UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

April 29, 2021 at 10:30 a.m.

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1. 21-90022-E-7 | **ROBERT MITTERWALD** | **TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS**
Pro Se | **3-29-21 [13]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on March 31, 2021. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor (*pro se*) has filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Motion are appropriate.

The hearing on the Motion to Dismiss is continued to 10:30 a.m. on June 24, 2021.

The court extends the deadlines for all parties in interest to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, to July 24, 2021.

The Chapter 7 Trustee, Eric J. Nims ("Trustee"), seeks dismissal of the case on the grounds that Robert William Mitterwald ("Debtor") did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341.

Alternatively, if Debtor's case is not dismissed, Trustee requests that the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor's next scheduled Meeting of Creditors, which is set for 11:30 a.m. on May 24, 2021. If Debtor fails to appear at the continued Meeting of Creditors, Trustee requests that the case be dismissed without further hearing.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on April 9, 2021. Dckt. 15. Debtor states that on March 29th at 11:30 he called the 1-877-994-0589 number he was provided and waited forty-five minutes with no response. Debtor asserts having followed the directions given. Debtor attempted to reach out to Trustee by telephone and asserts Trustee's "mail-box" was full. Debtor is sixty-nine years old and "not understanding the phone, computers etc."

DISCUSSION

Debtor did not appear at the Meeting of Creditor's. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 707(a)(1).

Debtor asserts having called but having issues with the court call system. The Meeting of Creditor has been continued to May 24, 2021 at 11:30 a.m. A continued meeting having been scheduled, Debtor has another opportunity to seek assistance and appear at the meeting.

Debtor responding and demonstrative an effort to prosecute his case in this COVID-19 restricted environment, the court continues the hearing on this Motion to 10:30 a.m. on June 24, 2021, which is after the continued First Meeting Date. That is the first available regular law and motion date at least ten days after the continued First Meeting of Creditors, allowing Debtor and Trustee to address any additional information issues prior to the continued date.

Based on the foregoing, cause exists to extend the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, to July 24, 2021. This is necessary to afford all parties and interest the opportunity to participate in a Meeting of Creditors sufficient in advance of any such deadlines.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 7 case filed by the Chapter 7 Trustee, Eric J. Nims ("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 hearing on the Motion to Dismiss is continued to 10:30 a.m. on June 24, 2021.

If the Trustee determines that the additional relief in this Motion requesting dismissal of this case is no longer required, the Trustee may file a Status Report stating that no further relief is requested and the court will then dismiss without prejudice that portion of the Motion.

IT IS FURTHER ORDERED that the deadlines for all parities to file actions under 11 U.S.C. § 523, § 707(b) and § 727 are extended through and including July 24, 2021.

2.	**18-90765-E-7** **ADJ-3**	**MIGUEL ORTEGA** **Jessica Dorn**	**MOTION FOR COMPENSATION BY THE LAW OFFICE OF FORES, MACKO, JOHNSTON, INC. FOR ANTHONY D. JOHNSTON, TRUSTEES ATTORNEY(S)** **3-31-21 [35]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 31, 2021. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

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

The Motion for Allowance of Professional Fees is granted.

The Law Office of Fores, Macko, Johnston, Inc., the Attorney ("Applicant") for Irma C. Edmonds, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period January 8, 2019, through March 29, 2021. The order of the court approving employment of Applicant was entered on February 1, 2019. Dckt. 23. Applicant requests fees in the amount of $8,500.00 and costs in the amount of $0.00. Applicant has waived costs advanced in the amount of $432.58.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

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 demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate prosecuting and adversary proceeding concerning the Estate's claim to the real property known as 1464 Angus Street, Patterson, California ("Real Property"). The Estate has $18,153.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES 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.

Adversary Proceedings: Applicant spent 27.10 hours in this category. Applicant litigated an adversary proceeding against Debtor that recovered $18,153.00 in satisfaction of the Trustee's claim on Debtor's equitable interest in real property.

Fee Application: Applicant spent 3.2 hours in this category. Applicant prepared and filed the instant application for fees and will waive compensation for any appearance at the hearing.

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
Anthony D. Johnston	30.3	$300.00	$9,090.00
Voluntary Reduction in fees			$590.00
	0	$0.00	$0.00
Total Fees for Period of Application			$8,500.00

Costs & Expenses

Applicant also waives costs advanced of $432.58.

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks to be paid the reduced amount of $8,500.00 for its fees incurred for Client. First and Final Fees in the amount of $8,500.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

Applicant waives costs advanced in this case.

The court authorizes the Chapter 7 Trustee to pay 100% of the fees and 100% of the costs allowed by the court.

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

Fees	$8,500.00
Costs and Expenses	$0.00

pursuant to this Application as final fees and costs 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 Fores, Macko, Johnston, Inc. ("Applicant"), Attorney for Irma C. Edmonds, the Chapter 7 Trustee,

("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Fores Macko Johnston, Inc. is allowed the following fees and expenses as a professional of the Estate:

Fores, Macko, Johnston, Inc., Professional employed by the Chapter 7 Trustee

Fees in the amount of $8,500.00
Expenses in the amount of $0.00,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

The fees and costs pursuant to this Motion, and fees in the amount of $0.00 and costs of $0.00 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 Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs 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.

3.	**19-90151-E-11** **HSM-5** **3 thru 6**	**Y&M RENTAL PROPERTY MANAGEMENT, LLC** **David Johnston**	**MOTION FOR COMPENSATION BY THE LAW OFFICE OF HEFNER, STARK & MAROIS, LLP FOR AARON A. AVERY, TRUSTEES ATTORNEY(S)** **4-8-21 [168]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 8, 2021. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

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

The Motion for Allowance of Professional Fees is granted.

Hefner, Stark & Marois, LLP, the Attorney ("Applicant") for Irma C. Edmonds, the Chapter 11 Trustee ("Client"), makes a Second and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period September 1, 2020, through April 29, 2021. The order of the court approving employment of Applicant was entered on September 20, 2019. Dckt. 53. Applicant requests fees in the amount of $32,494.50 and costs in the amount of $93.80.

Applicant was previously awarded first interim compensation in the amount of $27,668.00 and reimbursement of expenses in the amount of $692.26 for the period from August 21, 2019, through August 31, 2020. Dckt. 120.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

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 demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

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

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

A review of the application shows that Applicant's services for the Estate include advising Trustee with general estate administration activities, litigating a matter with creditor Wells Fargo, and disposing of estate assets. The Estate has $100,288.31 in unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES 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 50.40 hours, including 5.95 billed at no charge, in this category. Applicant advised Trustee with general estate administration activities; consulted with Trustee's CPA regarding the litigation, compromise, and case plan; and drafted and filed Chapter 11 status reports .

Asset Disposition: Applicant spent 10.4 hours, including 0.2 billed at no charge, in this category. Applicant drafted and revised the settlement agreement with Wells Fargo Bank, drafted and prosecuted motion to approve compromise with Wells Fargo Bank, and advised Trustee in connection with agreement performance.

Adversary Proceedings: Applicant spent 30.70 hours, including 1 billed at no charge, in this category. Applicant worked with Wells Fargo Bank to settle a dispute related to a deed of trust encumbering real property of the estate.

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**
Aaron Avery	83.55	$384.71	$32,142.50

	7.15	$0.00	$0.00
Howard Nevins	0.8	$440.00	$352.00
	0	$0.00	$0.00
Total Fees for Period of Application			$32,494.50

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	**Prior Interim Approved Fees**	**Prior Interim Fees Paid**
First Interim	$27,688.00	$27,688.00
	$0.00	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$27,688.00	

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $93.80 pursuant to this application. Pursuant to prior interim applications, the court has allowed costs of $692.26.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Photocopies	$0.10	$93.80
		$0.00
Total Costs Requested in Application		$93.80

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Second and Final Fees in the amount of $32,494.50 and prior Interim Fees in the amount of $27,688.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 11 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Costs & Expenses

Second and Final Costs in the amount of $93.80 and prior Interim Costs in the amount of $692.26 are given final approval pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 11 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

The court authorizes the Chapter 11 Trustee to pay 100% of the fees and 100% of the costs allowed by the court.

Applicant is allowed, and the Chapter 11 Trustee is authorized to pay, the final total following amounts as compensation to this professional in this case:

Fees	$60,162.50
Costs and Expenses	$786.06

pursuant to this Application as final fees and costs 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"), Attorney for Irma C. Edmonds, the Chapter 11 Trustee, ("Client") 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 for the period September 1, 2020, through April 29, 2021, the following fees and expenses as a professional of the Estate:
>
> Hefner, Stark & Marois, LLP, Professional employed by the Chapter 11 Trustee
>
> Fees in the amount of $32,494.50
> Expenses in the amount of $93.80,
>
> and the prior approved Interim Fees in the amount of $27,688.00 and Interim Expenses of $692.26 are approved as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 11 Trustee
>
> **IT IS FURTHER ORDERED** that the Chapter 11 Trustee is authorized to pay 100% of the fees and 100% of the costs given final approval by this Order, after giving full creditor for all interim payments made by the Trustee, from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

4. 19-90151-E-11 HSM-6

Y&M RENTAL PROPERTY MANAGEMENT, LLC
David Johnston

MOTION FOR COMPENSATION FOR IRMA EDMONDS, CHAPTER 11 TRUSTEE(S)
4-8-21 [174]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 8, 2021. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

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

The Motion for Allowance of Professional Fees is granted.

Irma C. Edmonds, the Chapter 11 Trustee, ("Applicant") for the Estate of Y&M Rental Property Management, LLC ("Client"), makes a Request for the Allowance of Fees and Expenses in this case. Fees are requested for the period August 29, 2019, through dismissal of this case.

