UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

April 30, 2015 at 10:30 a.m.

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1. 15-90203-E-7 CJY-1 | **ENRIQUE LOZA AND EMERITA RAMIREZ** Christian J. Younger | **MOTION TO COMPEL ABANDONMENT 3-25-15 [13]**

Final Ruling: No appearance at the April 30, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditors, and Office of the United States Trustee on March 25, 2015. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion for Motion to Abandon Property is granted.

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

The Motion filed by Enrique Medina Loza and Emerita Melendrez Ramirez ("Debtors") requests the court to order the Trustee to abandon the following property:

1. The business name “Medina Trucking”

2. 1995 Kenworth Tractor

3. The Debtors’ personal checking and savings account that is also used for the business with WestAmerica Bank ending in 7476-5

4. Miscellaneous hand tools

(the “Property”). The Debtors have claimed an exemption in the Property in its full amount pursuant to California Code of Civil Procedure §§ 703.140(b)(5) and (6). Dckt. 12, Schedule C. The Declaration of Enrique Medina Loza has been filed in support of the motion and values the Property to be $7,050.00.

Michael McGranahan, the Chapter 7 Trustee, filed a non-opposition tot he instant Motion on March 30, 2015.

The court finds that the exemptions claimed on the Property exceed the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by Enrique Medina Loza and Emerita Melendrez Ramirez (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. The business name “Medina Trucking”
>
> 2. 1995 Kenworth Tractor
>
> 3. The Debtors’ personal checking and savings account that is also used for the business with WestAmerica Bank ending in 7476-5
>
> 4. Miscellaneous hand tools
>
> and listed on Schedule B by Debtor is abandoned to Enrique Medina Loza and Emerita Melendrez Ramirez by this order, with no further act of the Trustee required.

2. 14-91610-E-7 VERONICA MUNOZ
EJN-1

CONTINUED TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
2-16-15 [26]

Final Ruling: No appearance at the April 30, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on February 19, 2015. By the court's calculation, 35 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Dismiss is denied without prejudice.

This Motion to Dismiss the Chapter 7 bankruptcy case of Veronica Munoz ("Debtor") has been filed by Eric J. Nims, the Chapter 7 Trustee ("Movant"). Movant asserts that the case should be dismissed based on the Debtor's failure to appear at the § 341(a) meeting of creditors.

OPPOSITION STATED BY DEBTOR

The Debtor filed an opposition to the instant Motion on March 11, 2015. Dckt. 32. However, the Debtor, using a form objection, fails to state any grounds on which her opposition is based.

MARCH 26, 2015 HEARING

At the March 26, 2015 hearing, the court continued the hearing to 10:30 a.m. on April 30, 2015 to allow the Debtor the opportunity to attend the second continued Meeting of Creditors on April 6, 2015. Dckt. 33.

RULING

Questions of 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)).

In relevant part, 11 U.S.C. § 707 provides:

> (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including -
>
> > (1) unreasonable delay by the debtor that is prejudicial to creditors. . .

On April 7, 2015, the Chapter 7 Trustee filed his Trustee Report at 341 Meeting which indicates that the Debtor appeared at the Meeting of Creditors. The Trustee has not filed a Report of No Distribution which indicates that the Trustee was satisfied with the Debtor's responses at the First Meeting of Creditors.

The Debtor having appeared at the continued Meeting of Creditors, the grounds for dismissal have been resolved. Therefore, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 7 case filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.

3. 15-90114-E-7 ROBERT/MICHELE SANCHEZ — ORDER TO SHOW CAUSE 4-1-15 [14]

CASE DISMISSED 4/1/15

Final Ruling: No appearance at the April 28, 2015 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Robert Sanchez ("Debtor"), Byron Nelson, the Office of the United States Trustee, and the Chapter 7 Trustee on April 3, 2015. The court computes that 27 days' notice has been provided.

The court's decision is to Discharge the Order to Show Cause.

On April 1, 2015, the court issued an Order to Appear and Show Cause. Dckt. 14.

BACKGROUND

On December 31, 2014, Robert Sanchez and Michele Susan Sanchez, the Chapter 7 Debtors ("Debtor") commenced a voluntary Chapter 7 case. EDC Case No. 14-91678. Debtor's attorney stated on the Petition is Carl E. Combs, from the Law Office of Carl E. Combs, 515 13th Street, Modesto, California. The Chapter 7 Trustee in that case has filed a Report of No Distribution and reports that the First Meeting of Creditors has been completed. 14-91678, February 17, 2015 Docket Entry Trustee Report.

On February 9, 2015, this Chapter 7 bankruptcy case was commenced for Debtor, with the Petition, Schedules, and Statement of Financial Affairs filed by Byron T. Nelson as counsel for Debtor. Mr. Nelson's address is 509 13th Street #3, Modesto, California. Though filed by Mr. Nelson, the Petition, Schedules, and Statement of Financial Affairs in this case are identical (even to the dates purported to have been signed by Debtor) to those filed in Case No. 14-91678 on December 31, 2014, by Carl Combs.

On March 9, 2015, Byron T. Nelson filed a Motion for Debtor requesting that this Chapter 7 case be dismissed. The Motion states that this case,

> [w]as an accidental duplicate filing. Debtors already have an open chapter 7 case that is currently pending discharge and therefore this duplicate filing under case no. 15-90114-E-7 should never have been filed with the Court and was the mistake of counsel.

Motion, Dckt. 13.

ORDER TO APPEAR

The court issued the instant Order to Appear on April 1, 2015, ordering the following:

IT IS ORDERED that this Chapter 7 case is dismissed.

IT IS FURTHER ORDERED that at 10:30 a.m. on April 30, 2015, Byron T. Nelson and Carl Combs, and each of them, shall appear before this court in the Modesto Department E courtroom, no telephonic appearances permitted for either of these two attorneys.

IT IS FURTHER ORDERED that on or before April 17, 2015, that Byron T. Nelson, and Carl Combs, and each of them, shall filed responses to this Order explaining:

A. How the "mistake" of Byron T. Nelson filing this Chapter 7 bankruptcy case (15-90114) for Robert and Michele Susan Sanchez occurred;

B. How Byron T. Nelson obtained access to the electronic files of Carl Combs to obtain the Petition, Schedules, Statement of Financial Affairs, and other documents signed by Robert and Michele Susan Sanchez which were filed in this case.

IT IS FURTHER ORDERED that Byron T. Nelson shall appear at the 10:30 a.m. hearing on April 30, 2015, and show cause why the court should not conduct further hearings to determine what sanctions, if any, are appropriate for what appears to be the unauthorized access to the electronic files of another attorney and the filing of a bankruptcy petition for persons who are not his client. Responses to this Order to Show Cause shall be filed on or before April 17, 2015.

IT IS FURTHER ORDERED that all responses to this Order shall be served on the Chapter 7 Trustee in this case and the U.S. Trustee for Region 17, Sacramento, California Office, Attn: Antonia Darling, Esq.

Dckt. 14.

CARL COMBS' DECLARATION

Carl Combs filed a declaration in response to the instant Order on April 15, 2015. Dckt. 19. Mr. Combs states that he is the attorney of record for the Debtors. Mr. Combs states that Byron Nelson is an attorney at his office who is employed approximately 15-20 hours per week and it is Mr. Nelson who prepared the Debtors' Chapter 7 bankruptcy petition which was filed under Mr. Combs name. Mr. Combs authorized Mr. Nelson to access his Pacer account to file and Mr. Nelson is the only attorney in Mr. Combs' office who prepares and filed bankruptcy petitions and documents.

Mr. Combs alleges that Mr. Nelson is the attorney who appeared with the Debtors at the Meeting of Creditors and the Mr. Nelson is an attorney of records for the Debtors as an employee at Mr. Combs' office.

