UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

March 19, 2015 at 10:30 a.m.

---

1. 14-29231-E-11 RLC-14 | **MIZU JAPANESE SEAFOOD BUFFET, INC. Stephen M. Reynolds** | **MOTION FOR COMPENSATION FOR STEPHEN M. REYNOLDS, DEBTOR'S ATTORNEY 2-19-15 [143]**

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

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

Below is the court's tentative ruling.

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

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on February 20, 2015. By the court's calculation, 27 days' notice was provided. 28 days' notice is required.

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

At the hearing Movant made an oral motion to shorten time for notice to 27 days. In light of the one day difference and a Chapter 11 plan having been confirmed in this case, the court ----------. The defaults of the non-responding parties are [not] entered.

The Motion for Allowance of Professional Fees is denied without prejudice.

Stephen Reynolds, counsel for the Debtors, ("Movant") filed the instant

Motion for Final Compensation and Costs on February 19, 2015. Dckt. 143.

However, a review of the Proof of Service shows that the Movant stated that the Motion was being served under Local Bankr. R. 9014-1(f)(1) while only providing 27 days notice.

Therefore, for failure to provide sufficient notice, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Stephen Reynolds ("Applicant"), Attorney for Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES

ALTERNATIVE RULING

Stephen M. Reynolds, the Attorney ("Applicant") for debtor in possession the ("Client"), makes a second Interim and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period December 5 2014, through February 5, 2015 . The order of the court approving employment of Applicant was entered on October 14, 2014, Dckt. 42. Applicant requests fees in the amount of $9,960.00 and costs in the amount of $476.79 for the period December 5, 2014 through February 5, 2015. Applicant is also seeking for final approval of prior interim fees in the amount of $20,220.00 which was granted on January 9, 2015. Dckt. 115.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

at the time at which the service was rendered toward the completion of, a case under this title;

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including reviewing Chapter 11 schedules, communicating with Debtor in possession, representing Debtor in possession at various hearings, preparing and filing motions, drafted an effective plan, and worked to confirm that plan . The court finds the services were beneficial to

the Client and bankruptcy estate and reasonable.

SECOND INTERIM 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 hours in this category. Applicant assisted Client with researching the necessary topics, attending the required hearings and conferences, communicating with the client and adversaries, and filing necessary documents for bankruptcy.

Asset Disposition: Applicant spent 4.1 hours in this category. Applicant worked to oversee that the sale motion was successful, drafting replies to oppositions, and attending the hearing for motion to sale.

Litigation Proceedings: Applicant spent 6.5 hours in this category. Applicant prepared for and reviewed documents for the different hearings that were required, drafted and filed notices and proof of service, and traveled to attend the hearings.

Plan Statement: Applicant spent 16.8 hours in this category. Applicant worked to ensure the plan was confirmed through various research, motions, and phone calls.

Claims: Applicant spent 1.55 hours in this category.

Fee Applications: Applicant spent 3.85 hours in this category.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Stephen Reynolds	33.2	$300.00	$9,960.00
Total Fees For Period of Application			$9,960.00

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	$20,220.00	$15,165.00

Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$20,220.00	

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $476.79.00 pursuant to this applicant.

The costs requested in this Second Interim Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Filing Fee for RLC-9	$176.00	$176.00
Filing Fee For RLC-4	$176.00	$176.00
Postage for RLC-9	$37.92	$37.92
Postage for RLC-4	$37.92	$37.92
Postage, Plan, Ballot, Notice, etc.		$48.95
Total Costs Requested in Application		$476.79

No costs were requested in the First Interim Application.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim and Final Request for Fees in the amount of $9,960.00 pursuant and prior Interim Fees in the amount of $20,220.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 11 case under the confirmed Plan. The total attorneys' fees given final approval in this case approved for Applicant are $30,180.00.

Costs and Expenses

The Second Interim and Final Request for Costs in the amount of $476.79 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 11 case under the confirmed Plan.

Applicant is allowed, and the Plan Administrator under the confirmed Chapter 11 Plan is authorized to pay, the following amounts as final compensation to this professional in this case:

Fees	$30,180.00
Costs and Expenses	$476.79

pursuant to this Application 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 Stephen Reynolds ("Applicant"), Attorney for 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 Stephen Reynolds is allowed the following final fees and expenses, inclusive of prior interim allowed fees and expenses, as a professional of the Estate:

Stephen Reynolds, Professional Employed by Debtor in Possession

Fees in the amount of $30,180.00
Expenses in the amount of $476.79

are approved are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Plan Administrator under the confirmed plan is authorized to pay the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 11 case under the confirmed Plan.

2. 11-48050-E-7 STAFF USA, INC.
TAA-3

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH W. AUSTIN COOPER AND W. AUSTIN COOPER, A PROFESSIONAL CORPORATION
2-9-15 [393]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on February 9, 2015. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

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

The Motion for Approval of Compromise is granted.

Thomas Aceituno, the Trustee, requests that the court approve a compromise and settle competing claims and defenses with W. Austin Cooper and W. Austin Cooper, a Professional Corporation ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the failure to disclose the payment to Settlor in the Chapter 11 proceeding, failure to obtain an order approving employment of Settlor for Staff USA, and failure to provide an explanation for the payment.

Trustee and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the

court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 395):

A. Settlor shall pay the estate the gross amount of $2,000.00 in satisfaction of all claims the Staff USA estate may have against him personally and against W. Austin Cooper, a Professional Corporation

B. The Trustee releases all claims of Staff USA, Inc. against W. Austin Cooper and W. Austin Cooper, a Professional Corporations

C. W. Austin Cooper and W. Austin Cooper, a Professional Corporation, for themselves, and their heirs, successors, and assigns, release and forever discharge each other and each of their respective officers, directors, agents, employees, accountants, attorneys, heirs, successors, and assignees from any and all claims, proofs of claim, demands, damages (including without limitation, economic, non-economic, and/or punitive or exemplary damages), actions or causes of action, claims for relief, suits or causes of suit of any kind and nature whatsoever arising from prior acts or conduct, whether known or unknown, whether liquidated or un-liquidated, whether matured or un-matured, whether contingent or actual, whether in law or in equity, and in whatever legal theory or form, and particularly, but not by way of limitation, of and from the claims asserted herein.

D. The parties shall bear their own attorney fees and costs. However, if there is litigation of any kind to enforce the provisions of the agreement, the prevailing party shall be entitled to recovery from the defaulting party his/her reasonable attorney fees and costs incurred in connection with such litigation.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

F.2d 610, 620 (9th Cir. 1988).

Under the Settlement Trustee shall recover $2,000.00 in satisfaction of the estate's claim. Movant asserts that the property can be recovered for the estate the claim it has against Settlor. This proposed settlement allows Movant to recover for the estate $2,000.00 without further cost or expense.

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

Probability of Success

This factor weight in favor of settlement because while the Trustee believes that the estate would prevail, the success in litigation is unknown. The success in litigation depends on the testimony and evidence produced by both parties and due to the factual matters being deeply entangled with a separate bankruptcy case, it is difficult to foresee ultimate success.

Difficulties in Collection

Trustee argues that because W. Austin Cooper represents that he has no substantial assets with which to pay the estate even if the estate prevails there would be difficulties in collecting if the matter was to go to litigation. Trustee asserts that W. Austin Cooper no longer practices law and is in ill health.

Expense, Inconvenience and Delay of Continued Litigation

Trustee argues that litigation would result in significant costs. The Trustee estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Trustee argues that the estate is currently administratively insolvent. The estate currently holds $11,700.00 but there is are Chapter 11 administrative expenses that exceed $60,000.00 and the estate will incur additional Chapter 7 administrative expenses.

Paramount Interest of Creditors

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

Reviewing the proposed settlement, it appears that it is in the best interest of the parties, estate, and creditors to bring this contentious matter to a close. The parties have reached a fair and equitable settlement and releases all the parties from any and all claims in connection with the alleged wrongful acts. The uncertain nature of the claims as well as the need for continued evidentiary hearing all support the court's conclusion that the settlement is in the best interest of all real parties in interest.

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

Estate. The motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Thomas Aceituno, the Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve Compromise between Movant and W. Austin Cooper and W. Austin Cooper, a Professional Corporation (“Settlor”) is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the Motion(Docket Number 395).

3. 10-23577-E-11 GLORIA FREEMAN
WFH-49 Reno F.R. Fernandez

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH W. AUSTIN COOPER AND W. AUSTIN COOPER, A PROFESSIONAL CORPORATION
2-24-15 [1628]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 24, 2015. By the court's calculation, 23 days' notice was provided. 28 days' notice is required.