STATUTORY BASIS FOR FEES

11 U.S.C. § 330(a)

> (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an

ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 —

> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.

In considering the allowance of fees for a professional employed by a trustee, the professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)).

In considering the compensation awarded to a bankruptcy trustee, the Bankruptcy Code further provides:

> (7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

11 U.S.C. § 330(a)(7). The fee percentages set in 11 U.S.C. § 326 expressly states that the percentages are the maximum fees that a trustee may received, and whatever compensation is allowed must be reasonable. 11 U.S.C. § 326(a).

Benefit to the Estate

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

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

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

A review of the application shows that Applicant's services for the Estate include general case administration and asset recovery. The Estate has $100,288.31 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES REQUESTED

Applicant 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 40.80 hours in this category. Applicant performed initial Trustee activities, engaged counsel and communicated to develop a list of immediate steps, traveled to Debtor's rental properties to perform exterior inspections, reviewed various financial documents, status reports and settlement agreement, worked with CPA and Debtor's Counsel on several matters, and consulted with Counsel regarding final motions to close case.

Efforts to Assess and Recover Property of the Estate: Applicant spent 12.90 hours in this category. Applicant investigated the disputed Wells Fargo deed of trust, prepared for and participated in successful BDRP mediation, and reviewed numerous communications between Counsel and Wells Fargo representatives.

Applicant requests the following fees:

25% of the first $5,000.00	$1,250.00
10% of the next $45,000.00	$4,500.00
5% of the next $122,524.17	$6,126.21
3% of the balance of $0.00	$0.00
Calculated Total Compensation	**$11,876.21**
Plus Adjustment	$0.00
Total Maximum Allowable Compensation	$11,876.21
Less Previously Paid	$0.00
Total First and Final Fees Requested	$11,847.99

The fees are computed on the total sales generated $203,111.04 of net monies (exclusive of these requested fees and costs), with an estimated gross value of $0.00 remaining in claims currently being pursued.

FEES ALLOWED

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. § 326(a) and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $11,847.99 are approved pursuant to 11 U.S.C. § 330 are authorized to be paid by the Chapter 11 Trustee

from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

In this case, the Chapter 11 Trustee currently has $100,288.31 of unencumbered monies to be administered. The Chapter 11 Trustee performed initial Trustee activities, engaged counsel, commenced an adversary proceeding against a major creditor, resolved the adversary proceeding via BDRP arbitration and collected rents on estate property. Applicant's efforts have resulted in a realized gross of $203,111.04 recovered for the estate. Dckt. 174, at ¶ 7.

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

Applicant is allowed, and the Chapter 11 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$11,847.99
Costs and Expenses	$506.52

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 Irma C. Edmonds, the Chapter 11 Trustee, ("Applicant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Irma C. Edmonds is allowed the following fees and expenses as trustee of the Estate:
>
> Irma C. Edmonds, the Chapter 11 Trustee
>
> Fees in the amount of $11,847.99
> Expenses in the amount of $506.52
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as trustee.
>
> **IT IS FURTHER ORDERED** that the Chapter 11 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

5.	**19-90151-E-11 JES-2**	**Y&M RENTAL PROPERTY MANAGEMENT, LLC David Johnston**	**MOTION FOR COMPENSATION FOR JAMES SALVEN, ACCOUNTANT(S) 3-31-21 [159]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 31, 2021. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

Applicant's Amended Notice of Hearing, filed April 7, 2021 modifies the instant motion setting the hearing pursuant to Local Rule 9014-1(f)(1) (Dckt. 160), to one set pursuant to Local Rule 9014-1(f)(2), where the Notice provides for presentation of any oral opposition at the hearing. Dckt. 166.

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

The Motion for Allowance of Professional Fees is granted.

James E. Salven, the Accountant ("Applicant") for Irma C. Edmonds, the Chapter 11 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period September 9, 2019, through March 31, 2021. The order of the court approving employment of Applicant was entered on September 20, 2019. Dckt. 52. Applicant requests fees in the amount of $24,400.00 and costs in the amount of $358.63.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the professional's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the professional exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. A professional must exercise good billing judgment with regard to the services provided because the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

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

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

A review of the application shows that Applicant's services for the Estate include case administration, compiling and preparing monthly operating reports, and review of tax issues. Exhibit B, Dckt. 162.

The Court notes that Applicant's Motion and Applicant's Declaration are bereft of any material summary of the services provided by Applicant or support for their necessity to the administration of the Estate. Applicant's Motion refers the court to Applicant's Declaration stating, "[t]hese items are further detailed in the declaration of the applicant," and Exhibits filed herewith. Dckt. 159, ¶¶ 6-8. Applicant's Declaration also directs the court to Applicant's Exhibits while providing no further detail of the basis for Applicant's Fees. Dckt. 161, ¶ 3.

Applicant's Exhibit are not the vehicle for providing information stated with particularity (required by Federal Rule of Bankruptcy Procedure 9013) as to why the services were necessary or beneficial to the estate, and even if they were, the Exhibits filed lack such information.

The Chapter 11 Trustee filed a Statement of No Objection to Applicant's Fees concluding that Applicant's Fees were "reasonable and necessary for estate administration." Dckt. 163. Despite the brevity of Applicant's application, the court finds the services were beneficial to Client and the Estate and were 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 7.3 hours in this category. Applicant did conflict checks, prepared engagement letter, conferred with Debtor Counsel regrading monthly operating reports, and estimates an additional 4.0 hours preparing and filing the instant Application and preparing a final report for Trustee.

Compilation and Preparation of Monthly Operating Reports: Applicant spent 75.7 hours in this category. Applicant prepared, or will prepare, a total of nineteen Monthly Operation Reports ("MOR"), and anticipates an additional 5 hours will be expended on two additional MORs (March and April 2021).

Estate Tax Matters: Applicant spent 14.6 hours in this category. Applicant reviewed prior returns, review a proposed settlement agreement for tax implications, prepared tax returns, and anticipates an additional 2 hours will be expended to enable preparation of the Estate's 2021 tax return when due.

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**
James E. Salven	97.6	$250.00	$24,400.00
	0	$0.00	$0.00
Total Fees for Period of Application			$24,400.00

Costs & Expenses

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

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copies	$0.15 and $0.20	$132.70
Lacerte Tax Proc	$99.00	$99.00
Mail K-1	$105.00	$105.00
Serve Fee App	$1.29	$21.93
Total Costs Requested in Application		$358.63

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $24,400.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 11 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Costs & Expenses

First and Final Costs in the amount of $358.63 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 11 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

The court authorizes the Chapter 11 Trustee to pay 100% of the fees and 100% of the costs allowed by the court.

Applicant is allowed, and the Chapter 11 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$24,400.00
Costs and Expenses	$358.63

pursuant to this Application as final fees and costs 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 James E. Salven ("Applicant"), Accountant for Irma C. Edmonds, the Chapter 11 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that James E. Salven is allowed the following fees and expenses as a professional of the Estate:
>
> James E. Salven, Professional employed by the Chapter 11 Trustee
>
> Fees in the amount of $24,400.00
> Expenses in the amount of $358.63,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as accountant for the Chapter 11 Trustee.
>
> **IT IS FURTHER ORDERED** that the Chapter 11 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

6. **19-90151-E-11 HSM-7** | **Y&M RENTAL PROPERTY MANAGEMENT, LLC David Johnston** | **MOTION TO AUTHORIZE PRE-DISMISSAL PROCEDURES AND/OR MOTION TO DISMISS CASE 4-8-21 [179]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 8, 2021. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Authorize Pre-Dismissal Procedures to Dismiss Chapter 11 Case is granted.

The Chapter 11 Trustee, Irma Edmonds ("Trustee") filed this Motion seeking authorization of pre-dismissal procedures of the Chapter 11 case pursuant to 11 U.S.C. § 1112(b)(1).

The Motion states the following with particularity (FED. R. BANKR. P. 9013):

1. The case was filed on February 21, 2019.

2. Debtor's Schedule A/B filed March 11, 2019 (Dckt. 14) reflects the Debtor's ownership of, and values placed on, the following real property assets (collectively "Real Properties"), which are primarily, though not exclusively, tenant-occupied residential real properties:

a. Single family residence at 2521 Fiesta Way, Ceres, California ("Fiesta Property"); Value: $295,000.00;

b. Duplex at 1723 Connie Way, Modesto, California; Value: $75,000.00;

c. Single family residence at 1526 Spokane Street, Modesto, California; Value: $110,000.00;

d. Single family residence at 613 Imperial Avenue, Modesto, California; Value: $130,000.00;

e. Single family residence at 1941 Hackett Road, Ceres, California; Value: $85,000.00;

f. Single family residence at 5130 Kiernan Avenue, Salida, California; Value: $230,000.00; and,

g. Vacant commercial property at 4379, 4403, 4427, and 4451 Morgan Road, Ceres, California; Value: $150,000.00.

3. Trustee has controlled and managed the Real Properties since her appointment. Trustee took possession and control of the (former) Debtor-in-Possession account and has collected funds provided to her by the various tenants of the rental properties which have been deposited in a "Trustee's account" for this case.

4. Trustee was holding approximately $94,338.00 in funds in the estate's accounts, including $3,194.00 ("Segregated Funds") turned over to the Trustee by the counsel for the former Debtor in Possession's, and held in a separate account, consistent with the court's order entered October 8, 2019. Debtor's counsel was given until October 31, 2019, to file a compensation application in connection to his services in a prior case for this Debtor. Trustee understands that the Debtor's counsel does not intend to seek authorization for the Segregated Funds to be paid to him as an administrative expense.

