UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

April 10, 2014 at 10:30 a.m.

1.	**13-92226-E-7**	**STEVE/CLAIRE TULL**	**MOTION TO AVOID LIEN OF AMERICAN EXPRESS CENTURION BANK**
	DCJ-1	**David C. Johnston**	**3-24-14 [19]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditor, and Office of the United States Trustee on March 24, 2014. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

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

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

A judgment was entered against the Debtor in favor of American Express Centurion Bank for the sum of $20,053.10. The abstract of judgment was recorded with Stanislaus County on April 26, 2013. That lien attached to the Debtor's residential real property commonly known as 2817 Stoneridge Drive, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $157,000.00 as of the date of the petition. The unavoidable consensual liens total $140,000.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 730.140(b)(1) in the amount of $17,000.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of American Express Centurion Bank, Stanislaus County Superior Court Case No. 676093, recorded on April 26, 2013, Document No. 2013-0035879-00, with the Stanislaus County Recorder, against the real property commonly known as 2817 Stoneridge Drive, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

2. 13-91534-E-7 MARGARITA JACOBO
TOG-3 Thomas O. Gillis

MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES, LLC
2-24-14 [27]

DISCHARGED 12-30-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditor, and Office of the United States Trustee on February 24, 2014. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

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

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

A judgment was entered against the Debtor in favor of Portfolio Recovery Associates, LLC for the sum of $8,273.74. The abstract of judgment was recorded with Stanilaus County on August 27, 2013. That lien attached to the Debtor's residential real property commonly known as 2036 Mount Whitney Court, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). According to Debtor, the amended Schedule A and C filed on November 7, 2013 (Dckt. 14) erroneously listed the current value of the subject property at $161,575.00. Debtor claims that a second amendment of Schedule A and C will be filed and served prior to the hearing on this matter. Dckt. 29. In her memorandum, Debtor claims that the true value of the property is $88,399.00 and the amount of unavoidable consensual liens is $139,500.00. Debtor also claims a $100.00 exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5). Dckt. 29. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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, Stanislaus County Superior Court Case No. 681812, recorded on August 27, 2013, Document No. 2013-0073570-00, with the Stanilaus County Recorder, against the real property commonly known as 2036 Mount Whitney Court, Modesto, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

3. 13-90935-E-12 KDG-9 — ARTURO/RAMONA ROMERO, Hagop T. Bedoyan — MOTION FOR COMPENSATION BY THE LAW OFFICE OF KLEIN, DENATALE, GOLDNER, ET AL. FOR HAGOP T. BEDOYAN, DEBTORS' ATTORNEY(S) 3-20-14 [175]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 12 Trustee, parties

requesting special notice, and Office of the United States Trustee on March 20, 2014. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

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

At the hearing ----------.

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP, the Attorneys ("Applicant") for Arturo Hernandez Romero and Ramona Delia Romero, the Chapter 12 Plan Administrators ("Client"), makes a Second Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period June 20, 2013 through January 21, 2014. The order of the court approving employment of Applicant was entered on June 10, 2013, Dckt. 22.

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

General Case Administration: Applicant spent 4.1 hours in this category. Applicant assisted Client by communicating about case status and outlook with Client, as well as communicating with counsel for American Equity Service, Inc. on several occasions regarding the case status. Applicant reviewed and approved the stipulation to continue hearings.

Efforts to Assess and Recover Property of the Estate: Applicant spent 36.6 hours in this category. Applicant communicated with Client regarding motion to sell equipment. Applicant prepared and filed ex parte application for order shortening time for service of motion to authorize Client to sell personal property. Applicant prepared purchase sale agreement for real property. Applicant also prepared, revised, and filed this motion for compensation.

Relief from Stay and Adequate Protection: Applicant spent 18.1 hours in this category. Applicant reviewed the motion for relief from stay filed by American Equity Service, Inc. Applicant performed legal research and prepared opposition and supporting declaration to the relief from stay motion. Applicant communicated with counsel for American Equity Service, Inc. regarding the motion.

Meeting of and Communications with Creditors: Applicant spent .7 hours in this category. Applicant conferred with Client regarding collection calls from Kubota. Applicant prepared and sent letter to creditor regarding automatic stay of collection actions against Client.

Fee and Employment Applications: Applicant spent 10.8 hours in this category. Applicant prepared and filed first interim application for fees and costs, which was granted. Applicant reviewed minute order regarding application.

Business Operations: Applicant spent .8 hours in this category. Applicant communicated with Client and accountant regarding 2013 cherry crop proceeds.

Financing and Cash Collections: Applicant spent .8 hours in this category. Applicant reviewed correspondence from counsel for American Equity Service, Inc. regarding crop proceeds as cash collateral. Applicant conferred with Client regarding same. Applicant communicated with counsel for American Equity Service, Inc. regarding sequester of cash collateral.

Tax Issues: Applicant spent 1 hours in this category. Applicant communicated with accountant regarding taxes from sale of real property and reviewed tax analysis.

Claims Administration and Objections: Applicant spent 11.5 hours in this category. Applicant communicated with counsel for American Equity Service, Inc. on several occasions regarding claim held by American Equity Service, Inc. Applicant performed legal research regarding late fee on balloon payment. Applicant also held several conferences with Client that were not charged.

Plan and Disclosure Statement: Applicant spent 119.7 hours in this category. Applicant spent a substantial amount of time analyzing options with Client for a Chapter 12 Plan. Applicant prepared a Chapter 12 Plan, along with a motion to confirm the Plan, and filed and served same. Applicant negotiated with counsel for the primary secured lender, American Equity Service, Inc., and worked out acceptable treatment of the claims. Applicant appeared at several hearings on confirmation of the Plan. Numerous stipulations to continue the hearings were prepared in an effort for the parties to resolve their disputes and finalize the Chapter 12 Plan. The Chapter 12 Plan was confirmed January 30, 2014. Several time entries related to this category were not charged.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

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

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including taking steps to reach a confirmable plan. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Hagop T. Bedoyan (27 years)	.8	$0.00	$0.00
Hagop T. Bedoyan (27 years)	16.6	$350.00	$5,810.00
Jacob L. Eaton (8 years)	3.9	$0.00	$0.00
Jacob L. Eaton (8 years)	8.6	$265.00	$2,279.00
Jacob L. Eaton (8 years)	91.2	$285.00	$25,992.00
Christian D. Jinkerson (10 years)	2.4	$0.00	$0.00
Christian D. Jinkerson (10 years)	7.1	$275.00	$1,952.50
Kaleb Judy (5 years)	3.1	$245.00	$759.50
Vijay Siddiah (Law Clerk)	17.7	$150.00	$2,655.00
Karen Clemans, CBA (Paralegal)	5.6	$0.00	$0.00
Karen Clemans, CBA (Paralegal)	29.5	$125.00	$3,687.50
Karen Clemans, CBA (Paralegal)	16.4	$150.00	$2,460.00
Sissy Rucker (Paralegal)	.6	$125.00	$75.00
Claudine Lalonde (Paralegal)	.3	$150.00	$45.00
Claudine Lalonde (Paralegal)	.3	$0.00	$0.00

Total Fees For Period of Application	$45,715.50

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

Application	Interim Approved Fees	Interim Fees Paid
First Interim	$10,225.00	$7,668.75
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$10,225.00	$7,668.75

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate counsel and rates for the services provided. Second Interim Fees in the amount of $45,715.50 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved, and seventy-five percent or $34,286.62, of the approved fees are authorized to be paid by the Plan Administrator under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan. The Applicant also requests authorization for the Client to pay the twenty-five percent "hold-back" in professional fees from the First Interim fee application, in the amount of $2,556.25, previously approved by the court.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $411.65 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of $202.36.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Filing Fee for Amendment		$30.00
Postage		$135.05
Photocopies		$246.60
Total Costs Requested in Application		$411.65

The Second Interim Costs in the amount of $411.65 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Applicant is allowed $45,715.50 in fees and $411.65 in costs. The Plan Administrator under the confirmed plan is authorized to pay the following amounts as compensation to this professional in this case:

Remainder of First Interim Fees	$2,556.25
Second Interim Fees	$34,286.62
Costs and Expenses	$411.65

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP ("Applicant"), Attorneys for Chapter 12 Plan Administrator having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP, Professional Employed by Chapter 12 Plan Administrator
>
> Second Interim Fees in the amount of $ 45,715.50
> Expenses in the amount of $ 411.65,
>
> The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Plan Administrator under the confirmed plan is authorized to pay seventy-five percent or $34,286.62 of the Second Interim fees allowed by this Order, the twenty-five percent or $2,556.25 remaining from the First Interim Fees, and one hundred percent or $411.65 of the Second Interim costs and expenses, for a total of $37,254.52, from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

4. 12-93049-E-11 MARK/ANGELA GARCIA — MOTION FOR COMPENSATION FOR
MLM-4 Mark J. Hannon — KRISTIN L. KIRCHNER, ACCOUNTANT
3-6-14 [313]

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

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

Below is the court's tentative ruling.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6) 21 day notice and L.B.R. 9014-1(f)(2) 14-day opposition filing requirements.)

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

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

SERVICE

The Proof of Service filed by Movant indicates that an "Attached List" was served with the Motion and supporting pleadings, however, no such list appears after page 2. Dckt. 317. It appears not all creditors were served with the motion.

If Movant can provide the court with proper service of the motion at the hearing, the following alterative ruling will apply:

FEES REQUESTED

Kristin L. Kirchner, CPA, CFE, the "Accountant" ("Applicant") for John E. Bell, Chapter 11 Trustee ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period December 2, 2013 through December 23, 2014. The order of the court approving employment of Applicant was entered on January 11, 2014.

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

Accounting Services: Applicant spent 60.8 hours at $175.00 per hour, 4.0 hours at $45.00 per hour, and 4.75 hours at $25.00 per hour in this category. Applicant assisted Client with reviewing in detail the Debtors' business banking records, accounting practices and transactions for fraud and, based on her findings, to organize and present her findings regarding the Debtors' financial condition to the Trustee. Applicant also provided traditional accounting services to the Trustee regarding the Debtors' businesses and provided the Trustee the necessary information to prepare the monthly operating reports for the Court. Applicant also assisted the Trustee in valuing the estate's assets, including but not limited to wine inventory. Applicant also has begun to perform an analysis of the estate's tax obligations and will ultimately prepare the federal and state tax returns.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including organizing the business books of the estate. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Kristin L. Kirchner, CPA, CFE	60.8	$175.00	$10,640.00
Kristin L. Kirchner, CPA, CFE (lower rate)	4.0	$45.00	$180.00

Kristin L. Kirchner, CPA, CFE (lower rate)	4.75	$25.00	$118.75
Total Interim Fees For Period of Application			$10,938.75

There have been no prior Interim Fee Applications.

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate professionals and rates for the services provided. First Interim Fees in the amount of $10,938.75 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and fifty-percent (50%), in the amount of $5,469.38 is authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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 Kristin L. Kirchner, CPA, CFE ("Applicant"), Accountant for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Kristin L. Kirchner, CPA, CFE is allowed the following fees as a professional of the Estate:
>
> Kristin L. Kirchner, CPA, CFE, Professional Employed by Trustee
>
> Fees in the amount of $ 10,938.75
>
> The fees are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay fifty percent (50%) in the amount of $5,469.38, of the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11.

5. 13-90150-E-7 PAUL/SHELBY ADAMS — ORDER TO SHOW CAUSE
13-9032 RHS-1 — 3-11-14 [17]
ADAMS ET AL V. U.S. DEPARTMENT OF EDUCATION

Notice Provided: The Order to Show Cause was served by the Clerk of the Court through the Bankruptcy Noticing Center on Plaintiffs, on March 12, 2014. 29 days notice of the hearing was provided.

The court ordered Plaintiffs, Paul G. Adams and Shelby L. Adams ("Plaintiffs") to appear to show cause as to why the court should not dismiss this adversary proceeding for failure to prosecute. Though this Adversary Proceeding was commenced on September 26, 2013, it does not appear that the Summons and Complaint have been properly served on the United States of America, the named defendant. The most recent Certificates of Service report service by U.S. Mail to the following: Office of the Attorney General, 455 Golden Gate, Suite 11000, San Francisco, California. Dckt. 12; U.S. Department of Education, 400 Maryland Ave SW, Washington, D.C. 20202. Dckt. 11.

Federal Rule of Bankruptcy Procedure 7004(b) (4) and (5) require that service of the summons and complaint in an adversary proceeding be served on (1) the Civil Process Clerk at the office of the United States attorney for the district in which the action in brought; (2) the United States Attorney General at Washington, District of Columbia; (3) the Officer or Agency which is the subject of the adversary proceeding. Parties are provided with a Roster of Governmental Agencies listing service addresses and requirements provided by various federal and state offices and agencies at the Court's website, http://www.caeb.uscourts.gov/documents/Forms/EDC/EDC.002 - 785.pdf.

No response has been filed to date.

6. 12-92854-E-7 ABEL/APRIL MUNOZ
ICE-1 Scott J. Sagaria

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH DEBTORS ABEL MUNOZ, JR. AND APRIL MARIE MUNOZ AND ABEL MUNOZ, DEBTOR'S FATHER
3-12-14 [22]

DISCHARGED 2-5-13

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

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

Below is the court's tentative ruling.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, parties requesting special notice, and Office of the United States Trustee on March 12, 2014. By the court's calculation, 29 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirement.)

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

The Motion For Approval of Compromise is denied without prejudice.

Irma Edmonds, the Trustee ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Debtors, Abel Munoz, Jr. And April Munoz ("Settlor").

NOTICE

However, it appears Movant has not provided proper notice for the relief requested. Federal Rule of Bankruptcy Procedure 2002(a)(3) requires 21 days notice, in conjunction with Local Bankruptcy Rule 9014-1(f)(1)

requires a 14-day opposition filing requirement for a total of 35 days' notice. By the court's calculation, 29 days' notice was provided.

SERVICE

Furthermore, it appears Counsel for Debtors was not served at the correct address. Debtors counsel was served at 333 W. San Carlos St #1750, San Jose, CA 95110, when the address on file for Counsel is 333 W. San Carlos St #620, San Jose, CA 95110.

If the Movant can show proper notice and service at the hearing, the court will issue the following alternative ruling:

Irma Edmonds, the Trustee ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Debtors, Abel Munoz, Jr. And April Munoz ("Settlor").

Following the Trustee's appointment, review of the schedules and examination, Trustee discovered that among the assets in this estate was a claim which accrued pre-petition in favor of the estate as and against Abel Munoz, Debtors' father, in the sum of $2,000.00. After preliminary investigation, the subject claim, on its face, appeared to be a preferential payment or fraudulent conveyance by the Debtors, Abel Munoz, Jr. and April Munoz, to Debtor's father, Abel Munoz, in June 2012, within one (1) year preceding the bankruptcy case. Debtors, Abel Munoz, Jr. and April Munoz, settled the preferential payment made to Debtor's father, Abel Munoz, in the sum of $2,000.00.

The proposed compromise, if approved by this Court, will authorize the following:

a) Approval of a gross settlement of the claim in favor of the Debtors' estate for $2,000.00.

b) Release by the estate and any other and further claims against Abel Munoz in their entirety.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Under the Settlement Movant shall recover $2,000 in satisfaction of the estate's claim for recovery of the property, with an asserted value of $2,000, from Settlor. Movant asserts that the property can be recovered for the estate a preference payment. This proposed settlement allows Movant to recover for the estate $2,000 without further cost or expense.

Probability of Success

Although the Trustee believes the probability of success in the present type of litigation is high, the need to continue the litigation is obviated based upon the terms and conditions of the settlement achieved. The Trustee contends that the settlement achieved provides to the bankruptcy estate as much money to the bankruptcy estate as what the Trustee contends was owing at time of filing in this matter. From review of the statements of the Debtors and other information obtained by the Trustee in the course of investigation of this matter, payment was made to Abel Munoz on or about June 2012 in the amount of $2,000 by the Debtors. There does not appear to be any defense to the Trustee's claim: notwithstanding the fact this may have been an innocent transfer between the parties. This favor weights in favor of the Trustee and settlement.

Difficulties in Collection

The Trustee contends that the settlement achieves her goals of placing the amount of the residual monies in the estate as where they should have been in amount at time of filing. Prompt payment has resolved the need for continued litigation. As such, collection is not an issue and settlement has saved the estate litigation costs. This Woodson factor is supportive of settlement.

Expense, Inconvenience and Delay of Continued Litigation

The litigation would be a mix of law and facts. Having received full settlement funds, this factor waives in favor of settlement.

Paramount Interest of Creditors

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

Consideration of Additional Offers

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

At the hearing **----------**.

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

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

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

The Motion to Approve Compromise filed by Irma C. Edmunds, the Trustee, (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Approve Compromise between Movant and Debtors, Abel Munoz, Jr. And April Munoz ("Settlor") is granted and the court authorizes the following:

a) Approval of a gross settlement of the claim in favor of the Debtors' estate for $2,000.00.

b) Release by the estate and any other and further claims against Abel Munoz in their entirety.

7. 13-90060-E-7 SCF-2 — SONORA CARPET MART, INC. — Patrick B. Greenwell — MOTION FOR COMPENSATION FOR RYAN, CHRISTIE, QUINN AND HORN, ACCOUNTANT(S) — 3-4-14 [16]

Final Ruling: No appearance at the April 10, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 37 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirements.)

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Ryan, Christie, Quinn & Horn, Certified Public Accountants ("Accountants") for the Estate, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of October 8, 2013 through January 15, 2014. The order of the court approving employment of Accountants was entered on December 19, 2013.

Description of Services for Which Fees Are Requested

Administration: Accountants conducted communications regarding overview of case, reviewed and executed employment application and fee application;

Tax Preparation and Related Matters: Accountants reviewed and analyzed tax returns for the estate.

Correspondence: Accountants prepared correspondence regarding filing tax returns and letters to taxing authorities.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

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

Id. at 959.

A review of the application shows that Accountants prepared the Debtor's federal and state tax returns. Accountants' work benefitted the Estate in that Accountants filed timely state and federal corporate tax returns on behalf of the Debtor company.

FEES ALLOWED

The hourly rates for the fees billed in this case are $250.00/hour for Paul E. Quinn, CPA, and $175.00/hour for Deborah A. Monis, CPA. The court finds that the hourly rates reasonable and that accountant effectively used appropriate rates for the services provided. The total accountants' fees in the amount of $2,135.00, representing 10.10 hours of services rendered, are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Accountants' Fees	$2,135.00.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Accountant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Ryan, Christie, Quinn & Horn is allowed the following fees and expenses as a professional of the Estate:

Ryan, Christie, Quinn & Horn, Accountants for the Estate Applicant's Fees Allowed in the amount of $ 2,135.00.

IT IS FURTHER ORDERED that this is the final allowance of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

8. 13-90069-E-7 HCS-2 | **DONALD/CLAUDETTE BECKWITH** | **Scott D. Mitchell** | **MOTION TO EMPLOY STEVEN B. STEIN, TYLER DRAA, MARCIA GERSTON AS SPECIAL COUNSEL 3-13-14 [65]**

DISCHARGED 4-29-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on March 13, 2014. By the court's calculation, 56 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted. No appearance required.

Chapter 7 Trustee, Gary Farrar ("Trustee"), seeks to employ special counsel Steven B. Stein, Esq. of Knox Ricksen LLP and Tyler Draa, Esq. and Marcia Gerston, Esq. of Greenfield Sullivan Draa & Harrington LLP ("Special Counsel"). Trustee seeks the employment of Special Counsel to assist the Trustee to continue litigating a product liability and personal injury lawsuit in the U.S. District Court of the Southern District of West

Virginia, entitled *Beckwith, et al., v. Boston Scientific Corporation*, Civil Action No. 2:13-cv-12326 ("Lawsuit"). The case was initially closed on May 10, 2013 and Special Counsel filed the lawsuit on May 24, 2013 on behalf of the Debtors as individuals and as part of a multidistrict litigation suit based on allegations of product liability and personal injury relating to the use of Obtryx Transobturator Mid-Urethral Sling System in 2009 (before Debtors filed this case). Debtors have amended their schedules to disclose the interest in the lawsuit. Trustee investigated the Lawsuit and discussed it with Special Counsel.

The Trustee argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present personal injury suit.

Marcia Gerston, an associate of Greenfield Sullivan Draa & Harrington LLP, testifies that they are representing a number of clients in the personal injury and product liability case involving a transvaginal mesh. Ms. Gerston testifies she, her firm, or proposed joint special counsel do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Steven B. Stein, an associate of Knox Ricksen LLP, testifies that he, his firm, or proposed joint special counsel do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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.

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that Special Counsel 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 Steven B. Stein, Esq. of Knox Ricksen LLP and Tyler Draa, Esq. and Marcia Gerston, Esq. of Greenfield Sullivan Draa & Harrington LLP as special counsel for the Chapter 7 estate at 40% of the net recovery, with reimbursement of costs if

there is a recovery, and other terms within the Contingency Fee Employment Agreement filed as Exhibit B, Dckt. 70. The approval of the contingency fee 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 the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ Steven B. Stein, Esq. of Knox Ricksen LLP and Tyler Draa, Esq. and Marcia Gerston, Esq. of Greenfield Sullivan Draa & Harrington LLP as special counsel for the Chapter 7 Trustee on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit B, Dckt. 70.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.
>
> **IT IS FURTHER ORDERED** that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

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

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
9-28-12 [1]

Debtor's Atty: Thomas O. Gillis

Notes:

Continued from 3/6/14 to be heard in conjunction with other matters on calendar.