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

The Motion For Approval of Compromise is granted.

David Flemmer, the Plan Administrator, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with W. Austin Cooper and W. Austin Cooper, A Professional Corporation ("Settlor"). The claims and disputes to be resolved by the proposed settlement are in connection with nine separate payments to Settlor which resulted in an order to show cause.

The Movant is seeking to recover from Settlor, and each of them, monies paid by Staff USA, a related entity, for legal services provided to the former

Debtor in Possession. The employment of Settlor to serve as counsel for the Debtor in Possession was not sought and never approved. No fees have been approved by this court for any services provided to the Debtor in Possession. The fees sought to be recovered by Movant total $33,000.00, plus an additional payment of $6,039.00 which is asserted by settlor to have been paid for representation provided to the debtor in possession in the Staff U.S.A. (for which no order authorizing employment as counsel for that debtor in possession was sought or obtained, and no fees have been allowed Settlor pursuant to 11 U.S.C. § 330).

The settlement has been stated by the parties on the record at the February 10, 2015 evidentiary hearing. The terms of the settlement are:

A. W. Austin Cooper and W. Austin Cooper, a Professional Corporation, and each of them, and David D. Flemmer, the Chapter 11 Plan Administrator, ("Plan Administrator") stipulated and agreed on the record W. Austin Cooper and W. Austin Cooper, a Professional Corporation, jointly and severally, are obligated to pay $16,000.00 to the Plan Administrator on the terms set forth in this Order approving the Settlement.

B. W. Austin Cooper and W. Austin Cooper, a Law Corporation, jointly and severally shall pay the Plan Administrator $6,000.00 in the following installments:

Installment	Amount	Date Payment Due
1.	$1,000.00	February 11, 2015 (payment acknowledged)
2.	$1,000.00	April 1, 2015
3.	$1,000.00	May 1, 2015
4.	$1,000.00	June 1, 2015
5.	$1,000.00	July 1, 2015
6.	$1,000.00	August 1, 2015

C. In the event of a default in timely payment, the Plan Administrator shall provide written notice to W. Austin Cooper and W. Austin Cooper, a Law Corporation at the following addressed:

1. W. Austin Cooper
Xxxxxx
Xxxxxx, California xxxxx

2. W. Austin Cooper, a Professional Corporation
Xxxxxx

Xxxxxx, California xxxxx

D. If a notice default is not cured within 14-days of the mailing of the notice; USPS First Class Mail, postage prepaid; then the full amount of the stipulated $16,000.00 shall be immediately due and payable in full. If the full amount becomes immediately due and payable in full due to an uncured default, the Plan Administrator shall be entitled to a supplemental order in this Contested Matter order the payment of the $16,000.00, less credit for any installment payments made by W. Austin Cooper or W. Austin Cooper, a professional corporation, which order may then be enforced as a judgment. (Fed. R. Civ. P. 54(a), 69, and Fed. R. Bankr. P. 7054, 7069, 9014). The hearing on the motion for entry of supplemental order in this Contested Matter (the same Docket Control Number shall be used) may be set on at least 14-days notice.

E. If all installment payments are timely made for payment of the $6,000.00 in full, the Plan Administrator waives and releases W. Austin Cooper and W. Austin Cooper, a Professional Corporation, from the payment of the additional $10,000.00 agreed to be paid in the Stipulation.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Under the Settlement the Plan Administrator shall recover at least $6,000.00, if the installments are timely paid and the additional $10,000.00 is waived and released, and $16,000.00 if there is a default and the Plan Administrator has to enforce the order for payment. The Trustee notes that recovery, and retaining, the full amount claimed depends on it being determined that there were constructive distributions made to the Debtor in this case. This Settlement is part of a larger settlement by which the competing claims of the Staff U.S.A., Inc. bankruptcy estate for payment of the monies recovered

is also resolved. The Staff U.S.A., Inc. Trustee has settled his estate's claims directly with W. Austin Cooper and W. Austin Cooper, a Professional Corporation. 11-48050, Motion to Approve Compromise, DCN: TAA-3.

Probability of Success

This factor weight in favor of settlement because while the Plan Administrator believes that the Plan Estate would prevail, the net financial success in litigation is unknown. This Settlement resolves not only the litigation issues between the immediate parties, but is part of the larger settlement by which claims for recovery of monies by the Staff U.S.A., Inc. bankruptcy estate are withdrawn.

Difficulties in Collection

Movant points out that W. Austin Cooper is no longer practicing law and the Professional Corporation is no longer in business. The Movant is not aware of assets from which to enforce a greater award from the court. Additionally, the Settlement creates an economic incentive for Settlor to pay the $6,000.00 in full and timely, so that a reduction in the $16,000.00 amount can be obtained.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that litigation would result in significant costs, with little tangible possibility of additional recovery. Under one analysis provide by the Movant, the gross recovery from litigation could be $11,000.00, with the costs of further litigation and collection providing a possible lower net benefit to the Plan Estate.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to the Plan Estate, recovery of a substantial net recovery, and reducing further expenses which the Plan Estate would have to pay.

Reviewing the proposed settlement, it appears that it is in the best interest of the parties, Plan Estate, and creditors to bring this contentious matter to a close. The parties have reached a fair and equitable settlement and releases all the parties from any and all claims in connection with the alleged wrongful acts. The uncertain nature of the claims as well as the need for continued evidentiary hearing all support the court's conclusion that the settlement is in the best interest of all real parties in interest.

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

CHAMBERS PREPARED ORDER

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

Findings of Fact and Conclusions of Law are stated in the

Civil Minutes for the hearing.

The Motion to Approve Compromise filed by David Flemmer, Plan Administrator, ("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 to Approve Compromise is granted and Settlement of this contested matter is approved on the terms and conditions set forth in this Order:

A. W. Austin Cooper and W. Austin Cooper, a Professional Corporation, and each of them, and David D. Flemmer, the Chapter 11 Plan Administrator, ("Plan Administrator") stipulated and agreed on the record W. Austin Cooper and W. Austin Cooper, a Professional Corporation, jointly and severally, are obligated to pay $16,000.00 to the Plan Administrator on the terms set forth in this Order approving the Settlement.

B. W. Austin Cooper and W. Austin Cooper, a Law Corporation, jointly and severally shall pay the Plan Administrator $6,000.00 in the following installments:

Installment	Amount	Date Payment Due
1.	$1,000.00	February 11, 2015 (payment acknowledged)
2.	$1,000.00	April 1, 2015
3.	$1,000.00	May 1, 2015
4.	$1,000.00	June 1, 2015
5.	$1,000.00	July 1, 2015
6.	$1,000.00	August 1, 2015

C. In the event of a default in timely payment, the Plan Administrator shall provide written notice to W. Austin Cooper and W. Austin Cooper, a Law Corporation at the following addressed:

1. W. Austin Cooper
Xxxxxx
Xxxxxx, California xxxxx

2. W. Austin Cooper, a Professional Corporation
Xxxxxx
Xxxxxx, California xxxxx

D. If a notice default is not cured within 14-days of the mailing of the notice; USPS First Class Mail, postage prepaid; then the full amount of the stipulated $16,000.00 shall be immediately due and payable in full. If the full amount becomes immediately due and payable in full due to an uncured default, the Plan Administrator shall be entitled to a supplemental order in this Contested Matter order the payment of the $16,000.00, less credit for any installment payments made by W. Austin Cooper or W. Austin Cooper, a professional corporation, which order may then be enforced as a judgment. (Fed. R. Civ. P. 54(a), 69, and Fed. R. Bankr. P. 7054, 7069, 9014). The hearing on the motion for entry of supplemental order in this Contested Matter (the same Docket Control Number shall be used) may be set on at least 14-days notice.

E. If all installment payments are timely made for payment of the $6,000.00 in full, the Plan Administrator waives and releases W. Austin Cooper and W. Austin Cooper, a Professional Corporation, from the payment of the additional $10,000.00 agreed to be paid in the Stipulation.

4. 10-23577-E-11 GLORIA FREEMAN **STATUS CONFERENCE RE: MOTION**
MHK-1 Reno F.R. Fernandez **FOR ADMINISTRATIVE EXPENSES**
11-30-12 [516]

Debtor's Atty: Reno F.R. Fernandez

Notes:

Continued from 2/10/15. Motion for Administrative Expenses was resolved by stipulation and continued for a Status Conference.

5. 11-48050-E-7 STAFF USA, INC. **STATUS CONFERENCE RE: MOTION FOR ORDER TO SHOW CAUSE**
MHK-4 **7-18-13 [257]**

Debtor's Atty: W. Austin Cooper

The Court having approved the settlement of this Contested Matter, **the Status Conference is removed from the calendar.**

Notes:

Continued from 2/10/15. Motion for Order to Show Cause was resolved by stipulation and continued for a Status Conference.

