UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

March 27, 2014 at 10:30 a.m.

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1. 12-91912-E-7 SSA-3 | **GEORGE/LORI AZEVEDO** | **Brian S. Haddix** | **MOTION FOR COMPENSATION FOR STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY(S), FEES: $4,393.00, EXPENSES: $130.84** **2-21-14 [47]**

DISCHARGED 10-22-12

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on February 21, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Final Ruling: The First and Final Application for 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 respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Steven S. Altman, Law Office of Steven Altman, PC, Counsel for the Chapter 7 Trustee, Michael D. McGranahan, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period February 22, 2013 through February 5, 2014. The order of the court approving employment of counsel was entered on March 12, 2013.

Description of Services for Which Fees Are Requested

Case Administration: Counsel spent 1.8 hours in this category for total fees of $418. Counsel transmitted appointment documents to the U.S. Trustee's Office and to the trustee; reviewed Trustee's analysis concerting sale and transfers between Debtors and third parties.

Fee Applications: Counsel spent 3.3 hours in this category for total fees of $825. Counsel prepared initial application to appoint counsel; reviewed petition and statement of affairs; performed conflict check; prepared supporting documents for appointment, including Order; prepared first and final fee application and supporting documents; and prepared notice and service of documents to creditors and interested parties.

Litigation: Counsel spent 10 hours in this category for total fees of $2,500. Counsel prepared preliminary case research into legal theories in favor of the estate with claimant and transferee Silva; prepared follow up letter to counsel Silva concerning defenses to either preference of fraudulent conveyance actions; reviewed documents obtained; prepared preference/fraudulent conveyance complaint; prepared letter to counsel demanding answer to complaint; reviewed answer and cross-complaint; prepared first status conference statement for court and attending hearing; conference call with counsel; conferences regarding settlement of claims; prepared Initial 26F case disclosures; prepared settlement agreement and supporting documents in favor of settlement and approval by Judge Sargis.

Claims Administration: Counsel spent 1 hour in this category for total fees of $250. Counsel reviewed all claim in estate and particular attention to Sanchez claim advanced in case and provided Trustee advisement of claims.

Asset Analysis and Recovery: Counsel spent 1.6 hours in this category for total fees of $400. Counsel reviewed case file and transmittal documents with Trustee concerning payment of dairy claim involving debtors and Silva and other possible preference claim; reviewed prior memo received by Trustee; reviewed UCC-1 documents concerning perfection of security agreements or lapses and releases related to sale transactions with Debtors.

DISCUSSION

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).

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

(a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful settlement of preference/fraudulent conveyance action for the benefit of the Estate. The estate has $16,758.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are $250.00/hour for counsel Steve Altman and $90.00/hour for paralegal Dawn Darwin. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $4,393.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $130.84 for copies and postage. The total costs in the amount of $130.84 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	$4,393.00
Costs and Expenses	$ 130.84

For a total final allowance of $4,523.84 in Attorneys' Fees and Costs 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 Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Law Office of Steven Altman, PC is allowed the following fees and expenses as a professional of the Estate:
>
> Steven S. Altman, Law Office of Steven Altman, PC, Counsel for the Estate
> Applicant's Fees Allowed in the amount of $ 4,393.00
> Applicants Expenses Allowed in the amount of $ 130.84.
>
> **IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they

are available.

2. 13-91315-E-7 APPLEGATE JOHNSTON, INC. CONTINUED MOTION FOR ORDER
WFH-2 George C. Hollister LIMITING NOTICE
7-23-13 [16]

CONT. FROM 8-22-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 23, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The court's decision is to xxxx the Motion to Limit Notice for Service. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

MARCH 27, 2014 HEARING

As of March 25, 2014, the court did not see any additional pleadings filed by Movant or any other parties in interest. It appears that the interim order has provided the Trustee with a fiscally reasonable accommodation to provide sufficient notice for judicial process and conserving limited estate resources.

In the court's September 2, 2014 Order (Dckt. 97), the Trustee was ordered to serve any supplemental pleadings for the extension of the court's order on or before February 24, 2014. No supplemental pleadings have been filed.

PRIOR HEARING

The Chapter 7 Trustee, Michael D. McGranahan, seeks an order limiting the entities that must be noticed when a motion is filed in this case. Given the size and complexity of this case, Trustee proposes to limit notices to

(a) The Office of the U.S. Trustee;

(b) Any creditor who filed a proof of claim;

(c) Any creditor or party in interest whose rights or interests are directly affected by a motion; and

(d) Those creditors and equity security holders who file a written request that all notices be served upon them

for the following motions applications:

1. Applications for the employment of professionals;

2. Motions regarding the proposed use, sale or lease of property of the estate other than in the ordinary course of business, unless the court for cause directs another method of giving notice;

3. Notice of proposed use, sale or lease of property pursuant to Federal Rule of Bankruptcy Procedure 6004(a)

4. Motions regarding the approval of a compromise or settlement of a controversy other than approval of an agreement involving the lifting of the automatic stay; unless the court for cause shown directs that notice be sent; and

5. Motions on any entity's request for compensation or reimbursement of expenses.

Special notice procedures may be appropriate in bankruptcy case without raising due process concerns. *See In re Southland Supply, Inc.*, 657 F.2d 1076, 1081 (9th Cir. 1981) (holding that notice of a proposed sale, compromise, or settlement to an authorized creditors committee and to any creditors who file a request to receive all notices is adequate); *see also In re Siegler Bottling Co.*, 65 B.R. 117, 119 (Bankr. S.D. Ohio 1986) (recognizing that the bankruptcy rules contain provisions generally authorizing the court to limit the notices to be sent to certain claimants).

The Trustee argues that there are expected to be in excess of 339 or more persons and entities listed on the mailing list in this case for future motions, particularly special notice matters. Serving notice on all claimants and other parties-in-interest will be expensive and time-consuming due to the expected number of such motions and applications filed. Giving notice to entities or parties with no direct stake or financial interest does not accomplish due process goals.

DISCUSSION

While it may be appropriate to reasonably limit notices required to be sent by the Trustee, the current proposal is not "reasonable." It attempts to turn the Bankruptcy Rules on their head and place an affirmative obligation on creditors to seek out notice, rather than what is required in cases – the party seeking relief providing notice to effected parties. Providing notice, and having an open judicial process is essential to having a fair judicial process.

Taken on its face, other than providing the U.S. Trustee with copies of pleadings, nobody would receive notice unless they either (1) filed a proof of claim or requested special notice. Creditors have been notified by the court not to file claims. Notice of Chapter 7 Bankruptcy Case, Dckt. 5. This would appear to insure that the Trustee would have few creditors to provide notice of what he is doing in the case for such "minor" actions such as selling property of the estate, using property of the estate, compromising rights of the estate, and obtaining compensation for himself and his professionals. If the relief requested is granted, the Trustee would not even have to serve the Debtor or Debtor's counsel, unless they made requests for special notice.

There has been no showing by the Trustee that the requested limitation on notices is calculated to reasonably reduce the expenses for the estate while still providing sufficient notice to parties in interest that the credibility of the federal bankruptcy process is maintained. While the court does not believe that the Trustee and counsel intend to act in an improper manner, the not giving of any significant notice (in a case where creditors are told not to file claims) would create the appearance of an impropriety and the "old buddy bankruptcy club" operating to hand out monies to trustees and professionals.

On Schedule B the Debtor lists personal property assets totaling $9,236,805.90. Dckt. 37 at 3-5. Schedule D lists $1,389,203.00 in secured claim, subject to a number of "unknown" claim amounts, liens, or collateral. *Id.* at 6-8.

The court granted the Motion on an interim basis while the Chapter 7 Trustee ascertains the extent of the work necessary for the administration of this case, on the following conditions:

I. The court modified the notice requirement for the following motions

A. Applications for the employment of professionals;

B. Motions regarding the proposed use, sale or lease of property of the estate other than in the ordinary course of business, unless the court for cause directs another method of giving notice;

C. Notice of proposed use, sale or lease of property pursuant to Federal Rule of Bankruptcy Procedure 6004(a)

D. Motions regarding the approval of a compromise or settlement of a controversy other than approval of an agreement involving the lifting of the automatic stay; unless the court for cause shown directs that notice be sent; and

E. Motions on any entity's request for compensation or reimbursement of expenses.

II. Notice for the above motions shall be provided to:

A. The Office of the U.S. Trustee;

B. Any creditor who filed a proof of claim;

C. Any creditor or party in interest whose rights or interests are directly affected by a motion;

D. Those creditors and equity security holders who file a written request that all notices be served upon them;

E. All creditors who are listed on Schedule D as having a secured claim;

F. The creditors holding the 20 largest general unsecured claims either filed with the court or listed on Schedule F.

III. The modification of the notice requirements of Rule 2002, Federal Rules of Bankruptcy Procedure, does not modify or alter the service of process obligations of any party pursuant to Rule 9014 for any contested matter or as otherwise required under the Bankruptcy Rules of Procedure for other matters.

IV. The Notice requirements are modified through and including May 31, 2013. The court shall conduct a further hearing on this Motion.

The court also ordered that the Movant shall file, and serve on or before February 24, 2014, on the parties specified above in this Order, a supplemental pleading requesting an extension of this order and any modifications to this order. Any Responses to the Trustee's supplemental pleadings shall be filed and served on or before March 18, 2014.

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 Prescribe and Limit Notice having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that xxxx.

3.	11-93716-E-7 JDP-2	**RAFAEL ANAYA AND CARMEN DELGADO** **Ann Marie Friend**	**MOTION TO AVOID LIEN OF CITIBANK, N.A.** **2-27-14 [34]**

DISCHARGED 2-7-12

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 Debtors, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on February 27, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien 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. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of Citibank (South Dakota) N.A. for the sum of $5,002.57. The abstract of judgment was recorded with Stanislaus County on Aug 19, 2009. That lien attached to the Debtor's commercial real property commonly known as 1221 Main Street, Newman, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $100,000.00 as of the date of the petition. The unavoidable consensual liens total $102,000.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $2.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Citibank, N.A., Stanislaus County Superior Court Case No. 634561, recorded on Aug 19, 2009, Document No. 2009-0081646-00, with the Stanislaus County 1221 Main Street, Newman, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

4.	**11-93716-E-7 JDP-3**	**RAFAEL ANAYA AND CARMEN DELGADO Ann Marie Friend**	**MOTION TO AVOID LIEN OF CAPITAL ONE BANK USA, N.A. 2-27-14 [40]**

DISCHARGED 2-7-12

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 Debtors, Chapter 7 Trustee, respondent creditors, interested parties, and Office of the United States Trustee on February 27, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien 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. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of Capital One Bank (USA) N.A. for the sum of $11,075.65. The abstract of judgment was recorded with Stanislaus County on July 27, 2010. That lien attached to the Debtor's commercial real property commonly known as 1221 Main Street, Newman, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $100,00.00 as of the date of the petition. The unavoidable consensual liens total $102,000.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $2.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Capital One Bank (USA) N.A., Stanislaus County Superior Court Case No. 643922, recorded on July 27, 2010, Document No. 2010-0065137-00, with the Stanislaus County Recorder, against the real property commonly known as 1221 Main Street, Newman, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

5.	11-93716-E-7 JDP-4	**RAFAEL ANAYA AND CARMEN DELGADO** **Ann Marie Friend**	**MOTION TO AVOID LIEN OF HSBC BANK USA, N.A.** **2-27-14 [48]**

DISCHARGED 2-7-12

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 Debtors, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on February 27, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien 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. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of HSBC USA, N.A. FDBA: Beneficial California, Inc. for the sum of $11,292.77. The abstract of judgment was recorded with Stanislaus County on April 6, 2010. That lien attached to the Debtor's commercial real property commonly known as 1221 Main Street, Newman, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $100,000.00 as of the date of the petition. The unavoidable consensual liens total $102,000.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 730.140(b)(5) in the amount of $2.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of HSBC USA, N.A., Stanislaus County Superior Court Case No. 648565, recorded on April 6, 2010, Document No. 2010-0030822-00, with the Stanislaus County Recorder, against the real property commonly known as 1221 Main Street, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

6. 13-91620-E-7 ICE-1 — JEROLD/RACHEL IVERSEN — Brian S. Haddix — MOTION TO EMPLOY WEST AUCTIONS, INC. AS AUCTIONEER(S) — 2-27-14 [20]

DISCHARGED 12-16-13

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 Debtors, Debtors' Attorney, all creditors, parties requesting special notice, and Office of the United States Trustee on February 27, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Employ without prejudice. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Irma Edmonds, Chapter 7 Trustee moves for authority to employ Dennis West of West Auctions, Inc. as auctioneer to liquidate the Double Depth Crypt at the Los Gatos Memorial Park in Los Gatos, California.

However, the Declaration filed by Dennis West in support of the motion states that he provides his testimony under penalty of perjury based only on "*the best of my knowledge, information and belief*." Dckt. 22, Emphasis added. In substance, Mr. West is stating "I hope the information is true and correct, and though I don't' know, I'm informed by someone else and believe (because it lets me win) that what I've said above is true and correct."

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

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

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

Movant has failed to provide the court with competent evidence of the obligation and Movant's interests. As such, the motion is denied without prejudice.

If Movant can provide the court with competent, personal knowledge testimony under penalty of perjury, then the court will issue the following tentative ruling:

Irma Edmonds, Chapter 7 Trustee moves for authority to employ Dennis West of West Auctions, Inc. as auctioneer to liquidate the Double Depth Crypt at the Los Gatos Memorial Park in Los Gatos, California. The Trustee believes employing West Auctions to sell the subject property and obtain the equity for the estate is in the best interests of creditors.

The Declaration of Dennis West testifies that he does not represent or hold any interest adverse to the Debtor or to the estate and that he has no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. The court approves the fees computed as a commission equal to twenty percent (20%) of the gross sales priced of the property, subject to further review pursuant to 11 U.S.C. § 328(a). Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

The requested 20% commission (whether only commission paid only by a trustee or when aggregated with a "buyer's premium") is at the high end of what this court has approved, absent a showing of special circumstances. The Motion does not state (nor is it hidden in the Trustee's declaration) a projected sales value for the asset, a Double Depth Crypt at the Los Gatos Memorial Park in Los Gatos, California. The court has no idea of what the Trustee intends to pay as a commission. It could be $600.00 or $20,000.00. At $600.00 it's easy to see that it would require at least that much work, but a $20,000 commission would not appear to be reasonable. The asset is listed on Schedule B as having a value of $4,000.00.

The court grants the Motion, with the maximum commission to be paid to the Auctioneer of $2,000.00, without further order of the court. If the sales price exceeds $10,000.00, the Auctioneer may file a motion for the court to allow further fees, based on a showing that the higher amount is reasonable. The Auctioneer is not authorized to be paid or receive any other amounts directly or indirectly (including a "buyer's premium") from any source in connection with the sale of this asset. No costs or expenses are requested to be allowed the Auctioneer.

Taking into account all of the relevant factors in connection with the employment and compensation of the realtor, considering the declaration demonstrating that West does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be

provided, the court grants the motion to employ West Auctions, Inc. as auctioneer for the Chapter 7 Trustee.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ West Auctions, Inc. as auctioneer for the Chapter 7 Trustee to sell the Double Depth Crypt at the Los Gatos Memorial Park in Los Gatos, California.
>
> **IT IS FURTHER ORDERED** that compensation computed as a commission equal to twenty percent (20%) of the first $10,000.00 of the gross sales price sold at auction is approved, subject to the provisions of 11 U.S.C. § 328(a). If the sales price exceeds $10,000.00, the Auctioneer may file a motion for the court to allow further fees, based on a showing that the higher amount is reasonable. The Auctioneer is not authorized to be paid or receive any other amounts directly or indirectly (including a "buyer's premium") from any source in connection with the sale of this asset. No other costs or expenses are authorized pursuant to this Order.
>
> **IT IS FURTHER ORDERED** that the Auctioneer, upon delivering the sale proceeds to the Trustee above the 20% commission permitted by this Order and the Trustee confirming receipt of such monies, is authorized to disburse the 20% commission to West Auctions, Inc.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

7. 13-92120-E-7 LELAND/VIENG BEECHER — CONTINUED MOTION TO AVOID LIEN OF INCENTIVE FINANCIAL SERVICES, LLC
DAT-1 Anh V. Trinh — 2-5-14 [13]

CONT. FROM 3-6-14

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on respondent creditors on February 5, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien 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). Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to grant the Motion to Avoid Lien. No appearance at the March 27, 2014 hearing is required.

PRIOR HEARING

A judgment was entered against the Debtor in favor of Incentive Financial Services, LLC for the sum of $15,412.43. The abstract of judgment was recorded with Stanislaus County on Aug 27, 2007. That lien attached to the Debtor's residential real property commonly known as 4016 Godfrey Drive, Salida, California. FN.1.

FN.1. The moving party filed the declaration and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

SERVICE

A review of the proof of service filed in support of this motion indicates that the Chapter 7 Trustee was not served with the motion. This is sufficient to deny the motion.

NO EXEMPTION CLAIMED

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $198,343.00 as of the date of the petition. The unavoidable consensual liens total $251,433.00 on that same date according to Debtor's Schedule D. However, the Debtor has not claimed an exemption in Schedule C. Schedule C, Dckt. 1. Therefore, the fixing of this judicial lien does not impair the Debtor's exemption, since none exists. The motion is denied.

CONTINUANCE

The Debtor reported at the March 6, 2014 hearing that an Amended Schedule C was being filed and a corrected proof of service to be filed. The court continued the hearing to allow the Debtor to address the issues raised at the March 6, 2014 hearing.

AMENDED DOCUMENTS

On March 6, 2014, Debtor filed an Amended Schedule C, Dckt. 19 and an Amended Notice of Hearing, Dckt. 22, reflecting service on the Trustee and respondent creditor.

RULING

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $198,343.00 as of the date of the petition. The unavoidable consensual liens total $251,433.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $3,999.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of Incentive Financial Services, LLC, Stanislaus County Superior Court Case No.613099, recorded on August 27, 2007, Document No. 2007-0109751-00, with the Stanislaus County Recorder, against the real property commonly known as 4016 Godfrey Drive, Salida, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

8. 11-94224-E-11 DCJ-9 EDWARD/ROSIE ESMAILI David C. Johnston

MOTION FOR COMPENSATION FOR BAUDLER AND FLANDERS, ACCOUNTANT(S), FEES: $14,227.50, EXPENSES: $0.00 3-6-14 [425]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, parties requesting special notice, and Office of the United States Trustee on March 6, 2014. By the court's calculation, 21 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Application for Fees has been 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant Application for Fees. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Ebaudler & Flanders, Certified Public Accountants, Donna E. Flanders and Michael R. Baudler, partners, the "Accountant" ("Applicant") for Debtor in Possession ("Client"), makes a Second Interim Request for the Allowance of Fees in this case. The period for which the fees are requested is for the period November 21, 2012 through January 16, 2014. The order of the

court approving employment of Applicant was entered on April 6, 2012, Dckt. 56.

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

U.S. Trustee Operations Reports: Applicant spent 134.10 hours in this category. Applicant charged $75.00 per hour for all work performed in U.S. Trustee Operations Reports. All work was performed by Michael R. Baudler. Mr. Baudler reviewed bankruptcy schedules filed with the Court, set up Excel spreadsheets comparing schedules with Quickbooks data, analyzed transaction, and prepared all monthly operating reports. Each report was approximately 200 pages in length. Mr. Baudler also performed backup and restoration of Debtors' Quickbooks data.

Tax Returns: Applicant spent 32.75 hours in this category. Applicant charged $75.00 per hour for some work and $175.00 per hour for more complex work performed in preparing payroll tax returns and bankruptcy estate tax returns. Applicant gathered necessary information and prepared numerous payroll tax returns and 2012 bankruptcy estate income tax returns.

Fee/Employment Applications: Applicant spent 5.0 hours in this category. Applicant prepared project billing summaries and chronological billing statements, and prepared summaries for the assistant of the Debtors' attorney. Applicant summarized times and billings.

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).

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing tax returns and U.S. Trustee Operation Reports. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

The fees request 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**
Ivy Au-Yang, staff accountant (Payroll Tax Returns)	12.75	$75.00	$956.25
Michael R. Baudler, CPA (Trustee Operation Reports)	134.10	$75.00	$10,057.50
Michael R. Baudler, CPA (Tax Returns - $75/hr)	18.25	$75.00	$1,368.75
Michael R. Baudler, CPA (Tax Returns - $150/hr)	1	$150.00	$150.00
Michael R. Baudler, CPA (Tax Returns - $175/hr)	4	$175.00	$700.00
Michael R. Baudler, CPA (Fee/Empl App.)	5.0	$175.00	$875.00
Total Fees For Period of Application			$14,107.50

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	$15,553.75	$11,665.31
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$15,553.75	

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim Fees in the amount of $14,107.50 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $120.00 pursuant to this application for amounts advanced for fees to process bankruptcy estate income tax returns.

The Costs in the amount of $120.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Fees	$14,107.50
Costs and Expenses	$ 120.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Ebaudler & Flanders, Certified Public Accountants ("Applicant"), Accountant 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 Ebaudler & Flanders, Certified Public Accountants, is allowed the following fees and expenses as a professional of the Estate:
>
> Ebaudler & Flanders, Certified Public Accountants,
> Professional Employed by Debtor in Possession
>
> Fees in the amount of $ 14,107.50
> Expenses in the amount of $ 120.00.
>
> The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Debtor in Possession 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.

9. 14-90231-E-7 JENNIFER GONZALES — **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se — **3-3-14 [15]**

Tentative Ruling: The court issued an order to show cause based on Debtor's failure to pay the required fees in this case ($306.00 due on February 20, 2014). The court docket reflects that the Debtor still has not paid the fees upon which the Order to Show Cause was based.

The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed.

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

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

10. 13-92241-E-7 ERIC/BROOKE COSTA — **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Christie S. Lee — **3-3-14 [17]**

Final Ruling: The court issued an order to show cause based on Debtor's failure to pay the required fees in this case ($30.00 due on February 17, 2014). The court docket reflects that on March 3, 2014, the Debtor paid the fees upon which the Order to Show Cause was based.

The Order to Show Cause is discharged. No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

11. 13-90950-E-7 FEDERICO/ILENE RUEZGA
ADJ-6 James P. Mootz

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH FEDERICO RUEZGA AND ILENE G. RUEZGA
3-5-14 [86]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 22 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 2002(a)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Compromise. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Michael D. McGranahan, trustee of the Chapter 7 bankruptcy estate ("Trustee") moves the court for an order approving the Settlement Agreement and Mutual Release of Claims (the "Settlement Agreement") by and between the Trustee and Federico Ruezga and Ilene G. Ruezga ("Debtors").

Trustee states that on the Debtors' original Schedule A, filed on May 16, 2013, the Debtors listed the following: "Residence located at 11243 Merced Court, Turlock, CA. (Half interest and Co-owner with mother) Debtors [sic] interest in home is $15,383.00." Trustee argues that the Merced Court Property in fact is comprised of a 30-acre parcel and includes an almond orchard of approximately 24-acres with eight year old trees, a newer 2,000 square foot residence (where the Debtors reside), and several pre-fabricated buildings.

Trustee argues that the original Schedule A appears misleading, and that a reasonable person would infer that it is solely comprised solely of single family residence. Nothing in the description hints that the property includes a 24-acre almond orchard. On July 26, 2013, the Court, upon an ex parte motion by the Debtors, which was not served on the Trustee, entered an order converting this case from Chapter 7 to Chapter 13. On September 11, 2013, the Court entered an order vacating the order converting the case from Chapter 7 to Chapter 13, upon motion by the Chapter 7 Trustee. The Trustee was re-appointed trustee in this case.

On September 5, 2013, the Debtors filed amended Schedules, A, B, and C. In amended Schedule A, the Debtors claim that they own the Merced Court Property as joint tenants with one of their mothers. The Debtors claim that the Merced Court Property has a current value of $480,000.00. The Trustee believes the following with respect to the Merced Court Property: (i) the 24-acre almond orchard is worth at approximately $20,000.00 per acre, or $480,000.00; (ii) the additional six-acres, which includes the residential curtilage, is worth approximately $15,000.00 per acre, or $90,000.00; and, (iii) the residence is worth $75.00 per square foot, or $150,000.00. Thus, the Trustee states the total value of the Merced Court Property, excluding some pre-fabricated work buildings, is approximately $720,000.00. The Trustee asserts that the Merced Court Property has equity of approximately $370,766.00 according to the Trustee's estimated value of it and accounting for the total senior liens.

The Trustee states that the Debtors in fact do not hold legal title to the Real Property but that title to the Merced Court Property has been held by Wenceslada P. Ruesga and Federico Ruesga, Co-Trustees of the Wenceslada Ruesga 2008 Revocable Trust since 2008. Trustee states that Wenceslada Ruesga, is the settlor of the Trust. The Trust is revocable and during her lifetime, the settlor is the sole beneficiary of the Trust. Trustee states that Wenceslada Ruesga, the mother of Debtor Federico Ruesga (aka Ruezga), is alive.