Mr. Combs recognizes that Mr. Nelson mistakenly filed the Debtors' petition under case no. 15-90114-E-7 which has caused a duplicative filing that

requires dismissal. Mr. Combs request the court to dismiss the mistakenly filed duplicative case. Mr. Combs also states that he has a personal conflict with the April 30, 2015 hearing date and that he be excused from personally appearing at the hearing. Mr. Combs requests that his declaration be accepted in lieu of a personal appearance and the Mr. Nelson, who will be present, represent Mr. Combs' office.

BYRON NELSON'S DECLARATION

Byron Nelson filed a declaration in response to the instant Order on April 16, 2015. Dckt. 20. Mr. Nelson states that he is an attorney at Mr. Comb's office and has been employed part-time since 2011. Mr. Nelson also assists with the Senior Law Project and occasionally take on personal cases for friends, family, and other individuals who cannot afford to pay the normal costs of an attorney. Mr. Nelson states that he is the only attorney at Mr. Combs' law office who handles bankruptcy cases, including the Debtors' case.

Mr. Nelson states that all bankruptcy files are stored on his computer at Mr. Combs' office and he has access to all of the offices cases and files, including the Debtors'.

Through the Senior Law Project, Mr. Nelson states he was referred an elderly couple who required bankruptcy relief but who could not afford the costs of an attorney. Mr. Nelson agreed to assist the couple at a discounted rate and prepared their petition at the computer located at Mr. Combs' office. Mr. Nelson alleges, however, that he mistakenly attached the Debtors' petition rather than the elderly couple's petition when electronically filing the case.

Mr. Nelson states that when he learned of the mistake, he contacted the court's help desk to notify them of the error and submitted a Motion to Dismiss.

Mr. Nelson apologizes for the mistake and states that he is now using an additional computer for the bankruptcy clients he represents outside of his employment at Mr. Combs' office.

DISCUSSION

Before discussing the responses of Mr. Combs and Mr. Nelson, the court notes that both respondents did not serve their declaration on the U.S. Trustee for Region 17, Sacramento, California Office, Attn: Antonia Darling, Esq. The court explicitly ordered that any responses to the instant Order shall be served on both the Chapter 7 Trustee and the United States Trustee's office. Both Mr. Combs and Mr. Nelson failed to comply with the court's order.

However, the court will still consider the responses of both attorneys.

Human beings do what human beings do - occasionally make mistakes. The responses of the two attorneys reflect that a mistake occurred. It is not implausible that the events transpired as they have both testified to under penalty of perjury.

The court discharges the Order to Appear and Show Cause. However, in light of both attorneys' failures to comply with the order and serve the U.S. Trustee, the court will have the Clerk of the Court serve a copy of the Order

to Appear and Show Cause, the two responses, and the order discharging the Order to Appear and Show Cause on the U.S. Trustee. This is done to insure that if there is something under investigation by the U.S. Trustee which does not appear obvious to the court, that office will have full notice of what has transpired in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Appear and Show Cause is discharged, no further proceedings to be conducted pursuant thereto except pursuant to further order of this court.
>
> **IT IS FURTHER ORDERED** that the Clerk of the Bankruptcy Court shall serve a copy of this Order, the Order Dismissing Bankruptcy Case and Order to Show Cause (Dckt. 14), the declaration of Carl E. Combs, Esq. (Dckt. 19), and the declaration of Byron T. Nelson, Esq. (Dckt. 20) on The U.S. Trustee for Region 17, Sacramento Division, Attn: Antonia Darling, Esq. These documents are served for informational purposes on that office, both Mr. Combs and Mr. Nelson having failed to serve their declarations on that office notwithstanding having been ordered to do so by this court.

4. 14-90521-E-7 DAVID RICE
14-9019 KWS-1
TURLOCK IRRIGATION DISTRICT V. RICE

MOTION FOR COMPENSATION FOR KEN WHITTALL-SCHERFEE, PLAINTIFF'S ATTORNEY
3-20-15 [88]

NO APPEARANCE OF MOVANT REQUIRED FOR CONTINUANCE OF HEARING

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant (*pro se*), Chapter 7 Trustee, and the Office of the United States Trustee on March 20, 2015. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion for Prevailing Party Attorneys' Fees is continued to 10:30 a.m. on June 11, 2015.

Turlock Irrigation District, the Plaintiff ("Plaintiff"), makes a Request for the Allowance of Fees and Expenses in this Adversary Proceeding.

The Plaintiff is seeking reimbursement of reasonable attorneys' fees and costs incurred by Plaintiff in the legal representation by its counsel in Adversary Proceeding No. 14-09019 pursuant to California Civil Code § 1882.2.

The Plaintiff is seeking total fees and expenses in the amount of $19,422.20.

BACKGROUND

On May 22, 2014, Plaintiff filed its complaint initiating the Adversary Proceeding pursuant to 11 U.S.C. § 523(a)(4), as well as Cal. Civ. Code § § 1882-1882.6 to object to the dischargeability of the underlying debt owed to Plaintiff by David Rice ("Defendant-Debtor").

On July 17, 2014, the court entered the default of Defendant-Debtor due to his failure to file any response to the Complaint. On August 6, 2014, the Defendant-Debtor filed a Motion to Set Aside Entry of Default which the court denied without prejudice on August 21, 2014. Dckt. 31. The Defendant-Debtor filed a second Motion to Set Aside Entry of Default on September 8, 2014 which the court denied on October 2, 2014. Dckt. 50.

On August 14, 2014, the Plaintiff filed a Motion for Entry of Default Judgment which the court denied on November 20, 2014. Dckt. 69.

On March 4, 2015, the court conducted a trial in the instant Adversary Proceeding. On March 10, 2015, the court issued its Judgment after Trial, which ordered that judgment be entered in favor of Plaintiff in the amount of $15,236.13 and that the judgment is nondischargeable. Dckt. 85. The Judgments also ordered Plaintiff to file a costs bill and a motion for allowance of attorneys' fees and costs by March 20, 2015.

APPLICABLE LAW

Cal. Civil Code § 1882

Under California Civil Code § 1882.1:

> A utility may bring a civil action for damages against any person who commits, authorizes, solicits, aids, abets, or attempts any of the following acts:
>
> a. Diverts, or causes to be diverted, utility services by any means whatsoever.
>
> b. Makes, or causes to be made, any connection or reconnection with property owned or used by the utility to provide utility service without the authorization or consent of the utility.
>
> c. Prevents any utility meter, or other device used in determining the charge for utility services, from accurately performing its measuring function by tampering or by any other means.
>
> d. Tampers with any property owned or used by the utility to provide utility services.
>
> e. Uses or receives the direct benefit of all, or a portion, of the utility service with knowledge of, or reason to believe that, the diversion, tampering, or unauthorized connection existed at the time of the use, or that the use or receipt, was without the authorization or consent of the utility.

If a utility is successful in any civil action brought pursuant to § 1882.1, "the utility may recover as damages three times the amount of actual damages, if any, plus the cost of the suit and reasonable attorney's fees." Cal. Civ. Code § 1882.2.

Prevailing Party Attorneys' Fees

Unless authorized by statute or contractual provision, attorney fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

DISCUSSION

The court finds helpful, and in most cases essential, for professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the U.S. Trustee, and is nothing new for professionals in this District. The task billing analysis requires only that the professional organize his or her task billing. The more simple the services provided, the easier is for Plaintiff to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Plaintiff to create the task billing analysis to provide the court, creditors, U.S. Trustee with fair and proper disclosure of the services provided and fees being requested by this Professional.

Included, in the motion is Plaintiff's counsel's raw time and billing records, which has not been organized into categories. Rather than organizing the activities which are best known to Plaintiff and Plaintiff's counsel, it is left for the court, U.S. trustee, and other parties in interest to mine the records to construct a task billing. The court declines the opportunity to provide this service to Plaintiff, instead leaving it to Plaintiff and

Plaintiff's counsel who intimately knows the work done and its billing system to correctly assemble the information. FN.1.

FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young associate (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different tasks.

