreclosure sale. This is identified as Case 17-28067. A review of the file for that case shows it was dismissed on January 26, 2018, due to Debtor failing to file schedules and statement of financial affairs.

Debtor's Nonproductive Bankruptcy Cases

It appears that Debtor has developed a use of bankruptcy relief consisting of filing cases, getting the benefit of filing, and then not bothering to prosecute them. This is true whether a simple Chapter 7 or more complex Chapter 11. This has led to the Debtor wasting certain bankruptcy rights. See 11 U.S.C. § 362(c)(3) and (c)(4).

Debtor and her counsel, in seeking conversion to Chapter 13 now state that Debtor has access to significant amounts of money, but none of such monies were previously reported. See July 31, 2018 Monthly Operating Report; 18-90123, Dckt. 60; as compared to the income Debtor now states.

The U.S. Trustee sought to convert or dismiss the prior case, based on the Debtor who was serving as the Former DIP's failure for nine continuous months to file monthly operating reports (October 2018 through Jun 2019). The Former DIP's and her counsel's only response was that she should be excused because of the misconduct of her late husband's former attorney's employee in 2013 (more than six years earlier). 18-90123; Opposition, Dckt. 68. Further, the Former DIP believed that since she viewed the Chapter 11 as a one creditor case (being used to prevent the foreclosure), she should not have to file the monthly operating reports because she was not going to pursue a loan modification.

The court's ruling on the U.S. Trustee's Motion to dismiss or convert the case succinctly addressed these contentions, holding:

> The Debtor in Possession's opposition is based on the desire to stay in Chapter 11, not any explanation as to why the Debtor in Possession is not filing monthly operating reports or prosecuting this case. It appears that filing this Chapter 11 case has been solely to obtain the automatic stay and the Debtor not intending to fulfill her obligations as the Debtor in Possession in good faith. Given that the Debtor in Possession is represented by counsel, such failure cannot have been inadvertent or unintentional.
>
> While the explanation as to why the prior Chapter 13 case failed and the stated misconduct of persons in her former attorney's office are strong, they do not grant the Debtor in Possession a waiver of the federal bankruptcy law.

18-90123; Civil Minutes, Dckt. 71.

Debtor and her counsel continue in this abuse of the Bankruptcy Code, dipping in to stay creditors but never really getting around to prosecuting a plan and paying creditors.

It is significant that when filing the Motion to Convert this to Chapter 13, the Debtor did not offer the court a draft of what the Chapter 13 plan would be and how Debtor would prosecute a Chapter 13 case in good faith.

Review of Current Schedules

Debtor and her counsel have filed Schedules in this case, and they provide some "curious" information under penalty of perjury provided by the Debtor.

On Schedule A/B Debtor states that she owns two pieces of real property:

1. 4912 Dunn Road.....FMV.....$457,158
2. 5019 Morgan Street.....FMV.....$274,000

Schedule A/B, Dckt. 15 at 5-6.

On Schedule C, Debtor claims no exemption in the $731,158.00 of stated value in these two pieces of real property.

On Schedule D, Debtor lists Fay Servicing as having a claim of $80,000.00, which is disputed and has collateral of $0.00 value to support it. *Id.* at 13.

On Schedule D, Debtor further states under penalty of perjury that Shellpoint has a claim of $158,000.00 for which the collateral has a value of $0.00. *Id.*

Thus, it appears that there are no creditors who could be foreclosing on any property and that, based upon Debtor's statement under penalty of perjury, no creditors with any secured claims.

On Schedule E/F, Debtor states that Self Help Federal Credit Union has a claim for a "Home Equity Line of Credit" which was last used by the Debtor in June 2019, but the amount of any obligation is "unknown" to Debtor. *Id.* at 15.

The only other creditor listed on Schedule E/F is Wells Fargo Bank, whose claim is stated by Debtor to be $0.00.

Taking the Schedules as stated by Debtor under penalty of perjury to be accurate, there is no creditor driven reason to file bankruptcy.

On Schedule I, Debtor states that she has $4,200.00 of profit a month from her business, plus an additional $2,500.00 from her fiancé. *Id.* at 20.

On Schedule J, Debtor states that after her reasonable and necessary expenses, she has $4,256.00 a month in net income. *Id.* at 23-24. Though having more than $4,000.00 a month in this net income, Debtor only has $1,000.00 in one checking account and no other assets reflective of having this "extra" $48,000.00 a year. *Id.*, Schedule A/B.[1]

[1] The court notes that in reviewing Schedule J, which is stated under penalty of perjury, the expenses look ridiculously low for a family of five - Debtor and a 12 year old child, two 17 year old children, and an 18 year old child. These ridiculous expenses include: $0.00 for home maintenance and upkeep; $450 for food and housekeeping supplies; $50 for personal care products and services; $100 for clothing, laundry, and cleaning; $100 for transportation (gas, registration, maintenance), $0.00 for self-employment and income taxes; and no taxes, insurance, utilities, or other expenses for the two pieces of real property listed on Schedule A/B. *Id.* at 24-25.