5. Wells Fargo Bank, N.A. ("Wells Fargo") held the only non-administrative claim in this case, and is the only creditor to file a proof of claim in this case in the amount of $131,562.26 alleged to be secured by a deed of trust encumbering the Fiesta Property.

6. Debtor disputed the Wells Fargo Claim contending that the Wells Fargo Claim relates to a Home Equity Line of Credit (HELOC), taken out by a prior owner of the Fiesta Property, which should have been repaid when the Fiesta Property was sold by that borrower a number of years ago.

7. After informal investigation and communication with Wells Fargo, Trustee commenced adversary proceeding Adv. No. 20-09005 ("Adversary Proceeding") against Wells Fargo through the filing of a Complaint: to Determine the Validity, Priority, or Extent of a Lien or Other Interest in Property; for Declaratory Relief; and, Objecting to Proof of Claim ("Complaint").

8. The parties participated in the Court's BDRP Program, and settled the Adversary Proceeding at a mediation session held in October, 2020. The parties' agreement ("Agreement") was documented, and the Trustee's compromise motion seeking approval of the Agreement was granted by order entered December 23, 2020.

9. Pursuant to the Agreement, the Trustee has paid $38,000.00 to Wells Fargo in settlement of disputes, with Wells Fargo receiving no additional funds from the estate. Wells Fargo then reconveyed the deed of trust securing the Wells Fargo HELOC.

10. Cause exists for dismissal because the only non-administrative claim (Wells Fargo) has been resolved pursuant to the Agreement, the Trustee has concluded that no further purpose is served through the continuation of this Chapter 11 case, and conversion to a Chapter 7 is not warranted in that the Debtor appears to be fully solvent, with no claims to pay, and no purpose would be served through liquidation of the Real Properties.

Motion, Dckt. 182.

Dismissal Procedures

Trustee proposes the following procedures for the dismissal of this case to provide appropriate and transparent reporting to the parties remaining involved in this case:

Phase 1

i. Trustee's final Monthly Operating Report shall be the report for April 2021 (Trustee's Final Report described below will include a listing of receipts and disbursements the Trustee makes between the filing of the April 2021 MOR, and the filing of the Trustee's Final Report);

ii. Trustee be permitted to move the Segregated Funds into the Trustee's general account for this case;

iii. Trustee will then distribute all allowed Final Administrative Expenses;

iv. Trustee will continue to pay ordinary course of business expenses, including United States Trustee quarterly fees, if any, through the filing of her Chapter 11 Trustee's Final Report;

v. After the above are completed, Trustee will turnover/distribute the balance of the funds in the Trustee's general account for this case ("Surplus Funds") to the Debtor, c/o of the Debtor's managing member, Yajaira Vaca, such that the balance in the Trustee's general account for this case will be $0.00; and,

vi. Then Trustee will upload her Chapter 11 Trustee's Final Report.

[The court's minor modification to the procedure as required is shown in the [bracketed] text below and discussion in the decision portion of this ruling.]

Phase 2

i. Once the Final Report has been filed, Trustee will upload [file with the court and serve on the Debtor and Debtor's Counsel an *Ex Parte* Motion and] a Declaration in Support of Entry of Order Dismissing Chapter 11 Case, which will provide the court with an evidentiary basis to conclude that all of the Trustee's administrative tasks in this case have been fulfilled and that an order granting the dismissal of this Chapter 11 case should be entered; and,

ii. Trustee will also lodge a proposed form of order ("Dismissal Order"), dismissing this Chapter 11 case, closing this estate, discharging the Trustee and relieving her of her of her duties, exonerating her bond, and ruling that the surety or sureties thereon are released from further liability thereunder except any liability which may have accrued during the time such bond was in effect.

Trustee filed her own Declaration under penalty of perjury to provide testimony attesting to the facts asserted in the Motion. Declaration, Dckt. 181.

DISCUSSION

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

Here, Trustee argues there is cause to dismiss the case because the only non-administrative claim (Wells Fargo) has been resolved pursuant to the Agreement and given the lack of non-administrative claims, no purpose would be served through confirmation of a Chapter 11 plan of reorganization in that the estate has sufficient funds on hand to promptly pay all allowed administrative claims now. Additionally, Trustee argues that conversion of this case to Chapter 7 similarly is not warranted in that the Debtor appears to be fully solvent, with no claims to pay, and no purpose would be served through liquidation of the Real Properties.

Trustee has proposed the dismissal of this case be done in two phases. Trustee believes that the Procedures provide a streamlined and well-defined structure for prompt, efficient dismissal following the successful administration of this case and estate.

Trustee's arguments are well-taken. The requested procedures allow Trustee to complete the case in a orderly fashion. Moreover, the dismissal allows Debtor to move on to a "fresh start"now that the Wells Fargo claim has been settled and the properties seem to be solvent. No party in interest has opposed the Motion. Cause exists to dismiss this case pursuant to 11 U.S.C. § 1112(b).

The Motion is granted.

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

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

The Motion to Authorize Pre-Dismissal Procedures and Dismiss Chapter 11 Case filed by the Chapter 11 Trustee, Irma Edmonds ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the court establishes the following procedures for the conclusion of this case, the dismissal of the case, and the Clerk of the Court Closing this case:

Phase 1 - Conclusion of the Case

A. Trustee's final Monthly Operating Report shall be the report for April 2021 (Trustee's Final Report described below will include a listing of receipts and disbursements the Trustee makes between the filing of the April 2021 MOR, and the filing of the Trustee's Final Report);

B. Trustee be permitted to move the Segregated Funds into the Trustee's general account for this case;

C. Trustee will then distribute all allowed Final Administrative Expenses;

D. Trustee will continue to pay ordinary course of business expenses, including United States Trustee quarterly fees, if any, through the filing of her Chapter 11 Trustee's Final Report;

E. After the above are completed, Trustee will turnover/distribute the balance of the funds in the Trustee's general account for this case ("Surplus Funds") to the Debtor, c/o of the Debtor's managing member, Yajaira Vaca, such that the balance in the Trustee's general account for this case will be $0.00; and,

F. Then Trustee will upload her Chapter 11 Trustee's Final Report.

Phase 2 - Dismissal of the Case

G. Once the Final Report has been filed, Trustee will file with the court and serve on the Debtor and Debtor's Counsel:

1. An *Ex Parte* Motion requesting dismissal of this case pursuant to the procedure authorized in this Order, and

2. A Declaration in Support of Entry of Order Dismissing Chapter 11 Case, which will provide the court with an evidentiary basis to conclude that all of the Trustee's administrative tasks in this case have been fulfilled and that an order granting the dismissal of this Chapter 11 case should be entered; and,

H. Trustee will also lodge a proposed form of order ("Dismissal Order"), dismissing this Chapter 11 case, closing this estate, discharging the Trustee and relieving her of her of her duties, exonerating her bond, and ruling that the surety or sureties thereon are released from further liability thereunder except any liability which may have accrued during the time such bond was in effect.

The Clerk of the Court may after the entry of the order dismissing this case and discharging the Trustee close this case.

7. 20-24123-E-11 FWP-21

RUSSELL LESTER
Thomas Willoughby

CONTINUED FINAL HEARING RE: MOTION TO APPROVE SETTLEMENT, RESTRUCTURING AND LOCK-UP AGREEMENT WITH THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
4-1-21 [515]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on April 1, 2021. By the court's calculation, 7 days' notice was provided. The court set the hearing for April 8, 2021. Dckt. 514.

A Proof of Service states that the Notice on the hearing for this Motion was served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on March 31, 2021. By the court's calculation, 8 days' notice was provided.

The Motion to Approve Settlement, Restructuring, and Lock-Up Agreement was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing opposition was stated.

The Motion for Approval of Compromise is denied.

Russell Wayne Lester, an individual, dba Dixon Ridge Farms, the Debtor in Possession, ("Movant") requests that the court approve the Settlement, Restructuring, and Lock-Up Agreement ("Agreement") between Movant and Prudential Insurance Company of America ("Prudential"). The claims and disputes to be resolved by the proposed settlement are Prudential's secured claim ("Prudential Claim") in this bankruptcy case and setting forth a mutually agreed upon treatment of Prudential's Claim (Proof of Claim No. 2-1) under an Amended Plan which shall be filed no later than July 31, 2021.

Movant and Prudential have negotiated and reached an agreement on the treatment of the Prudential Claim under a proposed Amended Plan, the settlement terms for this treatment are incorporated via a Term Sheet, filed as part of Exhibit A. *See* Dckt. 522. Although the Term Sheet contains many settlement provisions, Movant does not seek final approval of all those provisions. Motion at ¶ 12.

The instant motion seeks approval of the cooperation provisions between Movant and Prudential for how the parties will cooperate to obtain final approval for the settlement provisions pursuant to a Chapter 11 plan confirmation process. *Id*. If the Amended Plan is not confirmed, the settlement provisions will not reach final approval and will remain subject to dispute. *Id*.

Additionally, this Motion seeks immediate approval of the Lock-Up Provisions, summarized below. *Id*. at ¶ 13.

Movant and Prudential have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Agreement are set forth in the Agreement filed as Exhibit A in support of the Motion, Dckt. 522):

Agreement to Cooperate

A. Movant and Prudential agree to resolve the Prudential Claim on the terms contained in the Agreement.

B. Movant will propose, and Prudential will support, an Amended Plan that will include, but is not limited to, the terms summarized in the Instant Motion and set forth below as Summary of Primary Terms Consistent with Settlement and Summary of the Lock-up Provisions.

Motion at ¶¶ 12, 15.