Without the court separating the various tasks into various tasks the court cannot tell if there has been $30,000.00 of the fees is for staff meetings and only $5,000.00 is for research, $3,000.00 for drafting pleadings, and $3,000.00 is for the day of trial. If may be that just drafting the complaint is being billed for $10,000.00. The court does not know and it is not fair to ask the court to wade through a detailed billing statement, organize the fees into task areas, and then allocate the fees into those task areas, with the court imposing its characterization of the charges in the place of Plaintiff.

The court continues the hearing, rather than denying the Application without prejudice, to afford P the opportunity to provide the court, U.S. Trustee, and other parties in interest requesting the information with the necessary task billing analysis.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Prevailing Party Attorneys' Fees filed by Modesto Irrigation District, the prevailing Plaintiff in this Adversary Proceeding, ("Plaintiff") having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion for Prevailing Party Attorneys' Fees is continued to June 11, 2015, at 10:30 a.m. Plaintiff shall file a supplemental declaration and supporting documents as necessary, to provide the court, U.S. Trustee, and other parties in interest requesting copies of such supplemental pleadings, with an explanation of the fees requested and a task billing analysis which specifically groups the time and charges by the various task areas for such services on or before May 28, 2015.

5. 14-91633-E-11 SOUZA PROPANE, INC.
FWP-4 David C. Johnston

MOTION TO EMPLOY WESTWOOD BENSON BUSINESS BROKERS
4-16-15 [135]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 16, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Employ is granted.

Chapter 11 Trustee, David D. Flemmer, seeks to employ Westwood Benson Business Broker ("Broker"), pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Counsel to assist the Trustee in listing and selling the Debtor's business.

The Trustee argues that Broker's appointment and retention is necessary in light of the Trustee determining that the sale of the business to new ownership as opposed to reorganizing the business is the best strategy for maximizing the value of the business.

Richard Thompson, a business broker with Broker, testifies that he is the broker who will be responsible for the marketing and sale of the business. Mr. Thompson testifies he and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

The Chapter 11 Trustee attached a copy of the Representation Agreement. Exhibit 1, Dckt. 130. The terms of the Representation Agreement are as follows:

1. Broker's fee shall be a flat fee of $90,000.00 unless one of the four companies that the Trustee has been in discussions with ultimately buys the company, in which the Broker shall receive $54,000.00 if sold to either "interested buyers" or, if sold to either of the "serious buyers," the Broker shall receive $36,000.00.

2. The Representation Agreement shall terminate on April 1, 2016.

3. Any sale is subject to court approval.

Taking into account all of the relevant factors in connection with the employment and compensation of Counsel, considering the declaration demonstrating that Counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Westwood Benson Business Broker as broker for the Chapter 11 estate on the terms and conditions set forth in the Representation Agreement filed as Exhibit 1, Dckt. 138. The approval of the flat fee, which is contingent on the ultimate buyer of the business, is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

Thought it would appear that the sale of the business would generate significant proceeds, the Motion and supporting pleadings do not provide the court with a projection of the proceeds by which the reasonableness of a

$90,000.00 flat fee could be considered. That will require the court to consider that at the time of final allowance of the fees. This most likely will not result in any different conclusion in light of the very sophisticated parties involved and the Chapter 11 Trustee not one to give away estate assets. However, if the unfortunate event should occur where the court is presented with a sale that would generate only enough money to pay the flat fee, a professional hired by the estate should not be surprised at the court's consideration of the fee in light of subsequently learning that the assets were worth substantially less then presumed at the time of the hearing on this Motion.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 11 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and the Chapter 11 Trustee is authorized to employ Westwood Benson Business Broker as broker for the Chapter 11 Trustee on the terms and conditions, including the flat fee amount of $90,000.00, as provided for in the Representation Agreement filed as Exhibit 1, Dckt. 138.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328 (including consideration of the actual sales price of the assets).
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by broker in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.
>
> **IT IS FURTHER ORDERED** that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

6. 14-90748-E-7 PAULA SHAW MOTION TO COMPEL ABANDONMENT
MLP-2 Martha Lynn Passalaqua 4-10-15 [26]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditors, and Office of the United States Trustee on April 10, 2015. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Abandon Property is granted.

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

The Motion filed by Paula Kay Shaw ("Debtor") requests the court to order the Trustee to abandon the Debtor's ownership of a 3/16th share of oil and gas rights in Oklahoma (the "Property"). The Declaration of Debtor has been filed in support of the motion and values the Property to be $0.00 at the time the

petition was filed. The Debtor has claimed an exemption in the Property in the amount of $25,000.00 pursuant to California Code of Civil Procedure § 703.140(b)(5).

In the Debtor's Motion to Reopen Chapter 7 Bankruptcy Case states that the Debtor will be receiving income post-petition from the lease of the Property in a one-time lump sum payment of $11,464.00. Dckt. 16. The Debtor also stated in the Motion that the Debtor is not expecting any other income from the lease of the Property for several years.

The Debtor is also requesting that if the Motion is granted, that the court re-close the bankruptcy case.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by Paula Kay Shaw ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. A 3/16th share of oil and gas rights in Oklahoma
>
> and listed on Schedule B by Debtor is abandoned to Paula Kay Shaw by this order, with no further act of the Trustee required.
>
> The Clerk of the Court shall re-close this case as appropriate, the court having addressed all matters for which the case was re-opened.

7. 15-90048-E-7 RICHARD/SHANNON APPLEGATE MOTION TO COMPEL ABANDONMENT
JAD-1 Jessica A. Dorn 4-9-15 [22]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 6, 2015. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

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

The Motion to Abandon Property is granted.

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

The Motion filed by Richard and Shannon Elizabeth Applegate ("Debtor") requests the court to order the Trustee to abandon property commonly known as 3928 Trillium Avenue, Modesto, California (the "Property"). This Property is

encumbered by the liens of Wells Fargo Home Mortgage and Citimortgage Inc., securing claims of $370,051.81 and $43,193.49, respectively. The Declaration of Debtors has been filed in support of the motion and values the Property to be $370,000.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by Richard Applegate and Shannon Elizabeth Applegate ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. 3928 Trillium Avenue, Modesto, California
>
> and listed on Schedule A by Debtor is abandoned to Richard Applegate and Shannon Elizabeth Applegate by this order, with no further act of the Trustee required.

8. 10-90751-E-7 BSH-2 — MARTIN CORONADO AND BERENIS OCHOA — MOTION TO AVOID LIEN OF MOCSE FEDERAL CREDIT UNION — 4-10-15 [39]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on MOCSE FCU, on April 10, 2015. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of MOCSE Federal Credit Union ("Creditor") against property of Martin Ochoa Coronado and Berenis Ochoa ("Debtor") commonly known as 1916 Rouse Court, Modesto, California (the "Property").

IMPROPER SERVICE

A review of the Proof of Service shows that the Debtors failed to provide notice to the Chapter 7 Trustee. The Trustee, as the fiduciary of the estate, is a necessary party to be noticed on the instant Motion.

IMPROPER PLEADING

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

A. The Debtors filed a petition for relief under chapter 7 of the Bankruptcy Code on March 2, 2010.

B. The Debtor seeks to avoid a judicial lien of Mocse Credit Union (the "Lien") which was created by the recording of an abstract of judgment on January 21, 2010 as Document No. 2010-0005250, of the public records of Stanislaus County

C. The Lien impairs the debtors' primary residence, commonly known as 1916 Rouse Ct. Modesto, CA, which is otherwise exempt under 11 U.S.C. § 522(f).

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that the lien should be avoided. This is not sufficient. It appears that the Debtors have buried the grounds for the Motion in the Memorandum of Points and Authorities, which is improper under Fed. R. Bankr. P. 9013.