On the Statement of Financial Affairs, it is disclosed that in February 2018, Debtor paid $10,000.00 to her current attorney, which appears to have funded the non-productive bankruptcy filings. *Id.* at 30.

While showing more than $4,000.00 of monthly net income over expenses on Schedules I and J, on Debtor's Statement of Current Monthly Income, Debtor states under penalty of perjury that her income for the six months preceding the November 22, 2019 filing of the current Chapter 11 case have averaged $0.00 a month. *Id.* at 33-34. This stands in stark contrast to what Debtor says under penalty of perjury on Schedule I.

Prefiling Review Authority of the Federal Court

The Ninth Circuit Court of Appeals re-stated the grounds and methodology for prefiling review requirements as an appropriate method for the federal courts in effectively managing serial filers or vexatious litigants. *Molski v. Evergreen Dynasty Corp, et al*, 500 F.3d 1047 (9th Cir. 2007), *en banc* hearing denied, 521 F.3d 1215 (9th Cir. 2008); and *In re Fillbach*, 223 F.3d 1089 (9th Cir. 2000). While maintaining the free and open access to the courts, it is also necessary to have that access be properly utilized and not abused. The abusive filing of bankruptcy petitions, motions, and adversary proceedings for purposes other than as allowed by law diminishes the quality of and respect for the judicial system and laws of this country.

As addressed by the Ninth Circuit Court of Appeals in *Molski*, the ordering of a prefiling review requirement is not to be entered with undue haste because such orders can tread on a litigant's due process right of access to the courts. As discussed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982), the right to seek redress from the court is a protected right of civil litigants. The issuing of a prefiling order is to be made only after a cautious review of the pertinent circumstances.

However, the Ninth Circuit Court of Appeals clearly draws the line that a person's right to present claims and assert rights before the federal courts is a not a license to abuse the judicial process and treat the courts merely as a tool to abuse others.

> Nevertheless, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long, 912 F.2d at 1148*; *see O'Loughlin v. Doe, 920 F.2d 614, 618 (9th Cir. 1990)*.

Molski v. Evergreen Dynasty Corp, et al, *supra*, pg 1057.

The court is cognizant of the significant impact the filing of a bankruptcy case has not only on the Debtor, but creditors and other persons. Even if, due to the repeated filings and the provisions that Congress has placed in 11 U.S.C. § 362(c)(3) and § 362(c)(4) the automatic stay does not go into effect, the presentation of a filed bankruptcy petition and the significant sanctions imposed on someone violating the stay can work to improperly prevent creditors from legitimately enforcing their rights.

DECISION

Debtor's Counsel filed a Response on February 27, 2020. Dckt. 35. The Declaration of Anh V. Nguyen and two exhibits were filed in support of the response. Dckts. 36, 37.

Debtor's Counsel takes full responsibility for losing track of the status conference dates and failure to file a status conference report and failing to appear at the status conference hearing. Counsel explains that the case should not be converted to Chapter 7 because of "a simple error in filing snowballed into a big mess due to debtor's attorney's assumption that the case would be converted to one under Chapter 13 and that any errors on the schedules and filings could be corrected once the case was converted." Declaration, ¶ 6. Counsel apologizes for the errors and adds that in hindsight counsel should have addressed the errors before filing the motion to convert. *Id*., ¶ 8. Further, Counsel has agreed to return $4,000.00 of the retainer to Debtor due to these errors. *Id*., ¶ 7.

Debtor appeared at the February 6, 2020 Meeting of Creditors. Trustee's February 7, 2020 Report. The meeting has been continued to March 12, 2020 at 2:00 p.m.

According to Counsel's Response, Debtor has filed multiple bankruptcy filings after fraud was committed against her by her previous attorney, Thomas Gillis. Motion, at 2. Since then, Debtor has been working on loan modifications and chapter 11 plans. Even though her case was dismissed, she continued making adequate protection payments to her lender. Debtor's loan modification with her lender was recently accepted pending a trial period. (*See* Exhibit 1, Dckt. 37.)

Counsel argues that it was not Debtor's intent to file multiple bankruptcies or abuse the process. Since the alleged fraud, Debtor has lost one of her rental properties to foreclosure and wanted to exhaust her options to avoid the foreclosure of her last remaining rental property.

Debtor's counsel prays that the court consider the fraud committed against her and that her two properties would have been paid off had she not been victim of fraud. Debtor's counsel further prays that the court consider that the only creditor whose account is in default has offered her a loan modification pending a trial period. Debtor's counsel also prays that the court will consider Debtor's Chapter 13 Plan filed as Exhibit 2.