Trustee states that according to the Debtors, the Debtors and Oscar Ruezga (brother of Debtor Federico Ruezga) have paid in equal shares all expenses to plant the Almond Orchard. Further, according to the Debtors, Federico Ruezga and Oscar Ruezga have jointly and actively farmed the Almond Orchard for the past four years, sharing equally in income and expenses. There is no written partnership agreement between Federico Ruezga and Oscar Ruezga, and capital accounts have not been maintained. Trustee asserts that there is no oral or written lease agreement between the Trust (or Wenceslada Ruezga) and Federico Ruezga and Oscar Ruezga with respect to the Almond Orchard. For the Almond Orchard's 2013 crop, Federico Ruezga and Oscar Ruezga are under an output contract with Spycher Brothers. Both the Debtors and Trustee estimate that the Almond Orchard will produce total revenue of approximately $100,000.00 for the 2013 crop. The parties anticipate that Spycher Brothers will make its last disbursement for the 2013 Almond Orchard crop in or about June 2014.

The total priority claims filed in this case equal $30,170.52. The total general unsecured claims filed in this case equal $72,787.02. Thus, the sum of priority claims and general unsecured claims is $102,957.54. The Trustee contends that the Debtors hold an equitable interest in the Almond

Orchard; thus, the Debtor's interest in the Almond Orchard is property of the estate pursuant to 11 U.S.C. § 541. The Trustee contends that the Debtors in bad faith intentionally failed to properly describe the Merced Court Property to include the Almond Orchard on original Schedule A to mislead the Trustee and creditors.

The Trustee seeks approval of a compromise between the Trustee and the Debtors, with the following essential terms:

a. The Trustee will receive one-half (1/2) of the total revenue for the 2013 Almond Orchard Crop (the Trustee estimates he will receive $50,000.00);

b. The parties waive any claims against each other, whether direct or indirect, known or unknown, related to the Merced Court Property and the Almond Orchard, including, but not limited to the Trustee's waiver of any interest of the bankruptcy estate in the Almond Orchard; and

c. The Settlement Agreement is expressly conditioned upon this Court's approval, and the claims waived herein should be subject to over-bidding at the hearing on this motion.

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).

Here, the Trustee argues that the four factors have been met.

Probability of Success

The Trustee argues that it is extremely difficult to determine whether the Court would declare a one-half (1/2) interest in the Almond Orchard property of the estate after a trial if an action were filed. Trustee states that ultimately legal title to the Merced Court Property is

held by the trustees of the Trust for the sole benefit of the settlor, Wenceclada Ruesga. Trustee explains that any declaration that the bankruptcy estate holds a one-half (1/2) equitable interest in the Almond Orchard would directly abrogate the rights of the elderly Wenceslada Ruesga, the sole beneficiary of the revocable trust. Trustee states he would have to include Wenceslada Ruesga as a defendant in an action consistent with the due process requirements of the Fifth Amendment of the United States Constitution. Rather than finding that the Debtors hold a one-half (1/2) equitable interest in the Almond Orchard, Trustee asserts that the Court could find that the Debtors, hence bankruptcy estate, merely have a restitutionary claim for reimbursement of expenses incurred to plant the Almond Orchard, less the return enjoyed by the Debtors while farming the Orchard. Trustee states that while more discovery would flesh out additional facts, it likely would not aid much in predicting probability of success in litigation.

Difficulties in Collection

The Trustee states he would seek a declaration that the bankruptcy estate holds a one-half (1/2) equitable interest in the Almond Orchard. Even if the Court decreed the same, Trustee states that problems in the bankruptcy estate realizing cash proceeds would remain, as follows: (i) There is no written or oral lease agreement for the Almond Orchard. Could Wenceslada Ruesga terminate any possessory or tenancy rights in the Almond Orchard? (ii) The Almond Orchard will only produce income if it is properly maintained and appropriate labor is supplied. Trustee states that the bankruptcy estate does not have any funds to accomplish the foregoing.

Expense, Inconvenience and Delay of Continued Litigation

The Trustee argues that litigation would result in significant costs, given the unsettled area of law which is extremely complex. Formal discovery would be required. The Trustee estimates that if the matter went to trial, litigation expenses would consume the most of the expected recovery. Settlement nets approximately the same recovery for the Estate as if the case proceed to trial, but without the costs of litigation.

Paramount Interest of Creditors

The Trustee 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 shall announce the proposed settlement and request any other parties interested in making an offer to the Trustee for the claims or interests in the property to state their offers in open court.

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 Compromise filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compromise Controversy against Michael D. McGranahan, Trustee, and Federico Ruezga and Ilene G. Ruezga, Debtors 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 D in support of the motion March 5, 2014 (Docket Number 90).

12. 09-90452-E-7 CWC-8 | **DELIDDO AND ASSOCIATES, INC. David C. Johnston** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH EDWARD AND MICHELLE ERDELATZ 2-26-14 [244]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 26, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3). 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 court's tentative decision is to grant the Motion to Compromise. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 7 Trustee in this case, Stephen C. Ferlmann, moves the court for an order approving a compromise between Edward and Michele Erdelatz and the bankruptcy estate, pursuant to Federal Rule of Bankruptcy Procedure 9019. On February 24, 2009, Debtor filed a petition under Chapter 11 of the Bankruptcy Code. On January 29, 2010, this case was converted to a Chapter 7 case.

Among the assets which constitute property of the bankruptcy estate is a Judgment that was entered on February 13, 2012, in Adversary Proceeding No. 11-9017, initiated by the filing of a complaint to recover avoidable transfers against Jack P. DeLiddo, in the amount of $1,738,045.77. On March 7, 2012, Trustee recorded an Abstract of Judgment with the San Joaquin County Recorder, Document No. 2012-028372, creating a judicial lien on the real property owned by Jack P. DeLiddo, located at 1176 Bogarin Lane, Ripon, California ("Subject Property").

On February 5, 2014, Trustee received an offer from Edward and Michele Erdelatz to obtain a release of the bankruptcy estate's judicial lien on the subject property, for the sum of $2,500.00. Edward and Michele Erdelatz have entered into a real estate purchase contract with Jack P. DeLiddo to buy the subject property for the sum of $462,500.00. Such a sale will fully pay all outstanding liens and encumberances with the exception of the bankruptcy estate's judicial lien on the subject property. The Seller, Jack DeLiddo will not receive any monetary consideration from this sale, and the compromise will only releaes the bankruptcy estate's judicdial lien on the subject property. Given the value of the property and amount of senior liens and encumbrances, there is no equity in the subject property to support the bankruptcy estate's judicial lien.

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).

Here, the Trustee evaluates the terms of the compromise using the *"A & C* factors, but not in the actual Motion to Approve Settlement of the Controversy. Rather, the discussion of whether the compromise meets the

standard set out by *In re A & C Props.* and *In re Woodson* is incorporated into the Declaration of the Trustee in Support of the Motion, rather than the Motion itself. Pursuant to Federal Rule of Bankruptcy Procedure 9013(which is similar to Fed. R. Civ. P. 7(b)) requires that the motion itself state both the grounds upon which the relief is based and the relief with particularity. The Motion simply states:

> The Trustee believes that the compromise of the bankruptcy estate's judicial lien on the Subject Property is in the best interest of the Debtor's estate and the creditors therein, and that Trustee should be authorized to accept said settlement.

From reading the Motion, the court cannot get a sense of the Trustee's position on whether the compromise satisfies the paramount interest of the creditors, or whether difficult in collection of the judgment is a critical factor that militates in favor of reaching a compromise. The Trustee includes a relevant discussion of the acceptability of the compromise in his declaration. It is not, however, for the court to canvas other pleadings, and wait until the hearing, to receive additional evidence from a movant to "draft the motion" for the Trustee.

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. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. 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.

The court, however, will proceed to consider the merits of the settlement as this time. The Trustee, however, is advised that all grounds for relief must be stated with particularity in the body of future pleadings and motions, in accordance with the requirements of Federal Rule of Bankruptcy Procedure 9013.

Here, Trustee argues that the relevant *A & C Props* factors have been met.

Probability of Success

The probability of success in litigating the issues involved is not an issue in the compromise.

Difficulties in Collection

The bankruptcy estate's difficult in collection of the Judgment entered in Adversary Proceeding No. 11-9017, having commenced after Trustee filed a complaint to recover avoidable transfers from Jack P. DeLiddo, was a significant factor in support of the compromise. Given the value of the

subject property and amount of senior liens and encumbrances, there is no equity in the subject property to support the bankruptcy estate's judicial lien. While the amount of the compromise is relatively small, Trustee asserts that the bankruptcy estate has "everything to gain and nothing to lose from this compromise."

Expense, Inconvenience and Delay of Continued Litigation

The Trustee states that the complexity of litigation involved is not an issue in this compromise.

Paramount Interest of Creditors

The Trustee argues that settlement is in the paramount interests of creditors since the foreclosure of the subject property is imminent, and the bankruptcy estate's judicial lien on the subject property is in jeopardy. The judgment debtor, Jack P. DeLiddo, will receive no consideration from the sale of the subject property, and the bankruptcy estate will receive $2,500.00 in recognition of its judicial lien on the property.

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 Compromise filed by 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 Compromise Controversy against Jack P. DeLiddo is granted and the respective rights and interests of the parties are settled on the Terms set forth in the Letter Offer from the Realtor of Edward and Michele Erdelatz and Seller's Estimated Settlement Statement, filed as Exhibit 1 in support of the motion on February 26, 2014 (Docket Number 247).

13. 13-91459-E-11 KDG-1 | LIMA BROTHERS DAIRY
Hagop T. Bedoyan | AMENDED MOTION TO EMPLOY HAGOP T. BEDOYAN AS ATTORNEY(S)
3-5-14 [172]

APPEARANCE OF HAGOP T. BEDOYAN, LEAD COUNSEL FOR DEBTOR IN POSSESSION REQUIRED FOR MARCH 27, 2013 HEARING
Telephonic Appearance Permitted

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-in-Possession, all creditors, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 22 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Debtor-in-Possession of this Chapter 11 case (abbreviated to the term "Debtor" throughout the Motion and Declarations filed in support of this Motion), filed its initial Application for Order Authorizing the Employment of General Counsel to employ the firm of Klein, DeNatale, Goldner, Cooper, Rosenlieb, & Kimball, LLP ("Counsel") on December 5, 2014. FN.1.

FN.1. Counsel phrases the motion as requesting authorization for employment of Counsel as the attorney for the "Debtor." If so, then in this Chapter 11 case Counsel would not be entitled to be paid professional fees. Counsel abbreviates the term "Debtor-in-Possession" to "Debtor" at the beginning of the Motion to Employ, and within the first few lines of each of the Declarations submitted in support of the Motion (Dckt. Nos. 174-176). Counsel is advised that the practice of using "Debtor" as an abbreviated term for "Debtor-in-Possession" is confusing to the court and potential respondents, since both are legal terms of art that have distinct meanings in the context of a Chapter 11 case.

That counsel continues to use the term "Debtor" as a defined term for the Debtor in Possession only works to muddy the record and create

confusion. It is as if counsel is intentionally trying to confuse the record, the court, and parties in interest that it is the Debtor, in its personal capacity, which is "calling the shots" against creditors and not the fiduciary Debtor in Possession.

On December 11, 2013, the court entered an order approving Counsel's employment by the Debtor and the Debtor-in-Possession on the terms and conditions set forth in this Amended Application. The court signed the order which authorized the employment of Counsel as the attorney of record for the Debtor and Debtor in Possession, pursuant to 11 U.S.C. § 328(a), subject to the following terms and conditions:

1. The employment of Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball is subject to the applicable terms and conditions of 11 U.S.C. §§ 327 and 329-331, and authorization is retroactive as of October 8, 2013, the commencement of the bankruptcy case.

2. No compensation is permitted except upon court order, following an application made pursuant to 11 U.S.C. § 330(a).

3. Compensation paid to Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball shall be at the "lodestar rate" applicable at the time that services are rendered.

4. All funds received by Counsel from Debtor in connection with the case are deemed to be an advance payment of fees and property of the estate, until the entry of an order authorizing disbursement of such funds regardless of whether they are denominated a retainer or are said to be nonrefundable. Funds received from Debtor's partners that are deemed to constitute an advance payment of fees shall be maintained in a trust account in an authorized depository. Such account may be a separate interest-bearing account or an attorney's trust account containing commingled funds. Withdrawals are permitted only after the granting of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

What the court did not catch in reviewing the Order was that Counsel sought court approval to represent both the Debtor and the fiduciary Debtor in Possession. Such dual representation would put counsel in an untenable conflict – having a fiduciary duty to the Debtor personally and a fiduciary duty to both the Debtor in Possession, the fiduciary of the bankruptcy estate, and the bankruptcy estate itself.

At the hearing on Counsel's first interim fee application, KDG-3, the court requested that Counsel file an amended employment application to address the following:

A. That the Counsel firm clarify that it is employed by the Debtor-in-Possession, and not the Debtor.

B. That Counsel provide additional details regarding Counsel's connections to GlassRatner, the financial consultants employed by Debtor.

Counsel states that for these reasons, the Debtor in Possession (the court refusing to fall into counsel's trap of misidentifying the Debtor in Possession as "Debtor") brings this Amended Application to seek an Amended Order Authorizing Employment of General Counsel pursuant to 11 U.S.C. § 327(a), that clarifies that Counsel is employed by the Debtor-in-Possession, and to provide the court with further information concerning the sublease agreement between Counsel and GlassRatner. Additionally, this Amended Application discloses a new connection with American AgCredit that arose on February 2014. The Application states that it is brought under Federal Rule of Civil Procedure 60(a) to relate back to the date that the initial employment application was filed.

LIMITED LEGAL SERVICES AGREEMENT

Debtor in Possession initially retained the legal services of David C. Johnston to represent it in its Chapter 11 case. Johnston filed an application for authority for employment on September 27, 2013, and the court entered an order approving Johnston's employment on October 1, 2013. Dckt. No. 82. Due to Johnston's illness, the partners of "Debtor" contacted Hagop Bedoyan, a partner in the Counsel firm, to request that Counsel Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball substitute in as the attorney for Debtor. This representation will include all of services "normally rendered" to a Debtor-in-Possession in connection with a Chapter 11 case, including but not limited to the following:

I. Included Services

A. Consulting with Debtor in Possession concerning its present financial situation, and its realistically achievable goals.

B. Preparing the documents necessary to continue the bankruptcy case.

C. Advising Debtor concerning its duties as a debtor and debtor-in-possession in a Chapter 11 case.

D. If it appears that it can propose a viable plan, helping the formulation of the Chapter 11 plan, drafting the plan and disclosure statement, and prosecuting legal proceedings to seek confirmation of the plan.

E. If necessary, preparing and prosecuting such pleadings as complaints to avoid preferential transfers or transfers deemed fraudulent as to creditors, motions for authority to borrow money, sell property, or compromise claims and objections to claim.

II. Specifically Excluded Matters

Counsel states that its agreement with Debtor in Possession is for a "limited engagement." Counsel is not undertaking this engagement to meet all of Debtor's in Possession perceived needs for assistance concerning this bankruptcy case, but rather, for a defined set of obligations that may not cover all the legal service needs that arise from Debtor's in Possesion. Specifically, "but without limitation," Counsel is not undertaking to perform the following types of services for Debtor in Possession:

A. Auditing/Investigation: It is Debtor's in Possession exclusive duty to give Counsel all necessary information in a format that is complete, accurate, and sufficiently well-organized to make it usable. Counsel will not audit Debtor's in Possession financial information, nor will it investigate its affairs to detect whether it has given all necessary information.

B. Accounting/Tax Advice: The bankruptcy case may have some impacts on the Debtor in Possession and the estate. In addition, the bankruptcy case does not vitiate Debtor's in Possession duty to timely and properly file tax returns. If Debtor in Possession needs tax advice or accounting assistance, it must arrange to hire and pay his own accountant or other tax advisor. Counsel's sole function in this will be to apply for any necessary court approval to employ such professionals.

C. Business or Financial Advice: Any effective reorganization of Debtor's in Possession financial affairs will probably require that it consider making some fundamental changes to how he conducts his business and/or personal financial affairs. Except as necessary to help in complying with the requirements and limitations and the law places on debtors in bankruptcy cases, Counsel will not give Debtor in Possession any advice concerning increasing its income, decreasing expenses, or otherwise increasing net cash flow. Counsel's sole function will be to apply for any necessary court approval to employ such professionals.

D. Employment of Experts: Often, employing experts concerning cases is necessary. These might include real or personal property appraisers to testify concerning the value of Debtor's in Possession assets or economists to testify concerning the proper interest rate Debtor in Possession should pay under its plan. If such experts become necessary, Counsel will tell Debtor in Possession as far in advance as possible; it will be Debtor's in Possesion duty to select, employ, and pay such experts.

E. Litigation: Except for certain bankruptcy-related issues (such as objections to claims, actions to avoid transfers avoidable under bankruptcy law, defense of objections to exemptions, and motions to sell property or approve compromises), Counsel and firm are not undertaking to represent Debtor in Possession concerning any litigation that

Debtor in Possession may want to commence or that may be commenced against Debtor in Possession.

F. Other General Legal Services: Counsel and his firm are not undertaking by agreement whether "Debtor" needs assistance in these areas.

G. Impact on "Debtor's" Case on Others: This case may have an impact on several of Debtor's in Possession friends, family members, employees, partners or others. [The Motion does not indicate how a fictitious entity has friends and family members.] Counsel and his firm are not undertaking this matter to consider this impact or take steps to protect these affiliates.

H. Compliance with U.S. Trustee Reporting Requirements: The Office of the United States Trustee, a division of the United States Department of Justice, monitors the compliance by Chapter 11 debtors with various requirements. Counsel clarifies that it is Debtor's in Possesion responsibility to file monthly operating reports and to timely prepare them.

Compensation Structure

The Motion states that Debtor in Possession and Counsel have made the following economic arrangements, all of which are and will be subject to approval of the Court:

A. Counsel received a post-petition retainer of $25,000.00 for the Chapter 11 case from Debtor's in Possession partners ("Retainer"). Counsel received no money from Debtor in Possession for the proposed representation. The Retainer represents a capital contribution from the partners of the Debtor in Possession [and the separate, non-fiduciary Debtor], and it is not a loan to Debtor in Possession. Counsel will hold the balance of $25,000.00 pending the approval and allowance of attorney's fees and costs by the Court. Pending such approval and allowance, Counsel claims a possessory security interest in this money to secure payment of its fees.

B. Counsel's ultimate fees will probably be at least $75,000.00. Counsel will not assist Debtor in Possession in rendering a proposed plan feasible by waiving Counsel's right to payment in full ahead of Debtor's other unsecured creditors.

C. Counsel may, but shall not be required to, advance costs on Debtor's in Possession behalf when a cost for a particular item or service is under $200.00. Concerning costs not requiring court approval, when a cost bill is received that is over $200.00, the bill be forwarded to Debtor in Possession for payment. Since Counsel and his firm are contractually obligated to pay these bills as incurred,

Debtor in Possession is expected by Counsel to pay the bill promptly.

D. Subject to court approval, the scope of Counsel's engagement will require Debtor in Possession [presumably as the fiduciary of the estate and not in a personal, non-fiduciary capacity] to pay for services or items in addition to professional time. These services and items are designated as "costs" and include in-house costs and outside costs. Inside costs include copying charges, legal assistant services, investigative costs associated with the hiring of investigators, mileage reimbursement, and travel.

Disclosure of Adverse Interests and Connections

I. **Interests**

Counsel has no interest or represents no interest adverse to Debtor in Possession or its estate in any of the matters upon which it will be engaged, and Debtor believes that the employment of Counsel will be in the best interest of its estate.

II. **Connections**

Counsel states that it has no connections with Debtor, Debtor's creditors, any other party in interest, or their attorneys and accountants, the United States Trustee, or any person employed in the Office of the United States Trustee, or the Judge in this case except as set forth below:

A. Connections with a Trustee: There is no trustee appointed in this case.

B. Connections with Debtor and its Partners: Counsel has no connections with the Debtor or its Partners except Counsel’s representation of the Debtor-in-Possession in this case.

C. Connections with the Bankruptcy Judge: Other than appearing before the judge in connection with this proceeding and other matters unrelated to Debtor, KDG has no connections with the judge except,

a. Various Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball attorneys know Judge Sargis through the Central California Bankruptcy Association. Judge Sargis has spoken to this association many times and Counsel’s attorneys have interacted with him in that capacity. In addition, various attorneys know Judge Sargis through the California Bankruptcy Forum. Their relationship is and was collegial, and does not interfere with Counsel’s vigorous representation of clients.

D. Counsel's Representation of Creditors: A review of the Debtor's list of creditors does not show connections between Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball and "Debtor's" creditors, except that American Ag Credit retained Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball for representation unrelated to the Debtor's case and Debtor's in Possession fiduciary activities in this case in February, 2014 , with respect to the chapter 12 case pending in this court, *In re Silva*, Case No. 13-90323- E-12.

E. Connections with Creditors: A review of the list of creditors does not show connection with creditors listed by Debtor, except:

1. American AgCredit- The Vice President of Special Assets for American AgCredit is Maryam Ghazi. Ms. Ghazi and Counsel Hagop Bedoyan know each through our participation in and attendance at various California Bankruptcy Forum events over the past several years. As a result of that involvement, Ms. Ghazi and Bedoyan have become friends.

2. Bedoyan states in his declaration in support of the Motion to Employ that when the Debtor in Possession was having difficulty moving its case forward due to Mr. Johnston's health issues, and providing the court and American AgCredit with useful financial reports. Ms. Ghazi (of American AgCredit) contacted Bedoyan to request the names of financial consultants with dairy experience, who could step in and attempt to "resuscitate" the Debtor's bankruptcy case. In response, Bedoyan provided Ms. Ghazi with the names of George Demos at the GlassRatner firm and also the name of Bill Brinkman at the Walnut Creek-based Jigsaw Advisors, LLC. The Debtor in Possession eventually retained George Demos and the GlassRatner firm as its financial consultant. Dkct. No. 175.

3. Sometime on or around November 27, 2013, and presumably after Mr. Demos began reviewing the Debtor's in Possession financial affairs, Bedoyan states that he was contacted by George Demos of the GlassRatner firm and informed that the Debtor in Possession desired to replace Mr. Johnston with Bedoyan and the counsel firm. Before accepting the requested engagement, Bedoyan contacted Ms. Ghazi on November 27, 2013, to determine whether or not American AgCredit would allow sufficient time for new counsel to "come up to speed" and rectify many of the "deficiencies" in the case.

F. Connections with Attorneys: Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball has no known connections to attorneys involved in the case, except:

1. American AgCredit - The firm of Crabtree Schmidt represents American AgCredit in this case. Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball has represented Debtors in other

cases where Crabtree Schmidt represented this creditor. Those cases were unrelated to Debtor. In addition, Bedoyan states that he has known Walter Schmidt for several years due to their attendance at various bankruptcy-related conferences, such as the California Bankruptcy Forum, the Eastern District Conference and the Central California Bankruptcy Association's annual bankruptcy institute. Page 8 of the Declaration of Hagop Bedyoan, Dckt. No. 175.

G. Connections with Accountants: Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball has no known connections to the accountants used by Lima Brothers Dairy prior to filing for relief under Chapter 11.

H. Connections with Financial Advisors: Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball has no known connections with the Financial Advisors involved in this case except the following:

1. Counsel and members of the firm have worked, and are working, with GlassRatner Advisory & Capital Group, LLC ("GlassRatner"), Debtor-in- Possession's financial advisors, on other matters unrelated to Debtor-in- Possession.

2. GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, on a non-exclusive basis, occasionally refer clients to each other when their respective clients need professional services that the other provides. There is no agreement between GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball regarding referrals and no referral fees nor any kind of financial remuneration paid between GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball.

3. Bedoyan was contacted by Ms. Ghazi regarding a referral for a potential financial advisor who might assist the Debtor in Possession to better understand its financial position and to assist the Debtor in Possession in reorganizing its affairs. Bedoyan provided Ms. Ghazi with the contact information for Mr. Demos at GlassRatner and Mr. Brinkman at Jigsaw Advisors, LLC. Mr. Demos was contacted by Debtor in Possession for the purpose of retaining it and GlassRatner as its Financial Advisor.

4. GlassRatner subleases office space from Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball based on an oral contract.

   a. GlassRatner provides its own phone, internet, computer systems, and supplies. GlassRatner is authorized to use Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball’s copy machines and conference rooms when they are available, but rarely uses them.

b. GlassRatner pays its rent by providing Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball with financial consulting services, which consists of reviewing Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball's monthly financial statements and loan covenant compliance. The estimated value of these services is between $200.00 and $300.00 per month.

c. There is no fee sharing arrangement between GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, and the amount of rent or services provided is unrelated to referrals between and income of GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball. Counsel asserts that these are unrelated entities with no common ownership.

5. Counsel firm also subleases space to other tenants, including the Law Offices of Leonard K. Welsh, and the Law Offices of Thomas Fallgatter. The value of the leased space for each of these tenants is "on par" with the value exchanged between Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball and GlassRatner for their oral lease agreement.