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

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

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

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

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

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

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

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

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

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

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of

Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Therefore, because the Debtors failed to serve the Trustee and failed to state with particularity the grounds for the relief sought, the Motion is denied without prejudice

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

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

9. 14-91565-E-11 RICHARD SINCLAIR **MOTION FOR APPREHENSION OF**
HAR-5 **DEBTOR RICHARD SINCLAIR**
4-3-15 [147]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 2, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Apprehension of Debtor is denied without prejudice. In lieu of apprehension, the court shall order that the 2004 Examination take place on May 21, 2015, commencing at 9:00 a.m. at the United States Bankruptcy Court, Modesto California, in the conference room on the second floor outside the courtroom.

Andrew Katakis, California Equity Management Group, Inc. and Fox Hollow of Turlock Oners' Association ("Creditors") filed the instant Motion for Apprehension of Debtor Richard Sinclair on April 3, 2015. Dckt. 147. The Creditors seek the court to order that Richard Sinclair (" Debtor-in-Possession") appear for his Fed. R. Bankr. P. 2004 examination on May 21, 2015 at 9:00 a.m. at the law offices of McCormick Barstow, LLP.

The Creditors allege that, despite several attempts to personally serve Debtor-in-Possession with the subpoena for his Rule 2004 examination, and despite the court's order allowing for the examination, the Debtor-in-

Possession has refused to accept service and allow Creditors to conduct the Rule 2004 Examination. The crux of the Creditors' Motion is that the Debtor-in-Possession has actively avoided in person service and has attempted to be counsel for Ms. Machado, the Debtor-in-Possession's sister, who is also being subpoenaed for a Rule 2004 examination. The Creditors allege that they have attempted to confer with the Debtor-in-Possession over the Debtor-in-Possession stipulating to waive service of the subpoena and agree to appear for the May 21, 2015 examination day. However, the Creditors state that the Debtor-in-Possession has failed to return a signed copy of the stipulation.

DEBTOR-IN-POSSESSION'S OPPOSITION

The Debtor-in-Possession filed an opposition to the instant Motion on April 17, 2015. Dckt. 161. The Debtor-in-Possession states that he has agreed to attend the May 21, 2015 examination as well as the examination of his sister, Ms. Machado, on May 20, 2015. The Debtor-in-Possession states that he has not signed the stipulation because it requests that the Debtor-in-Possession "bring much stuff [the Debtor-in-Possession has] already advised [Creditors] under oath at the 1st meeting of creditors, that were privileged." Dckt. 161, pg. 2.

The Debtor-in-Possession also alleges that the process server attempted to serve the Debtor-in-Possession while he was not home. The Debtor-in-Possession states that the process server spent a number of days near the Debtor-in-Possession's home yet never properly served the Debtor-in-Possession.

CREDITORS' RESPONSE

The Creditors filed a response on April 23, 2015. Dckt. 166. The Creditors argue that they have satisfied the burden under Fed. R. Bankr. P. 2015 as Debtor-in-Possession has stated that he was aware of the process server's several attempts to serve him and admits that he refused to sign the stipulation waiving service. The Creditors note that service is required prior to the taking of the 2004 examination at issue and that the Debtor-in-Possession has actively avoided service to prevent the Creditors from meeting this requirement.

The Creditors next argue that the Debtor-in-Possession's argument that the documents requested are privileged or that he does not have them any longer and, therefore, he is not going to produce them is improper. The Creditor argues that the proper way to refuse the production of documents is to file a motion for protective order or motion to quash, not avoid service.

To that end, the Creditors argue that the Debtor-in-Possession has not properly asserted a privilege objection to the document requests set forth in the subpoena, pursuant to Fed. R. Civ. P. 45(a)(2).

The Creditors conclude by reiterating their request for the court to order the U.S. Marshal to bring the Debtor-in-Possession before the court and order him to attend his examination on May 21, 2015 at 9:00 a.m. on the matters specified in the examination notice and subpoena.

APPLICABLE LAW

In relevant part, the procedure for compelling the attendance of a person at a Rule 2004 examination is specified in Federal Rule of Bankruptcy Procedure 2005, which provides:

> (a) Order to compel attendance for examination
>
> On motion of any party in interest supported by an affidavit alleging (1) that the examination of the debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor's residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend for examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served, the court may issue to the marshal, or some other officer authorized by law, an order directing the officer to bring the debtor before the court without unnecessary delay. If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith. If necessary, the court shall fix conditions for further examination and for the debtor's obedience to all orders made in reference thereto.

Federal Rule of Bankruptcy Procedure 2004(d) permits the court, for cause, to set “any time or place it designates, whether within or without the district wherein the case is pending,” where the examination shall take place.

DISCUSSION

The main ground in which the Creditor is seeking relief under the instant Motion is that the Debtor-in-Possession has “evaded service of a subpoena.” The Creditors attach to their Motion an Affidavit of Reasonable Diligence from the process server. Dckt. 151, Exhibit D. A review of the affidavit shows that between February 26, 2015 and March 25, 2015, the process server attempted on eleven separate occasions to serve the Debtor-in-Possession at either his business or home. While the Debtor-in-Possession in his response states that he knew about the attempts and alleges that the process server was waiting by his house, the Debtor-in-Possession was never served nor has the Debtor-in-Possession waived service.

The Creditors request that the court issue an order for the apprehension of hte Debtor-in-Possession to attend the scheduled examination on May 21, 2015 at 9:00 a.m. However, under Rule 2005, the apprehension is to bring the Debtor-in-Possession to the court for a hearing of whether the Debtor-in-Possession is attempting to flee, evaded service, or disobeyed the subpoena. It is after this hearing that the court may then order the examination. Here, the Creditors attempt to bypass that initial hearing and have the court force the Debtor-in-Possession to attend the Rule 2004 examination. Therefore, the court denies the Creditors request for apprehension.

However, under Federal Rule of Bankruptcy Procedure 2004, the court has the authority to set the terms of any Rule 2004 examination, including the time and place. It is apparent from the lengthy pleadings of the party that this case and these parties have been in a state of constant litigation, over

numerous years and in numerous courts. It appears clear to this court that it is necessary to set a strict time and location for the Debtor-in-Possession's Rule 2004 examination. Based on the allegations of both parties against each other, it is evident that the parties may not "play nice" outside of the supervision of the court.

The parties have, allegedly, agreed to May 21, 2015 at 9:00 a.m. to be the time for the Rule 2004 examination to take place. In light of the contentions between the parties, the court finds it not only beneficial but also necessary for the Rule 2004 examination to take place in a neutral location with court oversight. The court, therefore, orders that the Rule 2004 Examination of the Debtor-in-Possession shall take place at 9:00 a.m. on May 21, 2015 in the Judicial Conference Room at the Modesto courthouse located at 1200 I Street, Suite 4, Modesto, California.

By ordering the examination to take place at the federal courthouse, it ensures that the parties will both appear and also allow the court to be readily available for both parties if any objections or other issues arise during the examination.

As to the Debtor-in-Possession's implicit objections to the documents requested, the court agrees with the Creditors that the Debtor-in-Possession has not properly alleged grounds in which to issue any protective orders as to those documents. However, in order to ensure an organized and efficient means of dealing with any objections, the court finds setting an objection schedule proper. Therefore, the court specially sets a hearing for 1:30 p.m. on May 19, 2015 to address any objections the parties may have in connection with the Debtor-in-Possession's Rule 2004 Examination. Any objections to the requested documents or the matters to be addressed at the Rule 2004 examination shall be filed and served, in writing and stated with particularity, on or before May 7, 2015. Any responses to the objections shall be filed and served on or before May 14, 2015.

Outside of any objections that may be raised prior to the hearing on any objections, the court orders that the Debtor-in-Possession shall bring all requested documentation listed on the Subpoena for Rule 2004 Examination to the Rule 2004 examination on May 21, 2015 at 9:00 a.m. Dckt. 151, Exhibit C.