Specifically, as further explained by Movant in the Memorandum of Points and Authorities filed in support of the instant Motion, through this Agreement to cooperate Debtor in Possession and Prudential will use commercially reasonable efforts to assist in obtaining and defending confirmation of the Amended Plan file pleadings and motions necessary to confirm the Amended Plan, participate in related hearings, and effect the terms of the Plan. The parties also agree not to take actions that would negatively affect the confirmation of the Amended Plan.

Summary of Primary Terms Consistent with Settlement

Movant's Memorandum of Points and Authorities ("MPA") highlights the following primary terms and conditions consistent within the settlement which are not subject to approval through this Motion (The full terms of the Agreement are set forth in the Agreement filed as Exhibit A in support of the Motion, Dckt. 522):

a. The sale of Gordon Ranch, MacQuiddy Ranch, and the Conservation Easement by December 31, 2021.

b. The sale of Oda Ranch by March 31, 2022.

c. Paydown of Prudential debt to $6,500,000 by July 1, 2022.

d. Restructuring of the remaining Prudential balance.

e. Creation of an independently managed, bankruptcy remote entity (the "SPE"), into which Prudential Collateral will be transferred to provide protection for Prudential, First North Bank of Dixon ("FNB"), and General Unsecured Creditors.

f. An agreed reduction of the default interest rate from 18 percent to 12 percent.

g. An agreed reduction of prepayment penalties of 50 percent for prepayments of interest through December 31, 2022, subject to certain conditions.

MPA at ¶ 5, Dckt, 519.

Summary of the Lock-up Provisions

The court summarizes the Lock-up Terms as follows (the full terms of the Agreement are set forth in the Agreement filed as Exhibit A in support of the Motion, Dckt. 522):

i. Debtor in Possession is required to file an Amended Plan on or before April 1, 2021, reflecting the terms of the Agreement.

ii. Debtor in Possession, Prudential and Kathleen Lester are required to take certain acts in promotion of confirmation of the Amended Plan.

iii. Debtor in Possession, Prudential and Kathleen Lester are to refrain from certain acts to hinder or oppose confirmation of the Amended Plan.

iv. The Amended Plan is to be confirmed by July 31, 2021, with an Effective Date on or before September 7, 2021.

Id. at ¶ 6.

Term Sheet

The Agreement incorporates a Term Sheet that contains many settlement provisions for treatment of Prudential's Claim under a proposed Amended Plan. This motion does not seek final approval for all those settlement provisions. The court stops short of the terms themselves as these are terms to be included on the Amended Plan which are to be set forth for confirmation, subject to creditors' objections, and to be reviewed by the court once the Amended Plan has been set for confirmation.

DISCUSSION

Though the present Motion states that it does not seek to have the court approve a compromise or alter, limit, or change rights and interests of the Parties, at the hearing it was presented in a way that there is a substantive compromise of rights. This complex comprise of rights cannot be determined on seven days notice and no opportunity to file a well thought out, precise written opposition. [Fn.1.]

FN. 1. In the posted tentative ruling, the court noted that it is a bit confused, and bemused, at being presented a thirty-seven page agreement which merely provides the handshake terms by which the Debtor in Possession and Prudential will in good faith work to prosecute a plan. The Parties and their counsel are well aware that the court will not, and cannot, pre-confirm plan terms for Prudential. Further, the court will not issue an order that binds the court to having to rubber stamp confirmation of a plan on the terms of a pre-confirmation agreement.

It appeared from the Motion that the Debtor in Possession stated that the terms were not binding, stating in the Motion:

> 12. The Debtor in Possession respectfully submits that the Settlement Restructuring and Lock-Up Agreement is slightly different from a typical settlement agreement. Like a normal settlement agreement, the Settlement Restructuring and Lock-Up Agreement incorporates a Term Sheet that contains many settlement provisions, but this motion does not seek final approval for all those settlement provisions. Instead, **this Motion seeks approval for the cooperation provisions by and between Prudential and the Debtor in Possession for how the parties will work together** to obtain final approval for the settlement provisions pursuant to a Chapter 11 plan confirmation process (i.e., the Lock-Up Provisions). If the Amended Plan is not confirmed, the settlement provisions will not be finally approved and will remain subject to dispute.
>
> 13. The Motion does seek immediate approval for the Lock-Up Provisions.

However, as stated at the hearing on April 8, 2021, it was asserted that the terms were to be at least unilaterally binding on Prudential.

The Debtor in Possession provided an analysis of the approval of compromise factors which the court reviewed. These are summarized further below.

Review of Additional Pleadings Filed

At the April 8, 2021 hearing, opposition to the Motion was stated by First Northern Bank of Dixon, in part asserting that if the agreement did not bind the parties, then the matter could be addressed through the confirmation of the Plan. The Debtor in Possession (who is not a party to the Agreement, but only as an individual and not the fiduciary debtor in possession) argued that the Agreement binds Prudential Insurance, so long as the Debtor in Possession complies with the terms of the Agreement. In some respects, it sounded in the nature of a one-way consideration deal with Prudential being bound but not the Debtor (and it being unclear how it would impact the Debtor in Possession in performing his duties as a fiduciary of the bankruptcy estate).

Though the discussion by the respective counsel for the Debtor in Possession, Prudential, and First Northern Bank, it became clear to the court that this was not merely an "agreement" to proceed in good

faith and providing the court with some parameters to judge good faith based on representations of parties, but rather a pre-confirmation setting of terms of a plan.

Debtor in Possession argued that this was really more in the nature of a compromise to resolve various claims, rights, interests, and challenges to the Prudential claim. Thus, there are substantive changes to the rights of the estate, Debtor in Possession, and Prudential. Such cannot be determined on seven days notice and oral arguments only at a hearing.

Creditor FNB's Opposition

Creditor First Northern Bank of Dixon ("FNB") filed an Opposition on April 22, 2021. Dckt. 580. FNB opposes the Motion to Approve Settlement, Restructuring and Lock-Up Agreement ("Agreement') on that basis that the Motion is inappropriate and unnecessary and especially when accounting for the hearing on the plan confirmation being a month away. FNB's main arguments against the Agreement are that the instant case is not a "mega-chapter 11 case" like that of PG&E; Debtor is seeking an advisory opinion; and Debtor has failed to meet its burden that the Agreement is fair and equitable to the creditors. FNB also strongly objects to the approval of the Term Sheet.

The court first turns to FNB's argument that the Motion seeks an advisory opinion. FNB cites to *In re Gonzalez*, where the court states that the prohibition on advisory opinions extends to bankruptcy courts. *In re Gonzalez*, 2015 Bankr. LEXIS 4578, *7. (Bankr. D. Nev., August 6, 2015). FNB argues that this approval of an agreement to cooperate is more of an advisory opinion or comfort order and that the parties do not need an order authorizing them to cooperate.

FNB contends that the motion is improper because the Agreement removes procedural safeguards in connection with plan development. Indeed, FNB argues that the Agreement in effect acts as a confirmation of the plan where important substantive rights which impact other creditors, including FNB, are not subject to the scrutiny of a proper confirmation process.

Specifically, FNB contends, the terms for cooperation state that Debtor in Possession must seek allowance of Prudential's entire claim and must seek confirmation of a plan of reorganization acceptable to Prudential. Thus, FNB argues that the terms terminate Debtor in Possession's ability to challenge Prudential's claim which will affect the feasibility of the plan and, by being contractually obligated to advance a plan acceptable to Prudential, this directly affects the confirmation process. FNB points the court to the various ways in which the terms of cooperation and the Term Sheet give Prudential veto power and control of all aspects of plan development, prosecution, and confirmation. Further adding that such terms may also "outsource" Debtor in Possession's fiduciary responsibilities.

FNB also notes that the Term Sheet contains provisions which directly affect FNB, such as granting FNB a new "completely silent" junior deed of trust, removal of rights typically held by a trust deed beneficiary, and creating a "put option" whereby FNB could be forced to purchase Prudential's loans under certain circumstances. FNB informs the court that such provisions are no longer part of the negotiation efforts and yet they remained part of the Term Sheet.

Next, FNB asserts that Debtor in Possession's analysis of the *In re Woodson* factors is inadequate and has failed to meet its burden of showing that the Agreement is "fair and equitable." Debtor in Possession has failed to analyze how the Agreement will impact substantive rights of creditors but has instead focused on reduction of expenses and risk from cooperation. FNB adds that whether the terms are

"fair and equitable" should be a determination for the court to make at the time of confirmation. Debtor in Possession's focus on the benefits of reducing Prudential default interest rate and prepayment premiums, in FNB's eyes, is misleading where FNB alleges that one of the main issues in this case is whether Prudential is even entitled to such sums. Thus, Debtor in Possession has failed to analyze how a significant reduction of the rates and premiums would be beneficial to the estate.

Moreover, Debtor in Possession refers to litigation savings of almost $1 million but no evidentiary support is provided for the calculation of litigation savings or other expenses. Adding that no analysis is provided comparing the potential cost savings with the potential benefit to the estate and creditors through a successful challenge to Prudential's claim.