6. 10-23577-E-11 GLORIA FREEMAN **STATUS CONFERENCE RE: ORDER TO SHOW CAUSE**
WFH-31 **Reno F.R. Fernandez** **3-1-13 [571]**

Debtor's Atty: Reno F.R. Fernandez

The Court having approved the settlement of this Contested Matter, **the Status Conference is removed from the calendar.**

Notes:

Order to Show Cause continued for a Status Conference by order filed 2/26/15 [Dckt 1635]. W. Austin Cooper or W. Austin Cooper, a law corporation, to pay the Plan Administrator the sum of $1,000.00 under the terms of the settlement on or before 2/11/15.

7. 11-48050-E-7 STAFF USA, INC. **MOTION FOR ADMINISTRATIVE EXPENSES**
TAA-4 **2-11-15 [399]**

Final Ruling: No appearance at the March 19, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on February 11, 2015. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Patrick Finnegan, the Accountant ("Applicant") for and through Thomas Aceituno, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for October 4,2014. The order of the court approving employment of Applicant was entered on March 18, 2014, Dckt. 379. Applicant requests fees in the amount of $600.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparation of 2013 federal and state corporate income tax. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Federal Corporate Income Tax: Applicant spent 3 hours in this category. Applicant assisted Client with preparing the 2013 tax return.

State Corporate Income Tax: Applicant spent 1 hours in this category. Applicant assisted Client with preparing the 2013 tax return.

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**
Patrick Finnegan, CPA	4	$150.00	$600.00
Total Fees For Period of Application			$600.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $600.00 are approved pursuant to 11 U.S.C. § 330] and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

Fees $600.00

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

case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Patrick Finnegan, the Accountant ("Applicant") for and through Thomas Aceituno, 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 Patrick Finnegan is allowed the following fees and expenses as a professional of the Estate:
>
> Patrick Finnegan, Professional Employed by Trustee
>
> Fees in the amount of $600.00,
>
> The Fees and Costs pursuant to this Applicant are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

8. 10-23577-E-11 GLORIA FREEMAN
WFH-46 Reno F.R. Fernandez

CONTINUED OBJECTION TO CLAIM OF INTERNAL REVENUE SERVICE, CLAIM NUMBER 30-1
1-6-15 [1575]

No Tentative Ruling.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on January 6, 2015. By the court's calculation, 51 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim number 30-1 of Internal Revenue Service is ------- .

David Flemmer, the Chapter 11 Plan Administrator ("Objector") requests that the court disallow the claim of Internal Revenue Service ("Creditor"), Proof of Claim No. 30-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be an administrative claim in the amount of $64,831.36. Objector asserts that the Claim has not been timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is November 30, 2012. Notice of Bankruptcy Filing and Deadlines, Dckt. 483.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

NOTICE OF CONTINUANCE

Objector filed a Notice of Continuance on February 13, 2015 stating that the hearing on the Objection shall be continued to 10:30 a.m. on March 19, 2015. Dckt. 1623.

DEBTOR'S NON-OPPOSITION

The Debtor filed a non-opposition to the Objector's instant Objection on February 25, 2015. Dckt. 1632.

FEBRUARY 26, 2015 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on March 19, 2015 to allow the parties the opportunity to settle. Dckt. 1637

DISCUSSION

No supplemental pleadings have been filed by the parties in connection with the instant Objection.

MARCH 19, 2015 HEARING

At the March hearing, ----

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Internal Revenue Service, Creditor filed in this case by David Flemmer, the Chapter 11 Plan Administrator having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 30-1 of Internal Revenue Service is -----

9. 10-23577-E-11 GLORIA FREEMAN
WFH-47 Reno F.R. Fernandez

CONTINUED OBJECTION TO CLAIM OF FRANCHISE TAX BOARD, CLAIM NUMBER 31-1
1-6-15 [1579]

No Tentative Ruling.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on January 6, 2015. By the court's calculation, 51 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim number 31-1 of Franchise Tax Board is ---.

David Flemmer, the Chapter 11 Plan Administrator ("Objector") requests that the court disallow the claim of Franchise Tax Board ("Creditor") filed by Gloria Freeman, Proof of Claim No. 31-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be an administrative claim in the amount of $9,806.50. Objector asserts that the Claim has not been timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is November 30, 2012. Notice of Bankruptcy Filing and Deadlines, Dckt. 483.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

NOTICE OF CONTINUANCE

Objector filed a Notice of Continuance on February 13, 2015 stating that the hearing on the Objection shall be continued to 10:30 a.m. on March 19, 2015. Dckt. 1625.

DEBTOR'S NON-OPPOSITION

The Debtor filed a non-opposition to the Objector's instant Objection on February 25, 2015. Dckt. 1633.

FEBRUARY 26, 2015 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on March 19, 2015 to allow the parties the opportunity to settle. Dckt. 1637

DISCUSSION

No supplemental pleadings have been filed by the parties in connection with the instant Objection.

MARCH 19, 2015 HEARING

At the March hearing, ----

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Internal Revenue Service, Creditor filed in this case by David Flemmer, the Chapter 11 Plan Administrator having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 30-1 of Franchise Tax Board, which was filed by Gloria Freeman, the Debtor, is ------.

10. 14-20352-E-11 PBG-8 PATRICK GREENWELL Patrick B. Greenwell

CONTINUED MOTION TO VALUE COLLATERAL OF I.R.S. 1-22-15 [94]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Internal Revenue Service, creditors, parties requesting special notice, and Office of the United States Trustee on January 21, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Value secured claim of Internal Revenue Service ("Creditor") is granted and Creditor's secured claim is determined to have a value of $43,181.67,.

The Motion filed by Patrick Greenwell ("Debtor-in-Possession") to value the secured claim of Internal Revenue Service ("Creditor") is accompanied by Debtor's declaration. FN.1.

FN.1. The pleading title motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and creditors are put to the

challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the simpler and brief the "points and authority" section is, the easier for the movant to actually file a proper separate Points and Authorities as required by the Local Bankruptcy Rules.

The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

However, based on the brevity of the additional "Points and Authorities" section of the Mothorities, the court waives this defect.

Creditor recorded at least one tax lien against assets of the Debtor-in-Possession located in Tuolumne County, California, prior to Debtor-in-Possession's filing of the Chapter 11 Petition.

The value of all of Debtor-in-Possession's unencumbered assets at the time of filing the Chapter 11 petition, as reflected in the schedules, is as follows:

Schedule A - Real Property.....$ None

Amended Schedule B - Personal Property.....$44,831.67
Amended Schedule D - No Senior Liens
on Personal Property

Net Asset Value.....$44,831.67

Debtor has listed on Amended Schedule B (Dckt. 56) and claimed exemptions on Schedule C (Dckt 1) the interests in the following assets in the following amounts:

Description on Amended Schedule B		**Exemption on Schedule C**	**Value Stated on Amended Schedule B**
Cash		$2,000.00	$2,000.00
Checking/Savings		$12.04	$12.04
California 529 Plan for Granddaughter		$1,919.63	$1,919.63
Interest in CalPERS		100%	$0.00

Pickup Truck		$1,500.00	$1,500.00
Automobile		$9,750.00	$9,750.00
Airplane		$17,000.00	$17,000.00
Household Furnishings		$4,500.00	$4,500.00
Security Deposit		$1,650.00	$1,650.00
Interest in Law Firm		$3,500.00	$3,500.00
Interest in Aztec Aviation		$2,500.00	
Clothing		$0.00	$3,000.00
TOTAL - Value of Personal Property as Exempt			**$44,831.67**

Debtor-in-Possession states that the airplane has a purchase money security interest in favor of Steve and Gina Oliveria. Their lien against the airplane is approximately $13,148.00. At the time of purchase of the aircraft, the title document was signed by both owners and delivered to Steve and Gina Oliveria. However, Steve and Gina Oliveria never sent that document to the FAA. Debtor-in-Possession believes that is sufficient perfection since Steve and Gina Oliveria could use that signed title document to take possession of the aircraft at any time. The Creditor takes the position that the security interest is not perfected. Debtor-in-Possession states that for purposes of this Motion only, Debtor-in-Possession will adopt the position of the Creditor.

The value of the household goods and clothing have been listed above with a value of $7,500.00 must be deduced from the property potentially subject to the Internal Revenue Service tax lien since they are not subject to levy pursuant to 26 U.S.C. § 6334. (Personal property which is exempt from levy for the payment of a federal tax obligation.)

