UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

May 4, 2017, at 10:30 a.m.

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1. **16-90500-E-11** **ELENA DELGADILLO** **MOTION TO SELL AND/OR MOTION FOR COMPENSATION FOR RE/MAX, REALTOR(S)**
HSM-7 **Len ReidReynoso** **4-4-17 [141]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 4, 2017. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Irma Edmonds, the Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here, Movant proposes to sell forty acres of agricultural real property commonly known Orchard Road, Vernalis, California ("Property").

The proposed purchaser of the Property is M3 Land Company, LLC, and the terms of the sale are:

A. Purchase price of $825,000.00;

B. Non-refundable escrow deposit of $8,000.00 from Buyer, to be applied to purchase price after satisfaction of sale conditions;

C. If Buyer fails to close the purchase due to default by Buyer, then the deposit shall be retained by Movant as liquidated damages for such breach;

D. Buyer shall pay the purchase price and close escrow on or before fifteen days after court approval;

E. The following closing costs will be allocated to the Estate and paid from the sales proceeds:

1. Cost of a natural hazard zone disclosure report,

2. One-half of the cost of the escrow fee,

3. Premium for a standard coverage title insurance policy,

4. County transfer tax,

5. Prorated share of real property taxes and assessments secured against the Property (including costs to cure any delinquencies) and utilities related to the Property,

6. Any amounts required to be withheld for state or federal taxes;

F. Buyer shall have ten days from acceptance fo the purchase agreement to complete all of its investigations and either waive all contingencies or cancel the purchase agreement;

1. Buyer has already waived in writing all contingencies;

G. Seller shall disclose to Buyer any outstanding rental and lease contracts relative to the Property or its crops;

1. Buyer reserves a right to approve or disapprove of any such contracts within five days of receipt;

2. If Buyer disapproves of such contracts, Buyer may rescind its offer for the Property with a return of its deposit within one day;

H. The Property is sold “as is,” “where is,” and “with all faults;”

I. Movant makes no representations or warranties, directly or indirectly, with respect to the condition or history of the Property and has no duty to inquire or investigate or provide any disclosures related to the Property;

J. Buyer shall rely solely on its own investigation of the Property in its decision whether to acquire the Property;

K. Title to the Property shall be subject to all liens or encumbrances for real property taxes and/or assessments that are not delinquent as of the close of escrow;

L. Even though Movant is not aware of any secured interests against the Property, if any monetary liens are discovered, delivery of title free and clear of liens may require cooperation and consent of any lienholders;

M. Sale includes a broker's commission of 6%.

N. Broker represents both parties to the sale, which was disclosed to both parties.

DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: xxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will provide approximately $644,000.00 in net proceeds.

A 6% percent broker's commission from the sale of the Property will equal approximately $49,500.00. The court approved the employment of Bob Brazeal of RE/MAX Executive on March 7, 2017. Dckt. 118. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker a 6% commission.

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 Sell Property filed by Irma Edmonds, the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Irma Edmonds, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to M3 Land Company, LLC, or nominee ("Buyer"), the Property commonly known as Orchard Road, Vernalis, California ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $825,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 145, and as further provided in this Order.

B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

C. The Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

D. The Trustee is authorized to pay a real estate broker's commission in an amount equal to six percent of the actual purchase price upon consummation of the sale. The six percent commission shall be paid to the Trustee's broker, Bob Brazeal.

2. **15-90502-E-7** **ANNA STARR** **MOTION FOR COMPENSATION BY THE LAW OFFICE OF FORES-MACKO, INC. FOR ANTHONY D. JOHNSTON, TRUSTEE'S ATTORNEY(S)**
ADJ-2 **Peter Macaluso** **4-6-17 [78]**

Final Ruling: No appearance at the May 4, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on April 6, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Anthony Johnston, the Attorney ("Applicant") for Irma Edmonds, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 7, 2015, through April 6, 2017. The order of the court approving employment of Applicant was entered on October 15, 2015. Dckt. 28. Applicant requests fees in the amount of $21,477.50 and costs in the amount of $459.05.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?

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

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

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including two adversary proceedings that netted $70,000.00 for the estate. The estate has $69,491.99 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 19.70 hours in this category. Applicant opposed Debtor's motion to convert the case to Chapter 13, which included preparing a written opposition, research, court appearances, and correspondence and phone conferences with Debtor's counsel. Applicant also made phone calls to a major creditor's attorney in the case.