10. 12-92570-E-12 COELHO DAIRY
TOG-23 Thomas O. Gillis

CONTINUED OBJECTION TO CLAIM OF BLACK ROCK MILLING, CLAIM NUMBER 24
2-11-14 [398]

CONT FROM 3-6-14

Local Rule 3007-1(c)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on the Chapter 12 Trustee, respondent creditor, and Office of the United States Trustee February 11, 2014. By the court's calculation, 23 days' notice was provided. 44 days' notice is required.

Tentative Ruling: This Objection to a Proof of Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1. Local Bankruptcy Rule 3007-1(b) requires that the objecting party filing an Objection to Proofs of Claim must file and serve the objection at least forty-four (44) days prior to the hearing date, unless the objecting party elects to give the notice permitted by Local Bankruptcy Rule 3007-1(b)(2).

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

NOTICE AND SERVICE

The Proof of Service filed reflects that the Objection, Exhibits, supporting Declaration, Notice of Hearing, and Debtor's Amended Schedule F were filed on February 11, 2014, just 23 days prior to this hearing. Dckt.

No. 402. Thus, proper notice under Local Bankruptcy Rule 3007-1 was not provided.

The objecting party has not indicated that the Objection was set for hearing on 30 days' notice, pursuant to the alternative noticing procedure set out by Local Bankruptcy Rule 3007-1(b)(2). The Notice of Hearing simply states that the "Motion" is being noticed pursuant to Local Bankruptcy Rule 9014-1(f)(2), which is not sufficient for an Objection to Proof of Claim. Dckt. No. 399. Even if the objecting party had wanted to set this motion for hearing pursuant to Local Bankruptcy Rule 3007-1(b)(2), this Objection was not served at least thirty (30) days prior to the hearing date as required by Local Bankruptcy Rule 3007-1(b)(2).

The continuance of the hearing has cured the notice and service defects.

REVIEW OF MOTION

Debtor in Possession states that it objects to the allowance of Claim No. 24, held by Black Rock Milling, on the grounds that the amount claimed is not owed by Debtor. Debtor asserts that Black Rock Milling has overcharged the Debtor by $129,219.68. Debtor in Possession offers the "Accounting of Charges and Payments," filed in support of this objection as Exhibit A.

REVIEW OF EVIDENCE

Although Frank Coelho, who as a general partner of Coelho Dairy, states in his declaration that he prepared Exhibit A and believes that it "accurately reflects the charges and payments" (thereby satisfying the authentication of evidence requirements as set forth be Federal Rule of Evidence 901), the declarant provides little information on the manner in which the statements were assembled. ¶ 3, Declaration of Frank Coelho, Dckt. 400. Debtor does not provide any context on how these "Cash Register" statements, showing an accounting of the invoices and payments made to Black Rock Milling as a Class 5 Creditor, were prepared, and does not testify as to his personal knowledge of the veracity of the contents of the statements provided.

OPPOSITION OF BLACK ROCK MILLING

On February 28, 2013, the Claimant Black Rock Milling ("Claimant") filed extensive opposition to Debtor in Possession Objection to their Claim. It appears, from the court's review of the Objection, that Claimant is asserting that Debtor in Possession has failed to provide accurate, complete accounting to disprove Black Rock Milling's claim.

For instance, Claimant argues that Debtor's in Possession accounting fails to consider any outstanding balance of Debtor prior to May of 2006, does not identify all of the invoices from May, 2006, to the present, and that the Debtor in Possession objection does not account for the attorney's fees clause of the contract that Debtor in Possession entered with Black Rock. Claimant alleges that, in reviewing the Debtor in Possession accounting, Claimant determines that Debtor's in Possession calculations are

absent more than 20 invoices in their calculations, including 8 consecutive invoices from September 21, 2010, to October 13, 2010. Claimant points to this detail to demonstrate that the Statement, designated Dckt. No. 401, is deficient and inaccurate.

In support of its opposition to the Objection of Claim, the Claimant has attached its own "Calculation of outstanding balance of Debtor to Black Rock Milling Co." filed as Exhibit 1 in support of the motion, the monthly statements of Claimant for the account with Debtor, dated from 2002 to the present, the contract between Debtor and Claimant, as well as four declarations of individuals in support of its opposition. Dckt. Nos. 431-435. The invoices and statement of transactions, which include invoices sent to Debtor, and payments made by Debtor from the time period of December 30, 2002, to February 28, 2014, filed in addition to a multitude of billings statements showing the past due amounts owed by Debtor to Claimant, **total 159 pages.** Dckt. 431. Claimant's exhibits filed in support of the opposition, which offer conflicting information on the invoice amounts charged, and payment amounts made by Debtor, are critical, however to the court's determination of the actual amount owed on the claim filed by Claimant.

The court continued the Objection to the Claim of Black Rock Milling to permit Claimant to serve the opposition and supporting exhibits and evidence to Debtor; and to allow the opportunity to fully deliberate on the pleadings and evidence presented by Debtor and Claimant on the amount owed on the Black Rock Milling claim, Claim No. 24 on the claims registry.

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).

Debtor-in-Possession not provided sufficient evidence to overcome its burden. Frank Coelho provides little information on the manner in which the statements in the Exhibits filed were assembled. ¶ 3, Declaration of Frank Coelho, Dckt. 400. Debtor in Possession does not provide any context on how these "Cash Register" statements, showing an accounting of the invoices and payments made to Black Rock Milling as a Class 5 Creditor, were prepared, and does not testify as to his personal knowledge of the veracity of the contents of the statements provided. The court cannot determine from the evidence presented how the Creditor "overcharged the Debtor by $129,219.68." Objection, Dckt. 398.

Creditor has provided several different declarations and exhibits in support of its claim. Debtor-in-Possession has not overcome its burden of presenting substantial factual basis to overcome the prima facie validity of

Creditor's Proof of Claim, the court finds no need to go into detail of the evidence it has submitted.

Based on the evidence filed by Debtor-in-Possession, the court finds that it has not met its burden of presenting substantial factual basis to overcome the prima facie validity of the proof of claim filed by Black Rock Milling.

Based on the evidence 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 Black Rock Milling filed in this case by 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 objection to Proof of Claim number 24 of Black Rock Milling is overruled.

11. 12-92570-E-12 COELHO DAIRY **CONTINUED MOTION TO DISMISS CASE**
DJD-5 Thomas O. Gillis **2-12-14 [403]**

CONTINGENT ON PLAN AT 3:30

CONT. FROM 3-6-14

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors' Attorney, Chapter 12 Trustee, and Office of the United States Trustee on February 12, 2014. By the court's calculation, 22 days' notice was provided. 28 days' notice is required. That requirement was not met.

Tentative Ruling: This Motion to Dismiss Case was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Notice of Hearing indicates that this Motion was served pursuant to Local Bankruptcy Rule 9014(f)(1), and advises potential respondents to serve and file with the court opposition at least fourteen (14) days preceding the date of the hearing. Dckt. No. 404.

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

SERVICE

Local Bankruptcy Rule 9014-1(f)(1) requires that the moving party file and serve the motion at least twenty-eight (28) days prior to the hearing date. This Motion was served on February 12, 2014, 22 days before the hearing date. The continuance of the hearing has cured the service defect.

REVIEW OF MOTION AND OPPOSITION

As summarized below, Creditor Black Rock Milling Co. ("Creditor") alleges malfeasance on the Debtor in Possession and Counsel for Debtor in Possession's part on several grounds. First, in misrepresenting the state of Debtor's finances in its requests to obtain post-petition financing. Second, the Debtor in Possession has routinely flaunted and violated court orders in obtaining cash collateral and in attempting to draft a confirmable plan in their case. Third, that Debtor in Possession counsel has not fulfilled his responsibilities to dutifully represent the Debtor in Possession and has overstated his services provided to Debtor in Possession (as listed in his billing records). Fourth, that confirmation of a feasible plan simply cannot be expected of the Debtor in Possession, and that Debtor's in Possession inability to effectuate a plan warrants dismissal of this bankruptcy case. These are serious allegations that the court does not treat lightly, and for

which all parties will be provided sufficient time to review, brief, present evidence to the court, and argue.

Debtor in Possession has filed an *Ex-Parte* Application for an Order Shortening Time to File Opposition to Motion for Dismissal, Dckt. No. 441, Debtor in Possession counsel states that he was not served the Motion to Dismiss, nor did he receive the notice of the motion in the mail. The Proof of Service shows that the Debtor in Possession was not served (the court notes however, that the Certificate reflects that Debtor in Possession counsel was served). Dckt. No. 406. Debtor in Possession counsel maintains that he is careful in handling and calendering Motions to Dismiss. Further, that he did not discover the Motion to Dismiss until March 2, 2014, when Debtor in Possession counsel checked PACER to prepare a response to "an attack on his fees" by Creditor. Counsel further states that he has suffered from a recent bout of cold that turned into an attack of bronchitis, and required emergency medical care for his condition and infection. Dckt. No. 441. Debtor in Possession requests additional time to respond to the Motion to Dismiss.

The court continued the matter to allow Debtor to file and serve opposition, if any by March 13, 2014. Order, Dckt. 463. No Opposition has been filed to date. However, Debtor-in-Possession filed an Amended Plan set to be heard for this same calendar date.

BACKGROUND

On August 8, 2012, Creditor sued Debtor for breach of contract and common counts causes of action in the Stanislaus County Superior Court. This lawsuit additionally identified the principals of the Debtor, Frank Coelho, Bernadette Coelho, and Mary Coelho individually as Defendants. On September 28, 2012, allegedly in response to Black Rock's lawsuit and pending writ of attachment motions, Debtor filed for bankruptcy. Throughout the bankruptcy, the Debtor in Possession counsel inaccurately stated and represented that not only was Debtor part of the bankruptcy, but so were the individuals Frank and Bernadette Coelho individually. Creditor asserts that this tactic was knowingly done to simply delay the civil lawsuit from proceeding against the individuals.

On December 27, Debtor in Possession filed a motion to confirm the Chapter 12 Plan, which Creditor opposed, as well as an additional creditor, Bank of the West, and Trustee Jan Johnson. The court denied Debtor's in Possession plan. On January 29, 2013, Black Rock filed a claim in bankruptcy against Debtor in Possession for its breach of contract and failure to pay monies owed. At that time, Debtor in Possession claimed it needed to do an accounting to determine the actual amount owed on the claim. Black Rock and Debtor in Possession appeared in March at a mediation in an attempt to resolve the claim. During the mediation, the parties agreed on a payment structure and payments were to commence on May 10, 2013. Debtor failed to make any payments to Black Rock, and disregarded the mediation settlement that was entered into.

On June 21, 2013, Debtor in Possession filed a motion for confirmation of a modified plan, which was again, denied by the court for some of the same reasons raised by creditors and the Chapter 12 Trustee in the first Motion to Confirm. On August 8, 2013, Debtor in Possession filed an objection to Black Rock's claim, and a motion to enforce the March 22, 2013 settlement between

Creditor, Debtor in Possession and Debtor. Debtor in Possession claimed that the alleged amount owed by Debtor to Black Rock was incorrect, and that an accounting would have to be performed to determine the amount owed. Both of these motions were denied/overruled; the motion to approve the compromise, in particular, was denied partly due the fact that Debtor had already breached the settlement agreement, which rendered the agreement void.

On September of 2013, Black Rock sought writ of attachment on Mary Coelho's property in civil court. The day prior to the write hearing, Debtor's in Possession counsel filed a Chapter 12 bankruptcy on behalf of Mary Coelho. This bankruptcy was dismissed after claims of improper filings and conflicts of interest arose against Thomas Gillis, Debtor in Possession counsel.

On October 11, 2013, the court heard and granted Creditor Bank of the West's Motion for Relief from the stay. Creditor Black Rock Milling alleges that it was apparent that Debtor in Possession counsel had not reviewed all of the moving papers, and was ill prepared to oppose the motion. The court noted in this hearing that Debtor in Possession had not yet filed a confirmable plan in the span of the year between that date and the filing of the bankruptcy petition, and had not even attempted to file a plan in several months.

Debtor in Possession obtained financing from the Bank of Nebraska to pay their outstanding debt to Bank of the West. In order to obtain financing, however, Debtor in Possession incurred additional debt, and required Frank, Bernadette, and Mary Coelho to incur additional debt on their property. Creditor states that the Bank of Nebraska has simply stepped into the shoes of the Bank of the West, and further encumbered Debtor's assets. In January 2014, Debtor in Possession counsel requested to meet with Creditor to discuss the outstanding balance for the claim.

Debtor in Possession counsel requested that the meeting take place on the Martin Luther King holiday, on January 20, 2014. Creditor and counsel agreed to the meeting and made special arrangements to be present for the holiday meeting. Fifteen minutes prior to the meeting, however, Debtor in Possession counsel informed Creditor that he would not be attending the meeting because he needed to figure out the accounting on the amount owed by Debtor (which Creditor asserts Debtor has been stating for over 15 months). On January 15, 2014, Debtor filed a motion seeking over $93,000 in fees and costs, which Creditor states was not properly served.

REVIEW OF MOTION

Creditor moves the court to dismiss this case. Creditor alleges that Debtor's failure to confirm a plan, inability to propose a confirmable plan, numerous unauthorized payments and violations of court orders, and draining of Debtor's assets by Debtor's counsel justify dismissal under 11 U.S.C. § 1208.

Creditor points out that almost a year and a half has passed from Debtor's Chapter 12 bankruptcy, and Debtor is no closer to a successful reorganization than it was when it first filed its petition. Debtor has received refinancing on their cows, which enabled Bank of the West to exit this bankruptcy; however, Debtors did so at the expense of the Debtor owner's real property, which were further encumbered in order to acquire the loan. Creditor also argues that Debtor has failed to file a plan that is feasible, filing a

first plan that was implausible, and a second plan that included the same deficiencies as the first plan.

Creditor argues that the Debtor's bankruptcy case has been unreasonably delayed and grossly mismanaged. In addition to the delay, it is asserted that Debtor in Possession counsel is "draining the assets of the bankruptcy," as Creditor puts it, by bringing a motion for fees in excess of $93,000.00. Creditor alleges that Debtor in Possession has grossly exaggerated his work on the case, and that counsel's bills were not necessary and beneficial to the estate, as Debtor in Possession has failed to get a plan confirmed for an almost 18-month period. Creditor also states that Debtor in Possession has grossly mismanaged its business, as Debtor in Possession has routinely provided inaccurate and misleading financial data regarding its financial condition. Creditor states that "it has become apparent" that Debtor in Possession has made unauthorized payments and draws in the excess of $80,000 (but does not cite to a source or evidence filed to substantiate this allegation). Creditor also maintains that Debtor in Possession has achieved financing by further encumbering Debtor in Possession property, as well as the property which Debtor's owners have outside of the bankruptcy, creating an even larger burden on Debtor in Possession.

In arguing that the failure to propose a confirmable plan creates an unreasonable delay, and is grounds for dismissal under 11 U.S.C. §§ 1208(c)(1) and 1208(c)(5), Creditor sheds light on the troubled history of Debtor's in Possession failure to achieve confirmation of a Chapter 12 Plan.

Creditor argues that the defects of Debtor in Possession's Plans, and its inability to address these concerns and file complete, confirmable, and accurate Plans, indicates that the court should deny Debtor in Possession leave to amend and file new, revised plans.

Though afforded additional time, the Debtor in Possession failed to file an opposition to this Motion. Because this court does not merely grant unopposed motions, the merits of this Motion must be considered.

DISCUSSION

Under 11 U.S.C. § 1208(c), on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including--

> (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees and charges required under chapter 123 of title 28;
> (3) failure to file a plan timely under section 1221 of this title;
> (4) failure to commence making timely payments required by a confirmed plan;
> (5) denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
> (6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1230 of this title, and denial of confirmation of a modified plan under section 1229 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan;

(9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and

(10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

The provisions of section 1208(c) are similar to sections 1112(b) and 1307(c), which govern dismissal of chapter 11 and chapter 13 cases, respectively. 8 COLLIER ON BANKRUPTCY ¶ 1208.03 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) However, section 1208(c) only authorizes dismissal of the case because the chapter 12 debtor is a farmer, and the court may not convert a case involuntarily to a case under chapter 7 even if the court believes that doing so is in the best interests of creditors. *Id.*

DISCUSSION

Given the serious nature of the pattern of the misconduct and bad faith actions undertaken by Debtor, as alleged by Creditor above, the court set the matter for a further briefing after the initial hearing.

The Debtor-in-Possession filed an Amended Plan, addressing many of the issues laid out in the motion and opposition to confirmation. No Opposition has been filed to the Motion to Confirm the Amended Plan.

Movant's points are all well taken and substantiated by not only by the evidence but the conduct of the Debtor in Possession, its principals, and counsel in this case. The court would be well justified in dismissing this case, or if it were a Chapter 11, converting it to a case under Chapter 7 or appointing a trustee who would properly exercise his or her fiduciary duties to the estate.

This court has addressed in greater detail in connection with the fee application by counsel and the motion to confirm the Amended Chapter 12 Plan the legal services provided by counsel for the Debtor in Possession, the strategy employed by the principals of the Debtor in Possession, and the lack of focus on what it means to be a fiduciary as the debtor in possession and general partner of the debtor who serves as the debtor in possession. That conduct can be properly addressed in connection with the motion for fees and the confirmed Chapter 12 Plan. It should not be forgotten that the court does have the power to convert this case to one under Chapter 7 "upon a showing that the debtor has committed fraud in connection with the case." 11 U.S.C. § 1208; *Reinbold v. Dewey County Bank*, 942 F.2d 1304 (8th Cir. 1991), cert. den. 503 U.S. 946 (1992); *In re Graven*, 936 F.2d 1304 (8th Cir. 1991). In denying this motion without prejudice, the court makes no ruling that the Debtor and its principals have, or have not, committed fraud during this case. As discussed in connection with the fee application, it could be as heinous as fraud, or "merely" hard headed principals who demand the attorney engage in certain conduct irrespective of the law, or inexperienced lawyering.

In considering whether to convert or dismiss cases under other reorganization Chapters, the court consider what is in the best interests of the creditors and estate. See 11 U.S.C. §§ 1112(b)(1) and 1307(c). Though Congress did not include that language in 11 U.S.C. § 1208(c), under the facts of this case the Debtor in Possession's desire to proceed with the Amended Chapter 12 Plan does coincide, in this court's opinion, as to what is in the best interests of creditors and the estate.

The Chapter 12 Plan being confirmed in this case provides for a 100% payment of all claims, including general unsecured claims with 5% per annum interest. The Plan provides that one of the general partners, Mary Coelho, is to liquidate some of her real property to help fund the Plan. While not perfect (in the sense that all creditors are not being paid today), the Chapter 12 Plan "straight jackets) the Debtor and its general partners into a federally supervised payment of these claims.

Further, the court does not purport to modify the rights of any of the creditors with respect to third-parties, such as the general partners, who are also liable for the debts of the Debtor partnership. Though the Debtor in Possession and its counsel misrepresented in the state court proceedings and in this court that the general partners and their assets were included in this bankruptcy case (going so far as to list on the petition and pleadings that the general partners were "aka's" of the Debtor partnership), this court has made it clear that the only debtor before this court is Coelho Dairy, a general partnership.

The court is confirming the Debtor in Possession's Amended Chapter 12 Plan that provides for the relatively prompt payment of creditor claims. If the court were to force the Debtor out of bankruptcy, it would most likely result in another case being filed and there being further extensive delay – which would not benefit either the Debtor or Creditors with respective an any legitimate legal and financial interests they have.

Therefore, the court denies the Motion without prejudice. If the principals of the Debtor and counsel fail to prosecute the confirmed plan in good faith, any party in interest remains free to assert any and all rights and claims in this case as appropriate.

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 by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

12. 12-92570-E-12 COELHO DAIRY
TOG-36 Thomas O. Gillis

CONTINUED AMENDED MOTION FOR COMPENSATION FOR THOMAS O. GILLIS, DEBTOR'S ATTORNEY 2-20-14 [417]

CONT. FROM 3-6-14

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, all creditors, parties requesting special notice, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 14 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

The court's tentative decision is to grant the Motion for Compensation for Thomas O. Gillis for attorneys' fees in the amount of $44,742.75. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Thomas O. Gillis, counsel for Debtor in Possession Coelho Dairy, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of September 15, 2012 to December 31, 2013. The order of the court approving employment of counsel was entered on November 1, 2012. Dckt. No. 47. The total fees requested, as stated in the Supplemental Pleadings Counsel now seeks to recover $88,120 in fees ($75,975.00 attorneys' fees and $12,145.00 paralegal fees).

The court allows attorneys' fees in the total amount of $44,742.75.

Description of Services for Which Fees Are Requested

In his Motion for Compensation, Counsel reports that the below tasks were performed in the prosecution of this case.

Case Administration: Counsel states that he spent 42.35 hours on this task. Counsel coordinated the case and engaged in "compliance activities," including reviewing deadlines, creditor requests, and case management.

