UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

March 29, 2018, at 10:30 a.m.

1.	**16-90500-E-11**	**ELENA DELGADILLO**	**MOTION TO ABANDON**
	HSM-20	**Len ReidReynoso**	**3-15-18 [313]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 15, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Abandon was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Abandon is granted.

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

The Motion filed by Irma Edmonds ("the Chapter 11 Trustee") requests that the court authorize her to abandon property commonly known as 3590 Star Ridge Road, Hayward, California; 9115 & 9119 International Boulevard, Oakland, California; 5319 Bancroft Avenue Oakland, California; a 2015 GMC Sierra Truck; the Vasquez promissory note disclosed at No. 30 on Schedule A/B; and all other personal property listed on Schedule A/B ("Property").

The Chapter 11 Trustee argues that this case is winding down and that she has recovered or generated sufficient funds to satisfy all claims as well as the costs of administration. She argues that the remaining Property is burdensome to the Estate because further liquidation will result in additional expenses to the Estate without purpose.

The court finds that the Property is of inconsequential value and benefit to the Estate because the Chapter11 Trustee has sufficient funds to pay all claims in this case, and there does not appear to be a reason for further liquidation of the Property. The court authorizes the Chapter 11 Trustee to abandon the Property.

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

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

The Motion to Abandon Property filed by Irma Edmonds ("the Chapter 11 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted, and the Property identified as 3590 Star Ridge Road, Hayward, California; 9115 & 9119 International Boulevard, Oakland, California; 5319 Bancroft Avenue Oakland, California; a 2015 GMC Sierra Truck; the Vasquez promissory note disclosed at No. 30 on Schedule A/B; and all other personal property listed on Schedule A/B is abandoned to Elena Delgadillo ("Debtor") by this order, with no further act of the Chapter 11 Trustee required.

2. **17-90910-E-7** **PAMELA COOK** **MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR**
MDM-1 **Scott Sagaria** **2-2-18 [22]**

Final Ruling: No appearance at the March 29, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 2, 2018. By the court's calculation, 86 days' notice was provided. 28 days' notice is required.

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

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

Michael McGranahan ("the Chapter 7 Trustee") filed a motion to extend time to file a complaint objecting to discharge Pamela Cook's ("Debtor") case. The Chapter 7 Trustee states that Debtor failed to disclose an insider preference on her schedules and statement of financial affairs as required by 11 U.S.C. § 521(a)(1)(B)(iii).

The Chapter 7 Trustee asks for additional time to investigate Debtor's personal affairs, requesting that the deadline to file a complaint be extended to May 7, 2018. The deadline for filing a complaint objecting to discharge was February 5, 2018.

The court may, on motion and after a noticed hearing, extend the time for objecting to the entry of discharge for cause. FED. R. BANKR. P. 4004(b)(1). The court may extend this deadline, so long as the request for the extension of time was filed prior to the expiration of the deadline. *Id.*

The instant Motion was filed on February 2, 2018, before the deadline to object to the discharge of Debtor.

The court finds that in the interest of the Chapter 7 Trustee to complete investigation, namely continuing to gather all necessary financial information about Debtor's assets, is sufficient cause to justify an extension of the deadline. Therefore, the Motion is granted, and the deadline for the Chapter 7 Trustee to object to Debtor's discharge is extended to May 7, 2018.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend Deadline filed by Michael McGranahan ("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 is granted, and the deadline for the Chapter 7 Trustee to object to Pamela Cook's ("Debtor") discharge is extended to May 7, 2018.

3. **18-90123-E-11** **LORENA ALVARADO** **MOTION TO IMPOSE AUTOMATIC STAY**
AVN-1 **Anh Nguyen**
3-15-18 [14]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on March 15, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Impose the Automatic Stay is granted.

Lorena Alvarado ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) imposed in this case. This is Debtor's third bankruptcy petition pending in the past year with the prior two cases having been dismissed. Debtor's prior bankruptcy cases (Nos. 17-25913 and 17-28067) were dismissed on September 25, 2017, and January 26, 2018, respectively. *See* Order, Bankr. E.D. Cal. No. 17-25913, Dckt. 14, September 25, 2017; Order, Bankr. E.D. Cal. No.17-28067, Dckt. 25, January 26, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(i), the provisions of the automatic stay did not go into effect upon Debtor filing the instant case.

Here, Debtor states that the instant case was filed in good faith and explains that the previous cases were dismissed because Debtor pleads that she did not complete the schedules and other required documents because she did not know what she was doing, but those documents have been submitted in this case already. Dckt. 22. Debtor also argues that she and her deceased husband were victims of fraud by an attorney's staff in her husband's bankruptcy case that she did not find out about until later, leading to her current foreclosure problems and a pending criminal case against the alleged fraudster. *Id.*

Debtor requests that the stay be imposed only as to actions by Shellpoint Mortgage Servicing ("Shellpoint") against real property commonly known as 5019 Morgan Street, Salida, California ("Property"). Presumably, Shellpoint is merely the loan servicer for a financial institution whose claim is secured by the Property.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions imposed if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(4)(B). The subsequently filed case is presumed to be filed in bad faith if two or more of Debtor's cases were both pending within the year preceding filing of the instant case. *Id.* § 362(c)(4)(D)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(4)(D).

Both of Debtor's prior cases were dismissed after Debtor failed to timely file documents.

Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior cases for the court to impose the automatic stay as to the Property.

The Motion is granted, and the automatic stay is imposed for the Property securing a claim of **xxxxxxxxxxxxx** and serviced by Shellpoint unless terminated by operation of law or further order of this court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Impose the Automatic Stay filed by Lorena Alvarado ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the automatic stay is imposed pursuant to 11 U.S.C. § 362(c)(4)(B) for real property commonly known as 5019 Morgan Street, Salida, California, securing a claim of **xxxxxxxxxxx** and serviced by Shellpoint Mortgage Servicing, unless terminated by operation of law or further order of this court.

4. **17-90826-E-7** **JASON/MONIQUE SCHROER** **MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES, LLC**
BSH-2 **Brian Haddix** **3-8-18 [32]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on March 8, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Portfolio Recovery Associates, LLC ("Creditor") against property of Jason Schroer and Monique Schroer ("Debtor") commonly known as 566 E Springer Street, Turlock, California ("Property").

In Debtor's "check box" Motion, Debtor alleges that a judgment was entered against Debtor in favor of Creditor in the amount of $3,876.76 and that an abstract of judgment was recorded with Stanislaus County on February 22, 2017, that encumbers the Property.

The Motion continues, alleging that Debtor acquired the Property on March 25, 2005. Motion ¶ 6, Dckt. 32. In Paragraph 9 of the Motion, Debtor "Checks the Boxes" that the following documents have been filed in support of the Motion:

9. Debtor submits the following documents in support of the motion:
a. ☒. Schedule C listing all exemptions claimed by Debtor

b. ☒. Appraisal of the property
c. ☒. Documents showing current balance due as to the liens specified in paragraph above
d. ☒. Recorded Abstract of Judgment
e. ☐ . Recorded Declaration of Homestead
f. ☒. Declaration(s)
g. ☐ . Other:

Unfortunately for Debtor, though, there appears to a filing error on the docket because no exhibits have been filed in support of this Motion. Debtor has not provided the court with a copy of the recorded abstract of judgment. Debtor has not provided the court with an appraisal and testimony by the appraiser. A review of the docket shows that one exhibit document was filed for BSH-3, and three identical exhibit documents were filed for BSH-4.

More significantly, Debtor affirmatively states under penalty of perjury that as of the commencement of this bankruptcy case Debtor has no interest in this, or any, real property. Amended Schedule A, Dckt. 19 at 3. On Original Schedule A/B, however, Debtor stated under penalty of perjury that the two co-debtors owned the Property. Dckt. 15 at 3. Though Amended Schedule A/B may be in error (which Debtor did not catch when carefully reviewing it before signing that all of the information therein was true and accurate under penalty of perjury), Amended Schedule A/B is Debtor's latest statement under penalty of perjury, signed by Debtor, in which it is stated that as of the commencement of this case Debtor had no interest in the Property.

On Schedule D, Debtor lists unavoidable consensual liens that total $332,143.34 as of the commencement of this case. Dckt. 15 at 17–18. Debtor filed an Amended Schedule C on March 8, 2018, claiming an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00. Amended Schedule C, Dckt. 48 at 3.

In his Declaration, Debtor provides his testimony under penalty of perjury as to the following facts:

1. He is the debtor and testifies based on his personal knowledge.

2. On Schedule A, Debtor stated that the value of the Property was $332,000.

3. Debtor reaffirms said statement of Value.

Dckt. 34 at 1. No testimony is provided as to the judgment, judgment lien, or to authenticate any documents.

This Motion fails for several reasons. First, Debtor has not provided a copy of the recorded abstract of judgment or any evidence of the judgment lien. Second, the controlling Amended Schedule A states that Debtor has no interest in real property anyway. At least one of those may be an error that Debtor's counsel can correct in a new motion. The Motion is denied without prejudice.

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Jason Schroer and Monique Schroer ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR PROVIDES THE COURT WITH EVIDENCE OF THE JUDGMENT AND RECORDED ABSTRACT OF JUDGMENT AND IF DEBTOR SHOWS AN INTEREST IN REAL PROPERTY ON SCHEDULE A

A judgment was entered against Debtor in favor of Creditor in the amount of $3,876.76. An abstract of judgment was recorded with Stanislaus County on February 22, 2017, that encumbers the Property.

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of $332,000.00 as of the petition date. Dckt. xx. The unavoidable consensual liens that total $382,720.31 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 15. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 48.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Jason Schroer and Monique Schroer ("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 Portfolio Recovery Associates, LLC, California Superior Court for Stanislaus County Case No. 2019610, recorded on February 22, 2017, Document No. 2017-0012183-00,

with the Stanislaus County Recorder, against the real property commonly known as 566 E Springer Street, Turlock, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

5.	**17-90826-E-7** **BSH-3**	**JASON/MONIQUE SCHROER** **Brian Haddix**	**MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES, LLC** **3-8-18 [35]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on March 8, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Portfolio Recovery Associates, LLC ("Creditor") against property of Jason Schroer and Monique Schroer ("Debtor") commonly known as 566 E Springer Street, Turlock, California ("Property").

In Debtor's "check box" Motion, Debtor alleges that a judgment was entered against Debtor in favor of Creditor in the amount of $2,145.81 and that an abstract of judgment was recorded with Stanislaus County on March 2, 2017, that encumbers the Property.

The Motion continues, alleging that Debtor acquired the Property on March 25, 2005. Motion ¶ 6, Dckt. 32. In Paragraph 9 of the Motion, Debtor "Checks the Boxes" that the following documents have been filed in support of the Motion:

> 9. Debtor submits the following documents in support of the motion:
> a. ☒. Schedule C listing all exemptions claimed by Debtor
> b. ☒. Appraisal of the property
> c. ☒. Documents showing current balance due as to the liens specified in paragraph above
> d. ☒. Recorded Abstract of Judgment
> e. ☐ . Recorded Declaration of Homestead
> f. ☒. Declaration(s)
> g. ☐ . Other:

On March 8, 2018, Debtor filed the following Exhibits in Support of the Motion to Avoid Judicial Lien (using the paragraph numbering in the pleading cover sheet):

> h. Schedule C listing exemptions (Amended Schedule C filed March 8, 2018)
>
> i. Unauthenticated Appraisal of the Property.
>
> j. September 8, 2017 Wells Fargo Loan Statement showing $332,143.34 loan balance; and an August 31, 2017 Ocwen Loan Servicing Statement showing a $50,576.97 loan balance.
>
> k. Unauthenticated Abstract of Judgment with a County Recorder's stamp showing a July 28, 2017 recording date, $1,877.20 for the amount of judgment, and that the Plaintiff was Portfolio Recovery Associates, LLC. (This does not appear to be the alleged judgment in the Check Box Motion.)

Dckt. 43.

On March 8, 2018, Debtor filed a second set of exhibits in support of this Motion to Avoid Judicial Lien. Dckt. 45. These Exhibits are identified as (using the paragraph numbering in the pleading cover sheet):

> h. Schedule C listing exemptions (Amended Schedule C filed March 8, 2018)
>
> i. Unauthenticated Appraisal of the Property.
>
> j. September 8, 2017 Wells Fargo Loan Statement showing $332,143.34 loan balance; and an August 31, 2017 Ocwen Loan Servicing Statement showing a $50,576.97 loan balance.

k. Unauthenticated Abstract of Judgment with a County Recorder's stamp showing a March 2, 2017 recording date, $2,145.81 for the amount of judgment, and that the Plaintiff was Portfolio Recovery Associates, LLC. (This appears to be the alleged judgment in the Check Box Motion.)

Significantly, Debtor affirmatively states under penalty of perjury that as of the commencement of this bankruptcy case Debtor has no interest in this, or any, real property. Amended Schedule A, Dckt. 19 at 3. On Original Schedule A/B, however, Debtor stated under penalty of perjury that the two co-debtors owned the Property. Dckt. 15 at 3. Though Amended Schedule A/B may be in error (which Debtor did not catch when carefully reviewing it before signing that all of the information therein was true and accurate under penalty of perjury), Amended Schedule A/B is Debtor's latest statement under penalty of perjury, signed by Debtor, in which it is stated that as of the commencement of this case Debtor had no interest in the Property.

On Schedule D, Debtor lists unavoidable consensual liens that total $332,143.34 as of the commencement of this case. Dckt. 15 at 17–18. Debtor filed an Amended Schedule C on March 8, 2018, claiming an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00. Amended Schedule C, Dckt. 48 at 3.

In his Declaration, Debtor provides his testimony under penalty of perjury as to the following facts:

1. He is the debtor and testifies based on his personal knowledge.

2. On Schedule A, Debtor stated that the value of the Property was $332,000.

3. Debtor reaffirms said statement of Value.

Dckt. 34 at 1. No testimony is provided as to the judgment, judgment lien, or to authenticate any documents.

This Motion fails for several reasons. First, Debtor has not provided a copy of the recorded abstract of judgment or any evidence of the judgment lien. Second, the controlling Amended Schedule A states that Debtor has no interest in real property anyway. At least one of those may be an error that Debtor's counsel can correct in a new motion. The Motion is denied without prejudice.