Efforts to Assess and Recover Property of the Estate: Applicant spent 1.90 hours in this category. Applicant reviewed schedules and identified potential community property subject to the estate's interest, analyzed filing an objection to Debtor's homestead exemption, and performed research and wrote an e-mail to Debtor's counsel explaining that even if Debtor filed under Chapter 13 the community property would remain part of the estate.

Fee and Employment Applications: Applicant spent 5.30 hours in this category. Applicant prepared the application for his employment in the case and prepared the instant Motion.

Residence Adversary Proceeding (16-09003): Applicant spent 36.20 hours in this category. Applicant researched California community property law and transmutation requirements, presented an argument at court that certain federal law was no longer "good law," successfully prosecuted an adversary proceeding, and settled with Debtor for $60,716.67.

Corvette Adversary Action (16-09006): Applicant spent 15.00 hours in this category. Applicant reviewed record and pursued an adversary proceeding alleging that the bankruptcy estate had a one-third interest in a Corvette, attended several status conferences regarding the adversary proceeding, and settled with Debtor for $9,283.33.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Anthony Johnston, attorney	78.10	$275.00	$21,477.50
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees For Period of Application			$21,477.50

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $459.05 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopies	$0.10	$160.70
Postage		$53.35
Service fee to Moe's Process Service		$245.00
		$0.00
Total Costs Requested in Application		$459.05

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $21,477.50 are approved

pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $459.05 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$21,477.50
Costs and Expenses	$459.05

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Anthony Johnston ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Anthony Johnston is allowed the following fees and expenses as a professional of the Estate:
>
> Anthony Johnston, Professional employed by the Trustee
>
> Fees in the amount of $21,477.50
> Expenses in the amount of $459.05,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Trustee.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

3. **16-90103-E-7** **JOSE MERCADO** **MOTION FOR COMPENSATION FOR**
SSA-3 **Nelson Gomez** **STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY**
3-27-17 [90]

Final Ruling: No appearance at the May 4, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 27, 2017. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Steven Altman, the Attorney ("Applicant") for Michael McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period June 21, 2016, through March 16, 2017. The order of the court approving employment of Applicant was entered on July 8, 2016. Dckt. 52. Applicant requests fees in the amount of $1,200.00 and costs in the amount of $25.28.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?

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

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

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including reviewing Debtor's filings, reviewing claims, assisting with turnover of unused funds when the case was converted from Chapter 11, and settling disputes with Debtor's counsel. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 4.30 hours in this category. Applicant communicated by phone and e-mail with the Trustee and Debtor about various matters and prepared related documents.

Efforts to Assess and Recover Property of the Estate: Applicant spent 4.60 hours in this category. Applicant transmitted records to the Trustee, reviewed proposed settlements, and drafted and sent settlement agreements to the Trustee.

Fee and Employment Applications: Applicant spent 3.60 hours in this category. Applicant prepared his employment application and the instant Motion.

Fee and Employment Objections: Applicant spent 0.40 hours in this category. Applicant attended a conference with Debtor's counsel to resolve an attorney fee dispute and communicated with Debtor's counsel and the Trustee regarding a resolution of the dispute.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Steven Altman, attorney	12.90	$300.00	$3,870.00
	0	$0.00	$0.00
	0	$0.00	$0.00

	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees For Period of Application			$3,870.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $25.28 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copying	$0.10	$12.90
Postage		$12.38
		$0.00
		$0.00
Total Costs Requested in Application		$25.28

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks to be paid a single sum of $1,200.00 for its fees incurred for Client. First and Final Fees and Costs in the amount of $1,200.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $25.28 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$1,200.00
Costs and Expenses	$25.28

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Steven Altman ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Steven Altman is allowed the following fees and expenses as a professional of the Estate:
>
> Steven Altman, Professional employed by the Trustee
>
> Fees in the amount of $1,200.00
> Expenses in the amount of $25.28,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Trustee.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

4. **16-90513-E-7** **TIRZAH HAMILTON** **MOTION TO COMPEL**
16-9012 **SSA-1** **4-6-17 [35]**
EDMONDS V. HAYES ET AL

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

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

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

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). Based upon language in the Notice of Hearing that objection may be presented at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Debtor (*pro se*), Chapter 7 Trustee, creditors, and Office of the United States Trustee on April 6, 2017. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Motion to Compel was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Compel is denied without prejudice.

