

Michael P. Dacquisto, the Attorney, ("Applicant") for Linda Schuette, the Chapter 7 Trustee, ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period February 13, 2014 through April 23, 2015. The order of the court approving employment of Applicant was entered on March 10, 2014, Dckt. 137. Applicant requests fees in the amount of \$1,000.00 and costs in the amount of \$156.05.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including contacting counsel for the creditor to obtain supporting documentation, resulting in a claim being withdrawn. The Applicant also worked on oppositions to Motions for Relief from the Automatic Stay. The estate has unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 0.4 hours in this category. Applicant assisted Client with general legal advice and assistance in matters that arose concerning general case administration issues.

Asset Analysis and Recovery: Applicant spent 1.1 hours in this category. Applicant initially reviewed the petition, schedules and statement of financial affairs, along with other documents from Client relative to potential assets in the case. The primary potential asset was real property in Adin, California with potential equity (non exempt) of approximately \$15,000.00. Client undertook efforts to sell this property, but was unfortunately not able to do so.

Asset Disposition: Applicant spent 0.2 hours in this category. Applicant reviewed a notice of intent to sell and a report of sale prepared by Client with respect to sale of several nonexempt items of personal property belonging to the Debtors.

Claims Review and Objection: Applicant spent 0.7 hours in this category. One creditor had filed a proof of claim seeking \$9,741.34 as a wage priority claim under 11 U.S.C. §507(a)(4). There was no documentation attached and the information on the proof of claim was confusing. At Client’s request, Applicant contacted counsel for that creditor and was able to determine the damages sought in the proof of claim were not owed by the estate to this creditor. The creditor’s attorney agreed to file a notice of withdrawal of that claim.

Relief from the Automatic Stay: Applicant spent 2.5 hours in this category. At the outset of the case, when Client was appointed after conversion from chapter 13 to chapter 7, a motion for stay relief was filed by a creditor with a lien against the real property in Adin, California. That motion, and the supporting documentation, indicated there was substantial non exempt equity in that property. Applicant reviewed the motion and supporting documents and prepared and filed opposition with the court. That opposition resulted in the motion for stay relief being withdrawn by the creditor.

Employment and Fee Applications: Applicant spent 4.9 hours in this category. Applicant obtained an order approving my employment and filed this Motion to approve my compensation. This time includes 1.0 hours as an estimate for the time necessary to appear at the hearing on this Motion, to review any objections, and to prepare a court order after the hearing. Applicant briefly reviewed paperwork prepared by Client to employ a real estate broker for the property in Adin, California.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Applicant: Michael P. Dacquisto	9.8	\$350.00	\$3,430.00
	0	\$0.00	<u>\$0.00</u>
Total Fees For Period of Application			\$3,430.00

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$156.05 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage	\$0.75	\$1.50
Copies	\$0.10	\$60.40
Postage	\$74.35	\$74.35
PACER Fees	\$0.10	\$11.80
Postage	\$8.00	\$8.00
Total Costs Requested in Application		\$156.05

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks to be paid a single sum of \$1,000.00 for its fees incurred for the Client. The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Therefore, First and Final Fees in the amount of \$1,000.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs and Expenses

Applicant is requesting \$156.05 in costs and expenses.

Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as on-line access to bankruptcy and state law and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include fee for PACER charges. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be changed in additional to the professional fees requested as compensation. The court disallows \$11.80 of the requested costs.

The First and Final Costs in the amount of \$144.25 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$1,000.00
Costs and Expenses	\$144.25

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

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

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

The Motion for Allowance of Fees and Expenses filed by Michael P. Dacquisto ("Applicant"), Attorney for 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 Michael P. Dacquisto is allowed the following fees and expenses as a professional of the Estate:

Michael P. Dacquisto, Professional Employed by Trustee

Fees in the amount of \$ 1,000.00
Expenses in the amount of \$ 144.25,

IT IS FURTHER ORDERED that the costs of \$11.80 are not allowed by the court.

The Fees and Costs pursuant to this Applicant are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Tentative Ruling: The Motion to Abandon Property 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 Provided. The Proof of Service states that the Motion and supporting pleadings were served on, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on March 13, 2015. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property 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. 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 hearing on the Motion to Abandon Property is continued to 10:30 a.m. on May 26, 2015.

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 filed by Roderick Darryl Robbins ("Debtor") requests the court to order the Trustee to abandon property commonly known as 4981 Martin Luther King Jr., Sacramento, California (the "Property"). This Property is encumbered by the liens of JPMorgan Chase Bank, N.A., securing a claim of \$64,043.00 on a first deed of trust. The Declaration of Roderick Darryl Robbins has been filed in support of the motion and values the Property to be \$75,000.00.

The instant case was converted from a Chapter 13 case to a Chapter 7 case on January 22, 2015. Dckt. 71. The Debtor contends that the value of the Property should remain \$75,000.00 as what was first filed in the Chapter 13 schedules. The Debtor has claimed an exemption of \$10,957.00 pursuant to C.C.P. § 703.140(b)(5), which in turn would have the debt secured by the Property (\$64,043.00) and the claimed exemption (\$10,957.00) exceed the value of the property (\$75,000.00).