As her final prayer, Debtor's counsel prays that the court dismiss the instant Chapter 11 bankruptcy case, not impose a two year ban on filing another bankruptcy case without pre-authorization of the district's chief bankruptcy judge.

While Debtor's counsel comes forward with excuses, the Debtor is nowhere to be found in responding to this Order to Show Cause. Debtor fails, or refuses, to provide any testimony in response to the Order to Show Cause.

At the hearing, **xxxxxxxxxx**

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

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

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is **xxxxxxxxxx**.

8. 18-90029-E-11 FWP-1 | **JEFFERY ARAMBEL** | **Matt Olson** | **MOTION TO SELL FREE AND CLEAR OF LIENS** | **2-6-20 [1101]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on February 6, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Focus Management Group USA, Inc., the Plan Administrator, ("Movant") to sell property under the confirmed plan after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the real property referred to as **New Parcel** which is comprised of approximately 31.62 acres of the "Grayson Ranch," ("Property").

The New Parcel is specifically described as follows: a Smaller Parcel of approximately 20.65 acres (previously approved for sale under Order, Dckt. 584) and the River Bottom Parcel of approximately 10.97 acres. According to Movant, the previously approved sale of the Smaller Parcel as part of the Grayson Ranch was not completed because Stanislaus County refused to approve the sale without knowing the buyer of the remaining parcel. The original land purchase was then bifurcated and Movant bring this Motion to provide for

the completion of the sale of the Smaller Parcel after obtaining the County's tentative approval in accordance with the proposed lot line adjustments joining the two parcels subject of this motion.

The issues with the Smaller Parcel arise from a prior parcel map which resulted in the appearance of several distinct parcels with all of them sharing a common legal description which prevents the sale or transfer of any one of the sub-parcels without the remainder of the property or without a county approved lot line adjustment.

Sale Terms

The proposed purchaser of the Property is M3 Land Company, LLC, a California Limited Liability Company for $534,445.78. The purchase price is allocated as follows:

(a) the Smaller Parcel (20.65 acres) at $474,110.78, pursuant to the terms of the previously approved sale,

and

(b) the River Bottom Parcel (10.97 acres) at $60,335.00.

The terms of the sale are summarized by the court as follows (the full terms of the Sale are set forth in the First Addendum to the Amended PSA filed as Exhibit A in support of the Motion, Dckt. 1104):

1. Seller and Buyer acknowledge that they have completed the sale of the Larger Parcel of the Property and that nothing in this Addendum shall impact that already completed purchase. The remaining Property that Buyer agrees to purchase form Seller and that Seller agrees to sell to Buyer is amended to include both the Smaller Parcel and the River Bottom Parcel being approximately thirty one point six two (31.62) acres for a remaining purchase price of Five Hundred Thirty-Four thousand Four Hundred and Forty Five Dollar 79/100 ($534,445.78) ("Purchase Price"). The Smaller Parcel and the River Bottom Parcel will be referenced together as the "New Parcel."

2. Seller acknowledges receipt from Buyer the sum of Twenty-Five Thousand Dollars $25,000.00 as deposit (the "Deposit") on account of the Purchase Price.

3. Seller and Buyer agree that the completion of the sale under the terms of this Addendum shall satisfy all of Seller's obligations, if any, to Buyer under the terms of the original Purchase Agreement and the Amended PSA.

4. Buyer and Seller's obligations under the Agreement, as amended by this Addendum, are expressly conditioned upon completion or satisfaction of the following matter on or prior to the Closing Date:

    a. Brighthouse Life Insurance Company and SBN V Ag I LLC provide consent to the release of their deeds of trust on the Property, and the other monetary liens on the Property are either released by the lien holder, or paid out from the purchase proceeds, by escrow, in connection with the Close, The only other known monetary liens are identified on the preliminary title report as past due and pro-rated real property taxes owed to Stanislaus County and a lien in favor of West Stanislaus Irrigation District recorded on February 22, 2016. If any other new monetary liens are discovered prior to Closing, Seller may elect

whether to pay such lien form the purchase proceeds through escrow; provided, however, that the Buyer shall not be obligated to complete its purchase of the New Parcel unless such additional monetary liens are either released by the lien holder, or paid out form the purchase proceeds, by escrow, in connection with the Close.

b. Approval by the Bankruptcy Court of the Sale of the New Parcel to the Buyer on the terms and conditions set forth in the Amended PSA as amended by this Addendum.

c. Approval of the lot line adjustment application by Stanislaus County, and

d. The issuance of title insurance by Title Company on the New Parcel.

5. There are no other contingencies to Buyer's obligations under the Agreement, and the Sale shall take place as soon as practicable after in item 4 pre-conditions have been satisfied.