6. Glass Ratner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball have reduced their agreement to writing and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball will bill GlassRatner for rent, and GlassRatner will bill Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball for consulting services.

7. Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball had connections with George Demos prior to to his joining GlassRatner. Demos was the owner of CFO Resources, Inc. Before joining GlassRatner. CFO Resources was an outside CFO and financial advisory company. Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball and CFO Resources had a long professional relationship of assisting mutual clients. From July 2008 to September 2012, CFO Resources provided Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball with ad hoc consulting services with regard to its financial affairs, loan covenant compliance, and hiring and training a controller. These services were provided by CFO Resources and paid for by Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball through March 1, 2012.

8. On March 1, 2012, CFO Resources began subleasing the office space that is now leased by GlassRatner. CFO Resources began leasing the office space from Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball when its prior lease was expiring, and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball had an empty office that it allowed CFO Resources to

use in exchange for consulting services. GlassRatner assumed the sublease with Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball on the same terms described above when Demos joined GlassRatner.

I. United States Trustee: Other than working with the United States Trustee and person employed by the Office of the United States Trustee in connection with this proceeding and other matters unrelated to "Debtor," there are no known connections to the United States Trustee, or any person employed by the Office of the United States Trustee.

DISCUSSION

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

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

The court had articulated in previous hearings on Counsel's fee applications that the Motion should state that Applicant is the Counsel for the Debtor in Possession, not the "Debtor." The court advised Counsel that if Counsel is attempting to be the attorney for the Debtor and the Debtor in Possession, there would be a disqualifying conflict arising under 11 U.S.C. § 327, thereby precluding Applicant from any compensation in this case.

In Chapter 11 cases, the debtor becomes the debtor in possession upon the commencement of the case and serves in that capacity until a Chapter 11 Trustee is appointed or the case is converted to one under Chapter 7. COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 1101.01. This creates a dual identity, that being the Debtor in its individual capacity and as the debtor in possession in its fiduciary capacity.

[3] The Separate Entity Theory

> Section 1101(1) contains only a definition. It does not address any distinction between the "debtor" and the "debtor in possession." Section 1107(a) describes the powers and duties of the debtor in possession. It grants to the debtor in possession all of the rights and powers of a trustee and requires the debtor in possession to perform all of the duties and functions of a trustee. Under section 323, the trustee is the representative of the estate. In a chapter 11

case, the debtor in possession acts in that role. This suggests that **the debtor exists in a separate capacity, in much the same way that an individual serving as trustee does not lose the individual's separate identity but has rights, powers, duties and obligations as trustee that are separate from those in the individual's personal capacity**. Thus, although one could properly say that the debtor in possession is not a separate entity from the debtor, that would be incomplete. The estate created by section 541 is a separate entity. The debtor becomes the representative of the estate and, when acting in that representative capacity, is referred to as the debtor in possession.

The other provisions of chapter 11 are consistent with this distinction. Except for section 1107, expressly defining the rights, powers and duties of a debtor in possession, the provisions of chapter 11 grant rights or powers to the trustee rather than to the debtor in possession. References to the debtor are to the debtor as such, rather than to the debtor acting in its capacity as debtor in possession. For example, subsections 1121(a) and (c) permit the debtor, not the trustee or debtor in possession, to file a plan at any time during the case, even after the appointment of a trustee. Section 1121(b) grants the debtor the exclusive right to file a plan for the first 120 days after the order for relief. Section 1112(a) authorizes the debtor to convert the case to one under chapter 7, "unless the debtor is not a debtor in possession." Section 1141(b) vests the property of the estate in the debtor upon confirmation, and section 1141(d) discharges the debtor, not the trustee or debtor in possession. 7

Some have argued that the Supreme Court ruled in National Labor Relations Board v. Bildisco & Bildisco that the debtor in possession is not a new entity but is the same entity as the prebankruptcy debtor. The assertion is based on language that "it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition." 8 However, this language has been taken out of context. The statement was made in the context of whether, for the purposes of applying the labor laws, the debtor in possession (or, more properly, the estate, of which the debtor in possession is the representative) should be treated as a successor employer. In full, the quote reads:

> Much effort has been expended by the parties on the question of whether the debtor is more properly characterized as an "alter ego" or a "successor employer" of the prebankruptcy debtor, as those terms have been used in our labor decisions. See *Howard Johnson Co. v. Hotel Employees*, supra, at 259, n. 5; *NLRB v. Burns International Security Services, Inc.*, supra; *Southport Petroleum Co. v. NLRB*, 315 U.S. 100,

> 106 (1942). We see no profit in an exhaustive effort to identify which, if either, of these terms represents the closest analogy to the debtor-in-possession... . For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing. 9
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> Footnote 7. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 527-28, 104 S.Ct. 1188, 1197, 79 L. Ed. 2d 482, 496-97, 9 C.B.C.2d 1219 (1983) .
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> Footnote 9. 465 U.S. 513, 527-28, 104 S.Ct. 1188, 1197, 79 L. Ed. 2d 482, 496-97 (emphasis added). Pre-Code case law provides some support for distinguishing between the roles of debtor and debtor in possession. Under former Chapter X, a trustee was always appointed unless the debtor's debts were less than $250,000. *In re J.P. Linahan, Inc.*, 111 F.2d 590 (2d Cir. 1940), involved a debtor that remained in possession. The Second Circuit reversed the district court's decision enjoining an election of directors to the debtor's board. In doing so, the Second Circuit distinguished between the roles of the debtor and the debtor in possession in the case, recognizing that the debtor continued to exist and represent the stockholders' interest during the case.

Id. See, *Burtch et al. v. Ganz et al. (In re Mushroom Transportation Company)*, 382 F.3d 325, 339 (3rd Cir. 2004),

> As we recently pointed out, "in Chapter 11 cases where no trustee is appointed,§ 1107(a) provides that the debtor-in-possession, i.e., the debtor's management, enjoys the powers that would otherwise vest in the bankruptcy trustee. Along with those powers, of course, comes the trustee's fiduciary duty to maximize the value of the bankruptcy estate." *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (en banc). The debtor-in-possession's fiduciary duty to maximize includes the "'duty to protect and conserve property in its possession for the benefit of creditors.'" *In re Marvel Entertainment Grp., Inc.*, 140 F.3d 463, 474 (3d Cir. 1998) (citation omitted). Thus, there is no question that Mushroom, acting through its representatives Arnold and Cutaiar, had a fiduciary duty to protect and maximize the estate's assets.

See also, *Rushton v. America Pacific Wood Products (In re Americana Expressways)*, 133 F.3d 752, 756 (10th Cir. 1997)("Under 11 U.S.C. § 1107 and

bankruptcy case law, a debtor in possession, like a bankruptcy trustee, is a fiduciary."); *Hanson v. Finn (In re Curry & Sorensen)*, 57 B.R. 824 (B.A.P. 9th Cir. 1986) (While pursuant to Section 1107(a) of the Code, a debtor in possession is not required to investigate and report under Sections 1106(a)(3) and (4), the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would a trustee for a debtor out of possession. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985).

The court had previously requested that, prior to filing a revised Motion for Fees, Counsel should have the employment order amended so that Counsel is engaged by the Debtor-in-Possession, not merely the Debtor. Dckt. Nos. 80 and 82. The Motion and supporting declarations of George Demos, Hagop Bedoyan, and Joe Lima, Dckt. Nos. 174-176, all reference the instant Motion as seeking authorization to employ the firm of Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball as counsel for "Debtor." The term "Debtor" is used as shorthand for "Debtor-in-Possession" throughout Counsel's pleadings and supporting evidence. In using these terms interchangeably and using the term "Debtor" in lieu of "Debtor-in-Possession," however, Counsel is creating confusion for the court and other parties in interest. "Debtor" and "Debtor-in-Possession" are legal terms of art that carry different connotations under the dual identity theory of the Debtor-in-Possession under 11 U.S.C. § 1101(1).

11 U.S.C. § 1107(a) describes the powers and duties of the debtor in possession. It bestows upon the debtor in possession all of the rights and powers of a trustee and requires the debtor in possession to perform all of the duties and functions of a trustee. These powers go beyond those granted to "Debtors" in defining a debtors' relationship to the estate. The court urges Counsel to make this distinction clear in subsequent pleadings, and to indicate that the "Debtor-in-Possession" exists in a separate capacity as fiduciary of the bankruptcy estate than the role of a "Debtor."

Counsel Hagop Bedoyan has clarified, in his Declaration, Dckt. No. 175, that the financial advisory firm GlassRatner and the Counsel firm have not entered any profit-sharing arrangements, whereby each entity may receive a percentage of fees based on referrals or suggestions for services. It appears that the Debtor-in-Possession was referred to GlassRatner by an executive officer of American AgCredit. Moreover, Counsel has clarified that GlassRatner subleases office space from Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball based on an oral contract. Pages 9-10, Motion to Employ, Dckt. No. 172.

The entities appear to have a type of in-kind services and rental space exchange agreement in which GlassRatner pays its rent by providing Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball with financial consulting services, which consists of reviewing Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball's monthly financial statements and loan covenant compliance matters. The Motion also states that there is no fee sharing arrangement between GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, and the amount of rent or services provided is unrelated to referrals between and income of GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball. *Id.*

Taking into account all of the relevant factors in connection with the employment and compensation of Counsel, considering the declaration demonstrating that Counsel does not hold an adverse interest to the Estate and is a disinterested person, and Counsel having provided a comprehensive description of the limited nature and scope of the services to be provided, the court grants the Amended Motion to Employ Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball as counsel for the Chapter 11 estate, on the terms and conditions set forth in Legal Services Agreement filed as Exhibit A, Dckt. 177.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Counsel 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 to Employ is granted and the Debtor-in-Possession is authorized to employ Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball as counsel for the Debtor-in-Possession on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit 1, Dckt. 49.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.
>
> **IT IS FURTHER ORDERED** that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

14. 13-91459-E-11 LIMA BROTHERS DAIRY
KDG-2 Hagop T. Bedoyan

AMENDED MOTION TO EMPLOY GLASSRATNER ADVISORY AND CAPITAL GROUP, LLC AS CONSULTANT(S)
3-5-14 [164]

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-in-Possession, all creditors, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 22 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Debtor-in-Possession of this Chapter 11 case (abbreviated to the term "Debtor" throughout the Motion and Declarations filed in support of this Motion), filed its initial Application for Order Authorizing the Employment of GlassRatner Advisory & Capital Group LLC ("GlassRatner") as business consultants and advisors for Debtor on on December 20, 2013. FN.1.

FN.1. Counsel phrases the motion as requesting authorization for employment of Counsel as the attorney for the "Debtor." If so, then in this Chapter 11 case Counsel would not be entitled to be paid professional fees. Counsel abbreviates the term "Debtor-in-Possession" to "Debtor" at the beginning of the Motion to Employ, and within the first few lines of each of the Declarations submitted in support of the Motion (Dckt. Nos. 174-176). Counsel is advised that the practice of using "Debtor" as an abbreviated term for "Debtor-in-Possession" is confusing to the court and potential respondents, since both are legal terms of art that have distinct meanings in the context of a Chapter 11 case.

That counsel continues to use the term "Debtor" as a defined term for the Debtor in Possession only works to muddy the record and create confusion. It is as if counsel is intentionally trying to confuse the record, the court, and parties in interest that it is the Debtor, in its personal capacity, which is "calling the shots" against creditors and not the fiduciary Debtor in Possession.

Further, sloppily referring to the "debtor in possession" as "debtor" may well lead to other professionals forgetting, and then breaching, their fiduciary duty to the bankruptcy estate. Such professionals may be mislead into believing that they represent the individual "debtor" who may want to use every twist, turn, and other conceivable device, artifice, and "constructively" phrased communication to "do creditors out of their rights under the Bankruptcy Code."

On December 11, 2013, the court entered an order approving GlassRatner's employment by the Debtor-in-Possession on the terms and conditions set forth in this Amended Application. The court authorized the employment of GlassRatner Advisory & Capital Group, LLC as its business consultant and advisor pursuant to 11 U.S.C. § 327(a), subject to the following terms and conditions:

1. The employment of GlassRatner is subject to the applicable terms and conditions of 11 U.S.C. § 327 and 11 U.S.C. §§ 330 and 331.

2. No compensation is permitted except upon court order, following an application made pursuant to 11 U.S.C. § 330(a).

3. Compensation paid to GlassRatner shall be at the "lodestar rate" applicable at the time that services are rendered.

4. No hourly rate referred to in the motion is approved unless unambiguously so stated in this order or in a subsequent order of this court.

5. Monthly applications for interim compensation pursuant to 11 U.S.C. § 331 will be entertained.

At the hearing on the first interim fee application brought by GlassRatner, KDG-5, the court requested that GlassRatner file an amended employment application to address the following:

A. That GlassRatner clarify that it is employed by the Debtor-in-Possession, and not the Debtor.

B. That GlassRatner provide additional details regarding GlassRatner's connections to Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, counsel of record to the Debtor-in-Possession.

C. The court requested that GlassRatner confirm that it is holding the retainer paid to it in a trust account. GlassRatner is holding the retainer it received in trust. Declaration of George Demos in Support of Amended Application by Debtor-in-Possession for Order Authorizing Employment of Business Consultants and Advisors.

The Debtor-in-Possession states that it wishes to employ GlassRatner as its business consultants and advisors because GlassRatner specializes in providing business consulting and advising services, and has extensive experience with dairies. GlassRatner is experienced in performing the consulting services required by Debtor-in-Possession and its Chapter 11 estate, and GlassRatner is readily familiar with the nature and complexities involved in the operation of Debtor's-in-Possession business.

The professional services that GlassRatner is to render include:

A. Preparing financial projections for use of cash collateral and other motions;

B. Preparing monthly operating reports; provide assistance with the assessment, formulation, or implementation of financial restructuring;

C. Provide assistance with formulation of a plan and disclosure statement, including financial projections;

D. Reviewing, evaluating, and participating in various negotiations with creditors;

E. And otherwise assisting in such matters as will aid in accomplishing the foregoing.

These activities appear to breakdown into several categories:

A. Bookkeeping (preparing monthly operating reports rather than a regular employee or bookkeeper for the Debtor in Possession), and

B. Financial consulting and assistance (assessment, formulation, or implementation of financial restructuring; financial projections, evaluating and participating in negotiations with creditor.)

The professional services to be rendered by GlassRatner are more fully described in the engagement letter dated December 3, 2013 ("Engagement Letter") attached as Exhibit A to Application. Dckt. No. 24. To the best of GlassRatner's knowledge, GlassRatner has no interests adverse to the Debtor-in-Possession and is disinterested. GlassRatner has no connections with Debtor-in-Possession, its Creditors, any other party in interest or their attorneys and accountants, the United States Trustee, or any person employed by the Office of the United States Trustee except as set forth below.

George Demos, a Senior Managing Director at GlassRatner reviewed with the Debtor-in-Possession its relationships with other attorneys and accountants, their principals, and its creditors and other parties in interest, and their respective counsel and accountants. Demos also reviewed the Debtor's Schedules of Assets and Liabilities filed with the court on September 2, 2013, and the list of employees of the office of the United States Trustee for Modesto and Sacramento Divisions of the court. Based on

such review, the only connections between GlassRatner on one hand, and the Debtor-in-Possession; its creditors; other interested persons and their attorneys and accountants, if known, on the other hand, are set forth below:

Disclosure of Adverse Interests and Connections

I. **Interests**

GlassRatner has no interest materially adverse to Debtor-in-Possession or its estate or any class of creditors in any of the matters upon which it is to be engaged, and Debtor-in-Possession believes that the employment of GlassRatner will be in the best interest of the estate.

II. **Connections**

GlassRatner has no connections with Debtor-in-Possession, its creditors, any other party in interest, or their attorneys and accountants, the United States Trustee, or any person employed in the Office of the United Trustee.

A. Connections with a Trustee: There is no trustee appointed in this case.

B. Connections with Debtor and its Partners: GlassRatner has no connections with the Debtor or its Partners except GlassRatner of the Debtor-in-Possession in this case.

C. Connections with the Bankruptcy Judge: Other than involvement with other cases before this judge, GlassRatner has no connections with the judge except,

a. George Demos is a member of the central California Bankruptcy Association. Judge Sargis has spoken to this association many times.

b. Brad Smith, a managing director of GlassRatner, is married to the Honorable Sherri Bluebond, a bankruptcy judge in the Central District of California.

D. Creditors: A review of the Debtor's list of creditors does not show connections between GlassRatner and Debtor's creditors, except that American AgCredit referred the Debtor in Possession to GlassRatner for financial consulting in this Chapter 11 case after AgCredit received GlassRatner's contact information from Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball.

E. Connections with Attorneys: GlassRatner has no connections to attorneys involved in the case except:

1. GlassRatner consults with many clients in the San Joaquin Valley. Mr. Demos and the employees of GlassRatner have

professional and personal interactions with attorneys in the San Joaquin Valley, some of which may be involved in this Chapter 11 case.

2. Mr. Demos and GlassRatner have worked, and are working, with Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball on other matters unrelated to Debtor-in-Possession.

3. GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, on a non-exclusive basis, occasionally refers clients to each other when their respective clients need professional services that the other provides. There is no agreement between GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball regarding referrals and no referral fees no referral fees nor any kind of financial renumeration paid between GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball.

4. Hagop Bedoyan of Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball was contacted by Maryam Ghazi, Vice President of Special Assets for American AgCredit, regarding a referral for a potential financial advisor who might assist the Debtor in Possession to better understand its financial position and to assist the Debtor in reorganizing its affairs. Bedoyan provided Ms. Ghazi (American AgCredit) with the contact information for Mr. Demos at GlassRatner and Mr. Brinkman at Jigsaw Advisors, LLC. Mr. Demos was contacted by Debtor in Possession for the purpose of retaining him and GlassRatner as its Financial Advisor.

5. GlassRatner subleases office space from Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball based on an oral contract. GlassRatner provides its own phone, internet, computer systems, and supplies. GlassRatner is authorized to use Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball's copy machines and conference rooms when they are available, but rarely uses them. GlassRatner pays its rent by providing Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball with financial consulting services, which consists of reviewing Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball 's monthly financial statements and loan covenant compliance. The estimated value of these services is between $200.00 and $300.00 per month.

   a. There is no fee sharing arrangement between GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, and the amount of rent or services provided is unrelated to referrals between and income of GlassRatner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball. GlassRatner asserts that these are unrelated entities with no common ownership.

6. Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball also subleases space to other tenants, including the Law Offices of Leonard K. Welsh, and the Law Offices of Thomas Fallgatter. The value of the leased space for each of these tenants is "on par" with the value exchanged between Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball and GlassRatner for their oral lease agreement. Glass Ratner and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball have reduced their agreement to writing and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball will bill GlassRatner for rent, and GlassRatner will bill Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball for consulting services.

7. Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball had connections with George Demos prior to to his joining GlassRatner. George Demos was the owner of CFO Resources, Inc. Before joining GlassRatner. CFO Resources was an outside CFO and financial advisory company. Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball and CFO Resources had a long professional relationship of assisting mutual clients. From July 2008 to September 2012, CFO Resources provided Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball with ad hoc consulting services with regard to its financial affairs, loan covenant compliance, and hiring and training a controller. These services were provided by CFO Resources and paid for by Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball through March 1, 2012.

8. On March 1, 2012, CFO Resources began subleasing the office space that is now leased by GlassRatner. CFO Resources began leasing the office space from Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball when its prior lease was expiring, and Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball had an empty office that it allowed CFO Resources to use in exchange for consulting services. GlassRatner assumed the sublease with Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball on the same terms described above when Demos joined GlassRatner.

F. Connections with Accountants: GlassRatner has no known connections to the accountants used by Lima Brothers Dairy to filing for relief under Chapter 11.

G. United States Trustee: Other than working with the United States Trustee and person employed by the Office of the United States Trustee in connection with this proceeding and other matters unrelated to "Debtor," there are no known connections to the United States Trustee, or any person employed by the Office of the United States Trustee.

GlassRatner was paid a retainer of $20,000.00 on December 10, 2013, by partners of the Debtor. The Retainer represents a capital contribution from the partners in Debtor, and it is not a loan to Debtor in Possession.

GlassRatner is holding the retainer in its client trust account pending approval and allowance of fees and costs by the court.

DISCUSSION

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

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

The court had articulated in previous hearings on GlassRatner's fee applications that the Motion should state that Applicant is the Counsel for the Debtor in Possession, not the Debtor. The court advised GlassRatner that if GlassRatner is attempting to be the attorney for the Debtor and the Debtor in Possession, there would be a disqualifying conflict arising under 11 U.S.C. § 327, thereby precluding Applicant from any compensation in this case.

In Chapter 11 cases, the debtor becomes the debtor in possession upon the commencement of the case and serves in that capacity until a Chapter 11 Trustee is appointed or the case is converted to one under Chapter 7. COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 1101.01. This creates a dual identity, that being the Debtor in its individual capacity and as the debtor in possession in its fiduciary capacity.

[3] The Separate Entity Theory

> Section 1101(1) contains only a definition. It does not address any distinction between the "debtor" and the "debtor in possession." Section 1107(a) describes the powers and duties of the debtor in possession. It grants to the debtor in possession all of the rights and powers of a trustee and requires the debtor in possession to perform all of the duties and functions of a trustee. Under section 323, the trustee is the representative of the estate. In a chapter 11 case, the debtor in possession acts in that role. This suggests that **the debtor exists in a separate capacity, in much the same way that an individual serving as trustee does not lose the individual's separate identity but has rights, powers, duties and obligations as trustee that are separate from those in the individual's personal capacity**. Thus, although one could properly say that the debtor in possession is not a separate entity from the debtor, that

would be incomplete. The estate created by section 541 is a separate entity. The debtor becomes the representative of the estate and, when acting in that representative capacity, is referred to as the debtor in possession.

The other provisions of chapter 11 are consistent with this distinction. Except for section 1107, expressly defining the rights, powers and duties of a debtor in possession, the provisions of chapter 11 grant rights or powers to the trustee rather than to the debtor in possession. References to the debtor are to the debtor as such, rather than to the debtor acting in its capacity as debtor in possession. For example, subsections 1121(a) and (c) permit the debtor, not the trustee or debtor in possession, to file a plan at any time during the case, even after the appointment of a trustee. Section 1121(b) grants the debtor the exclusive right to file a plan for the first 120 days after the order for relief. Section 1112(a) authorizes the debtor to convert the case to one under chapter 7, "unless the debtor is not a debtor in possession." Section 1141(b) vests the property of the estate in the debtor upon confirmation, and section 1141(d) discharges the debtor, not the trustee or debtor in possession. 7

Some have argued that the Supreme Court ruled in National Labor Relations Board v. Bildisco & Bildisco that the debtor in possession is not a new entity but is the same entity as the prebankruptcy debtor. The assertion is based on language that "it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition." 8 However, this language has been taken out of context. The statement was made in the context of whether, for the purposes of applying the labor laws, the debtor in possession (or, more properly, the estate, of which the debtor in possession is the representative) should be treated as a successor employer. In full, the quote reads:

> Much effort has been expended by the parties on the question of whether the debtor is more properly characterized as an "alter ego" or a "successor employer" of the prebankruptcy debtor, as those terms have been used in our labor decisions. See *Howard Johnson Co. v. Hotel Employees*, supra, at 259, n. 5; *NLRB v. Burns International Security Services, Inc.*, supra; *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). We see no profit in an exhaustive effort to identify which, if either, of these terms represents the closest analogy to the debtor-in-possession... . For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and

> property in a manner it could not have employed absent the bankruptcy filing. 9
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> Footnote 9. 465 U.S. 513, 527-28, 104 S.Ct. 1188, 1197, 79 L. Ed. 2d 482, 496-97 (emphasis added). Pre-Code case law provides some support for distinguishing between the roles of debtor and debtor in possession. Under former Chapter X, a trustee was always appointed unless the debtor's debts were less than $250,000. *In re J.P. Linahan, Inc.*, 111 F.2d 590 (2d Cir. 1940), involved a debtor that remained in possession. The Second Circuit reversed the district court's decision enjoining an election of directors to the debtor's board. In doing so, the Second Circuit distinguished between the roles of the debtor and the debtor in possession in the case, recognizing that the debtor continued to exist and represent the stockholders' interest during the case.

Id. See, *Burtch et al. v. Ganz et al. (In re Mushroom Transportation Company)*, 382 F.3d 325, 339 (3rd Cir. 2004),

> As we recently pointed out, "in Chapter 11 cases where no trustee is appointed,§ 1107(a) provides that the debtor-in-possession, i.e., the debtor's management, enjoys the powers that would otherwise vest in the bankruptcy trustee. Along with those powers, of course, comes the trustee's fiduciary duty to maximize the value of the bankruptcy estate." *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (en banc). The debtor-in-possession's fiduciary duty to maximize includes the "'duty to protect and conserve property in its possession for the benefit of creditors.'" *In re Marvel Entertainment Grp., Inc.*, 140 F.3d 463, 474 (3d Cir. 1998) (citation omitted). Thus, there is no question that Mushroom, acting through its representatives Arnold and Cutaiar, had a fiduciary duty to protect and maximize the estate's assets.