TRUSTEES OPPOSITION

Geoffrey Richards, the Chapter 7 Trustee, filed an opposition to the instant Motion on April 9, 2015. Dckt. 100.

The Trustee first argues that the Debtor cannot meet the burden of demonstrating that the Property is of inconsequential value or benefit to the estate, or is burdensome to the administration of the estate. The Trustee believes that he should not be bound by the valuation of the property in the Chapter 13 case when he was not even the trustee in the instant Chapter 7 case. Currently the Trustee is working with a real estate agent that he claims will value the Property over the amount of \$100,000.00. Furthermore, the Trustee notes that the Debtor has acknowledged that the Property has gone up in value since the initial filing, but seeks to hold the valuation as first filed.

Trustee further contends that a number of documents requested have not been provided by the Debtor, and without the requested documentation the Trustee cannot fully evaluate the Property. Additionally, the Trustee refers to the Debtor's testimony at the Meeting of Creditors where the Debtor stated that he did not consult a real estate agent prior to listing the value of his home, and instead relied on comparable homes. Furthermore, the Trustee found that the Property was sold for \$85,000.00 in 2008.

While the Trustee does not have a valuation of the property he seeks to at least continue this motion until he has the time to obtain a valuation. The Trustee argues against Debtor's case law in citing *In Re Lynch* 363 B.R. 101 (BAP 9th Cir. 2007) and that a Chapter 7 Trustee is not bound by the Debtor's asset values, especially when a Chapter 13 plan was never confirmed.

The Trustee's final argument is that the instant Motion should be denied, because it is premature and the Trustee has not had adequate time to find an independent real estate agent to value the Property.

DISCUSSION

In light of this case being recently converted to a Chapter 7 case, the Trustee requesting a continuance to seek an appraisal of the Property, and the unique factual circumstances surrounding this case, the hearing is continued for Final Hearing to 10:30 a.m. on May 26, 2015. Any supplemental pleadings by the Trustee shall be filed and served on or before May 5, 2015. Any response or opposition shall be filed and served on or before May 12, 2015.

On the issue of post-petition appreciation of value in bankruptcy cases, though not cited by the parties, two cases to consider are *Schwab v. Reilly*, 560 U.S. 770 (2010), and *Gebhart v. Gaughan*, 621 F.3d 1206 (2010). See *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) (It is incumbent upon the judge to correctly apply the law.) The parties may want to address those

authorities in any supplemental pleadings filed on this matter.

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 Abandon Property filed by Roderick Darryl Robbins ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is continued to 10:30 a.m. on May 26, 2015. Any supplemental pleadings by the Trustee shall be filed and served on or before May 5, 2015. Any response or opposition shall be filed and served on or before May 12, 2015.

3.	14-29231 -E-11	MIZU JAPANESE SEAFOOD BUFFET, INC. Stephen M. Reynolds	MOTION FOR COMPENSATION FOR KIT L. SUN, ACCOUNTANT(S) 3-24-15 [164]
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Final Ruling: No appearance at the April 23, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors' committee or creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on March 26, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

<p>The Motion for Allowance of Professional Fees is denied without prejudice.</p>
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Kit L. Sun, the Accountant ("Applicant") for Mizu Japanese Seafood Buffet,

Inc. the Debtor in Possession ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period October 4, 2014 through February 15, 2015. The court notes that an order of the court approving employment of Applicant was never entered. Applicant requests fees in the amount of \$4,800.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or **professional person**, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

U.S. TRUSTEE'S OBJECTION

Tracy Davis, the U.S. Trustee, filed a limited objection to the instant Motion on April 9, 2015. Dckt. 172. The Trustee objects on the following grounds:

1. The Accountant's employment has not yet been approved by the Court pursuant to 11 U.S.C. § 327(a).

DISCUSSION

The U.S. Trustee's objection is well-taken. Pursuant to 11 U.S.C. § 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.

However, Applicant has not provided or cited to an order approving the employment of the Applicant. The court's own review of the docket shows that the Debtor filed a Motion to Employ on October 17, 2015. Dckt. 57. However, the court rejected the ex parte order and requested the Debtor-in-Possession to file supplemental pleadings. The Debtor-in-Possession has yet to provide such pleadings. As of now, the employment of Applicant has yet to be approved.

Furthermore, the Applicant fails to provide time sheets or task billing to support the requested fees and costs. This does not comply with Local Bankruptcy Rule 9014-1(d)(6), which provides: "Every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(e)."

It appears that the Debtor simply forgot to file the Accountant's time sheets with the Fee Application, (Dckt. 167. no exhibits were attached). Although time sheets were filed previously, the court will not piecemeal exhibits from a formerly withdrawn motion, to the instant request.

Based on the Applicant failing to provide time sheets and task billing analysis of services provided and the court having never approved the employment of Applicant, the Motion is denied without prejudice.