Additionally, the security deposit of $1,650.00 is the collateral of the lessor of the property and subject to that creditor’s pre-existing lien.

After adjusting for the $7,500.00 in exempt from levy personal property and the $1,650.00 security deposit subject to another creditor’s lien, the remaining value for the Internal Revenue Service collateral is $35,681.67. (The court’s calculation is slightly lower than that of the Debtor in Possession.)

It is further asserted that the interest in the CalPers retirement is not property of the estate as provided by ERISA. See *Patterson v. Shumate*, 504 U.S. 753 (1992). Therefore, it is not included in the calculation of the Internal Revenue Service secured claim pursuant to 11 U.S.C. § 506(a). The court does not make any adjudication of the Internal Revenue Service lien, if any, on the CalPERS retirement monies. *I.R.S. v. Snyder*, 343 F.3d 1171 (9th Cir. 2003).

The value of the CalPERS account on the date the petition was filed was $88,312.17. That amount was computed using the balance of the account on July 1, 2013, which was $85,741.73 and adding $2,570.44 in interest (6% CalPERS interest rate for one-half year).

Debtor-in-Possession states that the amount of the Creditor's lien against Debtor-in-Possession's CalPERS account on the date the petition was filed was $88,312.17.

FEBRUARY 5, 2015 HEARING

At the hearing, the court continued the hearing on the Motion to Value secured claim of the Internal Revenue Service to 10:30 a.m. on March 19, 2015. The court ordered that opposition was to be filed and served on or before February 20, 2015, and replies, if any, on or before February 27, 2015.

UNITED STATES' OPPOSITION

The United States filed an opposition to the instant Motion on February 20, 2015. Dckt. 109. The United States opposes the Motion on the grounds that the Debtor-in-Possession incorrectly concluded that the value of collateral for Internal Revenue Service's tax lien is zero for the assets which cannot be levied. The United States cite to *U.S. v. Barbier*, 896 F.2d 377, 379 (9th Cir. 1990), which found that there is "no indication that Congress intended section 6334 exemption from summary collection proceedings to frustrate the IRS's status, arising under section 6221, as a secured creditor." The United States asserts that the Debtor-in-Possession cannot carry his initial burden of proof of overcoming any presumption established by the stated value in the secured creditor's proof of claim.

Additionally, the United States argues that the Internal Revenue Service has a tax lien on the Debtor-in-Possession's ERISA-qualified pension plans. The United States argues that the bankruptcy does not extinguish the tax lien against the debtors' interest in the pension plan and the lien continues to exist outside of the bankruptcy proceeding, citing to *United States Internal Revenue Service v. Snyder*, 343 F.3d 1171, 1173 (9th Cir. 2003).

In conclusion, the United States argues the Motion should be denied because the Debtor-in-Possession cannot carry his initial burden of proof on the value of assets.

DISCUSSION

As the owner, the Debtor-in-Possession's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The Debtor in Possession has shown that the personal property of the Estate (there being no real property in the estate) which is subject to the lien of the Internal Revenue Service is $35,681.67. This include the value of the aircraft. There has been no determination by the court of the possible respective claims, but Debtor in Possession honestly discloses that the lien documents were not properly filed with the FAA for recordation of any interest of the competing creditors.

The Internal Revenue Services asserts that based upon controlling Ninth Circuit Law, the $7,500.00 value of household goods is included in the value of the collateral securing the claim. The Internal Revenue Service cites to *U.S. v. Barbier* in support for this conclusion which explicitly found that an Internal Revenue Service "tax lien may be secured by property that is exempt

from levy under section 6334(a)." *U.S. v. Barbier,* 896 F.2d at 379. Seeing as the Debtor-in-Possession has not provided any conflicting case law and Barbier explicitly allowing an Internal Revenue Service tax lien to attach to otherwise exempt property, the court finds that the Internal Revenue Service lien is, in fact, secured as to the $7,500.00 as well.

The United States also argues that the ERISA-qualified pension plan should be included as well. However, *United States Internal Revenue Service v. Snyder* explicitly states that an ERISA pension plan "cannot be used to secure the IRS's claim under § 506(a)" because it is not property of the estate. While the lien on the pension plan may exist outside of bankruptcy, for purposes of § 506(a), the ERISA pension plan is not property that can secure an Internal Revenue Service lien.

The court determines the secured claim of the Internal Revenue Service in this case to have a value of $43,181.67, with the balance to be provided for as an unsecured claim for any bankruptcy plan in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Patrick Greenwell ("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 pursuant to 11 U.S.C. § 506(a) is granted and the claim of Internal Revenue Service ("Creditor") secured by the property of the estate in this case has a value of $43,181.67, with the balance to be provided for as an unsecured claim for any bankruptcy plan in this case. The property of the bankruptcy estate subject to the lien of the Internal Revenue Service in this case is $43,181.67.

11. 14-23471-E-11 ERROL/SUZANNE BURR
DNL-10 Iain A. MacDonald

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH RAYMOND E. SHINE
2-19-15 [249]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on February 19, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Approval of Compromise is granted.

Susan Smith, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Raymond Shine ("Settlor"). The claims and disputes to be resolved by the proposed settlement are regarding a malpractice case, Sierra Count Case No. 7195 and Adversary Proceeding No. 14-02184.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit G in support of the Motion, Dckt. 253):

A. The Trustee shall receive $120,000.00 from Settlor in good funds within 14 calendar days of entry of the order approving the settlement

B. Within 7 calendar days of receipt of the settlement payment, the Trustee shall cause the malpractice case and the adversary proceeding to be dismissed with prejudice with all parties bearing their own attorney fees and costs.

C. The parties shall exchange mutual releases of all known and unknown claims in whatever legal theory or form. Settlor's release includes all proof of claim that have been filed or could be filed against the bankruptcy estate by him, "Shine, Compton & Nelder, APC" and/or "Shine & Compton, APC." The release by the Trustee includes all claims, including those belonging to the Debtors, against Settlor, "Shimne, Compton & Nelder, APC" and "Shine & Compton, APC," together with all current and former shareholders in, and members and employees of, the professional corporations "Shine, Compton & Nedler, APC" and "Shine & Compton, APC."

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

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

Probability of Success

Trustee argues that this factor weighs in favor of the settlement because Settlor is vigorously disputing the claims asserted by the Trustee. Furthermore, the Trustee would need to establish, among other things, causation and that "but for" the law firm's negligence, a more favorable result would

have been obtained, which is a difficult standard to meet. Settlor is also claiming to have an expert that would opine that the Debtors' title insurer would not have participated in the boundary case, adding more difficulty to establish liability and damages. While the Trustee believes that she would prevail, the probability is uncertain.

Difficulties in Collection

The Trustee is not aware of any difficulties that would be encountered in collection.

Expense, Inconvenience and Delay of Continued Litigation

Trustee argues that litigation would result in significant costs, based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. The Trustee states that the need for expert testimony and the complex legal issues would involve substantial costs and expense associated with the employment of expert witnesses. The Trustee estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Trustee projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation.

Paramount Interest of Creditors

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

Consideration of Additional Offers

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

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

The proposed settlement accomplishes settling all claims against the Debtors, bringing in $120,000.00 into the estate for the benefit of the estate and creditors. The proposed settlement releases any current or potential claims against the Debtors. Upon review of the motion and the proposed settlement, the terms are in the best interest of the estate and creditors and is approved.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Susan Smith,

the 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 to Approve Compromise between Movant and Raymond Shine (“Settlor”) is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit G in support of the Motion(Docket Number 253).

12. 14-23471-E-11 ERROL/SUZANNE BURR
DNL-9 Iain A. MacDonald

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH STOEL RIVES, LLP
2-19-15 [243]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on February 19, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Approval of Compromise is granted.

Susan Smith, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Stoel Rives LLP("Settlor"). The claims and disputes to be resolved by the proposed settlement are the estate's release of any claims against the Settlor, including professional negligence, in exchange for the Settlor's release of any claims against the estate, including pre-petition and post-petition fees and expenses approximating $120,000.00.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit E in support of the Motion, Dckt. 247):

A. The Trustee on behalf of the Debtors and the bankruptcy estate, shall release the Settlor and its attorneys, including Michael B. Brown, Gregory Gatto, Uzunma A. Kas-Osoka, Sigrid Waggener, Susan Branch, Randall Faccinto, Shuray Ghorishi, Louis Ferreira, Juliet H. Cho, Edward C. Duckers, Bao M. Vu, and W. Christopher Posner of all claims or potential claims for their representation of the Debtors in the boundary case.