Reply by Prudential

Prudential Replies, concluding that the Objection by FNB appears to "stem, at best, from FNB's fundamental misunderstanding of the purpose, provisions, and effect of the Settlement, Restructuring and Lock-Up Agreement . . . pending before this Court." Reply, p. 1:17-19; Dckt. 590. Rather, Prudential construes the Lock-Up Agreement as:

> [s]imply an agreement between [Debtor in Possession] and Prudential to seek confirmation of a plan of reorganization that **contains provisions acceptable to both parties**. This provides certainty to [Debtor in Possession] and Prudential, **eliminates the possibility of Prudential objecting to confirmation or filing a competing plan**, and narrows the remaining confirmation issues with which [Debtor in Possession] and the court must contend**. If confirmation of that plan fails, [Debtor in Possession] and Prudential are free to terminate the Lock-Up Agreement.**

Id., p. 1:21.5-23.5, 2:1-5.5 (emphasis added). This appears to state that the Lock-Up Agreement is presented to "Lock-Up Prudential" and provide Debtor in Possession with a way to "keep Prudential in line." The court notes that in the Lock-Up Agreement it creates the agreement definition of Russell Lester, Debtor in Possession, with fiduciary duties to the bankruptcy estate, as "Lester," which may confusingly sound as the non-fiduciary individual debtor, Mr. Lester.

Prudential continues, explaining what it perceives to be FNB's fundamental misunderstanding, stating in the Reply (emphasis added and the court providing its commentary following a paragraph, rather than in a discussion below, for the ease of parties and counsel in noting how the court interprets what is stated to facilitate advocacy at the April 29, 2021 hearing): [Fn.2.]

FN. 2. As discussed below, as drafted, the Lock-Up Agreement is stated to be between Prudential and Russell Wayne Lester, an individual," and Kathleen H. Lester, an individual, who is a co-obligor. The drafters have made Russell Wayne Lester, an individual, not as the Debtor in Possession, a party to the Lock-Up Agreement. If that were the case, Mr. Lester, as the "mere" debtor, could not agree to restrict the exercise of powers of the fiduciary of the bankruptcy estate. Presuming that the Parties intend the Debtor in Possession to be the party to the contract and would so amend it, the court continues with consideration of the Motion and identifies the party agreeing as the ["Debtor in Possession"] to avoid confusion with Mr. Lester in his non-fiduciary capacity.

> 9. Unfortunately, it is clear from the Objection that FNB still fundamentally misunderstands not only the purpose and intent of the Lock-Up Agreement, but also its plain language.
>
> 10. For instance, FNB describes the Motion and the Lock-Up Agreement as a "*sub rosa* plan" "that will take away important procedural safeguards" and "tie[s] the court's hands at confirmation." Objection, p. 2. There is no analysis, however, as to how the Motion or the LockUp Agreement actually result in any of these ends, and FNB is simply mistaken about these points.
>
> 11. **The Lock-Up Agreement is straightforward**. [Debtor in Possession] and Prudential **have agreed upon a resolution of the outstanding issues between them**, the terms of which **are embodied in the Term Sheet**. Due to the mutually beneficial aspects of the Term Sheet – and the length of time of required to reach such agreeable terms – **[Debtor in Possession] and Prudential wish to confirm a plan that will incorporate the Term Sheet**.

This description provides a very simple, "we have an agreed set of terms that the Debtor in Possession and Prudential believe will be good plan terms."

> 12. That is exactly what the Lock-Up Agreement does. For instance, prior to the confirmation date of the Plan (the "Confirmation Date") **[Debtor in Possession] and Prudential will cooperate to seek confirmation of a plan that includes the terms of the Term Sheet** and to pursue the transactions contemplated therein. *See, e.g.* Lock-Up Agreement §§2(a)(i)-(v), 2(c)(ii)-(v), 5. At the same time, **[Debtor in Possession] and Prudential will not, among other things, pursue any other plans of reorganization or restructurings**. See, e.g. id., §§2(a)(vi), 2(c)(v). **[Debtor in Possession] and Prudential will similarly not engage in negotiations regarding any alternate plan or acquisition of Lester's assets**. *See, e.g. id.*, §§3(a)(i) and (ii), 3(b). [Debtor in Possession's] negotiations with other creditors are not prohibited, however, **[Debtor in Possession] can continue to freely negotiate the treatment of all other classes of creditors so long as such negotiations do not modify the terms of the Term Sheet without Prudential's prior consent.** *Id.* §3(a)(i).

This description can be read not to violate the Bankruptcy Code so long as there is no obligation on the Debtor in Possession to comply with the Lock-Up Agreement and no negative consequences other than Prudential saying that the Debtor in Possession is to pursue a plan other than on the terms that two good faith parties agreed should be pursued and "Katie bar the door, here comes Prudential's opposition and competing plan." As written, it appears that Prudential may be saying the Lock-Up Agreement does more, and locks up the Debtor in Possession who must comply with the Term Sheet and the fiduciary Debtor in Possession must get permission from Prudential before doing anything contrary to the Lock-Up Agreement. This latter interpretation would appear to effectively pre-set the plan terms and put Prudential in control of the plan proposed during the Debtor/Debtor in Possession exclusivity period and make Prudential the *de facto* plan proponent.

> 13. FNB makes the incorrect and unsupported conclusion that this exception is "illusory," likely based in part upon FNB's misstatement that it could be "forced" to

> purchase Prudential's loans through a "put option". Objection, pp. 8-9. Not only did FNB and Prudential repeatedly discuss the concept of a put option, but the Term Sheet recognizes that Prudential and FNB would have to enter into such an agreement for it to be effective. FNB could only do so voluntarily – it cannot be forced to do so. Further, any put option would only be a condition precedent to FNB receiving junior liens on Prudential's real estate collateral, liens that FNB otherwise has no right to obtain. Finally, FNB ignores that the Term Sheet states that the Plan "may" include such a concept, not that it shall. Term Sheet, ¶9(a). **This is an explicitly optional structure that would require FNB's consent. Regardless, because FNB eventually indicated it was not interested in executing the put option, the structure is not included in the Plan.**

There appears to be one reference to the "put option" in the FNB Opposition. Opposition, p. 9:14-18; Dckt. 580. In this one sentence FNB asserts that by the put option FNB could be forced to purchase Prudential's loan under certain circumstances. Prudential is correct that this is a reference to a substantive term, which the court would not be "confirming" or binding the Debtor in Possession or other parties in interest to in whatever plan is presented to the court by the Debtor in Possession and if confirmed. However, if the Lock-Up Agreement were to lock-up the Debtor in Possession from removing such a provision, if the Debtor in Possession concluded that such was not a proper term, unless authorization was granted by Prudential, then it would appear that the Lock-Up Agreement was setting plan terms which could not be violated by force of law (the court's order approving the Lock-Up Agreement).

> . . .
>
> 15. The **Lock-Up Agreement does limit certain material changes in [Debtor in Possession's] business actions until the Plan's effective date.** These include, for instance, **not to materially amend or terminate any material contracts outside of the ordinary course of business, not to agree to material agreements with employees outside of the ordinary course of business, and not to materially change any employee agreements outside of the ordinary course of business**. See, *e.g. id.*, §3(a)(iii)-(vi). These brief, narrow limitations are meant simply to ensure that Lester continues to maintain the status *quo* and the ordinary course of his business.

These provisions go to the day to day operation of the bankruptcy estate by the fiduciary Debtor in Possession. On the one hand they would appear to maintain the status quo pending a relatively soon (in legal passage of time) confirmation hearing. On the other hand, who controls what is "material" and who is actually controlling the operation of the bankruptcy estate?

> 16. Finally, the Lock-Up Agreement is of limited duration. If the Plan is confirmed, then it will automatically terminate upon the Plan's effective date. *Id.* §4(b). There are numerous other scenarios in which **either or both parties may terminate** the Lock-Up Agreement, including **upon mutual agreement** or **if the Court denies confirmation of the Plan**. *Id.* §4(a)(i) and (ii).

Looking at the termination provisions of the Lock-Up Agreement, § 4(a)(i) provides for a mutual consent termination; and § 4(a)(ii) provides that if the court finds any term of this agreement or the Plan unenforceable, the Lock-Up Agreement may be terminated by either party, with the parties having a good faith period until July 31, 2021 to modify or correct the matter determined to be unenforceable. This provision does not state that the court denies confirmation, but determines that the Plan is "unenforceable,"

not merely "denied confirmation." As written, denial of confirmation may not be a determination that a Plan is "unenforceable" since there is no confirmed plan to determine what is and is not enforceable.

However, in § 4(a)(v) of the Lock-Up Agreement there is a provision for termination of the Lock-Up Agreement by either party if there is not confirmation of the Plan by July 31, 2021. In turn, that ability to terminate is qualified by, "[p]rovided that neither the failure to achieve the Plan Effective Date nor the Bankruptcy Court's denial of confirmation of the Confirming Plan: (A) is caused by any failure of a terminating Party to fully perform its obligations under this Agreement; or (B) is due to the failure or refusal of a terminating Party to move promptly for the confirmation of the Plan;. . . ." Thus, one party could assert that the other, say the Debtor in Possession, did not fully perform its obligations, and therefore, the Lock-Up Agreement continues to work in perpetuity.

> 17. As should be abundantly clear, the Motion does not ask the Court to pre-approve the Term Sheet. It simply seeks Court authorization of [Debtor in Possession] and Prudential's agreement to pursue a Plan that includes the terms of the Term Sheet. If the Court approves the Lock-Up Agreement, then **[Debtor in Possession]** and Prudential **will be bound to seek confirmation of a plan that includes the terms of the Term Sheet** (such as the Plan), **unless and until confirmation is approved or denied.** The Court is not being asked to make any determination regarding confirmation or any Plan provision, and all parties in interest retain every right they would otherwise have to object to confirmation of the Plan. The only exception to this is, of course, **Prudential, who cannot object to the Plan as long as it contains the terms of the Term Sheet.**

The language used in describing the effect of the Lock-Up Agreement is problematic. It states that the fiduciary Debtor in Possession is bound to pursue only the terms of a plan as now agreed between the Debtor in Possession and Prudential. If so "bound," unless and until confirmation is approved or denied, if the Debtor in Possession chose not to pursue the Plan as agreed with Prudential, could Prudential seek mandatory injunctive relief requiring the Debtor in Possession to pursue the Plan or seek the appointment of a bankruptcy trustee who would be "bound" to perform the Lock-Up Agreement and pursue confirmation on the terms agreed with Prudential or an asserted administrative expense for breach of the Lock-Up Agreement?