Irma Edmonds, the Chapter 7 Trustee, filed this Motion to Compel Delores Hamilton, Defendant in this Adversary Proceeding 16-09012 to answer requests for admissions and to produce documents. The Trustee also seeks exclusion of evidence, sanctions, and reimbursement of fees and costs.

The Trustee asserts that a Request for Admissions and Request for Production of Documents were served on all defendants in this proceeding on January 27, 2017, and February 3, 2017, respectively. More than thirty days has elapsed since the date that responses to those requests were due. A letter detailing the default was sent to all parties in this proceeding, and now, the Trustee seeks terminating sanctions, exclusion of evidence at time of trial, deeming requests for admissions as admitted, and monetary fees and costs for the discovery violation and preparation of this Motion.

Review of Motion

As provided in Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, it is the motion that states with particularity the grounds upon which the requested relief is based. The other pleadings provide the legal authorities, arguments, and evidence.

The Motion begins requesting that the court issue an order to compel the responses to requests for admissions and production of documents. Motion, p. 1:26.5–27.5. Then, in the same sentence, the Motion continues to request: (1) exclusion of evidence, (2) sanctions, and (3) fees. *Id.*, 1:27.5.

In paragraph 4 of the Motion, the particular relief requested is stated as:

> 4. Plaintiff requests . . . the subject **Requests for Admissions be deemed admitted** in the current adversary proceeding . . . b) all party **defendants** . . . **not be allowed to offer any conflicting or disputed evidence on** these **issues (admitted in the Request for Admissions**); c) reimbursement of the Trustee's counsel's **reasonable fees and costs** incurred in propounding discovery, preparing and enforcing relief as a result of this motion; d) such other relief the Court deems just; . . . .

Id., 2:20–25, 3:1–2. The actual relief requested in the Motion is to compel production or response, but move immediately to exclude contrary evidence.

The requested relief continues in paragraph 4 of the Motion, stating:

> "[e)] in addition, as to the Requests for Production, **Plaintiff requests defendants** not otherwise currently in bankruptcy **be precluded from introducing any contrary or opposing evidence**, together with **reimbursement of the Trustee's** counsel's reasonable **fees and costs** incurred in propounding discovery, and enforcing relief as set forth in this motion. . . . .

Id. 3:2–5.

The Motion does not seek to "compel" the production or responses, but to sanction Defendants for failing to comply.

NOTICE OF HEARING PROCEDURE

This Motion states that it was "filed" pursuant to Local Bankruptcy Rule 9014-1(f)(2). Presumably that reference is intended to state that the Motion was set for hearing using the abbreviated 14-day notice period permitted under Local Bankruptcy Rule 9014-1(f)(2). Unfortunately, the Local Bankruptcy Rule excludes motions in adversary proceedings from that notice procedure.

LOCAL BANKR. R. 9014-1(f)(2).

(2) Motions Set on 14 Days' Notice. Alternatively, unless additional notice is required by the Federal Rules of Bankruptcy Procedure or these Local Rules, the moving party may file and serve the motion at least fourteen (14) days prior to the hearing date.

(A) This alternative procedure shall not be used for a motion filed in connection with an adversary proceeding. . . .

The Motion is required to be served in compliance with Local Bankruptcy Rule 9014-1(f)(1), which requires at least twenty-eight days notice.

In reviewing the Certificate of Service, it states that the Motion, Notice and Supporting Pleadings were served on April 6, 2017. Cert. of Serv., Dckt. 40. That is twenty-eight days before the May 4, 2017 hearing.

The Notice of Hearing only states that a hearing will be conducted on May 4, 2017, for the motion to compel, deem admitted, production of documents, and sanctions. Ntc. of Hrg., Dckt. 36. The Notice states that the Motion is "brought" pursuant to Local Rul 9014-1 (without specifying any subsection).

Missing from the Notice is any direction to the persons against whom the relief is requested whether written opposition is required, and if required, the effect of failing to reply. This is addressed by Local Bankruptcy Rule 9014-1(d) which requires for notices in this District:

(d) Format and Content of Motions and Notices.
. . .
(3) Separate Notice. Every motion shall be accompanied by a separate notice of hearing stating the Docket Control Number, the date and time of the hearing, the location of the courthouse, the name of the judge hearing the motion, and the courtroom in which the hearing will be held.