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

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

The Motion for Allowance of Fees and Expenses filed by Kit L. Sun ("Applicant"), Accountant 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 the Motion is denied without prejudice.

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

Benefit to the Estate

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

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

(b) To what extent will the estate suffer if the services are

not rendered?

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including analyzing IRS audits and filing tax returns. The estate has unencumbered monies to be administered as of the filing of the application.

In the Motion and then as testified to by the Chapter 7 Trustee, the estate has recovered \$1,612,517.67, which counsel has assisted. There remains \$180,504.48 being held by the Trustee to disburse in this case. Declaration, Dckt. 179.

The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 29.6 hours in this category. Applicant assisted Client with evaluating various general administrative matters and advised the Trustee regarding the same, including other possible administrative claims and estimates.

General Claim Analysis: Applicant spent 7.25 hours in this category. Applicant analyzed and advised Trustee in connection with various proofs of claims and analyzing IRS audits.

Asset Disposition: Applicant spent 48.75 hours in this category. Applicant prepared, reviewed, revised and finalized the complex motion and all related pleadings and papers related to the Trustee's Motion to Sell the cell tower property.

The Applicant requests \$29,973.00 in fees. The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. FN.1.

FN.1. The court notes that the Applicant failed to provide the court with an itemized list of number per hours worked for each attorney. The court reminds Applicant that the break-down of number of hours worked per professional is part of the required task-billing analysis and should not rely on the court to perform such services in the future.

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	\$94,414.00	\$94,414.00
	<u>\$0.00</u>	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$94,414.00	

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$329.50 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of \$871.07.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopies		\$286.00
Photocopies		\$31.00
Certified Copy	\$12.50	\$12.50
Total Costs Requested in Application		\$329.50

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim Fees in the amount of \$29,973.00 and prior Interim Fees in the amount of \$94,414.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs and Expenses

The Applicant fails to provide the court information as to how many photocopies or how much per page the Applicant charged. The court permits a maximum of \$0.10 per photocopy. Without more, the court cannot determine whether the photocopies expense totally \$317.00 is reasonable. Therefore, the court disallows costs and expenses in the amount of \$317.00.

The Second Interim Costs in the amount of \$12.50 and prior Interim Costs in the amount of \$871.07 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$29,973.00
Costs and Expenses	\$ 12.50

pursuant to this Application and prior interim fees of \$94,414.00 and interim costs of \$871.07 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Hefner, Stark & Marois LLP ("Applicant"), counsel 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 Hefner, Stark & Marois LLP is allowed the following fees and expenses as a professional of the Estate:

Hefner, Stark & Marois LLP, Professional Employed by Trustee

Fees in the amount of \$ 29,973.00
Expenses in the amount of \$ 12.50,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$94,414.00 and costs of \$871.07 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

5. [13-24254-E-7](#) RUSS TRANSMISSION INC
SMD-3 Gary F. Zilaff

MOTION FOR COMPENSATION FOR
GABRIELSON AND COMPANY,
ACCOUNTANT(S)
3-16-15 [[170](#)]

Final Ruling: No appearance at the April 23, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 16, 2015. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Gabrielson & Company, the Accountant ("Applicant") for Susan Didriksen the Chapter 7 Trustee ("Client"), makes a Second Interim and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period July 7, 2014 through February 10, 2015. The order of the court approving employment of Applicant was entered on April 22, 2013, Dckt. 17. Applicant requests fees in the amount of \$22,011.00 and costs in the amount of \$239.31.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including filing Tax Returns and corresponding with the IRS. The estate has unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 1.6 hours in this category. Applicant assisted Client with Preparing second and final fee application, including detailed description of tax and tax audit examination services.

Efforts to Assess and Recover Property of the Estate: Applicant spent 31.8 hours in this category. Applicant assisted Trustee with researching historical financial and accounting records involving various real property assets and related sales transactions to identify resulting taxable income and expenses, as well as reconstructing multiple year revenue and expense transactions from IRS provided bank records.

Adversary Proceedings: Applicant spent 20.7 hours in this category. Applicant assisted trustee with a complex audit examination conducted by the Internal Revenue Service involving the seven fiscal years ended July 31, 2007 through July 31, 2013, including analysis of proposed IRS adjustments and substantial communication with the IRS to defend and discuss various tax deductions and loss carry forwards.

Significant Motions and Other Contested Matters: Applicant spent 9.7 hours in this category. Applicant Prepared federal and state corporate income tax returns for fiscal year ended July 31, 2014 and the final short year ended January 31, 2015.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Michael Gabrielson	63.8	\$345.00	\$22,011.00

	0	\$0.00	<u>\$0.00</u>
Total Fees For Period of Application			\$22,011.00

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

Application	Interim Approved Fees	Interim Fees Paid
First Interim	\$23,979.00	\$23,979.00
	<u>\$0.00</u>	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$23,979.00	

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$239.31 pursuant to this application. Pursuant to prior interim applications, the court has allowed costs of \$193.25.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copies		\$116.80
Telephonic Appearance		\$30.00
Mileage		\$80.64
Postage		\$11.87
Total Costs Requested in Application		\$239.31

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim Fees in the amount of \$22,011.00 and prior Interim Fees in the amount of \$23,979.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs and Expenses

As to costs, Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as on-line access to bankruptcy and state law and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include a telephonic appearance. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be changed in addition to the professional fees requested as compensation. The court disallows \$30.00 of the requested costs.