> 18. In short, FNB's unsupported claim that the Lock-Up Agreement is a "*sub rosa* plan" or somehow grants Prudential control and "veto power over all aspects of [Lester's] plan development, prosecution, and confirmation" is a complete misunderstanding and misrepresentation of the Lock-Up Agreement. Objection, p. 7. Instead, **the Lock-Up Agreement provides certainty to [Debtor in Possession] and [the Estate's] largest creditor, Prudential. Provided that [Debtor in Possession] seeks a plan of reorganization that includes the Term Sheet**, **Prudential will not object to such** plan, will provide support for it, and will not pursue any alternative plan (which it previously did and which otherwise may result in much less favorable treatment for other creditors). At the same time, other parties in interest can continue to negotiate with Lester or object to confirmation of the Plan. Closing off one of the fronts on which Lester is battling also frees Lester to focus on confirmation and negotiating with remaining creditors, including FNB.

If the Lock-Up Agreement merely sets out the terms by which Prudential is "locked-up" to go along with the plan terms as agreed and the Debtor in Possession is not "bound" to proceed with the terms as agreed, then this could be viewed in a positive light. But when it is to provide "certainty" to Prudential that the fiduciary Debtor in Possession with take no action other than as pre-confirmation agreed by Prudential, unless Prudential authorizes it, then the background lighting for the Lock-Up Agreement becomes much more harsh.

> 19. The Objection primarily consists of a stream-of-consciousness regurgitation of every possible argument FNB could imagine. Most, if not all, of these are simply conclusory statements, rhetorical questions, and hypotheticals without any analysis of the actual text of the Lock-Up Agreement or the Term Sheet.

This observation adds little to a thoughtful analysis of what is presented. While Prudential may feel it has been goaded into such a response by attacks from FNB, descending into the swamp generally offers little in positive results.

> 20. The only argument with any substantive analysis or support is whether the LockUp agreement is a "*sub rosa* plan." A *sub rosa* plan is typically an agreement that has the "practical effect of dictating some of the terms of any future reorganization plan . . . [and] short circuit[s] the requirements of Chapter 11 for confirmation." *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983). But **the Lock-Up Agreement does not short-circuit the confirmation process in any way**. Instead, **[Debtor in Possession] and Prudential are agreeing to certain plan terms (which terms are already included in the Plan).** Compare this to the agreement in *Braniff*, which would permanently dictate how the debtor could use certain assets and how and to which creditors those assets could be distributed. Any plan ever posed by the Braniff debtor would have to include those terms, permanently tying the debtor's hands. Here, **[Debtor in Possession] and Prudential are simply agreeing to seek confirmation of a plan that incorporates the Term Sheet, providing benefits and certainty for both parties.** The Motion does not seek any determination regarding the terms of the Term Sheet, and all parties in interest can object to confirmation of the Plan. Approval of the Lock-Up Agreement has no bearing on the actual confirmation or confirmability of the Plan (except that it will eliminate the objection of Lester's largest creditor).

It appears that Prudential does assert that the Lock-Up Agreement does handcuff the Debtor in Possession with respect to the plan for which confirmation may be sought by the Debtor in Possession. Thus, effectively the plan presented to the court is substantially written and "approved" by Prudential, with the Debtor in Possession having no power, if the order approves the Lock-Up Agreement, to advance different terms, even if the Debtor in Possession were to determine that such agreed terms were not consistent with the Bankruptcy Code. If the Debtor in Possession and Prudential are merely, in good faith, setting out the terms that the two parties, in good faith, are going to advance, one wonders why an enforceable order of the court is necessary.

> 21. Ironically, FNB states that the Lock-Up Agreement "stands the plan confirmation process on its head" (without explaining how that is so). Objection, p. 6. Yet FNB raises numerous arguments that are only appropriate for confirmation, such as the Plan's feasibility or Lester's good faith. As the Plan is pending before this Court and

> a confirmation hearing on the Plan is approximately one month away, FNB has ample opportunity to raise these rhetorical questions.

This is an accurate observation of some of FNB's opposition grounds.

> . . .
>
> 23. FNB has laced its Objection with approximately 18 rhetorical questions (and numerous other unsupported conclusory statements), many of which verge on the absurd. For instance, FNB asks "is a 50% reduction [of the prepayment premiums] on certain terms and during certain time periods legally permissible?" Objection, p. 11. Considering that California courts have, for decades, upheld contractual prepayment premiums incurred in alternate performance, why would it be illegal to consensually amend those terms? *See, e.g. Ridgley v. Topa Thrift & Loan Assn.*, 17 Cal. 4th 970 (Cal. 1998); *Lazzareschi Inv. Co. v. S.F. Fed. Sav. & Loan Ass'n*, 22 Cal. App. 3d 303, 308 (Cal. Dist. Ct. App. 1971). The compromise of such obligations as set forth in the Plan is a significant concession benefitting the estate and all creditors besides Prudential. Each of the other numerous rhetorical questions and conclusory statements is similar, and to answer each in turn would be an exercise in futility.
>
> 24. **The Objection is a classic example of a Gish gallop. FNB is** attempting to overwhelm all parties (including the Court) by **raising as many arguments as possible without regard to their viability or level** of support to make it impossible to respond to each. Such arguments do not indicate that the Motion should be denied.

The term "Gish gallop" was not provided in the Reply. [Fn.3.] While some arguments raised by FNB go to confirmation terms, which it appears FNB asserts would be pre-set if the court binds the Debtor in Possession to the Lock-Up Agreement, the court has made it clear that it is not pre-ordaining plan terms by order of the court as such would not be kosher.

FN. 3. Going to the online Urban Dictionary, the following, colorful, definition is provided:

> Gish Gallop
>
> Named for the debate tactic created by creationist shill Duane Gish, a Gish Gallop involves spewing so much bullshit in such a short span that your opponent can't address let alone counter all of it. To make matters worse a Gish Gallop will often have one or more 'talking points' that has a tiny core of truth to it, making the person rebutting it spend even more time debunking it in order to explain that, yes, it's not totally false but the Galloper is distorting/misusing/misstating the actual situation.

https://www.urbandictionary.com/define.php?term=Gish%20Gallop. Two points, the parties have little to be concerned about getting Gish Galloped in federal court if they focus on the facts and the law in presenting their point. Second, while 10 pages in length (accounting for the title page and the twelfth page being just the signature page) present a lot of material, some of which arguments are confirmation issues, they do not appear to be "BS."

> 25. The Lock-Up Agreement is straightforward: [Debtor in Possession] will pursue confirmation of a plan that incorporates the terms of the Term Sheet and Prudential will support that plan and not file its own. This greatly narrows the remaining issues [Debtor in Possession] must address ahead of confirmation and provides certainty with his largest creditor. It does not affect any party's right to object to confirmation of the plan.

In some respects, as presented by Prudential, this is framed as effectively a jointly prosecuted plan during the exclusivity period, in with the Debtor in Possession and Prudential are allied to seek confirmation. Though "allied," they appear to apply a permutation of the Cold War Era Ronald Regan precaution of "Trust But Verify." This Lock-Up Agreement appears to demonstrate that while working together, both the Debtor in Possession and Prudential really do not trust the other to prosecute the *de facto* joint plan.

Approval of Compromise Factors
Presented by Debtor in Possession

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 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 Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (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); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Probability of Success

Movant argues this factor is in favor of settlement because it would be difficult to predict the outcome of litigation due to the numerous issues that would need to be decided. If the parties belief that Creditor is over secured is correct, other issues that would need to be determined are:

1. Appropriate post-petition interest rate;

2. Whether the contract default rate is enforceable;

3. If enforceable, whether the court should prescribe a different rate due to equitable considerations;

4. Whether contract prepayment premiums are unenforceable as "disguised penalties;"

5. If enforceable, whether the court should prescribe different premiums due to equitable considerations; and

6. Whether proposed treatment in the Plan is "fair and equitable."

Given that many of the issues allow the Court to use its discretion, it is difficult to predict the outcome. Additionally, the determination of some issues would require expert opinions that are not known at this time. The agreement is the parties attempt to establish an agreed path forward and when the monetary benefits are considered and the cost to litigate potential disputes are calculated, the total benefit to the estate could exceed $2,500,000.

Difficulties in Collection

Movant argues this factor is not relevant to this matter.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues this factor weighs heavily in favor of settlement because litigation in this matter would be expensive and complex. The issues relevant to Probability of Success apply with equal weight here. Their numerosity and complexity involves issues of federal and state law, as well as a potential battle of the experts.

Paramount Interest of Creditors

Movant argues this factor strongly favors settlement because the additional expenditure of disputing the issues involved does not benefit creditors fo the estate due to the time and expense to litigate legal and factual disputes. The agreement reduces the default interest rate from 18% to 12% and reduces prepayment premiums to 50% through December 31, 2022 without expensive litigation. Additionally, the settlement provides a path to confirmation of a plan that will allow continued operation of Debtor in Possession's business and full payment t o creditors.

Decision

FNB is correct, this court has not, will not, and cannot issue advisory opinions (which are different from properly granting declaratory relief as authorized by Congress) of future events. As FNB, Prudential, and the Debtor in Possession, and their respective counsel know, the court does not pre-confirm terms of a plan outside of the confirmation process. The proposed "lock-up" expressly states that no terms are binding absent being part of a confirmed plan.