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

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

IT IS ORDERED that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR SHOWS AN INTEREST IN REAL PROPERTY ON SCHEDULE A

A judgment was entered against Debtor in favor of Creditor in the amount of $2,145.81. An abstract of judgment was recorded with Stanislaus County on March 2, 2017, that encumbers the Property.

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of $332,000.00 as of the petition date. Dckt. xx. The unavoidable consensual liens that total $382,720.31 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 15. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 48.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Jason Schroer and Monique Schroer ("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 Portfolio Recovery Associates, LLC, California Superior Court for Stanislaus County Case No. 2020274, recorded on March 2, 2017, Document No. 2017-0014916-00, with the Stanislaus County Recorder, against the real property commonly known as 566 E Springer Street, Turlock, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

6. **17-90826-E-7** **JASON/MONIQUE SCHROER** **MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES, LLC**
BSH-4 **Brian Haddix** **3-8-18 [38]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on March 8, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Portfolio Recovery Associates, LLC ("Creditor") against property of Jason Schroer and Monique Schroer ("Debtor") commonly known as 566 E Springer Street, Turlock, California ("Property").

In Debtor's "check box" Motion, Debtor alleges that a judgment was entered against Debtor in favor of Creditor in the amount of $1,877.20 and that an abstract of judgment was recorded with Stanislaus County on July 26, 2017, that encumbers the Property.

The Motion continues, alleging that Debtor acquired the Property on March 25, 2005. Motion ¶ 6, Dckt. 32. In Paragraph 9 of the Motion, Debtor "Checks the Boxes" that the following documents have been filed in support of the Motion:

9. Debtor submits the following documents in support of the motion:
a. ☒. Schedule C listing all exemptions claimed by Debtor

b. ☒. Appraisal of the property
c. ☒. Documents showing current balance due as to the liens specified in paragraph above
d. ☒. Recorded Abstract of Judgment
e. ☐ . Recorded Declaration of Homestead
f. ☒. Declaration(s)
g. ☐ . Other:

On March 8, 2018, Debtor filed the following Exhibits in Support of the Motion to Avoid Judicial Lien (using the paragraph numbering in the pleading cover sheet):

> h. Schedule C listing exemptions (Amended Schedule C filed March 8, 2018)
>
> i. Unauthenticated Appraisal of the Property.
>
> j. September 8, 2017 Wells Fargo Loan Statement showing $332,143.34 loan balance.
>
> k. Unauthenticated Abstract of Judgment with a County Recorder's stamp showing a July 26, 2017 recording date, $1,877.20 for the amount of judgment, and that the Plaintiff was Portfolio Recovery Associates, LLC.

Dckt. 41.

On March 8, 2018, Debtor filed a second set of exhibits in support of this Motion to Avoid Judicial Lien. Dckt. 46. These Exhibits are identified as (using the paragraph numbering in the pleading cover sheet):

> h. Schedule C listing exemptions (Amended Schedule C filed March 8, 2018)
>
> i. Unauthenticated Appraisal of the Property.
>
> j. September 8, 2017 Wells Fargo Loan Statement showing $332,143.34 loan balance; and an August 31, 2017 Ocwen Loan Servicing Statement showing a $50,576.97 loan balance.
>
> k. Unauthenticated Abstract of Judgment with a County Recorder's stamp showing a July 26, 2017 recording date, $1,877.20 for the amount of judgment, and that the Plaintiff was Portfolio Recovery Associates, LLC.

Significantly, Debtor affirmatively states under penalty of perjury that as of the commencement of this bankruptcy case Debtor has no interest in this, or any, real property. Amended Schedule A, Dckt. 19 at 3. On Original Schedule A/B, however, Debtor stated under penalty of perjury that the two co-debtors owned the Property. Dckt. 15 at 3. Though Amended Schedule A/B may be in error (which Debtor did not catch when carefully reviewing it before signing that all of the information therein was true and accurate under penalty of perjury), Amended Schedule A/B is Debtor's latest statement under penalty of perjury,

signed by Debtor, in which it is stated that as of the commencement of this case Debtor had no interest in the Property.

On Schedule D, Debtor lists unavoidable consensual liens that total $332,143.34 as of the commencement of this case. Dckt. 15 at 17–18. Debtor filed an Amended Schedule C on March 8, 2018, claiming an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00. Amended Schedule C, Dckt. 48 at 3.

In his Declaration, Debtor provides his testimony under penalty of perjury as to the following facts:

1. He is the debtor and testifies based on his personal knowledge.

2. On Schedule A, Debtor stated that the value of the Property was $332,000.

3. Debtor reaffirms said statement of Value.

Dckt. 34 at 1. No testimony is provided as to the judgment, judgment lien, or to authenticate any documents.

This Motion fails for several reasons. First, Debtor has not provided a copy of the recorded abstract of judgment or any evidence of the judgment lien. Second, the controlling Amended Schedule A states that Debtor has no interest in real property anyway. At least one of those may be an error that Debtor's counsel can correct in a new motion. The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Jason Schroer and Monique Schroer ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR SHOWS AN INTEREST IN REAL PROPERTY ON SCHEDULE A

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of $332,000.00 as of the petition date. Dckt. xx. The unavoidable consensual liens that total $382,720.31 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 15. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 48.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Jason Schroer and Monique Schroer ("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 Portfolio Recovery Associates, LLC, California Superior Court for Stanislaus County Case No. 2023470, recorded on July 26, 2017, Document No. 2017-0054088-00, with the Stanislaus County Recorder, against the real property commonly known as 566 E Springer Street, Turlock, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

7. **18-90029-E-11** **JEFFERY ARAMBEL**
MF-8 **Matthew Olson**

CONTINUED MOTION TO EMPLOY ARCH & BEAM GLOBAL, LLC AS RESPONSIBLE INDIVIDUAL AND FINANCIAL ADVISOR
2-28-18 [107]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on March 7, 2018. By the court's calculation, 15 days' notice was provided. The court set the hearing for March 22, 2018. Dckt. 128.

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

The Motion to Employ Arch & Beam Global, Inc. to provide services to Debtor is ~~denied without prejudice~~.

Jeffery Arambel ("Debtor in Possession") seeks to employ Arch & Beam Global, LLC ("Advisor") as a Responsible Individual and Financial Advisor pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Advisor to assist and advise Debtor in Possession respecting performance of debtor in possession duties. FN.1.

FN.1. As discussed below, the Original and now the Amended Agreement for such employment clearly state that it is for the employment by Debtor individually, not as the fiduciary debtor in possession to employ professionals who have a fiduciary duty to the bankruptcy estate in performing duties for and of the fiduciary debtor in possession.

Debtor in Possession argues that Advisor's appointment and retention is necessary to provide a smooth administration of the Chapter 11 estate in this case. Debtor in Possession states that Advisor will perform the following services:

A. Installation of a financial reporting process appropriate to the company's strategy;

B. Development of the required financial and operational data for control and planning purposes;

C. Conversion of financial data into meaningful trend and exception information reports to improve performance and controls, including, but not limited to, weekly cash forecasts, weekly sales trends and weekly inventory requirements;

D. Development and implementation of a facilities closure strategy;

E. Review of leases;

F. Management of accounts receivables collection;

G. Negotiations of debt with creditors;

H. Development of long term financial forecast;

I. Preparation of a plan of reorganization;

J. Direction of the liquidation of selected assets; and

K. Assistance with performance of fiduciary duties.

Howard Bailey, a Senior Managing Director of Arch & Beam Global, LLC, testifies that he is a Certified Turnaround Professional with over thirty years of experience in banking, restructuring, and bankruptcy. Mr. Bailey testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

CREDITOR'S OBJECTION

American AgCredit, FLCA ("Creditor") filed an Objection on March 5, 2018. Dckt. 118. Creditor argues that the Motion should be set on noticed hearing instead of as an *ex parte* motion so that all parties have adequate time to respond. Creditor's argument has been resolved by the court setting this matter for a hearing.

U.S. TRUSTEE'S OBJECTION

Tracy Hope Davis ("U.S. Trustee") filed an Objection on March 5, 2018. Dckt. 124. The U.S. Trustee opposes terms in the employment agreement that would give Advisor duties of a debtor in possession and that would limit Advisor's liability.

The U.S. Trustee notes that the Engagement Letter includes language that Advisor "**shall have no responsibility for mistakes or omissions on our part arising as a result of having relied upon information, representations and books & records provided by the Debtor that were inaccurate or incomplete.**" *Id.* at 2. The U.S. Trustee notes that the engagement letter also includes an indemnification clause that would essentially absolve Advisor from liability for its own negligence.

The U.S. Trustee also narrows down on Debtor in Possession's language in the Memorandum of Points and Authorities that Advisor is needed to "take over the duties and responsibilities related to the administration of the Chapter 11 process." *Id.* at 4 (citing Dckt. 108 at 2:17–19). The U.S. Trustee is not even sure what Advisor could do in this case because the Memorandum cites to the Northern District's Local Rule 4002-1 for the concept of a Responsible Individual when the debtor in possession is not an individual, but in this case, the debtor in possession is an individual.

FIRST REVISED PROPOSED AGREEMENT

Debtor in Possession and Advisor, in considering the Oppositions have proposed a modified version of the employment of Advisor. Reply, Dckt. 145. In the Reply, it is stated that Advisor's role will be tailored back, no longer filling the "Responsible Individual," but serve only as a financial advisor. Howard Bailey provides his Declaration (Dckt. 146) addressing these changes and his role as the Financial Advisor. Jeffery Arambel, the individual debtor who sought to have Mr. Bailey employed as the Responsible Representative, has not provided a Declaration explaining how he will now be able to serve personally as the Responsible Representative for the fiduciary Debtor in Possession.

Review of Amended Agreement

Upon review the Amended Agreement (Exhibit A, Dckt. 147), the court distills the terms of the Financial Advisor employment to be:

A. The employment is to assist "Debtor" (not Debtor in Possession) in the Chapter 11 Bankruptcy Case of Jeffery Arambel. FN. 2.

FN.2. The proposed employment does not get off on a strong footing, the Financial Advisor either not appreciating the fiduciary duties of a debtor in possession and the fiduciary duties to the bankruptcy estate of a professional hired to be employed by the debtor in possession; does not understand the difference between the debtor and the fiduciary debtor in possession; or seeks to be paid by the estate for doing private work for Debtor that may conflict with the fiduciary duties of Debtor in Possession.

B. Mr. Bailey will serve only as the Financial Advisor to "Debtor."

C. Mr. Bailey's firm will, in addition to serving as the Financial Advisor to "Debtor," will "staff the Case with additional consultants from Arch + Beam." FN.3.

FN.3. Using the terminology "Staff the Case" sounds in the nature of running the Chapter 11 bankruptcy case in the place of the fiduciary debtor in possession, as opposed to merely providing "financial advise" to "Debtor" or a debtor in possession.

D. As Financial Advisor to "Debtor," Mr. Bailey and the others at his firm are to provide the followings services :

a. Installation of a financial reporting process appropriate to Debtor's company's planning purposes;

b. Develop the required financial and operational data for control and planning purposes;

c. Convert the data into meaningful trend and variance reports to improve performance and controls, including, but not limited to, weekly cash forecasts, weekly sales trends and weekly inventory turnover trends;

d. Develop and implement an optimal facilities closure strategy;

e. Review leases and renegotiate lease rates where possible;

f. Negotiate debt with creditors;

g. Develop long term financial forecast;

h. Aid in development of Debtor's Plan;

i. Implement administrative controls to maximize timely collection of accounts receivables;

j. Identify surplus, inventory, machinery and equipment;

k. INTENTIONALLY LEFT BLANK; and

l. Assist Debtor in performing its fiduciary duties.

Exhibit A, p. 2 of 8; *Id.*

Those services sound less in the "financial advisor" role but more in the chief executive officer, chief financial officer, chief operations officer, manager, or responsible representative for a debtor in possession role. The last item, "Assist Debtor in performing its fiduciary duties" appears to be a clear statement that Financial Advisor does not seek to be employed pursuant to 11 U.S.C. § 327 as a professional for the fiduciary Debtor in Possession, but only personally by Debtor to assist the individual Debtor personally and avoid any fiduciary duties to the bankruptcy estate. Debtor may so elect to employ personal professionals who are not employed by the fiduciary debtor in possession or who owe a fiduciary duty to the bankruptcy estate—but such personal professionals are not hired pursuant to 11 U.S.C. § 327.

CREDITOR SUMMIT'S OBJECTION

SBN V Ag I LLC ("Creditor Summit") filed an Objection on March 20, 2018. Dckt. 151. Creditor Summit proposes employing Cordes & Company, instead of Advisor. Creditor Summit stresses that the Estate needs an independent advisor or a Chapter 11 Trustee, not a financial advisor who reports to Debtor. Creditor Summit also argues that current real estate values are unknown because there are no recent appraisals and that Debtor has a history of promising to sell but not following through. Creditor Summit even suggests that this Motion is a further attempt to delay sales. Finally, Creditor Summit emphasizes that the Motion does not make Advisor independent from Debtor.

DEBTOR IN POSSESSION'S STATUS REPORT

Debtor in Possession filed a Status Report on March 21, 2018. Dckt. 153. Debtor in Possession argues that there are four pending sales, totaling $30,026,646.00, with a potential to be as large as $34,600,446.00.

APPLICABLE LAW

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.

RULING

As noted by the U.S. Trustee in opposing the original agreement, it sought to replace the individual Debtor as Debtor in Possession and appoint the Financial Advisor to stand in that role. This was seeking to have what is commonly called a "Chief Restructuring Officer" or a business manager put in place to run the business and structure the reorganization. Though not commonly done in this District, good

reason can exist to do so, even in individual debtor Chapter 11 cases. The individual debtor may well be so beaten down by the financial and personal struggles leading up to the bankruptcy case that the individual debtor may not have the emotional energy to undertake the lead responsible representative role for the bankruptcy case on his or her own. Additionally, it may be that the individual debtor does not have the financial and business ability to run and reorganize the business, it having ended up in Chapter 11 under his or her direction. Whatever the reason, it is not a negative moral mark on a debtor in possession seeking the proper assistance of legal, financial, and other professionals to successfully navigate the complex Chapter 11 case.

The crux of the U.S. Trustee's original opposition was that the Financial Advisor appears to be watering down his fiduciary duties and responsibilities to the bankruptcy estate by including a substantial "non-responsibility" caveat to his professional employment as the Responsible Representative.