Motions, Responses, and Objections: Counsel states that he spent 90.70 hours on this task. Counsel prepared the Statement of Financial Affairs and Schedules, status reports, all motions, including use of cash collateral,

motions to approve settlement of claims. Counsel also filed oppositions to responses. Counsel states that a critical issue was defending a motion for relief from the automatic stay, and the dismissal of case. Counsel states that he also filed motions to approve loans of Debtor-in-Possession and other motions outlined in Exhibit B.

Court Hearings: Counsel spent 41.65 hours in this category of tasks. Counsel states that attended multiple hearings during the application period.

Meeting with Clients and Opposing Parties: Counsel spent 39.60 hours on this task. Counsel met with clients and opposing parties. Counsel also arranged a private mediation with the plaintiff of a civil case, Black Rock Milling.

Fee/Employment Applications and Objections: Counsel spent 8 hours on this category of work performed. Counsel prepared the application seeking authority for employment, and all supporting documents, including the order authorizing employment. Counsel also prepared the Application for Attorney Fees and Expenses.

Plan: Counsel spent 12 hours on this task. Counsel prepared and filed a Chapter 12 Plan and attended the plan hearing.

Written and Telephone Correspondence: Counsel spent 42.45 hours on this category of tasks. Counsel prepared various emails, called creditors, and Debtor-In-Possession numerous times.

Postage, Supplies, and other Costs: Counsel spent 6.45 hours on this task. Counsel states that he supplied copies, postage, and other costs for the duration of the case, and that a filing fee was advanced.

REVIEW OF THE MOTION AND CASE HISTORY

This Chapter 12 case has had a long and tortured history – for Creditors, Debtor in Possession, and the General Partners. FN.1. The court questions whether Counsel's services have generated much benefit to the estate in the good faith prosecution of this case, and whether Counsel's services were actually beneficial to the Debtor in Possession and the estate, and were reasonable and necessary to the administration, again, in the good faith prosecution of this case. It may well be that the principals of the Debtor and serving in their fiduciary capacity as Debtor in Possession had a hard headed, it's my way or the highway, burn through as much money as you can in legal fees because I would rather it go to you than the creditor approach. However, to the extent that counsel engaged in such activities, which do not meet the requirements of 11 U.S.C. § 330, counsel cannot expect to be paid for dancing to that client's tune.

FN.1. The general partners include Mary Coelho, an elderly woman who is the trustee of a family trust and whose assets have been given to secure post-petition loans obtained by the Debtor in Possession. At one point Counsel described Mary Coelho as an elderly woman who did not understand that she had given some of her assets pre-petition to secure loans obtained from Bank of the West, making vague allegations that Bank of the West had taken unfair advantage of her. Then, after this court granted Bank of the West relief from the

automatic stay due to the Debtor in Possession's abject failure to prosecute the case, Mary Coelho "filed" her own bankruptcy case under Chapter 11. Actually, it was Counsel for the Debtor in Possession who attempted to secretly file the case for her, using his electronic filing privileges. This resulted in counsel being the counsel of record for Mary Coelho, a general partner, as well as the Debtor in Possession in this case. The court continues to be concerned that Counsel and the other general partners are taking unfair advantage of the elderly Mary Coelho who, as represented by counsel, could not understand that she was giving collateral to Bank of the West pre-petition.

A review of the court docket reveals that the Chapter 12 case has had a prolonged, winding history, in which not much has happened by way of achieving the reorganization of the Debtor business, an organic dairy located in Modesto, California. Debtor filed its bankruptcy case on September 28, 2012. The Petition states that Coelho Dairy, a general partnership, is also known as Frank R. Coelho (one of the general partners) and does business as Bernadette Coelho (wife of Frank Coelho). Dckt. 1. This is clearly false and demonstrates either an intentional effort by Counsel to mislead the court and creditors or a lack of basic understanding of bankruptcy law.

Almost a year and a half has passed from the commencement of this case and Debtor in Possession has not yet confirmed a Chapter 12 Plan so that Trustee can begin disbursing funds to creditors. The inability of the Debtor in Possession to propose a confirmable plan; protracted wrangling over certain claims (such as Debtor in Possession's troubled attempts at resolving the claims of Creditor Black Rock Milling, which included agreed a settlement agreement that which Debtor in Possession allegedly breached (¶ 7, Motion to Dismiss, Dckt. No. 403)); denials of requests to incur debt; and unsuccessful attempts to defend against Motions for Relief of Automatic Stay, are all signs that Debtor in Possession Debtor has mismanaged or ineffectively managed this case and unreasonably delayed in proposing a reorganization plan. In fact, two creditors, Bank of the West and Black Rock Milling, both filed Motions to Dismiss this bankruptcy case pursuant to 11 U.S.C. § 1208(c).

Review of Specific Matters and Rulings of the Court

When the Debtor in Possession sought an order providing for the initial use of cash collateral, the Motion was clearly deficient. As stated by the court,

> "The Motion does not provide any allegations as to how much cash collateral is to be used, the source of the cash collateral, the use to which the cash collateral is to be made, the creditors having interests in the cash collateral, the benefit to the estate in using the cash collateral, and the replacement assets to be generated by the use of cash collateral.
>
> Because a dairy herd is at issue in this case, and to avoid otherwise needless suffering for the animals, the court has reviewed the additional pleadings filed by the Debtor in Possession."

October 10, 2012 Civil Minutes, Dckt. 35. In the Civil Minutes the court further notes the defects in the Motion For Authorization to Use Cash Collateral, including the failure to provide a budget for more than a two-week period. Fortunately for the Debtor in Possession, the Bank of the West (whose cash collateral was to be used) consented to the use of cash collateral pending further hearing.

Pursuant to the Stipulation with Bank of the West, the further use of cash collateral was authorized by the court. November 14, 2012 Civil Minutes, Dckt. 55. However, at the hearing it was disclosed to the court that the expenses shown in the written stipulation included some expenses which the Debtor in Possession was not actually paying, and the expenses had to be corrected at the hearing.

By June of 2013, Bank of the West had so tired of the Debtor in Possession's and counsel's inability to move a plan forward or obtain promised refinancing, it would no longer consent to the use of cash collateral. Though the Debtor in Possession and Counsel continued to allow the case to languish, the court authorized the use of cash collateral, stating,

> "Bank of the West appeared at the hearing and stated that the Bank did not consent to the further use of cash collateral. The Bank offered no proposal as to how its collateral, a dairy herd, could be cared for if the Debtor in Possession could not continue to use the cash collateral to care for the herd and generate additional cash collateral. Implicit in the Bank's response was an acknowledgment that the court would order the use of cash collateral given the Bank's failure to consent to further use or provide an alternative for the caring for of the herd.
>
> The Debtor in Possession has a confirmation hearing set for August 22, 2013, and requested that the use be permitted through that date. The Bank argued that at the point the court no longer authorized the use of cash collateral, the Bank would at some point file a motion for relief. Then after the hearing on the Motion (which requires at least 14 days' notice), then the bank would go to state court to obtain an order for possession of the herd. Bank of the West offered no explanation as to how the dairy cows would fair if they were not feed, milked, or cared for during the at least 30 days it would take to obtain a possession order from the state court.
>
> The dairy herd consisting of living creatures who are unable to care for themselves, the court will not allow them to go uncared for through the recalcitrance of the Bank and no action on its part to protect its collateral at this juncture.
>
> **The Debtor in Possession offers no explanation as to how it was "surprised" at the cash collateral authorization expiring on June 30, 2013, or why it could not file its motion until 4:30 p.m. the evening before the hearing, notwithstanding counsel for the Debtor in Possession having confirmed with the**

Courtroom Deputy a week earlier that his "emergency" motion could be heard on June 26, 2013.

The Debtor in Possession delaying filing the Motion until 4:30 p.m. **reflects a lack of respect to the creditor, opposing counsel, parties and attorneys in unrelated matters, and the court. Counsel created an "emergency"** by failing to file his pleading earlier, diverting the court from being available to address other matters. **This belated filing reflects a belief that judicial resources exist solely for the convenience of counsel and his client – damned be any other person.**

...

The court finds it necessary and proper to order a prospective corrective sanction. First, Thomas Gillis and any attorneys in his firm, shall file any further cash collateral motions in this case providing the at least 28 day notice as required by Local Bankruptcy Rule 9014-1(f)(1). If counsel fails to properly prosecute this case and timely file such a motion, and instead must obtain an order shortening time, seek emergency relief, or use the Local Bankruptcy Rule 9014-1(f)(2) 14 day notice procedure, the court shall order Thomas Gillis to pay $2,000.00 in corrective sanctions. Merely by properly prosecuting his case and timely filing a Motion, Mr. Gillis can avoid the imposition of this corrective sanction."

June 26, 2013 Civil Minutes, Dckt. 161, Emphasis added. Both orally and in the written civil minutes the court has made it clear to Counsel that is prosecution strategy or the legal abilities of his office to prosecute the case were not to the minimum level for an experienced reorganization attorney.

On August 16, 2013, Counsel filed an Amended Schedule A which erroneously listed real property owed by Mary Coelho (the elderly general partner trustee) as being property of Coelho Dairy a general partnership and property of the bankruptcy estate. Dckt. 217. As was explained to the court by the warring parties, this was done to deter a creditor in its efforts to enforce its rights against Mary Coelho as a general partner.

On August 8, 2013, Counsel filed a pleading entitled "Objection to Claim of Black Rock Milling. Dckt. 191. As addressed by the court, this "objection" was nothing more than a sham pleading which alleged no basis for the objection. The court stated,

"An objection to claim must be in writing and filed with the court. Fed. R. Bank. P. 3007(a). The objection must be sufficient to overcome the prima facie evidence of the claim. Here, the grounds for the objection are stated to be, Case Number: 2012-92570 Filed: 8/22/2013 Doc # 230

'Debtor her [sic.] objects to the allowance of Claim #24 held by Block Rock Milling on the grounds that the

> amount claimed is not owed because the interest was over charged and some charges not occurred.'
>
> Objection, Dckt. 191. The court cannot tell if the objection is to $1.00 of the claim or the entire claim. The court and creditor are left to guess as to the extent of the relief requested. The "testimony" provided by Frank Coelho, one of the partners of the Debtor, is merely a recitation of the "grounds" alleged in the motion. This demonstrates that he has no actual knowledge of this claim or what the Debtor in Possession asserts is the correct amount of the claim."

August 22, 2013 Civil Minutes, Dckt. 230. Again, this demonstrates legal practice either intentionally being done to cause the parties and court to waste time and money, or a legal practice by counsel's office below that of experienced reorganization counsel.

The Debtor in Possession and Counsel negotiated and sought approval of a compromise with Black Rock Milling. Motion, Dckt. 171, Filed July 22, 2013. The Motion states that the settlement calls for a $50,000 down payment by May 10, 2013 (the motion being filed two months after the down payment date) and then payments of $3,400.00 for sixty months.

The Settlement Agreement, Dckt. 174, required that Frank and Bernadette Coelho (not the Debtor) make a $50,000.00 initial payment by May 10, 2013, and then for Frank and Bernadette Coelho make monthly payments to Black Rock Milling. The Motion caught the objection of Black Rock Milling, stating that the default of Frank and Bernadette Coelho in failing to make the payments thereunder. The attorney for Frank and Bernadette Coelho (personally) listed on the Settlement Agreement is Thomas Gillis, the counsel for the Debtor in Possession in this case (who also was the "secret attorney" for Mary Coelho, another of the general partners).

The court denied the Motion to Approve the Compromise, stating,

> "Here, the Debtor fails to provide sufficient information in the pleadings for the court to determine if the proposed settlement agreement is reasonable. Debtor has not provided any legal authority or discussion regarding the settlement agreement.
>
> Furthermore, Debtor failed to state that it was already in material breach of the settlement agreement, by failing to make the initial $50,000 payment by the May 10, 2013 deadline and three additional monthly payments of $3,400.00. The court does not find this to be a non-material breach."

August 22, 2013 Civil Minutes; Dckt. 234. Again, this demonstrates legal practice either intentionally being done to cause the parties and court to waste time and money, or a legal practice by counsel's office below that of experienced reorganization counsel.

The Debtor in Possession also sought to obtain post-petition financing to pay Black Rock Milling under the above settlement (for which the Debtor in Possession was not a party and had not agreed to pay the settlement). Motion to Incur Debt, Dckt. 167. The "borrowers" identified in the Motion were Frank Coelho (a general partner of the Debtor) and Bernadette Coelho, his wife. The Debtor in Possession was not seeking to borrow the money and no property of the estate was being given to secure the loan.

On its face, the Motion to Incur Debt continued to perpetuate the myth created by Counsel and the principals of the Debtor that somehow the principals and the general partners were included in the bankruptcy case. 11 U.S.C. § 364 does not provide the court with a basis for authorizing loans to be entered into by non-trustee's, debtors in possession, or Chapter 13 debtors.

In denying the Motion to Incur Debt (by Frank and Bernadette Coelho), the court stated,

> "A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). In re Gonzales, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. Id. at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).
>
> Here, Debtor has not provided a copy of the agreement to the court as Federal Rule of Bankruptcy Procedure 4001(c) requires. Additionally, it does not appear that Debtor is the entity seeking to enter into the loan, as Debtor states it is Frank & Bernadette Coelho who are borrowers on the loan, rather than Coelho Dairy, the Debtor in this case.
> ...
>
> The court is unsure why it is being asked to approve a loan being obtained by Frank Coelho and Bernadette Coelho. Coelho Dairy, the Debtor in Possession is not borrowing the money. Coelho Dairy is a partnership, for which Frank and Bernadette Coelho, Mary Coelho, and Mary Coelho, Trustee of the Frank R. Coelho Living Trust are partners. Statement of Financial Affairs, Answer to Question 21. Dckt. 12 at 37. Furthermore, the Debtor in Possession does not address the reasonableness of incurring debt. As the court denied the Motion to Approve Settlement Agreement, the loan does not appear necessary at this time. Based on the foregoing, the motion is denied."

August 22, 2013 Civil Minutes, Dckt. 236. Again, this demonstrates legal practice either intentionally being done to cause the parties and court to

waste time and money, or a legal practice by counsel's office below that of experienced reorganization counsel.

At the August 22, 2013 Status Conference, the court addressed with Counsel the false statements in the Schedules and Petition in listing non-debtors as being jointly in this case with the Debtor Partnership, listing that the Debtor Partnership does business as the real person general partners, and listing assets not owned by the partnership (but owned by the individual partners) as partnership assets which is property of the estate. August 22, 2013 Status Conference Civil Minutes, Dckt. 245; Order for Debtor in Possession to correct erroneous statements under penalty of perjury, Dckt. 251. Again, this demonstrates legal practice either intentionally being done to cause the parties and court to waste time and money, or a legal practice by counsel's office below that of experienced reorganization counsel.

Ultimately, the court set for an evidentiary hearing the Bank of the West Motion for Relief From the Automatic Stay. August 22, 2013 Civil Minutes, Dckt. 249. The court conducted the final hearing on the Motion for Relief From the Automatic Stay on October 11, 2013. The court's Findings of Fact and Conclusions of Law were stated on the record, for which a transcript is found at Docket Entry No. 337. The court's findings and conclusions include the following:

A. "What I was presented with was the cause being that these debtors have had or these debtors, this debtor in possession, the partnership, has been in bankruptcy for over a year, has tried various things, has not been able to move a plan forward and that while there was arguing about not providing financial reports and the counter arguments back and it turned out to be much of what I suspected and why I have the testamentary hearing. What also comes back is some of the key information provided, the comparison of the actual to the budget was inaccurate." Pg. 4:24-25, 5:1-9.

B. "Now, I do have to say with respect to Mr. Coelho, he strikes me as being a very hard working man. He's putting his sweat, time, blood into the dairy. I did not see or conclude from the evidence presented that he had an evil motive, that he was running some type of scam, that he was trying to intentionally manipulate the data and the information. But however his business office operation is set up, it generated bad data for the budget to actual comparisons that were prepared, making it appear that this debtor in possession was operating profitably." Pg. 6:13-23.

C. "Another factor that comes into play, Mr. Gillis, you may have heard me in court yesterday going after a couple of attorneys and trustees, and the same is equally true for debtors in possession, they are fiduciaries of the bankruptcy estate. And when a Chapter 11 or Chapter 12 is filed or even a Chapter 13 in which the debtor has a business, it can't just be we continue our business operations the way we always did it. One of the key problems here is information that was left out of those comparison reports was the fact that Mr. Coelho was taking

draws, was the fact that the mother Mary Coelho was getting paid money. Now, draws, there's different ways to define it." Pg. 7:8-20.

D. "But effectively what the record shows me, and again, I'm not saying that Mr. Coelho did this with an evil motive, but these draws were taken off the books. They don't really show up in the cash analysis and what the -- Mr. Coelho's sister [working as the bookkeeper for the Debtor in Possession] would say, well, yeah, they don't show up as an expense because they are not an expense. They are a draw. Accounting wise you would not show it as an expense. The problem is in the bankruptcy case you've got to account for the money and here that led to misleading reports." Pg. 8:3-12.

E. "So Mr. Gillis, unfortunately, that weighs more heavily on your client's side. Again, he's the fiduciary as the principal. When I say your client, again, the partnership. And having the general partner fulfilling the duty of the fiduciary can't just decide I'm not going to follow the judge's order. I'm going to pay myself money." Pg. 9:22-25, 10:1-3.

F. "Also, I did not hear any good explanation as to why Mary Coelho was getting paid money. The fact that it's trying to be used -- the excuse of well, yeah, we just gave her some money to pay some of her expenses because she let -- the cows for the partnership that she as a trustee of the family trust is one of the general partners didn't charge rent. Again, fiduciary of the estate." Pg. 10:19-25, 11:1.

G. "Again, Mr. Gillis, I'm presented with evidence, Mr. Coelho's Discover Card being paid and he's testified sure, it was for partnership expenses. I don't have any evidence of that. All I have is his personal card. I've got Mary Coelho's personal credit card being paid. Life insurance, prior to some explanation of that with respect to the bank said we had to have it. On the other hand, do I see it in the budget? Is there a line item for it? Maybe I don't get as excited about that with the bank's complaining if that were the only thing, but it's not. And then satellite T.V. and other expenses." Pg. 11:11-21.

H. "It just strikes me I have a debtor in possession paralyzed in bankruptcy just wanting to continue to operate the way it was, unable the make the hard decisions that one has to make to have a successful reorganization." Pg. 13:2-6.

I. "I would have expected to see from this debtor in possession clear, accurate financial statements that say, Judge, this is exactly what we really did...And especially in light of when you get the movant's papers that say these aren't consistent. The check register doesn't match to the comparison. We can match the check register to the bank statement, but no, and I just get this very ephemeral testimony about, oh, yeah, we're profitable. The company will be profitable in the future. I had the

accountant come in for which I have not issued an order authorizing employment saying sure, no problem, Judge. Everything else being equal these guys can be profitable." Pg. 13:17-25, 14:1-5.

J. "And again, this debtor in possession made unauthorized payments from cash collateral, violated the order I had issued thereon in paying draws, in paying personal expenses of the partners. And the argument can be made and contention in light of everything, Judge, it's not a big number. It's only 50, 60, $80,000. That's a big number and it's symptomatic of a debtor in possession that does not understand what it is to be a fiduciary." Pg. 17:5-13.

K. "I'm at a loss as to how I have a professional [accountant] that's employed by the debtor in possession that one, has not been approved by the court; two, has not had his fees approved; and three, has been paid." Pg. 19:5-8.

L. "A note I put here and I'm going to mention it and again, this may help a debtor in possession and the general partners figure out what they are going to do and it may be they look at it and decide we've got other assets here that we shouldn't sink into this, maybe they should. But what it reminded me of was going back to the 1960s and watching Mohammed Ali box and doing the rope dope and just leaning back and not getting hit and my sense as I listen to this unfold was that this debtor in possession has been rope [a] doping for a year and not engaging in any real fight, not engaging in any real organization and just rope [a] doping to try to continue to maintain the status quo." Pg. 23:24-25, 24:1-11.

Transcript, Dckt. 337. While the court is not surprised when a debtor comes into a case with pre-petition poor records, bad financial practices, a misunderstanding of the state law fiduciary duties of a general partner, a poor understanding of legal significance of a partnership, and the relationship between a general partner, the general partner's assets, and assets of the partnership, there should be no such post-petition misunderstanding when the debtor in possession is represented by experienced reorganization counsel. Looking at the conduct of the Debtor in Possession under the watch of Counsel, again, this demonstrates legal practice either intentionally being done to cause the parties and court to waste time and money, or a legal practice by counsel's office below that of experienced reorganization counsel.

Only after being in the case for more than two years, Bank of the West's patience being exhausted, and the Debtor in Possession failing in its fiduciary duties and good faith prosecution of this case on many levels, and Bank of the West obtaining relief from the automatic stay did the Debtor in Possession and the general partner get serious about finding a replacement loan for Bank of the West (apparently having decided that it could not restructure the debt through a plan in this Chapter 12 case or a Chapter 11 case). December 12, 2013 filed Motion to Incur Debt. Dckt. 365.