B. The Settlor, on behalf of itself and its parties, shall release the Trustee, the bankruptcy estate, and the Debtors, from the compensation claim and any related claim

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

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

Probability of Success

Trustee argues that this factor weighs in favor of the settlement because Settlor is vigorously disputing the claims asserted by the Trustee. Furthermore, the Trustee would need to establish, among other things, causation and that "but for" the law firm's negligence, a more favorable result would have been obtained, which is a difficult standard to meet. Settlor is also claiming to have an expert that would opine that the Debtors' title insurer would not have participated in the boundary case, adding more difficulty to establish liability and damages. While the Trustee believes that she would prevail, the probability is uncertain.

Difficulties in Collection

The Trustee is not aware of any difficulties that would be encountered in

collection.

Expense, Inconvenience and Delay of Continued Litigation

Trustee argues that litigation would result in significant costs, based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. The Trustee states that the need for expert testimony and the complex legal issues would involve substantial costs and expense associated with the employment of expert witnesses. The Trustee estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Trustee projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation.

Paramount Interest of Creditors

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

Consideration of Additional Offers

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Susan Smith, 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 to Approve Compromise between Movant and Stoel Rives, LLP ("Settlor") is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit E in support of the Motion(Docket Number 247).

13. 14-23471-E-11 ERROL/SUZANNE BURR
MF-5 Iain A. MacDonald

MOTION FOR COMPENSATION FOR MATTHEW J. OLSON, DEBTORS' ATTORNEY
2-19-15 [238]

Final Ruling: No appearance at the March 19, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Attorneys for Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on February 19, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Macdonald Fernandez LLP, the Attorneys ("Applicant") for Debtor in Possession ("Client"), makes a first and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period January 1, 2014 through February 19, 2015. The order of the court approving employment of Applicant was entered on May 9, 2014, Dckt. 31. Applicant requests fees in the amount of $43,623.00 and costs in the amount of $877.74.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing the petition, attending meeting of creditors, defending a motion to convert, drafted and defended Chapter 13 plan, and drafted fee application. The estate has $237,378.00 of unencumbered monies to be administered as of the filing of the application. Dckt. 228 The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Commencement of Case: Applicant spent 31.70 hours in this category. Applicant assisted Client with preparing the petition, amending the petition, and attending the Chapter 13 meeting of creditors.

Retention of Professionals: Applicant spent 6.1 hours in this category. Applicant prepared applications to retain special litigation counsel on behalf of the Chapter 13 estate.

General Case Administration: Applicant spent 1.3 hours in this category. Applicant assisted Client with understanding their duties, responding to inquiries, meeting with the Debtors, and necessary revisions to the schedules and statements.

Plan and Disclosure Statement: Applicant spent 14.90 hours in this category. Applicant drafted chapter 13 plan, and amended 13 plan, a motion to confirm the proposed amended plan, and defended objections to the plan.

Adversary Proceedings: Applicant spent 43.20 hours in this category. Applicant assisted Debtors and special litigation counsel with removal and analysis of bankruptcy issues related to the Burr v. Shine matter, and defended a motion to convert the Chapter 13 case to Chapter 7.

Relief from Stay Matters: Applicant spent 8.40 hours in this category. Applicant negotiated the terms of a stipulation for relief from stay and appeared at the hearing on approval of the proposed stipulation.

Exemptions: Applicant spent .50 hours in this category. Applicant asserted certain exemptions under state law for the bankruptcy case.

Fee Application: Applicant spent 4.70 hours in this category. Applicant prepared the instant fee application.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The

persons providing the services, the time for which compensation is requested, and the hourly rates are:

Services	**IAM**	**RF**	**MJO**	**KM**	**Total Hours**
Commencement of Case	.50	.40	30.80	$0.00	31.70
Retention of Professionals	0.00	0.00	6.10	$0.00	6.10
Adversary Proceedings/ Contested Matters	0.00	0.00	43.20	$0.00	43.20
Plan and Disclosure Statement	0.00	0.00	14.90	$0.00	14.90
Case Administration	.30	0.00	1.00	$0.00	1.30
Relief from Stay Matters	0.00	0.00	8.40	$0.00	8.40
Exemptions	0.00	0.00	.50	$0.00	.50
Fee Application	0.00	0.00	2.70	$2.00	4.70
Totals	.80	.40	107.60	$2.00	$110.80

Breakdown of time spent by lawyer.

Attorney	**Initials**	**Hours**	**Hourly Rate**	**Total**
Iain A. Macdonald	IAM	.80	$425.00	$340.00
Reno F.R. Fernandez III	RF	.40	$425.00	$170.00
Matthew J. Olson	MJO	107.60	$350.00	$37,660.00
Kathleen Miller	KM	2.0	$150.00	$300.00
TOTALS		110.80		$38,470.00

Services	**Time**	**Attorney**	**Total Fees Computed Based on Time and Hourly Rate**

Commencement of Case	31.70	IAM, RF,MJO	$11,162.50
Retention of Professionals	6.10	MJO	$2,135.00
Adversary Proceedings/ Contested Matters	43.20	MJO	$15,120.00
Plan and Disclosure Statement	14.90	MJO	$5,215.00
Case Administration	1.30	IAM, MJO	$477.50
Relief from Stay Matters	8.40	MJO	$2,940.00
Exemptions	.50	MJO	$175.00
Fee Application	4.70	MJO, KM	$1,245.00
Total Fees For Period of Application			$38,470.00 (Voluntarily reducing to 34,623.00)

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $877.74 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Facsimile- 50 pages	$0.20	$10.00
Postage		$64.64
Photocopying-1,910	$0.10	$191.00 FN.1
Credit Reports		$70.00
Filing Fee		$281.00
Telephone Court Appearance		$67.00
Total Costs Requested in Application		$683.64

FN.1. The Applicant sought reimbursement for copies at the rate of $0.20 per page. However, in this District, the court only allows a rate of $0.10 per page. The court sua sponte reduced this on behalf of the Applicant.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Interim Fees in the amount of $34,623.00 (having been voluntarily reduced by 10% by applicant) pursuant to 11 U.S.C. § 331 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case under the confirmed Plan. While this case was originally filed under Chapter 13 of the Bankruptcy Code, it is a complex proceeding which involves multiple trials and other proceedings.

Costs and Expenses

Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as on-line access to bankruptcy and state law and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include facsimile. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be changed in additional to the professional fees requested as compensation. The court disallows $10.00 of the requested costs.

The first and final Costs in the amount of $673.64 pursuant to 11 U.S.C. § 331 and 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 under the confirmed Plan.

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

Fees	$34,623.00
Costs and Expenses	$673.64

pursuant to this Application as first and final fees pursuant to 11 U.S.C. § 331 and 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 Macdonald Fernandez LLP (“Applicant”), Attorney for 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 Macdonald Fernandez LLP is allowed the following fees and expenses as a professional of the Estate:

Macdonald Fernandez LLP, Professional Employed by Debtor in Possession

Fees in the amount of $34,623.00
Expenses in the amount of $673.64,

IT IS FURTHER ORDERED that the costs of $10.00 are not allowed by the court.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case under the confirmed Plan.

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

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

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

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

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

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

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

The Hearing on the Motion to Dismiss the Chapter 7 Bankruptcy Case is granted and the case is dismissed

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

Keven A. Sears and Bree Lynn Sears ("Debtors") filed a prior chapter 13 Petition (Case No. 13-27044-E-13C) on May 23, 2013. That case was dismissed

on May 18, 2014, with no proposed Plans being confirmed.

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

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

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

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

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

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

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

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

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

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

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

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

Local Standards: Housing and Utilities; Mortgage/Rent Expense

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

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

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

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

Other Necessary Expenses: Life Insurance

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

Other Necessary Expenses: Telecommunication Services

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

Summation

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

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

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

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

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

APPLICABLE LAW

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

> (b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).
>
> (2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of--
>
> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $7,4751, whichever is greater; or
>
> (II) $12,4751.
>
> (ii) (I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue

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

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

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

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $1,8751 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such

expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

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

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

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

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

divided by 60.

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

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

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

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

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any

information provided to demonstrate that additional expenses or adjustments to income are required.

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

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

(II) $12,4751.

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

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

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

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

FEBRUARY 5, 2015 HEARING

At the hearing, the Debtors disputed the analysis and evidence presented by Movant and requested time to file and serve their opposition as provided in Local Bankruptcy Rule 9014-1(f)(2). The court set this matter for final hearing at 10:30 a.m. on March 19, 2015. The court ordered that opposition to the Motion shall be filed and served on or before February 20, 2015, and replies, if any, shall be filed and served on or before February 27, 2015.