As noted above, the current proposed employment and the original employment both get off on the wrong foot describing it as the mere individual Debtor who is seeking to employ the Financial Advisor. For this to be authorized by the court, and for the scope of the services, it has to be the fiduciary Debtor in Possession.

In the original Motion and Agreement, for the services to be provided, Debtor in Possession and the Responsible Representative got it right; the employment is to hire a Responsible Representative to fulfill for Debtor in Possession many of the duties of Debtor in Possession—it appearing that these include: running the business, reviewing and evaluating claims, developing plan terms, and advancing the case. It appears that Debtor in Possession personally would continue in that role, having some overall final decision say as the fiduciary debtor in possession (much in the way that the CEO has the final say over the acts of the various other officers and managers running the business of a corporate debtor in possession).

Exhibit B is a redline comparing the original Agreement to the Amended Agreement. Dckt. 24 at 10–16. Interestingly, the duties to be performed do not change. Rather, the Amended Agreement merely drops the reference to those duties being in the nature of those of a court-appointed responsible representative. The Amended Agreement also removes the limitation of liability provision that would appear to gut the fiduciary responsibilities of any professional authorized to be employed pursuant to 11 U.S.C. § 327.

It appears that Debtor in Possession and the Financial Advisor overreacted to the opposition of the U.S. Trustee and some creditors. It is clear in this case that creditors believe that Debtor in Possession needs substantial business, financial, operational, and legal assistance in attempting to prosecute this and the related Filbin Land & Cattle Co, Inc. cases—which are stated by the two debtors to have assets in excess of $200,000,000.00 and large operating revenues.

The court is not convinced that there needs to be a Chapter 11 trustee in both, or possibly either, of the bankruptcy cases. Bringing in proper and responsible operations and management assistance may well be what is necessary (and is likely what any Chapter 11 trustee would have to do). The appointment of possible Chapter 11 trustees will turn on whether the court concludes that Mr. Arambel is able to fulfill his fiduciary duties as Debtor in Possession in his individual case and as the responsible representative in the

Filbin case, as well as whether there are irreconcilable conflicts that preclude Mr. Arambel from serving in both, or either, fiduciary roles.

However, what cannot be approved is for Mr. Arambel, as "Debtor," to hire the Financial Advisor to run the Chapter 11 case. Paraphrasing William Shakespeare, who appears to have been anticipating this case, "A Responsible Representative/CRO is a Responsible Representative/CRO by any other name." FN.4.

FN.4. William Shakespeare, 1597, *Romeo and Juliet*, Act II, Scene II; "What's in a name? that which we call a rose By any other name would smell as sweet;. . . ."

MARCH 22, 2018 HEARING

At the hearing, the various parties in interest addressed specific concerns relating to the employment and operation of the Estate by Debtor in Possession. Counsel for Debtor in Possession provided suggested amendments to the employment agreement. Dckt. 156.

The court continued the hearing to 10:30 a.m. on March 29, 2018, to allow the parties time to structure an amended agreement for employment of Advisor. Dckt. 161.

MARCH 29, 2018 HEARING

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**.

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 Jeffery Arambel ("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 ~~by the Debtor is denied without prejudice~~.

8. **18-90029-E-11** **JEFFERY ARAMBEL** **MOTION TO EMPLOY BUSINESS DEBT SOLUTIONS, INC. AS BROKER(S)**
MF-6 **Matthew Olson** **2-15-18 [64]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on parties requesting special notice and Office of the United States Trustee on February 15, 2018. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted.

Jeffery Arambel ("Debtor in Possession") seeks to employ Charles Doyle of Business Debt Solutions, Inc. dba Business Capital ("Broker") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Broker to procure and consummate transactions with lenders to provide the Estate with financing to fund operations pending plan confirmation and with exit financing.

Debtor in Possession argues that Broker's appointment and retention is necessary to acquire working capital to operate orchards, and Debtor in Possession states that the current cash on hand is insufficient. Debtor in Possession proposes to pay Broker an underwriting and syndication fee of $15,000.00 to gather information, prepare and distribute a confidential information memorandum, solicit financing offers, distribute lender documents, assist in evaluating offers, and support in entering into a loan agreement. That fee is non-refundable.

Debtor in Possession also proposes that Broker receives a financing fee of 3% of the total maximum amount of actual financing obtained for the Estate due and payable simultaneously with and at the time of entering into a written loan agreement, as well as 3% of any incremental increase in the financing that occurs within eighteen months of the loan agreement date. Debtor in Possession requests that Broker's fees be subject only to 11 U.S.C. § 328(a) and not 11 U.S.C. § 330 because it is not Broker's general practice to maintain time records on an hourly or project basis.

The proposed employment is for six months from the execution date, subject to additional automatic thirty-day renewals until a party gives ten days' written notice of termination. During the first renewal period, Debtor in Possession may terminate the agreement with thirty days' written notice.

Charles Doyle, a principal and managing director of Business Debt Solutions, Inc. dba Business Capital, testifies that he has more than twenty years' experience and has recently provided loan acquisition services in a Chapter 11 case. He states that he will represent only the Estate in any transaction and will not represent both Debtor in Possession and a potential lender. Mr. Doyle testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

CREDITORS' OPPOSITION

Dorothy M. Arnaud, individually, and as Co-Trustee of the Patrick H. and Margaret J. Filbin Trust UTA, dated December 30, 1973; and Helen F. Jacobson, individually, and as Co-Trustee of the Patrick H. and Margaret J. Filbin Trust UTA, dated December 30, 1973 ("Creditors") filed their collective Opposition to this Motion. FN.1.

FN.1. Creditors filed the Opposition and Proof of Service in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court's expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

Creditors "are troubled by the multiple amendments" to the schedules, and they believe that the schedules are inaccurate. For instance, Creditors note that the second amended schedules show monthly net income of $41,356.11, but Debtor in Possession has not reported expenses for mortgages on other properties, real estate taxes, maintenance, repair, and upkeep expenses, or other expenses derived from operating a business. Creditors also believe that property values have been overestimated.

Regarding the Motion to employ Broker, Creditors question what utility Broker would provide given alleged uncertainty about Debtor's assets and liabilities.

DEBTOR IN POSSESSION'S REPLY

Debtor in Possession filed a Reply on March 22, 2018. Dckt. 159. Debtor in Possession argues that there is a duty to investigate all methods to resolve the Estate and to protect the value of assets, and Broker is necessary for that evaluation. Debtor in Possession argues that Broker will help analyze opportunities to obtain funding for short-term operations, as well as potential financing that would replace the current capital structure.

Debtor in Possession also argues that a number of the points raised by Creditors have been raised, addressed, and resolved already.

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.

A review of the proposed financing agreement shows that Broker will be representing both Debtor in Possession in this case and Filbin Land & Cattle Co., Inc., in its own case. As opposed to the general bankruptcy counsel, other professionals hired may have some connections between the two cases. Here, the operation of the farming business and the ownership of the land, while split over the two bankruptcy cases, are inexorably intertwined.

The Opposition goes to issues that the parties in this case have been addressing—the ability of Jeffery Arambel to serve as the debtor in possession and the responsible representative for the debtor in possession in the related Filbin case. Any financing, and the further obligation to Broker beyond the initial $15,000 fee is contingent on the court approving any financing, as well as such obligations being subject to review pursuant to 11 U.S.C. § 328.

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Charles Doyle of Business Debt Solutions, Inc. dba Business Capital as Broker for Debtor in Possession on the terms and conditions set forth in the Financing Agreement filed as Exhibit A, Dckt. 65. Approval of compensation is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

The 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 Employ filed by Jeffery Arambel ("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 Debtor in Possession is authorized to employ Charles Doyle of Business Debt Solutions, Inc. dba Business Capital as Broker for Debtor in Possession on the terms and conditions as set forth in the Financing Agreement filed as Exhibit A, Dckt. 65.

IT IS FURTHER ORDERED that, except as provided in this paragraph, 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. Debtor in Possession is authorized to pay the $15,000.00 Underwriting and Syndication Fee provided for in the Agreement.

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.

No financing, obtaining post-petition credit, or incurring of any financial obligations by Debtor in Possession, or successors (if any) in the Jeffery Arambel Bankruptcy Case or the Filbin Land and Cattle Co., Inc. Bankruptcy Case is authorized or approved by this Order.

9.	**18-90030-E-11** **MF-6**	**FILBIN LAND & CATTLE CO., INC.** **Michael St. James**	**MOTION TO EMPLOY BUSINESS DEBT SOLUTIONS, INC. AS BROKER(S)** **2-15-18 [51]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on parties requesting special notice on February 15, 2018. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted.

Filbin Land & Cattle Co., Inc., ("Debtor in Possession") seeks to employ Charles Doyle of Business Debt Solutions, Inc. dba Business Capital ("Broker") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Broker to procure and consummate transactions with lenders to provide the Estate with financing to fund operations pending plan confirmation and with exit financing.

Debtor in Possession argues that Broker's appointment and retention is necessary to acquire working capital to operate orchards, and Debtor in Possession states that the current cash on hand is insufficient. Debtor in Possession proposes to pay Broker an underwriting and syndication fee of $15,000.00 to gather information, prepare and distribute a confidential information memorandum, solicit financing offers, distribute lender documents, assist in evaluating offers, and support in entering into a loan agreement. That fee is non-refundable.

Debtor in Possession also proposes that Broker receives a financing fee of 3% of the total maximum amount of actual financing obtained for the Estate due and payable simultaneously with and at the time of entering into a written loan agreement, as well as 3% of any incremental increase in the financing that occurs within eighteen months of the loan agreement date. Debtor in Possession requests that Broker's fees be subject only to 11 U.S.C. § 328(a) and not 11 U.S.C. § 330 because it is not Broker's general practice to maintain time records on an hourly or project basis.

The proposed employment is for six months from the execution date, subject to additional automatic thirty-day renewals until a party gives ten days' written notice of termination. During the first renewal period, Debtor in Possession may terminate the agreement with thirty days' written notice.

Charles Doyle, a principal and managing director of Business Debt Solutions, Inc. dba Business Capital, testifies that he has more than twenty years' experience and has recently provided loan acquisition services in a Chapter 11 case. He states that he will represent only the Estate in any transaction and will not represent both Debtor in Possession and a potential lender. Mr. Doyle testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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.

A review of the proposed financing agreement shows that Broker will be representing both Debtor in Possession in this case and Filbin Land & Cattle Co., Inc., in its own case. As opposed to the general bankruptcy counsel, other professionals hired may have some connections between the two cases. Here, the operation of the farming business and the ownership of the land, while split over the two bankruptcy cases, are inexorably intertwined.

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Charles Doyle of Business Debt Solutions, Inc. dba Business Capital as Broker for Debtor in Possession on the terms and conditions set forth in the Financing Agreement filed as Exhibit A, Dckt. 52. Approval of compensation is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Filbin Land & Cattle Co., Inc., ("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 Debtor in Possession is authorized to employ Charles Doyle of Business Debt Solutions, Inc. dba Business Capital as Broker for Debtor in Possession on the terms and conditions as set forth in the Financing Agreement filed as Exhibit A, Dckt. 52.

IT IS FURTHER ORDERED that except as provided in this paragraph, 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. Debtor in Possession is authorized to pay the $15,000.00 Underwriting and Syndication Fee provided for in the Agreement.

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.

No financing, obtaining post-petition credit, or incurring of any financial obligations by Debtor in Possession, or successors (if any) in the Jeffery Arambel Bankruptcy Case or the Filbin Land and Cattle Co., Inc. Bankruptcy Case is authorized or approved by this Order.

10. 17-90432-E-12 CARLOS/BERNADETTE ESTACIO MOTION TO DISMISS CASE
SBM-2 Peter Fear 2-14-18 [106]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, Chapter 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 14, 2018. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one day's notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor in Possession filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The hearing on the Motion to Dismiss is continued to 10:30 a.m. on May 31, 2018.

Wells Fargo Bank ("Movant") seeks an order dismissing this case pursuant to 11 U.S.C. § 1208(c) based upon bad faith and unreasonable delay that is prejudicial to creditors. Movant argues that no payments have been made to it during this case.

Particularly, Movant notes that Carlos Estacio and Bernadette Estacio ("Debtor in Possession") withdrew a proposed plan on November 28, 2017, and stated they hoped to propose a new plan within two weeks. Dckt. 106 at 3:14–18.5 (citing Dckt. 79). More than two months later, a plan has not been proposed according to Movant.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on March 15, 2018. Dckt. 149. Debtor in Possession argues that a new plan that has been proposed eliminates the concerns raised by this Motion, that the law cited by Movant does not support the Motion, that the Motion is factually deficient, and that the notice of this Motion violates the court's Local Bankruptcy Rules.

Debtor in Possession argues that the proposed plan includes a deadline for when a sale of real property must occur, and Debtor in Possession consents to voluntary conversion of this case to Chapter 7 if such a sale does not occur within the time constraint.

Debtor in Possession also argues that Movant's claim is oversecured by one million dollars because of its first in priority lien position, secured by a deed of trust. Contrary to Movant's argument, Debtor in Possession claims that dismissing this case will cause prejudice to creditors holding unsecured claims because they are not likely to receive any funds, but the proposed plan would pay those claims fully.

Debtor in Possession argues that Movant has not set forth any factual grounds to support a finding of bad faith that would justify dismissing this case. Debtor in Possession believes that the Motion violates Federal Rule of Bankruptcy Procedure 9013 because Movant has not alleged facts to support the claims in the Motion. Arguing against a finding of undue delay, Debtor in Possession notes that at the November 30, 2017 status conference, the court stated that it was not setting a deadline for a new plan to be filed, choosing instead to allow the parties to decide when to file their respective motions. *See* Dckt. 94.

Debtor in Possession argues that there has not been an unreasonable delay that is prejudicial to creditors because adequate protection payments were offered to Movant, without response. Finally, Debtor in Possession argues that the notice for this Motion violates Local Bankruptcy Rule 9014-1(d)(3)(B)(iii) by not including certain language, but Debtor in Possession does not state what language is missing.

DEBTOR IN POSSESSION'S EVIDENTIARY OBJECTION

Debtor in Possession filed an Evidentiary Objection on March 15, 2018, based upon the Federal Rules of Evidence ("FRE"). Dckt. 150.

Debtor in Possession objects to an alleged reference in paragraph 3 of the Motion to another declaration for a separate motion for relief—the declaration of Jon Zagaris. Specifically, Debtor in Possession objects to statements in four separate paragraphs.