See also, *Rushton v. America Pacific Wood Products (In re Americana Expressways)*, 133 F.3d 752, 756 (10th Cir. 1997)("Under 11 U.S.C. § 1107 and bankruptcy case law, a debtor in possession, like a bankruptcy trustee, is a fiduciary."); *Hanson v. Finn (In re Curry & Sorensen)*, 57 B.R. 824 (B.A.P. 9th Cir. 1986) (While pursuant to Section 1107(a) of the Code, a debtor in possession is not required to investigate and report under Sections 1106(a)(3) and (4), the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would a trustee for a debtor out of possession. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985).

GlassRatner states that it is not a pre-petition creditor of "Debtor." GlassRatner is not an insider and it was not an employee of Debtor-in-Possession within the last two years, and it does not hold or represent an interest that is adverse to the estate. GlassRatner states that it has no interests materially adverse to Debtor-in-Possession or any class of creditors. GlassRatner has disclosed its connections with Debtor-in-Possession, and does not believe that any of these connections would interfere with duties to Debtor-in-Possession and its estate.

Taking into account all of the relevant factors in connection with the employment and compensation of GlassRatner and considering the declaration of George Demos, which demonstrates that GlassRatner does not hold an adverse interest to the Estate and is a disinterested entity, the court grants the Amended Motion to Employ GlassRatner Advisory & Capital Group LLC ("GlassRatner") as business consultants and advisors for the Estate, on the terms and conditions set forth in the Engagement Letter dated December 3, 2013. Dckt. No. 169.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Counsel 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 to Employ is granted and the Debtor-in-Possession is authorized to employ GlassRatner Advisory & Capital Group LLC as business consultants and advisors for the Debtor-in-Possession on the terms and conditions as set forth in the Engagement Letter dated December 3, 2013. Dckt. No. 169.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

15. 13-91459-E-11 LIMA BROTHERS DAIRY
KDG-4 Hagop T. Bedoyan

CONTINUED
MOTION TO USE CASH COLLATERAL AND/OR MOTION FOR ADEQUATE PROTECTION
1-17-14 [119]

CONT. FROM 2-13-14

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 17, 2014. By the court's calculation, 13 days' notice was provided.

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

The court's decision is to grant the Motion to Use Cash Collateral and to set a date for further hearing on a supplemental motion, if any, for further used of cash collateral.

Lima Brothers Dairy, the Debtor-in-Possession seeks an order authorizing the use of cash collateral, in the form of cash on hand, money on deposit, milk and cull proceeds, and the feed, derived from its business operations to fund its ongoing operations on an emergency basis. Debtor-in-Possession believes the use of these funds is necessary to preserve its operations as a going concern and to insure the 2,200 animals, including milk cows, dry cows, heifers, calves and bulls, are fed.

Debtor-in-Possession seeks the use of cash collateral through July 14, 2014. This court previously authorized the use of cash collateral through and including April 14, 2014. Civil Minutes, Dckt. No. 154.

Based on the loan and security documents, Debtor-in-Possession believes that AgCredit has first priority liens against the Cash Collateral. Based on loan statements and the representations of AgCredit, Debtor believes that the debt owed to AgCredit is about $1.8 million on its Cow Loan and $0.00 on its Feed Loan. On the petition date, AgCredit was owed

about $2.5 million on the two loans combined, but Debtor-in-Possession sold some livestock and pool quota and paid AgCredit pursuant to stay-relief orders entered on October 16, 2013, and November 5, 2013, in addition to continuous monthly payments throughout the case.

Debtor-in-Possession states the following creditors hold security interests junior to AgCredit's interest against the Cash Collateral: (1) Stanislaus Farm Supply (UCC-1 filed August 29, 2012), and (2) Cargill, Inc. (UCC-1 filed October 15, 2012).

Debtor-in-Possession had previously stated that it has been using cash collateral pursuant to two very narrow cash collateral stipulations dated September 11, 2013, and December 2, 2013. Debtor seeks broader use of cash collateral under the motion as well as additional protections to AgCredit. Debtor has requested that AgCredit continue to consent to the use of cash collateral under a further stipulation. Debtor is hopeful that such a stipulation will be presented to the Court in conjunction with this motion.

The court notes that on March 4, 2014, Debtor-in-Possession and AGCredit filed a Fourth Stipulation to continue the hearing on the Motion for Relief from the Automatic Stay filed by American AgCredit. Dckt. No. 163. The Stipulation provides that the hearing on the Motion for Relief from the Automatic Stay, WJS-1, shall be continued to April 10, 2014, at 10:00 am. The parties stated in the Stipulation that the continuance of the hearing will allow Debtor-in-Possession and AgCredit time to analyze Debtor-in-Possession’s long-term budget, and make necessary adjustments and continue negotiations regarding the terms of repayment in a plan of reorganization. Dckt. No. 163 at 2.

In its Motion to Use Cash Collateral, Debtor-in-Possession states it will provide AgCredit with adequate protection, including:

> a. caring for and maintaining the secured parities' collateral,
>
> b. granting AgCredit a replacement lien on Debtor's post-petition property of the same type and nature as against Debtor's prepetition property to the extent the use of cash collateral results in a decrease in value of AgCredit's interest in its collateral,
>
> c. making bi-weekly adequate-protection payments to AgCredit in the amount of about $35,000.00 (increasing to $55,000.00 in February 2014 and thereafter) as provided in the Budget;
>
> d. providing monthly financial reports to AgCredit, and allowing reasonable inspection of its operations; and
>
> f. harvesting crops in the field and converting it into usable silage, thereby substantially increasing the feed collateral value.

Debtor-in-Possession states it will provide junior secured creditors Stanislaus Farm Supply and Cargill, Inc. with adequate protection by granting replacement liens on milk proceeds and milk products generated by Debtor-in-Possession post-petition of the same type and nature as existed when Debtor filed its case to the extent the use of cash collateral results in a decrease in value of their interest in their collateral.

Conditional Objection by Creditor

Creditor Cargill, Incorporated, Cargill Animal Nutrition ("Cargil) filed a "conditional opposition" to the Motion (Dckt. No. 142), stating that no provision had made for payments to Cargill in the Motion. Cargill argued that the dairy budget attached to the Motion to Use Cash Collateral did not include the payment currently made to Cargill pursuant to an Irrrevocable Milk Proceeds Assignment, which was executed in favor of Cargill by Debtor-in-Possession. The assignment, according to Cargill, provided for two payments per month, totaling a note payment of $5,609.63. ¶ 4, Opposition of Cargill, Dckt. No. 142.

The court was informed, that Cargill has since been paid through its milk assignment, thus resolving Cargill's conditional opposition. Civil Minutes, Dckt. No. 154.

Debtor-in-Possession's budget for the authorization of use of cash collateral until July, 2014, as included below, explicitly states that "[l]oan payments include Cow loan & two mortgages to ACC totaling $61,186, and Cargill at $5,600 per month." Dckt. No. 186.

SUPPLEMENTAL PLEADINGS FILED BY DEBTOR IN POSSESSION

Debtor-in-Possession filed the original Motion to Use Cash Collateral on January 17, 2014. The court granted interim and continued use of Cash Collateral through April 13, 2014, pursuant to Civil Minute Orders entered on February 5, 2014, and February 20, 2014. The court continued the hearing on the Motion to March 27, 2014 at 10:30 am. The court directed Debtor-in-Possession to file a supplement to the Motion on or before March 10, 2014. Civil Minutes, Dckt. No. 154.

Debtor-in-Possession states that the Supplement to the Motion (Dckt. No. 183) requests authorization for continued use of Cash Collateral from April 14, 2014, though July 13, 2014, as provided in the budget included in the Supplemental Exhibits to M0tion to Use Cash Collateral and Grant Adequate Protection as Exhibit "D" ("the Budget") under the same terms as provided in the Civil Minute Orders previously issued by the court.

Debtor-in-Possession states that the following budget represents the best estimate and income and expenses of Debtor-in-Possession from April 14, 2014 through July 13, 2014. Debtor-in-Possession requests authorization to use about $1,416.558.00 from April 14, 2014, through July 13, 2014, as described in the budget below.

	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	
Cash Flow Week	1	2	3	4	5	6	7	8	9	10	11	12	13	
Post-Petition Accounting Week	20	21	22	23	24	25	26	27	28	29	30	31	32	
Week Beginning Monday	1/13/14	1/20/14	1/27/14	2/3/14	2/10/14	2/17/14	2/24/14	3/3/14	3/10/14	3/17/14	3/24/14	3/31/14	4/7/14	TOTAL
BEGINNING CASH BALANCE	**$58,574**	**$124,674**	**$57,574**	**$179,174**	**$56,147**	**$157,474**	**$86,374**	**$33,974**	**$143,674**	**$198,824**	**$126,724**	**$73,924**	**$139,974**	
ADD: Cash Receipts:														
Net Milk Check	$207,000		$233,000		$207,000		$43,500	$184,500	$175,050		$38,900	$175,050		$1,264,000
Bull Calf Income	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$9,100
Cow Sales		$10,000		$10,000		$10,000		$10,000		$10,000			$10,000	$60,000
TOTAL CASH RECEIPTS	**$207,700**	**$10,700**	**$233,700**	**$10,700**	**$207,700**	**$10,700**	**$44,200**	**$195,200**	**$175,750**	**$10,700**	**$39,600**	**$175,750**	**$10,700**	**$1,333,100**
LESS: Operating Disbursements														
Hay	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$136,500
Grain/Silage	$35,000	$55,000		$60,000		$60,000		$60,000		$60,000		$60,000		$390,000
Seed and Farming														$0
Payroll, Taxes & Benefits	$19,200		$19,200		$19,200		$19,200		$19,200			$19,200		$115,200
Contract Labor		$2,000		$2,000		$2,000		$2,000		$2,000		$2,000		$12,000
Hauling	$1,500				$1,500				$1,500				$1,500	$6,000
Fuel & Oil	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$28,000
Herd Replacement									$14,000		$21,000		$14,000	$49,000
Repairs & Maint.		$2,000		$2,500		$2,000		$2,500		$2,000		$2,500		$13,500
Supplies	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$52,000
Utilities	$8,000	$300			$8,000	$300			$8,000	$300			$8,000	$32,900
Vet & Breeding	$1,500				$1,500				$1,500				$1,500	$6,000
Insurance	$400		$400	$2,500	$400		$400	$2,500	$400		$400	$2,500	$400	$10,300
Owner's Draw	$5,000		$5,000		$5,000		$5,000		$5,000			$5,000		$30,000
Misc	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$6,500
TOTAL OPERATING DISBURS.	**$86,600**	**$77,800**	**$40,600**	**$85,500**	**$51,600**	**$82,800**	**$40,600**	**$85,500**	**$65,600**	**$82,800**	**$37,400**	**$109,700**	**$41,400**	**$887,900**
Less: Non-Operating Disburs.														
Legal and Professional Fees													$25,000	$25,000
Property Taxes	$20,000												$18,000	$38,000
2013 Payroll Tax Liability			$30,000											$30,000
US Trustee Fees			$6,500											$6,500
TOTAL NON-OPER. DISBURS.	**$20,000**		**$36,500**										**$43,000**	**$99,500**
Less Loan Payments														
Loan Payments	$35,000		$35,000	$48,000	$55,000		$55,000		$55,000		$55,000		$55,000	$345,000
TOTAL LOAN PAYMENTS	**$35,000**		**$35,000**	**$48,000**	**$55,000**		**$55,000**		**$55,000**		**$55,000**		**$55,000**	**$345,000**
TOTAL CASH DISBURSEMENTS	**$141,600**	**$77,800**	**$112,100**	**$129,500**	**$106,600**	**$82,800**	**$95,600**	**$85,500**	**$120,600**	**$82,800**	**$92,400**	**$109,700**	**$139,400**	**$1,332**
ENDING CASH BALANCE	**$124,674**	**$57,574**	**$179,174**	**$104,374**	**$205,474**	**$133,374**	**$81,974**	**$191,674**	**$$246,824**	**$174,724**	**$121,924**	**$187,974**	**$59,274**	**$59,274**

DISCUSSION

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

No objection has been raised to the use and the payments are reasonable and necessary to maintain Debtor's operations. The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). Here, the existence of a substantial equity cushion and the adequate protection payment protect the creditors interests, with the court granting creditors with liens on the cash collateral replacement liens in the same types of collateral described in their security agreements and other lien documents, to the extent that the use of cash collateral reduces the pre-petition amount of collateral which secured their respective claims.

The court authorizes the use of cash collateral, as set forth above, through and including July 13, 2014. To provide for the orderly administration of this case, the court continues the hearing on this Motion to Use Cash Collateral to 10:30 a.m. on June 26, 2014. On or before June 2, 2014 the Debtor in Possession shall file a Supplemental Motion for Further Use of Cash Collateral, and Oppositions, if any, to the Supplemental Motion shall be filed and served on or before June 16, 2014.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Authorize Use of Cash Collateral filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the motion to use cash collateral for the payment of the expenses is granted, and the Debtor in Possession is authorized through and including July 13, 2014, to use cash collateral may be used to pay the following expenses:

	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	
Cash Flow Week	1	2	3	4	5	6	7	8	9	10	11	12	13	
Post-Petition Accounting Week	20	21	22	23	24	25	26	27	28	29	30	31	32	
Week Beginning Monday	1/13/14	1/20/14	1/27/14	2/3/14	2/10/14	2/17/14	2/24/14	3/3/14	3/10/14	3/17/14	3/24/14	3/31/14	4/7/14	TOTAL
BEGINNING CASH BALANCE	**$58,574**	**$124,674**	**$57,574**	**$179,174**	**$56,147**	**$157,474**	**$86,374**	**$33,974**	**$143,674**	**$198,824**	**$126,724**	**$73,924**	**$139,974**	
ADD: Cash Receipts:														
Net Milk Check	$207,000		$233,000		$207,000		$43,500	$184,500	$175,050		$38,900	$175,050		$1,264,000
Bull Calf Income	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$700	$9,100
Cow Sales		$10,000		$10,000		$10,000		$10,000		$10,000			$10,000	$60,000
TOTAL CASH RECEIPTS	**$207,700**	**$10,700**	**$233,700**	**$10,700**	**$207,700**	**$10,700**	**$44,200**	**$195,200**	**$175,750**	**$10,700**	**$39,600**	**$175,750**	**$10,700**	**$1,333,100**
LESS: Operating Disbursements														
Hay	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$10,500	$136,500
Grain/Silage	$35,000	$55,000		$60,000		$60,000		$60,000		$60,000		$60,000		$390,000
Seed and Farming														$0
Payroll, Taxes & Benefits	$19,200		$19,200		$19,200		$19,200		$19,200			$19,200		$115,200
Contract Labor		$2,000		$2,000		$2,000		$2,000		$2,000		$2,000		$12,000
Hauling	$1,500				$1,500				$1,500				$1,500	$6,000
Fuel & Oil	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$3,500	$1,000	$28,000
Herd Replacement									$14,000		$21,000		$14,000	$49,000
Repairs & Maint.		$2,000		$2,500		$2,000		$2,500		$2,000		$2,500		$13,500
Supplies	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$4,000	$52,000
Utilities	$8,000	$300			$8,000	$300			$8,000	$300			$8,000	$32,900
Vet & Breeding	$1,500				$1,500				$1,500				$1,500	$6,000
Insurance	$400		$400	$2,500	$400		$400	$2,500	$400		$400	$2,500	$400	$10,300
Owner's Draw	$5,000		$5,000		$5,000		$5,000		$5,000			$5,000		$30,000
Misc	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$500	$6,500
TOTAL OPERATING DISBURS.	**$86,600**	**$77,800**	**$40,600**	**$85,500**	**$51,600**	**$82,800**	**$40,600**	**$85,500**	**$65,600**	**$82,800**	**$37,400**	**$109,700**	**$41,400**	**$887,900**
Less: Non-Operating Disburs.														
Legal and Professional Fees													$25,000	$25,000
Property Taxes	$20,000												$18,000	$38,000
2013 Payroll Tax Liability			$30,000											$30,000
US Trustee Fees			$6,500											$6,500
TOTAL NON-OPER. DISBURS.	**$20,000**		**$36,500**										**$43,000**	**$99,500**
Less Loan Payments														
Loan Payments	$35,000		$35,000	$48,000	$55,000		$55,000		$55,000		$55,000		$55,000	$345,000
TOTAL LOAN PAYMENTS	**$35,000**		**$35,000**	**$48,000**	**$55,000**		**$55,000**		**$55,000**		**$55,000**		**$55,000**	**$345,000**
TOTAL CASH DISBURSEMENTS	**$141,600**	**$77,800**	**$112,100**	**$129,500**	**$106,600**	**$82,800**	**$95,600**	**$85,500**	**$120,600**	**$82,800**	**$92,400**	**$109,700**	**$139,400**	**$1,332**
ENDING CASH BALANCE	**$124,674**	**$57,574**	**$179,174**	**$104,374**	**$205,474**	**$133,374**	**$81,974**	**$191,674**	**$$246,824**	**$174,724**	**$121,924**	**$187,974**	**$59,274**	$59,274

The amount authorized for each category may be increased by no more than 10% each month, but the total cash collateral used in a month cannot exceed the monthly total set forth in the budget above.

IT IS FURTHER ORDERED that the hearing on this Motion to Use Cash Collateral to 10:30 a.m. on June 26, 2014. On or before June 2, 2014 the Debtor in Possession shall file a Supplemental Motion for Further Use of Cash Collateral, and Oppositions, if any, to the Supplemental Motion shall be filed and served on or before June 16, 2014.

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.

No attorneys' fees or other professional fees are approved by this order or inclusion of such expense item in the budget. Such professional fees may be paid only as allowed and authorized to be paid by separate order of the court.

16. 13-91459-E-11 LIMA BROTHERS DAIRY — MOTION TO USE CASH COLLATERAL
KDG-4 Hagop T. Bedoyan — 3-10-14 [183]

Final Ruling: The motion appearing to duplicate the Motion to Use Cash Collateral filed January 17, 2014, DCN KDG-4, **this matter is removed from calendar.**

17. 13-91963-E-7 MICHELLE HOLTZINGER MOTION TO COMPEL ABANDONMENT
TPH-1 Thomas P. Hogan 2-27-14 [23]

Local Rule 9014-1(f)(2) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 27, 2014. By the court's calculation, 14 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Abandon Real Property and the Trustee is ordered to abandon the property. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here, the property commonly known as 17680 Yosemite Road, Sonara, California, is impaired by two trust deeds in favor of Bank of America and Wells Fargo, securing loans with balances of $151,711.00 and $222,000.00 respectively. Debtor's Schedule D also lists a judgment lien for an Abstract of Judgment filed in Toulumne County Superior Court on June 8, 2012, against the Debtor in the amount of $198,170.02.

Debtor obtained a professional appraisal on her residence, conducted on February 16, 2014, in which the appraiser determined the market value of the property to be $295,000.00. Exhibit B, Dckt. No. 26. The appraisal is not authenticated by the appraiser who prepared the report pursuant to Federal Rule of Evidence 901. Additionally, Debtor's Schedule A had previously listed the value of the property located at 17680 Yosemite Road, Sonora, California, to be $269,555.00. Regardless of the most accurate

valuation of the property, the unavoidable consensual liens on the property total at least $373,711.00, based on the secured mortgage loans and equity line of credit held by Wells Fargo and Bank of America and listed on Debtor's Schedule D. It appears that the non-exempt equity in the subject property has been exhausted, and that the Trustee cannot profitably liquidate the property for proceeds over above the liens listed on Debtor's Schedule D.

Since the debt secured by the property exceeds the value of the property, and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the real property identified as:
>
> 1. 17680 Yosemite Road, Sonora, California
>
> on Schedule A by the Debtor is abandoned to Michelle Mapa Holtzinger, the Debtor, by this order, with no further act of the Trustee required.

18. 14-90263-E-7 EDMON KANOON HESARI — **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**

Pro Se — **3-3-14 [14]**

Tentative Ruling: The court issued an order to show cause based on Debtor's failure to pay the required fees in this case ($306.00 due on February 26, 2014). The court docket reflects that the Debtor still has not paid the fees upon which the Order to Show Cause was based.

On March 2, 2014, the court denied Debtor's Application for a Waiver of the Chapter 7 Filing Fee, on the basis that Debtor's income appears to exceed the 150% threshold provided for in the U.S. Department of Health and Human Services' poverty guidelines. Dckt. No. 12.

The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed.

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

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

19. 13-91964-E-7 HCS-2 | JEFFREY RAMOS AND ALIDA MANAOIS - RAMOS Steele Lanphier | MOTION TO SELL FREE AND CLEAR OF LIENS 3-4-14 [41]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and some supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 4, 2014. The Supplemental Declaration of the Chapter 7 Trustee, and Exhibits to the Supplemental Declaration, Dckt. Nos. 48 and 49, were not served until March 10, 2014. By the court's calculation, 23 days' notice was provided for service of the Motion and initial declarations, and 17 days' notice was provided for service of the Declaration of Gary R. Farrar, and the attendant exhibits.

21 days' notice is required for Motions to Sell Property set for hearing under Local Bankruptcy Rule 9014-1(f)(12). This requirement was not met.

Tentative Ruling: The Motion to Sell Property was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 2002(a)(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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Permit Debtor to Sell Property without prejudice. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

INSUFFICIENT NOTICE PERIOD

Federal Rule of Bankruptcy Procedure 6004 requires that notices of proposed sales, use, or leases of property, other than cash collateral, not in the ordinary course of business be given pursuant to Federal Rule of Bankruptcy Procedure 2002(a)(2), (c)(1), (i), and (k). Federal Rule of Bankruptcy Procedure 2002(a)(2) mandates that twenty-one days' notice be provided to parties in interest for motions proposing the sale of property.

Here, the Trustee filed and served the Motion to Sell and some exhibits and declarations on March 4, 2014, 23 days before this hearing date. The Supplemental Declaration of the Chapter 7 Trustee, and Exhibits

to the Supplemental Declaration, Dckt. Nos. 48 and 49, however, were not served until March 10, 2014, only 17 days' notice before this hearing date. Respondent creditors, Debtors, and other parties in interest were not provided with sufficient time to review the Declaration of Gary R. Farrar, and the Preliminary Title Report offered as Exhibit A on Dckt. No. 49. Debtors set the motion for hearing under Local Bankruptcy Rule 9014-1(f)(2).

Because the Trustee did not provide adequate service of Dckt. Nos. 48 and 49 under Federal Rule of Bankruptcy Procedure 2002(a)(2), this motion is denied without prejudice.

Alternative Ruling – However, if the Moving Trustee can provide the court with evidence of proper notice, the court's Alternative Tentative Ruling is set forth below:

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b). 11 U.S.C. § 363 provides that a Trustee, after notice and a hearing, may sell property of the bankruptcy estate other than in the ordinary course of business. Here, Trustee Gary R. Farrar proposes to sell the real property located at 2308 Ustick Road, Modesto, California.

It appears that Trustee has not filed a Purchase Agreement that sets forth the terms and conditions of the sale to this Motion; Trustee does, however, provide a preliminary title report (Dckt. No. 49), and the purchase offer of the proposed buyer, a counteroffer by the Trustee, and a Chase Mortgage Statement as Exhibits in support of the Motion. Dckt No. 46. Rather, the Offer and Counteroffer of the potential buyer and Trustee are referred to collectively as the "Agreement." Trustee also seeks authorization to compensate realtor Bob Brazeal of PMZ Real Estate from the proceeds of the sale.

In their schedules, Debtors disclosed and valued the property at $80,000, while claiming an exemption of $14,479.27 pursuant to California Code of Civil Procedure § 703.140(b)(5). Debtors indicated that the property is subject to a secured debt of $65,014.69, held by Chase Bank. Trustee consulted realtor Bob Brazeal to perform an analysis of the fair market value of the property, and to place the property for sale. On January 18, 2014, the Trustee and Brazeal received an offer from Guadalupe Mendoza to purchase the property for $150,000.

On January 21, 2014, Trustee made a counteroffer to Mendoza, agreeing to the purchase price, but proposing the following additional terms:

A. Trustee's acceptance is subject to bankruptcy court approval and possible overbids;

B. The buyer understands the property is being sold in "as-is" condition;

C. The deposit shall be increased to $2,500; and

D. Eliminating the arbitration/mediation provisions from the purrchase contract. Counteroffer, Exhibit B, Dckt. No. 46.

On January 23, 2014, Mendoza accepted the counteroffer, and the parties reached an agreement where Mendoza would purchase the property for $150,000.00, subject to bankruptcy court approval, and on the terms described in the Offer, as modified by the Counteroffer. Trustee states that neither he nor his professionals have any relationship with Mendoza, and that the Agreement is condition on the court's approval of this motion.