The court's review and commentary on specific provisions of the Lock-Up Agreement include the following:

I. Plan, Voting in Favor of Plan, Supporting Bankruptcy Pleadings, Obligations of the Debtor in Possession. Lock-Up Agreement. Page 2; Dckt. 522.

A. The term "Plan" is defined as the Chapter 11 plan as agreed to by Debtor in Possession and Prudential, as set forth in the Lock-Up Agreement and Term Sheet. *Id*., ¶ E of Recitals.

B. "[Debtor in Possession] covenants and agrees (unless otherwise modified or waived by Parties in writing) that he will, at his own cost, including applicable fees for attorneys, accountants, or other professionals, to the extent applicable:" *Id*., Recitals and Duration, § 3.(a)

1. Assist in obtaining and defending confirmation of the Plan; *Id*., (a)(i);

2. Assist Prudential with respect to obtaining the Bankruptcy Court's approval of the Bankruptcy Pleadings [the Plan, pleadings, and motions acceptable to Debtor in Possession and Prudential necessary to confirm the plan]; *Id*.

In the phrasing of the two sections above, it appears that it is Prudential that is prosecuting confirmation of a plan and that the fiduciary Debtor in Possession has been reduced to the assistant to Prudential.

3. Amend the Debtor in Possession's current plan to be consistent with the Term Sheet and coordinate filing the Bankruptcy Pleadings with Prudential; *Id*., (a)(ii);

4. Support the Plan; *Id*., (a)(iii);

5. Participate in all pre-confirmation hearings as requested by Prudential; *Id*., (a)(iv);

The fiduciary Debtor in Possession has the obligation to participate consistent with his fiduciary duties and not merely as and when requested by Prudential.

6. "in no way agree to or otherwise provide any support to any other proposed transaction, financial restructuring, **or any plan of reorganization other than the Plan** and any transactions contemplated by the Plan, Terms Sheet or this Agreement; *Id*., (a)(vi);

This appears to state that even if the fiduciary Debtor in Possession determines that there is a better Plan consistent with his fiduciary duties to the bankruptcy estate, he is "bound" to only pursue the Plan to which Prudential has agreed.

7. "**[o]ppose** any actions by **any** other party to **change** the rights, remedies, claims, powers, **benefits, privileges**, lien, **security interests**, **or protections of Prudential**, **including**, inter alia, **any objection to the Prudential Claim**;" *Id*., (a)(vii);

The fiduciary Debtor in Possession is not the agent of any other party and is not "bound" to rise to the defense of any other party in interest or creditor. Here, this appears to say that the Debtor in Possession will expend time, money, and professional resources of the Bankruptcy Estate to defend Prudential against all other creditors.

> 8. "not object to or contest, and not otherwise take any action or file any pleading that would materially delay, oppose, or be inconsistent with, the Term Sheet, the Plan, the Bankruptcy Pleadings, or any other document filed to effect the confirmation or consummation of the Plan;" *Id*., (a)(viii);

As addressed above, even if the fiduciary Debtor in Possession should subsequently determine that the Plan and Term Sheet are not in the best interests of the Bankruptcy Estate, or even if they were not consistent with the Bankruptcy Code, the fiduciary Debtor in Possession would be "bound" to remain silent and not fulfill his fiduciary duties.

> 9. "seek allowance in full of the Prudential Claim; . . . ." *Id*., (a)(x).

The court is unsure of what affirmative acts the fiduciary Debtor in Possession would be taking to "seek allowance" of Prudential's claim and do so as the apparent "agent" for Prudential.

C. Obligations of Prudential. *Id*., § 3(b)

> 1. "not encourage, solicit, or initiate any inquiry or proposal from, or encourage, solicit, or initiate any discussions or negotiations with, or continue in any discussions or negotiations with, any person or party (other than Lester or an affiliate, associate, representative or agent of Lester, and other than discussions with any person related to any sale process pursuant to the terms hereof) concerning any potential acquisition of assets of Lester."

Little is required of Prudential other than not acting contrary to the Plan and Term Sheet which the Debtor in Possession is obligated to assist Prudential in getting confirmed.

Reviewing the Lock-Up Agreement, it appears to be an agreement to lock-up the fiduciary Debtor in Possession and have him work to support and advance the interests of Prudential, including the extreme of requiring the Debtor in Possession to "oppose . . .any objection to the Prudential Claim." Lock-Up Agreement § 2.(a)(vii); Dckt. 522. While the court sincerely believes that counsel for the Debtor in Possession and counsel for Prudential that have appeared in this case approached this intending to have a fair, good faith, cooperation agreement, unfortunately the other attorney who worked on this (whether at their firms or those who generated an agreement to "Lock-Up and keep in line a Debtor in Possession) took this inappropriately over the top in neutering the fiduciary debtor in possession.

The Term Sheet is provided as Exhibit A to the Lock-Up Agreement. Dckt. 522 at 17. The Term Sheet is not titled Debtor in Possession-Prudential Term Sheet, but the "Prudential Term Sheet." While possibly a mere shortcut, in light of the minimal commitments from Prudential, the title strikes the court as being consistent with an "Agreement Locking Up the Debtor in Possession."

The Term Sheet requires that the Plan must set up "bankruptcy-remote" trusts to be owned by the "Lester Family" (not defining who is the "Lester Family"). This Term Sheet, which must be the Plan

advanced by the Debtor in Possession, must put all of "Prudential's real property collateral," real and personal, into the bankruptcy remote trusts. Prudential Term Sheet ("Prudential TS"), § 1)a); Dckt. 522.

From that point on, the assets that were property of the bankruptcy estate and have gone in the trust are outside the Plan and will be managed by a manager selected by Prudential. Prudential TS, § 1)e), *Id*. The Prudential TS then continues with the Prudential-Lester terms for paying Prudential outside of any bankruptcy plan.

In § 9 of the Prudential TS, provision is made for a "completely silent and subordinate junior lien to be given to FNB." The Debtor in Possession has agreed, and would be bound to only pursue a plan allowing Prudential to modify its senior lien without any notice to or consent of FNB and other acts which may be of detriment to the "completely silent and subordinate junior lien." Prudential TS, § 9)a); *Id*.

As discussed by the Fifth Circuit Court of Appeals in *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983), "The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets."

Though Prudential doth protest that the Lock-Up Agreement does not establish plan terms but merely states that "Prudential will not object to such plan" so long as the Debtor in Possession stays locked in with the terms in the Lock-Up Agreement is not persuasive. From Prudential's side of the table, nothing is being settled. Rather, Prudential is "locking up" the Debtor in Possession to pursue only one type of plan, with that lockup having been put in place by an order of the court.

The Lock-Up Agreement is not merely a simple agreement by which Prudential commits to support and vote for a plan that has specified terms, but locks the fiduciary Debtor in Possession into presenting no other terms and that the fiduciary Debtor in Possession must proceed only with a Chapter 11 plan that is as provided for in the Lock-Up Agreement. In substance, the only plan that can be presented by the fiduciary Debtor in Possession is the Lock-Up Agreement Plan, presented to the court in a take it or leave it position, with the Debtor in Possession supporting Prudential as requested by Prudential.

Additionally, the fiduciary Debtor in Possession would become obligated to, at the cost and expense of the bankruptcy estate and all the other creditors, defend Prudential's claim, affirmatively seek to have Prudential allowed its claim, and oppose anyone who challenges Prudential in any way.

This Lock-Up Agreement raises some significant, and serious, issues concerning the Debtor in Possession, not merely whether plan terms were being pre-ordained outside of the confirmation process. This Lock-Up Agreement could well appear to be one in which the Debtor in Possession has moved from being the fiduciary of the Bankruptcy Estate advocating in court to being the representative of Prudential and to defend Prudential with assets of the Bankruptcy Estate.

If the Parties had an agreement which stated plan terms on which they agreed and committed Prudential to support a plan with those terms if such a plan was advanced by the Debtor in Possession at the expense and cost of the Bankruptcy Estate, and not be able to switch positions at the last minute to extract additional benefits from the Debtor in Possession and Bankruptcy Estate, such might be an agreement that the court could impose. It would "lock-up" Prudential to protect the interests and rights of the Bankruptcy Estate. Unfortunately, the Lock-Up Agreement locks-up the Debtor in Possession to do the bidding of Prudential.

The Motion titled Motion to Approve Settlement, Restructuring, and Lock-Up Agreement with Prudential Insurance Company of America is denied. [Fn.4.]

FN. 4. The court notes that Prudential, the Debtor in Possession, and FNB have each expressed great frustration at the inability of the Debtor in Possession and Prudential to find a way to work with, compromise, and have FNB join Team Prudential (given the terms of the Lock-Up Agreement, identifying it as "Team Prudential-Debtor in Possession" would be overly charitable). Personalities of various persons involved in these discussions may have made finding a resolution difficult. It is unfortunate that the parties and their counsel have been unable to achieve good faith, solid economic resolutions.

However, that merely results in the parties proceeding to confirmation. Those advancing or objecting to plan terms in good faith will clearly stand out. Those who are drawing unreasonable lines and choosing litigation cost and expense as a negotiating tool will also stand out.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Settlement, Restructuring, and Lock-Up Agreement by Russell Lester, 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.

FINAL RULINGS

8.	**20-90210-E-11 AP-1**	**JOHN YAP AND IRENE LOKE** **Arasto Farsad**	**MOTION TO APPROVE STIPULATION FOR RELIEF FROM THE AUTOMATIC STAY** **3-25-21 [188]**

Final Ruling: No appearance at the April 29, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on March 25, 2021. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Stipulation for Relief from the Automatic Stay is granted.