Federal Rules of Evidence Invoked

Federal Rule of Evidence 401 states that evidence is relevant if (1) it has any tendency to make a fact more or less probable than it would be without the evidence, and if the fact is of consequence in determining the action.

Federal Rule of Evidence 403 allows a court to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing of issues, misleading a jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rule of Evidence 602 states that a witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.

Federal Rule of Evidence 701 limits lay person testimony to opinions rationally based on the witness's perception, that are helpful to clearly understanding the witness's testimony or to determining a fact in issue, and not based on scientific, technical, or other specialized knowledge.

Federal Rule of Evidence 702 sets forth the rules for testimony by an expert witness. The witness must be qualified as an expert by knowledge, skill, experience, training, or education and may testify in the form of opinion if (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case.

Federal Rule of Evidence 802 states that hearsay is inadmissible unless provided for by a federal statute, the Federal Rules of Evidence, or rules prescribed by the Supreme Court.

Federal Rule of Evidence 901 states that to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Federal Rule of Evidence 902 contains fourteen categories of evidence that are self-authenticating and do not need any extrinsic evidence to be admitted.

Federal Rule of Evidence 1002 requires an original writing, recording, or photograph to be provided to prove its content.

Objections to Evidence

Declaration of Jon Zagaris

Objection No. 1

In paragraph 3 of the Zagaris declaration, Debtor in Possession objects to the statement made by the declarant that:

> "I have been advised by the listing agent that the seller of the property has a dairy permit for 696 milking cows, but no milk supply contract, and that the free stalls and loafing barn on the property are in poor condition, and need repair"

on the grounds that it is hearsay to the extent that the declarant relies upon someone else's statement or writing (FRE 802), that it is not relevant (FRE 401), and that it is speculative and lacks foundation (FRE 602).

Ruling: The Zagaris declaration has not been filed or incorporated by Movant as evidence in support of the present Motion. The only declaration provided has been that of Steven B. Mains. Objection overruled.

Objection No. 2

In paragraph 4 of the Zagaris declaration, Debtor in Possession objects to the statement

"I have been provided by my licensed realtor salesperson with the following listing and sale information for properties in the vicinity of the property:

(a) 5725 Erlich Road (approx. 1 miles from the property) Sold on December 29, 2017, for $32,805 per acre; on market 52 days. 4 Homes, operational dairy (permit for over 900 head), and 2 lagoons for dairy flush and irrigation on 213.38 acres.

(b) 2254 Eucaluptus Avenue, Patterson, CA (approx [sic] 7 miles from the property) Sold November 3, 2017, for $27,200 per acre; on market 255 days. Operational dairy with all facilities: free stalls, hay barns, milk barn, and 2 domestic wells on 25 acres.

(c) 6124 Hogan Road (approx [sic] 4 miles from the property) Listed for sale for 159 days at $29,878 per acre. Formerly a dairy, now a feedlot on 167.35 acres."

on the grounds that the statement is hearsay to the extent it relies upon someone else's statement or writing (FRE 802), that it is not relevant (FRE 401), and that it is speculative and lacks foundation (FRE 602).

Ruling: The Zagaris declaration has not been filed or incorporated by Movant as evidence in support of the present Motion. The only declaration provided has been that of Steven B. Mains. Objection overruled.

Objection No. 3

In paragraph 5 of the Zagaris declaration, Debtor in Possession objects to the statement "Attached in the accompanying Exhibits, market 'Exhibit E, Exhibit E-1, and Exhibit H,' respectively, are true copies of the listings of each of the above-described comparative properties" on the grounds that the statement is not relevant (FRE 401) and that the supposed exhibits cannot be located, making the statement speculative and lacking in foundation (FRE 602). Debtor in Possession argues that the exhibits filed with the Khatri Brothers, LP, motion for relief are not identified the way mentioned in the statement.

Ruling: The Zagaris declaration has not been filed or incorporated by Movant as evidence in support of the present Motion. The only declaration provided has been that of Steven B. Mains. Objection overruled.

Objection No. 4

In paragraph 6 of the Zagaris declaration, Debtor in Possession objects to the statement "In its current state, based on the above information, I am informed and believe that the property is worth between

$34,500 and $35,000 per acre, and should be sold at a price between $1,338,945 and $1,358,350" on the ground that the statement is hearsay to the extent that the declarant is merely repeating what he has been told or what has been written but not submitted to the court (FRE 802). Debtor in Possession also objects on the grounds that Jon Zagaris is not a competent expert qualified to appraise real property, despite being a licensed real estate broker (FRE 702), that the statement is irrelevant (FRE 401), that it is speculative and lacks foundation (FRE 602), and that it is more prejudicial than probative (FRE 403).

Ruling: The Zagaris declaration has not been filed or incorporated by Movant as evidence in support of the present Motion. The only declaration provided has been that of Steven B. Mains. Objection overruled.

Declaration of Jawaharlal Khatri

Objection No. 5

Debtor in Possession objects to references to Exhibit "NS, pages 1-5" in the Jawaharlal Khatri declaration filed in support of the separate Khatri Brothers, LP, motion for relief. Debtor in Possession argues that the exhibit cannot be identified, that references to it are hearsay (FRE 802), and that it lacks foundation for this Motion (FRE 602).

Ruling: The Khatri declaration has not been filed or incorporated by Movant as evidence in support of the present Motion. The only declaration provided has been that of Steven B. Mains. Objection overruled.

Objection No. 6

Further for the Khatri declaration, Debtor in Possession objects to the Motion's use of the phrase "I am informed and believe that the Debtors . . ." from that declaration on the basis that it is hearsay (FRE 802). Debtor in Possession objects to statements in that declaration by Jawaharlal Khatri that Debtor in Possession has "listed the property . . . for sale at a price so high that it will likely not attract any purchase offer" on the basis that it exceeds the scope of a lay witness (FRE 701), that Jawaharlal Khatri is not a real estate expert witness competent to testify (FRE 702), that the statement is speculative and lacks foundation (FRE 602), that the statement is hearsay (FRE 802), and that the statement is not relevant (FRE 401).

Ruling: The Khatri declaration has not been filed or incorporated by Movant as evidence in support of the present Motion. The only declaration provided has been that of Steven B. Mains. Objection overruled.

Objection No. 7

Debtor in Possession also objects to three exhibits filed with the Khatri Brothers, LP, motion for relief—Exhibits 1–3. For each exhibit, Debtor in Possession argues that Movant has failed to authenticate the exhibit or to identify its purpose (FRE 901).

Ruling: Movant did not filed any exhibits to the Motion. The Motion, Memorandum of Points and Authorities, nor the Mains Declaration references any Exhibit 1, 2, or 3. They also do not incorporate any Exhibit 1, 2, or 3 from any other docket filing. Objection overruled.

Declaration of Michael Peale

Objection No. 8

Debtor in Possession objects to admission of an appraisal report filed as Exhibit B and referenced in the Michael Peale declaration for a separate motion for relief on the bases that it is inadmissible hearsay (FRE 802), that it has not been authenticated (FRE 902), and that it violates the best evidence rule (FRE 1002).

Ruling: The Peale declaration, and any exhibits to the Peale declaration, have not been filed or incorporated by Movant as evidence in support of the present Motion. The only declaration provided has been that of Steven B. Mains. Objection overruled.

Objection No. 9

Debtor in Possession objects to the admission of Exhibit C mentioned in the Peale declaration on the ground that Movant failed to authenticate it (FRE 901), that it is inadmissible hearsay (FRE 802), and that it is not relevant (FRE 402). Additionally, Debtor in Possession argues that any statement by Mr. Peale about the exhibit is inadmissible because he lacks status as an expert witness (being a banker and not a realtor) to discuss the document (FRE 701).

Ruling: The Peale declaration, and any exhibits to the Peale declaration, have not been filed or incorporated by Movant as evidence in support of the present Motion. The only declaration provided has been that of Steven B. Mains. Objection overruled.

Declaration of Steven Mains

Objection No. 10

Debtor in Possession objects to paragraph 3 of the Steven Mains Declaration stating that "In an email to the attorney for Khatri Brothers, LP, Debtors' counsel represented that 'Arturo [Romero, who is the father of Mrs. Estacio] is 88 and is in quite poor health. He would not be of any help learning about the Romer's finances. While Romona Romero [his wife] appears to be in relatively good health and is mentally sharp, she is 85 years old" on the grounds that the statement is inadmissible hearsay (FRE 802) and that it is not relevant (FRE 402).

Ruling: The statement being made is attributed to Debtor in Possession's counsel acting in that capacity. The statement is being made for a party opponent. The statement relates to parents of Debtor, not the Debtor in Possession or fiduciaries responsible for this case. The court overrules the objection in light of the prior plan being advanced as dependant upon the elderly parents leasing the property. While overruled, it may be of little moment if Debtor in Possession is actively, in good faith, pursuing a plan not dependent on elders in ill-health.

Objection No. 11

> Debtor in Possession objects to paragraph 4 of the Mains Declaration stating:
>
> "At the scheduled status conference on November 30, 2017, Debtors' counsel announced his clients' intention to sell their property at 4413 South Prairie Flower Road, Turlock . . . in lieu of leasing the Faith Home Road property. The Court then dismissed without prejudice the motions to approve the plan and to lease the Faith Home Road property. The Court scheduled a status conference for March 29, 2018. The Court also directed the Debtors to file monthly operating reports. To this end, Debtors filed a motion to employ an accountant on December 15, 2017. This motion was granted on December 17. The first operating report for October, 2017, was filed on January 16, 2018.

Debtor in Possession argues that the statement is inadmissible hearsay (FRE 802) and that it is not relevant (FRE 402).

Ruling: As to the Mains Declaration statements about what events occurred at the November 30, 2017 hearing, the objection is overruled. The statements are matters of record, reported in the court's civil minutes, and as such, they are not hearsay. *See* Dckt. 85, 86, 94. Additionally, the statements about what the court ordered are relevant to show whether Debtor in Possession has followed the orders and is actively prosecuting this case such as to avoid the court finding cause to dismiss. Finally, as shown in the court record, Mains was present at the hearing representing his client, Wells Fargo Bank, N.A.

Objection No. 12

Debtor in Possession objects to paragraph 5 of the Mains Declaration stating that "On January 15, 2018, Debtors' counsel emailed to me and the attorneys for Khatri Brothers, LP to provide a web link to a residential listing of the South Prairie Property for sale: [URL]" on the grounds that it is inadmissible hearsay (FRE 802) and is not relevant (FRE 402).

Ruling: The Mains Declaration statement that he received an e-mail from Debtor in Possession's counsel about a property listing with an attached link in the Declaration to that listing, the objection is overruled. The objection is not hearsay because Mr. Mains is merely reporting that he received an e-mail with a link that he included in the Declaration; he is not testifying about the contents of the weblink. Additionally, to the extent that Movant has been arguing that the case should be dismissed because of undue prejudice, then a property listing by Debtor in Possession would be relevant to counter undue delay.

Objection No. 13

Debtor in Possession objects to paragraph 6 of the Mains Declaration stating that "According to a further email from Debtors' counsel, by January 24, 2018, this listing had been taken down and replaced with an agricultural property listing" on the grounds that it is inadmissible hearsay (FRE 802) and is not relevant (FRE 402).

Ruling: As to the Mains Declaration statement about another e-mail from Debtor in Possession's counsel stating that the property listing had been replaced with an online listing for another property, the objection is overruled. Again, Mr. Mains is reporting that an e-mail was received; he does not actually comment on the e-mail in first-person as though asserting that a property listing had been replaced. Additionally, a property listing is relevant to the court's analysis of whether there has been undue delay that is prejudicial to creditors.

DISCUSSION

Dismissal of a Chapter 12 case upon the request of a party in interest is governed by 11 U.S.C. § 1208(c). That section states that after notice and a hearing, the court may dismiss a Chapter 12 case for cause, and one of the grounds for dismissal is "unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors." 11 U.S.C. § 1208(c)(1). There must be more than a delay; it must be unreasonable. *See In re Standley*, No. 11-62373-12, 2013 Bankr. LEXIS 5137, at *7 (Bankr. D. Mont. Dec. 6, 2013).

Here, there is no question that there has been a delay in payments to creditors. A plan is not yet confirmed. That delay is not a sufficient ground for this Motion, though. The delay must also be unreasonable and prejudicial to creditors. Neither of those elements are present.

As to unreasonableness, the first proposed plan was filed within ninety days, as required by the Code. *See* 11 U.S.C. § 1221. After two hearings, the court dismissed the motion to confirm the plan without prejudice and stated that it was not setting a deadline to file a new plan, instead leaving the decision of what motions to file and when up to the parties. *See* Dckt. 88, 94. A little more than two months later, Debtor has filed a new plan. *See* Dckt. 129. That delay of eighty-four additional days is not unreasonable.

As this court has discussed in the tentative ruling on the motion to confirm the plan now before the court, there are issues to address in connection with a commercially reasonable sale of the property, protection of interests, and the payments that must be made under the Plan if Debtor in Possession seeks to market the property at the sales price indicated (which is significantly higher than Debtor stated under penalty of perjury on the Schedules).

As to prejudice, Debtor in Possession argues successfully that most likely the only way that unsecured claims will receive any funds is through a Chapter 12 plan. To dismiss the case now would prejudice those creditors from receiving full payment as proposed in the new plan. *See id.* at 9.

The court continues the hearing on the Motion to Dismiss to 10:30 a.m. on May 31, 2018.

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

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

The Motion to Dismiss the Chapter 12 case filed by Wells Fargo Bank ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Dismiss is continued to 10:30 a.m. on May 31, 2018.

11. 17-90432-E-12 CARLOS/BERNADETTE ESTACIO MOTION TO DISMISS CASE
VFG-2 Peter Fear 2-22-18 [121]

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession's Attorney, Chapter 12 Trustee, and Office of the United States Trustee on February 22, 2018. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one day's notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition). Debtor in Possession and all creditors in this case were not served with notice of this motion. *See* FED. R. BANKR. P. 2002(a)(4).

The Motion to Dismiss has not been properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor in Possession filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Dismiss is denied without prejudice.

Khatri Brothers, LP, ("Movant") seeks an order dismissing this case pursuant to 11 U.S.C. § 1208(c) based upon bad faith and unreasonable delay that is prejudicial to creditors. Movant argues that no payments have been made to it during this case.