DEBTORS' OPPOSITION

The Debtors filed an opposition to the instant Motion on February 20, 2015. Dckt. 153.

First the Debtors argue that the U.S. Trustee nor the Chapter 7 Trustee have found any issues on the Debtors' Form B22.

The Debtors then argue that the Debtors' economic situation has materially changed since they filed the first Chapter 13 bankruptcy on May 23, 2013 and the second case on May 21, 2014. The Debtors argue that these changes are reflected in the amended Form B22 filed upon conversion on December 4, 2014.

As to the income of Debtor Kevin Spears, the Debtors assert that the public defender's contract limited his ability to attract any private cases and derived no income therefrom since August 1, 2014. The Debtors point to the Declaration of Debtor Kevin Sears and the bank statements provided by the Debtors to the Trustee's office and to Movant's attorney.

As to the business expenses of Bree Sears, the Debtors assert that they were negligently left out of the original filing in this case but were included in the Chapter 7 Form B22 filed on December 4, 2014. Dckt. 126. The Debtors argue they are valid and appropriate expenses incurred monthly by Debtor Bree Sears to enable her to perform her duties pursuant to her contract as a web designer.

The Debtors state that the Movant's reliance on a single month's bank statement is not proper and that a more accurate description and itemization of Debtor Kevin Sears was included in the original filing and Debtor Bree Sears expenses are better explained in Debtor Bree Sears declaration.

Debtors further argue that the expenses for secured debts ($3,255 for the on-going first mortgage payment and an additional $850.62 to cure the arrears) is proper. The Debtors are in arrears in the amount of $51,037 and if the Debtors were given the opportunity to pay that off in five years, it would equal $850.62 a month. The Debtors calculated the amounts this way to determine what expenses the Debtors would incure in a five year Chapter 13 plan. The Debtors argue that they are appropriate deductions under Form B22 even though the Debtors may lose their house.

Debtors argue that the $100.00 deduction taken for life insurance payments and $37.00 per month for telecommunication expenses are proper and valid expenses and are included on the approved Form.

The Debtors conclude by addressing the disposition of money received by Debtors from the Chapter 13 Trustee after the conclusion of their first chapter 13 case. Debtors assert that the funds were used ot pay mortgage and tax arrears as reported in the filing of the second Chapter 13 case and are no longer in the Debtors' possession.

MOVANT'S REPLY

On February 27, 2015, the Movant filed a reply to the Debtor's opposition. Dckt. 159.

The Movant argues that Debtor Kevin Sears has had a contract with Butte County since February 2013. In the two Chapter 13 cases, the Debtor has attempted to show he was making more than enough to fund a five year plan to pay his secured creditors but not his unsecured. However, now that the case has been converted to a Chapter 7, Movant argues that Debtor manipulated his income just enough to pass the means test by claiming he has no private practice clients. Furthermore, the Debtor's declaration does not specifically support the claim that he has no private clients.

As to the Debtors' expenses, the Movant argues that the Debtors have made no adjustments in the level of expenses even though Debtor has stated he derives no income from private pay clients since August 1, 2014. The Movant states that due to the lack of private clients, there would be a reduction of

variable costs.

The Movant then argues that Debtor Bree Spears self-employment reporting is not accurate. The Debtor reports her gross receipts to be $2,941.00 and reports expenses of $865.00. Movant argues that hte documents provided indicate an actual average expenses of about $88.00 per month.

As to the secured debts, the Movant argues that the Debtors do not address the additional claim of deduction for the 2007 BMW 328i in the amount of $436.00. Furthermore, the Movant states that the Debtors have failed to file a Statement of Intention as to the vehicle, in which the Movant argues is so that the Debtors can preserve the ability to claim the deduction.

Lastly, the Debtors received a refund in the prior Chapter 13 case of $15,427.88 on or after August 15, 2014. The Debtors argue that the funds were used to pay mortgage and tax arrearages as reported in the second Chapter 13 case. However, the Movant argues that there is nothing in the record as to where the refund went.

DISCUSSION

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

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

Finally, these Debtors have significant monthly income (exceeding $140,000 annually) and have twice failed to prosecute Chapter 13 cases in good faith. It appears that the Chapter 7 Trustee can, at best, generate *di minimis* monies for creditors. These Debtors' obligation are primarily consumer debts, with the one exception to that for the one active creditor in this case, Cory Adams. The obligation to Cory Adams is that as determined by the California State Bar for monies which Debtor Kevin Sears improperly disbursed from his trust account. Since filing the first Chapter 13 case on May 23, 2013, the Debtors have exhausted more than 20 months of time, money, and resources in trying to not pay Mr. Adams. Along the way the Debtors, though representing to the court in the Chapter 13 cases that they were paying their taxes, managed to build up post-petition tax defaults.

The contentions by these Debtors that misstatements under penalty of perjury by them were "mere errors," made in the rush to file are not credible. Debtors have stood by time and again in advancing Chapter 13 Plan that they have substantial income each month. In justifying the proposed plan in this case, not only did Mr. Sears repeatedly testify that he had the substantial income, but the Debtors stood by the statements under penalty of perjury in the Schedules that there were no expenses for Mrs. Sears' business. This allowed them to create the appearance on original and amended Schedules I and J that they had just enough money to fund a plan which allowed them to retain their home, make a large monthly mortgage payment, make a substantial mortgage arrearage payment (to cure an arrearage in excess of $51,000.00), retain their BMW, retain two other cars for the co-debtor and an adult daughter, pay a tax

arrearage, and pay a small dividend to creditors holding general unsecured claims. Original and First Amended Plan, Dckts. 5 and 75.

Debtors received the anticipated refund from the Chapter 13 Trustee from their prior case which was dismissed. 13-27044, dismissed on May 18, 2014. This failure to be truthful and candid was one of the factors leading to the dismissal of the first Chapter 13 case. In the court's findings of fact and conclusions of law for the order dismissing the first Chapter 13 case, the court states,

> "From reviewing the opposition to the Motion to Dismiss, the court concludes that this case is not being actively prosecuted in good faith. Rather, it appears that the Debtors have not come to grips with the reality of being a debtor. The plan being proposed consists mainly of the Debtors maintaining their current lifestyle and not paying creditors (other than $4,056.40 to live in their current home and $269.00 to pay their non-dischargeable delinquent taxes). The inability to accurate state income and expenses is not credible, as a persons average expenses do not fluctuate with income. Rather, this testimony indicates that the Debtors made up the expense number to fit the plan they so desired to prevent the foreclosure on their home.
>
> The pleading titled Motion to confirm the Second Amended Plan is so deficient that it cannot be granted. It appears to have been a last minute pleading to try and further delay the dismissal of this case."

13-27044; Civil Minutes, Dckt. 115.

Debtors take credit for converting this case to one under Chapter 7 "voluntarily." Notice of Conversion filed on November 17, 2014 at 8:55 p.m., Dckt. 109. However, the "election" was made on the eve of the November 18, 2014 final hearing on a motion to dismiss this bankruptcy case. It was also after the court posted it's tentative ruling which was to grant the motion and dismiss the bankruptcy case. The Civil Minutes from the hearing, which was conducted to consider whether the case should be dismissed , include the following findings and conclusions.

> "It is clear that Debtors have continued in their plan focused on keeping their house, irrespective of the cost, continuing to drive a BMW (irrespective of the two Debtors owning two other cars free and clear of any liens), while not explaining where all of the unpaid tax monies from 2013 have been diverted (in excess of $30,387 combined unpaid state and federal taxes, Proofs of Claims Nos. 3 and 6) while the Debtors were safely ensconced in the prior Chapter 13 case.
>
> In the prior Chapter 13 case the Debtors stated under penalty of perjury that their monthly expenses, exclusive of the mortgage to be paid through the proposed Chapter 13 Plan, were $7,934.50 a month. Amended Schedule J, 13-27044 Dckt. 63. Debtor Kevin Sears now testifies under penalty of perjury that his income was $144,673.00 in 2013. Dckt. 74. Though

not disclosed on the Statement of Financial Affairs, Amended Schedule I states that Co-Debtor Bree Sears has additional income of $34,152.00 a year Dckt. 48. Combined, the court projects that in 2013 Debtors had $178,825.00 in income, which averages $14,902.00 a month. After deducting the $7,934.50 in expenses (without regard as to whether they are reasonable), the Debtors had $6,097.50 in monies left over. This is greater than the $4,707.53 plan payment (original Plan, 13-27044 Dckt. 5), $4,781.60 plan payment (first amended plan, *Id.* Dckt. 25), $5,281.61 plan payment (third amended plan, *Id.* Dckt. 60) in 2013.