As discussed by the court in connection with the confirmation hearing on the latest Amended Chapter 12 Plan, the Debtor in Possession, Counsel, and the general partner continue to ignore or not understand the fiduciary duties of the general partner and Debtor in Possession, or the difference between the property of the estate, property of the partnership, and property of the general partner. In his declaration in support of confirmation, Frank Coelho, the general partner, states under penalty of perjury that:

A. the dairy business is "his,"

B. he will operate "my organic dairy business during the term of my Chapter 12 Plan...,"

C. the Chapter 12 case was filed because it "was impossible for me to repay the debt owed to my creditors and remain in business...,"

D. "When I started my bankruptcy my cows..."

E. The income shown on the financial projections is "the income that I will receive during the five year term of the Plan...,"

F. "I will be able to make the payments required by the Plan...," and

G. "I will require five years instead of three years to consummate an effective plan."

Declaration, Dckt. 426.

The court also notes that the five year financial projection, Exhibit C, Dckt. 428, is not a five year financial projection, but merely a one year budget which has been copied four times, with the dates changed on the four copies to make it appear that it is a "five year financial projection." Each monthly income and expenses item for each month, for that month during the five years of the "projection" are identical. Again, this demonstrates legal practice either intentionally being done to cause the parties and court to waste time and money, or a legal practice by counsel's office below that of experienced reorganization counsel.

Review of Proposed Chapter 12 Plans

First Proposed Chapter 12 Plan

The Debtor in Possession filed its first motion to confirm its Chapter 12 Plan on December 27, 2012. Unless the court grants an extension, the debtor must file a plan of repayment with the petition or within 90 days after filing the petition. 11 U.S.C. § 1221. The Debtor in Possession filed this plan 88 days before the deadline set by 11 U.S.C. § 1221. The Motion was opposed by the Creditor Black Rock Milling, Bank of the West, and the Chapter 12 Trustee, Jan Johnson. The Plan was opposed on the basis that Debtor in Possession failed to carry its burden of showing that the plan complies with 11 U.S.C. § 1225(a)(6).

With respect to the first proposed plan, the Trustee and responding Creditors asserted that although Debtor in Possession proposed to pay all of the unsecured creditors 100% of its claims by paying a lump sum into the plan on or before month 60 from a refinance of his real property, but there was no evidence before the court as to what real property will be refinanced in order to obtain the funds, when such loan will be taken out, or if the Debtor Plan Administrator would be able to qualify for that large of a loan.

The Trustee also asserted that the claim of Blackrock Milling was estimated at $120,000.00 in the plan, but the Creditor filed a proof of claim in excess of $340,000.00. The plan stated that if any claim is more than the estimated amount, the re-finance loan will be increased to cover the excess amount. The Trustee expressed serious concerns as to whether the Debtor Plan Administrator would be able to comply with the plan terms if the creditors claim is in fact $340,000.00. The Motion to Confirm Plan was denied, and the Chapter 12 Plan was not confirmed. March 28, 2013 Civil Minutes, Dckt. No. 105.

In denying confirmation, the court noted several defects. First, that Counsel had failed to property serve the Internal Revenue Service and the United States of America. Second, that Counsel had failed to comply with the minimum pleading requirements of Federal Rule of Bankruptcy Procedure 9013. Counsel failed to provide the minimal evidence necessary to support confirmation. *Id.* FN.2.

FN.2. In arguing that the hearing on confirmation should be continued the Debtor in Possession, through Counsel, represented that its is in the "final stages" of refinance of the Bank of the West Loan and that its dispute with Black Rock would be resolved by May 1, 2013. *Id.* Both of these representations grossly missed the mark.

Second Proposed Chapter 12 Plan

Debtor in Possession filed a Motion to Extend Time on April 29th, and the Motion was granted with Debtor in Possession ordered to file its Amended Plan on or before June 21, 2013. Civil Minute Order, Dckt. No. 136. On June 21, 2013, Debtor in Possession once again filed a motion for confirmation of their modified plan with the court.

In this second instance of attempted confirmation, Debtors in Possession's Chapter 12 Plan was again opposed by several parties in interest, and the Motion was Confirm was denied on multiple grounds. Civil Minutes, Dckt. No. 247. Creditor Black Rock Milling Co., LLC ("Black Rock") objected to the motion to confirm on the grounds that Debtor in Possession breached a Settlement Agreement, and that because of the breach, Black Rock was now entitled to full repayment of its outstanding debt. Dckt. No. 187.

Black Rock also asserted that the Amended Plan contained minimal changes from the original plan which was denied. Black Rock argued that Debtor in Possession intended to continue to operate the business without any significant changes to the dairy operation and without refinancing, and that Debtor in Possession has not shown evidence that it will be profitable in future years. Lastly, Black Rock made the serious allegation that Debtor in

Possession failed to identify all of its assets in the bankruptcy schedules, including the 32.89 acre parcel on Claribel Road, Modesto, California, owned by Frank and Bernadette Coelho. Black Rock asserted that this shows bad faith on the part of the Debtor.

Creditor Westamerica Bank ("Westamerica") also opposed the plan on the grounds that it suffers from the same objectionable infirmities and the original plan, which was denied. Westamerica argued that the plan was not feasible as Debtor in Possession business operations do not generate sufficient income to fund the proposed payments to its creditors under the amended plan.

Creditor Bank of the West ("BOTW") also opposed the plan on the grounds that the plan was not feasible as Debtor in Possession had not provided any sufficient evidence to support its overly optimistic budget projections, and that Debtor had incurred significant liabilities that could affect its cash collateral. BOTW stated that it has become aware that Debtor in Possession accountants had not been paid an were owed $8,800 for the preparation of records up to December 31, 2012, a past due silage bill of $11,000, breach of settlement agreement with Black Rock, and that Debtor in Possession had only paid $2,208 in total administrative expenses. BOTW also stated that the plan included an unnecessary and uncertain balloon payment that was contingent on future financing.

The court noted in its ruling on the Motion to Confirm the Amended Plan that Debtor's in Possession plan relied on a Motion for Approval of Compromise and a Motion for Approval of Post-Petition Financing, both of which had been denied. As the plan is based on these motions being granted, the plan was not feasible. The court also determined that the evidence Debtor in Possession submitted in support of confirmation was insufficient.

Debtor in Possession provided the court with yearly financial statements 2009-2012, which were illegible. The Debtor in Possession also provided the court with a Typical Annual Profit and Loss Projection intended to show that the plan is feasible. Exhibit C, Dckt. 149. The court was unable to determine even if the one month "projection" was at all plausible. The court noted that Mr. Coelho did not provide any information on how he determined these projections. Declaration, Dckt. 148. The court also stated that the lack of providing even minimal competent evidence was an indication that the plan has been proposed and prosecuted in bad faith. August 22, 2013 Civil Minutes, Dckt. 247.

Again, this demonstrates legal practice either intentionally being done to cause the parties and court to waste time and money, or a legal practice by counsel’s office below that of experienced reorganization counsel.

The court ultimately determined that the Plan did not comply with 11 U.S.C. § 1225 and denied confirmation of the Plan.

Third Amended Plan

Debtor-in-Possession filed a third amended plan on February 10, 2014, that was subsequently withdrawn on February 20, 2014, before a hearing was conducted.

Forth Amended Plan

Debtor-in-Possession filed a fourth amended plan on February 24, 2014, which is currently pending before this court.

The inability to confirm a plan under 11 U.S.C. § 1225 is troubling in the context of Counsel's instant Motion for Compensation. Debtor in Possession's counsel has filed multiple plans that have not complied with provisions of the Bankruptcy Code. It is clear that Debtor-in-Possession's second plan failed to address the concerns raised by the Trustee and various creditors during the confirmation hearing of the first proposed plan. Debtor in Possession's repeated filings and alleged reporting of inaccurate information, violation of cash collateral orders, and failure to comply with a settlement agreement with Creditor Black Rock suggests a pattern of evasive, dishonest behavior in which Debtor in Possession has manipulated the Bankruptcy Code to improper ends.

This implicates the conduct of Counsel and the request for attorneys' fees in assisting the Debtor in Possession in its actions in this case. Counsel is asking for a total of $91,565.00 as compensation for services rendered by his law firm, and expenses and costs of $1,725.75. This is an extremely large amount for case in which a Plan has not been confirmed and there has been no real contested litigation. Counsel states that 282.20 hours of professional services have been rendered, in a case that has gone nowhere in a slow, almost glacial pace.

The only benefit that the court can discern in Counsel's prosecution of the case is Debtor in Possession continuing to use cash collateral in supporting its business as usual operations. Even the operation of the business by the Debtor in Possession has been questioned, as Debtor in Possession is accused of crafting overly optimistic budget projections, and incurring significant financial liabilities that have effected its use of cash collateral. Counsel's work seems to have generated very little benefit to the estate, and instead has been directed to retaining possession and control of the estate's business without any restructuring or prosecution of the case by the Debtor in Possession and its principals.

UNITED STATES TRUSTEE'S OPPOSITION TO THE MOTION FOR COMPENSATION

The United States Trustee filed Opposition to the Motion for Approval of Compensation and Reimbursement for Costs on March 3, 2014. Dckt. No. 445.

In the Motion, the United States Trustee ("UST") first states that the Notice of the Motion is confusing. The UST points out that On February 20, 2014, Notice of the Motion, Dckt. No. 418, was filed advising in the body that a hearing would be held on February 13, 2014. While the Notice of Hearing's caption appears to provide the actual date set for hearing of March 6, 2014, that hearing date is 14 days after the filing of the papers. In violation of Local Rule 9014-1(f)(2), which requires 28 days' notice of a hearing to require written opposition, the Notice requires written opposition be filed on the very day the Notice was filed.

Second, the UST argues that representation appears inadequate. The UST notes that Counsel in this case is requesting fees of $91,565 for a case

without a confirmed plan and for which attempts to confirm a plan have been inadequate. The UST expresses the same concerns outlined by the court and creditors in previous motions to confirm (discussed above), regarding the inability of Debtor to confirm a feasible plan under 11 U.S.C. § 1225. The UST also notes that on February 24, 2014, a fourth plan was filed. Dckt. No. 427. While refinancing to obtain a lump sum has been removed from the Plan's treatment of Class 5 unsecured claims, the Plan offers no evidence to support that "there is about $192,000 remaining in loan proceeds from Nevada State Bank." The UST speculates that the court will still be unable to determine even if the one month "projection" is at all plausible as Mr. Coelho does not provide any information on how he determined the projections in support of the plan. Counsel continues to ignore providing even minimal competent evidence.

Third, the UST argues that counsel and paralegal time is duplicative. The UST argues that time appears to be duplicative for any task wherein a paralegal is involved. In every time entry for which a paralegal is associated, the paralegal is stated to have completed the very same task that Counsel did, providing no confidence that either the attorney's or the paralegal's time is accurate. The UST reviews wide swaths of entries that it alleges have exactly the same description and time charged by both the attorney and the paralegal, as well as entries that are suspect because they y have the same description for both the attorney and the paralegal, although the time attributed is different.

Fourth, the UST argues that many time entries appear to be merely standardized or approximations (e.g., every status conference attendance appears to have been charged at 1.5 hours).

Fifth, the Trustee alleges that Counsel appears to duplicates entries, stating that there are particular entries that appear to have been charged twice and possibly three times on the same date. Sixth, the UST states that Counsel is vague about what he has done and charges for pre-petition services, offering entries that are too vague and nondescriptive to be deemed reasonable or necessary.

The issues raised by the United States Trustee cannot be underestimated, as these concerns may not only result in the reduction of fees, but disallowance of the entire amount of fees that have been requested by Counsel. Because the UST's opposition was filed two days before the hearing date on this Motion (which may be partly be due to Counsel's confusing Notice of Hearing filed for the Motion), the court allowed Counsel the opportunity and additional time to review the UST's objection, and file responsive pleadings if necessary.

COUNSEL'S RESPONSE

Counsel states that on his corrected fee application, he has deleted the time on each of the entries the U.S. Trustee referenced. Counsel also states that his time entries were not standardized but rather reduced from his "real fees" which he states would have been more than $147,000.00.

Counsel also states that he has put an explanation on the entries that the U.S. Trustee questioned in his corrected fee application.

In what counsel calls his "corrected fee application" is in fact two unauthenticated exhibits labeled "Amended itemized Entries by Date" and "Amended itemized Entries by Category." Exhibits, Dckt. 474.

The Summary provides the following:

Category	**Detail**	**Attorney Hrs.**	**Amount**	**Paralegal Hrs.**	**Amount**
A	Case Administration	40.90	$15,337.50	3.85	$673.75
B	Motions, Responses & Objections	56.95	$21,356.25	33.95	$5,941.25
C	Court Hearings	36.35	$13,631.25	8.0	$1,400.00
D	Meeting with Clients & Opposing Parties	31.50	$11,812.50		
E	Fee/Employment Applications	4.5	$1,687.50	3.5	$612.20
F	Plan	8.0	$3,000.00	3.0	$525.00
G	Written & Telephone Correspondence	24.4	$9,150.00	16.65	$2,913.75
H	Postage, Supplies and Costs			.45	$78.75
	Total By Category	202.60	$75,975.00	69.40	$12,145
	Total Hours	**272.00**			
	Total Costs	**$88,120**			

DISCUSSION

Legal Standards

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).

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

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

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

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

Id. at 959.

Costs v. Fees

Counsel claims to have spent 6.45 total hours on the task category of "Postage, Supplies, and other Costs." Counsel billed the client for supplying copies, postage, and "other costs" as detailed in the following chart:

Date	Detail of Professional Services	Attorney Hrs.	Amount	Paralegal Hrs.	Amount
	Postage, Supplies and Other Costs				
9/30/13	Prepared and FedEx Evidentiary Binders to Judge Sargis	3.0	$1,125	3.0	$525
10/24/13	Supplied Debtor copies of docs sent to K. Vote			.10	$17.50
10/25/13	Supplied Debtor copies of docs sent to K. Vote			.15	$26.25
11/26/13	Emailed Copy of Signed Stipulation to Debtor			.20	$35.00
	Total Postage, Supplies and Other Costs	**3.0**	**$1,125**	**3.45**	**$603.75**

In Counsel's unauthenticated "Amended" time sheets, he still charges for the following Postage, Supplies and other Costs:

Date	Detail	Attorney Hours	Amount	Paralegal Hours	Amount
10/9/13	Supplied copies to Client			.20	$35.00
10/24/13	Supplied Debtor copies			.10	$17.50
10/25/13	Supplied Debtor copies			.15	$26.25
	TOTAL			**.45**	**$78.75**

The court cannot fathom how Counsel believes that the acts of providing postage, supplies, and the costs of preparing evidentiary binders should be folded into the request for fees. The courts in this circuit have held courts have held postage expenses to be reimbursable or potentially reimbursable under 11 U.S.C. § 330. See *Matter of Rauch*, 110 B.R. 467, 20

Bankr. Ct. Dec. (CRR) 46, 22 Collier Bankr. Cas. 2d (MB) 751 (Bankr. E.D. Cal. 1990); and *In re Ginji Corp.*, 117 B.R. 983, 24 Collier Bankr. Cas. 2d (MB) 216 (Bankr. D. Nev. 1990). But these costs are just that--costs, and should not be billed to the client as professional fees for services performed.

Counsel is essentially charging the estate for the "labor" of providing stamps and photocopying documents for the court. Additionally, Counsel is charging three hours of attorney's fees, at his rate of $375.00, for preparing "evidentiary binders to Judge Sargis." Counsel's paralegal performs an additional 3 hours worth of work in helping Counsel with this task. The hourly rates for the fees billed in this case are $375.00/hour for counsel for 210.90 hours and $175.00/hour for a law clerk for 71.30 hours. This amounts to $1,650.00 worth of work, for six hours of preparing exhibit binders. The court does not understand why this work could not have been performed by an member of the administrative staff, such as a legal secretary, instead of Counsel. Other tasks, like sending copies of documents and supplying photocopies can also be assigned to filing clerks or secretaries. The court will not allow counsel to charge his attorney fee rate for the task or preparing and mailing trial binders and disallows $1,125.00 in fees.

This confusion can perhaps be attributed to Counsel's imprecise use of the terms "fees" and "costs," as Counsel seems to use the terms interchangeably when discussing his requests for his compensation for professional work, and costs associated with the expenses incurred in travel, copies, and postage. The court cannot ascertain what the actual costs and expenses incurred by Counsel and his firm were in handling this case. The total costs in the amount of $78.75 are rejected on this basis.

Time Records

Counsel's time records are confusing, to say the least. For instance, many of the entries regarding filing, discussing and attending plan confirmation hearings appear in several other categories rather than "Plan," such as "Meetings with Clients" and "Written Correspondence." This makes it exceedingly difficult for the court to determine the amount of time spent on each task. If Counsel intended to create a confusing record to "slip something by the court and creditors," such would be difficult to surpass what has been presented in support of this Motion.

Therefore, the court has reconstructed the categories from the amended raw billing timesheets provided by Counsel in the following chart:

Category	**Attorney Hours**	**Amount ($375/hr)**	**Paralegal Hours**	**Amount ($175/hr)**
Case Administration	50.65	$18,993.75	15.6	$2,730.00
Motion for Cash Collateral	43.85	$16,443.75	15.65	$2,738.75
Motion for Relief from Stay	7.6	$2,850.00	.2	$35.00

Loan; Motion to Incur Debt	28.35	$10,631.25	5.45	$973.75
Motions to Dismiss	4.4	$1,650.00	1.0	$175.00
Objection to Claim and Trial	17.15	$6,431.25	6.35	$1,111.25
Fee/Employment Applications	4.6	$1,725.00	3.5	$612.5
Plan	19.75	$7,406.25	3.4	$595.00
TOTAL BY CATEGORY	**176.35**	**$66,313.25**	**51.15**	**$8,951.25**
TOTAL HOURS	**227.5**			
TOTAL FEES	**$75,264.50**			

The time entries that the court could not categorize due to vague descriptions were not included in the chart above. These included time entries such as reviewing a vague "Order" or "Order Shortening Time" and vague emails to "K Vote re: Stipulation," "requesting documents," "Bi-weekly docs to K Vote" and vague descriptions about preparing documents for unstated motions.

No Benefit to the Estate

In reviewing Counsel's itemized entries in the Motions, Responses, and Objections category, the court notes that Counsel spent over eight hours reviewing opposition/ objections by creditors and the Trustee to Debtor's Motion, as well as in preparing and filing responses to said items of opposition. These responses, however, are only made necessary because of Debtor's ineffective attempts to confirm a plan, to obtain post-petition financing, and to use cash collateral. The denials of such motions were not "close calls" or turned on resolving conflicting evidence. Rather, the denials generally flowed from the relief not be supported by the law or evidence.

For example, on in the entry dated 8/16/13 on page 42 of the billing records, Dckt. No. 420, Counsel states that he spent 1.20 hours, and his paralegal spent 1.00 hour, in preparing and filing a response to the Motion to Compromise the claim of Black Rock Milling. Debtor in Possession sought approval of a mediated settlement of Claim No. 24, filed by Black Rock Milling. This settlement was negotiated by the attorneys present at a scheduled mediation between the parties. Debtor in Possession argued that the settlement was fair to all creditors and beneficial to the estate, resolving an active civil lawsuit brought by Black Rock Milling.

The Creditor and party to the settlement, Black Rock, however, opposed the motion. Dckt. No. 186. Creditor Black Rock Milling Co. ("Black Rock") opposed Debtor in Possession Motion on the grounds that the settlement agreement was breached almost at inception and that it is no longer enforceable. This, it was argued, which meant that Black Rock is now entitled to full repayment of the outstanding debt. The agreement called for a payment of $50,000.00 to Black Rock by May 10, 2013, and the further payments Black Rock of $3,400.00 a month for 60 months. Black Rock stated that none of these

payments were made despite being almost three months after the payment deadline. Black Rock stated that it agreed to take a reduced amount based on Debtor's in Possession promise to pay a lump sum by May 10, 2013 and made plans to use the payment to satisfy outstanding debts with its own creditors. Black Rock asserted that Debtor's in Possession failure to make a payment was a condition precedent to the settlement agreement, made the agreement unenforceable. Debtor's in Possession conduct contravened the very settlement agreement that Debtor in Possession sought to be approved, and had already breached before presenting the agreement in court.

In addition to the issues raised by Black Rock (the very creditor whose dispute that the settlement agreement was designed to resolve), the court identified other flaws in the Motion. In denying the Motion to Approve the Compromise, TOG-11, the court stated,

> "Here, the Debtor [Debtor in Possession] fails to provide sufficient information in the pleadings for the court to determine if the proposed settlement agreement is reasonable. Debtor [Debtor in Possession] has not provided any legal authority or discussion regarding the settlement agreement.
>
> Furthermore, Debtor [Debtor in Possession] failed to state that it was already in material breach of the settlement agreement, by failing to make the initial $50,000 payment by the May 10, 2013 deadline and three additional monthly payments of $3,400.00. The court does not find this to be a non-material breach. Based on the foregoing, the Motion is denied."