Particularly, Movant notes that Carlos Estacio and Bernadette Estacio ("Debtor in Possession") withdrew a proposed plan on November 28, 2017, and stated they hoped to propose a new plan within two weeks. Dckt. 121 at 3:4–10.

Movant argues that Debtor in Possession's listing of their property has not been done with any effort to actually sell property and is merely a sham while Debtor in Possession continues to live in the property.

INSUFFICIENT NOTICE OF MOTION

Movant provided service of this Motion to Debtor in Possession's counsel, Jan Johnson ("the Chapter12 Trustee"), and the Office of the U.S. Trustee. Federal Rule of Bankruptcy Procedure 2002(a)(4) requires notice by mail to Debtor in Possession, the Chapter12 Trustee, and all creditors. Here, Movant failed to serve Debtor in Possession and all creditors, including a party requesting special notice.

While the court would be willing to waive this defect as to Debtor in Possession because Debtor in Possession filed an Opposition, the court cannot look past the omission of service upon all creditors in this case.

Therefore, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 12 case filed by Khatri Brothers, LP, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.

12. **11-92235-E-11** **JAMES/LORI SARAS** **CONTINUED ORDER TO SHOW CAUSE**
RHS-1 **Mikalah Liviakis** **1-8-18 [805]**

APPEARANCE OF DAVID STERNBERG AND MIKALAH LIVIAKIS REQUIRED FOR THE HEARING

TELEPHONIC APPEARANCES PERMITTED

Final Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Office of the United States Trustee as stated on the Certificate of Service on January 11, 2018. The court computes that 35 days' notice has been provided.

The Order to Show Cause is discharged.

On November 16, 2012, the court entered its order confirming the Chapter 11 Plan in this case. Order, Dckt. 665. Under the terms of the Plan, James Saras and Lori Saras, the two Debtors, served as the Plan Administrators and are responsible for performance of the Chapter 11 Plan. Plan, attached as Exhibit A to Order Confirming Plan, *Id.*

On November 20, 2013, James Saras and Lori Saras, the Plan Administrator Debtors, filed a Motion for Entry of Discharge ("Motion") (Dckt. 765), representing to the court that the Chapter 11 Plan had been completed, with one exception. That exception was payment to the Class 10 ranching crew workers, with the Motion stating:

> 5. The only creditors we have not yet paid are a group of ranching crew workers that are part of Class 10 of the Plan and U.S. Bank, National Association. However, we are current on the payments to U.S. Bank, National Association (Class Six and Class Six Arrearages) [with the non-arrearage payments extending beyond the Plan]. We are attempting to locate and inform all of the ranching crew workers that are part of Class 10 so that we can issue payment to them pursuant to he confirmed chapter 11 plan.

Motion ¶ 5, *Id.* The court, in granting the Motion, stated in the Minutes from the Hearing on the Motion for Entry of Discharge:

While the U.S. Bank, N.A. claim does not cause the court concern with respect to entry of the discharge (based on completion of the Plan), the inability or failure to pay the Ranching Crew Workers is another story. These Class 10 creditors are listed as having $40,000.00 of claims. This is a significant amount of money. The Declaration of James Saras does not state how many of these claims have been paid and what amount remains for creditors "to be found." The Plan Administrators have not addressed the requirements of 11 U.S.C. § 347(b) with respect to the Class 10 distributions which have not been made at this time.

Additional Information, December 19, 2013 Hearing

At the hearing on December 19, 2013, the Plan Administrators reported that there remains $38,220.00 in monies for payment of the "Worker Creditor Claims" to be disbursed. Because some of the workers are in the region only for the agricultural season, the Plan Administrators are attempting to locate them.

The Plan Administrators have the funds to disburse, but are unable to due to the nature of the creditors. Rather than hold up the discharge to Debtors who have otherwise successfully completed a plan, the better solution is to order the Plan Administrators to deposit the $38,220.00 with the Clerk of the Bankruptcy Court, and then when they have located the creditors to have the Plan Administrators seek a release of the monies so that it may be distributed to these creditors.

Therefore, conditioned on the deposit of the $38,220.00 with the Clerk of the Bankruptcy Court, which monies shall be held pending further order of this court, the court grants the Debtors, and each of them, their discharges in this case. The Clerk shall not issue the discharges until after the $38,220.00. Further, the court waives the reopening fee in this case for the Plan Administrators seeking an order for the Clerk of the Court to release the deposited funds, due to the unique challenges facing the Debtors in Possession is locating and distributing the claim payments to these creditors.

Civil Minutes, Dckt. 793. The court, relied on the Plan Administrator Debtors and their counsel to diligently complete the plan and make the disbursements to the Ranching Crew Workers.

UNDISBURSED MONIES

In mid-December 2017, the Clerk's Office contacted David Sternberg, Special Counsel for the Plan Administrator Debtors in the bankruptcy case. The Clerk's Office notified Mr. Sternberg that the $38,220.00 deposited with the court had not been disbursed. This was four years after the Plan Administrator Debtors and their counsel represented to the court that the disbursement of such monies would be diligently prosecuted.

By letter dated January 5, 2018, Mr. Sternberg replied, providing information concerning the monies on deposit with the court, which includes:

> "In the process of drafting the Subject Motion [motion to disburse monies to the Ranch workers], I was unable to obtain valid addresses for the day workers and, as such, the Subject Motion was never filed."
>
> "Thereafter, Lori Elsie Saras passed away, and James John Saras has become non-functional."
>
> "There were funds in my trust account with which to pay for the motion to distribute the funds to the day workers ("Subject Motion"). . . The funds held in my trust account to fund the Subject Motion were subsequently levied upon by the State of California, and no monies remain to pay for the Subject Motion."

Letter, Dckt. 802.

As to the latter point, it appears that Mr. Sternberg incorrectly identifies the monies that were the subject to a State of California Levy. First, the court ordered the monies to pay the Ranch Worker claims to be deposited with the court—the very monies that were the subject of the Clerk's inquiry. Second, the court is unsure how monies that are the subject of a Confirmed Chapter 11 Plan, which are held by the fiduciary Plan Administrators or in the attorney trust account for the fiduciary Plan Administrators, and not monies of the Debtors personally, could be the subject of a state law levy of some debt other than as provided for in the Confirmed Chapter 11 Plan.

The letter also discloses that at some unspecified time in the past Plan Administrator Debtor Lori Elsie Saras passed away. The court's initial search of the personal records data base indicates that Lori Saras passed away December 1, 2014—which was approximately a year after the entry of her discharge.

Mr. Sternberg further states that at some time during the past four years James Saras has become "non-functional." No time reference is made as to the fiduciary Plan Administrator Debtor James Saras becoming unable to fulfill his fiduciary duties under the Confirmed Chapter 11 Plan.

ISSUANCE OF ORDER TO APPEAR AND SHOW CAUSE

The fiduciary Plan Administrator Debtors in this case have been represented by two attorneys, David Sternberg as Special Counsel and Mikalah Liviakis as general bankruptcy counsel. There remains unperformed a substantial distribution under the Confirmed Chapter 11 Plan. No action has been taken by the fiduciary Plan Administrators or their counsel to address this default. Further, though one fiduciary Plan Administrator has died and the other is "non-functional," the attorneys for those fiduciaries have not acted to address these failures or protect their clients' interests with respect to the fiduciary duties to be performed.

Upon review of the files in this case, the letter from Special Counsel David Sternberg, the belated reported death of Lori Saras, one of the two fiduciary Plan Administrator Debtors, the belated reported "non-functional" state of James Saras, the other fiduciary Plan Administrator Debtor, and good cause appearing, the court issued an Order to Appear and Show Cause on January 8, 2018. Dckt. 805.

The court ordered David Sternberg and Mikalah Liviakis to appear personally at the hearing, and required each of them to file and serve status reports by January 26, 2018, regarding the actions taken to proceed with the performance of the Confirmed Chapter 11 Plan to pay the Ranch Workers Claims, including:

> (1) the dates of communications with the fiduciary Plan Administrator Debtors since the December 19, 2013 hearing on the Motion for Entry of Discharge;
>
> (2) the efforts made and actions taken by the reporting attorney to disburse the monies for the Ranch Workers Claims;
>
> (3) the Ranch Worker Claim creditors for which the reporting attorney had an address or believed that the fiduciary Plan Administrator Debtors had an address; and
>
> (4) the dates which the reporting attorney learned of the death of Lori Saras and the "nonfunctionality" of James Saras.

The court also ordered that a death certificate for Lori Saras be filed by January 26, 2018. For James Saras, the court ordered him to appear personally to address issues concerning the defaults under the Confirmed Chapter 11 Plan regarding payment of the monies for the Ranch Worker claims.

If the parties believed that Mr. Saras is physically or mentally unable to appear at the Status Conference and Order to Show Cause, then on or before January 26, 2018, they were to file with the court and serve on the U.S. Trustee properly authenticated testimony of Mr. Saras' doctor(s) providing expert testimony to the court concerning his physical or mental "nonfunctionality."

Finally, the court ordered that James Saras, as the surviving Plan Administrator Debtor, David Sternberg, and Mikalah Liviakis, and each of them, shall show cause why the court does not immediately appoint an independent third-party to serve as a replacement plan administrator in light of the reported death of one Plan Administrator Debtor and the "Nonfunctionality" of the other Plan Administrator Debtor.

DAVID STERNBERG'S STATUS REPORT

David Sternberg filed a Status Report on January 26, 2018. Dckt. 808. He states that the $38,220 is still on file with the court until disbursement instructions become available.

Mr. Sternberg reports that upon receiving the court's order, he immediately contacted James Saras, but he was unable to reach him, and he has not heard from him since.

Regarding performance of the plan to pay the claims of the Class 10 ranching crew workers, Mr. Sternberg reports the following dates and events:

A. December 19, 2013: Mr. Sternberg met with Mr. Saras and discussed Class 10 ranching crew workers, learning that because of winter, Mr. Saras would not be able to provide information until spring.

B. December 20, 2013: Mr. Sternberg reviewed and executed a check for $38,220.00 and forwarded it to the court.

C. Mr. Sternberg assisted Mr. Saras and Andrea Saras (his daughter) relocate to another location because of pending divorce proceedings and ensured that taxes were paid.

D. February 7, 2014: Mr. Sternberg spoke with Armand and learned that Armand would obtain addresses for the Class 10 ranching crew workers.

E. February 20, 2014: Mr. Sternberg received a list of Class 10 ranching crew workers with missing information and instructed his assistant to contact Armand about the missing information.

F. February 21, 2014: Mr. Sternberg spoke with Mr. Saras about Class 10.

G. February 25, 2014: Mr. Sternberg spoke with Mr. Saras about providing addresses for the Class 10 ranching crew workers.

H. February 2, 2015: Mr. Sternberg instructed an associate to prepare a motion to reopen and a motion to disburse so that a full draft could be sent to Mr. Saras to obtain necessary information about the ranching crew workers.

I. February 3, 2015: Mr. Sternberg's associate left a message with Mr. Saras about providing addresses, and a proposed declaration was sent to Mr. Saras regarding those addresses.

J. February 6, 2015: Mr. Sternberg's associate spoke with Mr. Saras about obtaining the addresses.

K. February 9, 2015: A message was left with Mr. Saras about obtaining the addresses.

L. February 12, 2015: Another message was left with Mr. Saras, and correspondence was sent to him.

M. February 23, 2015: Another letter was sent to Mr. Saras.

N. March 26, 2015: At a meeting, Mr. Saras stated that he would get the addresses.

O. March 30, 2015: Mr. Sternberg spoke with Mr. Saras about acquiring the addresses.

P. June 26, 2015: Mr. Sternberg drafted a letter to Mr. Saras about the missing addresses.

Q. February 19, 2016: Mr. Sternberg spoke with Andrea Saras and instructed her to have her father obtain the addresses.

R. April 27, 2016: Mr. Sternberg spoke with Mr. Saras about whether there was any money for Mr. Saras, and Mr. Sternberg told him that there was not.

S. September 13, 2017: Mr. Sternberg received a notice from the EDD that the remaining client funds in his trust account had been levied upon.

T. December 21, 2017: Mr. Sternberg received an e-mail from Linda Payne, Financial Specialist at the United States Bankruptcy Court.

U. January 5, 2018: Mr. Sternberg prepared a response to Ms. Payne's e-mail.

Mr. Sternberg suggests that the court appoint an investigator to ascertain whether the addresses of the Class 10 ranching crew workers while leaving the case open so that a motion may be brought to disburse funds. Alternatively, he suggests that the court appoint an independent fiduciary to have the funds disbursed to Class 10. He argues that any remaining funds should be disbursed to unsecured claims.

Mr. Sternberg reports that Lori Saras died on December 1, 2014, and the last time Mr. Sternberg spoke with Mr. Saras was April 27, 2016, although Mr. Sternberg argues that Mr. Saras was unclear and incoherent during that conversation.

MIKALAH LIVIAKIS'S STATUS REPORT

Mikalah Liviakis filed a Status Report on January 26, 2018. Dckt. 812. Mr. Liviakis states that Mr. Sternberg is filing a redacted copy of the death certificate with the court.

Mr. Liviakis does not have first-hand knowledge of Mr. Saras's health because he has not had direct contact with him in several years. He states that Mr. Saras has not contacted him.

Mr. Liviakis believes that his last contact with the Sarases was around the beginning of 2014 because they preferred to communicate with Mr. Sternberg. Mr. Sternberg, in turn, provided information to Mr. Liviakis.

Mr. Liviakis does not know when he learned of Mrs. Saras's death, but he estimates that it was in the middle or latter portion of 2015.

Prior to discharge, Mr. Liviakis states that there was difficulty getting Mr. Saras to comply, usually taking repeated efforts. He states that Mr. Saras eventually complied in most instances, but not without significant prodding. Mr. Liviakis does not attribute that performance to functionality, though.

Mr. Liviakis believes that Mr. Saras has compiled a list that provides names for the ranching crew workers, with many of them sharing the same address. Mr. Liviakis does not know why so many have been listed at the same address, and Mr. Saras has not explained why. Mr. Liviakis suggests that making disbursements without further information would cause a significant risk of error.