6. Seller shall diligently pursue any legal, surveying, title or other work necessary to remove the transfer restrictions from County and to obtain clear title and legal description sufficient to transfer title of the New Parcel to Buyer and shall keep Buyer adequately apprised of such efforts and progress.

7. Buyer shall cooperate with Seller in executing document necessary to lift such transfer restriction on the parcel, so long as such cooperation does not require further outlay of funds by Buyer and so long as Buyer's position in relation to that New Parcel is not substantially impacted by any action requested by Seller.

8. Seller to notify Buyer that Seller is in a position to close once restrictions from the County and title companies have been removed.

9. Upon receipt of Seller's notification, Buyer shall deposit the balance of the Purchase Price in escrow with Title Company.

10. Buyer's $25,000.00 Deposit shall be allocated to Buyer's account for the close of the New Parcel.

11. Signed instructions for closing to be delivered by or before April 1, 2020, unless mutually extended by written agreement. Escrow fees to be paid as follows: one half by buyer, and one half by seller.

12. If good title is not transferred by April 1, 2020, Buyer retains rights to pursue performance of the Amended Contract. Seller retains it rights and defenses against such actions.

13. Relevant terms and conditions which apply to the sale of the New Parcel:

a. There shall be no due diligence period.

c. Seller agrees to reasonably cooperate with Buyer in a Tax Exchange provided there is no cost to seller or delay in the close of escrow.

g. Title is free of liens and encumbrances other than: (a) current property taxes, (b) covenants, conditions and restrictions and public utility easements of record if any, provided the same

do not adversely affect the continued use of the property for the purposes for which it is presently being used. The costs of a current preliminary title report shall be split equally by the parties. Seller shall furnish Buyer at on-half by Seller's expense a standard California Land Title Association policy issued by First American, showing titled vested in Buyer subject only to the above. If seller fails to deliver title as above, Buyer may terminate the Agreement, as amended by this addendum, and the deposit shall be returned to Buyer.

h. Property taxes, premiums on insurance acceptable to Buyer, rents, and interest shall be pro-rated as of the date of recordation of deed. Any bond or assessment which is lien, including but not limited to any assessment or lien for property cleanup performed by a county agency, shall be paid by Seller, transfer taxes, if any shall be paid one-half by Buyer, and one half by Seller.

i. Seller shall pay all recording clerk's fees for the recordation of the Deed.

j. Buyer shall pay all costs incurred by Buyer in connection with its investigation of the Property, site inspections or environmental audits, and all of Buyer's professional fees.

k. Possession shall be delivered to Buyer on close of escrow.

m. If Buyer fails to complete said purchase as herein provided by reason of any default of Buyer, Seller shall be released from his obligation to sell the property to Buyer and Seller shall retain the Deposit as his liquidated damages.

14. The Property is to be sold AS-IS with no seller representations or warranties.

Sale Free and Clear of Liens

The Motion states that the Plan Administrator "seeks to pay the only known and valid monetary liens" against the Property being sold. These liens are identified as:

Priority	Creditor	Estimated Claim Amount
Property Taxes	Stanislaus County Tax Collector	$11,558.88
1st Deed of Trust	Brighthouse	$6,655,067.15
2nd Deed of Trust	Summit	$45,491,296.74
3rd Lien	West Stanislaus Irrigation District	$11,000.00

The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances:

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

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

(2) such entity consents;

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

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

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

11 U.S.C. § 363(f)(1)–(5).

The Motion heading states that the sale free and clear of liens is authorized by 11 U.S.C. § 363(f). The lien claims that Movant seeks to pay are the Property Taxes (which are in first priority) and then the most junior lien of the Irrigation District. The Motion states that Movant Plan Administrator is (only) informed and believes that Brighthouse and Summit would consent to the sale free and clear of their respective liens. However, it is not alleged that such consent has been documented. The Motion does not identify any other ground for the court ordering a sale free and clear of liens.

In the Points and Authorities Movant repeats that it only "seeks to pay known and valid monetary liens." For the Property Taxes, the points and authorities state that they will be paid in full from escrow. For the Irrigation District claim, that too is to be paid in full directly from escrow.

No specific provision of 11 U.S.C. § 363(f) is identified as the basis for the court ordering, rather than the creditor "merely" releasing its lien for payment in full through escrow. While Movant might say, "judge, can't you read and state for me it is 11 U.S.C. § 363(f)(5) for the property tax lien," the court could say the same back to Movant.

To the extent that Movant needs to have the court order the sale free and clear for these two liens as part of the order, such is granted, with the order expressly stating that it is free and clear with the liens attaching to the net sales proceed, which remaining net proceeds shall not be disbursed to the Plan Administrator until the two secured claims are paid directly from escrow.