The Second Interim Costs in the amount of \$209.31 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$22,011.00
Costs and Expenses	\$ 209.31

pursuant to this Application and prior interim fees of \$23,979.00 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Gabrielson & Company ("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 Gabrielson & Company is allowed the following fees and expenses as a professional of the Estate:

Gabrielson & Company, Professional Employed by Trustee

Fees in the amount of \$ 22,011.00
Expenses in the amount of \$209.31

IT IS FURTHER ORDERED that the costs of \$30.00 are not allowed by the court.

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$23,979.00 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee is authorized to

S.A.

3. Accounts of RBC Capital Markets, LLC and Edward D. Jones & CO. L.P. previously disclosed by the Debtor in a pending martial dissolution proceeding, along with any documents related to their control and transfer, including statements and deposit and withdrawal receipts reflecting current location of proceeds.

APPLICABLE LAW

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

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

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

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

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

DISCUSSION

No opposition has been filed to this Motion by the Debtors or other parties in interest.

The factual circumstances surrounding this case are unique. The Debtor has allegedly relocated to Costa Rica and has failed to respond to any of the Movant's request for turnover. The assets requested by the Movant all fall within Property of the estate, pursuant to 11 U.S.C. § 541 and the documentation requested is necessary to determine the extent of the estate's

interest as well as necessary for the Movant to perfect any interest the estate may have in the assets. As pointed out by the Movant, the documentation requested is necessary for the Movant, as the fiduciary of the estate, to claim an interest in the Property.

Therefore, 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 for Turnover of 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 the Motion for Turnover of Property is granted.

IT IS FURTHER ORDERED that Debtor shall deliver on or before **[date]**, possession of:

1. The real property commonly known as Los Del Fines, Bayside, Unit #2, Tambor, Costa Rica ("Property")
2. Documents related to the Property's control and transfer including the shares of books for the Costa Rica corporation known as Morena Velar, S.A.
3. Accounts of RBC Capital Markets, LLC and Edward D. Jones & CO. L.P. previously disclosed by the Debtor in a pending martial dissolution proceeding, along with any documents related to their control and transfer, including statements and deposit and withdrawal receipts reflecting current location of proceeds.

with all of their personal property, personal property of any other persons which Debtors, and each of them, allowed access to the Property; and any other person or persons that Debtors, and each of them, allowed access to the Property removed from the Property.

7. [13-27672-E-7](#) DAVID FLORK
SNM-1 Stephen N. Murphy

MOTION TO AVOID LIEN OF GEORGE
W. MERRILL
3-25-15 [[38](#)]

Tentative Ruling: The Motion to Avoid 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).

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 Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 25, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Avoid 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Avoid Judicial Lien is continued to 10:30 a.m. on July 23, 2015, for the Evidentiary Hearing Scheduling Conference (to set the Evidentiary Hearing for this Contested Matter).

This Motion requests an order avoiding the judicial lien of George Merrill ("Creditor") against property of David Flork ("Debtor") commonly known as 7022 Leisure Town Road, Vacaville, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$690,835.92. An abstract of judgment was recorded with **Solano** County on September 25, 2012, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$265,000.00 as of the date of the petition. The unavoidable consensual liens total \$2,335.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of \$175,000.00 on Schedule C.

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.

OPPOSITION

Creditor filed an opposition to the instant Motion on April 8, 2015. Dckt. 43.

Debtor has claimed an exemption in the subject property pursuant to California Code of Civil Procedure §704.730. California Code of Civil Procedure §704.710(c) requires that the judgment debtor reside in the property in which the automatic homestead exemption is claimed on the date the judgment creditor's lien attaches to the dwelling, and in which the judgment debtor has resided continuously thereafter until the date of the court determination that the dwelling is a homestead. However, When Creditor asserts that when he obtained a Right to Attach Order against the Property, the state court determined that the Property was not to be exempt from attachment. Dckt. 45. Exhibit D. Creditor further asserts that (based on information and belief) that Debtor did not continuously reside in the Subject Property as his homestead from May 16, 2012, the date the Writ of Attachment was recorded, until June 4, 2013, the date on which his bankruptcy petition was filed. FN.1. As a result, Debtor is not entitled to claim a homestead exemption under California Code of Civil Procedure §704.730 and Creditor's judicial lien may not be avoided.

FN.1. The court notes that Creditor attempts to testify under penalty of perjury based on his "information and belief" on several of these points. Unless an expert who may provide an opinion, a witness must base his testimony on personal knowledge, not guess or supposition. F.R.E. 601, 602. While not fatally defective for the current pleadings, such "information and belief testimony," even if not objected to by the opposing party, would have little credibility with the court as the finder of fact.