Mr. Liviakis summarizes the information Mr. Saras provided to Mr. Sternberg as follows:

Name	Address	Amount Owed
Robert Pizeno	2554 Dobbins Lane, Riverbank, California 95367	$101.58
Dolores Piceno		$754.57
Luis Muchica		$242
Leonardo Navarro		$35
Jorge Hernandez		$99
Alejandro Luna		$693
Antonio Calderon		$1074
Guadalupe Calderon		$1728
Ross Arauza		$2534
Davis Arauza		$1221
Monica Arauza		$1217
Wizer Arauza		$1231
Ross Arauza		$1283
Klamt Arauza		$896
Hlford Arauza		$1475
Carson Arauza		$1357
Jose G. Torrez	No Address Provided by Mr. Saras	$656.38
Hadan Hernandez		$441.31
Arnolfo Torrez		$1120
Esteban Lazo		$357
Jose Sanchez		$901
Alecan Valdez		$90

Rosa G. Oreiel		$415
Luis Hernandez		$455.87
Pedro Garibay		$347
Javier Madina		$72
Oriel Mateo		$1407
Irma Salseda	PO Box 269, Winton, California 95388	$550.72
Victor Calderon		$349
Abal Barrientos		$336
Jose Luis Medina		$722
Heriberto Medina		$244
Oscar Rosales		$694
Jose Torrez	PO Box 1123, Salida, California 95368	$644.38
Jouquin Yepez		$1008
Ramira Manzo		$134
Ricardo Machuna	3766 Patterson Road, Riverbank, California 95367	$240
Jose Luis Machuna	3660 Iowa Avenue, Riverbank, California 95367	$1040
Leonardo Navarro	2621 Santafee Street, #3, Riverbank, California 95367	$35

Mr. Liviakis suggests mailing declarations that include a requirement for each worker to confirm whether: (1) he or she has ever worked for Mr. Saras, (2) when he or she worked for him, and (3) how much money is believed to be owed.

Additionally, Mr. Liviakis suggests that the court could require Mr. Saras to offer testimony explaining the status of information concerning the ranching crew workers.

FEBRUARY 15, 2018 HEARING

At the hearing, the two counsel addressed the court. James Saras did not appear at the hearing. Based on information provided by the U.S. Trustee, it appears that the address of record for James Saras may now be inaccurate. Dckt. 817. No updated address for Mr. Saras, the plan administrator, has been filed by his attorneys.

It was represented by the attorneys that all creditor payments have been made under the plan, with the exception of those to the farm workers. It appears that Mr. Saras's interest, as the fiduciary plan administrator to pay such creditors has waned. Though the money is deposited with the court, Mr. Saras appears to be intentionally failing to act. That has caused there to be a continuing default in plan performance.

The court noted that grounds for converting or dismissing a Chapter 11 case include material default by the debtor with respect to a confirmed plan. 11 U.S.C. § 1112(b)(4)(N).

The court continued the hearing to afford the two attorneys time to reconnect with their client, to impress upon him the significance of the failure of a fiduciary plan administrator to perform the plan, to update Mr. Saras's address, and to update the court of the active performance of the plan to get creditors paid properly. The court continued the hearing to 10:30 a.m. on March 29, 2018. Dckt. 818.

EX PARTE APPLICATION TO PAY & ORDER

On March 15, 2018, Plan Administrator filed an Ex Parte Application to Pay $28,166.01 be paid to the Trust Account of David M. Sternberg & Associates, to be distributed to farm workers. Dckt. 822.

The court issued an order on March 22, 2018, ordering the Clerk of the Court to issue a check in the sum of $28,166.01 from the $38,220.00 on deposit with the court to the Trust Account of David M. Sternberg & Associates. Dckt. 839. The court further ordered David Sternberg to issue checks to the thirty-eight farm worker creditors and to file receipts confirming the distribution of the checks with the court.

RULING

The Plan Administrator and Counsel have addressed the prosecution of the Plan issues. The court has ordered David M. Sternberg to file an accounting of the payment and copies of the receipts of such payments to the farm workers. Order, Dckt. 839.

The Court discharges the Order to Show Cause, no sanctions ordered.

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 ordered.

13. **11-92235-E-11** **JAMES/LORI SARAS** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION**
Mikalah Liviakis **6-22-11 [1]**

Final Ruling: No appearance at the March 29, 2018 status conference is required.

Debtors' Atty: Mikalah R. Liviakis

The Status Conference is continued to 2:00 p.m. on August 23, 2018, to afford Plan Administrator and Counsel to conclude the plan payment distributions**.**

Notes:
Continued from 2/15/18 to be heard in conjunction with the Order to Show Cause [RHS-1]

[DMS-1] *Ex Parte* Application for Approval to Pay Farm Worker Creditors filed 3/15/18 [Dckt 822]

[DMS-2] *Ex Parte* Application for Counsel to be Excused from Personally Appearing at the Court Hearing on March 29, 2018 filed 3/15/18 [Dckt 830]

MARCH 29, 2018 STATUS CONFERENCE

The Plan Administrator/Debtor, acting through is attorneys, is concluding the distributions due under this Plan. Order, Dckt. 839. The court continues the Status Conference to afford the Plan Administrator/Debtor to make and document such payments.

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 Status Conference in this post-confirmation Chapter 11 case having been Scheduled, the court having reviewed the file, and good cause appearing,
>
> **IT IS ORDERED** that the Status Conference is continued to 2:00 p.m. on August 23, 2018.
>
> **IT IS FURTHER ORDERED** that David Sternberg and Mikalah Liviakis, and each of them, as counsel for the Plan Administrator/Debtor appear at the continued Status Conference—**Telephonic Appearance Permitted.**

14. **16-90139-E-7** **AJAVA SYSTEMS, INC.** **OBJECTION TO CLAIM OF NORACLE SYSTEMS INC., CLAIM NUMBER 25**
BJ-7 **David Johnston** **2-9-18 [198]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on February 9, 2018. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 25 of Noracle Systems Inc. is sustained.

Michael McGranahan, the Chapter 7 Trustee ("Objector") requests that the court disallow the claim of Noracle Systems Inc. ("Creditor"), Proof of Claim No. 25 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $1,050,000.00. Objector asserts that:

A. the Claim should be subordinated under 11 U.S.C. § 510(b) because it arises from the breach of a purchase agreement concerning stock in Ajava Systems, Inc. ("Debtor") and must be subordinated to all claims or interests that are senior to those holding stock in Debtor;

B. the Claim should be disallowed in its entirety under 11 U.S.C. § 502(d) unless Creditor returns a preference of $405,250.00; and

C. if Creditor returns the preference, the Claim should be reduced to $428,000.00 based on the $500,000.00 amount identified in Debtor's schedules, less the $72,000.00 amount of illegal usurious interest collected by Creditor.

Objector asserts that the actual basis for the Claim is a breach of a stock purchase agreement. Objector alleges facts about Debtor failing to issue common stock to Creditor in breach of an oral agreement to do so. Accordingly, Objector argues that the claim is subordinated to any senior or equal priority claim pursuant to 11 U.S.C. § 510(b).

Additionally, Objector argues that the Claim reveals that a preferential transfer occurred, and he argues that the Claim should be disallowed unless the preference is returned. The promissory note attached to the Claim shows a principal amount of $1,455,250.00 on December 12, 2015. The balance sheet attached to the Claim shows that the amount was $1,050,000.00 on December 31, 2015. This case was filed on February 8, 2016, and so, Objector argues that the reduction of $405,250.00 was a preferential transfer that occurred within ninety days of filing the petition. He argues that the Claim should be disallowed unless the preferential transfer is returned. *See* 11 U.S.C. § 502(d); *Elliott v. Frontier Props. (In re Lewis W. Shurtleff, Inc.*), 778 F.2d 1416, 1421 (9th Cir. 1985).

Third, Objector argues that the Claim should be disallowed to the extent of the Estate's setoff claim for illegal usurious interest. Objector argues under California law that illegal interest that exceeds ten percent per annum is usurious and illegal (unless exempt) and may be set off by the Estate. To make that argument, Objector begins with the promissory note amount on December 12, 2015: $1,455,250.00 at 10% annual interest. Then, Objector points to a first payment of $372,000.00 being required within seven days of a loan being funded, but no later than January 15, 2016, comprised of $300,000.00 in principal and $72,000.00 in interest. According to the balance sheet from December 31, 2015, Debtor owed $1,050.00.00, and the Claim filed does not include interest. Objector infers from those documents that the first payment—including $72,000.00 in interest—was made before December 31, 2015. Objector calculates that over the nineteen days that elapsed, the daily interest was $3,789.47368 per day, which over the 360-day year called for in the promissory note totals $1,364,210.53 in interest. That amount divided by the original principal of $1,455,250.00 yields a 93.74% annual interest rate, which Objector argues is usurious and illegal, making it subject to setoff.

Objector argues without support that the court should reduce the Claim to the $500,000.00 amount identified on Schedule E/F and should reduce that amount further by the usurious interest. Objector asserts that the Claim should be reduced to $428,000.00.

DISCUSSION

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

The Evidence supporting the Objection centers on that of Chapter 7 Trustee's Counsel, Mark Gorton, Esq. Declaration, Dckt. 202. Gorton recounts his conversations with Vijay Advani, the president of Noracle Systems, Inc. Though no deposition of Advani has been presented providing the direct

testimony, Gorton's second-hand testimony skirts the problem of hearsay (FED. R. EVID. 801(c)—Statement made by declarant outside of court presented as evidence of the truth asserted), given that this statement was made by Advani, the president of Creditor. Federal Rule of Evidence 801(d)(2) provides that such a second-hand statement is not hearsay if it is offered against an opposing party and:

> (A) Made by the party;
> . . .
> (C) Made by a person whom the party authorized to make the statement;
> . . .
> (D) Made by the party's agent or representative on a matter within the scope of that relationship and while it existed. . . .

The testimony of Gorton is about statements of Advani, the president of Creditor, speaking for Creditor, in his capacity of Creditor, about Creditor's claim in this case.

Gorton's testimony is that Advani, as president of the party opponent Creditor, stated that the claim of Creditor is:

A. Advani asserted that Creditor never received any money from Debtor and therefore was not obligated to repay any preference or interest that (at 3% per month) the Chapter 7 Trustee asserts is illegal and unenforceable. Dec. ¶ 5; Dckt. 202.

B. Creditor does not have an attorney, and all communications are to be with Advani directly. *Id.*

C. Four or five years preceding the filing of the bankruptcy case, Advani, on behalf of Creditor and Raj Chauhan ("Raj"), as president of Debtor, had an oral agreement for Creditor to acquire an ownership interest in Debtor. To purchase that ownership interest, Creditor paid $1,050,000 to Debtor. *Id.*, ¶ 6.

D. Advani stated that though the $1,050,000 was paid, no ownership instruments (presumably stock shares) were produced by Debtor. Gorton's testimony does not include any statements about why or how Creditor would pay $1,050,000 on a handshake with no written documentation. *Id.*

E. Advani states that finally, about a year before the bankruptcy (which appears to be three or four years after the $1,050,000 is purported to have been paid by Creditor to Debtor without any written documentation), Advani finally began pressing Raj to come up with the ownership documents. *Id.*

F. Gorton testifies that Advani also stated that when he pressed Raj, somehow the ownership interest that Creditor had purchased for $1,050,000 had been "unilaterally converted" by Raj from an ownership interest to an unsecured loan. Gorton provides no testimony as to how Advani contended that the ownership interest purchased for $1,050,000 was somehow unilaterally converted. *Id.*

G. Advani then stated that "shortly" before the bankruptcy that Raj contacted him and said that Debtor was working on a bank loan. As part of that loan, the obligation to Creditor (arising out of the $1,050,000 stock purchase) would have to be documented. *Id.*, ¶ 7.

H. Advani, believed that from such a loan Creditor might be paid, so Advani prepared a promissory note and sent it to Raj. *Id.*

I. Raj signed the note, without negotiating any terms. Then, the bankruptcy case was filed. *Id.*

The Chapter 7 Trustee provides his Declaration (Dckt. 201) as further evidence in support of the Objection to Claim. He testifies:

A. The Chapter 7 Trustee reviews the Schedules filed in this case and the Proof of Claim filed by Creditor.

B. The Chapter 7 Trustee directs the court's attention to the Note upon which Creditor bases its claim is dated December 12, 2015, and states that the amount owing on the Note is $1,455,250.00.

C. The Chapter 7 Trustee then directs the court to Creditor's Proof of Claim, to which the note and a balance sheet are attached, which state that the amount owed is $1,050,000.00 as of December 31, 2015.

D. The Chapter 7 Trustee posits that the $1,455,250.00 obligation on the note was reduced by $405,250.00 within the ninety-day period preceding the February 8, 2016 commencement of Debtor's bankruptcy case.

E. The Chapter 7 Trustee directs the court to the terms of the Note itself, which requires:

1. $1,455,250.00 is due on the Note,

2. $372,000.00 is due and payable within seven days of the Note being "funded."

i. The $372,000 is stated to represent $300,000 of principal and $72,000 of interest.

At this juncture, the court notes that the interest rate under the Note is 3% per month. On a $1,455,250 principal balance, that would be $42,157.50 per month in interest. On $1,050,000 principal, that would be $31,500 per month in interest. The $72,000 amount does not neatly line up with any of the possible principal balances.

ii. Upon payment of the $372,000, the principal balance due under the Note would be $1,083,250.00.

For Exhibits (Dckt. 200), the Chapter 7 Trustee provides the court with:

A. Proof of Claim No. 25 filed by Creditor;

B. The Chapter 7 Trustee's Counsel's November 1, 2017 Demand Letter to Debtor for repayment of an asserted preference payment of $477,230.00. The amount of the payment is based on the face amount of the note, stated payment amounts ($372,000), the $1,083,250.00 balance stated in the Note after the $372,000 payment, and the ultimate $1,050,000 amount of the claim; and

C. Demand letter and proposed stipulation for 11 U.S.C. § 510(c) subordination of claim.

No Opposition by Creditor

Creditor has elected to not file an opposition to this Objection to Claim and request for 11 U.S.C. § 510 subordination. Such lack of opposition is almost unbelievable for a creditor who has a bona fide $1,050,000 claim. Equally unbelievable is someone paying $1,050,000 to buy equity in a company on a handshake, no documentation, and then taking no action for four or five years to obtain such interest.

While the statements attributed to Creditor (Advani's statements) are that Raj and Debtor "unilaterally" converted Creditor's ownership interest to mere debt, such statements do not make sense. If Creditor purchased an interest, then it had an interest that it could enforce. Raj and Debtor did not have the unilateral power to extinguish ownership interests in Debtor (at least no such super power has been presented to the court).