However, with respect to doing the above, Movant must provide the court with a basis for ordering that the sale be free and clear of the senior liens of Brighthouse and Summit. Though it is likely that they will consent, as of the time the court conducted its review of the Motion and supporting pleadings, no consents had been documented with the court.

However, at the hearing, **XXXXXXXXXX**

Private Sale of the Property

Plan Administrator argues that a private sale between the parties without overbidding is provided under Bankruptcy Rule 6004(f) on the following unique and special circumstances:

(1) Reorganizing Debtor is already in contract with Buyer for the sale of the Smaller Parcel;

(2) Stanislaus County will only approve a sale of the Smaller Parcel if it is combined with the River Bottom Parcel;

(3) the Smaller Parcel and River Bottom Parcel need to be owned by the same entity;

(4) Buyer owns two adjoining parcels which will allow the lot line adjustment to be completed without increasing the total number of parcels as required by the County; and

(5) Buyer is willing to buy an additional $60,335.00 for the 10.97 acres River Bottom Parcel in order to allow Buyer to close on the Smaller Parcel, which Buyer has already contracted to purchase.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the transaction of the River Bottom Parcel is necessary for the sale of the Smaller Parcel to be completed. The transaction provides for fair and reasonable consideration in light of the circumstances that the Stanislaus County will only approve of the sale of the Smaller Parcel as long as it does not increase the total number of parcels and the end user of the River Bottom parcel use the property for agricultural or environmental purposes.

The Property was negotiated in good faith bargaining by the Reorganizing Debtor and Buyer. Additionally, sufficient notice was provided to the creditors. Thus, the court determines the sale is the in best interest of the Estate.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court so that Reorganizing Debtor may close the sale of the New Parcel as expeditiously as possible otherwise delaying the sale will only increase the risk of further expense or loss of the estate.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is granted.

Counsel for the Plan Administrator shall prepare and lodge with the court a proposed order granting the Motion consistent with the forgoing Ruling.

9. 19-90464-E-7 RICHARD RICKS
19-9020 MAS-1
HIRST LAW GROUP, P.C. V. RICKS

MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION
1-24-20 [12]

No Tentative Ruling: The Motion For Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor on January 24, 2020. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion for Summary Judgment is xxxxxxxxxx .

Hirst Law Group, P.C. ("Plaintiff") filed the instant adversary proceeding on December 6, 2019, against Richard Arland Ricks ("Defendant-Debtor"). In the underlying bankruptcy proceeding, Plaintiff claimed he had a claim against the Defendant-Debtor in excess of $100,000.00, though no Proof of Claim has been filed.

REVIEW OF THE MOTION FOR SUMMARY JUDGMENT

On January 24, 2020, Plaintiff filed the instant Motion for Summary Judgment pursuant to Fed. R. Bankr. P. 7056. Dckt. 12. Plaintiff asserts that the are no issues of material fact such that Plaintiff is entitled to judgment as a matter of law. Plaintiff adds that if the court is disinclined to grant summary judgment, then Plaintiff seeks summary adjudication as to the 11 U.S.C. § 727(a)(4)(A) claim only. Further adding that Plaintiff will dismiss all the remaining claims under 11 U.S.C. § 727(a)(3) and 11 U.S.C. § 727(a)(5) if court grants the summary adjudication as to 11 U.S.C. § 727(a)(4)(A).

The court begins its consideration of the requested relief with the Motion itself and the grounds with particularity stated therein. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007. The grounds stated with particularity consist of the following:

> Plaintiff Hirst Law Group P.C. ("HLG") hereby moves for summary judgment against defendant Richard Arland Ricks for denial of discharge under 11 U.S.C. § 727(a)(4)(A) pursuant to FRBP 7056. There are no disputed issues of material fact such that HLG is entitled to judgment as a matter of law. Should the Court be disinclined to grant summary judgment, then HLG seeks summary adjudication as to the 11 U.S.C. § 727(a)(4)(A) claim only. If the Court grants HLG's summary adjudication motion as to the 11 U.S.C. § 727(a)(4)(A) claim, HLG will dismiss all the remaining claims so as judgment can be entered on the 11 U.S.C. § 727(a)(4)(A) claim singly.

Motion, Dckt. 12. The above is the entirety of what is stated in the Motion.

As addressed below in considering a summary judgment, that a party "moves for summary judgment" and alleges that there are no disputed issues of material of fact, are not sufficient grounds for granting the requested relief.

Review of Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007. Fed. R. Bankr. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion."

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

In considering the Twombly and Iqbal requirements, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

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

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

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Additional Documents Filed With the Motion

A Memorandum of Points and Authorities in support of the Motion was also filed. Dckt. 18. The Points and Authorities begins with a rich statement of particular factual grounds and events upon which the Motion is based. The Points and Authorities then, beginning on page 3, provides the legal authorities and arguments applying the legal authorities to the "grounds" as stated in the first two pages of the Points and Authorities.