Civil Minutes, Dckt. No. 234

According to the entries in Counsel's billing records for this Motion, a total of 4.15 hours were spent by Counsel and his paralegal on filing and responding to Creditors' objections, for an amount of $1,246.25 charged. As noted by the court, however, the motion was devoid of any legal authority or discussion of the *In re A & C Props* factors in determining the reasonableness of the settlement agreement, and Counsel was remiss in mentioning that Debtor had already breached the terms of the settlement agreement by not making timely payments by the first several deadlines. Counsel should have been aware that this Motion lacked merit, and should have reasonably anticipated that Creditor would oppose the filing of this Motion. Counsel spent additional time corresponding with the parties on the Motion, and attending the hearing in which the motion was denied by the court. Counsel wasted the client's, creditors', and the court's time and funds by filing motions that Counsel should have known would be denied.

The same can be said of many of the other Motions that Counsel filed, including the multiple Motions to Confirm Plans, both of which were denied due to clear defects in the proposed provisions of the plans. For instance, Debtors in Possession's second Motion to Confirm the Chapter 12 Amended Plan, Dckt. No. 147, could not be granted. The Plan drew the same objections from creditors Bank of the West, WestAmerica, and Black Rock. Debtor had five months after its original plan to make the necessary corrections to its revised plan. Debtor in Possession did not attempt to submit sufficient evidence to

support its proposed budgets, and the next attempt to propose an amended plan came 8 months after the second plan filed on June 21, 2013, and was rejected by the court.

Again, in reviewing the Plan category of the billing statements, the court notes that Counsel spent an inordinate amount of time preparing and filing pleadings that suffered from fundamental deficiencies, and were bound to be denied by the court. According to Counsel's billing statements, a total of 11 hours was spent on just preparing and filing the two motions to confirm Debtor's Chapter 12 Plan. Dckt. No. 420 at 48. Counsel charges for withdrawals based on his own mistakes, and even a notice of errata in Debtor's Motion to Incur Debt, which according to the entry dated August 15, 2013 in the Motions, Responses, and Objections Category of the billing statements, took almost 2 hours to complete by both Counsel and paralegal.

Double Billing

The court notes that there appeared to be duplicate billing for a task where the paralegal was involved. It appears that the paralegal billed for the same task completed by Counsel. This included sending various correspondence, preparing and filing documents for court, and attending hearings.

In response, Counsel filed "Amended Itemized Entries" allegedly omitting duplicate entries by his paralegal and those entries labeled "Read and Calendared" in which billing was reviewed.

Billing Rates

The court does not find Counsel's hourly rate of $375.00 reasonable or that counsel effectively used appropriate rates for the services provided. Much of the work performed in this case was not necessary and reasonable, and Counsel did not exercise good billing judgment with respect to the services that he and his paralegal undertook as part of the court's authorization to employ him to represent the Debtor in this case. In evaluating Counsel's work under the standard established in *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991), the court determines that Counsel's services have only marginally benefitted Debtor's estate.

Moreover, the court has been presented with evidence that Debtor in Possession has violated cash collateral orders, mislead and possibly engaged in fraudulent reporting of the Debtor's finances, possibly filed of the case in bad faith as a strategy to delay a civil lawsuit for breach of contract filed by one of Debtor's creditors, bungled efforts to confirm a viable plan, and other failures. Instead of advancing Debtor's interests, Counsel's services can be seen as having set the estate back; Debtor's estate has declined in value, while this case has stayed stagnant for 18 months. Counsel has not zealously represented the Debtor by pursuing reorganization in this case, and has not performed at the level of skill, and performed the type of necessary and reasonable legal services as required and demanded by 11 U.S.C. § 330, that would warrant the granting of attorney's fees.

If the court believed that Counsel intentionally and in bad faith "bungled" the prosecution of this case, Counsel would be allowed $0.00 in fees.

Rather, the court has concluded that while Counsel may be well intentioned to help those who come to him, he has clearly demonstrated that he and his office do not have the level of sophistication or support for that of an "experienced bankruptcy or reorganization attorney or law office." The misstating and misunderstanding of basic issues of who is the debtor in a general partnership case, the fiduciary duties of the general partner, the fiduciary duties of the debtor in possession, the fiduciary duties of the general partner acting for the debtor in possession, the property of the estate, and property of the general partner evidence such lack of knowledge and experience.

Further, the repeated misstatements and confusion as to the basic pleading requirements, duties of the Debtor in Possession, and non-productive motions filed demonstrate that Counsel's office does not have the abilities to function as an "experienced bankruptcy and reorganization" office.

In his declaration, Counsel states that his hourly rate is $375.00. Though he states in his declaration that he has been in practice for 45 years which has involved bankruptcy, he does not point to cases which he has successfully reorganized. He also justifies his hourly fee, directing the court to two attorneys, Daniel Egan and Riley Walter, who bill $370.00 and $395.00 an hour, respectively. Each of these attorneys have practiced a shorter time than Counsel.

Though Counsel has practiced longer, that does not guarantee him a $375.00 hourly rate. To paraphrase from the 1988 vice-presidential debate, "Daniel Egan and Riley Walter have practiced in this court, and you are not either of them, nor is your law office commensurate with their respective offices." FN.3.

FN.3. Paraphrasing Sen. Lloyd Bentsen's response to Vice President Daniel Quayle in the 1998 vice-presidential debates, "Senator, you are no Jack Kennedy."

The court does not make the above comment in a disparaging way, but rather in recognition of the experienced bankruptcy and reorganization attorneys known in this area of law. They have their clients properly prepared not only to file a case, but also to fulfill their duties as debtor in possession. There should be no problems with the unauthorized use of cash collateral. There should be no problems arising because general partners just took whatever draws in profits they believed they deserved from property of the estate. There should be no problems arising because the monthly operating reports state inaccurate information. There should be no problems arising because the cash collateral budgets and cash collateral usage reports are inaccurate. There should be no problems arising because the motions fail to comply with Federal Rule of Bankruptcy Procedure 9013 or that the attorney fails to present evidence to support the motion.

All of the above, and more, are problems that have arisen and continue to appear in this case. While the attorney does not guaranty any result or that their client will not breach his duties, the attorney has to properly prepare the client and counsel them on how to fulfill their fiduciary duties. If the client does not have the financial abilities, then the bankruptcy or reorganization attorney has to see that the client, as the fiduciary of the

estate, engages the services of the professionals and non-professionals to do that work.

The experienced bankruptcy or reorganization attorney does not merely dance to a client's tune filing motions or advancing plans which do not have merit or are not supported by the law. Sometimes, it takes the bankruptcy or reorganization attorney to tell the client that what he or she wants to do is not in good faith or supported by the law or evidence.

In his Corrected Declaration (Dckt. 419) Counsel sought the payment of $91,565.00 for legal and staff fees. Counsel stated that he spent 210.90 hours, billed at $375.00 an hour, and Kylie Kaur billed 71.30 hours billed at $175.00 an hour.

From the court's review of the present Motion, supporting pleadings, and the files in this case, on a gross basis 105.90 of time could be justified for good faith, bona fide, work spent by Counsel. At that, 50% is generous. Most of the motions filed by the Debtor in Possession were denied, often for failure to plead grounds for the relief requested or provide evidence to support the relief requested

However, after wading through the fee application, the jumbled billing (there being a non-meaningful task billing analysis), the court could identify 176.35 hours of time attributed to Counsel. However, these include non-productive time on defective motions to value, the defective plans, and the defective motions to use cash collateral. The court reduces the 176.35 hours of billings by an additional 25 hours – for a total of 151.35 hours. The court will err on the higher side in allowing the fees.

In considering a fair hourly rate for the services provided, $250.00 for counsel is more than generous. The legal services provided are not those of a $375.00 experienced bankruptcy as referenced by Counsel. The basic pleading defects, failure to advise the client how to fulfill the basic fiduciary duties, and the inability to prosecute this case until Bank of the West was in the process of foreclosing is indicative of an attorney with a $250.00 hourly billing rate.

For the 151.35 hours, counsel is allowed $37,837.50 in attorneys' fees. For a Chapter 12 case in which the "restructure" consists of obtaining a new loan, which must be paid off in two years, and paying creditors 100%, plus 5% interest, $37,837.50 is generous. In reality, the disallowed attorneys' fees represent the non-productive pleadings, delays, and actions which bore no, and had no prospect of bearing any, productive fruit for the estate.

The Declarations in support of the Motion are telling as to the level of knowledge and experience in bankruptcy reorganization for Counsel and his office. Counsel states under penalty of perjury,

> "My practice for the past 45 years has involved bankruptcy. I have represented many Debtor in Possession in Chapter 12 cases. I have successfully obtained confirmation of Chapter 12 plans of reorganization on behalf of Debtor-in-Possession."

Thomas Gillis Declaration, Dckt. 419.

Having received this testimony, the court had the Clerk's Office run a report on all of Counsel's Chapter 11 and Chapter 12 cases filed since December 15, 2009. The following chart summarizes the cases and their dispositions.

CHAPTER 12 CASES

Rogelio Delgado Calderon and Laura Sofia Bobadilla 13-15305 Fresno	Filed: 08/02/13	Plan Confirmed January 28, 2014. ($5,088 general unsecured claims, $126,655 secured claim)
Joe Bettencourt and Maria Bettencourt 11-93024 Modesto	Filed: 08/25/11	Plan Confirmed May 4, 2012.
Jose Carmo and Delma Carmo 11-93728 Modesto	Filed: 10/24/11	Amended Plan (suspending payments) Confirmed October 5, 2012.
Antonio Cabral and Maria Cabral 13-10132 Fresno	Filed: 09/30/13 Dismissed: 06/04/13	
Antonio Cabral and Maria Cabral 12-12050 Fresno	Filed 03/08/12 Dismissed 10/13/12	
Antonio and Maria Cabral 10-18874 Fresno	Filed 05/11/12 Dismissed 05/29/12	
Antonio Gomes 12-91736	Filed 06/20/12	Plan Confirmed December 25, 2013
Luis Soto and Maria Soto 10-19042 Fresno	Filed: 08/08/10	Plan Confirmed February 29, 2012.
Ricardo and Maria Maldonado 11-14556 Fresno	Filed 04/20/11	Plan Confirmed April 23, 2012.

Antonio Silva and Maria Brasil 12-13764 Fresno	Filed: 04/26/12 Dismissed 02/27/14	
Bettencourt Dairy 11-93071 Modesto	Filed 08/29/11 Dismissed 09/14/12	
Gloria Avila 14-21673 Sacramento	Filed: 02/21/14	
Domingo and Remedios Tabangcura 10-35377	Filed 06/11/10 Dismissed 12/06/10	
Dimas and Rosa Coelho 12-19290 Fresno	Filed 11/01/12 Dismissed 04/07/14	
Loao and Luzia Vaz 12-19291 Fresno	Filed 11/01/12 Dismissed 04/07/14	
Epigmenio Jimenez 11-15795 Fresno	Filed 05.20/11 Converted 08/11/11	
Antonio Batista and Maria Ascencao 12-90996	Filed 04/07/12 Dismissed 07/02/12	

CHAPTER 11 CASES

GMC Dairy Farms, LP 13-10302 Fresno	Filed 01/17/13	Creditor Plan filed April 3, 2013. Farm Credit West, FLCA and Farm Credit West, PCA

Luis and Angela Sousa 11-94004 Modesto	Filed 11/18/11	Chapter 11 Plan Confirmed December 25, 2013. Failure to file post-confirmation operating reports, failure to file fee applications.
Rosendo and Maria Jaime 12-17411 Fresno	Filed 08/29/12 Dismissed 10/25/12	
Rosendo and Maria Jaime 12-19873 Fresno	Filed 11/30/12 Dismissed 10/25/13	
Rosendo Perez and Maria Jaime 14-10695 Fresno	Filed 2/18/14	Chapter 11 Plan filed on April 7, 2014
Eliazar and Lourdes Gonzalez 13-17903 Fresno	Filed 12/19/13 Dismissed 01/30/12	
Bravo and Antonia Chavez 12-13233 Fresno	Filed 04/10/12 Dismissed 10/31/12	
Richard and Veronica Solis 10-91258 Modesto	Filed 04/05/10 Dismissed 07/30.10	
Salvador Padilla and Maria Lopez 11-10560 Fresno	Filed 01/18/11 Dismissed 07/19/11	
Antonio and Lorena Martinez 10-41667 Sacramento	Filed 08/16/10 Dismissed 11/01/10	

Juan and Margarita Ramirez 11-26870 Sacramento	Filed 03/21/11 Dismissed 01/17/13	
George and Marilyn Lanting 13-13388 Fresno	Filed 05/10/13	No Confirmed Plan. Creditor Plan Filed by Farm Credit West, PCA and Farm Credit West, FLCA
Maria Pedro 13-17297 Fresno	Filed 11/13/13 Dismissed 03/31/14	
Hector Rendon 12-10099 Fresno	Filed 01/06/12 Dismissed 03/01/12	

While counsel has confirmed a couple plans, the vast majority of his reorganization cases are dismissed. Again, a sign of an attorney who is not an experience bankruptcy or reorganization attorney. In recent cases it has been the creditors who are advancing the Chapter 11 plans, to which the Debtors have joined. These plans being advanced are not by Counsel for his clients. Therefore, the court finds that $250.00 per hour is more commensurate with the services provided in this Chapter 12 case.

As for the services of Counsel's paralegal, Ms. Kaur, Counsel has not provided her qualifications or experience for the court to determine that $175.00/hour is appropriate.

Further in reviewing the Amended Itemized Statement, Exhibit Dckt. 474, it appears to include many secretarial activities, such as filing documents, delivering documents to the postal service or Federal Express, and sending emails. Additionally, the Itemized statement does not clearly identify what are the "paralegal services," but merely includes time for activities billed by Counsel.

The court adjusts Ms. Kaur's hourly rate to $135.00 to take into account the secretarial activities versus properly billable paralegal activities. Counsel's method of reporting and stating the activities renders it almost impossible for the court to determine what paralegal activities were actually provided. However, the court will give Ms. Kaur the benefit of the doubt in allowing Counsel to recover some of the fees.

Therefore, the court finds that $135.00 per hour is more commensurate with the secretarial/paralegal services provided in this Chapter 12 case. For the 51.15 hours this court could categorize into tasks, total attorney fees in the amount of $6,905.25 appear to be appropriate for the services provided in this case.

IDENTIFICATION OF POTENTIAL DISQUALIFYING CONFLICT

The attorney of record in the bankruptcy of Coelho Dairy is Thomas Gillis, whose signature appears on the last page of the Debtor's bankruptcy petition. Dckt. No. 1 at 3. The court authorized the employment of Mr. Gillis as counsel for the Debtor in Possession. Dckt. 47.

In the letter sent by Gillis to the court on February 17, 2014 in the case of *In re: Mary Coelho*, Case No. 13-91641, however, Gillis states that he had assisted Mary Coelho, a confirmed principal of the Debtor, with her *pro se* filing of her Chapter 12 case. Dckt. No. 44, *In re: Mary Coelho*, Case No. 13-91641. In his letter, Counsel noted that he did not ask Mary Coelho for a fee for filing the case, and approached several local attorneys to take over the case to dismiss it or handle it. Counsel states that a lawyer based in Fresno, California, Nancy Klepac, eventually agreed to take over the and substitute into Mary Coelho's bankruptcy case as the attorney of record. Letter of Thomas Gillis, Dckt. No. 44, *In re: Mary Coelho*, Case No. 13-91641. The order granting the Motion to Substitute Attorney so that Nancy Klepac could appear as Mary Coelho's attorney in her bankruptcy case was entered on November 23, 2013, as Dckt. No. 35 in *In re: Mary Coelho*, Case No. 13-91641.

It has become apparent, however, from representations made by Counsel at the recent status conference and the letters, that Nancy Klepac has merely been acting at the behest of Gillis, and that Gillis's role in Mary Coelho's case has gone beyond simply recruited an "independent attorney" to work on Mary Coelho's individual Chapter 12 bankruptcy case. Rather, Gillis's own statements strongly suggest that Gillis was simultaneously handling the cases of Mary Coelho and the Coelho Dairy, and that Nancy Klepac may not have even ever met with Mary Coelho in substituting into Mary Coelho's case as her attorney of record.

As the court noted during the February 13, 2014 Status Conference on the Coelho Dairy Case, at the status conference,

> Thomas Gillis, counsel for the Debtor in Possession, disclosed that he "handled" the dismissal of the Mary Coelho bankruptcy case by hiring an attorney in Fresno to "represent" Mary Coelho. Mr. Gillis could not say whether the attorney in Fresno ever met with Mary Coelho. This raises even greater concerns that Mary Coelho is unaware of the transactions being entered into, representations made on her behalf, and the possible taking of her assets in an effort by this Debtor in Possession, Debtor, and counsel to "save" this dairy.
>
> Civil Minutes in the Coelho Dairy Bankruptcy Case, Dckt. No. 414.

Section 327(a) authorizes the employment of professional persons, only if such persons do not hold or represent an interest adverse to the estate and are "disinterested persons," as that term is defined in section 101(14) of the Code. Section 101(14) defines "disinterested person" as a person that

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

When determining whether a professional holds a disqualifying "interest materially adverse" under the definition of disinterested, courts have generally applied a factual analysis to determine whether an actual conflict of interest exists. 3 COLLIER ON BANKRUPTCY ¶ 327.04[2][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Some courts have been willing to go further and find a potential conflict or appearance of impropriety as disqualifying. *See Dye v. Brown*, 530 F.3d 832, 838 (9th Cir. 2008) (in context of section 324, examining totality of circumstances, trustee's past relationship with insider created potential for materially adverse effect on estate and appearance of conflict of interest).

Although the language of section 327(a) refers only to professionals employed by a trustee, the section also applies to professionals employed by a chapter 11 debtor in possession pursuant to 11 U.S.C. § 1107(a), which provides in relevant part, "a debtor in possession shall have all the rights … and powers, and shall perform all the functions and duties … of a trustee serving in a case under this chapter." *DeRonde v. Shirley (In re Shirley)*, 134 B.R. 940, 943 (BAP 9th Cir. 1992); 11 U.S.C. § 1107(a). This equally applies to the attorney representing the Chapter 12 debtor in possession.

Under 11 U.S.C. § 541 of the Bankruptcy Code, each estate is a separate and distinct entity. Under Chapter 12 of the Bankruptcy Code, the debtor-in-possession is expressly authorized to remain in possession of, and to continue to operate, his or her farm or commercial fishing operation. 11 U.S.C. § 1203. The debtor in possession is granted all of the rights and powers of a Chapter 11 trustee under 11 U.S.C. § 1106, except for the right to compensation under 11 U.S.C. § 330. The debtor in possession in a Chapter 12 case is also required to perform all of the functions and duties of a Chapter 11 debtor, except for the investigative duties specified in 11 U.S.C. § 1106(a)(3) and the filing of a statement of such investigation pursuant to 11 U.S.C. § 1106(a)(4). 11 U.S.C. § 1203. As in a Chapter 11 case, the court may prescribe limitations on the rights and powers of a Chapter 12 debtor-in-possession to operate the debtor's business. 11 U.S.C. § 1203.

Thus, in acting as the trustee" of the estate in bankruptcy and being entitled to hire professionals, a debtor in possession is a statutory fiduciary of its own estate. 11 U.S.C. §§ 1106, 1107(a). The fiduciary of a bankruptcy estate must receive independent counsel, regardless of the estate's relationship to other entities prior to filing. *In re Amdura Corp.*, 121 Bankr. 862, 868-69 (Bankr. D. Colo. 1990). The inability to fulfill the role of independent professional on behalf of the fiduciary of the estate constitutes

an impermissible conflict. *See In re Adam Furniture Indus., Inc.*, 158 Bankr. 291, 302 (Bankr. S.D. Ga. 1993).

The appointment of the same counsel in related chapter 11 cases is presumptively improper. *In re Lee*, 94 B.R. 172 (Bankr. C.D. Cal. 1988); *In re Wheatfield Bus. Park LLC*, 286 B.R. 412, 418 (Bankr. C.D. Cal. 2002). Further, the same counsel should not be appointed for related chapter 11 debtors where creditors have dealt with the debtors as an economic unit. *In re Parkway Calabasas, Ltd.*, 89 B.R. 832, 835 (Bankr. C.D. Cal. 1988).

The court is proceeding to issue orders to show cause in this case and in the Mary Coelho case to determine whether Mary Coelho has been represented by independent counsel, whether the Debtor in Possession has been represented by independent counsel, and what conflicts of interest may exist for Thomas Gillis in this case and whether he qualifies for employment pursuant to 11 U.S.C. § 327. Civil Minutes, Dckt. No. 414. This potential disqualifying conduct was identified in the Declaration of Mary Coelho, which was filed in support of the latest motion to confirm. Dckt. No. 392. In that declaration, Mary Coelho testifies under penalty of perjury that her property is secured for an obligation owing to Nevada State Bank. She believes that the property is worth $1,400,000.00, and has listed it with an undisclosed real estate broker.

The court recognized that this declaration was problematic, however, because it appears that the debt secured by Mary Coelho's property is that owed to Nebraska State Bank. Given that a bankruptcy case was filed by counsel for the Debtor in Possession for Mary Coelho, and as explained above, Counsel had hid his participation, these statements under penalty of perjury caused the court concern. Mary Coelho Bankruptcy Case, 13-91641.