The lack of opposition and the statements attributed to Advani sound more in the nature of a "convenience note" given to someone that Raj sought to favor in the upcoming bankruptcy case, rather than a capitulation after four or five years. At best for Creditor, those statements indicate that it was an owner of Debtor, and then on the eve of bankruptcy, Creditor and Debtor conspired to edge out the bona fide creditors of Debtor and to create an illusory debt to Creditor.

Ruling

The court sustains the Objection and orders:

A. The claim of Noracle Systems, Inc. that are the basis of Proof of Claim No. 25 are subordinated pursuant to 11 U.S.C. § 510(b) to all other claims and the administrative expenses in this case.

In 11 U.S.C. § 506(b), Congress provides:

§ 510. Subordination

. . .

(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

The court finds that to the extent that an actual obligation exists upon which the Note provided as the basis for the claim in Proof of Claim No. 25 actually exists, such claim arises from the rescission of the purchase of the ownership interests in Debtor by Creditor. The evidence that any such payment for an interest was originally made is very thin. The statements attributed to Mr. Advani are inconsistent as to dollar amounts.

B. To the extent that any portion of the obligation of Proof of Claim No. 25 is not arising from the rescission of the purchase of ownership interests in Debtor, the entire claim is disallowed pursuant to 11 U.S.C. § 502(d), until all payments received by Creditor on this obligation during the ninety days prior to the February 8, 2016 commencement of this case are repaid to the Chapter 7 Trustee.

With respect to allowing claims, 11 U.S.C. § 502(d) provides:

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

Here, the Chapter 7 Trustee has provided court with evidence that the obligation owed to Creditor was reduced in the weeks before the bankruptcy case was filed. The December 12, 2017 Note on its face requires Debtor to pay $372,000.00 within seven days , which is within ninety days of the February 8, 2016 filing of the bankruptcy in this case.

C. The interest rate stated in the Note, 3% per month in the event of a default, is an invalid, unenforceable interest obligation.

The California Constitution, Art. XV § 1, provides:

§ 1. Interest rates

The rate of interest upon the loan or forbearance of any money, goods, or things in action, or on accounts after demand, shall be 7 percent per annum but it shall be

> competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest:
> . . .
> (2) For any loan or forbearance of any money, goods, or things in action for any use other than specified in paragraph (1) [personal, family, household obligation], at a rate not exceeding the higher of (a) 10 percent per annum or (b) 5 percent per annum plus the rate prevailing on the 25th day of the month preceding the earlier of (i) the date of execution of the contract to make the loan or forbearance, or (ii) the date of making the loan or forbearance established by the Federal Reserve Bank of San Francisco on advances to member banks under Sections 13 and 13a of the Federal Reserve Act as now in effect or hereafter from time to time amended (or if there is no such single determinable rate of advances, the closest counterpart of such rate as shall be designated by the Superintendent of Banks of the State of California unless some other person or agency is delegated such authority by the Legislature).

The court takes judicial notice that the Federal Reserve Bank rates have been well less than 5% per annum for the period involving the Note and the underlying obligation. The 3% per month interest rate is usurious and not enforceable. No grounds have been shown for Creditor to be exempt from the Usury provisions of the California Constitution.

However, the 3% per month interest rate applies only to the payment of the $300,000 in principal and $72,000 in interest required to be paid, and apparently paid, within seven days of the Note being signed in December 2015. The general Note provision for interest is 10% per annum. See Note ¶ (c), attached to Proof of Claim No. 25, providing for interest on the $1,083,245.00 principal amount of the obligation.

Overruling Objection to Reduce to Amount Stated on the Schedules

With respect to the court reducing the claim to the amount stated in the Schedules, the court overrules the Objection. Merely because Debtor listed an amount of the claim on Schedule D does not overcome the *prima facie* evidence of the claim created by the Proof of Claim filed. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

> "Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is "deemed allowed," the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, the allegations of the proof of claim are taken as true. If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they *prima facie* establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. But the ultimate burden of persuasion is always on the claimant. Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more."

In re Holm, 931 F.2d at 623 (quoting 3 L. King, COLLIER ON BANKRUPTCY § 502.02, at 502-22 (15th ed. 1991)). The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. *Id.*; *In re Allegheny International, Inc.*, 954 F.2d 167, 173–74 (3d Cir. 1992). The burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. *In re Knize*, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997).

The court also overrules without prejudice the Chapter 7 Trustee's request that the court reduce the claim amount for any illegal interest paid. At this juncture such determination is not ripe, there to be no disbursements on this claim until all other claims are paid in full—which the Chapter 7 Trustee asserts cannot occur in this case due to the limited assets and the amount of claims. Additionally, the court is not persuaded by the Chapter 7 Trustee's speculation on the computation of the $72,000 interest amount stated in the Note.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Noracle Systems Inc. ("Creditor"), filed in this case by Michael McGranahan ("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 Objection to Proof of Claim Number 25 is sustained, and:
>
> A. The claim of Noracle Systems, Inc. that is the basis of Proof of Claim No. 25 is subordinated pursuant to 11 U.S.C. § 510(b) to all other claims and the administrative expenses in this case.
>
> B. To the extent that any portion of the obligation of Proof of Claim No. 25 is not arising from the rescission of the purchase of ownership interests in Ajava Systems, Inc. ("Debtor"), the entire claim is disallowed pursuant to 11 U.S.C. § 502(d), until all payments received by Creditor on this obligation during the ninety days prior to the February 8, 2016 commencement of this case are repaid to the Chapter 7 Trustee.
>
> C. The interest rate stated in the Note, 3% per month in the event of a default, is an invalid, unenforceable interest obligation.
>
> **IT IS FURTHER ORDERED** that the Chapter 7 Trustee's Objection asserting that the claim amount should be reduced to the amount stated in the Schedules by Debtor is overruled.

IT IS FURTHER ORDERED that the Chapter 7 Trustee's request to apply an offset for the "illegal interest paid" is overruled without prejudice. Such determination will be made if, and when, such determination is necessary because there is to be an actual payment on the Note or other obligation upon which Proof of Claim 2 is based.

15. 16-90139-E-7 MDM-3 | **AJAVA SYSTEMS, INC. David Johnston** | **OBJECTION TO CLAIM OF SCHREIBER FOODS, INC., CLAIM NUMBER 29 2-9-18 [193]**

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on February 9, 2018. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 29 of Schreiber Foods, Inc. is overruled.

Michael McGranahan, the Chapter 7 Trustee ("Objector") requests that the court disallow the claim of Schrieber Foods, Inc. ("Creditor"), Proof of Claim No. 29 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $1,936,932.93. Objector asserts that the Claim has not been timely filed. *See* FED. R. BANKR. P. 3002(c). The deadline for filing proofs of claim in this case is October 13, 2016. Notice to File Proof of Claim Due to Possible Recovery of Assets, Dckt. 129.

Objector requests that the claim be treated as a late-filed claim to be paid as a dividend pursuant to 11 U.S.C. § 726(a)(3).

CREDITOR'S RESPONSE

Creditor filed a Response on March 15, 2018. Dckt. 204. Creditor argues that it was one of the three petitioning creditors in this involuntary case, and it signed the involuntary petition under penalty of perjury alleging that its unsecured claim was for $1,936,932.93 against Debtor. Creditor argues that it has participated actively in this case.

Creditor argues that the formal Proof of Claim filing date relates back to the informal claim that was filed by filing the involuntary petition. Creditor cites to several decisions in the Ninth Circuit for support that it has a valid claim in this case, and those cases are discussed below.

DISCUSSION

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

The deadline for filing a proof of claim in this matter was October 13, 2016. Creditor's Proof of Claim was filed on November 28, 2016. No order granting relief for an untimely-filed proof of claim for Creditor has been issued by the court.

Despite no order granting relief to file an untimely proof of claim being issued, Creditor presents several cases in support of it having a valid claim. Most influential of those cases is *Wright v. Holm (In re Holm)* because it is controlling precedent for this court. *See generally* 931 F.2d 620. The Ninth Circuit noted that it had "consistently applied the 'so-called rule of liberality in amendments' to creditors' proof of claim" to allow a formal claim to relate back to some previously document that constitutes an informal claim. *Id.* at 622 (quoting *Anderson-Walker Indus., Inc. v. Lafayette Metals, Inc. (In re Anderson-Walker Indus., Inc.)*, 798 F.2d 1285, 1287 (9th Cir. 1986)).

The Ninth Circuit established that a document constitutes an informal proof of claim when it makes an explicit demand showing the nature and amount of the claim against the bankruptcy estate and when it conveys an intent to hold the debtor liable for the asserted claim. *Id.* (quoting *In re Anderson-Walker Indus., Inc.*, 798 F.2d at 1287)). Many types of documents can constitute an informal proof of claim. *See, e.g.*, *In re Anderson-Walker Indus., Inc.*, 798 F.2d 1285 (letter sent to Chapter 7 trustee's counsel); *Sambo's Rests., Inc. v. Wheeler (In re Sambo's Rests., Inc.)*, 754 F.2d 811 (9th Cir. 1985) (combination of post-petition complaint filed in state court, correspondence to attorney for Chapter 11 debtor in possession, and joint motion to transfer lawsuit to bankruptcy court); *Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374 (9th Cir. 1985) (motion for relief from automatic stay); *County of Napa v. Franciscan Vineyards, Inc. (In re Franciscan Vineyards, Inc.)*, 597 F.2d 181 (9th Cir. 1979) (letter sent to trustee), *cert. denied*, 445 U.S. 915 (1980).

In this instance, the very first item on the docket, the involuntary petition, sets for Creditor's Claim in the exact amount that eventually was listed on its official proof of claim. That the amount is exactly the same can even be used for the argument the official proof of claim is not viewed as an amendment of the informal claim but is merely another expression of an amount that the court had been made aware of already.

Based on the evidence and argument before the court, the Objection to the Proof of Claim is overruled.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Schrieber Foods Inc. ("Creditor"), filed in this case by Michael McGranahan ("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 Objection to Proof of Claim Number 29 of Schrieber Foods Inc. is overruled.

16. 17-90941-E-7 THEODORE WILCOX
Pro Se

TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
2-9-18 [18]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and creditors on February 11, 2018. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor (*pro se*) has not filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Motion are appropriate.

The Motion to Dismiss is granted, and the case is dismissed.

Gary Farrar ("the Chapter 7 Trustee") alleges that Theodore Wilcox ("Debtor") did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case.

Alternatively, if Debtor's case is not dismissed, the Chapter 7 Trustee requests that the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor's next scheduled Meeting of Creditors, which is set for 9:30 a.m. on March 8, 2018. If Debtor fails to appear at the continued Meeting of Creditors, the Chapter 7 Trustee requests that the case be dismissed without further hearing.

DEBTOR'S OPPOSITIONS

Debtor filed two Oppositions, one after the February 9, 2018 Meeting of Creditors, and the other after the March 8, 2018 Meeting of Creditors. Dckt. 21, 23. For the first one, Debtor states that he was confused about the court dates and whether he needed to appear. Dckt. 21 He states that to his understanding, he has to go to the court on March 8, 2018, and March 29, 2018. *Id.* For the second opposition, Debtor states simply, "I got the dates confused." Dckt. 23.

RULING

While confusion for a pro se debtor to the first Meeting of Creditors may be excusable, confusion as to the March 8, 2018 date is unbelievable in this case. Debtor stated clearly in his first opposition that his understanding was that he had to appear on March 8, 2018. To contradict that statement after failing to appear on confusion grounds is not reasonable.

The multiple failures to appear in this case have caused deadlines to run and put creditors' rights in peril—all to Debtor's advantage. Unfortunately, the correct cure for this is to dismiss this case and have Debtor file a new case, with new deadlines, and a new meeting of creditors being set.

Cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

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

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

17. **02-94454-E-7** **LUANN SELECKY**
SSA-6 **Greg Smith**

MOTION FOR TURNOVER OF PROPERTY AND/OR MOTION PAYMENT OF COURT ORDERED SANCTIONS , MOTION FOR COMPENSATION FOR STEVEN ALTMAN, TRUSTEES ATTORNEY(S) 3-2-18 [99]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on March 2, 2018. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Motion for Turnover is granted.

Michael McGranahan, the Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 1037 Westmont Terrace, Modesto, California ("Property"), along with enforcement orders, enforcement of a $5,000.00 sanction, and compensation for legal counsel.

DISCUSSION

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Movant has initiated this proceeding to compel Luann Selecky ("Debtor") to deliver property to Movant. The Federal Rules of Bankruptcy Procedure permit the trustee to obtain turnover from Debtor without filing an adversary proceeding. This Motion for injunctive relief, in the form of a court order requiring that Debtor turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *Collect Access LLC v. Hernandez (In re Hernandez)*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *see also* 11 U.S.C. §§ 541(a), 542(a). Section 542(a) requires someone in possession of property of the estate to deliver such property to the trustee. Pursuant to 11 U.S.C. § 542, a trustee is entitled to turnover of all property of the estate from a debtor. Most notably, pursuant to 11 U.S.C. § 521(a)(4), Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

No opposition has been filed to this Motion by Debtor or any other party in interest.

At the February 15, 2018 hearing, the court noted that Movant could file a separate motion for immediate turnover of the Property and include an enforcement mechanism as part of the order. Dckt. 96. The court also noted that it has already issued a $5,000.00 sanction against Debtor and that the appropriate step now for Movant is to enforce the order, not seek a repetitive order. *Id.*

Enforcement of Turnover Orders

Though the court does not anticipate there being any failure by Debtor to comply with the order of this court, the Ninth Circuit has reaffirmed a bankruptcy judge's power to issue corrective sanctions, including incarceration, to obtain a person's compliance with a court order. *Gharib v. Casey (In re Kenny G Enterprises, LLC)*, No. 16-55007, 16-55008, 2017 U.S. App. LEXIS 13731 (9th Cir. July 28, 2017). Though an unpublished decision, *Gharib* provides a good survey of the reported decisions addressing the use of corrective sanctions by an Article I bankruptcy judge. *Id.* at *2–5.

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 Turnover of Property filed by Michael McGranahan, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Turnover of Property is granted.

IT IS FURTHER ORDERED that Luann Selecky ("Debtor") shall deliver on or before April 12, 2018, possession of the real property commonly known as 1037 Westmont Terrace, Modesto, California ("Property"), with all of their personal property, personal property of any other persons that Debtor, and each of them, allowed access to the Property; and any other person or persons that Debtor, and each of them, allowed access to the Property removed from the Property.