Therefore, the Creditor's request for apprehension of the Debtor-in-Possession is denied without prejudice. The court orders that the Rule 2004 examination of the Debtor-in-Possession shall take place on May 21, 2015 at 9:00 a.m. in the Judicial Conference Room for courtroom 2003, at Robert T. Matsui United States Courthouse, 501 I Street, Sacramento, California. The Debtor-in-Possession shall produce all documents requested in the Subpoena for Rule 2004 Examination to the Rule 2004 examination. The court sets a hearing addressing any objections to the requested documentation or scope of the Rule 2004 examination for 1:30 p.m. on May 19, 2015. Any objections to the requested documentation or the scope of the examination shall be filed and served on or before May 7, 2015. Any responses or replies to the objections shall be filed and served on or before May 14, 2015.

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

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

The Motion to for Protective Order filed by the Creditors 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 Apprehension is denied without prejudice.

IT IS FURTHER ORDERED that the Rule 2004 examination of Debtor-in-Possession shall take place on May 21, 2015 at 9:00 a.m. in the Judicial Conference Room at the Modesto courthouse located at 1200 I Street, Suite 4, Modesto, California. The Debtor-in-Possession shall produce at the hearing all documentation requested in the Subpoena for Rule 2004 Examination, as stated in Exhibit C, Dckt. 151.

IT IS FURTHER ORDERED that the court shall conduct a hearing on any evidentiary objections or claims of privilege to the documents requested or the scope of the 2004 examination at 1:30 p.m. on May 19, 2015 at the Robert T. Matsui united States Courthouse located at 501 I Street, Suite 3-200, Sacramento, California. Any objections or claims of privilege to the subpoenaed documents or the scope of the 2004 examination shall be filed and served on or before May 7, 2015. Any responses or oppositions shall be filed and served on or before May 14, 2015.

IT IS FURTHER ORDERED that any person asserting any objections or privileges shall attend the hearing, in addition to their attorney appearing at the hearing. Such appearances must be in person, no telephonic appearances permitted for any party or person seeking such relief. Telephonic appearances are permitted for counsel.

10. 14-91565-E-11 RICHARD SINCLAIR **MOTION FOR PROTECTIVE ORDER**
RCS-2 **3-23-15 [127]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Not Provided. No Proof of Service has been attached to the instant Motion.

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

The Motion for Protective Order is denied.

A Motion for Protective Order was filed March 23, 2015. Dckt. 127. The Motion states that it is filed by Kathryn C. Machado, a non-party movant. (The pleadings refer to Kathry Machado as Dr. Because these proceedings appear to have nothing to do with her professional activities, the court refers to her as Ms. Machado to signify that her involvement relates to business activities concerning property in which the estate may, or may not, have an interest). However, the Motion is signed by Richard Sinclair, the Debtor-in-Possession. In the upper left hand corner of the first page of the Motion is the following:

> RICHARD C. SINCLAIR, SBN: 068238
> ATTORNEY AT LAW
> P.O. Box 1628
> Oakdale, CA 95361
> TEL: (209) [XXX-XXXX]
> E-MAIL: rsinclairlaw@msn.comn

Dckt. 127. However, it does not list Ms. Machado as being Mr. Sinclair's client.

The Motion is not signed by Mr. Sinclair, but it does not indicate that he is signing it as the attorney for Ms. Machado.

The Motion states that it is Ms. Machado who is seeking an order terminating the taking of depositions. The Motion requests the relief as it applies to a series of various entities, identified as KCM, LLC and SUN-ONE, LLC, Golden Hills, Chinese Camp, LLC, Richard C. Sinclair Family Trust, and Ms. Machado.

REPRESENTATION BY DEBTOR IN POSSESSION

The present Motion raises an interesting issue, one which the Debtor in possession and Ms. Machado may need to address. Richard Sinclair is the Debtor in Possession, the fiduciary of the estate who is fulfilling the duties of a bankruptcy trustee. However, he appears to also be attempting to represent third-parties who it is asserted are holding property of the bankruptcy estate or received avoidable transfers made by the Debtor pre-petition. This appears to raise an irreconcilable conflict between Mr. Sinclair, the fiduciary to the bankruptcy estate, and Ms. Machado.

While not dismissing the motion on those grounds, Mr. Sinclair, Ms. Machado, the U.S. Trustee, and other parties in interest should consider any such representation by the Debtor in Possession and how that is impacted by Mr. Sinclair's fiduciary duties to the bankruptcy estate.

FAILURE TO PROVIDE PROOF OF SERVICE

First, the court notes that the Debtor-in-Possession failed to file a Proof of Service. Without a Proof of Service, the court cannot confirm that proper notice was given to all necessary parties. The failure to provide a Proof of Service is grounds to deny the Motion. However, in light of the Opposition filed, it appears that the Motion was served.

MOTION

The Motion argues the following:

Requests for Depositions are not likely to lead to relevant evidence.

Movant claims that the 13 requested depositions are being conducted in a manner that is not reasonably calculated to discover any matter relevant to the claims or defenses of any party to this action and is intended to embarrass, annoy, and harass. Instead the Movant contends that the depositions are purely a fishing expedition and thus inappropriate pursuant to CCP 2016-2036. Furthermore, the amount of discovery by subpoena for depositions is limited to 10 pursuant to Rule 30(a)(2)(A)(i). Further, the Movant states that the Debtor already stated under oath what he did with his inheritance, and the depositions requested are outside the scope.

Movant was scheduled for three different depositions while the Creditors could have obtained the information through written discovery or from the public recordings. Instead the Movant claims that the request for depositions is simply to run up attorneys fees.

Certificate of Pre-Motion Conference

Movant attempted to resolve this matter without the instant Motion through pre-motion conference but to no avail. Movant claims that opposing council insisted on taking the maximum number of depositions.

Protective Order should be granted.

Movant contends that the Creditor is seeking to gain information from the Debtor's and Movant's family that pertain to assets the Debtor never had interest in. The Movant also claims that the attorney for creditor has stalked her for 20 years, and was convicted of federal foreclosure fraud in 2014. Furthermore, Movant is not a party, does not owe Sinclair for another 6 years, and the amount is already known by the opposition.

CREDITORS' OPPOSITION

The Creditors filed an opposition to the instant Motion on April 15, 2015. Dckt. 156. The Creditors make the following arguments:

The Court has Previously Ruled the 2004 Examinations Shall Go Forward

The court has issued an Order Granting the Application authorizing each examination requested by the Creditors on February 15, 2015. Dckt. 158 Exhibit B. Furthermore, the Creditors believes that the information being sought is both relevant and nonprivileged as the documents and testimony are needed from the Debtor-in-Possession, his sister, and his ex-spouse to determine the status of the Sinclair Ranch, Sinclair's Trust, Mrs. Sinclair's Trust, and purported transfers of assets by the Debtor-in-Possession. Furthermore, Ms. Machado is needed because she has documents and information since she is the successor trustee of Debtor's Trust and involved in the various limited liability companies the Debtor-in-Possession set up.

Protective Orders are Rarely Issued to Limit Rule 2004 Examinations and the Debtor's Arguments Under FRCP Rule 26 are Misplaced.

Examinations under Federal Rule of Bankruptcy Procedure 2004 and discovery provisions under Federal Rules of Civil Procedure 26 and 45 are quite different. Rule 2004 discovery is broader than discovery under the Federal Rules of Civil Procedure. The Creditor contends that the Debtor's argument that the depositions at issues are fishing expeditions are misplace. Rule 2004 examination has been said to be allowed as a fishing expedition for the purpose of obtaining information relevant to the administration of the bankruptcy estate.

The Creditor argues that the examinations of Mr. Sinclair, his sister, and his ex-wife are all for the purpose of obtaining relevant information. Those parties are alleged to have knowledge of the Debtor's affairs, and thus subject to examination.

Creditors Do Not Seek to Obtain Trade Secret Information from Sinclair Ranch.

The Creditors claim to have no interest in infringing upon any trade secrets regarding the Sinclair Ranch or potential senior community thereon. The Creditors simply seek to discover the nature and extent of the bankruptcy estate and anything which may affect the administration fo the Debtor's estate

and discover any acts, conduct, property, liabilities, and financial condition of the Debtor-in-Possession.