Creditor The Bank of New York Mellon f/k/a The Bank of New York as Trustee for First Horizon Alternative Mortgage Securities Trust 2005-AA8; Nationstar Mortgage LLC (dba Mr. Cooper) as servicer, creditor with a secured claim ("Movant"), requests that the court approve a stipulation with John Hst Yap and Irene Laiwah Loke ("Debtor") pursuant to Federal Rule of Bankruptcy Procedure 4001(d) which provides that Movant and Debtor (collectively "Parties") stipulate that Movant is entitled to termination of the automatic stay and the surrender of the real property located at 1032 Deena Way, Fallon, Nevada ("Deena Property").

STIPULATION

Movant and Debtor stipulate to an order regarding termination of the automatic stay and surrender of the Deena Property, subject to approval by the court upon the following facts (the full terms of the Stipulation are set forth in the Stipulation filed in support of the Motion, Dckt. 190):

A. A promissory note dated July 7, 2005 executed by Debtors to First Horizon Home Loan Corporation in the principal sum of $178,800.

B. The Note is secured by a first position deed of trust encumbering the Deena Property that was duly recorded on July 14, 2005, in the Official Records of Churchill County, State of Nevada.

C. Subsequently, all of Lender's beneficial interest in the Loan was assigned and transferred to Movant.

D. On February 17, 2021, Debtor filed their combined Chapter 11 Disclosure Statement and Plan. (*See* Dckt. 175). Movant's claim is identified as a Class 1A Unimpaired Claim and Property to be surrendered.

E. On March 24, 2021, Debtors and Movant executed a Stipulation Re: Termination of the Automatic Stay and Surrender of the Property.

F. Movant's claim secured by the Deena Property shall not be modified in any way.

G. The automatic stay is terminated and Movant may proceed with foreclosure of the Deena Property.

H. Upon entry of the Order Confirming Debtor's Chapter 11 Plan, the Deena Property shall be deemed surrendered to Movant.

I. Debtor's Chapter 11 Plan shall continue to reflect that Creditor's claim is unimpaired.

J. The 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(2) is waived.

K. The Order approving this Stipulation remains binding despite conversion of Debtor's case to another chapter.

L. The terms of the Stipulation may not be modified, altered, or changed by Debtor's Chapter 11 Plan.

DISCUSSION

Here, Movant and Debtor stipulate to termination of the automatic stay as to and surrender of the Deena Property. The Motion to Approve the Stipulation was filed and was set for hearing. A total of 35 days

notice was provided with oppositions and responses to be heard at the hearing. The Motion's Certificate of Service provides for all who received notice of this Stipulation.

The Stipulation is based on Debtor's desire to surrender the Deena Property and Debtor confirms that the Property will not be necessary for reorganization of Debtor's Bankruptcy Estate. The Stipulation to Terminate the Automatic Stay allows Debtor to surrender, and Movant to proceed with foreclosure, of the Deena Property.

Counsel, Debtor, and Creditor have responsibly addressed these issues, allowed Counsel to participate in the solution, and have presented a Stipulation that allows Debtor to move on.

The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Stipulation filed by The Bank of New York Mellon f/k/a The Bank of New York as Trustee for First Horizon Alternative Mortgage Securities Trust 2005-AA8; Nationstar Mortgage LLC (dba Mr. Cooper) as servicer, Secured Creditor ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Stipulation between Movant and John Hst Yap and Irene Laiwah Loke is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Stipulation filed as Exhibit 1 in support of the Motion (Dckt. 190).
>
> **IT IS FURTHER ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 1032 Deena Way, Fallon, Nevada ("Property"), to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

9. 20-90327-E-7 SSA-4 | **PHILIP/DALLIA ENGLE** | **MOTION FOR ADMINISTRATIVE EXPENSES**
Gurjeet Rai | **3-26-21 [72]**

Final Ruling: No appearance at the April 29, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 26, 2021. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Administrative Expenses is granted.

Chapter 7 Trustee, Michael D. McGranahan ("Movant") requests payment of administrative expenses in the amount of $2,155.66, incurred during the period of March 1, 2021 to July 1, 2021, for payment of past and ongoing post-petition expenses to preserve property of the estate known as 5119 Curtis Street, Salida, California while Trustee markets and sells the property. Payments are to be made to the property's insurer and utility servicers.

DISCUSSION

Movant argues that payment of the requested expenses is necessary because the property needs ongoing utilities for the proper marketing and maintenance of the property while Trustee seeks to sell the property. Specifically, Trustee requests payment of the subject administrative expense in the principal amount of $250.00 per month for a period of four (4) months and payment of a past due utility bill in the amount of $69.66 filed as Exhibit 2, and allow for payment of the insurance bill of $1,086.00 filed as Exhibit 1. *See* Dckt. 75. Trustee intends to pay the ongoing utility expenses for the next four months (beginning March 1, 2021), or until the sale of the property closes, whichever comes first.

Section 503(b)(1)(A) of the Bankruptcy Code accords administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ." Here, Movant states that ongoing utilities and property insurance are necessary to preserve the estate and allow Trustee to market and sell the property.

Movant having demonstrated that the expenses were necessary, the court finds that Movant providing payment of utilities and property insurance for property of the estate was necessary for and provided benefit to the Estate.

Movant further requests that the order authorizing payment be retroactive to March 1, 2021, as some payments were required and have already been made by Movant. A bankruptcy court can exercise its equitable discretion to grant retroactive authorizations when it is appropriate to carry out the Bankruptcy Code and when the approval benefits the debtor's estate. *In re Harbin*, 486 F.3d at 522. Retroactive approvals should only be used in "exceptional circumstances." *Atkins*, 69 F.3d at 974. Payment of utilities and insurance have been paid for maintenance of the real property is for the benefit of the bankruptcy. The court finds cause to grant retroactive authorization of such payments.

The Motion is granted, and the Chapter 7 Trustee is authorized to pay administrative expenses in the amount of $2,155.66.

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 Administrative Expense filed by Chapter 7 Trustee, Michael D. McGranahan ("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 is granted, and the Chapter 7 Trustee is authorized to pay $2,155.66 for insurance and utilities as an administrative expense of the Chapter 7 Estate in this case pursuant to 11 U.S.C. § 503(b)(1), effective March 1, 2021.

10. 18-90029-E-11 FWP-12 | **JEFFERY ARAMBEL** / **Michael St. James** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH LBA RV-COMPANY XXVII, LP** **3-25-21 [1396]**

Final Ruling: No appearance at the April 29, 2021 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possessions's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on March 25, 2021. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Approval of Compromise is granted.

Focus Management Group USA, Inc., the Plan Administrator, ("Movant") requests that the court approve a compromise and settle competing claims and defenses between Movant and Jeffrey Arambel, Reorganized Debtor in one hand and LBA RV-Company XXVII, LP, A Delaware Limited Partnership ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the disputed distribution of $750,000 in escrow funds held back (the "Holdback") from the pre-bankruptcy sale of Debtor's real property to Settlor (the "Holdback Claims"), and Settlor's counterclaims for Damages and Declaratory Relief ("Counterclaims").

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 1400):

A. The Holdback funds are to be distributed as follows: $225,000.00 to or at the direction of Settlor, and $525,000.00 (the "Estate Funds") to or at the direction of Movant.

B. Movant acknowledges that the Estate Funds are subject to Brighthouse Life Insurance Company's ("Brighthouse") first priority deed of trust and Brighthouse has first claim to recovery from the Holdback Claims.

C. No later than five business days after the Effective Date, Debtor and Settlor shall jointly dismiss the Adversary Proceeding and all claims asserted within.

D. As of the occurrence of the effective date, Settlor shall amend Proof of Claim No. 12 to be filed "materially in advance of any hearing regarding approval by the Court of this Settlement Agreement.".

E. The Effective Date shall be the fifteenth day following entry of the Approval Order approving this settlement.

F. If and only if the Effective Date occurs and the Holdback payments are made, the parties shall release each other from any claims related to the Holdback Claims or asserted in the Adversary Proceeding.

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 Constr.)*, 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 Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (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); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Probability of Success

Movant asserts that although confident the Estate will prevail there is some risk it will not. Both parties have asserted rights to receive all or a portion of the Holdback. Moreover, there are valid arguments on both sides on whether the Incentive Program was extended in substantially its current form. Settlor contends that the agreement is not enforceable because it was not approved by the bankruptcy court and

Settlor was not aware of the bankruptcy case as the time of the agreement. Because there are arguments on both sides regarding the distribution of the Holdback funds, continuing to litigate the dispute will likely be expensive.

Difficulties in Collection

Movant does not believe collection is a factor as the funds in dispute have been deposited in the court's registry.

Expense, Inconvenience, and Delay of Continued Litigation

Continued litigation will be expensive and delay Movant's administration of the Estate. Settlor has asserted counterclaims and demands for attorneys' fees. Although Reorganized Debtor has funded the litigation, the costs are still material since the Estate does not have funds to pay an attorneys' fee award.

Paramount Interest of Creditors

The Settlement Agreement eliminates the risks, ongoing costs of litigation, and potential delay of distributions to creditors. It also recovers $525,000.00 that may be paid to creditor Brighthouse. Movant has informed Creditors with secured claims, Brighthouse and Summit, of the Settlement Agreement and has not received any objection.

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 because the settlement reduces the administrative expenses of the Estate, avoids expensive litigation and delays, and recovers $525,000 for distribution to creditors of the Estate. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Focus Management Group USA, Inc., the Plan Administrator, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and LBA RV-Company XXVII, LP, A Delaware Limed Partnership ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the Motion (Dckt. 1400).