Next, the Declaration of Mark A. Serlin, counsel for Plaintiff has been filed. Dckt. 14. Mr. Serlin's testimony relates to the 2004 Examination he conducted of the Defendant-Debtor.

The Declaration of Michael Hirst is also provided. Dckt. 16. He testifies to representing the Defendant-Debtor, beginning in 2013, in a federal False Claims *qui tam* action. Mr. Hirst further testifies that in April 2015 the Defendant-Debtor obtained a payment of $1,287,000. Not satisfied, Defendant-Debtor asserted a claim against Mr. Hirst's firm concerning that representation. Mr. Hirst's firm prevailed and has a claim against the Defendant-Debtor arising therefrom.

In August 2019, Mr. Hirst was told by Brian Soriano, that Mr. Soriano was representing the Defendant-Debtor in a new *qui tam* action. Further, that he was seeking to have Mr. Hirst's firm assist in that new action, which was projected to be 5 to 15 times the value of the successful recovery in the prior case in which Mr. Hirst represented the Defendant-Debtor.

Additionally the following documents have been provided (Dckt. 15):

> - Exhibits A: Defendant-Debtor Richard Rick Rule 2004 Examination Transcript (including the exhibits attached to the subpoena)
>
> - Exhibit B: Transcript of Record Proceedings for September 16, 2019 (Trustee Irma Edmonds Presiding)

and at Dckt. 17:

> - Exhibit A: copy of the Arbitration Award Judgment for attorney's fees and costs
>
> - Exhibit B: copy of email communication between Brian Soriano and Michael Hirst

APPLICABLE LAW FOR A MOTION FOR SUMMARY JUDGMENT

In an adversary proceeding, summary judgment is proper when "[t]he movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000). "[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 248 (1986).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations,

stipulations ..., admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a sufficiently supported motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707, citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *County. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage [,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

Review of the Complaint

Plaintiff seeks a determination that Plaintiff's claims are nondischargeable pursuant to 11 U.S.C. §§ 727(a)(3), 727(a)(4)(A), and 727(a)(5) as the claims arise from Defendant-Debtor's failure to keep or preserved recorded information related to Defendant-Debtor's financial condition or business transaction; false statements and/or omissions in the Defendant-Debtor's Schedules and Statement of Affairs; failure to satisfactorily explain the dissipation of monies allegedly received by Defendant-Debtor. Dckt. 1. The grounds upon which these claims are based are as follows:

A. As it pertains to 11 U.S.C. § 727(a)(3), Plaintiff alleges that Defendant-Debtor claimed at a Rule 2004 examination that he had no banking or other documents whatsoever regarding his income, assets, expenditures, and the like notwithstanding his receipt of a subpoena under F.R.B.P. 2004 compelling such production such that discharge under this section is appropriate.

B. As it pertains to 11 U.S.C. § 727(a)(4)(A), Plaintiff alleges that Defendant-Debtor testified in a Rule 2004 examination that he had a large qui tam claim which he knew to exist before he filed for bankruptcy which he did not disclose in his sworn schedules in this bankruptcy case such that discharge under this section is appropriate.

C. As it pertains to 11 U.S.C. § 727(a)(5), Plaintiff alleges that Defendant-Debtor has failed to satisfactorily explain the dissipation of over $1.2 million in cash received by Debtor in May 2016 and the fact that there are now no assets to distribute to creditors of Defendant-Debtor such as Plaintiff such that denial of discharge under this section is appropriate.

Review of the Answer

In response, Defendant-Debtor filed an Answer to the Complaint on January 6, 2020. Dckt. 9.

A. As to the allegation that Debtor failed to keep or preserve recorded information, Defendant-Debtor denied having concealed, destroyed, mutilated, falsified, and/or failed to keep or preserve information and/or documents.

B. Defendant-Debtor states that he has been married to an accountant for 25 years and that he never kept custody of documents or financial records and any information or documents related to his finances were submitted by his ex-wife Joy L. Hughes in her deposition with Mr. Serlin ("Plaintiff's Counsel") last year. Adding that he told counsel that the only documents he had failed to provide was the pink slip for his motorcycle.

C. Defendant-Debtor admits that he signed his bankruptcy petition and answered "no" to the question of any pending lawsuits. Defendant-Debtor then states that no qui tam lawsuit has been filed at the city, county, state, or federal level. Defendant-Debtor's understanding of the question being that a case has been filed.

D. Defendant-Debtor states that all financial information, including bank statements were provided to Plaintiff's Counsel under Defendant-Debtor's former wife's deposition, which Defendant-Debtor states explains the dissipation of funds.

E. Defendant-Debtor advises the court that he could not afford the $240.00 to obtain a copy of his deposition but he is very clear on the matters stated above.