SALE REQUESTED TO BE FREE AND CLEAR OF LIENS

The Trustee also requests approval to sell the real property free and clear of all liens on the subject real property pursuant to 11 U.S.C. § 363(f)(2) and (3). Pursuant to 11 U.S.C. § 363(f)(2), the Trustee may sell property free and clear of any interest in such property of an entity other than the estate if such an entity consents. Under 11 U.S.C. § 363(f)(3), the Trustee may sell property free and clear of any interest in such property of an entity other than the estate only if such interest is a lien, and the price at which such property is to be sold is greater than the aggregate value of all liens on such property.

Trustee states that he has reviewed a preliminary title report for the property that shows the following liens against it:

A. A deed of trust held by JPMorgan Chase Bank, in the amount of $150,000;

B. An abstract of judgment in the amount of $18,000.95, held by Calvary SPV I, LLC; and

C. An abstract of judgment in the amount of $10,351.25 held by Calvary SPV I, LLC.

Trustee obtained from Debtors a mortgage statement for the Chase Lien, dated December 2, 2013. The unpaid principal balance due according to the mortgage statement on that date was approximately $64,096.38. On February 4, 2014, Trustee's counsel spoke with Laura Hoalst of Winn Law Group, APC, counsel for Calvary SPV, I, LLC. Hoalst agreed to provide a payoff demand of $0.00, and to prepare and send for recording the appropriate documents to release the second and third liens of Cavalry. Declaration of Bakken.

Trustee proposes to sell the property free and clear of the Cavalry Liens under 11 U.S.C. § 363(f)(2) because he has obtained the consent of the creditor to the proposed sale, and will pay the Chase lien from the proceeds of the sale through escrow. Trustee states the sale should also be free and clear of the Cavalry Liens under 11 U.S.C. § 363(f)(3) because the price at which the Property is to be sold is greater than the aggregate value of the liens on the property.

In considering the request to order the sale free and clear the court considers the evidence presented. The testimony in the three declaration is that of the Trustee, Real Estate Broker, and attorney for the Trustee.

Beginning with the attorney for the Trustee, Laris Bakken, she testifies that she talked with Laura Hoalst, an attorney, for Cavalry SPV I, LLC, and Ms. Hoalst told her that Calvalry SPV I, LLC would provide a payoff demand of $0.00, and for Ms. Bakken to prepare the approropriate documents to release the liens of that creditor, and so Ms. Bakken tells the court what Ms. Hoalst told her. First, this is hearsay which Ms. Bakken, an attorney, wants to repeat for the court. That does not make it any less or more credible as evidence. Second, in this day and age of electronic communications, "old fashioned fax machines," and telephonic appearances, there is little excuse for not having something as significant as a creditor's lien bypassed not documented in writing or attested to in court by that creditor. Merely because the Movant is the trustee does not mean that he is held to a lesser standard of pleading and evidence.

The Trustee then provides his declaration. He testifies that he has reviewed a preliminary title reports and tells the court what he was told by reading the title report. The title report is provided as Exhibit A, Dckts. 49, 50. He also provies the court with a mortgage statement which he "obtained" (in

an undisclosed way) showing that as of December 2, 2013, the "unpaid principal balance" on the debt secured by the Chase lien was $64,096.38. There is no testimony as to the current amount of the claim of JPMorgan Chase Bank, what in addition, to anything, is owed beyond the "principal balance," or why the Trustee proposes to pay JPMorgan Chase Bank only its principal balance instead of the total claim secured by the property to be sold. No proof of claim has been filed by "JPMorgan Chase Bank" in this case.

The court's concerns are raised even more in reviewing the Certificate of Service provided by the Trustee for this Motion. Dckt. 47. The court cannot find a "JPMorgan Chase Bank" (much less a name actually identified to a specific financial institution) having been served as required by Federal Rule of Bankruptcy Procedure 7004, 9014. There is a "Chase" which was served with just the Notice at an address in Westerville, Ohio and a post office box in Palatine, Illinois. There is a Chase Bank USA W A Heritage Bank One served with just the Notice c/o collection agency (no showing that the collection agency is the agent for service of process).

In reviewing the FDIC data base for federally insured financial institutions the court notes that there are two financial institutions with the words "JPMorgan Chase Bank" in their names. These are JPMorgan Chase Bank, N.A. and JPMorgan Chase Bank, Dearborn. http://www3.fdic.gov/idasp/main.asp. The Trustee declaration does not specifically identify which is the creditor whose lien is to be violated by court order. The Certificates of Service do not attest to having served the Motion on the "JPMorgan Chase Bank" whose lien rights are to be altered.

Though the Certificate of Service, Dckt. 50, states that the Notice of Motion was served on Cavalry SPV I, LLC, there is no attestation that the Motion was served on this creditor whose liens are to be altered.

Further, it does not appear that service was made on these two creditors are required by Federal Rule of Bankruptcy Procedure 7004. There has not been service by certified mail on or to the attention of an officer of "JPMorgan Chase Bank" if it is one of the two federally insured financial institutions identified by the FDIC. Fed. R. Bankr. P. 7004(h). For Cavalry SPV I, LLC, the service was not made on or to the attention of a managing member or agent for service of process. Fed. R. Bank. P. 7004((b)(3). FN.1. The court is not going to rely on a minimum wage employee in a mail room to determine that pleadings "served" by mail are legal proceedings which need to be "served by the mail room employee" on an officer or agent for service of process.

FN.1. The California Secretary of State website lists CT Corporation System as the agent for service of process for Cavalry SPV I, LLC. http://kepler.sos.ca.gov/. It also lists the same address as used by the Trustee for this creditor's address.

Merely because the Trustee says "this is enough to pay the creditor in full, so let me bypass his lien," is not sufficient grounds for this court to order the sale free and clear of liens. Like every other seller in California, the Trustee can sell the property, make demand on the creditors to present their payoff demands in escrow, and close the sale in the ordinary course of business.

DISTRIBUTION OF SALES PROCEEDS

The Trustee proposes to disburse the sales proceeds of $150,000.00 as follows: $9,000 to the realtor; $1,500 for the estimated closing costs; $64,096.38 for the Chase lien; resulting in a $75.403.62 in net proceeds for the bankruptcy estate.

WAIVER OF 14-DAY STAY OF ENFORCEMENT

The Trustee has also requested a waiver of the fourteen (14) day stay of the provisions of Federal Rule of Bankruptcy Procedure 6004(h). Federal Rule of Bankruptcy Procedure 6004(h) provides a fourteen (14) day stay of enforcement on orders authorizing the use, sale, or lease of property other than cash collateral. Trustee argues that a waiver of the stay is warranted because assuring the prospective purchasers (bidders) of the finality of the sale transaction will equate to higher bids at the hearing. Trustee also believes that it is in the best interest of Trustee and any prospective purchasers that the sale closes as soon as possible.

While stated as a bald assertion by the Trustee that any sale process would be better if there was no fourteen day stay, such was not the determination of the Rules Committee and Supreme Court in adopting the Federal Rules of Bankruptcy Procedure. If the Trustee's contention, standing alone, was correct, the Supreme Court would not have imposed a fourteen day stay of enforcement (increasing it from the former ten day stay of enforcement).

At the hearing the Trustee supported this contention with **XXXXXXXXXXXXXXXXXXXXXXX**.

Updated Preliminary Title Report

On March 10, 2014, Trustee filed an updated preliminary title report from the North American Title Company, along with a declaration attesting to his review of the updated report. Dckt. Nos. 48 and 49.

Trustee states in his Declaration that the updated preliminary title report that Trustee received on March 5, 2014, reflects an additional lien against the subject property, not covered in Trustee's Motion. The lien is in the form of an abstract of judgment in the amount of $27,939.38, and it is held by Unifund CCR, LLC. ¶ 3, Supplemental Declaration of Trustee in Support to Motion to Sell, Dckt. No. 48.

Based on the court's review of the updated Title Report, prepared by the North American Title Company, it appears that there are now four liens reflected against the subject property:

A. A deed of trust held by JPMorgan Chase Bank, in the amount of $150,000;

B. An abstract of judgment in the amount of $18,000.95, held by Calvary SPV I, LLC; and

C. An abstract of judgment in the amount of $10,351.25 held by Calvary SPV I, LLC.

D. An abstract of judgment in the amount of $27,939.38 held by Unifund, CCR, against Debtor Alinda B. Manois-Ramos aka Alinda B. Manois, emanating from a judgment issued in Stanislaus County.

The Trustee states that he will pay the Unifund Abstract "from the proceeds of the sale through escrow." *Id.* at ¶ 4

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Permit Trustee to Sell Property is granted, subject to the

court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

However, the court does not approve the sale free and clear of liens. The Trustee can pay such amounts as are owed through escrow. If improper demands are made, the Trustee may seek an amended order to sell free and clear on 24 hours notice, with the court ordering the liens attaching to the proceeds pending determination of the correct amount owed. If improper demands are made, the court presumes that the Trustee would not only seek the determination of the correct amount, but recover of all legal fees, costs, and expenses caused by such improper demand, in addition to any other damages and claims arising under applicable law.

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to sell property filed by 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 Gary Farrar, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b), to Guadalupe Mendoza ("Buyer"), the residential real property commonly known as 2308 Ustick Rd., Modesto, California ("Real Property"), on the following terms:
>
> 1. The Real Property shall be sold to Buyer for $150,000, on the terms and conditions set forth in the Purchase Offer Dated January 18, 2014, and the Counteroffer by Trustee Dated January 21, 2014, filed in support of the Motion. Exhibits A and B, Dckt. No. 46.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount no more than six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to the Trustee's broker, Bob Brazeal.
>
> 5. Trustee is authorized to make the following distributions from the Net Sales Proceeds, based on the purchase price of $150,000.00:
>
>   a. Six percent or $9,000.00, for the commission payable to Bob Brazeal, Realtor for the Trustee;
>
>   b. Estimated closing costs of $1,500;

c. "JPMorgan Chase Bank" for the only deed of trust recorded against the Real Property, estimated to be $64,096.38;

d. Unifund CCR, LLC for its claim, estimated to be $27,939.38, secured by the Abstract of Judgment recorded on June 28, 2013, Doc. 2013-55695 of the Official Records of Stanislaus County, California.

e. The balance of the sales proceeds, after payment of the above, to Gary Farrar, the Chapter 7 Trustee for the bankruptcy estate.

20. 10-91965-E-7 CRAIG WILSON — **MOTION TO AVOID LIEN OF PERSOLVE, LLC**
SDM-3 Scott D. Mitchell — **2-13-14 [31]**

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on February 13, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Avoid a Judicial Lien 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. 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 court's tentative decision is to grant the Motion to Avoid the Judicial Lien. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor seeks an order avoiding a judicial lien pursuant 11 U.S.C. § 522(f)(1)(A). A judgment was entered against the Debtor in favor of Persolve, LLC, a limited liability company for the sum of $12,802.58. The abstract of judgment was recorded with Sacramento County on April 27, 2009.

That lien attached to the Debtor's residential real property commonly known as 1221 College Avenue, Modesto, California.

OPPOSITION BY JUDGMENT CREDITOR

Judgment Creditor Persolve, LLC dba Account Resolution Associates ("Creditor"), opposes Debtor's Motion to Avoid to Avoid the Judicial Lien on the basis that Debtor has not attached any "admissible evidence" to support the claims in the Motion to Avoid the Judicial Lien. Creditor states that it has received no documentation providing any basis for Debtor's factual contentions.

Creditor also asserts that Debtor has not attached any evidence that the property in question is exempt, that the property has the encumbrances claimed in Debtor's motion, and that it is of the value stated by Debtor. Dckt. No. 49.

In its Opposition Creditor admits that it has a judgement lien and requests that it be "upheld." Dckt. SDM-3. The Opposition does not provide any description or identification of what judgment lien is asserted or that it is different from the judgment lien which the subject of the Motion to Avoid Judicial Lien.

DISCUSSION

To avoid a judicial lien pursuant to 11 U.S.C. § 522(f), a debtor must show the following:

> First, there must be an exemption to which the debtor "would have been entitled under subsection (b) of this section." 11 U.S.C. §522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be either a nonpossessory, nonpurchase-money security interest in categories of property specified by the statute, 11 U.S.C. § 522(f)(2), or be a judicial lien. 11 U.S.C. § 522(f)(1).

In re Mohring, 142 B.R. 389, 392-93 (Bankr. E.D. Cal. 1992), aff'd, 24F.3d 247 (9th Cir. 1994).

Debtor's Schedule C shows that Debtor properly claimed an exemption of $1.00 for the subject property, 1221 College Avenue, Modesto, California, in his signed and sworn Schedules, filed under the penalty of perjury. Schedule C, Dckt. No. 1.; Exhibit 1, Dckt. 34. Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $136,500.00 as of the date of the petition. Declaration, Dckt. 33; Schedule D, Dckt. 34. The unavoidable consensual liens total $159,279.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C.

The Creditor, Persolve, LLC, holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. The Debtor has attached an Abstract of Judgment from the

Civil and Small Claims Divison of the Stanislaus County Superior Court, for *Persolve, LLC v. Craig D. Wilson*, Case No. 630440 as Exhibit "1". Dckt. No. 34. The abstract is a summary of the court's final decision, and creates a lien on the real property owned or later acquired by the defendant in the county where the abstract of judgment is recorded. Here, the abstract summarizing the judgment entered against Debtor reflects that the total amount of judgment entered was $12,802.58, and that the judgment was rendered on October 27, 2008. The abstract itself was issued on January 28, 2009. The Recorder's Stamp on the Abstract of Judgment Title Cover Sheet, reflects that the abstract was recorded on April 27, 2009 against Debtor in Stanislaus County. Exhibit 1, Dckt. No. 34.

Creditor claims that Debtor has not provided admissible evidence to show the existence of the claimed judicial lien. Federal Rule of Evidence 902(1)(A) states that a documents that bears a seal purporting to be that of the United States; and any political subdivisions and territories of the United States, are self-authenticating that requires no extrinsic evidence of authenticity in order to be admitted. Federal Rule of Evidence 902(4) provides that a copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — is self-authenticating if the copy is certified as correct by:

> (A) the custodian or another person authorized to make the certification; or
>
> (B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

It does not appear that Debtor authenticated the Abstract of Judgment Debtor either by testimony or 902(4). Additionally, the Abstract of Judgment offered by Debtor does not bear the endorsement, signature, or seal of the Recorder or Recorder's office in the space reserved for such on the upper right hand corner of the Abstract of Judgment. Dckt. No. 34. The abstract cannot therefore be considered a self-authenticating, domestic public document pursuant to Federal Rule of Evidence 902(1).

Creditor Persolve, LLC admits that Creditor wants the lien upheld; it argues that Debtor has failed to provide any evidence of the lien, but simultaneously requests in its prayer for relief that the judgment lien be upheld. Dkct. No. 49. Creditor's opposition is essentially asking that the court deny the existence of the lien, while affirming the lien and requesting that Debtor be ordered from filing additional motions to avoid the lien. Absent the creditor stating (which statements are subject to Fed. R. Bankr. P. 9011) that the abstract does not represent the lien which it is attempting to "uphold," the court shall proceed with ruling on the merits of the motion on the abstract provided.

The motion is also accompanied by the Debtor's declaration. The Debtor values the real property at the value of $136,500.00. Dckt. No. 33. As the owner, the Debtor'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). Wells Fargo Hom Mortgage is

listed on Schedule D has having a deed of trust in the property in the total amount of $159,279.00. Dckt. No. 1.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), the court determines there is no equity in the property known as 1221 College Avenue, Modesto, California to support the judicial lien. Here, Debtor has also established the existence of a judicial lien impairing Debtor's claim of exemption in the Property. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B). The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Persolve, LLC, County Superior Court Case No. 630440, Document No. 2009-0040625-00, recorded on April 27, 2009, with the Stanislaus County Recorder, against the real property commonly known as 1221 College Avenue, Modesto, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

21. 13-90382-E-7 MICHAEL CARSON
13-9016
TAIPE V. CARSON

CONTINUED MOTION FOR COMPENSATION FOR THOMAS P. HOGAN, PLAINTIFFS ATTORNEY, FEES: $10,562.00, EXPENSES: $363.46
1-8-14 [79]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on January 8, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion for Attorney's Fees and Costs has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Defendant Michael R. Carson having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is to deny the Motion for Prevailing Party Attorneys' Fees. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

BACKGROUND

Plaintiff Graciela Carson makes a Motion for an Award of Attorney Fees and Costs for $10,562.00 in fees and expenses of $363.46 in this adversary proceeding. The period for which the fees are requested is for the period of May 24, 2013 through December 31, 2013.

Although this motion is framed broadly as a motion for "compensation" for Plaintiff's counsel's services, this is actuality, a Motion for prevailing party's attorney's fees. In its review of the pleadings and supporting evidence produced by both parties, the court notes that Plaintiff and Defendant's counsel appear to confuse, and at times, conflate the parties' child support proceeding in state court, and the adversary case filed in this court in connection with Defendant's bankruptcy case. Before the court parses the arguments for and against the present Motion for Fees and Costs, the court reviews the background of the motion, and the history of the case.

State Court Judgment

The underlying debt obligation arises from a state court judgment by the Contra Costa Superior Court. The judgment was rendered in a child custody, visitation, and support case litigated by the Plaintiff and

Defendant. In the state court proceeding, the Contra Costa County Superior Court issued an order on January 24, 2013, determining the respective responsibilities of Plaintiff and Defendant in payments for child support and attorneys' fees for the parties' family law attorneys (Exhibit A, Dckt. No. 83).

In the present Motion for Attorney Fees and Costs, Plaintiff states that Plaintiff was ordered the Defendant the sum of $462 per month for child support, whereas Defendant was ordered to pay Plaintiff's attorney in the family law case the sum of $12,480. Plaintiff's motion also states that the child support award of $452 owed to Defendant was to be "offset" by Defendant's payment of attorneys' fees of the $12,480 amount, to be paid over a time frame of approximately 27 months. To determine whether this characterization is accurate, the court reviews the actual text of the judgment issued by the Contra Costa Superior Court.

The state court's order consists of a form judgment, with a "Findings and Order" document describing the court's findings after the January 24, 2013 hearing, attached to the form judgment. Exhibit A, Dckt. No. 83. In the attachment, the state court refers to Plaintiff Graciela Carson as "Petitioner," and Defendant-Debtor Michael Carson as "Respondent," and states as follows:

FINDINGS AND ORDER AFTER HEARING ON JANUARY 8, 2013

1. Child Support (Jun-Dec 2012): Based on oral testimony and records received into evidence at the January hearing, the court finds the parties' earnings for the period from June 2012 through December 2012 are $9,197 per month for Petitioner and $8,000 per month for Respondent. Guideline child support for said period is $380 per month (See Exhibit A). The guideline child support obligation includes reimbursement to Petitioner for child support add-ons of $155 per month and Respondent's deductions for union dues, medical insurance and mandatory retirement contributions. The parties stipulate each parent exercises a 95%/5%timeshare Father has primary custody of Michael, Jr. And Mother has primary custody of Cassandra.

2. Child Support Arrearage (Jun-Dec 2012): Petitioner shall pay to Respondent the sum of $2,520 in child support arrearage for June through December 2012. Said amount is deemed paid in full by offsetting the attorney fee award due and owing to Petitioner's counsel/

3. Child Support (Jan 2013 forward): Effective January 1, 2013 Petitioner shall pay Respondent Father the sum of $452 per month as guideline child support based on Respondent's W-2 base pay of $7,333 per month and Petitioner's self-employment earnings of $9,197 per month. (See Exhibit B).

4. Quarterly Reconciliation of Respondent's Overtime Earnings: Respondent shall provide Petitioner with a copy of his pay stubs for the quarter no later than the 15th of the following month.

Due Date	**Record of Earnings**
April 15th	January through March
July 15th	April through June
October 15th	July through September
January 15th	October through December

In the event Respondent has any earnings in excess of $7,333 per month ($21,999 per quarter), he shall pay to Petitioner a percentage of his gross overtime earnings pursuant to the Exhibit B overtime table for Father. Said amount is due to Petitioner concurrently with the scheduled date for production of quarterly payroll records.

5. Attorney Fee Award (Family Code § 271): The court orders Respondent to pay Petitioner's counsel the sum of $15,000 in attorney fees pursuant to Family Code § 271. Said fee award is reduced to $12,480 for the $2,520 child support arrearage due from Petitioner to Respondent for June through December 2012. The $12,480 attorney fee award shall accrue interest at the legal rate of 10% per annum effective February 8, 2013.

6. In the event Petitioner elects to forgo payment of the monthly guideline child support obligation of $452 due to Respondent, effective January 1, 2013, Respondent shall receive a credit for said amount against the outstanding attorney fees to Petitioner's counsel. Attached is an amortization schedule (See Exhibit C).

Findings and Order After Hearing, Cal. Super. Contra Costa, Case No. D10-04543, January 24, 2010. Dckt. No. 83 at 3. Plaintiff did not file the exhibits referred to in the "Findings" attachment on the docket.

Sections 5 and 6 of the "Findings and Order After Hearing", which provide for an award of $12,480 for attorneys fees under Family Code § 271, have been the subject of intense contention in this matter, prompting recriminations and multiple filings and responses by both parties and their respective counsel.

In the Plaintiff's Motion for Attorney Fees and Costs, Plaintiff describes the total amount of $15,000 in attorney fees, pursuant to Family Code § 271 to be paid to Plaintiff's attorney by Defendant, as "sanctions" imposed on Defendant for having "engaged in completely excessive litigation." Lines 7-12, Page 2, Motion for Fees, Dckt. No. 79.

The court notes that in the adversary case, Adv. Proc. No. 13-09016, Plaintiff attached a one-page excerpt from the "Reporter's Transcript of Proceedings" from the state court child support hearing conducted on January 8, 2013. In the Adversary Complaint, Dckt. No. 1, Plaintiff states that

> Exhibit 2 if a true and correct copy the face page 158 of the January 8 2013 reporter's transcript of proceedings setting forth Judge Fannin's findings re Defendant's bad

faith conduct and imposing sanctions in the amount of $15,000 payable to Plaintiff GRACIELA TAIPE.

¶ 10, Adversary Complaint, Dckt. No. 1.

From the court's review of the transcript page provided, however, the finding of "bad faith conduct" on the part of Defendant is not so clearly stated by the state court judge. Moreover, the transcript indicates that the state court litigation involved allegations of dishonesty in Plaintiff's bankruptcy filings, issues that have not been briefed by the parties in this matter, or in the adversary case. The transcript includes the following statement by the state court judge:

> "The issue really was whether or not Ms. Taipe lied in the bankruptcy filing that she contends was dismissed because it was filed by a non-attorney who did it without her knowledge, which I find credible. So the whole fight about whether or not she would be imputed with 12,000 income because of a statement in one line of a dismissed petition was sort of overblown. As a result, it resulted -- ended up people spending $80,000 for today. And that's not even including your fees for today, the court reporter and everything else. It's craziness. It shouldn't happen like that.
>
> And so, looking under 271, where I'm supposed to sanction people who frustrate the policy of the law to promote settlements and where possible to reduce the costs of litigation, I'm going to impose $15,000 on Mr. Carson for Ms. Taipe's fees."

Reporter's Transcript of Proceedings, Exhibit B attached to the Adversary Complaint of Graciela Taipe, Dckt. No. 1.

Family Code § 271 provides a court may base an award of attorney's fees and costs on the extent to which the conduct of a party or attorney furthers or frustrates the policy of the law that favors settlement of litigation. Section 271 states that an award of attorney's fees and costs made pursuant to this section is "in the nature of a sanction." The Defendant was sanctioned $15,000.00 pursuant to Family Code § 271.

Adversary Proceeding

In April 10, 2013, Plaintiff filed an Adversary Complaint to Determine the Dischargeability of Debt under 11 U.S.C. § 523(a)(5). Specifically, Plaintiff seeks:

A. That the judgment of $12,480.00 for the § 271 Sanctions, plus interest at the rate of 10% per annum from February 3, 2013 forward. Awarded as sanctions pursuant to the state court order dated January 8, 2013, be deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(5) as a domestic support obligation; and that

B. Plaintiff be granted such other and further relief as the court may deem just and proper, including attorney fees and costs incurred in litigating this adversary proceeding, subject to proof.

Dckt. No. 1. In the Adversary Complaint, Plaintiff characterizes the judgment as sanctions against the Defendant-Debtor, to punish the Defendant-Debtor's excessive prosecution of a child support claim against the Plaintiff. Plaintiff argues that since this award was granted, in relation to litigation of a child or spousal support obligation, than the attorney's fees award in state court constitutes a nondiscahrgeable obligation of support in Plaintiff's bankruptcy case. *In re Morello*, 185 B.R. 853, 757 (Bankr. E.D. Tenn 1995).

The Adversary Proceeding was ultimately resolved with a stipulated order determining that the Plaintiff's right to offset the $15,000.00 sanction award against future support payments constituted an setoff (11 U.S.C. § 553) which was not discharged in this bankruptcy case. Order filed November 30, 2103, Dckt. 78.