The unpaid tax monies have just "disappeared" from the bankruptcy estate in the prior case or in this case. Additionally, upon the closing of the prior bankruptcy case the Chapter 13 Trustee refunded $15,427.88 to the Debtor. Trustee's Final Report, 13-27044 Dckt. 126. The Debtor only paid $40,669.79 into their plan, *Id.*, which over 11 months of the plan averages only $3,697.25. This $15,427.88 does not appear to be accounted for in Schedule B either as monies received (in a bank account) or as an account receivable (if not yet disbursed by the Chapter 13 Trustee when this second bankruptcy case was filed three days after the prior case was ordered dismissed).

...

Even though they own two cars free and clear, the Debtors believe that they in good faith want to divert monies so that they can have and drive a third car, the BMW, for the two of them. Though they were protected in the prior bankruptcy case, the Debtors failed to pay $30,000.00 in income taxes and are unable to explain where that $30,000.00 was diverted to by the Debtors. Even though they had been in a prior bankruptcy case for a year, when filing the present case the financial information was rife with errors and material non-disclosures. Though receiving more than $15,000.00 back from the Chapter 13 Trustee from the prior case, those monies have just 'disappeared.'

...

The Debtors have elected to convert this case to one under Chapter 7. Though converted, Debtors' conduct may still warrant dismissal of this (the Debtors' second) bankruptcy case. Though cause exists, the correct result is for this case to be converted to one under Chapter 7 as done by these Debtors.

The Debtors and Movant have been locked in a struggle, by which Movant has been prevented by the automatic stay from enforcing his right to be paid by the Debtor for the binding arbitration award he received from the State Bar against Mr. Sears. The Movant has pending a Motion to have this obligation determined nondischargeable in this Adversary Proceeding.

From the prosecution of this case, the prior case, and this claim by Movant and the Debtors, the court is convinced

> that dismissal will just begat further bankruptcy filings by the Debtors. This will require the Movant to incur further costs and expenses in working to protect his rights against the Debtors."

Civil Minutes, Dckt. 117. The court denied the motion to dismiss without prejudice, considering the substantial income being generated by the Debtors, their lack of truthfulness in disclosing income and expenses, the lack of candor in disclosing assets, and the inaccuracy of statements under penalty of perjury, so as to afford an independent fiduciary (the Chapter7 Trustee) the opportunity to review the case and determine if there were any significant assets to administer.

The Chapter 7 Trustee has demonstrated that there are no significant assets to administer. The Debtors failed to Schedule the refund they were due from the Chapter 13 Trustee from the first Chapter 13 case when they filed the current case. In their October 30, 2014 Opposition a motion to dismiss (Dckt. 97), Debtors assert that the pre-petition obligation of the Chapter 13 Trustee in the first bankruptcy case is not property of the estate. No legal authority is stated for this proposition. Debtors merely argue that if it had been "received" pre-petition, then it would have been disclosed. However, 11 U.S.C. § 541 does not provide that only monies received prior to the commencement of a bankruptcy estate is property of the estate, but all property, real and personal, rights and interests (whether cohoate, incohate, contingent, or disputed) is property of the bankruptcy estate. 11 U.S.C. § 541(a). This obligation of the Chapter 13 Trustee to refund the monies paid into the first Chapter 13 case, but not disbursed to creditors, was nothing more than an accounts receivable of the Debtors.

Further, even if a pre-petition accounts receivable was not property of the estate pursuant to 11 U.S.C. § 541(a), Debtors admitting that "Had the money been received prior to the filing of this [second] case...it would have been property [of the bankruptcy estate]" admits that it had to be property of the Chapter 13 estate. *Id.* at p. 4:14-16. 11 U.S.C. § 1306 provides that in addition to property of the estate defined in 11 U.S.C. § 541, property of the estate in a Chapter 13 case includes "[a]ll property of the kind specified in [§ 541] that the debtor acquires after the commenced of the [Chapter 13] case but before the case is closed, dismissed, or converted to a case under chapter 7, 11 or 12 of this title, whichever occurs first;...."

However, the monies were not provided for in any Chapter 13 Plan, and as now admitted by Debtors, either "set aside" to pay taxes (Response, Dckt. 97) or spent to pay the mortgage and taxes (Opposition, Dckt. 153). Though stated in the Opposition to the current motion (Dckt. 153)_that Bree Sears is testifying that these monies have been paid, she fails to provide any such testimony. Declaration, Dckt. 156.

After the Debtors have repeated stated under penalty of perjury that they have substantial monthly income, when it served their purpose to create the appearance of trying to confirm a Chapter 13 Plan and maintain their lifestyle, they now only offer short, conclusory testimony under penalty of perjury that they actually make less than they were representing to the court as late as November 2014. Declarations, Dckts. 155, 156. The court does not find such conclusions by the Debtors credible.

In these two bankruptcy cases which have spanned now almost two years with no confirmed plan, there have been only two active parties – the Debtors and Cory Adams (through his counsel). Mr. Adams is a former client of Kevin Sears for whom the California State Bar has made the determination that the monies received for the representation exceeded the value of the representation by $30,000.00. 13-270544, Proof of Claim No. 9; Proof of Claim No. 9 filed in this case.

Though representing to the court that Debtors were paying their income and self-employment taxes during the first bankruptcy case, the Internal Revenue Service has now filed a proof fo claim for the failure of Debtors to pay $27,810.00 in their 2013 income taxes and the California Franchise Tax Board for Debtors failure to pay $2,577.00 in 2013 income taxes. Amended Proof of Claim No. 3. Though generating substantial income in 2013 ($144,476.00 as reported on the Original and Amended Statement of Financial Affairs, Question 1; Dckts. 1, 48), it appears that no taxes were paid and those monies were diverted by the Debtors (as the fiduciaries of the Chapter 13 estate in the first bankruptcy case).

The Debtors have demonstrated, and documented over the two bankruptcy cases, that they are unable to accurately and truthfully provide information to the court, Chapter 13 Trustee, creditors, and other parties in interest. The only party in interest (other than the Chapter 13 Trustee) appearing in this case (other than filing proofs of claim or request for special notice) is Cory Adams, Kevin Sears former client. The same is true in the first bankruptcy case, with the only exception being that Bank of New York Mellon filed one opposition to the Debtors' original Chapter 13 Plan. 13-27044, Dckt. 28. The objection was limited to (1) the Debtors understating the amount of the arrearage, and (2) Debtors' income and expense information is inaccurate because they fail to provide for paying state and federal income and self-employment taxes. After that one opposition filed on July 22, 2013, no one other than Cory Adams appears in that bankruptcy case through its dismissal on May 18, 2014, and continuing through this current case to today's hearing.

If the Debtors, two years ago, had charted a course to propose and confirm a good faith Chapter 13 plan, they may well have been almost half way through it and moving toward a financially rehabilitated future. Counsel for Cory Adams has argued (for which the court has not received testimony and made findings) that the bankruptcy filings are motivated only by Kevin Sears ill will to avoid paying Cory Adams (who is currently incarcerated relating to the matter for which Kevin Sears was engaged as counsel) the monies as determined by the California State Bar.

In looking at how the Debtors have prosecute their two bankruptcy cases, the multiple misrepresentations of their finances, the plans proposed, and their conduct, the court concluded that they had not prosecuted the Chapter 13 cases in good faith. This has not been for the want of knowledgeable, experienced bankruptcy counsel. They have been represented by one of the well known, reputable bankruptcy attorneys in the norther part of our District. He has confirmed many plans over the years and helped many debtors confirm bankruptcy plans in complex cases. The court is confident that this is a situation where well intentioned, simple minded debtors are led down the garden path of failure by a wily attorney seeking to abuse the law for his or her personal gain.

The Debtors opposition raises more concerns than answers provided by Debtors. The statements under penalty of perjury, testimony, and arguments of Debtors once again appearing to provide information for the sole purpose of passing the Means Test. The substantial refund the Debtors received along with the income and expenses numbers not matching up all add to the issues of whether the instant case is an actual reflection of the Debtors' finances.

Under 11 U.S.C. § 707(b), that the presumption of bad faith does in fact exist. The Debtors have not filed any supplemental Schedules in order to reflect a new financial reality. The court does have the Schedules filed by the Debtors on May 21, 2014 and August 7, 2014 to determine and analyze the Debtors' finances, at a time they were not trying to convince the court that their income was as low as possible.