DENIAL OF DISCHARGE LAW

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

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

(a) The court shall grant the debtor a discharge, unless—

[. . .]

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained,

> unless such act or failure to act was justified under all of the circumstances of the case[.]

11 U.S.C. § 727(a)(3).

11 U.S.C. § 727(a)(4)(A)- False Oaths

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

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

11 U.S.C. § 727(a)(4)(A).

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

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

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

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

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

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

> (a) The court shall grant the debtor a discharge, unless—
>
> [. . .]

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

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

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

DISCUSSION

At this juncture, the court is presented with a Motion, which if taken as the grounds asserted by Movant, is insufficient to grant any of the relief requested.

At the hearing, **xxxxxxxxxx**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Summary Judgment filed by Hirst Law Group P.C. ("Plaintiff") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion For Summary Judgment is **xxxxxxxxxx**

FINAL RULINGS

10.	**19-90027-E-7** **BLF-5**	**JORGE NEGRETE AND VERONICA AYARD** **Thomas Gillis**	**MOTION FOR COMPENSATION FOR LORIS L. BAKKEN, TRUSTEES ATTORNEY(S)** **1-27-20 [72]**

Final Ruling: No appearance at the March 12, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 27, 2020. By the court's calculation, 45 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Loris L. Bakken, the Attorney ("Applicant") for Michael D. McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period April 22, 2019, through March 12, 2020. The order of the court approving employment of Applicant was entered on April 25, 2019. Dckt. 27. Applicant requests fees in the amount of $4,965.00 and costs in the amount of $87.90.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's

authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include general case administration and strategies on how to handle property of the estate and assisted Trustee in (1) employment of an auctioneer and sale of property at public auction, and (2) investigation of a pre-petition sale of property of the estate. The Estate has $17,049.75 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 4.00 hours in this category. Applicant prepared the fee agreement and employment application and the instant fee application; reviewed and discussed with Trustee possible objections to the Debtor's exemptions; reviewed whether to file a complaint objecting to Debtor's discharge; and anticipates attending the hearing on the fee application by telephone.

Employment of Auctioneer and Sale of Property at Public Auction: Applicant spent 13.4 hours in this category. Applicant assisted in the employment of auctioneers by preparing an addendum to the auctioneer's agreement, prepared and filed the application to employ the auctioneers for the estate; prepared and filed the motion to sell the 2018 Trailer; prepared and filed the application for compensation of auctioneers; communicated with the auctioneers regarding the employment and compensation motions; reviewed the tentative rulings on those motions; and appeared in person at the hearing of both motions.

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**
Loris L. Bakken	15.7	$300.00	$4,710.00
	1.7	$150.00	$255.00
Total Fees for Period of Application			$4,965.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $87.90 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Postage	N/A	$42.20
Copying	$0.10 per page	$45.70
Total Costs Requested in Application		$87.90

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $4,965.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $87.90 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees $4,965.00

Costs and Expenses $87.90

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Loris L. Bakken ("Applicant"), Attorney for Michael D. McGranahan, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Loris L. Bakken is allowed the following fees and expenses as a professional of the Estate:
>
> Loris L. Bakken, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $4,965.00
> Expenses in the amount of $87.90,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

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

Final Ruling: No appearance at the March 12, 2020 Hearing is required.

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

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

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

The Hearing on the Motion to File Claim After Claims Bar Date has been continued to 10:30 a.m. on May 21, 2020, by prior order of the court (Dckt. 1115), the Parties actively working to resolve this matter through mediation.

FEBRUARY 5, 2020 STATUS REPORT & EX-PARTE MOTION

Jeffrey Edward Arambel, Reorganizing Debtor, filed a Status Report on March 5, 2020 Dckt.1114.

A. Consistent with the court's directives, the parties met and conferred on March 2, 2020, to attempt to resolve both the Motion and allowance of the underlying claim in a sum certain. The parties were not able to reach an agreement at that meet and confer session, but agreed to further mediation and will request referral of the matter to the Court's Bankruptcy Dispute Resolution Program ("BDRP").

B. The parties are exchanging names of potential BDRP mediators and expect to submit a joint motion for referral of this matter to the BDRP mediator within the next 14 days.

C. To allow time for the mediation to occur, Reorganizing Debtor requests that the scheduled hearing on the Motion be continued about 60 days, to May 21, 2020. While May 14 is the regular Modesto day, counsel for the Reorganizing Debtor has a conflict that day and requests that court continued the hearing to May 21, 2020.

D Counsel for the Reorganizing Debtor conferred with counsel for El Che and the Plan Administrator regarding the proposed continued hearing date and understands that there is no objection to the proposed continued hearing date.

E. The Reorganizing Debtor proposes to file a status report regarding the Motion not later than seven days before the continued hearing.