(4) Contents of Notice. The **notice of hearing shall advise** potential respondents **whether and when written opposition must be filed**, the **deadline for filing** and serving it, and the names and addresses of the persons who must be served with any opposition. **If written opposition is required**, the **notice of hearing shall advise** potential respondents that the **failure to file timely written opposition may result** in the motion being **resolved without oral argument and the striking of untimely written opposition**. . . ."

LOCAL BANKR. R. 9014-1(d)(3), (4) (emphasis added).

Here, the Notice does not state whether written opposition is required, whether oral opposition may be presented, and the effect of failure to file written opposition.

For these procedural defects, denial of the Motion without prejudice is proper. When the potential sanctions can result in the inability to later present opposition evidence, the "i's" must be dotted,

and the "t's" must be crossed. Further, as shown below, there are other challenges with the Motion, making denial without prejudice the correct result based on the substance of what has been presented today.

APPLICABLE DISCOVERY LAW

The Federal Rules of Civil Procedure are incorporated into bankruptcy proceedings in large part. This is true with respect to the discovery provisions (whether in an adversary proceeding or contested matter). Here, Federal Rule of Civil Procedure 37 and incorporating Federal Rule of Bankruptcy Procedure 7037 are cited in the motion as the basis for the relief requested.

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

"Meet and Confer" Requirement

Federal Rule of Civil Procedure 37(a)(1) requires that the motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." FN.2.

FN.2. Both the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure are mentioned several times in the court's ruling. A Federal Rule of Civil Procedure will be referred to as "Rule," and a Federal Rule of Bankruptcy Procedure will be referred to as "Bankruptcy Rule."

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

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

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

F.R.D. at 171; *see also Triad Commer. Captive Co.*, 2009 Bankr. LEXIS 4539, at *27; *Sanchez*, 2008 Bankr. LEXIS 4239, at *3.

Rule 37 also requires that the moving party must have conferred in good faith or attempted to confer with the opposing party regarding the discovery dispute. *Shuffle Master, Inc.*, 170 F.R.D. at 171. The court in *Shuffle Master* noted that good faith "cannot be shown merely through the perfunctory parroting of statutory language . . . to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means." *Id.*; *see also Sanchez*, 2008 Bankr. LEXIS 4239, at *3–4. The movant must show good faith and the party need actually attempt a meeting or conference. *Shuffle Master, Inc.*, 170 F.R.D. at 171. Courts have found that "conferment" requirement entails "two-way communication, communication which is necessary to genuinely discuss any discovery issues and to avoid judicial recourse." *Compass Bank v. Shamgochian*, 287 F.R.D. 397, 398–99 (S.D. Tex. 2012).

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

The court first considers whether the Trustee has satisfied the "meet and confer" requirement of Rule 37(a). In the Declaration of Steven Altman, he states that he served Requests for Admissions (First Set) and Request for Production of Documents to all party defendants on January 27, 2017. Dckt. 37, at 2. Both the Motion and the Memorandum of Points and Authorities state that the Request for Production of Documents was served on February 3, 2017. *Compare* Dckt. 35, at 2 (Motion), *and* Dckt. 38, at 2 (Memorandum of Points and Authorities), *with* Dckt. 37, at 2 (Declaration of Steven Altman). It appears that the incomplete statement of dates in the Declaration is an oversight and not intentional misrepresentation of the date the discovery requests were sent. It is clear from the Motion that thirty days has elapsed since service of the requests, and none of the defendants responded to the discovery requests.

Mr. Altman states that he attempted to meet and confer by sending a letter to all defending parties advising them of the default and this prospective Motion. Dckt. 37, at 2; *see also* Dckt. 39, Exhibit 3 (March 31, 2017 letter to Defendant). Mr. Altman also testifies that all defendants failed to make initial disclosures pursuant to Rule 26 and that Tirzah Hamilton ("Debtor") failed to appear and produce documents at a deposition on March 24, 2017. *Id.* Despite Mr. Altman informing all of the defendants of the discovery violations, none of them has responded to him. *Id.*

The court has reviewed the March 31, 2017 "meet and confer" letter and determines that it does not satisfy the requirement. *See* Dckt., 39, Exhibit 3. The letter states:

> On January 27, 2017, this office sent to you Request for Admissions in this case. In addition, on February 3, 2017, this office also sent to you Request for Production of Documents in the above case.