In this case, Debtor alleges that the value of the Subject Property on the date of filing was \$265,000. Creditor states that if that were true, and assuming that Debtor is entitled to a homestead exemption in the amount of \$175,000, the available net equity to secure Creditor's judgment lien is \$87,665. However, Creditor is informed and believes and based thereon alleges that the actual value of the Subject Property on the date of filing was far in excess of \$265,000, and that Creditor's judicial lien may not be avoided except to the extent that it exceeds the total value of the property less non-avoidable liens and the Debtor's allowable homestead exemption. Creditor requests that the evidentiary hearing in this matter be set sufficiently far in the future to allow Creditor to obtain an appraisal of the Subject Property.

DISCUSSION

The first issue raised by Creditor is whether the Debtor may claim the automatic homestead exemption in light of the state court, at the time of issuing the right to attach order, stating that the state court found that the Debtor failed to prove that the property was exempt from attachment. Opposition, p. 2:19-21, Request for Judicial Notice, Exhibit D; Dckt. 45.

The Ninth Circuit Bankruptcy Appellate Panel provided an insightful

discussion on the automatic homestead exemption and judicial liens in California. The court in *In re Pike* stated the following:

[T]he filing of a bankruptcy petition is the functional equivalent of a forced or involuntary sale under California law, thus allowing a claiming debtor to have the rights, benefits and protections of the automatic homestead provisions. See *In re Mayer*, 167 B.R. 186, 189 (9th Cir. BAP 1994); *In re Herman*, 120 B.R. 127, 131-32 (9th Cir. BAP 1990); *In re Cole*, 93 B.R. 707 (9th Cir. BAP 1988). In a forced or involuntary sale context, the practical effect of the homestead, whether declared or automatic, is the same under California law: "the homestead trumps the judgment lien, and the debtor's exemption is deducted from the proceeds before the judgment creditor recovers." See *In re Scovis*, 231 B.R. 336, 340 (9th Cir. BAP 1999). . . .

In turn, these cases are grounded on the philosophy that "when analyzing § 522(f) lien avoidance problems as a matter of federal law, bankruptcy courts are instructed to 'disregard some element of realty' and consider, in the abstract, whether the debtor would be entitled to an exemption under state law if the lien did not exist... whether the debtor would be entitled to an exemption under state law 'but for the lien itself.'" *In re Hastings*, 185 B.R. 811, 814 (9th Cir. BAP 1995) (quoting *Owen v. Owen*, 500 U.S. 305, 311, 111 S.Ct. 1833, 1837, 114 L.Ed.2d 350 (1991)) (emphasis in original).

In re Pike, 243 B.R. 66, 72 (B.A.P. 9th Cir. 1999).

In the context of the procedure for obtaining a writ of attachment in California, the Code of Civil Procedure explicitly states that:

The court's determinations under this chapter shall have no effect on the determination of any issues in the action other than issues relevant to proceedings under this chapter nor shall they affect the rights of the plaintiff or defendant in any other action arising out of the same claim of the plaintiff or defendant. The court's determinations under this chapter shall not be given in evidence nor referred to at the trial of any such action.

Cal. Civ. Proc. Code § 484.100. Creditor is correct that California Code of Civil Procedure § 484.070(b) provides, "Failure to make the claim does not preclude the defendant from later claiming the exemption. If the claim is made as provided in this section but the defendant fails to prove that the property is exempt from attachment, the defendant may not later claim that the property, or a portion thereof, is exempt except as provided in Section 482.100." (Creditor's quote leaving off the first sentence and the portion after the last comma.) The Right to Attach Order merely states that "Defendant failed to prove that all the property described in plaintiff's application is exempt from attachment." Exhibit D, Dckt. 45. This court mean that Debtor made no attempt to claim an exemption. It could mean that Debtor asserted that only part, not "all the property described" was subsection to an exemption. The court is not presented with evidence of what was actually litigated in the state court.

Additionally, California Code of Civil Procedure § 484.070(b) cited by Creditor that even if there is a failure to "prove" the claim of exemption, as opposed to merely asserting one, the exemption may be claimed as provided in California Code of Civil Procedure § 482.100. This allows for a post-levy exemption based on a change in circumstances.

Here, the Creditor relies on check box form for the Right to Attach Order to contend that Debtor did not prevail in litigation over whether a homestead exemption could be asserted. Creditor's lack of knowledge is evidenced by the Opposition, which best states Creditor's contention as,

"Creditor is informed and believes Mr. Flork claimed the Leisure Town Road property as exempt at the hearing and this finding is binding on Debtor in establishing that he was not entitled to a homestead exemption under California Code of Civil Procedure §704.730 as of the date Creditor's secured interest attached to the Subject Property when the Right to Attach Order was issued and the Writ of Attachment was recorded."