However, the parties, and their respective attorneys, reaching this conclusion did not come easy. The Adversary Proceeding was commenced on April 10, 2013. The Plaintiff filed the Complaint in pro se. Dckt. 1. Defendant filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) and Federal Rule of Bankruptcy Procedure 7012. Dckt. 6. On June 10, 2013, Plaintiff's present counsel substituted in to represent Plaintiff. Dckt. 10. Opposition to the motion to dismiss was filed, Dckts. 13, 14; and then a reply to the opposition was filed. Dckts. 17, 18, 19.

The initial Status Conference in this Adversary Proceeding was continued by the court to August 1, 2013. Civil Minutes, Dckt. 16. This was done in light of the pending motion to dismiss.

The Motion to Dismiss was denied on several grounds. June 27, 2014 Civil Minutes, Dckt. 21. First, it was not properly served. Second, it failed to comply with the basic pleading requirements of Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007. At this hearing the court brought to the attention of the two attorneys the provisions of 11 U.S.C. § 553 providing for setoff and that a setoff was akin to a secured claim, which is not discharged in bankruptcy. (The right of set off against another obligation, as opposed to enforcing the underlying obligation against other assets of the debtor who receives the discharge.)

The Plaintiff filed an Amended Complaint (Dckt. 33) prepared by her counsel. The Amended Complaint asserted nondischargeability of the debt under 11 U.S.C. § 523(a)(5) and (15) and the right of setoff pursuant to 11 U.S.C. § 553.

The Parties were not able to resolve the dispute, and the Amended Complaint begat a Motion to Strike. Dckt. 37. The Motion sought to strike the following language of the Amended Complaint, pg. 8, ¶ 4, lines 2-3,

> "...including attorney fees and costs incurred in litigating this adversary proceedings, subject to proof."

It was asserted that the above language should be stricken based on it constituting "[a]n insufficient defense or any redundant, immaterial, impertinent, or scandalous material." The motion does not allege the grounds by which the language was any of the above. It was asserted in the Points and Authorities (Dckt. 38) that though required under the American Rule for attorneys' fees, no contractual or statutory provision was stated as the basis for attorneys' fees.

Defendant also filed a separate (as required under the motion pleading rules) Motion to Dismiss the First Amended Complaint. Dckt. 40. The grounds stated with particularity in the motion (as required by Fed. R. Civ. P. 7(b) and 7007) consisted of the following statement:

> "on the grounds: (1) that there are no facts set forth in the complaint to support a claim for relief against him (2) that the plaintiff has failed to and cannot state any causes of action against him."

Motion to Dismiss, Dckt. 40. This merely is a statement of the rule and possible legal conclusion of the court, not grounds upon which the court can then draw such legal conclusions. This legal conclusion pleading is insufficient to meet the state with particularity standard for motions, and even the less strict "short plain statement of the grounds" requirement for a complaint. Fed. R. Civ. P. 8(a), Fed. R. Bank. P. 7008; *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982); *Martinez v. Trainor*, 556 F.2d 818, 819-820 (7th Cir. 1977) (citing to 2-A MOORE'S FEDERAL PRACTICE, para. 7.05, at 1543 (3d ed. 1975)); *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010).

The Plaintiff filed her Opposition to the Defendant's Motion to Dismiss, Dckt. 45, and Motion to Strike, Dckt. 48 In responding to the Motion to Dismiss, the Plaintiff addressed in detail the 11 U.S.C. § 553 grounds for the discharge not limiting the Plaintiff's setoff rights. Dckt. 45.

In responding to the Motion to Strike the portion of the Amended Complaint by which Plaintiff asserted the right to attorneys' fees, Plaintiff stated that the basis of the attorneys' fees was asserted under Family Code §§ 2030, 2032, 3557.

The court denied Defendant's Motion to Strike and Motion to Dismiss. Civil Minutes, Dckts. 58, 60, November 6, 2013 filed orders, Dckts. 62, 64. The court noted Defendant's, and Defendant's counsel repeated failure to comply with the minimum pleading requirements of Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007.

On November 14, 2014 the Defendant filed an Answer to the First Amended Complaint. Dckt. 71. In it, Defendant responds stating his claim for attorneys' fees pursuant to California Family Code §§ 2030-2032, 271. This is stated in the prayer at the end of the Answer. This is the method

used by Defendant to plead his claim for attorneys' fees in the Answer, deeming it to meet the pleading requirements of the Federal Rule of Civil Procedure and Federal Rule of Bankruptcy Procedure. No other claim for attorneys' fees is stated.

At the November 21, 2013 Status Conference the court confronted the attorneys with the question about how they, after apparently agreeing that the application of 11 U.S.C. § 533 resolved the issue, could not come to a settlement on the Amended Complaint. After posturing, it came down to the attorneys and their clients not agreeing on attorneys' fees. At that point the court accepted the parties stipulation stated on the record resolving the merits of the Complaint, determining that the setoff rights were not discharged. Civil Minutes, Dckt. 76; Order, Dckt. 78.

The Parties still unable to resolve the attorneys' fee issue, on January 8, 2014, Plaintiff filed the Motion for Attorneys' Fees as the prevailing party – the debt having been determined to be nondischargeable. At the January 30, 2014, the parties addressed with the court the pending contested motion for attorneys' fees and unaddressed issues in connection with the Motion and the Opposition. Supplemental pleadings were filed.

PLAINTIFF'S MOTION FOR FEES AND COSTS

The present motion for prevailing party attorneys' fees is symptomatic of this Adversary Proceeding and the inability of the parties, and their respective attorneys to "get along." Though at the initial status conference the court identified that the non-dischargeability issue was illusory as the state court judge had created a setoff right which could be enforced pursuant to 11 U.S.C. § 553, the parties were incapable of bringing this matter to a conclusion. The best that could be done was for the court to obtain a stipulation on the record eight months after the Adversary Proceeding was filed. The parties and their respective counsel blame the other for "not being reasonable." The court does not attempt to determine who is right and wrong, as that is not the issue, except to the extent that it bears on the reasonableness of attorneys' fees, if any, awarded.

From the court's review of Plaintiff's pleadings, Plaintiff seeks the following relief:

A. $10,562.00 in attorney's fees and $363.46 in costs, incurred in connection with prosecution of the bankruptcy adversary proceeding;

B. That the above described fees and costs be considered an award to the prevailing party in the adversary proceeding filed by Plaintiff, which Plaintiff initiated to determine the non-dischargeability of the state court awarded attorney fee award pursuant to 11 U.S.C. § 553.

Plaintiff's Counsel has provided Monthly Billing Statements for the service period of Mary 24, 2013 - December 31, 2013, which are attached as Exhibit "G," in support of this Motion. Dckt. No. 83.

Moreover, Plaintiff has asserted several statutory grounds for the right to be awarded attorneys's in this Adversary Proceeding. They are as follows,

California Family Code § 2030

California Family Code § 2030 provides,

> (a) (1) In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.

This section applies not only to a proceeding for dissolution of marriage, nullity of marriage, or legal separation, but in "any proceeding subsequent to the entry of the related judgment." This Adversary Proceeding is a proceeding subsequent to the state court proceeding in which the obligation was ordered and relates to the enforcement of that family law order.

The plain language of this section provides that it is intended that each party to, and in connection with, the orders and judgment be afforded access to legal representation.

To grant an award of attorneys' fees under this section, the court is required to make findings,

A. Whether an award of attorney's fees and costs under this section is appropriate,

B. Whether there is a disparity in access to funds to retain counsel, and

C. Whether one party is able to pay for legal representation of both parties. If the

Id. (a)(2). Only if the "findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs." *Id.* A Motion for attorneys' fees and costs pursuant to Family Code § 2030 requires an analysis of the respective needs of the parties, as well as the ability to pay on the part of the party from whom fees have been requested. *Marriage of Rosen* (2002) 105 Cal.App.4th 808, 829, 130 Cal.Rptr.2d 1; *Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1166, 62 Cal.Rptr.2d 466. As set forth by Defendant, the court is to exercise both discretion and the consideration of the statutory factors in the exercise of that discretion. *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 315.

Pursuant to California Family Code § 2030(e) the California Judicial Council has promulgated a rule of court for the application of this attorneys' fees provision. California Rule of Court 5.427 provides that a request for attorneys' fees based on financial need, as described in Family Code sections 2030, 2032, 3121, 3557, and 7605 include the following:

A. A current Income and Expense Declaration;

B. A personal declaration in support of the request for attorney's fees and costs (information in California Form FL-158);

C. Detailed time and charges for the attorneys' fees information of the type normally provided in federal court for fee applications or prevailing party attorneys' fees.

The response to such a motion must include the income and expense information and personal declaration with the Form FL-158 information. California Rule of Court 5.427(b).

California Family Code § 2032

California Family Code § 2032 provides that the court may award attorneys' fees and costs pursuant to Section 2030 "where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." Cal. Fam. Code § 2032(a). The statute requires that in "determining what is just and reasonable," the court shall take into consideration,

> "the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances."

Id. (b).

California Family Code § 3557

California Family Code § 3557(a) provides that the court may award attorneys' fees to (1) a custodial parent based on an existing support order or penalty incurred in connection with Chapter 5 (Cal. Fam. §§ 4720 et seq.) or (2) for a supported spouse in an action to enforce an existing order for spousal support. The award of attorneys' fees is appropriate to ensure each party's access to legal representation for the above when the court determines that (1) an award of attorneys' fees is appropriate, (2) there is a disparity in access to funds to retain counsel, and (3) one party is able to pay for legal representation for both parties.

California Family Code § 271

California Family Code § 271 provides that a court may award attorney's fees and costs to the extent to which the conduct of a party or attorney "furthers or frustrates the policy of the law to promote settlement of litigation, and where possible, to reduce the cost of litigation by encouraging cooperation between the attorneys." *Id.* (a). Plaintiff asserts that she has been forced to engage in unnecessary litigation, and incur "higher costs than necessary" given Defendant's refusal to enter into an order determining the state court's judgment of attorney's fees as a setoff under 11 U.S.C. § 553. Plaintiff claims that it has performed substantial work to oppose Defendant's opposition and continued pursuit of litigation.

California Family Code § 4320

In ordering spousal support under Section 4320, the court shall consider all of the following circumstances:

> (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:
>
> > (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.
> >
> > (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.
>
> (b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.
>
> (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.
>
> (d) The needs of each party based on the standard of living established during the marriage.
>
> (e) The obligations and assets, including the separate property, of each party.
>
> (f) The duration of the marriage.
>
> (g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.
>
> (h) The age and health of the parties.

(I) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

(j) The immediate and specific tax consequences to each party.

(k) The balance of the hardships to each party.

(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.

(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4324.5 or 4325.

(n) Any other factors the court determines are just and equitable.

OPPOSITION BY DEFENDANT

Defendant filed opposition to the Motion on January 30, 2014, advancing the below arguments:

I. Because the litigation underlying this motion implicates questions of federal bankruptcy law, rather than child support enforcement questions, Plaintiff's counsel cannot rely on provisions of the Family Code to recover an award of attorney's fees.

A. The gravamen of the litigation rests on defendant's bankruptcy and his pursuit of bankruptcy protections and relief, and not from a state court family law proceeding. Whether the Defendant's debt could be discharged did not turn on whether the disputed claims were enforceable under applicable state law. Rather, Defendant argued that Plaintiff's complaint hinged on the question of whether an award of attorney's fees stemming from a state court matter is dischargeable.

II. Defendant states that because this is not a case of child custody and visitation, division of community property, or a party seeking child support and an award of attorney's fees under the California Family Code, there is no contract involved.

A. Defendant argues that the Plaintiff is attempting to ask that this court act as the family court, and make an award determination based on the "relative need and ability" of the parties under the California Family Code, particularly California Family Code, § 2030 et seq. Plaintiff has not complied with the procedures established by California Family Code § 2030(e). The California Judicial Council has promulgated statewide rules of court implementing Section 2030(e).

B. Defendant asserts that Plaintiff's Motion and the evidence offered are inadequate. Defendant opposes the granting of attorneys' fees under the cited California Rule of Court and Family Code sections. Plaintiff does not file a request for order, a current income and expense declaration, and other papers detailing Plaintiff's financial circumstances. Defendant argues that Plaintiff's motion does not include the above-listed documents, thereby preventing the court from considering the finances, income, and expenses of Plaintiff in determining whether Plaintiff is in need of an award, and whether or not she can pay her own fees.

1. Upon a review of the docket, however, the court notes that Plaintiff has now provided the forms required by California Rule of Court 5.427 and Family Code Section 2030(e). Dckt. No. 113.

III. A party does not necessarily need to be the winning party in order to be awarded attorney's fees or costs under the California Family Code. As such, Defendant asserts that Plaintiff makes more income than Defendant, and that Plaintiff can pay her own fees under the California Family Code.

A. Defendant cites to an order by the Contra Costa County Superior Court, entered on January 28, 2013, where the court found Plaintiff made $9,197.00 monthly in comparison to Defendant's $7,333.00, to highlight the parties' income disparity. Plaintiff's Exhibit A, Findings and Order After Hearing Filed January 24, 2013, Dckt. No. 83 at 2-6, 19.

IV. Defendant also asserts that Plaintiff's pleadings are defective, in that the request for attorney's fees was only included in the Plaintiff's prayer for relief, rather than the body of the complaint.

A. Federal Rule of Bankruptcy Procedure 7008(b) requires that a request for an award of attorney's fees be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply. Plaintiff's request for attorney fees is not included in the body of Plaintiff's Motion.

B. Defendant additionally contends that Plaintiff's Motion does not state with particularity the grounds upon which the

relief sought is based pursuant to Federal Rule of Bankruptcy Procedure 9013.

V. Lastly, Defendant argued that Plaintiff's submission of evidence related to the parties' settlement negotiations in their marital dissolution proceedings violates Federal Rule of Evidence § 408. Federal Rule of Evidence § 408 bars the admission of conduct or statements made in the course of negotiations, to prove liability for any alleged losses or damages, in open court.

A. Defendant submits that the state court findings offered by Plaintiff in support of the motion to be inadmissible and should not be considered by this court.

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION

Plaintiff filed a reply to the Defendant's opposition on February 6, 2014, contending the following:

I. Defendant was adequately notified of Plaintiff's request for attorney's fees from the outset of the adversary proceeding. Plaintiff cites to the case of *In re Carey,* 446 N.R. 384 (B.A.P. 9th Cir. 2011), a matter in which an attorney's fees motion was initially denied to the appellant's failure to request attorney's fees specifically as a claim in the Complaint.

A. The court in *In Re Carey* explained that the pleading provisions in the Civil and Bankruptcy Rules of Civil Procedure were intended to provide the parties with adequate notice of the opposing party's claims or defenses. *Id.*

1. Plaintiff states that Defendant was continuously aware of Plaintiff's request for attorney fees, even filing a Motion to Strike Plaintiff's Request on September 12, 2013, thus acknowledging Plaintiff's request.

II. Plaintiff maintains that a request for attorney's fees is permitted under the Bankruptcy Code because this request was asserted in the Complaint. Plaintiff argues that this request in the Complaint is sufficient to award a prevailing claimant to reasonable fees generated in the prosecution of a complaint under Federal Rule of Bankruptcy Procedure 7009, and the court's ruling in *In re Carey*. *Id.* at 394.

A. In *Carey,* the Ninth Circuit Bankruptcy Appellate Panel, determined that an adversary complaint to determine nondischargeability provided adequate notice to debtor of judgment creditor's claim for attorneys fees, even though the judgment creditor did not include an explicit request for attorneys' fees in the body of the Complaint. *In re Carey*, 446 B.R. 384, 392 (B.A.P. 9th Cir. 2011).

Rather, the judgment creditor included the claim for an award of attorney's fees in its prayer for relief; the court

decided that this, coupled with a preamble clearly stating that the that judgment creditor sought an award of attorneys fees from debt, and paragraphs in the body of the complaint containing supporting factual allegations identifying the promissory note, execution of replacement guarantee, and other underlying substantive facts supporting judgment creditor's claims, sufficiently provided notice to Debtor for the judgment creditor's request of attorney fees. *Id.*

1. Here, Plaintiff did not include the request for attorney's fees in the body of the Complaint, but rather embedded the request in the prayer for relief at the bottom fo the Complaint. The issue of whether Plaintiff has properly pled his claim for attorney's fees is further discussed below.

III. Plaintiff imputes on Defendant's attorney knowledge of this court's acknowledgment that the state court attorney's fee award is an set-off that included a mutuality of debts that would be treated as a secured claim.

A. Plaintiff states that this court had long instructed the parties' attorneys to craft a stipulation, agreeing that the offset would not violate the discharge injunction against the domestic support obligation. Exhibit 3, Excerpts from Transcript from Hearing Held on June 27, 2013, Dckt. No. 93.

IV. Plaintiff accuses Defendant-Debtor's counsel of being uncooperative, and unwilling to work with Plaintiff's counsel to fashion the court's requested order. Plaintiff expresses frustration at Defendant's counsel's lack of cooperation in drafting an order that would allow Plaintiff continue to offset her child support obligation, and to determine the offset to be nondischargeable under 11 U.S.C. § 553. Exhibit 4, Dckt. No. 93. Plaintiff argues that against the advice of the court, Defendant's counsel persisted in moving forward with litigation, and refused to work with Plaintiff's counsel to craft an order memorializing the court's assessment that the attorney's fees offset from the state court is nondichargeable.

V. Plaintiff also advances two additional arguments in favor of recovering attorney's fees connected to the adversary proceeding. The arguments consist of the following:

1. Plaintiff can recover attorney's fees under California Family Code Section 271, due to Defendant's refusal to cooperate and frustration of the settlement process.

2. Plaintiff is entitled to Attorney Fees and Costs, pursuant to California Family Code Section 2032, based on Plaintiff's financial circumstances and Defendant's ability to pay.

DEFENDANT'S SUPPLEMENTAL OPPOSITION TO PLAINTIFF'S REPLY

Defendant Michael Carson filed supplemental opposition to Plaintiff's Motion for Fees on February 20, 2014, Dckt. No. 103, to respond to the two "additional arguments" raised in the Plaintiff's reply.

Defendant's opposition is mostly a rehash of the arguments advanced in Defendant's initial opposition, filed on January 30, 2014, on Dckt. No. 89. Defendant again argues that state law does not govern the substantive issues in this matter; that the Plaintiff cannot recover attorneys' fees as sanctions because the complained of conduct does not rise to the level of sanctionable conduct (addressing Plaintiff's accusations that Defendant's counsel has been unreasonably uncooperative in refusing to enter an order determining the award as a setoff); that a sanctions award cannot impose a unreasonable financial burden; that Plaintiff must adhere to relevant California state law when requesting fees; and that Plaintiff's First Amended Complaint is defective in requesting attorney's fees. Supplemental Opposition, Dckt. No. 103.

DISCUSSION

I. Consideration of State Law in Determining Nondischargeability and Merits of the Request for Attorney's Costs and Fees

After a review of the pleadings, the court disagrees with Defendant's contention that because the litigation underlying the Motion for Compensation implicates questions of bankruptcy law (rather than issues of child support), Plaintiff cannot rely on provisions of the Family Code to recover an award of attorney's fees.

Defendant argues that Plaintiff erroneously cites to the California Family Code, specifically § § 271 and 2030-2032, to assert that attorneys' fees are warranted. Defendant asserts that questions of whether the state court, in awarding attorney's fees to Plaintiff weighed the "relative need and ability" of the parties under the California Family Code, would figure into this court's determination of whether the judgment debt is non-dischargeable under 11 U.S.C. § 523(a)(5), but is not relevant to Plaintiff's current request for attorney's fees.

There is an extensive body of law, however, indicating that an award of attorney's fees in a bankruptcy case assumes the nondischargeable character of the underlying debt. The Dischargeability of ancillary obligations, such as attorney fees and interest, generally depends on that of primary debt, unless relationship of ancillary to primary obligations is so attenuated that it would be unreasonable to characterize them as nondischargeable based on nondischargeability of primary debt. 11 U.S.C. § 523(a). *In re Florida*, 164 B.R. 636 (B.A.P. 9th Cir. 1994). In that case, which involved a debtor who had forged a release of an IRS lien and caused the title insurer to incur damages (the judgment debt pf which was determined to be nondischargeable under 11 U.S.C. § 523(a)(6),) the Ninth Circuit Bankruptcy Appellate Panel held that ancillary obligations imposed on debtor, including discovery sanctions and attorney fees, partook of character of primary debt and are not dischargeable. *In re Florida*, 164 B.R. 636, 639 (B.A.P. 9th Cir. 1994).

Bankruptcy courts do not limit themselves within the scope of bankruptcy law in determining attorneys' fees for requests for attorneys fees made within nondischargeability adversary proceedings. For example, there is case law indicating that attorney fees and costs that incurred by a creditor successfully prosecuting nondischargeability complaint, under 11 U.S.C. § 523(a)(14) (a statute excepting from discharge any debt incurred to pay what would otherwise have been a nondischargeable federal tax obligation) are awarded as part of this nondischargeable substitute debt, **if such fees would be recoverable outside bankruptcy under state or federal law**. *In re Dinan*, 448 B.R. 775 (B.A.P. 9th Cir. 2011). In fact, this court recently determined, in a case involving a debtor who had stole the creditor's collateral (to commit what qualified as a willful and malicious injury under 11 U.S.C. §523(6)), that the offending debtor's contractual obligation to pay attorneys' fees was also nondischargeable.

Courts outside of this jurisdiction are in agreement that debtors' attorney fee obligations in bankruptcy proceedings partake of the same character as underlying judgment debt. See *In re Smith*, 321 B.R. 542 (Bankr. D. Colo. 2005); *In re Harland*, 235 B.R. 769 (Bankr. E.D. Pa. 1999); *In re Braun*, 327 B.R. 447 (Bankr. N.D. Cal. 2005); etc.

Here, in this adversary case, the court has already entered an order that the state court award of attorney fees is excepted from Defendant Debtor's discharge under 11 U.S.C. § 553, as a setoff for Plaintiff for sanctions ordered against Defendant-Debtor. Civil Minute Order, Dckt. No. 78. This court determined that the state court fee award could continue to be enforced, notwithstanding the entry of discharge for the Defendant-Debtor in his bankruptcy case, Bankruptcy Case No. 13-9016. Because this court found that the underlying debt is nondischargeable and a setoff under 11 U.S.C. § 553 on November 21, 2013, the ancillary obligation of Plaintiff's attorney's fees in the adversary proceeding will be considered non-dischargeable in Defendant-Debtor's bankruptcy case. *In re Florida*, 164 B.R. 636 (B.A.P. 9th Cir. 1994).

The underlying debt in this matter concerns manifold questions of state family law. Operating on the premise that the obligation of attorney's fees in the adversary proceeding assumes the character of the family law judgment debt, the court will consider the merits of Plaintiff Counsel's recovery of the fees and costs based on applicable provisions of the California Family Code. These are the provisions of state law upon which the court determined that the state court attorney's award constituted a setoff for Plaintiff. Civil Minutes of the Status Conference on November 21, 2013; Dckt. No. 76.

Attorneys' Fees, If Any, Awarded Are a Post-Petition Obligation of Defendant

There is also a more simple, basic reason why the attorneys' fees, if any, awarded in this Adversary Proceeding. The fees, based on the grounds alleged, are for the post-petition litigation strategy and conduct of the Defendant and Defendant's counsel. The plain language of 11 U.S.C. § 524(a) provides that the effect of a discharge (as is applicable to a monetary obligation),

"(a) A discharge in a case under this title –

...

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt [discharged under section 727, 944, 1141, 1228, or 1328 of Title 11] as a personal liability of the debtor, whether or not discharge of such debt is waived; and ...."

The discharge granted in a Chapter 7 case is provided for in 11 U.S.C. § 727(b) and applies to the following debts,

"(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all **debts that arose before the date of the order for relief under this chapter**, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title."

11 U.S.C. § 727(b), emphasis added.

The obligation to pay attorneys' fees, if any, arises from and relates to the litigation in this court the April 10, 2013 filing of this Adversary Proceed to the present. The Order for Relief in the Defendant's bankruptcy case, 13-90382, was on March 3, 2014, the date the Defendant filed his voluntary Chapter 7 Petition. Thus, the obligation, if any, to pay legal fees relating to this litigation did not arise before the order for relief in the Defendant's bankruptcy case. As such, it cannot be discharged in the Chapter 7 case. It is a post-petition personal liability of the Defendant.

Attorneys' Fees as Sanctions

In Plaintiff's Reply to Defendant's Opposition to the Motion for Fees, Dckt. No. 92, Plaintiff states that Defendant and Defendant's counsel were uncooperative in fashioning an order stating that the state court attorney's fees award is a setoff under 11 U.S.C. § 553, and that Defendant has been stalling since June 27, 2013, to agree to such a stipulation. Dckt. No. 92 at 7. In the Civil Minutes on the Status Conference that took place on November 21, 2013, the court noted that,

> At the November 21, 2013 [conference], the Parties stated their Stipulation resolving the nondischargeability on the record. Dckt. No. 76.