Failure to comply with this Order shall be addressed, without limitation, with post-order proceedings for contempt, corrective sanctions, writs of possession, and other ordinary remedies of a trustee to forcibly take possession of property of the bankruptcy estate.

18. **02-94454-E-7** **LUANN SELECKY** **MOTION TO SELL FREE AND CLEAR OF LIENS**
SSA-7 **Greg Smith** **3-2-18 [106]**

Final Ruling: No appearance at the March 29, 2018 hearing is required.

Michael McGranahan ("the Chapter 7 Trustee") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Sell Free and Clear of Liens was dismissed without prejudice, and the matter is removed from the calendar.**

19. 15-90284-E-7 MDM-2 | **ANTONIO/LUCILA AMARAL** **Axel Gomez** | **MOTION FOR COMPENSATION FOR MICHAEL D. MCGRANAHAN, CHAPTER 7 TRUSTEE** **2-13-18 [53]**

Final Ruling: No appearance at the March 29, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 13, 2018. By the court's calculation, 44 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Michael McGranahan, the Chapter 7 Trustee, ("Applicant") for the Estate of Anotonio Amaral and Lucila Amaral ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. Fees are requested for the period March 25, 2015, through February 15, 2018.

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). A professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by a trustee are "actual," meaning that the fee application reflects time entries properly charged for services, the trustee must demonstrate still that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A trustee must exercise good billing judgment with regard to the services provided because the court's authorization to employ a trustee to work in a bankruptcy case does not give that trustee "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing

judgment is mandatory."). According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include recovering preferences, through compromise and litigation, but the litigation judgment was abandoned. The Estate has $6,746.54 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES REQUESTED

Applicant requests the following fees:

25% of the first $5,000.00	$1,250.00
10% of the next $45,000.00	$200.00
Calculated Total Compensation	**$1,450.00**
Plus Adjustment	($200.00)
Total Maximum Allowable Compensation	$1,250.00
Less Previously Paid	$0.00
Total First and Final Fees Requested	$1,250.00

FEES ALLOWED

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. § 326(a) and that Applicant effectively used appropriate rates for the services provided. First and Final Fees pursuant to 11 U.S.C. § 330 are authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

COSTS REQUESTED AND ALLOWED

The Chapter 7 Trustee also requests reimbursement of expenses in the reduced amount of $99.83 for postage and copies. First and Final Costs pursuant to 11 U.S.C. § 330 are authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

RULING

In this case, the Chapter 7 Trustee currently has $6,746.54 of unencumbered monies to be administered. The Chapter 7 Trustee sought recovery of preferential transfers and was able to recover funds for the Estate. Applicant's efforts have resulted in a realized gross recovered for the Estate.

This case required significant work by the Chapter 7 Trustee, with full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowable as a commission to the Chapter 7 Trustee.

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

Fees	$1,250.00
Costs and Expenses	$99.83

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 Michael McGranahan, the Chapter 7 Trustee, ("Applicant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Michael McGranahan is allowed the following fees and expenses as a professional of the Estate:
>
> Michael McGranahan, the Chapter 7 Trustee
>
> Fees in the amount of $1,250.00
> Expenses in the amount of $99.83,
>
> **IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

20. **08-92594-E-7** **ROBERT/STEPHANIE** **CONTINUED MOTION TO COMPEL**
15-9054 **ACHTERBERG** **1-9-18 [77]**
ACHTERBERG, JR. ET AL V.
CREDITORS TRADE ASSOCIATION,

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant's Attorney on January 10, 2018. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Office of the United States Trustee has not been served. The latest United States Trustee guidelines request service of all pleadings and orders in Chapter 7 adversary proceedings.

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

The Motion to Compel is xxxxxxxxxxxx.

Robert Achterberg, Jr., and Stephanie Achterberg ("Plaintiff") requests that the court order Gary Looney, president and owner of Creditors Trade Association, Inc., dba Great Western Collection Bureau ("Defendant") to produce documents related to payment of a judgment against Defendant. Plaintiff also asks for reimbursement of fees and costs associated with Defendant failing to comply with discovery. Additionally, Plaintiff seeks imposition of monetary sanctions against Defendant for any future failures and to prohibit Defendant from introducing contrary evidence to the Motion.

FEBRUARY 15, 2018 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on March 8, 2018, because of a filing error of the court's tentative ruling. Dckt. 87.

MARCH 8, 2018 HEARING

At the hearing, the court noted that Exhibit F for time and billing charges was not filed due to an error. Dckt. 92. The court continued the hearing to 10:30 a.m. on March 29, 2018, for the missing exhibit to be filed and for the court to rule on the request for attorney's fees. Dckt. 94.

As to the requested financial documents, the court granted the Motion and ordered Defendant to produce the documents at 10:30 a.m. on March 29, 2018. The court ordered that failure to do so would result in a corrective sanction of $2,500.00. *Id.*

FILING OF EXHIBIT F

Plaintiff filed Exhibit F on March 12, 2018. Dckt. 95. The exhibit shows that a total of 9.0 hours was spent working on this matter. At an hourly rate of $265.00, the total amount of attorney's fees incurred is $2,385.00.

NOTICE OF COMPLIANCE AND NON-OPPOSITION

On March 14, 2018, Defendant filed a Notice of Compliance stating that it had provided documents numbered CTA 1 through CTA 703. Dckt. 97.

On the same day, Defendant also filed a Non-Opposition to the Motion and its request for documents and $2,385.00 in attorney's fees. Dckt. 98.

PLAINTIFF'S REPLY

Plaintiff filed a Reply on March 22, 2018. Dckt. 99. Plaintiff states that what it received contained several progress sheets on accounts that Defendant supposedly attempted to collect on and bank statements from Umpqua Bank from September 2017 through February 2018. Plaintiff states that the bank statements are each two pages long, are blank on the second page, and do not show any activity since September 26, 2017, when $500.00 was deposited. Plaintiff states that the remaining statements show a deduction of $10.00 for a bank service charge.

Plaintiff argues that information provided shows that the bank account "is obviously not being used by Defendant." *Id.* at 2:11. Plaintiff also argues that it has not received any copies of judgments in which Defendant is the creditor, although Plaintiff also notes that Defendant has stated that documents would be produced within one to two weeks.

Plaintiff requests full compliance with the court's order.

APPLICABLE LAW

The Federal Rules of Civil Procedure are incorporated into bankruptcy proceedings in large part. This is true with respect to the discovery provisions (whether in an adversary proceeding or contested

matter). Here, Federal Rule of Civil Procedure 37 and incorporating Federal Rule of Bankruptcy Procedure 7037 are cited in the motion as the basis for the relief requested.

Federal Rule of Civil Procedure 37(a) establishes the procedure for obtaining an order from the court to compel a party to respond to discovery. When requested and the court issues such an order, the requesting party is entitled to recover the costs and expenses in prosecution of such a motion. FED. R. CIV. P. 37(a)(5).

"Meet and Confer" Requirement

Federal Rule of Civil Procedure 37(a)(1) requires that the motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." FN.1.

FN.1. Both the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure are mentioned several times in the court's ruling. A Federal Rule of Civil Procedure will be referred to as "Rule," and a Federal Rule of Bankruptcy Procedure will be referred to as "Bankruptcy Rule."

The certification requirement of Rule 37(a)(1) was described in *Shuffle Master, Inc. v. Progressive Games, Inc.* as comprising two elements:

> [T]wo components are necessary to constitute a facially valid motion to compel. First is the actual *certification* document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the *performance*, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer. Each of these two subcomponents must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

170 F.R.D. 166, 170 (D. Nev. 1996); *see also Triad Commer. Captive Co. v. Carmel (In re GTI Capital Holdings, LLC)*, No. AZ-09-1053-JuMKD, 2009 Bankr. LEXIS 4539, at *26–27 (B.A.P. 9th Cir. Aug. 20, 2009); *Sanchez v. Wash. Mutual Bank (In re Sanchez)*, No. 06-2251-D, 2008 Bankr. LEXIS 4239, at *2–3 (Bankr. E.D. Cal. Sept. 8, 2008). The court went further, stating that "a moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" *Shuffle Master, Inc.*, 170 F.R.D. at 171; *see also Triad Commer. Captive Co.*, 2009 Bankr. LEXIS 4539, at *27; *Sanchez*, 2008 Bankr. LEXIS 4239, at *3.

Rule 37 also requires that the moving party must have conferred in good faith or attempted to confer with the opposing party regarding the discovery dispute. *Shuffle Master, Inc.*, 170 F.R.D. at 171. The court in *Shuffle Master* noted that good faith "cannot be shown merely through the perfunctory parroting of statutory language . . . to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means." *Id.*; *see also Sanchez*, 2008 Bankr. LEXIS 4239, at *3–4.

The movant must show good faith and the party need actually attempt a meeting or conference. *Shuffle Master, Inc.*, 170 F.R.D. at 171. Courts have found that "conferment" requirement entails "two-way communication, communication which is necessary to genuinely discuss any discovery issues and to avoid judicial recourse." *Compass Bank v. Shamgochian*, 287 F.R.D. 397, 398–99 (S.D. Tex. 2012).

The "meet and confer" requirement is not satisfied by mailing a letter from one party's counsel to another party's counsel. *See Leimbach v. Lane (In re Lane)*, 302 B.R. 75, 78–79 (Bankr. D. Idaho 2003). The requirement of filing "a certificate cannot be satisfied by including with the motion copies of correspondence that discuss the discovery at issue. . . . The Court is unwilling to decipher letters between counsel to conclude that the requirement has been met." *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001).

DISCUSSION

Meet and Confer Requirement Discussed at March 8, 2018 Hearing

The court first considers whether Plaintiff has satisfied the "meet and confer" requirement of Rule 37(a). After trial, the court granted a motion compelling defendant to appear and be examined. *See* Dckt. 75, 76. Defendant was examined on September 28, 2017, after the court's hearing on the motion to compel. Dckt. 76. Mr. Gross states that at that examination, Defendant failed to supply all requested documents, including bank statements for any accounts utilized by Defendant along with a list of all accounts receivable or accounts in which Defendant is a judgment creditor. Dckt. 79 at 2:16–21.

Mr. Gross states that he attempted to meet and confer on October 10, 2017, by e-mailing a letter to Defendant advising of the default. *Id.* at 2:22–23. Mr. Gross states that he received a response from Defendant's counsel on October 16, 2017, stating that Defendant's house had been lost to fire and that he would not be able to respond for another week. *Id.* at 2:23–3:1.

Mr. Gross states that he sent a second e-mail attempting to meet and confer on November 16, 2017, advising that he would bring this Motion otherwise. *Id.* at 3:2–5.

The court has reviewed the October 10, 2017 "meet and confer" letter. In it, counsel for Plaintiff communicates to Defendant:

> In a follow up to the Order for Exam and to constitute a meet and confer effort, I would ask that you provide my office with details as well [as] bank statements for any accounts utilized by Creditors' Trade Association, Inc. In addition. A [*sic*] list of all accounts receivables or accounts in which Creditors' Trade Association, Inc, is a judgment creditor.
>
> As for a possible settlement, we would like to see a payment of $1,500.00 per month by your client.

Exhibit C, Letter, Dckt. 80.

That correspondence is considered in light of the prior proceedings in this case. On September 28, 2017, the court conducted a hearing on Plaintiff's motion to compel Defendant to appear and be examined. Dckt. 76. Debtor appeared and was examined.

It is clear that though Plaintiff has attempted to engage Defendant in communication, Defendant has not reciprocated. That is not a situation when there is merely a perfunctory letter sent. Rather, there have been two face-to-face hearings at which Defendant attended.

Defendant's unwillingness to meet and confer does not defeat Plaintiff's ability to request for the court to order that Defendant produce financial documents.

Attorney's Fees and Costs Requested

The Motion requests that the court award Plaintiff reasonable attorney's fees and costs arising from Defendant's failure to comply with discovery.

That is similar to the process used for general discovery and the failure to comply. Federal Rule of Civil Procedure 37 and Federal Rule of Bankruptcy Procedure 7037 require that the court award the moving party's attorney's fees, except for specified circumstances. Here, it is proper to award attorney's fees to Plaintiff.

According to Exhibit F, Plaintiff's attorney's fees total $2,385.00, and Defendant does not oppose that amount. Dckt. 95, 98. The court finds that amount reasonable and awards Plaintiff $2,385.00 in attorney's fees, payable by Defendant.

Corrective Sanction for Failure to Comply

Part of the court's order after the March 8, 2018 hearing stated that failure to produce the required documents by 10:30 a.m. at the March 29, 2018 hearing at the U.S. Bankruptcy Court, Modesto Courthouse, would result in a corrective sanction of $2,500.00 being issued against Defendant and payable to Plaintiff.

Plaintiff's Reply indicates that Defendant has not fully complied with the order yet, which means that it has not complied. At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**.

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 Compel filed by Robert Achterberg, Jr., and Stephanie Achterberg ("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 to Compel is **xxxxxxxxxxxx**.

21. 17-90917-E-7 **DAVID ECKERDT**
Randall Walton

TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
2-28-18 [18]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and parties requesting special notice on March 2, 2018. By the court's calculation, 34 days' notice was provided. 28 days' notice is required. The Office of the U.S. Trustee was not served.

The Motion to Dismiss has not been properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Dismiss is xxxxxxxxxxxxxxxx.

Irma Edmonds ("the Chapter 7 Trustee") alleges that David Eckerdt ("Debtor") did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 707(a)(1).

Alternatively, if Debtor's case is not dismissed, the Chapter 7 Trustee requests that the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor's next scheduled Meeting of Creditors, which is set for 12:00 p.m. on March 26, 2018. If Debtor fails to appear at the continued Meeting of Creditors, the Chapter 7 Trustee requests that the case be dismissed without further hearing.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on March 28, 2018. Dckt. 21. Debtor states that he attended the Meeting of Creditors held on March 26, 2018. He notes that the hearing was continued to April 9, 2018, for him to provide his Social Security card.

RULING

At the hearing, **xxxxxxxxxxxxxxxxxxxx**.

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

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

The Motion to Dismiss the Chapter 7 case filed by Irma Edmonds ("the Chapter 7 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is **xxxxxxxxxxxxxx**.