There is a Conflict of Interest in the Debtor's Representation of Mrs. Machado.

The Creditors argue that the Debtor is violating his fiduciary duties to the estate and his creditors by interfering with their attempt to obtain information regarding the Sinclair estate. Furthermore, attorney's for the estate may not hold or represent an interest adverse to the estate, and the Debtor's attempt to prevent the Rule 2004 examination of Ms. Machado is unlawfully taking a position which is adverse to the estate.

There was no Good Faith Efforts on the Debtor-in-Possession's Part or on Mrs. Machado's Part to Meet and Confer Prior to the Filing of the Present Motion.

The Creditors contend that the instant Motion fails the test for Federal Rule of Bankruptcy Procedure 7026 in that the Debtor-in-Possession failed to meet and confer in good faith prior to the filing of the present motion. While the Creditor and Debtor-in-Possession did communicate generally about their positions of who should be examined the instant Motion was filed without any good faith effort.

MOVANT'S REPLY

The Movant filed a reply on April 24, 2015. Dckt. 171. The reply states that the "gifts" by Debtor-in-Possession to his children took place 13 years prior to filing and that they cannot be brought back into the estate. The Debtor-in-Possession then reiterates his argument that the Creditors are only seeking to harass and "stalk" the Debtor-in-Possession and his family through their Fed. R. Bankr. P. 2014 requests.

APPLICABLE LAW

Fed. R. Bankr. P. 2004, entitled "Examinations," provides for the following:

> (a) Examination on motion
>
> On motion of any party in interest, the court may order the examination of any entity.
>
> (b) Scope of examination
>
> The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for

> purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.
>
> (c) Compelling attendance and production of documents
>
> The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.
>
> (d) Time and place of examination of debtor
>
> The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.
>
> (e) Mileage
>
> An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.

It has been well established that Fed. R. Civ. P. 26(c), which governs protective orders in adversary proceedings and contested matters, is inapplicable to Fed. R. Bankr. P. 2004 examinations. *See In re Handy Andy Home Imp. Centers, Inc.*, 199 B.R. 376, 380 (Bankr. N.D. Ill. 1996). If the information the parties seek to protect is of secret, confidential, scandalous, or defamatory nature, Fed. R. Bankr. P. 9018 permits the court to enter a protective order. *See id.* FN.1.

FN.1. Fed. R. Bankr. P. 9018 states:

> On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made

> confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

DISCUSSION

Here, Movant has failed to make a showing sufficient for this court to prevent the taking of the Rule 2004 examinations.

First, Movant fails to move the court under Fed. R. Bankr. P. 9018. Instead, the Debtor-in-Possession improperly requests that this court issue a protective order under Fed. R. Civ. P. 26(c). As stated by the court in *In re Handy Andy Home Imp. Centers, Inc*., Fed. R. Civ. P. 26(c) is inapplicable to Rule 2004 examinations. Movant improperly construes a Rule 2004 examination as a deposition, as evidenced by the continuance use of the phrase throughout the Motion. This is incorrect.

The purpose of Rule 2004 examinations is to allow involved parties the opportunity to examine any entity on matters relating to financial matters of the debtor or the estates and to matters effecting the administration of the estate or right to discharge. The Movant repeatedly argues that the "depositions [are] being conducted in a manner that is not reasonably calculated to discover any matter relevant to the claims or defenses of any party to this action and that is intended solely to annoy, embarrass, and oppress." Dckt. 127, pg. 1. The Movant is convoluting depositions in litigation with a Rule 2004 examination in bankruptcy, attempting to impose the same standard for depositions on Rule 2004. In fact, it appears that the Debtor-in-Possession believe that the bankruptcy itself "is an action for money damages." Dckt. 127, pg. 2. There are no limitations to the number of Rule 2004 examinations a party may request nor is there a requirement for a discovery conference.

Outside of relying on the incorrect federal rule, the Movant also fails to allege any information that is outside the scope of a Rule 2004 examination. The Movant makes conclusory statements alleging that the examinations are "needlessly time consuming and expensive," "irrelevant and unproductive," and "lack [] relevance," all based on the Debtor-in-Possession's conclusion that the Sinclair Ranch is not property of the estate nor can be brought back into the estate. However, the Movant merely making this statement does not make this necessarily true. The Creditors here have a right under Fed. R. Bankr. P. 2004 to examine the Debtor and any entity that may have knowledge of the financial matters of the Debtor and the estate. It is not the Debtor or Movant to make a blanket legal conclusion that the Sinclair Ranch is not part of the estate and, therefore, the Creditors should not have the opportunity to examination parties who have information concerning the Sinclair Ranch.

Even reviewing the Motion in context of Fed. R. Bankr. P. 9018, the Movant fails to make a showing that there is any subject that is either secret, confidential, scandalous, or defamatory. The Movant is attempting to have the court issue a protective order which would prevent the Creditors from performing any examination. Implicitly in this request, construing the Motion as one under Rule 9018, is the premise that all the information the that the parties who have been subpoenaed for examination is secret, confidential,

scandalous, or defamatory. The Movant has not made such a showing. The Movant merely wishing to prevent the Creditors from

Therefore, because the Movant has improperly requested a protective order pursuant to Fed. R. Civ. P. 26 and has failed to allege any subject matter that is secret, confidential, scandalous, or defamatory pursuant to Fed. R. Bankr. P. 9018, the Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to for Protective Order filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.

11. 15-90072-E-7 ENLLO GUERRERO **TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS 3-27-15 [19]**

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

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

Below is the court's tentative ruling.

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

Correct 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 27, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss the Chapter 7 Bankruptcy Case is granted and the case is dismissed.

This Motion to Dismiss the Chapter 7 bankruptcy case of Enllo Guerrero ("Debtor") has been filed by Eric J. Nims ("Movant"), the Trustee ("Movant"). Movant asserts that the case should be dismissed based on the Debtor's failure to appear at the § 341(a) meeting of creditors.

OPPOSITION STATED BY DEBTOR

The Debtor filed an opposition to the instant Motion on March 11, 2015. Dckt. 22. However, the Debtor, using a form objection, fails to state any grounds on which her opposition is based.

RULING

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)).

In relevant part, 11 U.S.C. § 707 provides:

> (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including -
>
> > (1) unreasonable delay by the debtor that is prejudicial to creditors. . .

Movant states that Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay which is prejudicial to creditors and cause to dismiss the case. 11 U.S.C. § 707(a)(1).

While the Debtor filed an objection to the Motion, the Debtor has not provided any grounds in which the Motion should not be granted.

Cause exists to dismiss this case pursuant to 11 U.S.C. § 707(a)(1). Therefore, the Motion is granted and the case is dismissed.

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

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

12. 14-91074-E-7 CESAR PIMENTEL AND VERONICA CASTRO
14-9027
MCGRANAHAN V. PIMENTEL ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
10-28-14 [1]

Final Ruling: No appearance at the April 28, 2015 Status Conference is required.

Plaintiff's Atty: Anthony D. Johnston
Defendant's Atty: unknown

Adv. Filed: 10/29/14
Answer: none

Nature of Action:
Objection/revocation of discharge

The court having granted Plaintiff's requests for entry of default judgment against all defendants, **the Status Conference is continued to 2:30 p.m. on July 23, 2015.**

Notes:

Continued from 3/26/15 to be conducted in conjunction with the motions for entry of default judgment in this Adversary Proceeding.

13. 14-91074-E-7 CESAR PIMENTEL AND VERONICA CASTRO ADJ-1
14-9027 MCGRANAHAN V. PIMENTEL ET AL
MOTION FOR ENTRY OF DEFAULT JUDGMENT
2-6-15 [23]

Final Ruling: No appearance at the April 30, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 6, 2015. By the court's calculation, 83 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Default Judgment is granted.

Michael Mcganhan, the Chapter 7 Trustee, ("Plaintiff") filed the instant Motion for Entry of Default Judgment Against Cesar Pimentel ("Defendant-Debtor") on February 6, 2015. Dckt. 23.