In their Status Conference Statement for the January 30, 2014 Status Conference, Plaintiff advised the court that the parties had stipulated that "the right of offset pursuant to 11 U.S.C. § 553 is not dischargeable." The court then issued an order stating the rights of the parties based on their stipulation, bringing to an end the non-dischargeability portion of this adversary proceeding. To date, however, no such stipulation has been filed.

On the basis of what Plaintiff's counsel terms as Defendant's "complete failure to cooperate and frustration of the settlement process," Plaintiff argues that the court should award of attorney's fees and costs to Plaintiff's counsel as a sanction under California Family Code § 271. Plaintiff asserts that the sanction should be imposed to "excoriate" (a term not used in the statute) Defendant's violation of the family law courts' "public policy" of promoting settlement and reducing the costs of litigation in family law cases.

Pursuant to Family Code Section 271, the court has the authority to base an award of attorney's fees and costs to the extent to which the conduct of a party or attorney "furthers or frustrates the policy of the law to promote settlement of litigation, and where possible, to reduce the cost of litigation by encouraging cooperation between the attorneys. California Family Code Section 271(a).

Plaintiff's counsel states that Plaintiff has been forced to engage in unnecessary litigation, and incur "higher costs than necessary" given Defendant's refusal to enter into an order determining the state court's judgment of attorney's fees as a setoff under 11 U.S.C. § 553. Plaintiff claims that it has performed substantial work to oppose Defendant's opposition and continued pursuit of litigation. Plaintiff's Counsel further argues that Defendant's "dilatory and uncooperative conduct" justifies what might otherwise be an "excessive need based fees and costs award," where attorney's fees are incurred because of another party's refusal to cooperate. *Marriage of Kozen*, 185 CA3d 1258 (1986).

The Plaintiff does not provide any further authority, however, on what constitutes the type of conduct that would merit an award of attorney fees and costs as a sanction alone, under California Family Code Section 271. The court surveys the decisions from cases citing California Family Code Section 271, and notes the following:

I. A wide range of conduct has been sanctioned for alleged violations of California Family Code § 271.

II. The cases in which courts imposed sanctions, bear few similarities to the facts of this case.

   A. Plaintiff makes no attempt to draw comparisons between cases in which the parties had been sanctioned for the behavior under Family Code Section 271, and the "uncooperative" and "dilatory" behavior of Defendant's counsel.

III. In applying the California Family Code § 271, the courts have imposed sanctions for:

   A. individual family law litigants for violating child support orders;

   B. not filing income and expense statements to evade enforcement of orders to show cause to enforce judgments distributing marital property;

C. failure to disclose funds in a separate savings account to conceal his assets from marital dissolution proceedings;

D. and other actions which seem to indicate that sanctions are imposed for contempt committed in violating the orders or disclosure statutes of California's family law courts. *Parker v. Harbert* (App. 1 Dist. 2012) 151 Cal.Rptr.3d 642, 212 Cal.App.4th 1172; *In re Marriage of Falcone and Fyke* (App. 6 Dist. 2012) 138 Cal.Rptr.3d 44, 203 Cal.App.4th 964; *In re Marriage of Simmons* (App. 4 Dist. 2013) 155 Cal.Rptr.3d 685, 215 Cal.App.4th 584.

B. Weighing Parties' Income and Determining Superior Ability to Pay

California Family Code § 2032, provides that the court has the discretion and power to consider the amount of the award and what is just and reasonable under the relative circumstances of the respective parties, in determining who can afford to pay and award of attorney's fees, and in what amount. California Family Code § 2032. California Family Code § 2032(b) states that in determining what attorney's fees award is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320 of the California Family Code.

The parties file the following as evidence of their respective financial circumstances:

I. Plaintiff's Exhibit 7: The November 2013, self-reported Income and Expense Declaration of Defendant Michael Carson. The shows that Defendant's monthly average salary as of the time of filing in November 2013 was $7,400.00. The Income and Expense Declaration of Michael Carson estimates the Plaintiff's gross monthly income to be $12,906.00. Exhibit 7, Dckt. No. 93 at 44.

II. Plaintiffs Exhibit 8: The February, 2014, self-reported Income and Expense Declaration of Plaintiff Graciela Taipe. Plaintiff declares a gross monthly income of $2,667.00. The Income and Expense Declaration of Michael Carson estimates the Plaintiff's gross monthly income to be $9,239.00. Exhibit 8, Dckt. No. 93 at 50.

III. Plaintiff's Exhibit 1 in Support of Declaration of Graciela Taipe: Bankruptcy Schedule of Michael Carson, Dckt. No. 96. The court notes that this exhibit only consists of the first page of Defendant's Statement of Financial Affairs. The document shows that $14,522.00 was received by Defendant in income from the Contra Costa County Sheriff's Office in 2013.

IV. Defendant's Exhibit A: Schedule C to Plaintiff's 2009 federal 1040 tax return, Dckt. No. 106.

V. Defendant's Exhibit B: Schedule C to Plaintiff's 2010 federal 1040 tax return, Dckt. No. 106.

VI. Defendant's Exhibit C: Schedule C to Plaintiff's 2011 federal 1040 tax return, Dckt. No. 106.

VII. Defendant's Exhibit D: Schedule I to Plaintiff's Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court, Northern District of California Case No. 12-42406, Dckt. No. 106.

VIII. Defendant's Exhibit E: Plaintiff's 2011 Dublin Chevrolet sales application, Dckt. No. 106.

IX. Defendant's Exhibit F: Plaintiff's letter to PennyMac seeking a loan modification to her residential home, Dckt. No. 106.

X. Defendant's Exhibit H: Plaintiff's July 31, 2012 Income and Expense Declaration in the matter of *Marriage of Carson*, Contra Costa Superior Court Case No. D10-04543, Dckt. No. 106.

XI. Defendant's Exhibit I: Plaintiff's December 24, 2012 Income and Expense Declaration in the Matter, *Marriage of Carson*, Contra Costa Superior Court Case No. D10-04543, Dckt. No. 106.

XII. Defendant's Exhibit J: Plaintiff's June 28, 2013 Income and Expense Declaration in the Matter, *Marriage of Carson*, Contra Costa Superior Court Case No. D10-04543, Dckt. No. 106.

XIII. Defendant's Exhibit K: Transcript Excerpts from Plaintiff's Deposition, November 11, 2012. Dckt. No. 106.

XIV. Defendant's Exhibit L: Google URL hyperlink to the Clip-N-Clean Business. Dckt. No. 106.

XV. Plaintiff's "Second" Exhibit 2: Corrected 1099 for 2013 for Plaintiff, Dckt. No. 113.

XVI. Plaintiff's "Second" Exhibit 3: Paystubs of Plaintiff for February 2014. Dckt. No. 113.

XVII. Plaintiff's "Second" Exhibit 4: Income and Expense Declaration of Defendant, Dckt. No. 113.

The court's task in sifting through the evidence to determine the relative needs of the parties is complicated by the parties' mutual imputations that the other is intentionally misleading the court in representing his/her finances.

For instance, Plaintiff offers the Income and Expense Declaration of Michael Carson, which shows that Defendant's monthly average salary as of the time of filing the declaration on November 2013 was $7,400.00. Dckt. No. 93 at 44. This is offered to show that Plaintiff makes less income than the Defendant, as Plaintiff's most recent Income and Expenses Declaration, filed on February 4, 2014, declares a gross monthly income of $2,667.00.

Exhibit 1, Dckt. No. 113. Plaintiff explains that her gross income has dwindled substantially because of the loss her business, Clip n Clean. ¶ 5, Declaration of Plaintiff in Support of the present Motion for Attorney's Fees, Dckt. No. 95. Plaintiff further estimates Defendant's income to be approximately $9,329.00, based on his bankruptcy schedules. *Id*. at ¶ 6.

However, Defendant disputes Plaintiff's contention that she only earns $2,667.00 monthly. Defendant's Declaration in Opposition to the Motion for Fees, Dckt. No. 105. Defendant disputes that Plaintiff actually sold the business, stating,

> [Plaintiff] has the means and ability to pay her own attorney's fees and costs in the matter. Plaintiff has misrepresented her true income on several occasions, and I am informed and believe and on that basis allege thereon that she earns more than she actually represents.
>
> I dispute Plaintiff's contentions that I was unreasonably in any of the litigations. To the contrary, it was Plaintiff who has been unreasonably by concealing her actual income. Plaintiff possess my property that was awarded to me in our dissolution matter and she refuses to relinquish it to me. She is in contempt of court orders.

¶ 2-3, Defendant's Declaration in Opposition to the Motion for Fees, Dckt. No. 105.

Rather, Defendant maintains that Plaintiff makes more income than Defendant, and that Plaintiff can pay her own fees. Defendant cites to an order by the Contra Costa County Superior Court, entered on January 28, 2013, where the court found Plaintiff made $9,197.00 monthly in comparison to Defendant's $7,333.00, to highlight the parties' income disparity. Plaintiff's Exhibit A, Findings and Order After Hearing Filed January 24, 2013, Dckt. No. 83 at 2-6, 19.

Additionally, Defendant offers copies of Plaintiff's filed federal 1040 tax returns for the years of 2009-2011, Dckt. No. 106, which consist of Plaintiff's report of the business expenses and income of her business, the pet grooming salon also referred to as Clip n Clean. Dckt. 106. These returns are not particularly useful to the court, for two reasons, the first being that, although Defendant disputes that Plaintiff has closed or lost her business, these returns are all at least two and a half years old. Second, in filing the returns, Defendant states in his Declaration, Dckt. No. 105, that they are all filed with the caveat that Defendant "disputes the net income reported at line 31" of all of the forms. With this disclaimer, Defendant is essentially asking that the court disregard all of the figures reported in the copies of the 1040 tax returns, that Defendant himself has offered as evidence of Plaintiff's relatively higher income.

Defendant also files the Chapter 7 Bankruptcy Schedule I of Plaintiff, from her bankruptcy case, N.D. Cal. No. 12-42406, as evidence that Plaintiff makes an income of $12,000.00 monthly. Dckt. No. 106. This evidence, however, possibly predates Plaintiff's loss of her business. This is a recurring problem with Defendant's exhibits, which Defendant purports

to show Plaintiff's purchase of a Chevy Cruz in February 23, 2011; that Plaintiff's income is $11,000, based on letter that Plaintiff submitted to support of her request for a loan modification from Pennymac; payments for the aforementioned purchase of a Chevy Cruz in June 22, 2012' and the Income and Expense Declarations of Plaintiff in the parties' marital dissolution matter from July 31, 2013 and June 28, 2013. Exhibits A-H, Dckt. No. 106. Defendant also makes unsubstantiated allegations that Plaintiff has taken multiple trips abroad to Peru, and that Plaintiff sold the boat and trailer awarded to Defendant in the marital dissolution case to "pocket" the money. Defendant's Declaration, Dckt. No. 105.

Plaintiff fares only a bit better in what seems to have become a contest of who can provide the more competent evidence in persuading the court of each party's income. Plaintiff offers an Income and Expense Declaration from February 4, 2014, which reflects that her current gross income is $2,667.00.

Plaintiff also provides copies of her "Corrected 1099" from Clip N. Clean, showing that she receives "nonemployee" compensation of $32,020.00. Exhibit 2, Dckt. No. 113. This document does not assist the court. Only a portion of the 1099 is scanned, and the writing and form are barely legible. The court has no idea what the figure in Box 7 of the form is supposed to represent. Similarly, Plaintiff attaches a check for $1350 from Clip in Clean as Exhibit 3, Dckt. No. 113. This is framed as a "paystub" for Plaintiff, but the presentation of this check lacks any context and explanation from Plaintiff as to what the checks represent.

The parties do not produce any tax returns, (Plaintiff includes an excerpt of her 1099 for her business, but does not explain the ambiguous figures contained in the "nonemployee compensation" portion of the form), and tax transcripts that might assist the court in determining the relative financial circumstances of each party to make an award based on need pursuant to California Family Code § 2032. Instead, each have produced their self-reported Income and Expense Declarations, which both argue are unreliable evidence of the opposing party's income.

Plaintiff also states in her Declaration, Dckt. No. 114, that Defendant has incurred less than $2000 in attorneys fees (though Plaintiff does not state whether this is for the adversary proceeding and the family court case), while Plaintiff has incurred over $60,000 in attorneys fees with the family court. Dckt. No. 112 at 2.

All told, in the muck of evidence created by both sides, the court regards Plaintiff's February, 2014 Income and Expense Declaration, and the Defendant's November, 2013, Income and Expense Declaration as the competent pieces of evidence showing the parties' financial circumstances. The Declarations are both signed by the parties, who swear under penalty of perjury that all of the information contained in the forms and any attachments is true and correct. They are also the most recent pieces of evidence provided by the parties, showing their relative income and expenses.

In Plaintiff's Income and Expense Declaration, signed on February 3, 2014, Dckt. No 113 starting at page 3, Plaintiff declares that her income is

$2,557.00 per month. She also lists $427 received in life insurance benefits, and 2,000 in assets, as well as total expenses of $2,873.00.

Defendant's Income and Expense Declaration, dated November 18. 2013, is the most recent declaration of expenses and income that the court has on the record for Defendant. In his responsive pleadings and exhibits, Defendant produced many documents that Defendant claimed to contravene Plaintiff's reporting of her finances. Defendant, however, did not produce any recent pay advices or tax documents that could assist the court in determining Defendant's own income. Thus, the court relies on the figures reported by Defendant in his sworn declaration from November of 2013. In the Declaration, the Defendant declares that he receives $6,600.81 in gross income per month, before taxes. Defendant notes deductions such as required union dues of $97.19, required retirement payments of $1,385, and medical insurance premiums of $513 in the Deductions section of the Declaration. Dckt. No. 113 starting on page 13. Defendant also notes expenses of $4,907.00.

The Defendant and Plaintiff do not come to this court with a clean slate with respect to discretionary attorneys' fees being awarded under these Family Code Sections. In the state court family court litigation, where presumably the court had good and accurate records of the parties respective finances, the state court judge imposed $15,000.00 in attorneys' fees pursuant to California Family Code § 271. The state court judge held,

> "The issue really was whether or not Ms. Taipe lied in the bankruptcy filing that she contends was dismissed because it was filed by a non-attorney who did it without her knowledge, which I find credible. So the whole fight about whether or not she would be imputed with 12,000 income because of a statement in one line of a dismissed petition was sort of overblown. As a result, it resulted -- ended up people spending $80,000 for today. And that's not even including your fees for today, the court reporter and everything else. It's craziness. It shouldn't happen like that.
>
> **And so, looking under 271, where I'm supposed to sanction people who frustrate the policy of the law to promote settlements and where possible to reduce the costs of litigation, I'm going to impose $15,000 on Mr. Carson for Ms. Taipe's fees.**"

Reporter's Transcript of January 8, 2013, Proceedings, Exhibit B attached to the Adversary Complaint of Graciela Taipe, Dckt. No. 1.

The Hon. Jill C. Fannin, the state court judge conducted this hearing less than a year before the litigation was conducted. As a necessary element in making the award, Judge Fannin took "[i]nto consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party

requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award." Cal. Fam. 271.

California Family Code § 271

The court finds that the Defendant has engaged in conduct to frustrate the policy of promoting and achieving settlements relating to California family law matters. It is clear that the Defendant, with the assistance of his attorney in this Adversary Proceeding, has continued the litigation strategy which "earned him" an attorneys' fees award of $15,000.00 by Judge Fannin. The protections afforded by that Code Section are equally applicable here.

This Adversary Proceeding should have been resolved very early in light of the clear grounds under the 11 U.S.C. § 553 setoff rights and that the state court award allowed it to be setoff against the ongoing support obligations. While Debtor's counsel may contend that Plaintiff's counsel was unreasonable, he did little, if anything to push this to settlement. Left to their own devices the Defendant would still be contending that the setoff right was discharged and the case grinding forward.

Defendant offers no credible efforts of trying to conclude this matter or foster settlement. While Plaintiff's counsel may be "challenging" to some attorneys, Defendant and Defendant's counsel exploited Plaintiff's counsel's nature to drive the litigation costs higher. This was, as is shown by the evidence presented and the file in this case, part of a plan to make litigating the nondischargeability of the $15,000.00 award not economical for Plaintiff. Such strategy and failure to "cooperate," "reduce costs of litigation," and "promote settlement" is exactly what California Family Code § 271 is intended to address in connection with the rights flowing from those family law proceedings.

The court also notes that Defendant made no effort to conclude this matter on the merits. Even if Plaintiff's counsel was difficult to work with, knowledge, experience attorneys can manage the situation and get the correct terms of a "settlement" before the judge. One easy method in federal court is to make an offer of judgment pursuant to Federal Rule of Civil Procedure 68 and Federal Rule of Bankruptcy Procedure 7068. This turns the table on an "difficult" plaintiff or plaintiff's attorney. If the proposed judgment is refused and the ultimate judgement is no better than what was offered, the defendant who offered the judgment will recover costs, which may include attorneys' fees (which quite possibly could have been asserted under Cal. Fam. 271). Fed. R. Civ. P. 68(d), Fed. R. Bank. P. 7068.

Further the even more experience litigator, once having learned of 11 U.S.C. § 553, could have sought a judgment on the pleadings on those grounds. This would have mooted out the balance of the Amended Complaint, bringing the litigation to a conclusion with there being very little in attorneys' fees to argue about. Even if there was an attorneys' fee dispute, that could have been resolved through post-judgment motions in a very contained, cost-effective judicial process. Instead, the Defendant pursued his strategy to maximize the litigation costs and expenses, both for himself and the Plaintiff.

In considering the incomes, assets, and liabilities (which the Defendant has mostly discharged through bankruptcy) of the parties, this court comes to the same independent conclusion that attorneys' fees and costs are properly awarded to Plaintiff.

California Family Code § 2030

The fees are also requested pursuant to California Family Code § 2030. The fees may be awarded in any "proceeding subsequent to the entry of a related [family court] judgment...." Cal. Fam. 2030(a)(1). These fees may be awarded to "[e]nsure that each party has access to legal representation,...to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party,..., to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." *Id.*

The court further finds that the awarding of attorneys' fees incurred by Plaintiff to protect her rights and award of $15,000.00 in the state court family law case. Not only does the Defendant have the ability to pay, but given the modest amount of the obligation at issue, the remaining $12,480.00 of the award, but his strategy to drive up litigation expenses and failure to forthright address the issues would impose an unreasonable economic burden and financial impracticality if Plaintiff could not recover attorneys' fees. The court also finds credible the Plaintiff's testimony that her income has been reduced, significantly impairing her ability to be represented by counsel in this Adversary Proceeding.

California Family Code § 3557 and 4302

California Family Code §§ 3557 as an grounds for an award of attorneys' fees in connection with the proceedings in this court concerning the family court award does not stand. These proceedings do not relate to a support order or a child support delinquency order. California Family Code § 4320 is equally inapplicable as the family court award is not one relating to spousal support.

California Civil Code § 1717 and
California Code of Civil Procedure § 1021

The Plaintiff asserts a right to attorneys' fees pursuant to California Civil Code § 1717. This Civil Code Section only authorizes an award of attorney fees for prevailing parties "in any action on a contract" where the contract "specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . ." Cal. Civ. Proc. Code § 1717(a). California law permits recovery of attorney fees by agreement, for tort as well as contract actions. Cal. Civ. Proc. Code § 1021.

Here, the Complaint does not contain a breach of contract claim. Plaintiff and Plaintiff's counsel do not provide the contractual basis for claiming attorneys' fees or a specific provision upon which they base a right to contractual attorneys' fees in this Adversary Proceeding. Rather, the only claim in the adversary asserted was a non-dischargeability claim

based on Plaintiff's characterization of the attorney's fee award as a domestic support obligation under 11 U.S.C. § 523(a)(5).

Plaintiff does not point to any provision of any settlement agreements, any contracts entered into during the marital dissolution proceeding in the Contra Costa Superior Court, or any other contracts entered into between the parties, that would support the award for attorney's fees as set forth by California Civil Code § 1717. California Civil Code § 1717 is clear in providing that the attorney's fees and costs may only be awarded upon provisions or statements, that expressly provide for such, on a contract. No contract has been produced by either party in this case.

California Code of Civil Procedure § 1021 also allows recovery of attorney's fees where the measure and mode of compensation of attorneys have been established in an express or implied agreement. Cal. Civ. Proc. Code § 1021. Plaintiff does not allege any agreement, however, in which the parties have agreed that Plaintiff's counsel will receive any attorney's fees as the prevailing party in this adversary proceeding.

No grounds under California Civil Code § 1717 or California Code of Civil Procedure § 1021 exist for Plaintiff in this Adversary Proceeding.

Amount of Attorneys' Fees and Costs

The Plaintiff's attorneys fees of $10,562.00 and costs of $363.00 have been requested and are documented by the time records presented as Exhibit G. Dckt. 83. These are the fees and costs through December 31, 2013. Since that time Plaintiff's counsel has been required to review numerous exhibits and supplemental briefs presented by the Defendant. In addition, Plaintiff's counsel has been required to present further evidence and legal arguments in support of the disputed attorneys' fees.

The court awards the Plaintiff $10,562.00 and costs of $363.00 as the prevailing party in this Adversary Proceeding pursuant to the separate and independent grounds arising under California Family Code § 271 and California Family Code § 2030. To the extent that some of the fees may be prior to the court having brought 11 U.S.C. § 551 to the attention of the Parties, the Plaintiff has incurred substantial legal fees and costs since December 31, 2014, which would be recoverable.

II. Pleading Attorney's Fees

Plaintiff is requesting attorneys' fees incurred in the adversary proceeding. The requirements of claims for attorneys' fees in the Bankruptcy Code are set out by Federal Rule of Bankruptcy Procedure 7008(b), which provides that a claim for attorneys' fees must be pleaded

> as a claim in a complaint, cross-claim, third party complaint, answer, or reply as may be appropriate.

A pleading in an adversary proceeding which includes a request for attorney's fees must contain a short and plain statement of the claim showing

that the pleader is entitled to relief and a demand for judgment for such relief. Fed. R. Bankr. P. 7008(a). Rule 7008(a) provides that Federal Rule of Civil Procedure 8 generally applies in adversary proceedings. Federal Rule of Civil Procedure 8 lays out the general rules for pleading in litigation in federal court. Federal Rule of Civil Procedure 8(a)(2) provides that a claim for relief must contain no more than "a short and plain statement of the claim showing that the pleader is entitled to relief."

In this adversary case, Plaintiff's complaint does not state a separate claim in the body of the motion for attorneys fees pursuant to Federal Rule of Bankruptcy Procedure 7008(b). Defendant maintains that statements made in a prayer at the end of a complaint are inadequate to satisfy the requirement of Rule 7008(b) that a request for attorney's fees be stated as a claim. See *Garcia v. Odom (In re Odom)*, 113 B.R. 623 (Bankr. C.D. Cal. 1990); *Hartford Police F.C.U. v. DeMaio (In re DeMaio)*, 158 B.R. 890, 892 (Bankr. D. Conn. 1993); *In re AM International, Inc.*, 46 B.R. 566 (Bankr. M.D. Tenn. 1985). The three cases listed are cited by Defendant in his opposition pleadings, all for the proposition that requests for attorney fees included in the prayer for relief complaints are insufficient in adversary proceedings.

The court notes that each case present unique circumstances that must be reviewed on a case-by-case basis.

1. The court in the first case cited by Defendant, *In re Odom*, 113 B.R. 623, 624 (Bankr. C.D. Cal. 1990) held that Plaintiffs had not properly pled their attorney fees, noting that,

> Plaintiffs' dischargeability complaint included a prayer for attorneys' fees and costs "on the Third, Fourth, and Fifth Causes of Action" as well as an additional prayer for such fees and costs "on all Causes of Action." None of the causes of action in the complaint makes reference to attorneys' fees incurred in the first or second state court action.

In re Odom, 113 B.R. 623, 624 (Bankr. C.D. Cal. 1990).

In *In re Odom*, the court seems to state that Plaintiff's request for attorney fees was not explicitly stated, and instead contained vague references to how the request for fees would only apply to certain causes of action contained in the dischargeability complaint.

a. In the second cited case of *Matter of DeMaio*, 158 B.R. 890, 892 (Bankr. D. Conn. 1993), the plaintiff did not event raise the claim of attorney's fees in its pre-trial memorandum, during trial, or in its post-trial memorandum.

b. In the third case cited by Defendant, *In re AM International, Inc.*, 46 B.R. 566, the court did not seem to decide the issue of awarding costs and attorney's fees on the question of whether they

> were properly pled in the complaint; rather, the discussion on attorney fees centered on whether an entity knowingly violated an automatic stay, and whether that violation warranted a punitive sanction of attorney's fees. *In re AM Int'l, Inc.*, 46 B.R. 566, 577 (Bankr. M.D. Tenn. 1985)

The court recognizes that case authority is split on the issue of whether requests for attorney's fees must be included in the body of a pleading. Of equal probative value, the court identifies countervailing authority from the decisions of other bankruptcy courts, which have held that attorney's fees requests do not need to be pled in the body of a complaint, if the request at all must even be pled. See *First Nat'l Bank v. Bernhardy (In re Bernhardy)*, 103 B.R. 198, 199 (Bankr.N.D.Ill.1989) (holding, without discussing Rule 7008(b), that "[t]here is no provision in the Code or the rules that requires [a debtor] to plead a request for attorney's fees" and that if there were such a provision requiring specific pleading, a prayer for " 'such other relief as is just' is sufficient"); accord, *Thorp Credit, Inc. v. Smith (In re Smith)*, 54 B.R. 299, 303 (Bankr.S.D.Iowa 1985) ("[T]here [is no] good reason to hold that such pleading is required. 'Since § 523(d) clearly states that the debtor is entitled to costs and reasonable attorney's fees, the creditor is on notice that loss of his claim could result in his being assessed those fees and costs.' ") (quoting *Commercial Union Ins. Co. v. Sidore (In re Sidore*), 41 B.R. 206, 209 (Bankr.W.D.N.Y.1984)).