Opposition p.2:21-26; Dckt. 43. Since it was Creditor who was seeking the writ of attachment and participated in whatever proceeding occurred, it appears problematic that any binding determination was made in light of Creditor only is "informed and believes" of the opposition to Creditor's state court proceedings.

The Motion and supporting evidence presented by Debtor is equally problematic. First, the Motion and supporting Declaration of Debtor merely state that Debtor "lives" in the property. Dckts. 38 and 40. Debtor does not address the Right to Attach Order, State Court Judgment, and Abstract of Judgment which were recorded pre-petition. The Abstract of Judgment was recorded on September 25, 2012. Exhibit B, Dckt. 41. The Right to Attach Order was recorded on November 10, 2010. Exhibit D, Dckt. 45. Debtor does not address Creditor's rights under the writ of attachment, the court's statement that the property is not exempt from attachment, and the requirements of California Code of Civil Procedure § 482.100.

Even if Debtor is correct that an exemption may be claimed, everyone agrees that there is value in excess of the senior liens and the asserted homestead exemption. That amount cannot be determined, absent an agreement as to value, until this court has determined the value of the Property.

The court continues the hearing to allow discovery to proceed and will conduct an Evidentiary Hearing Schedule Conference at 10:30 a.m. on July 23, 2015. The Creditor shall file and serve any supplemental pleadings on or before June 26, 2015, and Debtor shall file and serve Replies, if any, on or before July 10, 2015.

An 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 hearing on the Motion is continued to 10:30 a.m. on July 23, 2015, at which time the court shall conduct an Evidentiary Hearing Scheduling Conference (to set the Evidentiary Hearing date for this Contested Matter). The Creditor shall file and serve any supplemental pleadings on or before June 26, 2015, and Debtor shall file and serve Replies, if any, on or before July 10, 2015.

8. [12-28879](#)-E-11 ANNETTE HORNSBY
SK-6 Sunita Kapoor

MOTION TO EMPLOY WALLACE C.
DOOLITTLE AS SPECIAL COUNSEL
AND/OR MOTION FOR COMPENSATION
FOR WALLACE C. DOOLITTLE,
SPECIAL COUNSEL(S)
3-27-15 [[347](#)]

Final Ruling: No appearance at the April 23, 2015 hearing is required.

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 Debtor, Debtor's Attorney, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on March 26, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 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.

Debtor in Possession, Annette Hornsby, seeks to employ special counsel pursuant to Local Bankruptcy Rule 9014-1(f)(1), Bankruptcy Code Sections

327(e), and subject to the Retainer Agreement. Dckt. 350 Exhibit B. Debtor in possession seeks the employment of Wallace C. Doolittle, as special counsel to assist the Debtor in appealing a summary judgment to determine that the purchasers of the property located at 950 Harrison Street #207 San Francisco, California at a foreclosure sale was wrongful and that she owns the property. San Francisco Superior Court Case # CGC 12-520585.

Debtor in Possession seeks authorization to employ Wallace C. Doolittle as special counsel to appeal the summary adjudication, all briefing, and attendance at the oral argument subject to the retainer agreement. Dckt. 350 Exhibit B. Wallace C. Doolittle has agreed to a flat fee for the proceedings to \$10,000.

Wallace C. Doolittle's representation will be limited to aforementioned limitations. If, after the proceeding commences, the Debtor in Possession wishes to employ Mr. Doolittle as special counsel to pursue further claims, the parties will enter into a separate written agreement and seek bankruptcy court approval of the same.

The Motion states that Wallace C. Doolittle does not have experience in Bankruptcy matters and has no connection with the Debtor in possession, the creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any other person employed in the office of the United States Trustee. Debtor in Possession does not believe that any conflict exists that would preclude Mr. Doolittle's employment set for in 11 U.S.C. § 327, and does not hold or represent any interest adverse to the Debtor in Possession or to the estate.

APPLICABLE LAW

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

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

DISCUSSION

It is well established law that approval of employment pursuant to 11 U.S.C. § 327 is a condition precedent to a professional being awarded fees for representing a trustee, debtor in possession, or creditors' committee in a Chapter 11 case. A trustee (and debtor in possession as provided in 11 U.S.C. § 1107) **"with the court's approval, may employ one or more attorneys... to represent or assist the trustee [debtor in possession] in carrying out the**

trustee's [debtor's in possession] duties under this title." 11 U.S.C. § 327(a).

In *Atkins v. Wain (In re Atkins)*, 69 F.3d 970 (9th Cir. 1995), the Ninth Circuit Court of Appeals addressed the requirement for approval of employment before compensation may be allowed counsel for the trustee or debtor in possession. "In bankruptcy proceedings, professionals who perform services for a debtor in possession cannot recover fees for services rendered to the estate unless those services have been previously authorized by a court order. See 11 U.S.C. § 327(a); 2 Fed. R. Bank. P. 2014(a); 3 see, e.g., *McCutchen, Doyle, Brown & Enersen v. Official Comm. of Unsecured Creditors (In re Weibel, Inc.)*, 176 Bankr. 209, 211 (Bankr. 9th Cir. 1994) (citation omitted)." *Id.*, pg. 973. While bankruptcy courts have the equitable power to retroactively authorize such employment, such retroactive approval is limited to exceptional circumstances. *Id.*, pg. 974.