The summons in the instant Adversary Proceeding was issued on October 29, 2014 and Defendant-Debtor was required to file an answer or other responsive pleading to the complain on or before November 28, 2014. On January 8, 2015, the Clerk of the Court entered an order of entry of default for each defendant.

The Plaintiff requests the discharge of the Debtor be denied pursuant to 11 U.S.C. § 727(a)(2)(A) and (B) and § 727(a)(4)(A) because of the failure of the Defendant-Debtor to disclose his claims related to an automobile accident which occurred on or about April 21, 2013 in the initial schedules, statement of financial affairs, and the 342 meeting of creditors questionnaire.

COMPLAINT

COUNTS 1-3

For Counts 1-3, Plaintiff claims relief under 11 U.S.C. §727(a)(2)(A) and 11 U.S.C. § 727 (a)(2)(B) on the basis that Debtor concealed material

information with the intent to hinder, delay, or defraud the creditor and the Trustee by failing to report the auto accident on the Defendant-Debtor's bankruptcy schedules and not disclosing an settlement discussions or claims at the Meeting of Creditors.

COUNTS 4-8

As to Counts 4-8, Plaintiff claims relief under 11 U.S.C. § 727(a)(4)(A) on the grounds that each of the Debtors knowingly and fraudulently committed perjury in connection with this case. Both Debtors intentionally failed to list the Auto Accident claim in Schedule B or anywhere else in the Schedule or Statement of Financial Affairs, even though both affirmed under penalty of perjury that they had listed all of their assets and asserting that the Petition and Schedules were complete.

Additionally, Plaintiff objects to the discharge of each Debtor pursuant to 11 U.S.C. § 727(a)(4)(A) on the grounds that on September 2, 2014, in the Defendant-Debtors' 341 Meeting of Creditors, knowingly and fraudulently made a false oath, as follows:

> As to question 6 of the 341 Questionnaire, Defendant-Debtors falsely answered "no" to the question, "Are you making, or do you intend to make, any claims against anyone?"
>
> The trustee asked the following question: "Have there been any settlement offers?" Debtor, Mr. Pimentel, responded: "No." Co-Debtor Veronica Caster did nothing to correct this allegedly false testimony, thereby endorsing it as her own under oath.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee,* 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if the Motion of Entry of Default Motion is not granted. It is the fiduciary duty of the Chapter 7 Trustee to oversee the bankruptcy estate and ensure the proper distribution of any property of the estate for the benefit of the debtor, creditors, and estate. The failure of Defendant-Debtor to accurately disclose his claims related to an automobile accident, occurring on or about April 21, 2013, hinders the Trustee's ability to execute his duties which violates 11 U.S.C. §727(a)(a)(A) and 11 U.S.C. §727 (a)(4)(A).

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's Complaint Objecting to Discharge of Debtors. Further, there is no evidence of excusable neglect by the Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant-Debtor has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by Michael Mcganhan, the Chapter 7 Trustee Plaintiff, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that the discharge of Cesar Pimentel, Defendant-Debtor, from his debts be denied for the reasons set forth above. Counsel for the Plaintiff shall prepare and lodge with the court **on or before May 15, 2015**, a proposed judgment

consistent with this Order. The judgment shall further provide that any attorneys' fees and costs as allowed by the court shall be enforced as part of the judgment.

IT IS FURTHERED ORDERED that **on or before May 15, 2015**, Plaintiff shall file a costs bill and motion for attorneys' fees, if any. The motion for attorneys' fees, if any, shall clearly set forth the contractual or legal basis for an award of attorneys' fees.

14. 14-91074-E-7 CESAR PIMENTEL AND VERONICA CASTRO ADJ-2
14-9027 MCGRANAHAN V. PIMENTEL ET AL
MOTION FOR ENTRY OF DEFAULT JUDGMENT
2-6-15 [28]

Final Ruling: No appearance at the April 30, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 6, 2015. By the court's calculation, 83 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Default Judgment is granted.

Michael Mcganhan, the Chapter 7 Trustee, ("Plaintiff") filed the instant Motion for Entry of Default Judgment Against Veronica Castro ("Defendant-Debtor") on February 6, 2015. Dckt. 28.

The summons in the instant Adversary Proceeding was issued on October 29, 2014 and Defendant-Debtor was required to file an answer or other responsive pleading to the complain on or before November 28, 2014. On January

8, 2015, the Clerk of the Court entered an order of entry of default for each defendant.

The Plaintiff requests the discharge of the Debtor be denied pursuant to 11 U.S.C. § 727(a)(2)(A) and (B) and § 727(a)(4)(A) because of the failure of the Defendant-Debtor to disclose his claims related to an automobile accident which occurred on or about April 21, 2013 in the initial schedules, statement of financial affairs, and the 342 meeting of creditors questionnaire.

COMPLAINT

COUNTS 1-3

For Counts 1-3, Plaintiff claims relief under 11 U.S.C. §727(a)(2)(A) and 11 U.S.C. § 727 (a)(2)(B) on the basis that Debtor concealed material information with the intent to hinder, delay, or defraud the creditor and the Trustee by failing to report the auto accident on the Defendant-Debtor's bankruptcy schedules and not disclosing an settlement discussions or claims at the Meeting of Creditors.

COUNTS 4-8

As to Counts 4-8, Plaintiff claims relief under 11 U.S.C. § 727(a)(4)(A) on the grounds that each of the Debtors knowingly and fraudulently committed perjury in connection with this case. Both Debtors intentionally failed to list the Auto Accident claim in Schedule B or anywhere else in the Schedule or Statement of Financial Affairs, even though both affirmed under penalty of perjury that they had listed all of their assets and asserting that the Petition and Schedules were complete.

Additionally, Plaintiff objects to the discharge of each Debtor pursuant to 11 U.S.C. § 727(a)(4)(A) on the grounds that on September 2, 2014, in the Defendant-Debtors' 341 Meeting of Creditors, knowingly and fraudulently made a false oath, as follows:

> As to question 6 of the 341 Questionnaire, Defendant-Debtors falsely answered "no" to the question, "Are you making, or do you intend to make, any claims against anyone?"
>
> The trustee asked the following question: "Have there been any settlement offers?" Debtor, Mr. Pimentel, responded: "No." Co-Debtor Veronica Caster did nothing to correct this allegedly false testimony, thereby endorsing it as her own under oath.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R.

Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee,* 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if the Motion of Entry of Default Motion is not granted. It is the fiduciary duty of the Chapter 7 Trustee to oversee the bankruptcy estate and ensure the proper distribution of any property of the estate for the benefit of the debtor, creditors, and estate. The failure of Defendant-Debtor to accurately disclose her claims related to an automobile accident, occurring on or about April 21, 2013, hinders the Trustee's ability to execute his duties which violates 11 U.S.C. §727(a)(a)(A) and 11 U.S.C. §727 (a)(4)(A).

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's Complaint Objecting to Discharge of Debtors. Further, there is no evidence of excusable neglect by the Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant-Debtor has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by Michael Mcganhan, the Chapter 7 Trustee Plaintiff, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that the discharge of Veronica Castro, Defendant-Debtor, from her debts be denied for the reasons set forth above. Counsel for the Plaintiff shall prepare and lodge with the court **on or before May 15, 2015**, a proposed judgment consistent with this Order. The judgment shall further provide that any attorneys' fees and costs as allowed by the court shall be enforced as part of the judgment.
>
> **IT IS FURTHERED ORDERED** that **on or before May 15, 2015**, Plaintiff shall file a costs bill and motion for attorneys' fees, if any. The motion for attorneys' fees, if any, shall clearly set forth the contractual or legal basis for an award of attorneys' fees.

15. 15-90084-E-7 CARLOS/CELIA PULIDO **MOTION TO COMPEL ABANDONMENT**
KC-1 **4-17-15 [15]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditors, and Office of the United States Trustee on April 16, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Abandon Property is granted.