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

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

REVIEW OF THE MOTION

Creditor asserts the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U. In the present action, Debtor did not list Creditor's address, and failed to correctly identify Creditor in his Schedules D, E/F, G, and/or H, as

required by F.R.B.P. 1007(a), as Creditor's address as reflected on the invoices mailed to Debtor was not listed.

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

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

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

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

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

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

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

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

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

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

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

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

Declarations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of Exhibits

Exhibit A: Invoices

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

Exhibit B: Proof of Claim Number 38

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

DEBTOR'S OPPOSITION

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

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

B. In *Lompa v. Price* (*In re Price*), 871 F.2d 97 (9th Cir. 1989), the Ninth Circuit held that notice to an attorney representing a claimant in a state-court proceeding would apprise a creditor of a bankruptcy and related deadlines. The creditor was not directly notified by the

bankruptcy court of the bar date for filing dischargeability complaints under 11 U.S.C. § 523(c) because he was not listed by the debtor, and creditor's motion for extension was not made before the time had expired under Bankr. R. 4007(c). *Id.* at 98. The Bankruptcy Appellate Panel held that notice to creditor's counsel constituted notice to appellant, and that it would apprise the creditor of the pendency of the dischargeability deadline date. *Id.* The Ninth Circuit affirmed. *Id.* at 99.

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

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

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

F. Creditor failed to show excusable neglect.

G. The existence of excusable neglect is determined by considering the totality of the circumstances, including these factors: (1) the reason for the delay; (2) the danger of prejudice to the debtor; (3) the length of delay and its impact on judicial proceedings; and (4) whether the claimant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Co.*, 507 U.S. 380, 395 (1993). The burden of presenting facts to establish excusable neglect is on the moving party. *Key Bar Invs., Inc. v. Cahn* (*In re Cahn*), 188 B.R. 627, 631 (B.A.P. 9th Cir. 1995); see also *In re Pac. Gas & Elec. Co.*, 311 B.R. 84, 89 (Bankr. N.D. Cal. 2004).

Pioneer mandated a balancing test for determining excusable neglect, but did not assign the weight to be given to each of its nonexclusive factors in arriving at an equitable determination. *Pincay*, 389 F.3d at 860.

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

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

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

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

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

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

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

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

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

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

PLAN ADMINISTRATOR'S OPPOSITION

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

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

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

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

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

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

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

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

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

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

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

CREDITOR'S REPLY

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

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

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

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

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

Creditor argues that his request to allow the claim is not bar by *res judicata* because under that doctrine the judgment must involve the same parties. Creditor was not represented in the bankruptcy

until after the Plan was confirmed. Creditor did not participate and did not have reasonable opportunity to object. Moreover, Creditor is not challenging the Plan but requesting that its claim be allowed as timely filed so that it may be included under the general unsecured claims class.

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

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

APPLICABLE LAW

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

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

F.R.B.P. 3003.

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

> Likewise, after the passage of the bar date, an extension may be granted upon a showing of cause. Although Rule 3003(c)(3) specifies that the time for filing a proof of claim may be extended for cause, the Supreme Court (in *Pioneer Inv. Servs.*] has adopted the excusable neglect standard without considering whether Rule 3003(c)(3) provides for a test different from Rule 9006(b). However, as interpreted by the Court, application of the excusable neglect standard includes consideration of factors, such as prejudice to the debtor, which some courts had previously determined to be beyond the scope of the Rule 9006(b) analysis.

9 Collier on Bankruptcy P 3003.03[b].

In *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489 (1993), affirming the Court of Appeals for the Sixth Circuit, the Supreme Court, in a five-to-four decision, ruled that a court may find that a creditor's failure to file a proof of claim by the bar date was

due to excusable neglect when it has considered all of the relevant circumstances, including danger of prejudice to the debtor; the length of the delay; the reason for the delay and whether such delay was in the control of the party filing the late claim; the possible impact of the delay on the judicial proceedings; and whether the party filing the late claim acted in good faith.

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consideration of Excusable Factors

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

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

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

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

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

Debtor scheduled Creditor's claim. Debtor disputed creditor's claim. Debtor had notice sent to Creditor through the attorneys representing Debtor in the state court action. Notices and information about the bankruptcy case continued to go to Creditor's counsel until a change of address was fled.

After that, Debtor continued to receive notices, motions, and pleadings, including the proposed Plan and Disclosure Statement and the approved Disclosure Statement and Plan set for confirmation, all of which include the language that Creditor's claim was disallowed as provided in the Federal Rule of Bankruptcy Procedure.

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) whether the creditor acted in good faith;

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

and

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

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

Ruling on Motion to File Late Claim

The court has continued the hearing to allow the Parties the opportunity to engage in settlement negotiations.

Denial Without Prejudice of Countermotion

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

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

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