This court takes a more literal reading of the requirements of Federal Rule of Bankruptcy Procedure 7008(b) for plaintiffs and Federal Rule of Civil Procedure 8(b) and Federal Rule of Bankruptcy Procedure 7008(a) for defendants in pleadings. First, the court is convinced that neither plaintiff's counsel nor defendant's counsel appreciated the significance of Rule 7008(b). If not brought to their attention by the court attempting to promote compliance with the basic pleading rules in federal court, this would have been a non-issue.

Second, while the Adversary Proceeding dragged on due to what the court has determined the conduct and strategy of the Defendant, it was relatively early in the pleading process. It is likely that, both Plaintiff's counsel and Defendant's counsel having been educated on federal court pleading requirements would have sought leave (as any stipulation in this case was all but impossible) to amend their respective complaint and answer, both of which sought recovery of attorneys fees.

Third, in response to the Motion to Strike Plaintiff clearly identified the statutory basis upon which the attorneys' fees were requested. There was no "surprise" to Defendant as to that basis, though Defendant has fiercely litigated that issue.

Fourth, the court accepts Defendant's pleading of the claim for attorneys' fees in his answer as an admission of what Defendant accepts as compliance with Federal Rule of Bankruptcy Procedure 7008(b). In the Answer Plaintiff demonstrated his compliance with Federal Rule of Civil Procedure 8(a)(2) to "state a short plan statement of the claim showing that the pleader is entitled to relief." Answer, Dckt. 71. This Answer was filed on November 14, 2013, and Defendant and Defendant's counsel are hard pressed to state that they incorrectly pleaded the Defendant's right to attorneys' fees.

III. Plaintiff is the Prevailing Party For Which "Judgment" Has Been Entered

Attorney's fees may be awarded to an unsecured creditor in an adversary proceeding, only to the extent that state law governs the substantive issues and authorizes the court to award fees. *Thrifty Oil Co. v. Bank of America Nat. Trust and Sav. Ass'n*, 322 F.3d 1039 (9th Cir. 2003). There is no general right to recover attorneys' fees under the Bankruptcy Code. *See In re Kord Enterprises II*, 139 F.3d 684 (9th Cir. 1998) (whether included as part of secured claim); *Heritage Ford v. Baroff (In re Baroff)*, 105 F.3d 439 (9th Cir. 1997) (prevailing party contractual attorneys' fees in nondischargeability action). Under the American Rule, the prevailing party is not entitled to collect reasonable attorneys' fees unless provided for by statute or contract. *Travelers Casualty & Surety of America v. Pacific Gas and Electric Company*, 549 U.S. 443, 448 (2007). (Enforcing contractual attorneys' fees provision for litigating issues arising under bankruptcy law.)

However, a prevailing party in a bankruptcy proceeding may be entitled to an award of attorney fees in accordance with applicable state law if state law governs the substantive issues raised in the proceedings." *In re Davison*, 289 B.R. 716, 722 (B.A.P. 9th Cir. 2003*)*, quoting *Johnson v. Righetti* (*In re Johnson*), 756 F.2d 738, 741 (9th Cir.1985).

Here, judgment has been rendered in the parties' adversary case. Federal Rule of Civil Procedure 54(a) defines a "judgment" as a decree and any order from which an appeal lies. Federal Rule of Bankruptcy Procedure 7054 applies Federal Rule of Civil Bankruptcy Procedure Rule 54(a)-(c) in bankruptcy adversary proceedings. Federal Rule of Bankruptcy Procedure 7054 allows for the recovery of costs to the prevailing party after the entry of judgment, except when a statute or the Bankruptcy Rules otherwise provides.

The Plaintiff is awarded Attorneys' fees in the amount of $10,562.00 and costs of 363.46.

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 Attorneys' Fees and Costs filed by Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Attorneys' Fees and Costs is granted and Graciela Taipe, the Plaintiff, is awarded $10,925.46 in attorneys' fees and costs in this Adversary Proceeding, and against Michael Carson, the Defendant. This order awarding attorneys' fees and costs to be paid by Michael Carson may be enforced in the same manner as a judgment issued by this court. Fed. R. Civ. P. 54(a), Fed. R. Bank. P. 7054, Fed. R. Civ. P. 69, Fed. R. Bankr. P. 7069.

22. 11-91992-E-7 LINDA GALVAN
RLA-1 Axel B. Gomez

MOTION FOR CONTEMPT AND/OR MOTION FOR SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION
2-13-14 [19]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on respondent Creditor and respondent Creditor's Attorney on February 13, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required. That requirement was met.

No Tentative Ruling: The Motion for Contempt 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Relief Requested and Grounds Stated

Pursuant to Federal Rule of Bankruptcy Procedure 9013(which is similar to Fed. R. Civ. P. 7(b)) requires that the motion itself state both the grounds upon which the relief is based and the relief with particularity. The Motion, which is filed as a "Notice of Hearing" simply addresses the following:

A. The time and location of the hearing in which Debtor is moving the court to find Creditor Lillian Trudell ("Creditor") in contempt of the Chapter 7 discharge, granted to Debtor Linda K. Galvan ("Debtor") on September 19, 2011.

B. Debtor states that she will be asking the court to award her compensatory damages, attorney's fees, and punitive damages, and to issue an order removing the lien Creditor purports to have on debtor's home.

C. Debtor cites to Local Bankruptcy Rule 9014-1(f)(1) to request that potential respondents file written opposition to the Motion, no later than fourteen (14) days before the hearing date.

From reading the Motion, the court has no idea of the grounds on which Debtor is requesting that the Creditor be found in contempt of Debtor's Chapter 7 discharge. From a review of the Motion, the court has no way to distinguish the factual grounds from the legal argument. Debtors instruct the court to read the Memorandum of Points of Authorities to determine the bases for this motion. It is not, however, for the court to canvas other pleadings, and wait until the hearing, to receive additional evidence from a movant to "draft the motion" for Movants.

Pleading with Particularity

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Debtor is essentially requesting the court to treat the points and authorities as the "motion." As shown in the court's examination of the pleadings above, the court cannot discern what is factual grounds or legal argument. Debtor is essentially asking that the court accept a combined motion and points and authorities ("Mothorities") in which the court and the respondent Creditor are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Bankr. P. 9013), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant.

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. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties

to see and understand the particular grounds (the basic allegations) upon which the relief is based. 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.

Here, Debtor's Motion gives no indication of why Debtor is entitled to relief. Instead, Debtor includes all relevant facts and statements of law in the Memorandum of Points and Authorities, filed on February 13, 2014. Dckt. No. 20.

REVIEW OF MEMORANDUM OF POINTS AND AUTHORITIES

Debtor states that her residence was sold at a foreclosure sale by Aurora, her senior lender, and that the sale "wiped out" Creditor Lillian Trudell's junior lien on the property. Debtor then filed for Chapter 7 bankruptcy and received a discharge; Debtor informed Creditor's lawyers, but Creditor insisted her lien was valid and could be enforced. When Creditor refused to release the lien, Debtor could not refinance a hard money loan on her home. Debtor asserts that because Creditor's actions violated the Chapter 7 discharge, Creditor should be found in contempt.

According to Debtor, Creditor loaned Debtor $104,000 in July of 2006. The loan was secured by a second deed of trust on Debtor's home located at 2480 Valdosta Drive, Turlock ("Galvan home"). The first Deed of Trust was held by CTX Mortgage Company, which later "transferred" the loan to Aurora Loan Services. That deed of trust predated Creditor's Deed of Trust, as it was recorded in June 2006. In July 2006, Creditor recorded her second Deed of Trust. The Aurora loan went into default and Aurora initiated foreclosure proceedings. Debtor states that the Creditor sent a Notice of Default to various parties, including Creditor.

Aurora proceeded with the foreclosure and the Galvan home was sold at a foreclosure sale on January 20, 2009. The Trustee's Deed Upon Sale was recorded on February 2, 2009. Debtor asserts that the foreclosure sale extinguished all private liens on the Galvan home, including the Aurora Deed of Trust and Lillian Trudell's Deed of Trust. On February 7, 2011, Debtor and her husband bought the home back from Aurora. They financed the purchase through a loan from Ashley Gournoe, a private investor. This loan was a "hard money" loan with a high interest rate and a short maturity date, and it called for interest only payments and then a balloon payment of the principal at the end of the loan term in July 2012.

Debtor and her husband obtained a short extension of the payoff date by paying a $7,000 penalty. Debtors then sought a loan to pay off the private investor loan. They obtained a commitment from W.J. Bradley for a 30 year fixed rate loan at 3.2%, an interest rate far below the rate for the private investor loan. Their proposed lender required them to get a title insurance policy. The company that offered the policy did a title search. This search turned up respondent Creditor's Deed of Trust as a still-existing lien on the home. Debtor's proposed new lender did not proceed with the loan because Creditor did not release her lien.

Debtor approached Creditor to have her release the lien by signing a full Reconveyance of the Deed of Trust. Creditor declined to release the lien and reconvey the Deed of Trust. On March 15, 2013, the Debtor's counsel sent Creditor and her counsel a letter demanding release of that lien. Creditor refused and insisted that the lien was valid, that the foreclosure on the lien was not proper, and that Debtor was still required to pay off the Trudell loan.

Debtor asserts that her Chapter 7 discharge relieved her from personal liability for all pre-petition debts, including the Trudell loan, under 11 U.S.C. § 524 (a)(2). Debtor filed for Chapter 7 bankruptcy on June 2, 2011 and received her Chapter 7 discharge on September 19, 2011. Debtor states that the January 2009 foreclosure sale extinguished Mrs. Trudell's Deed of Trust. Debtor argues that since she filed for bankruptcy in 2011, Creditor did not have any lien on the Galvan home. Debtor further states that she is entitled to compensatory damages, attorney's fees, punitive damages, and an order releasing the Trudell Lien on the Galvan Home.

CREDITOR'S OPPOSITION

Creditor asserts that the motion as "inherently illogical," and that Debtor is attempting to bring a state law issue over title to real property within the bounds of discharged bankruptcy. Debtor states that the security interest of Lillian Trudell on the property located at 2480 Valdosta Drive in Turlock, California (hereinafter, "subject property") was wiped out prior to the bankruptcy petition filed by Linda Galvan. Creditor argues that if this contention is true, then the current motion is frivolous because the dispute between Lillian Trudell and the Debtor and her husband has nothing to do with the bankruptcy discharge. Creditor states that Debtor and her husband have not established that Creditor has performed or acted in violation of the court order as is required under 11 U.S.C. § 524(a), and that the Motion is based on a series of privileged communications between attorneys that cannot be the subject of any action pursuant to California Evidence Code § 1152.

Debtor argues that because the foreclosure in 2009 wiped out the security interest in the subject property, Creditor is now violating the 2011 discharge order, which Creditor characterizes as misleading. If the 2009 foreclosure wiped out the Creditor's security interest, then the Creditor would qualify as a sold-out junior creditor. If the 2009 trustee sale complied with all notice requirements as Debtor contends, then Creditor was an unsecured creditor at that time of the bankruptcy. Creditor was not listed on Debtor's bankruptcy petition. If, on the other hand, Creditor did not receive notice of the foreclosure in 2009, then her junior lien was not eliminated. *See* Cal. Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed. Cal. CEB) § 2.50. Creditor argues that no matter which position the Debtor takes, the bankruptcy had no bearing on the junior lien.

Debtor's underlying argument regarding the application of 11 U.S.C. § 524(a) requires a finding that the bankruptcy discharge is what eliminated the security interest, but Debtor jumps from claiming that Lillian Trudell's security was wiped out by the foreclosure to asserting it was wiped out by the bankruptcy.

Creditor appears to acknowledge that if Creditor was given actual notice of the foreclosure sale in 2009, and the trustee sale was "properly and lawfully conducted," then Creditor's security interest would be eliminated and this matter would not invoke the bankruptcy proceedings that occurred later.

DEBTOR'S REPLY

Debtor responds by stating that Creditor's lien has "everything" to do with Debtor's bankruptcy. California law allows the "resurrection" of a foreclosed lien on property when the prior mortgagor buys the property back. See, e.g., *DMC, Inc. v. Downey Savings & Loan Assoc.*, 99 Cal.App.4th 190 (1999). Even though the foreclosure may have eliminated Creditor's lien, the possibility remained that the lien could come back to life as an equitable lien once Debtor, the prior mortgagor, purchased the property back after the foreclosure sale. The *DMC* case calls for the creation of an equitable lien in those circumstances. Trudell does not deny the *DMC* holding and in fact she continues to believe that she has a valid lien on the Galvan home. The Chapter 7 discharge is the only decree that truly eliminates the Creditor's lien, because it bars the resurrection of the lien.

Debtor states that if the 2009 foreclosure truly eliminated any possibility that the lien could be revived, this dispute would be solely a matter of California law and not a concern of the bankruptcy court. But, it did not, and because the Chapter 7 discharge is the only court order that truly eliminates the possible revival of the Trudell lien, Debtor asserts that the discharge offers Debtor her only hope for relief, and that the sole remedy for violation of the discharge is to move this Court to find Creditor in contempt. Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002).

STANDARD

Motion for Contempt

"Civil contempt is the normal sanction for violation of the discharge injunction." *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002). This is a matter of federal law, and a core matter for the Bankruptcy Court. 11 U.S.C. § 105 does not itself create a private right of action, but it does provide a bankruptcy court with statutory contempt powers in addition to whatever inherent contempt powers the court may have. Because these powers inherently include the ability to sanction a party, a bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction and order damages for the debtor if appropriate on the merits. *Id.* at 506-507.

A contempt proceeding by the United States trustee, debtor, or a party in interest in bankruptcy is a contested matter. *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1189 (9th Cir. 2011). Contempt proceedings are not listed under Bankruptcy Rule 7001 and are therefore contested matters not qualifying as adversary proceedings. *Id.* Contempt proceedings for a violation of § 524 must be initiated by motion in the bankruptcy case under Rule 9014 and not by adversary proceeding. *Id.*

A creditor who attempts to collect a pre-petition discharged debt in violation of the discharge injunction is in contempt of the bankruptcy court that issued the order of discharge. *Eady v. Bankr. Receivables Mgmt. (In re Eady)*, 2008 Bankr. LEXIS 4696 (B.A.P. 9th Cir. 2008). In addition to the bankruptcy court's inherent power to impose an order for contempt only upon a showing of "bad faith," section 105 grants statutory contempt powers and a creditor may be liable under section 105 if it willfully violated the permanent injunction of section 524. *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002); *Walls*, 276 F.3d at 509.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contempnor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see also* 11 U.S.C. § 105(a).

The party seeking contempt sanctions has the burden of proving by clear and convincing evidence that the contempnors violated a specific and definite order of the court. *Bennett*, 298 F.3d at 1069. The burden then shifts to the contempnors to demonstrate why they were unable to comply. *Id.* The movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction. *Id.* For the second prong, the court employs an objective test and the focus of the inquiry is not on the subjective beliefs or intent of the alleged contempnor in complying with the order, but whether in fact their conduct complied with the order at issue. *Bassett v. Am. Gen. Fin. (In re Bassett)*, 255 B.R. 747, 758 (9th Cir. B.A.P. 2000)(*rev'd on other grounds*, 285 F.3d 882 (9th Cir. 2002)).

DISCUSSION

Based on a review of the pleadings, it appears the Debtor seeks several different types of relief:

(a) for the court to issue a judgment finding Lillian Trudell in contempt for violating Debtor's discharge;

(b) for the court to award compensatory damages;

(c) for the court to award punitive damages;

(d) for the court to award attorney's fees;

(e) to issue an order requiring to release the Deed of Trust and record with the Stanislaus Recorder's Office a full reconveyance of the Deed of Trust.

Memorandum of Points and Authorities, Dckt. 20.

First, Motion seeks to have the court order several different types of relief. While Federal Rule of Civil Procedure 18 and Federal Rule of

Bankruptcy Procedure allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014, which does not incorporate Rule 9018 for contested matters. As with the present Motion, the reason for not incorporating Rule 7018 into contested matters is in part based on the short notice period for motions and the substantive matters addressed by the bankruptcy court in motions. These include sales of property, disallowing claims, avoiding interests in real and personal property, confirming plans, and compromising rights of the estate – proceedings which in state court could consume years. In the bankruptcy court, such matters may well be determined on 28 days notice. Allowing parties to combine claims and create potentially confusing pleadings would not only be a prejudice to the parties, but put an unreasonable burden on the court in the compressed time frame of bankruptcy case law and motion practice

It appears that Debtor seeks a contempt order, injunctive relief and for the court to determine the extent, validity or priority of a security interest, in order for the court to order the release of a lien. A request to determine the extent, validity, or priority of a security interest, or a request to avoid a lien, requires adversary proceeding. Fed. R. Bankr. P. 7001(2). Debtor cannot attempt the determine the extent, validity, or priority of the creditor’s security interest through a Motion.

23. 14-90155-E-11 UST-2 NORTH AMERICAN DIESEL INDUSTRIES, INC. MOTION TO RECONSIDER O.S.T. 3-17-14 [69]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and all creditors on March 17, 2014. By the court's calculation, 10 days' notice was provided.

No Tentative Ruling: The Motion to Reconsider 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to xxxx the Motion to Reconsider. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The United States Trustee ("UST") moves for reconsideration under Federal Rule of Civil Procedure 60(b), incorporated by Federal Rule of Bankruptcy Procedure 9014, of the Court's order on Motion SMO-1 directing the appointment of a chapter 11 trustee, Dckt. 55. The basis for the motion is that after much time and numerous efforts, the UST is unable to locate a person willing to serve as chapter 11 trustee in this case. The UST consulted with the parties and contacted potential trustee candidates recommended by them, however none of those potential candidates is willing to serve. The UST also reached out to other potential candidates who similarly are unwilling to serve.

The UST filed the Declaration of David Flemmer, who states several serious challenges that would be insurmountable without at least a $75,000 cash infusion, including the following:

> 1. **Insufficient cash.** The current cash position of the company is not clear but appears to be approximately $30,000. The company owes approximately $5,400 in back rent and $3,000 in payroll taxes. These expenses would likely be categorized as administrative and need to be paid sooner than later. The receiver is holding customer checks, but they may have been stopped and would likely create a liability if they were deposited. Money has been received for at least three engines, but parts still need to be

acquired to complete them. Parts and labor would also need to be purchased and paid so that sales of finished engines could be completed.

2. **Labor**. It is not clear that the Debtor will be able to re-call and retain qualified staff. Engine rebuilding not only requires mechanical skill but also knowledge of electronically controlled injection and timing systems.

3. **Limits or no use of Cash Collateral**. Counsel for the secured Creditor in this case reported to me that his client would rather have the case out of bankruptcy so that they could move to have the inventory liquidated. Mr. Peltier (Creditor's Counsel) said that if Mr. Khedry was highly involved after a Trustee was appointed, they would likely not allow the use of cash. Since Mr. Khedry has been in the business for 30 years, he has contacts literally throughout the world that would be necessary for a successful reorganization.

4. **Cost of Administration**. A trustee would need to hire counsel to investigate the alleged liens on parts and inventory as well as the other legal aspects of running a Chapter 11 case, which may also include litigation of creditor claims. Accounting and tax professionals would also have substantial time in the case to investigate and fix issues that will likely arise.

5. **Customer acquisition and retention**. The fact is that customers may not want to work with a vendor that is in bankruptcy.

6. **Vendor cooperation**. Vendors in this case will likely put the Debtor on COD for all parts and supplies, thus causing an increased need for immediate cash.

7. Risk of asset theft. Since sales of engines and parts will likely require out-of-country transfers, the likelihood of asset theft is elevated. In addition, shipping engines overseas brings a higher risk of asset destruction.

8. **Lack of financial records**. There is no accurate inventory list or reliable accounting records. Some of the inventory is allegedly owned by a party in Venezuela. This claim may be impossible to verify since an accurate list is not available. This fact would hamstring reorganization even further since these assets could not be sold to increase cash flow.

9. **Economic and Legal issues**. The Debtor serves the farming community where stationary and mobile diesel engines are highly regulated. The State of California is on the constant hunt to reduce particulate matter from these sources. New laws require new styles of engines that reduce

> the need to rebuild existing power units. Finally, if water availability is reduced for farming needs, many pumps will not be needed this year and consequently shut down.

Declaration, Dckt. 72.

Based on the unwillingness of the potential trustee candidates to serve, and on additional information provided by those candidates, the UST has concluded that conversion or dismissal of this case is in the best interests of creditors.

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 Reconsider filed by the U.S. Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is xxxx.

24. 14-90156-E-11 DIESEL ENGINE MOTION TO RECONSIDER O.S.T.
UST-2 INDUSTRIES, INC. 3-17-14 [66]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and all creditors on March 17, 2014. By the court's calculation, 10 days' notice was provided.

No Tentative Ruling: The Motion to Reconsider 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to xxxx the Motion to Reconsider. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The United States Trustee ("UST") moves for reconsideration under Federal Rule of Civil Procedure 60(b), incorporated by Federal Rule of Bankruptcy Procedure 9014, of the Court's order on Motion SMO-1 directing the appointment of a chapter 11 trustee, Dckt. 54. The basis for the motion is that after much time and numerous efforts, the UST is unable to locate a person willing to serve as chapter 11 trustee in this case. The UST consulted with the parties and contacted potential trustee candidates recommended by them, however none of those potential candidates is willing to serve. The UST also reached out to other potential candidates who similarly are unwilling to serve.

The UST filed the Declaration of David Flemmer, who states several serious challenges that would be insurmountable without at least a $75,000 cash infusion, including the following:

> 1. **Insufficient cash.** The current cash position of the company is not clear but appears to be approximately $30,000. The company owes approximately $5,400 in back rent and $3,000 in payroll taxes. These expenses would likely be categorized as administrative and need to be paid sooner than later. The receiver is holding customer checks, but they may have been stopped and would likely create a liability if they were deposited. Money has been received for at least three engines, but parts still need to be

acquired to complete them. Parts and labor would also need to be purchased and paid so that sales of finished engines could be completed.

2. **Labor**. It is not clear that the Debtor will be able to re-call and retain qualified staff. Engine rebuilding not only requires mechanical skill but also knowledge of electronically controlled injection and timing systems.

3. **Limits or no use of Cash Collateral**. Counsel for the secured Creditor in this case reported to me that his client would rather have the case out of bankruptcy so that they could move to have the inventory liquidated. Mr. Peltier (Creditor's Counsel) said that if Mr. Khedry was highly involved after a Trustee was appointed, they would likely not allow the use of cash. Since Mr. Khedry has been in the business for 30 years, he has contacts literally throughout the world that would be necessary for a successful reorganization.

4. **Cost of Administration**. A trustee would need to hire counsel to investigate the alleged liens on parts and inventory as well as the other legal aspects of running a Chapter 11 case, which may also include litigation of creditor claims. Accounting and tax professionals would also have substantial time in the case to investigate and fix issues that will likely arise.

5. **Customer acquisition and retention**. The fact is that customers may not want to work with a vendor that is in bankruptcy.

6. **Vendor cooperation**. Vendors in this case will likely put the Debtor on COD for all parts and supplies, thus causing an increased need for immediate cash.

7. Risk of asset theft. Since sales of engines and parts will likely require out-of-country transfers, the likelihood of asset theft is elevated. In addition, shipping engines overseas brings a higher risk of asset destruction.

8. **Lack of financial records**. There is no accurate inventory list or reliable accounting records. Some of the inventory is allegedly owned by a party in Venezuela. This claim may be impossible to verify since an accurate list is not available. This fact would hamstring reorganization even further since these assets could not be sold to increase cash flow.

9. **Economic and Legal issues**. The Debtor serves the farming community where stationary and mobile diesel engines are highly regulated. The State of California is on the constant hunt to reduce particulate matter from these sources. New laws require new styles of engines that reduce

> the need to rebuild existing power units. Finally, if water availability is reduced for farming needs, many pumps will not be needed this year and consequently shut down.

Declaration, Dckt. 72.

Based on the unwillingness of the potential trustee candidates to serve, and on additional information provided by those candidates, the UST has concluded that conversion or dismissal of this case is in the best interests of creditors.

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 Reconsider filed by the U.S. Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is xxxx.