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

The Motion filed by Carlos Pulido and Celia Garibay De Pulido ("Debtor") requests the court to order the Trustee to abandon the following property:

1. Business name, "CC Taqueria" and CC Taqueria, Inc.;

2. Business checking accounts with Umpqua with an approximate balance of -<$23.52>;

3. Corporate checking accounts with Umpqua with an approximate balance of $1,189.56;

4. Miscellaneous office furniture and equipment, including desk, phones, a computer, a printer, tables and chairs (majority 14 years old), refrigerator (40 years old), menus, silverware, plates;

5. Miscellaneous inventory;

6. Liquor license.

(the "Property"). The Debtors exempted the full amount of the combined Property on Schedule C pursuant to California Code of Civil Procedure §§ 703.140(b)(5) and (6). The Declaration of Carlos Pulido has been filed in support of the motion and values the Property to be $24,939.56.

The court finds that the Property is fully exempt, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by Carlos Pulido and Celia Garibay De Pulido ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. Business name, "CC Taqueria" and CC Taqueria, Inc.;
>
> 2. Business checking accounts with Umpqua with an approximate balance of -<$23.52>;
>
> 3. Corporate checking accounts with Umpqua with an approximate balance of $1,189.56;
>
> 4. Miscellaneous office furniture and equipment, including desk, phones, a computer, a printer, tables and chairs (majority 14 years old), refrigerator (40 years old), menus, silverware, plates;
>
> 5. Miscellaneous inventory;
>
> 6. Liquor license.

and listed on Schedule B by Debtor is abandoned to Carlos Pulido and Celia Garibay De Pulido by this order, with no further act of the Trustee required.

16. 14-91385-E-7 EUGENE/VICKI DEHERRERA **MOTION FOR REVIEW OF FEES**
UST-2 **3-27-15 [35]**
CASE DISMISSED 3/10/15

Final Ruling: No appearance at the April 30, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 7 Trustee on March 27, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

Tracy Hope Davis, the United States Trustee, ("UST") filed the instant Motion to Review Fees of Debtors' Attorney on March 27, 2015. Dckt. 35.

The instant case was filed by Eugene and Vicki Deherrera (Debtors") on October 10, 2015. The Debtors' attorney is David Foyil, Esq. Mr. Foyil received $1,600.00 in connection with the representation of the Debtors. Dckt. 1, Disclosure of Compensation of Attorney for Debtor.

On December 15, 2015, the clerk of the court issued a Notice of Filing of United States Trustee's Statement of Presumed Abuse under 11 U.S.C. § 704(b)(1)(A). Dckt. 13.

The case was dismissed on March 10, 2015 after the court found that the case was filed in bad faith. Dckt. 30. Specifically, the court found:

> By under-accounting their monthly income and simultaneously inflating their monthly expenses, the Debtors manipulated the Means Test to evade the presumption of abuse under 11 U.S.C. § 707(b)(2), and manipulated their Schedules I and J to shield available disposable income to repay creditors. By "playing with the numbers," the Debtors attempted to avoid a potential dismissal of their Chapter 7 case. At the same time, claiming to have no disposable income, the Debtors seek to reaffirm secured debt on a boat. In so doing, they unfairly manipulated the Bankruptcy Code. A review of the attached exhibits and the Debtors' financial information, it is blatantly apparent that the Debtors and Debtors' counsel "fudged" the numbers in an attempt to qualify under the extraordinary relief of Chapter 7 but still retain luxury goods. The court is unsure whether the Debtors thought the court and the UST would not evaluate their finances, but a simple review show large discrepancies in what is listed even between Schedule I and Schedule J and the Means Test.
>
> . . .
>
> Furthermore, the presumption of abuse arises in this case under 11 U.S.C. § 707(b)(2). The totality of the circumstances of the Debtors' financial situation demonstrates abuse under 11 U.S.C. § 707(b)(3)(B). The case was filed in "bad faith" under 11 U.S.C. § 707(b)(3)(A). Such abuse and such "bad faith" warrant dismissal of the case under 11 U.S.C. § 707(b)(1). The fact that the Debtors are attempting to retain a luxury boat while seeking discharge to other unsecured debts without any explanation is prima facie bad faith.

The UST argues that under 11 U.S.C. § 329(b) and Fed. R. Bankr. P. 2017(b), that disgorgement of Mr. Foyil's fees received in connection with this case is proper. The UST argues that the fees should be disgorged to the Chapter 7 Trustee.

APPLICABLE LAW

In relevant part, 11 U.S.C. § 329 provides:

> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--
>
> (1) the estate, if the property transferred--
>
> (A) would have been property of the estate; or

> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
>
> (2) the entity that made such payment.

Fed. R. Bankr. P. 2017, titled "Examination of Debtor's Transactions with Debtor's Attorney," states, in relevant part:

> (b) Payment or transfer to attorney after order for relief
>
> On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

For purposes of this rule, an "order for relief" means a voluntary petition.

The initial burden under section 329(b) is upon the attorney to justify the compensation charged in connection with a bankruptcy case. In re Thomas, No. 09-16734-A-7, 2009 WL 9087775, at *2 (Bankr. E.D. Cal. Dec. 3, 2009) (citing *In re Jastrem*, 253 F.3d 438, 443 (9th Cir.2001); *In re Mahendra*, 131 F.3d 750, 757 (8th Cir.1997); *In re Basham*, 208 B.R. 926, 931-32 (B.A.P. 9th Cir.1997); *In re Xebec*, 147 B.R. 518, 524 (B.A.P. 9th Cir. 1992). Pursuant to § 329, courts have broad discretion to disallow and require disgorgement of attorney compensation found to be excessive. In re Clark, 223 F.3d 859, 863 (8th Cir. 2000).

DISCUSSION

The UST's argument is well-taken. The court in its order dismissing the case plainly found that the Debtors and Mr. Foyil "fudged" the numbers in an attempt to qualify for relief under Chapter 7 while attempting to retain possession of luxury goods at the expense of the Debtors' creditors.

Neither the Debtors nor Mr. Foyil responded to the earlier Motion to Dismiss or to the instant Motion, which once again signals to the court that neither the Debtors nor Mr. Foyil are prosecuting this case in good faith.

Mr. Foyil has failed to make a showing that justifies the $1,600.00 compensation. As the court found in dismissing the case, Mr. Foyil had an integral part in the "mathematical magic" on the Means Test in attempts to qualify the Debtors for Chapter 7 relief while still allowing them to retain the luxury boat. Mr. Foyil prepared these documents, manipulating the Debtors' finances to give the appearance of qualifying for Chapter 7. The $1,600.00 received by Mr. Foyil as compensation appears to have been payment for Mr. Foyil to create a false reality for the Debtors to get what they want. Unfortunately, such fees are not justifiable and are, per se, excess. Mr. Foyil, as an officer of the court, has a duty to both clients and the court to honestly and truthfully represent the client and what is presented to the

court. Here, Mr. Foyil violated this duty by filing schedules which are facially false. Mr. Foyil should not earn fees for untruthful filings and when the Debtors will not be receiving their discharge.

In light of the court's finding in dismissing the case, the failure of the Debtors or Mr. Foyil filing a response to the instant Motion, and the fact that the Debtors' case was dismissed, the court finds that the $1,600.00 received by Mr. Foyil in connection with the instant case was excessive. Therefore, the Motion is granted and Mr. Foyil shall disgorge the $1,600.00 received in fees to Gary Farrar, the Chapter 7 Trustee by noon on May 29, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Review Fees of Debtors' Attorney filed by the United States 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. David Foyil shall disgorge the $1,600.00 received in fees to Gary Farrar, the Chapter 7 Trustee by noon on May 29, 2015.
>
> This Order constitutes a judgment (Fed. R. Civ. P. 54(a) and Fed. R. Bankr. P. 7054, 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure (including Fed. R. Civ. P. 69 and Fed. R. Bankr. P. 7069, 9014).