In that case, this court found,

> Thomas Gillis appeared at the hearing, stating that he was not counsel for the Debtor in Possession. However, the court records show that he electronically filed the Petition for the Debtor, which filing certifies Case Number: 2013-91641 Filed: 10/10/2013 Doc # 23 that Mr. Gillis is the counsel for the Debtor [Mary Coelho].
>
> Mr. Gillis is counsel for the Coelho Dairy Partnership in its bankruptcy case, for which Mary Coelho is identified as a general partner for the Coelho Family Trust. Issues identified by the court include (1) whether Mr. Gillis has an irreconcilable conflict as the attorney for the Coelho Dairy Partnership and attempting to give legal advice to one of the general partners, (2) the contention that Mary Coelho was not able to understand that she was signing a deed of trust to secure debt of the Coelho Dairy Partnership, (3) the Schedules filed by Mary Coelho under penalty of perjury do not list any interests in any trusts and asserts a personal interest in the Coelho Dairy Partnership (not that of being a general partner in her fiduciary capacity as a trustee), (4) income of less than $800 a month on Schedule I, and (5) the Debtor showing ownership of no significant personal property assets other

than the asserted 50% interest in the Coelho Dairy Partnership (which does not generate any income for the Debtor).

The filing of this bankruptcy petition appears not to have been done by Mary Coelho knowledgeably and intentionally. She may well have been placed in bankruptcy through the actions of others, including the other general partner in the Coelho Dairy Partnership.

At the hearing, Thomas Gillis stated that he was "looking for" bankruptcy counsel for Mary Coelho. This bankruptcy case was filed on September 11, 2013. It is now a month later and Mary Coelho is only having Mr. Gillis "looking for counsel."

The court finds that the immediate dismissal of this case is necessary and proper to dismiss this case for cause. The court is convinced that Mary Coelho is not actively participating in the filing of this case and it continuing may work to harm her interests. Further, the Schedules filed in this case demonstrate that there is no good faith attempt being made to prosecute a Chapter 12 case. Third, though he filed the case for the Debtor, Thomas Gillis did not list his name on the Petition. The attempted secret representation of a debtor in possession in a Chapter 12 case is not conduct which shall be condoned.

At the Status Conference Thomas Gillis, who stated that he "did not" file the case for Mary Coelho and that he was "looking for counsel" for Mary Coelho, represented that Mary Coelho did not oppose the court dismissing this Chapter 12 case. However, the court cannot determine if Thomas Gillis actually represents Mary Coelho or whether Mary Coelho actually is aware that she has commenced a Chapter 12 bankruptcy case. Further, there is grossly inaccurate information in the Schedules filed under penalty of perjury by Mary Coelho. The court will not ignore this conduct and grant the requested dismissal by counsel without further inquiry."

Civil Minutes, 13-91641, Dckt. 23.

The court has allowed the addressing of that issue trail the confirmation in this case. At this juncture, the court leaves it to eh U.S. Trustee and Chapter 12 Trustee to press the issue of whether Counsel is disqualified from receiving any fees in this case. 11 U.S.C. § 327. To the extent that either the U.S. Trustee or Chapter 12 Trustee believe that any such disqualifying conflict exists, a motion to make that determination shall be filed and served on or before May 31, 2014.

The court will separately address the conduct of Counsel and the attorney who purportedly appeared as counsel for Mary Coelho in her case.

CONCLUSION

Based on the foregoing, Counsel is allowed, and the Debtor in Possession is authorized to pay, the following amounts as compensation to this professional in this case, subject to being vacated or disgorged if it is determined by timely filed motion of a disqualifying conflict:

Fees.....$44,742.75
Costs..... Included as part of Secretarial/Paralegal Fees

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Thomas O. Gillis ("Applicant"), Attorney for the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Thomas O. Gillis is allowed the following fees and expenses as a professional of the Estate:
>
> Thomas O. Gillis, Professional Employed by Debtor in Possession, subject to being vacated or disgorged if it is determined by timely filed motion of a disqualifying conflict, is allowed:
>
> Fees.....$44,742.75
> Costs..... Included as part of Secretarial/Paralegal Fees
>
> **IT IS FURTHER ORDERED** that all other fees and costs requested in the fee application are not allowed by the court.
>
> The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Debtor in Possession is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 12 case.

13. 13-91675-E-7 SHAWN/CORINNE MOOY **MOTION TO DISMISS CASE**
13-9038 USA-1 **3-5-14 [18]**
MOOY ET AL V. U. S. DEPARTMENT OF EDUCATION

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on March 5, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The Motion to Dismiss is granted and the case is dismissed. No appearance required.

The United States acting on behalf of its agency, the United States Department of Education ("Movant"), moves the Court for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as made applicable to adversary proceedings by Federal Bankruptcy Rule 7012. Movant is the Defendant institution in this case. Movant argues that the the complaint fails to state a plausible claim for undue hardship as required by 11 U.S.C. § 523(a)(8) and Rule 12(b)(6). Both Debtors work and have annual income of $53,681. Movant states that the complaint does not describe the terms of their student loans, but Debtors have an Income Contingent Repayment Plan on which they have never made any payments.

FEDERAL RULE OF BANKRUPTCY PROCEDURE 7007

Law and motion pleading practice in adversary proceedings is governed by Federal Rule of Civil Procedure 7(b). Fed. R. Bankr. P. 7007. A motion filed in an adversary proceeding, "must,"

A. be in writing unless made during a hearing or trial;

B. **state with particularity the grounds** for seeking the order; and

C. state the relief sought.

Fed. R. Civ. P. 7(b).

In the present Motion, the following grounds are stated with particularity;

A. "As more fully shown in the memorandum of points and authorities filed herewith, the Mooys both work and have annual income of $53,681."

B. "The complaint does not describe the terms of their student loans."

C. Alleges an additional fact that "[the Mooys] have an Income Contingent Repayment Plan and never made any payments."

D. States the legal conclusion, "Under these circumstances, the complaint fails to state a plausible claim for undue hardship as required by 11 U.S.C. § 523(a)(8) and Rule 12(b)(6)."

Motion, Dckt. 18. These grounds, stated with particularity, are what the Movant has based its request for relief – dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012. See *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982); *Martinez v. Trainor*, 556 F.2d 818, 819-820 (7th Cir. 1977).

Review of Allegations in the Complaint

Before ruling on the Motion the court must review the Complaint to determine what is alleged and whether the above stated grounds support a motion to dismiss for failure to state a claim. The Complaint, subject to the "short and plan statement showing that the pleader is entitled to the relief" required by Federal Rule of Civil Procedure 8(a) and Federal Rule of Bankruptcy Procedure 7008, as applied by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), alleges.

A. Jurisdiction exists pursuant to 28 U.S.C. §§ 134, 157, and 523(c)(1).

B. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2).

C. The Debtors are obligated to Defendant United States of America for $51,681.06, consisting of,

1. $30,168.45 owed by Corinne Mooy, and

2. $21,512.61 owed by Shawn Mooy.

D. The debts are for an educational benefit or loan made, insured or guaranteed by a governmental unit, or otherwise subject to the provisions of 11 U.S.C. § 523(a)(8).

E. On September 16, 2014, the Debtors filed bankruptcy.

F. Shawn Mooy has poorly controlled epilepsy, which has prevented him from completing his education. His earning potential is limited.

G. The Debtors have a dependant child living with them who is 2 years of age.

H. Debtors' adjusted gross income for 2012 was $53,681.

I. If the loans are not discharged, they would impose an undue burden on the Debtors. (The allegation appears to have a typographical error, referencing an undue burden on the "defendant.")

J. The Debtors should be discharged of the two educational loans described above.

Complaint, Dckt. 1.

STANDARD

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal, 129* S.Ct. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible

grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

In ruling on a 12(b)(6) motion to dismiss, the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to "accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

DISCUSSION

As Movant states, student loan obligations are generally presumed to be nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(8). Section 523(a)(8) provides that:

> A discharge under section 727 ... does not discharge an individual debtor from any debt-for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8). Undue hardship is now the only basis for discharging student loans under 11 U.S.C. § 523(a)(8). Although "undue hardship" is not defined in the Bankruptcy Code, the Ninth Circuit has recognized that " '[t]he existence of the adjective "undue" indicates that Congress viewed garden-variety hardship as insufficient excuse for a discharge of student loans....' " *In re Pena*, 155 F.3d 1108, 1111 (9th Cir.1998) (quoting *In re Brunner*, 46 B.R. 752, 753 (Bankr. S.D.N.Y. 1985), aff'd 831 F.2d 395 (2d Cir.1987)).

To determine if excepting student loans from discharge will create an undue hardship on a debtor, the Ninth Circuit has adopted the three-part test established by the Second Circuit in Brunner. *In re Rifino*, 245 F.3d 1083 (9th Cir. 2001). To obtain a discharge of a student loan obligation, the debtor must prove:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;

(2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

(3) that the debtor has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396. Under this test, the burden of proving undue hardship is on the debtor, and the debtor must prove all three elements before discharge can be granted. *Education Credit Management Corp. v. Nys (In re Nys*), 446 F.3d 938 (9th Cir. 2006). If the debtor fails to prove any one of these three prongs then his debt will not be discharged. *Id.*

The first prong of the *Brunner* test requires the debtor to prove that she "cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans." *Brunner*, 831 F.2d at 396. To meet this requirement, the debtor must demonstrate more than simply tight finances. *In re Nascimento*, 241 B.R. 440, 445 (9th Cir. BAP 1999) *In re Rifino*, 245 F.3d 1083, 1088 (9th Cir. 2001)

Debtors do not make adequate allegations alleging financial adversity in their case. Debtors simply allege that Joint Debtor Shawn Mooy has poorly controlled epilepsy, which prevent him from completing his classes and earning a degree. Debtors assert that this condition limits his earning potential, but have not alleged that Debtor's ability to earn is compromised completely.

Additionally, Debtors provide no information about their current income and expenses. Debtors state that their gross income for 2012 is $53,681, but do not describe whether Debtors would be able to maintain a minimal standard of living for themselves and their dependent child, if they were forced to repay their loans. There are no factual contentions contained the Complaint, showing that Debtors have tight finances and cannot maintain a "minimal" standard of living on their annual income of $53.681.00. Debtors do not describe the employment and present state of financial affairs of Joint Debtor Corinne Mooy, who owes the larger portion of the amount owed to Movant on her student loan--$30,168.45. Debtors make no factual contentions relating to the requirements of the first prong of the *Brunner* test.

The second prong of the Brunner test requires a debtor to prove that "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans." *Brunner*, 831 F.2d at 396. The "additional circumstances" prong of the Brunner test "is intended to effect 'the clear congressional intent exhibited in § 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt.' " *Rifino*, 245 F.3d at 1088–89.

There must be evidence that the debtor's "road to recovery is obstructed by the type of barrier that would lead [the court] to believe he will lack the ability to repay for several years." *Matter of Roberson*, 999 F.2d 1132, 1137 (7th Cir. 1993).

Examples of such barriers may include psychiatric problems, lack of usable job skills and severely limited education. *Id. See also Pena*, 155 F.3d at 1114 (affirming bankruptcy court's finding that second prong of *Brunner* test was met when the debtors presented evidence of the wife's serious, ongoing mental disability which prevented her from obtaining meaningful, permanent employment); compare *In re Brightful*, 267 F.3d 324, 330 (3rd Cir.2001) (bankruptcy court found that second prong of *Brunner* test was met because debtor most likely would never attain her college degree, lacked vocational training, suffered psychiatric problems and was emotionally unstable. The Third Circuit reversed finding that the debtor was nonetheless "intelligent, physically healthy, currently employed, possessed useful skills ... and had no extraordinary, non-discretionary expenses"). *See also In re Birrane*, 287 B.R. 490, 497 (B.A.P. 9th Cir. 2002)

Debtors have not alleged whether Joint Debtor Shawn Mooy is still able to work regardless of his condition, nor what his earning potential is as it relates to this Complaint. Debtors do not assert whether Shawn Mooy's disability precludes him from securing meaningful, permanent employment and contribute to the household's finances and loan payments entirely. In fact, Movant points out that Debtors' Schedule J shows that Joint Debtor Shawn Mooy has been has been employed for more than two years. The Complaint filed by Debtors does not allege that there is a long term, undue hardship that prevents Debtors from making any payments on their student debt.

Movant also argues that because the Complaint fails to state the repayment period of the student loan, it is difficult to determine the time period and portion of time for which Debtors must show that their state of affairs is likely to persist. Debtors have not stated any of the terms of their subject student loans. Debtors' Complaint does not meet the second element of the *Brunner* test.

The third prong requires "that the debtor has made good faith efforts to repay the loans...." *In re Pena*, 155 F.3d 1108, 1111 (9th Cir. 1998) (quoting *Brunner*, 831 F.2d at 396). The "good-faith" requirement fulfills the purpose behind the adoption of section 523(a)(8). *Brunner*, 46 B.R. at 754-55. Section 523(a)(8) was a response to "a 'rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of education loan debts.' " *Id.*, (quoting the Report of the Commission on the Bankruptcy Laws of the United States, House Doc. No. 93-137, Pt. I, 93d Cong., 1st Sess. (1973) at 140 n. 14). This section was intended to "forestall students ... from abusing the bankruptcy system." *Id.*

Debtors make no allegations regarding the repayment of their student loans or the other debts which may have caused the filing of this bankruptcy case. The Complaint merely states that the Plaintiff owe $51,681.06. Debtors do not allege the attempts to repay their student loans or attempts at negotiating a repayment plan. There are no allegations that Debtors applied for or were denied an administrative remedy such as Total and Permanent Disability or Income Contingent relief under 20 U.S.C. § 1087(a); 34 C.F.R. §682.402(c).

The Complaint does not contain sufficient factual allegations showing that Debtors are entitled to relief under 11 U.S.C. § 523(a)(8).

Debtors have not sufficiently alleged that their student loan obligations should be discharged, by showing that this debt imposes an undue hardship on Debtors and their dependent. The Debtors have not stated plausible claims, substantiated by specific factual allegations and information regarding their employment, income, expense, dependants, and household finances, to fulfill the three elements of the *Brunner* test.

Furthermore, Debtors do not include information about the terms of their loans, and their attempts, if any, to repay the loans back in good faith. Debtors' Complaint, Dckt. No. 1, does not include short, plain statements, showing Debtors' entitlement to the extraordinary relief of discharging student loans for undue hardship under 11 U.S.C. § 523(a)(8). Without such factual allegations, the complaint does not satisfy the pleading requirements of Rule 8 or the plausibility requirements of Rule 12(b). Thus, this Motion is granted and the Debtors' adversary 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 filed by Defendant 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 Complaint is dismissed without prejudice.
>
> **IT IS FURTHER ORDERED** that if Plaintiffs desire to file an amended complaint in this Adversary Proceeding, they shall file and serve on or before April 30, 2014 a motion for leave to file an amended complaint, with a copy of the proposed amended complaint filed as an exhibit in support of the motion. Though leave to file a first amended complaint is liberally granted, the court is requiring the motion and copy of proposed amended complaint filed as an exhibit by the *Pro Se* Plaintiffs to avoid merely a repeat filing of a motion to dismiss.
>
> If no motion to file an amended complaint is timely filed, the Clerk of the Court shall close the file for this Adversary Proceeding.

14. 13-92179-E-7 CURTIS/SANDRA ARLT — MOTION TO AVOID LIEN OF STANISLAUS CREDIT CONTROL SERVICES, INC.
BSH-1 Brian S. Haddix — 3-14-14 [18]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on March 14, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required. That requirement was met.

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

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

A judgment was entered against the Debtor in favor of Stanislaus Credit Control Service, Inc. for the sum of $4,617.40. The abstract of judgment was recorded with Stanislaus County on October 16, 2013. That lien attached to the Debtor's residential real property commonly known as 3344 Sierra Street, Riverbank, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $155,000.00 as of the date of the petition. The unavoidable consensual liens total $104,008.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $46,374.60 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Stanislaus Credit Control Service, Inc., Stanislaus County Superior Court Case No. 2000047 Document No. 2013-0087036-00, recorded on October 16, 2013, with the Stanislaus County Recorder, against the real property commonly known as 3344 Sierra Street, Riverbank, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

15. 13-92179-E-7 CURTIS/SANDRA ARLT — MOTION TO COMPEL ABANDONMENT
BSH-2 Brian S. Haddix — 3-19-14 [36]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 19, 2014. By the court's calculation, 22 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Abandon Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Compel Abandonment without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

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

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. Debtors seek an order compelling the Chapter 7 Trustee to abandon the estate's interest in the following assets:

1. Real Property commonly known as 3344 Sierra Str., Riverbank, CA, 95367;

2. $400 cash on hand;

3. 75% of $171.72 in Golden 1 Credit Union Savings (3302-0) bank account;

4. 75% of $84.00 in Golden 1 Credit Union Checking (3302-9 bank account);

5. 75% of $195.15 in Chase Savings (3270) bank account;

6. 75% of Chase Checking (3383) bank account;

7. The debtors' household goods and furnishings listed in Exhibit A to Schedule B with a value of $2,645;

8. The debtors' personal clothing listed in Schedule B;

9. The debtors' engagement and wedding rings, other rings, and costume jewelry listed in Schedule B with a value of $345.00;

10. The debtors' interest in a 403(b) Retirement Plan held through Franklin Templeton Investments with a value of approximately $109.23;

11. A 1997 Dodge Ram Laramie 2500;

12. A 2012 Dodge Avenger SE 4D;

13. A 2012 Dodge Ram 2500 Laramie;

14. A 2003 Dodge Neon SRT-4 4D;

15. 1 full blood border collie (family pet);

16. 2 mixed-breed collies (family pets);

17. 2 mixed-breed cats (family pets).

B. In support of the motion, the Debtors aver that they filed this bankruptcy case on December 16, 2013. Debtors are a "party in interest."

C. Debtors have claimed the equity in the property as exempt. The first date set for the 11 U.S.C. § 341 Meeting was held on January 23, 2014. Debtors argue that Trustee has had a reasonable amount of time to evaluate the asset's value.

D. Debtors argue that the property is of inconsequential value or benefit to the estate, and thus request that the court enter an order directing the Trustee to abandon the estate's interest in the listed assets.

The Motion to Compel Abandonment of the Property does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion merely demands that certain assets of the estate to be abandoned because the property is "of inconsequential value or benefit to the estate." This is not sufficient.

A debtor must establish by a preponderance of the evidence that the Property is burdensome or of inconsequential value and benefit to the estate in seeking an order compelling the abandonment of property of the estate. *In re Viet Vu*, 245 B.R. 644, 650 (B.A.P. 9th Cir. 2000). The courts have held that an order compelling abandonment is the exception, not the rule; abandonment should only be compelled in order to help the creditors by assuring some benefit in the administration of each asset. Absent an attempt by the trustee to churn property worthless to the estate just to increase fees, abandonment should rarely be ordered." *Id.* at 647 (quoting *Morgan v. K.C. Mach. & Tool Co. , 816* F.2d at 246).

In this Motion, the Debtors have not described with particularity the encumbrances, lien and exemptions claimed for each item of real and personal property. The court cannot determine whether the estate still retains interest in the above-listed property, or whether the debt recorded against the property, and exemptions claimed exceed the value of the estate's interest in the property. Debtors have not described whether there is equity in the property, and described the status of the debt owed on the property as of the petition filing date.

Debtors merely assert that the property is of inconsequential value, and assume that since Trustee has not taken action to liquidate the assets described since the 341 Meeting of Creditors took place on January 23, 2014, that the court should direct the Trustee to abandon the estate's interest in the listed assets. Dckt. No. 36 at 2. Debtors file their Amended Schedules A, B, and C, Dckt. No. 39, in support of the Motion. Debtors expect the court to sift through the evidence provided to determine the grounds for the relief requested, instead of pleading the factual contentions of the body of the actual Motion. Debtors make no allegations specific to each item of property, and assumes that the court will review the schedules, and correspond each lien and debt asserted, to the listing of exemptions and descriptions of the property in Debtors' Schedules A-C.

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

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

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

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

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

> Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

Based on the information provided, the court cannot determine whether the debt secured by the property exceeds the value of the property, and whether there are negative financial consequences to the Estate in retaining the property. Debtors have not met their burden of proof in showing that the property is of inconsequential value and benefit to the Estate, and that the court should direct the Trustee to abandon the property. The Motion to Compel Abandonment is therefore denied without prejudice.

A minute order substantially in the following form shall be prepared and issued by the court:

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

The Motion to Abandon Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is denied without prejudice.

16. 13-92179-E-7 CURTIS/SANDRA ARLT — MOTION TO EMPLOY FIRST CAPITAL AUCTION, INC. AS AUCTIONEER
HCS-2 Brian S. Haddix — 3-17-14 [26]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, and all creditors on March 18, 2013. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

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

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

Chapter 7 Trustee, Gary Farrar, seeks to employ First Capitol Auction, Inc. ("First Capitol"), as the Trustee's auctioneer. Debtors filed their bankruptcy case on December 16, 2013. In their amended schedules, Debtors disclosed an interest in a vehicle identified as a 2006 Dodge Charger V6 SE 2.7 4D (the "Vehicle"). Debtors valued the Vehicle at $6,000 and did not claim an exemption in the Vehicle. Debtors did not schedule any liens or encumbrances against the Vehicle and the Trustee is unaware of any liens or encumbrances against it. The Vehicle is the property of the bankruptcy estate, and the Trustee believes that the vehicle has equity for the estate.