On considering whether granting Chapter 7 relief is a abuse for purposes of 11 U.S.C. § 707(b), the court may also consider whether the debtor filed the bankruptcy petition in good faith based on the totality of the circumstances of the debtor's financial situation demonstrates abuse. Here, the vast weight of the evidence is that the Debtors do not suffer from an income problem. Rather, they have an expense problem - "needing" to pay a monthly mortgage (including arrearage to be cured over five years) payment of $4,115.63 and a BMV vehicle payment of $181.43 (notwithstanding Debtors owning two other cars free and clear). Amended Chapter 13 Plan, Dckt. Dckt. 75. Giving up the house frees up over $4,000.00 a month, and if the creditor conducts a nonjudicial foreclosure sale, there will be no deficiency. The BMW 328i is scheduled by the Debtors as having a value of $11,348, which could be sold to pay that secured claim in full and provide Debtors with approximately $1,500.00 net proceeds (less costs of sale). Schedule B, Dckt. 1, and Proof of Claim No. 5. The Debtors' "financial distress" exists only because they insist on creating that distress themselves.

Based on all of the evidence provided, the presumption of abuse does arise.

Additionally, cause exists to dismiss this case as provided in 11 U.S.C. § 707(a). The court denied the earlier motion to dismiss to allow an independent fiduciary to determine if there were any assets to administer, rather than letting the Debtors slip away from their ongoing misrepresentations. The Trustee has not opposed the present Motion, only the Debtors. There are no significant assets for the Trustee to administer. FN.1.

FN.1 The court notes that on February 17, 2015, the Chapter 7 Trustee filed a pleading titled "Report of Sale." Dckt. 151. In it, the Chapter 7 Trustee states that on January 15, 2015, he served a notice of an intend to allow the Debtors to "buy back the equity in his/her business goodwill for $5,000.00. In reviewing the Notice of Intent, the court notes that (1) the property being sold is identified as "business goodwill," (2) no business is identified as to which the good will relates, and (3) no other property is identified in the Notice. Dckt. 140.

No order pursuant to 11 U.S.C. § 363(b) has been entered by the court. While 11 U.S.C. § 363(b) states that "The trustee, after notice and hearing, may use, sell or lease property, other than in the ordinary course of business, . . .," it does not state that such sale is determined valid by the trustee.

Rather, 11 U.S.C. § 102(a) provides that the term "after notice and hearing" means after (1) "after such notice as is appropriate in the particular circumstances" and (2) "such opportunity for a hearing as is appropriate in the particular circumstances." It is for the court to determine whether these two conditions have been met, not for ad hoc determinations by the individual trustees. In the context of this Notice, the court is hard pressed to identify what goodwill was proposed to be sold.

At best, the Chapter 7 Trustee may have a *di minimis* amount of monies to distribute, which will be consumed by priority tax claims (for the taxes which were not paid during the prior Chapter 13 case). The Chapter 7 Trustee has not unearthed any significant assets or recovery of transfers for these Debtors.

Cause exists to dismiss this case based on the Debtors failure to provide accurate information and to prosecute the Chapter 13 cases. Through the two non-productive Chapter 13 cases the Debtors have unreasonably delayed the creditors in the exercise of their rights, which has resulted to prejudice to the creditors. The only active creditor in this case, Cory Adams, has been unable to prosecute and enforce his award of $30,000.00 against Kevin Sears during the two years of non-productive bankruptcy cases. During that time, monies that were to pay taxes have disappeared, the tax debt growing. The Chapter 13 refund from the first bankruptcy case was taken in and dissipated. But for the non-productive bankruptcy cases Mr. Adams could have sought a levy against Kevin Sears' income or the pre-petition refund due from the Chapter 13 Trustee from the first bankruptcy case.

The court finally notes that even if the Chapter 7 case were to proceed, its most significant (other than nondischargeable taxes) creditor with an unsecured claim, Cory Adams, has pending a nondischargeability action. It seeks to have the $30,000.00 debt determined by the California State Bar to be nondischargeable. The grounds allege a breach of fiduciary duty for Kevin Sears having transferred the $30,000.00 from his trust account to himself, rather than just the portion he was entitled. While Mr. Adams has not actively prosecuted that Adversary Proceeding (apparently banking on obtaining the dismissal of this bankruptcy case), if he is correct, the Chapter 7 case would be for naught with respect to the vast majority of the unsecured obligations (88%) of the Debtors being nondischargeable (student loans, taxes, and Mr. Adams, if he were to prevail in the Adversary Proceeding). FN.2.

FN.2. The court notes that Kevin Sears has not actively defended the Adversary Proceeding, instead merely seeking to continue deadlines. In rejecting Kevin Sears request that the Adversary Proceeding deadlines be extended, the court stated:

> "Though this Adversary Proceeding has been pending for fourteen months, little has transpired. Most of the battles between the Plaintiff and the Defendant-Debtor have been in the bankruptcy case fighting for/against confirmation and seeking to dismiss/maintain the bankruptcy case. Though the Defendant-Debtor and his co-Debtor are highly compensated and have gross income of $172,476.00 (Schedule A, Dckt. 1, 14-25376). On Amended Schedule J the Defendant-Debtor and co-Debtor corrected this information to state gross income of $218,496 a year. Notwithstanding such substantial income,

confirmation of a Chapter 13 Plan eluded the Defendant-Debtor and his co-Debtor.

...

The Original Scheduling Order in this Adversary Proceeding set a March 31, 2014 close of discovery. Order, Dckt. 12. Pursuant to the stipulation of the parties, the court extended the close of discovery to October 15, 2014. Order, Dckt. 19. On October 15, 2014, the day ordered for close of discovery as extended pursuant to the first stipulation, the Parties submitted a second stipulation to extend discovery to February 16, 2015. Second Stipulation, Dckt. 23. The Second Stipulation provides no explanation as to why discovery has not been conducted over the past fourteen months or why the Parties have not completed discovery as they represented to the court they would so do in the first stipulation.

...

Defendant-Debtor further states that there have been on settlement discussions, but possibly after discovery the parties may be able to rationally resolve this matter. Such statements are not consistent with this Adversary Proceeding which has been pending for fourteen months and two years of Chapter 13 Chapter 13 cases in which the Defendant-Debtor and Plaintiff could have rationally resolved this dispute.

Defendant-Debtor reports that the Plaintiff continues to be incarcerated in Southern California. The Parties seek to avoid the cost and expense of having to depose the Plaintiff. It further states that Plaintiff intends to take the Defendant-Debtors deposition and that the Defendant-Debtor wants to take the deposition of the Plaintiffs criminal defense attorney.

No explanation is provided as to why these two, relatively simple, declarations have not been taken after fourteen months in this Adversary Proceeding. Further, Defendant-Debtor does not provide any indication as to why he rationally would need to take Plaintiffs criminal defense attorneys deposition over a dispute relating to fees which Defendant-Debtors has been order through arbitration to repay to the Plaintiff.

Status of Adversary Proceeding

What is eluding the court is what complicated discovery is required which could not, and should have been conducted during the fourteen months that this Adversary Proceeding has been pending. It appears that there can be little factual matters in dispute. If a binding arbitration has been conducted and specific findings made, no party has asserted that such determinations can be ignored or relitigated by this court. It appears that possibly some legal issues concerning the attorney-client relationship, the obligation to hold retainers in an attorneys client trust account, and the

> fiduciary duties and relationship which may exist between an attorney and his or her client."

13-02285; Civil Minutes for Adversary Proceeding Pre-Trial Conference, Dckt. 26.

Kevin Sears prosecution of his defense in this Adversary Proceeding is an inactive as his prosecution of the Chapter 13 case. Coming in at the Pre-Trial Conference to request more time to conduct one or two depositions which he has failed to take during the prior fourteen months does not demonstrate a good faith prosecution of a case. While Cory Adams is the Plaintiff and has done little to prosecute the Adversary Proceeding (again, apparently banking on the bankruptcy case being dismissed), that does not explain Kevin Sears failure to take advantage of the inaction and beat back this alleged breach of fiduciary duty for the $30,000.00 claim, if he was actually prosecuting his bankruptcy case and not merely seeking improper and prejudicial to creditors delay.

The court also notes that one of the purported depositions is of the criminal defense attorney who succeeded Kevin Sears in representing Cory Adams. It was not explained as to why, when the issue in the Adversary Proceeding is Kevin Sears disbursing monies from the client trust account for which he was not entitled, the relevance of taking the deposition of the successor criminal defense attorney.

Kevin Sears and Bree Lynn Sears have been provided multiple opportunities to provide truthful and accurate information, and have failed. They have been provided multiple opportunities to prosecute their cases, and they have failed. Their conduct has been to cause unreasonable delay and visit upon creditors unnecessary and improper prejudice. The prosecution of this as a Chapter 7 also constitutes an abuse of the Bankruptcy Code and Chapter 7.

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

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