What is required for a professional to qualify for such equitable relief for such exceptional circumstances is described by the Circuit as follows:

"To establish the presence of exceptional circumstances, professionals seeking retroactive approval must satisfy two requirements: they must (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankrupt estate in a significant manner. *In re Occidental Fin. Group, Inc.*, 40 F.3d at 1062 (finding retroactive approval inappropriate where these two conditions were not met); *In re THC Fin. Corp.*, 837 F.2d at 392 (affirming denial of retroactive approval where these two conditions were not satisfied) (citations omitted). Whether additional factors should or must be considered is contested in this appeal.

Id. Factors considered by the court, though not all elements are required for the court to grant retroactive employment, include the following, which were originally discussed in *In re Twinton Properties Partnership*, 27 B.R. 817 819-20 (Bankr. N.D. Tenn. 1983).

1. The debtor, trustee or committee expressly contracted with the professional person to perform the services which were thereafter rendered;
2. The party for whom the work was performed approves the entry of the *nunc pro tunc* order;
3. The applicant has provided notice of the application to creditors and parties in interest and has provided an opportunity for filing objections;
4. No creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order;
5. The professional satisfied all the criteria for employment pursuant to 11 U.S.C. § 327 (West 1979) and Rule 2014] of the Federal Rules of Bankruptcy Procedure at or before the time services were actually commenced and remained qualified during the period for which services were provided;

6. The work was performed properly, efficiently, and to a high standard of quality;
7. No actual or potential prejudice will inure to the estate or other parties in interest;
8. The applicant's failure to seek pre-employment approval is satisfactorily explained; and
9. The applicant exhibits no pattern of inattention or negligence in soliciting judicial approval for the employment of professionals.

Id., pg. 975. The Atkins panel noted that "These factors, among others, have been cited with approval by the Ninth Circuit BAP. See, e.g., *Credit Alliance Corp. v. Boies (In re Crook)*, 79 Bankr. 475, 478 (Bankr. 9th Cir. 1987); *In re Crest Mirror & Door Co.*, 57 Bankr. 830 at 832; *In re Kroeger Properties & Dev., Inc.*, 57 Bankr. at 823." *Id.* Other factors included (1) the good faith of the professional in proceeding without an order, (2) the response to information that no order had been entered, (3) the emergent need for the services, (4) whose responsibility it was to obtain the order, (5) applicant's relationship with the debtor, and (6) applicant's sophistication in bankruptcy law.

RELIEF REQUESTED IN THE MOTION

The Motion requests that the court authorize the employment retroactive to April 23, 2014.

This is the Debtor-in-Possession's second attempt at seeking retroactive employment of Wallace Doolittle as special counsel. The court previously denied the Motion to Employ. Dckt. 316.

A review of the prior motion (Dckt. 293) and the instant Motion shows that the Debtor-in-Possession made only two changes in the Motion:

1. Paragraph 4: adding the line "On March 10, 2015, Debtor as Debtor in possession and Mr. Doolittle entered into an amended retainer agreement which is attached hereto as Exhibit B. Debtor intends to continue to prosecute all these claims when she becomes administrator of the estate.
2. Paragraph 7: adding ". . . and filing an Opening Brief."

Here, as before, the court finds that there has not been a sufficient showing of exceptional circumstances to justify the retroactive employment of special counsel, Wallace Doolittle. Balancing the factors outlined in the Atkins panel as well as noting the glaring omissions in the Motion and the retainer agreement, the court denies the Motion without prejudice.

In the Motion, the Debtor in Possession cites the Ninth Circuit Decision "*Okamoto v. THC Fin. Corp. (In re THC Fin. Corp)*, 837 F. 2d 389, 397," for the proposition that a bankruptcy judge may grant retroactive authorization to employ counsel pursuant to 11 U.S.C. § 227 only under exceptional circumstances. The "extraordinary circumstances" stated in the Motion with particularity (Fed. R. Bankr. P. 9013) are,

- A. "Here, such circumstances [exceptional circumstances] exist,..."
- B. "Mr. Doolittle's services were not only beneficial to the Debtor, but necessary for Debtor to preserve the property as an asset for the Bankruptcy estate." FN.1.

FN.1. This statement appears to express a fundamental misunderstanding of who the client is and whose interests are being "protected." It is not the "Debtor" who is seeking authorization to employ Mr. Doolittle, but the "Debtor in Possession." The "Debtor" has no right to seek to employ counsel in this Chapter 11 case pursuant to 11 U.S.C. § 327 or have the estate pay for such counsel for the "Debtor." The rights and interests of the "Debtor" are not being advanced, but the rights and interests of the Bankruptcy Estate.