Trustee has determined that he requires the services of First Capitol to sell the Vehicle. Trustee believes that it is in the best interests of the estate, Debtors, and the creditors to employ First Capitol because First Capitol is able to expose the Vehicle to a large number of prospective purchasers and therefore sell the Vehicle for the best possible price.

Based on Trustee's investigation and the declaration of Eric Smith, filed in support of this application, the Trustee is satisfied that First Capitol has no connection with the Debtors, creditors, or any party in interest, the Debtors' attorney, the United States Trustee, or any person employed in the office of the United States Trustee. Trustee believes that First Capitol does not represent any interests adverse to the proper representation of the Trustee or the estate, and is a disinterested party to this bankruptcy case.

The moving Trustee files the Declaration of Eric V. Smith in support of the Motion. Dckt. No. 28. Smith testifies that to his qualifications as an auctioneer, stating that he has been an auctioneer since 1987. *Id.* at ¶ 2. Smith confirms Trustee's statement that he has no connection with any of the parties involved in this case, and that Smith has entered into an agreement with the Trustee, subject to the following condition: First Capitol's compensation will be a commission of 5 percent of the sales price of the Vehicle sold at auction, plus reimbursement of reasonable expenses up to $500 incurred in preparing the Vehicle for sale, including out of pocket expenses for transportation and storage of the Vehicle.

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.

Taking into account all of the relevant factors in connection with the employment and compensation of Auctioneer First Capitol Auction, Inc., considering the declaration demonstrating that the proposed Auctioneer 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 First Capitol Auction. The Trustee having brought a concurrent Motion to Sell Debtors’ 2006 Dodge Charger V6 SE 2.7 4D, with a request for authorization to pay First Capitol a 5% commission of the sales proceeds, the fees be paid as authorized in the order approving the sale.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ First Capitol Auction, Inc. as Auctioneer for the Chapter 7 Trustee of the Debtors' 2006 Dodge Charger V6. The fees and expenses may be paid by the Chapter 7 Trustee as authorized by the court in a subsequent order (the order approving the sale or the order approving fees, if such separate motion is filed).

17. 13-92179-E-7 HCS-3 | **CURTIS/SANDRA ARLT** **Brian S. Haddix** | **MOTION TO SELL AND/OR MOTION FOR COMPENSATION FOR FIRST CAPITAL AUCTION, INC., AUCTIONEER** **3-17-14 [31]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on March 17, 2014. By the court's calculation, 24 days' notice was provided. 21 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b).

The Chapter 7 Trustee moves for court authorization to sell personal property of the estate at public auction, and to compensate his auctioneer from the sales proceeds the Trustee receives. Trustee believes that the proposed sale of the personal property is in the best interests of the creditors.

Debtors filed their bankruptcy case on December 16, 2013. In their amended schedules, Debtors disclosed an interest in a vehicle identified as a 2006 Dodge Charger V6 SE 2.7 4D (the "Vehicle"). Debtors valued the vehicle at $6,000 and did not claim an exemption in the vehicle. Debtors did not schedule any liens or encumbrances against the vehicle and the Trustee is unaware of any liens or encumbrances against it. The vehicle is the property of the bankruptcy estate, and the Trustee believes that the vehicle has equity for the estate.

Trustee believes, based on his knowledge of the vehicle and an evaluation conducted by First Capitol Auction, Inc, that there is equity in the in the vehicle, and a sale of the vehicle at public auction is the best method of liquidating it for the benefit of the estate. Trustee has concurrently filed an application to employ First Capitol as auctioneer to sell the vehicle at public auction, which is granted by the court. Trustee believes that by using an auction process, the vehicle will be exposed to the biggest number of prospective purchasers possible, and will be sold for the best possible price.

Trustee states that he intends to sell the vehicle at an online/live auction to be conducted on First Capitol's website. First Capitol engages in extensive advertising, including internet advertisements, and it emails auction announcements to a subscriber list of approximately 15,000 people. The vehicle will be sold on an "as is" basis without any warranty; interested individuals may inspect the vehicle on weekdays between 9:00 am to 4:00 pm, or by appointment. Trustee intends to accept the highest reasonable bids. If, in the exercise of the Trustee's business judgment, no reasonable bids are received, the vehicle may be held for subsequent auction or private sale without additional notice. Trustee believes that the sale of the vehicle at a public auction is in the best interests of creditors because it is likely to obtain the best possible price, and should be approved by the court.

Trustee also requests authorization to pay First Capitol a 5 percent commission, and to reimburse First Capitol for reasonable expenses up to $500.00 incurred in preparing the vehicle for sale, including out of pocket expenses for transportation and storage of the Vehicle. Following the sale, First Capitol will submit the gross sales proceeds to the Trustee and the Trustee wil file a report of the sale with the court. Trustee will then pay First Capitol's approved commission and expenses.

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

ISSUANCE OF AN ORDER

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to sell property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Gary Farrar, the Chapter 7 Trustee ("Trustee")], is authorized to sell pursuant to 11 U.S.C. § 363(b), the personal property described as 2006 Dodge Charger V6 SE 2.7 4D, on the following terms:
>
> 1. The sale proceeds shall first be applied to closing costs, taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 2. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 3. The Trustee be and hereby is authorized to pay a commission of five percent (5%) of the actual purchase price upon consummation of the sale, as well as reimburse reasonable expenses of up to $500 incurred in preparing the vehicle for sale, including out of pocket expenses for transportation and storage of the Vehicle to Trustee's auctioneer. The five percent (5%) commission shall be paid to the Trustee's auctioneer, First Capitol Auction, Inc.

18. 09-91780-E-7 ORGELIA GOMEZ MOTION TO AVOID LIEN OF
HDN-2 Henry D. Nunez GILBERTO GOMEZ
2-28-14 [111]

APPEARANCE OF HENRY D. NUNEZ, COUNSEL FOR DEBTOR REQUIRED FOR APRIL 10, 2014 HEARING. Telephonic Appearance Permitted

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 7 Trustee and Office of the United States Trustee on February 28, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Avoid Judicial Lien as moot, the court having previously issued an order on this Motion. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

This Motion suffers from several substantive and procedural defects, which are addressed below.

SERVICE

The Certificate of Service, filed on February 28, 2014, reflects that only the Chapter 7 Trustee and the Office of the United States Trustee were served the Motion, supporting pleadings, and evidence filed in support of the Motion. Dckt. No. 116.

Because a motion to avoid a judicial lien seeks relief against a specific, identifiable party, the Movant must comply with Local Bankruptcy Rule 9014-1 in giving notice to the creditor affected. The respondent creditor is a party in interest, must be afforded an opportunity to file any objections or opposition to the Motion to Avoid the Lien. The Debtor should

take particular care in serving affected lienholders, in the manner required by the Federal Rules of Bankruptcy Procedure, and in particular Federal Rule of Bankruptcy Rule 7004(b) and 7004(h), which govern service for corporate and FDIC-insured lenders.

Here, the judgment creditor, Gilberto Gomez, was not served the Motion and its supporting documentation.

RELIEF PREVIOUSLY GRANTED BY THE COURT

On August 10, 2009 the Debtor filed a Motion to Avoid the Lien of Gilberto Gomez. DCN: HDN-2, Dckt. 21. The court issued an order thereon, determining,

A. The Motion was granted;

B. The Abstract of Judgment of Gilberto recorded as document number 2007-0058071-00, on or about May 7, 2007, with the Stanislaus County Recorder, Case No. 10971202863 is avoided;

C. The order pertains to the property commonly known as lot 17 of Sun Ray Gardens No. 1, City of Turlock, California, according to the maps thereof filed May 12, 1982, in Volume 29 of Maps, page 742 of the Official Records, commonly described as 575 Blossom Drive, Turlock, California.

Order, Dckt. 42, Filed October 6, 2009.

On February 28, 2014, the Debtor has filed another Motion to Avoid Judicial Lien, Dckt. 111, which again uses Docket Control No. HDN-2. The use of docket control numbers are unique to each specific motion and not to be recycled through multiple motions. Local Bankruptcy Rule 9014-1(c)(4).

As discussed below, the new Motion fails to comply with the basic pleading requirement of Federal Rule of Bankruptcy Procedure 9013 (the motion itself must state with particularity the grounds upon which the requested relief is based). The "Motion" merely tells the court to read other pleadings, all of the records and other documents in the bankruptcy case, and whatever else Counsel may choose to present at the hearing.

The "Points and Authorities" appears to make may factual allegations as grounds upon which the motion should be granted, rather than providing the court with legal points and case authorities. It appears that the Debtor is requesting the court to avoid a judgment lien of Gilbert Gomez arising from a state court case No. 109712. Further grounds are stated in the "Points and Authorities" that an abstract of judgment was recorded on May 7, 2007 in the Stanislaus County Recorder, document No. 2007-0058071-00.

Further grounds are stated in the "Points and Authorities" that the lien is alleged to impair some exemption that the Debtor has in the real property commonly known as 575 Blossom Dr., Turlock, California.

It appears to the court that the Debtor is requesting a second order, using the same docket control number, repeating that the lien is avoided. No request has been made to amend the prior order.

Based on the Debtor having previously obtained an order, this present motion is moot.

RELIEF REQUESTED AND GROUNDS STATED

Pursuant to Federal Rule of Bankruptcy Procedure 9013(which is similar to Fed. R. Civ. P. 7(b)) requires that the motion itself state both the grounds upon which the relief is based and the relief with particularity. The Motion states in its entirety:

> COMES NOW, Debtor, ORGELIA AURELIA GOMEZ, will move the Court for an order to avoid the fixing of a judicial lien of creditor GILBERTO GOMEZ. Debtor's motion is made on the grounds that said lien is a judicial lien which impairs exemptions to which Debtor would be entitled. The Motion will be based upon the Notice of Hearing; the Memorandum of Points and Authorities in Support of the Motion; the Declaration of Orgelia Aurelia Gomez; and the Request for Judicial Notice in Support of the Motion; on the records and files herein; and upon such evidence and oral argument as may be presented at the hearing on the Motion.

From reading the Motion, the court has no idea of the grounds on which Debtor are requesting that the lien be avoided. The court has no way to determine, from the Motion, the legal authority on which Debtor request that relief should be accorded. Debtor instructs the court to read the Memorandum of Points of Authorities, the Declaration of the Debtor, and the evidence filed to determine the bases for this motion. It is not, however, for the court to canvas other pleadings, and wait until the hearing, to receive additional evidence from a movant to "draft the motion" for Movants.

Mothorities

There does not appear to be an actual motion, stating with particularity the grounds for the relief sought Debtor is essentially requesting the court to treat the points and authorities as the "motion." The pleading appears to be a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities"). The court and parties in interest are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Creditor.

The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, Creditor, Debtor, and creditors to provide those services for the moving party. Law and motion practice in federal court, and especially in

bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, Creditor and Debtor, or case and adversary proceedings. The rules are simple and uniformly applied. The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and the other party.

Moreover, Debtor's Motion provides no basis for the relief requested. Debtor acknowledge as such, directing the court to read the Memorandum of Points and Authorities to understand the basis for the Motion to Avoid the Lien.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-Debtor-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the Creditor (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled. Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007.

Here, Debtor's Motion gives no indication of why Debtor is entitled to relief. Debtor's Memorandum in support of the Motion to Avoid the Judicial Lien provides information on Debtor's case, and the basis for the relief requested by Debtor.

MEMORANDUM OF POINTS AND AUTHORITIES

A judgment was entered against the Debtor in favor of Gilberto Gomez for the sum of $$37,911.55. The abstract of judgment was recorded with Stanislaus County on May 7, 2007. That lien attached to the Debtor's residential real property commonly known as 575 Blossom Dr. Turlock,

California. Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $208,000.00 as of the date of the petition. The unavoidable consensual liens total $139,000.00 on that same date according to Debtor's Schedule D.

In seeking to avoid a judicial lien pursuant to 11 U.S.C. § 522(f)(1)(A), the Movant must show that the fixing of a judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B). The Movant must show that the respondent judgment creditor holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property, and that after application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity in the Movant's property to support the judicial lien.

Here, the Debtor argues that the lien arising from the judgment debt of Gilberto Gomez, impairs the exemption to which Debtor is entitled. Debtor makes no mention, however, of the exemption that Debtor has claimed on the property. Debtor fails to attach a copy of Debtor's Schedule C, showing any exemptions claimed, and the exemption that is allegedly "impaired" by the judicial lien. Instead, Debtor merely alleges that he is entitled to the avoidance and cancellation of the judicial lien of Gilberto Gomez. Debtor additionally states that the lien is defined as a judicial lien and it is not one that arises out of a domestic support obligation judgment.

Merely asserting that Debtor is entitled to avoiding the lien because an undisclosed exemption has been impaired, does not warrant the granting of the Debtor's request for relief under 11 U.S.C. § 522(f)(1)(A).

A minute order substantially in the following form shall be prepared and issued by the court:

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

19. 13-92082-E-7 ELIZABETH CLEMINS **MOTION TO AVOID LIEN OF LVNV**
Angela Mestre **FUNDING, LLC**
2-28-14 [16]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditor, and Office of the United States Trustee on February 28, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The Motion to Avoid a Judicial Lien is continued to 10:30 a.m. on May 22, 2014, to allow Debtor's counsel of record to appear and prosecute the Motion. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Debtor, in *pro se*, has filed a Motion to Avoid Lien on Real Estate. The Debtor, in pro se, has used a "Best Case LLC Form" for this purpose. She has signed the Motion using the "/s/ typed signature" which may only be used by persons who are authorized to electronically file pleadings with the court. Local Bankruptcy Rule 5005-1(c)(1), 5005.5-1(a), (d), 9004-1(c).

However, the Debtor in this case is not representing herself, but is represented by counsel, Angela Mestre. Ms. Mestre has appeared as counsel of record representing the Debtor in this case on multiple occasions. Ms. Mestre has been paid $1,300.00 to represent the Debtor in this Chapter 7 case. Disclosure of Compensation, Dckt. 1 at 36. The form states that counsel, for the $1,300.00 will not represent the Debtor in connection with,

A. Any dischargeability actions;

B. Judicial lien avoidances;

C. Relief from stay actions;

D. Any other adversary proceedings;

E. Negotiations with secured creditors to reduce to market value;

F. Preparation and filing of Reaffirmation Agreements and Applications; and

G. Filing of Motions pursuant to 11 U.S.C. § 522(f)(2)(A) for avoidance of liens on household goods.

While some of these are reasonable, such as adversary proceedings and dischargeability actions, others are patently improper, leaving the poor Debtor to fend for herself in obtaining the basic benefits of a Chapter 7 bankruptcy case – such as avoiding judicial liens, at least advising on the merits of a motion for relief from the stay; advising and assisting with reaffirmation agreements, and motions to avoid liens that impair exemptions on household goods.

For the $1,300.00 in fees counsel states that she will only assist the Debtor in,

A. Initial consultation, analysis of Debtor's financial situation and advise whether to file bankruptcy;

B. Prepare and file petition, schedules and statement of affairs;

C. Exemption planning; and

D. Representation at First Meeting of Creditors.

Id. On its face, this Disclosure indicates that counsel's "representation" of the Debtor is limited to (1) telling the Debtor that she should file bankruptcy, (2) telling the Debtor to pay counsel $1,300.00, (3) preparing the petition, schedules, and statement of financial affairs, and (4) showing up at the First Meeting of Creditors. After that, and anything that flows from the bankruptcy — "The Debtor is on her own."

Filing of bankruptcy is a difficult enough experience with knowledgeable counsel providing the necessary representation to take a client through a "simple" Chapter 7 case. There is nothing to indicate that the Debtor has any knowledge or ability to understand or prosecute the "avoiding of a judicial lien," "avoiding a lien that impairs exempt household goods," or "a motion for relief from the stay."

In the Eastern District of California representation of a debtor includes the basic necessary services, which includes the necessary, reasonable services, for avoiding of liens which impair exemptions. As discussed below, it appears that for a knowledgeable, experienced attorney, the motion to avoid a judicial lien was a simple task, well within a $1,300.00 fee for a Chapter 7 case.

Additionally, the court cannot imagine how this Debtor was able to get a Best Case, LLC form document. It appears that counsel may be providing

the forms, pushing the poor Debtor further into the legal swamp to flounder and possibly lose her rights.

REVIEW OF MOTION

The Form Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. Debtor seeks to avoid and cancel a judicial lien held by Lvnv Funding, LLC, pursuant to 11 U.S.C. § 522(f).

B. A judgment was entered against the Debtor in favor of Lvnv Funding, LLC, for the sum of $4,714.27.

C. The abstract of judgment was recorded with Stanislaus County on June 10, 2013.

D. On June 10, 2013, the creditor recorded a judicial lien against the Debtor's residence, listed on Schedule A, commonly known as 2724 Rosewood Avenue.

E. The "estimated" fair market value of the Rosewood Property is $133,243.00, directing the court to review Exhibit B (a Zillow.com printout).

F. Debtor's interest in the Rosewood Property has been claimed as "full exempt" (which is a term the court does not recognize) in the bankruptcy case, directing the court to read Exhibit D (copy of Schedule C).

G. Debtor alleges the legal conclusion that the Lvnv Funding Llc judgment lien "[i]mpairs exemptions to which the debtor(s) would be entitled under 11 U.S.C. § 522(b)." (The court is always concerned with a pro se or attorney uses a form in which it appear that the parties do not know whether there is only one or multiple debtors in a case. Such indicates that review of the pleading may have only been cursory.)

H. It is alleged that the Rosewood Property is encumbered by a lien by "Wells Fargo Home Mortgage) with a balance of $106,263.19, directing the court to review Exhibits E and F (Schedule D and a document bearing the letterhead Wells Fargo, Home Mortgage).

FAILURE TO COMPLY WITH FED. R. BANK. P. 9013

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

In seeking to avoid a judicial lien pursuant to 11 U.S.C. § 522(f)(1)(A), the Movant must show that the fixing of a judicial lien impairs the Debtor's exemption of the real property and its fixing is

avoided subject to 11 U.S.C. § 349(b)(1)(B). The Movant must show that the respondent judgment creditor holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property, and that after application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity in the Movant's property to support the judicial lien.

Here, the Debtor argues that the lien recorded by Lvnv Funding, LLC, impairs the exemption to which Debtor is entitled. Debtor makes no mention, however, of the exemption that Debtor has claimed on the property. Instead, Debtor merely alleges that she is entitled to the avoidance and cancellation of the judicial lien of the respondent creditor.

The court cannot determine from the motion itself, the grounds being asserted, including – what exemption has been claimed, and if the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B). Part of the reason why Debtor might not have felt the need to supply such critical information is because the Motion appears to be nothing more than a form template, in which Debtor's attorney is filling in the blanks with her client's information, rather than properly pleading the Debtor's case.

Some confusion has also been created by Movant failing to comply with Federal Rule of Bankruptcy Procedure 9013 (requiring the motion to state with particularity the grounds for the relief requested) and Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents which require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents.

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

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 which can then be used by the court.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*,

550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

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

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

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

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

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual

allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

FAILURE TO PROVIDE EVIDENCE IN SUPPORT OF THE MOTION

The Debtor, appearing in pro se, has presented the court with allegations in the Motion for which there is no competent evidence or properly authenticated documents. The Debtor seeks to assert the value of the Property based upon the hearsay statements of Zillow.com. Merely because someone finds something on the internet doesn't make it true or credible evidence. Fed. R. Evid. 601, 602, 801, 802, 901. While the court may take notice of the Schedules, an out of court notice from "Wells Fargo Mortgage Company" and a printout from the internet are not part of the court's file as documents which have been properly authenticated or testimony based on the personal knowledge of the declarant.

NEED FOR FURTHER HEARING

The defects in the motion are so gross and the Debtor appears to have been abandoned by counsel, the court can proceed only with the participation

of Debtor's counsel of record. The court continues the hearing to allow Debtor's counsel to appear in court, no telephonic appearance permitted, to address this motion and how it will be properly prosecuted.

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Avoid Judicial Lien is continued to 10:30 a.m. on May 22, 2014.
>
> **IT IS FURTHER ORDERED** that Angela Mestre, the Debtor's attorney of record in this case shall appear at the May 22, 2014 hearing in person, no telephonic appearance permitted for any attorneys for the Debtor.
>
> **IT IS FURTHER ORDERED** that the court suspends the application of Federal Rule of Bankruptcy Procedure 7041 and Federal Rule of Bankruptcy Procedure 41(a)(1) with respect to this Motion, and dismissal of the Motion shall only be by further order of the court after noticed hearing.