This was previously raised at the prior hearing on the nearly identical motion. The Amended Retainer Agreement appears to try and correct this error by stating "Annette Hornsby, as Debtor in Possession" and having Ms. Hornsby sign the amended retainer agreement as "Annette Hornsby, as Debtor in Possession. Dckt. 251.

- C. Mr. Doolittle is not an experience bankruptcy attorney and did not know that prior court approval is required to be employed by, and entitled to compensation for such services, a Debtor in Possession. (While not expressly stating, the court infers that Mr. Doolittle asserts that he relief on the expertise of the general bankruptcy counsel for the Debtor in Possession in electing to represent the Debtor in Possession.)

Motion, Dckt. 347.

The fees for the services are to be \$10,000.00, as a flat fee for all the work and costs. The services are to represent the Debtor in Possession for the prosecution of an appeal, which includes all briefing and oral argument, from the summary judgment granted for Victor Li and Yao Lun Jiang in California Superior Court, San Francisco County, case no. CGC 12-520585.

The Amended Retainer Agreement providing for the scope of representation and the fixed fee is referenced in the Motion as Exhibit B. A document titled "Amended Retainer Agreement" has been filed at the same time as this Motion, Dckt. 351. It does not have a docket control number and is not numbered as Exhibit B. Given that it is signed by Annette Hornsby and Wallace Doolittle, it is fair to infer that this is the Amended Retainer Agreement referenced in the Motion. In his Declaration, Mr. Doolittle testifies that "Exhibit B" is a copy of the Amended Retainer Agreement signed by Mr. Doolittle and "Debtor as Debtor in possession." Declaration, Dckt. 349. FN.2.

FN.2. A review of the prior declaration of Mr. Doolittle shows that, like the Motion, the only addition to the declaration is the line "On March 10, 2015, Debtor as Debtor in possession and I subsequent entered into an amended retainer agreement which is attached hereto as Exhibit B. Debtor intends to continue to prosecute all these claims when she becomes administrator of the estate." Dckt. 349, paragraph 4.

The Amended Retainer Agreement makes reference to Mr. Doolittle having already received payment of the \$10,000.00 flat fee. No such payment of monies of the bankruptcy estate have been authorized by the court and the Debtor in Possession would be acting in violation of her fiduciary duties in paying monies of the estate to a profession under such circumstances.

While the Motion makes reference to a \$10,000.00 flat fee to Mr. Doolittle, it is mum on the source of the monies. Mr. Doolittle's declaration does not attest to the source of the monies. No exhibit is provided as a copy of the check or other payment method. The court does not know if monies of the Bankruptcy Estate were disbursed, without authorization; the Debtor in Possession has purported to borrower monies to pay Mr. Doolittle; or some third party is paying Mr. Doolittle, and possibly directing his conduct rather than the Debtor in Possession. The court raised this issue on the Debtor-in-Possession's prior motion to employ but it remains unaddressed in the instant Motion.

Another issue arises with the Motion. The court is in the dark as to the claims being litigated on appeal, what was determined against the Debtor in Possession (or whether the Debtor in Possession is even a party to the state court action), and what issues are being appealed for the \$10,000.00 fee.

While \$10,000.00 to brief and argue an appeal in the California District Court of Appeal is not unreasonable (and for some issues could well be viewed as a bargain), the Debtor's in Possession continued failure to fulfill her fiduciary duties and treat her fiduciary obligations as the Debtor in Possession as merely annoyances which she and her bankruptcy counsel are disdained to be bothered with, have left Mr. Doolittle in a precarious position.

CONFIRMATION OF CHAPTER 11 PLAN

The court has now confirmed the Chapter 11 Plan in this case. It has been a hard row for this Debtor in Possession, now Debtor-Plan Administrator to hoe. Though the court filed its order denying the prior motion to employ on November 11, 2014 (Dckt. 319), proposed special counsel and the Debtor in Possession's bankruptcy counsel chose not to file the present motion to employ until March 27, 2015. Dckt. 347.

This failure to act is not consistent with the diligent representation of the Debtor in Possession and now Plan Administrator.

However, in light of the court having now confirmed a Chapter 11 Plan, for which the Debtor in Possession had the support of the major creditors, the court will authorize the employment (and bring this sore point of the case to a conclusion). The four month delay in filing the present motion, when even the special counsel had knowledge not only of needing to be employed, but the standards for retroactive employment, are not consistent with an attorney failing to obtain such employment merely by error. The court authorizes the employment effective February 1, 2015, and special counsel may provide the services required under the engagement letter

The Motion is denied without prejudice.

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

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

The Motion to Employ filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ Wallace Doolittle as special counsel is granted, with the approval of employment effective February 1, 2015, and for all serves provided thereafter on the terms and conditions of the engagement agreement (Dckt. 351) filed in support of the Motion. The court leaves it to the Debtor-Plan Administrator and Counsel for the Debtor-Plan Administrators, as fiduciaries under the confirmed Chapter 11 Plan to determine whether all, or what portion of the \$10,000.00 set fee is properly payable for the services to be rendered on or after February 1, 2015.