20. 13-91985-E-7 MICHAEL SMITTLE MOTION TO COMPEL ABANDONMENT
BSH-2 Brian S. Haddix 3-11-14 [25]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 11, 2014. By the court's calculation, 30 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Abandon Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The court's tentative decision is to deny the Motion to Compel Abandonment without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

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

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. Debtor seeks an order compelling the Chapter 7 Trustee to abandon the estate's interest in the following assets:

1. Real Property known as 11000 Union Hill Rd, Columbia, CA.

2. Edward Jones Brokerage Account;

3. Bank of America Checking Account ending in 1799;

4. All of the debtor's household goods & furnishings as described in Exhibit A to Schedule B filed with the debtor's petition;

5. The debtor's wearing apparel as listed in the debtor's Schedule B;

6. The debtor's Fishing Pole and Tackle as listed in the debtor's Schedule B;

7. The debtors' interest in the Waste Management Retirement Plan worth approximately $8,000;

8. A 1992 Chevy 1 Ton Truck (non-op);

9. A 1972 Chevy ½ Ton Truck (not running);

10. A 2004 Circle J Stock Trailer;

11. A 1994 Chevy ½ Ton 4WD Truck;

12. One mixed breed dog named.

Motion, Dckt. 25. While the court could "guess" that these items have no value for the estate, there are no grounds stated in support of these assets being abandoned (Fed. R. Bankr. P. 9013), but merely that here are the assets, the Debtor demands they be abandoned. FN.1.

FN.1. Debtor and Counsel might argue, "Gee judge, it's really simple, and no one objects, and you can see that things like household goods are really cheap, so just sign the order." The problem is that if it were that "simple," then the Debtor could have provided such information with particularity in the Motion. The court simply, fairly, and evenly applies the pleading rules to all parties and attorneys. The court does not leave attorneys' guessing when the rules must be complied with and when the court just "lets it slide." A judicial attitude of "letting it slide" only begets some attorneys (which, for the record, clearly would not be the one representing the Debtor in this case) then "stretching the truth," and ultimately lying for their clients to try and sneak assets out of the estate by misleading the court and creditors.

In support of the motion, the Debtor testifies that the above assets are what he demands be abandoned to him. Dckt. 27. The Debtor then files as Exhibits copies of Schedules A, B, and C, assigning to the court the task of reviewing, determining which information from these Schedules is relevant for the Motion, and then to assemble and state that information for the Debtor in support of the Motion. Finally, the court having assembled the information and stated it for the Debtor, to then rule on the Motion for the Debtor, giving him the abandonment that he demands from the court.

The Motion to Compel Abandonment of the Property does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested

relief is based. The motion merely demands that certain assets of the estate to be abandoned because the property is "of inconsequential value or benefit to the estate." This is not sufficient.

A debtor must establish by a preponderance of the evidence that the Property is burdensome or of inconsequential value and benefit to the estate in seeking an order compelling the abandonment of property of the estate. *In re Viet Vu*, 245 B.R. 644, 650 (B.A.P. 9th Cir. 2000). The courts have held that an order compelling abandonment is the exception, not the rule; abandonment should only be compelled in order to help the creditors by assuring some benefit in the administration of each asset. Absent an attempt by the trustee to churn property worthless to the estate just to increase fees, abandonment should rarely be ordered." *Id.* at 647 (quoting *Morgan v. K.C. Mach. & Tool Co. , 816* F.2d at 246).

In this Motion, the Debtor has not described with particularity the encumbrances, lien and exemptions claimed for each item of real and personal property. The court cannot determine whether the estate still retains interest in the above-listed property, or whether the debt recorded against the property, and exemptions claimed exceed the value of the estate's interest in the property. Debtor has not described whether there is equity in the property, and described the status of the debt owed on the property as of the petition filing date.

Debtor merely asserts that the property is of inconsequential value, and assume that since Trustee has not taken action to liquidate the assets described since the 341 Meeting of Creditors took place on December 12, 2013, and that the court should direct the Trustee to abandon the estate's interest in the listed assets. Dckt. No. 25 at 2. Debtor files his Amended Schedules A, B, and C, Dckt. No. 28, in support of the Motion. Debtor expects the court to sift through the evidence provided to determine the grounds for the relief requested, instead of pleading the factual contentions of the body of the actual Motion. Debtor makes no allegations specific to each item of property, and assumes that the court will review the schedules, and correspond each lien and debt asserted, to the listing of exemptions and descriptions of the property in Debtor's Schedules A-C.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A

complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

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

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

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which

> unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

Based on the information provided, the court cannot determine whether the debt secured by the property exceeds the value of the property, and whether there are negative financial consequences to the Estate in retaining the property. Debtor has not met his burden of proof in showing that the property is of inconsequential value and benefit to the Estate, and that the court should direct the Trustee to abandon the property. The Motion to Compel Abandonment is therefore denied without prejudice.

A Minute Order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is denied without prejudice.

21. 14-90085-E-7 JDP-1 — DANNY/JOELLEN HUESTIS — James D. Pitner — MOTION TO AVOID LIEN OF CITIBANK, N.A. — 3-5-14 [11]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditor, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required. That requirement was met.

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

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

A judgment was entered against the Debtor Joellen Huestis in favor of Citibank, N.A. for the sum of $10,225.19. The abstract of judgment was recorded with Stanislaus County on January 29, 2013. That lien attached to the Debtors' residential real property commonly known as 1365 Speer Street, Oakdale, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtors' Schedule A, the subject real property has an approximate value of $160,000.00 as of the date of the petition. The unavoidable consensual liens total $190,046.23 on that same date according to Debtors' Schedule D. The Debtors claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $4,122.24 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

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

IT IS ORDERED that the judgment lien of Citibank, N.A., Stanislaus County Superior Court Case No. 674294, Document No. 2013-0008131-00, recorded on January 29, 2013, with the Stanislaus County Recorder, against the real property commonly known as 1365 Speer Street, Oakdale, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

22. 13-90090-E-7 JORGE PEREZ — MOTION TO SELL
CWC-4 Maria C. Jaime — 3-13-14 [56]

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

Correct Not Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on March 13, 2014. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. This requirement was not met.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to deny the Motion to Permit Trustee to Sell Property without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

INSUFFICIENT NOTICE PERIOD

Federal Rule of Bankruptcy Procedure 6004 requires that notices of proposed sales, use, or leases of property, other than cash collateral, not in the ordinary course of business be given pursuant to Federal Rule of Bankruptcy Procedure 2002(a)(2), (c)(1), (I), and (k). Federal Rule of

Bankruptcy Procedure 2002(a)(2) mandates that twenty-one days' notice be provided to parties in interest for motions proposing the sale of property.

Local Bankruptcy Rule 9014-1(f)(1), however, also requires that moving party setting motions for hearing under this rule provide at least fourteen days, preceding the date of the hearing, for potential respondents to file and serve written opposition to the motion. The bankruptcy courts of the Eastern District of California require that the moving party provide fourteen (14) days to permit that written opposition to be filed and served in advance of the hearing (pursuant to Local Bankruptcy Rule 9014-1(f)(1)), **in addition** to the twenty-one (21) days' notice of hearing mandated and opportunity to present an opposition under Federal Rule of Bankruptcy Procedure 2002(a)(2). Thus, Motions to Sell Property in this district must be filed and served at least **thirty-five (35) days** prior to the hearing date.

Here, the Moving Chapter 7 Trustee filed and served the Motion to Sell on March 13, 2014, 28 days before this hearing date. The Trustee set the motion for hearing under Local Bankruptcy Rule 9014-1(f)(1). Because the Trustee did not provide sufficient notice for potential respondents to file written opposition to the motion under Local Bankruptcy Rule 9014-1(f)(1), this motion is denied without prejudice.

If the court shortens the notice period or the Trustee provides the court with evidence that proper notice was give, the court may issue the following tentative ruling:

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b).

Here, the Trustee proposes to sell the real property commonly known as 1746 Monterey Avenue, Modesto, California. The Trustee has entered into an agreement with Jessica Buendia and Randall Steele of 442 Weyer Road, Modesto, California (the "Buyers"), for the sale of the property for $50,000.00 in cash, or certified funds upon the terms and conditions described in the parties' California Residential Purchase Agreement and Joint Escrow Instructions with Addendum dated February 11, 2014. Exhibit 2, Dckt. No. 59.

The Buyers have deposited the sum of $3,000.00 with the Trustee to be held in a trust pending court approval of the sale. The property is being purchased on an "as is, where is" basis. Said sale is without representation or warranties of any kind, express or implied, including, without limitation, representations of merchantability and/or fitness for any particular purposes. The sale is subject to court approval and to third party overbids at the hearing on this matter.

Prior to the hearing, all third party bidders must deposit $3,000 in certified funds with the Trustee and agree to execute a contract with terms and conditions identical to the Agreement, in order to be eligible to make overbids at the hearing. All deposits of unsuccessful bidders will be fully refundable.

Under the terms of a separate agreement, Trustee reports that PMZ Real Estate, the Trustee's and Buyers' licensed real estate broker, will receive a brokerage fee of 6% of the sales price. The Trustee is informed and believes that the estate will not incur any adverse tax consequences from the sale, and that the sale will fully pay all liens, encumbrances, taxes, etc. on the subject property.

The costs and expenses of the sale may include, but are not limited to, all closing costs, property taxes and assessments, and the real estate broker's commission. The Trustee states that this sale represents the Trustee's best efforts to sell the subject property for the highest possible price, and Trustee believes that the proposed sale is in the best interest of the estate.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Permit Trustee to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to sell property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Irma C. Edmonds, the Chapter 7 Trustee ("Trustee"), is authorized to sell pursuant to 11 U.S.C. § 363(b)to Jessica Buendia and Randall Steele ("Buyers"), the residential real property commonly known as 1746 Monterey Avenue, Modesto, California ("Real Property"), on the following terms:
>
> 1. The Real Property shall be sold to Buyer for $50,000.00, on the terms and conditions set forth in the California Residential Purchase Agreement and Joint Escrow Instructions with Addendum dated February 11, 2014, filed as Exhibit 2 in support of the Motion. Dckt. 59.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount no more than six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to the Trustee's broker, PMZ Real Estate, or divided among the real estate agents or brokers involved in the transaction as agreed between such agents or brokers.

23. 08-90896-E-7 CHARLES/TINA WILLIAMS
08-9067 SCF-3
PURCELL V. WILLIAMS ET AL
ADV. CASE CLOSED 11/4/09

CONTINUED ORDER TO APPEAR FOR EXAMINATION (MARIE WILLIAMS)
2-19-14 [42]

Notice Provided: Plaintiff served the Order to Appear for Examination, Subpoena to Produce Documents, and a the Declaration of Stephen C. Ferlmann on Debtor on February 22, 2014. 12 days' notice of the hearing was provided.

The Order to Appear For Examination is removed from the calendar. No appearance at the April 10, 2014 hearing is required.

Withdrawal of Request for Further Examination Pursuant to Current Order

On April 7, 2014, the judgment creditor filed a Notice of Withdrawal for Tina Marie Williams, the judgment debtor, to appear for further examination pursuant to the court's Order for Examination. Though not expressly stated in the Withdrawal, the court infers that the judgment debtor has provided the information listed in the prior order and that she and the judgment creditor have continued in the cooperative resolution of this matter that was demonstrated at the prior hearing.

Order for Examination

The court removes the matter from the calendar, with no further hearing set on the Order of Examination.

The Order of Examination was continued from March 6, 2014, to this hearing date. Civil Minutes, Dckt. No. 48.

Gilbert L. Purcell, a Law Corporation ("Plaintiff"), is the Plaintiff and Judgment Creditor in the adversary case of *Purcell v. Williams et al*, Adversary Proceeding Case No. 08-09067. The court entered a default judgment against Defendants, Gartside Williams and Tina Marie Williams, on October 7, 2008, in the amount of $897,504.92 and held that this judgment is nondischargeable. Default Judgment, Bankr. E.D. Cal., Adv. Proc. No. 08-09067. The adversary proceeding was closed on November 4, 2009.

On February 14, 2014, Plaintiff filed a *subpoena duces tecum* to require that Debtor, Tina Marie Williams ("Debtor") appear and produce certain items at this Examination. This is the third such request from Plaintiff; the first examination occurred on July 14, 2010, and the second application for an order to appear for examination was dropped from calendar. Civil Minutes Order, Dckt. No. 40. For this Order to Appear, Dckt. No. 42, Plaintiff has ordered that Debtor Tina Marie Williams produce the following items:

1. Debtor's individual income tax returns and the income tax returns of any partnership, corporation, or other entity in which Judgment Debtor has an interest greater than five

percent (5%) for the past three (3) years inclusive including work papers for each return.

2. Debtor's checking account statements for the last three years on all of Debtor's bank accounts

3. Copies of all financial statements and/or loan applications made by the Debtor within the last three years

4. Copies of any statements of investments, including copies of stocks and bonds, and other investment securities of any kind

5. The most recent savings loan passbook, savings account passbook, credit union savings passbook, any certificate of deposit in which Judgment Debtor has any interest or any other savings plan or savings account in which Debtor has interest

6. A list of all the contents of any safety deposit box which Debtor has a right to access, or in which property owned by Debtor is contained

7. All life insurance policies, endowment, annuity, and retirement policies or similar polices in which Debtor has or may have an interest, and which has or may have cash redemption or loan provisions

8. Copies of deeds of conveyance, whether recorded or otherwise, as to any real estate which Debtor now owns, has owned, or in the near future will hold an equitable or legal interest

9. Certificates of title and/or pink slips to all motor vehicles, trucks, tractors, farm machinery, boats, travel trailers, campers, and licensable vehicles of any kind which are owned by the Debtor or in which Debtor claims to have an interest; together with a list of all similar motor vehicles requested n this paragraph which have been purchased or disposed of during the past three years

10. Written records evidencing property transfer

11. A list of all personal property owned by Debtor including copies of receipts for the purchase of any personal property items with a value in excess of $250.00 for the last two years

12. A copy of any records pertaining to any ownership in livestock for the past two years

13. A copy of records pertaining to any pending personal injury or worker's compensation claim for the last two years

14. A copy of records pertaining to any interest Debtor has in an estate or trust, or pending probate matter

15. A copy of Debtor's pay advises or pay stubs from wages and/or tips earned from employment for the past twelve months

16. A copy of any and all books, papers, or records in Debtor's possession or control that may contain information concerning property or income or indebtedness due to Judgment Creditor

MARCH 6, 2014 HEARING

Tina Marie Williams, the Judgment Debtor appeared for the examination. Civil Minutes, Dckt. No. 48.

At the conclusion of the examination, the Judgment Debtor and Counsel for Plaintiff appeared in open court, and stated the following agreement for a stipulated order of the court:

A. On or before March 12, 2014 Tina Marie Williams, Judgment Debtor, shall produce at the office of Stephen Ferlmann, counsel for Plaintiff Judgment Creditor, a copy of her 2011 Federal Tax Return filed with the Internal Revenue Service.

B. On or before March 12, 2014, Tina Marie Williams shall provide copies of her bank account statements for the period January 1, 2013 through February 2014.

C. On or before March 14, 2014, Tina Marie Williams shall provide a copy of a list of her assets to Stephen Ferlmann.

D. On or before April 10, 2014, Tina Marie Williams shall file her 2012 and 2013 Federal Tax Returns and provide copies of said returns to Stephen Ferlmann.

E. Tina Marie Williams and the Plaintiff have agreed to increase the wage garnishment for the enforcement of the judgment in this Adversary Proceeding to $150.00 per pay period, an increase from the current $80.00 per pay period.

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 hearing on the Order to Appear for Examination having been conducted, and upon review of the pleadings, evidence, arguments of counsel, Withdrawal of Request for Further Hearings Pursuant to the Current Order of Examination, and good cause appearing,

IT IS ORDERED that the continued hearing on the Order for Examination is removed from the calendar, with no further appearance of the judgment debtor ordered at this time.

24. 13-92199-E-7 PJE-1 — MARK THOMPSON, Patrick J. Edaburn — MOTION TO CONVERT CASE TO CHAPTER 13, 2-25-14 [13]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 25, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required. That requirement was met.

No Tentative Ruling: The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The Motion to Convert is xxxxx and the case is xxxx converted to a proceeding under Chapter 13. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Debtor seeks to convert this case from Chapter 7 to Chapter 13. The Bankruptcy Code authorizes a one-time, near absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

Here, the Debtors' case has not previously been converted, and Debtor is eligible for Chapter 13 relief under 11 U.S.C. § 109(3). Debtor has completed his 11 U.S.C. § 341 Chapter 7 hearing, but his case has not yet been closed. Debtor states that he lacks the sufficient exemptions to protect his assets in a Chapter 7 case, and states that he would like to retain his vehicle and pay unsecured creditors in a five year Chapter 13 Plan. Declaration, Dckt. No. 15. Debtor anticipates that Student Loan

payments will come within the next year, and that it would be in his best interest to arrange payments through a Chapter 13 Plan.

Debtor argues that this conversion is in the best interest of the unsecured creditors because they would receive a higher dividend under the Chapter 13 plan than they would under the Chapter 7 liquidation. Debtor states that he has disposable income after his expenses and believes that he can propose a confirmable plan.

Notice was provided to the Chapter 7 Trustee, Office of the United States Trustee, and other interested parties. No opposition has been filed. A review of the file does not indicate any action pending with the Chapter 7 Trustee or a party in interest which would indicate that the conversion is sought for other than a good faith purpose.

TRUSTEE'S REPORT OF INVESTIGATION

On March 12, 2014, the Chapter 7 Trustee filed his Report of Investigation in this case. Dckt. 18. The Report includes the following concerning the conduct of the Debtor:

A. On Schedule A the Debtor listed his residence on Trident Drive as having a value of $260,000.00. The Trustee's investigation, and with the assistance of a local realtor, leads the Trustee believes that the property could have a listing price of $339,950.00. Even after allowing for some negotiating with a buyer, there could well be $70,000+ in non-exempt equity for this property that was not disclosed by the Debtor under penalty of perjury on Schedule A.

B. The Trustee also engage an auctioneer to inspect the Debtor's three vehicles. The Trustee and auctioneer identified the vehicles having a value of $31,500. On Schedule B the Debtor only listed two vehicles, not disclosing one which has a projected value of $11,500.00.

C. The Trustee also reports that the Debtor transferred the vehicle which was not disclosed to his sone prior to filing bankruptcy.

The court has reviewed the Debtor's Schedules and Statement of Financial Affairs, which have been presented to the court by Debtor under penalty of perjury. The Statement of Financial Affairs discloses that the Debtor had income of:

A. 2013.....$ 69,000 (Household income, disability and pension)

B. 2012.....$195,392

C. 2011.....$131,491

Questions 1 and 2, Statement of Financial Affairs, Dckt. 1 at 25.

In response to Question No. 7 (gifts) and 10 (other transfers not in the ordinary course of business), the Debtor stated under penalty of perjury "None." *Id.* at 26, 27.

Though the Debtor is married, on Schedule I he does not provide any income information for his spouse. Dckt. 1 at 17-19. What the Debtor does disclose is that there is "Spousal Contribution" of $3,758.60. It appears that the Debtor has intentionally failed to disclose additional family unit income.

On Schedule I the Debtor lists monthly income of only $4,878.60, which is substantially less than the $195,392 "Household Income" in 2012. On Schedule H the nondebtor spouse, Brenda L. Thompson, is listed as a co-debtor for all of the Debtor's obligations. Dckt. 1 at 16.

DISCUSSION

Though a Debtor's right to convert a case to one under Chapter 13 is almost absolute, it is not absolute. A "bankruptcy judge may override a Chapter 7 debtor's conversion right based on a finding of bad faith." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 379 (2007). The authority to convert is left to the discretion of the bankruptcy court. *Id.* at 377. In determining whether the debtor's conversion involved bad faith, "a bankruptcy judge must review the totality of the circumstances." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). Under the "totality of the circumstances" test, the court examines whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or filed his Chapter 13 petition or plan in an inequitable manner. *Id.* Debtor's history of filings and dismissals is relevant in determination of "bad faith." *Id.*

The overriding factor as to whether the conversion should be alloed goes to the core of bankruptcy proceedings. With the ability to get great benefits from bankruptcy, debtors must proceed in good faith, providing candid, honest information. The Ninth Circuit Court of Appeals most recently review this concept in *Danielson v. Flores (In re Flores)*, 735 F.33d 855, (9th Cir. 2013), stating,

> "Finally, our interpretation of § 1325(b)(1)(B) is consistent with the policies that underlie the Bankruptcy Code and the BAPCPA amendments. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank*, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991))."

The Collier on Bankruptcy discussion of Marrama notes there being a simple, practical reason for the conversion right to 13 being "almost absolute," if converted it is the bankruptcy judge who will consider whether it should be reconverted to a Chapter 7 due to the debtor's conduct. 6 COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 706.02.

Based on the totality of the circumstances, the court questions the Debtor's good faith. The residential real property was grossly understated as to value. A vehicle had been transferred to the Debtor's son but the Debtor made the affirmative statement under penalty of perjury that no such transfers had been made by the Debtor. The Debtor's spouse's income is not disclosed, but only what portion of that the Debtor wants to show as a "contribution."

The Chapter 7 Trustee and the U.S. Trustee have not weighed in on this motion. Neither has opposed, or supported the conversion. The lack of response leaves the court to try and address whether the Debtor is merely an innocent, but confused consumer, or one, with the assistance of his attorney, has intentionally connived to mislead the court and defraud creditors.

Therefore, **xxxxxxxxxxxxxxxxxxxxxxxxxxxx.**

Therefore

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 Convert 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 Convert is granted and the case is converted to a proceeding under Chapter 13 of Title 11, United States Code.