> Insofar as the Request for Admissions were concerned, responses were due within thirty (30) days, specifically by or before February 26, 2017. With respect to the Production of Documents Request served on you, responses were due on March 5, 2017.
>
> You have failed to answer same in the time required by law.
>
> As such, it is contemplated that this office will be moving for a Motion for Order to Compel Answers to Requests for Admissions and Request for Discovery Production, deem admissions, answered, exclude defendant's ability to submit contra evidence proof at time of trial and also seek reimbursement of attorney fees and costs and other relief.

Dckt. 39, Exhibit 3. The letter addresses Defendant's default, but it does not contain any language about the parties resolving the discovery dispute, and it does not make a demand that Defendant respond to the "meet and confer" letter. Instead, the letter skips the confer stage and summarizes sanctions the Trustee will seek in a motion before the court. Nothing in the letter attempts to resolve the discovery violations without court action.

Mr. Altman's efforts do not satisfy the "meet and confer" requirement. The requirement cannot be satisfied by mailing a letter to the nonresponding party explaining the discovery issue. *See Leimbach v. Lane (In re Lane)*, 302 B.R. 75, 78–79 (Bankr. D. Idaho 2003). For this Motion, no evidence has been presented that the parties met and attempted to resolve the discovery problems non-judicially. Instead, what has been presented to the court is that the Trustee did not receive responses of any kind and attempted to "meet and confer" by following the same pattern of mailing documents, which the Trustee knew was not garnering responses.

The "meet and confer" prerequisite has an important function. By "obliging attorneys to certify to the Court that they conferred in good faith," many discovery disputes are resolved without the court's intervention. *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001). The Trustee and Defendant have not met and conferred, according to the pleadings. The Motion is denied without prejudice.

Though Trustee's Counsel may believe that the attempt to "meet and confer" will be futile based on the conduct of Defendants to date, the requirement to try is not subject to a party's subjective "I do not think it will work" exception.

Additional Relief Requested

The Motion generally requests that the court go beyond "compelling" responses to discovery and instead jumps:

> "as to the Requests for Production, Plaintiff requests defendants not otherwise currently in bankruptcy be precluded from introducing any contrary or opposing evidence, together with reimbursement of the Trustee's counsel's reasonable fees and

> costs incurred in propounding discovery, and enforcing relief as set forth in this motion."

Motion, p. 3:2–5; Dckt. 35.

The Motion does not make it clear what is the basis for such excluding and admissions sanctions. In the Points and Authorities (which is not the motion and does not substitute for the requirements of Rule 7(b)), reference is made to ""BR 7037(c)(2)," "BR 7036(3)," "BR 7037(3)(B)," "BR 7037(4), and "BR 7036;" it is in general terms.

Even adjusting the reference from 7037 to Rule 37, some of these reference do not match up to Federal Rule of Civil Procedure 37.

The court also notes that the requests for forced admissions are generally made, with a copy of the request for admissions presented. The court is not presented in the Motion (which could be set out in an addendum or exhibit) of the specific admissions which are requested to be made. Rather, a copy of the request for admissions document is filed as an exhibit in support of the Motion. Exhibit 1, Dckt. 39. While the court could extrapolate from the Request for Admissions, the better practice is to have the requested items to be ordered admitted clearly stated separately.

For the requested order excluding evidence, it just generally requests that an order be issued excluding evidence related to what was requested to be produced. There is not specific evidence on specific points identified. For the court to issue such an order it would all but ensure a (largely unnecessary) dispute that the court is saddled with at trial. Again, the better practice is to clearly state the issues and factual determinations for which no evidence can be provided by the Defendants.

Denial of Motion Without Prejudice

The court has considered whether to continue the hearing on this Motion (bending the meet and confer requirement to occur after the motion is filed but before any opposition is due) or deny it without prejudice. Denial without prejudice is the right result. That will allow Plaintiff-Trustee to clearly advance the motion before the court and for the court to issue an order that will not be unnecessarily assailable on appeal (if any).

It may be that the "rush" for the Motion is that discovery is set to close on June 30, 2017. Scheduling Order, Dckt. 25. In light of the failure to comply with discovery, if additional discovery time is needed to properly meet and confer, issue an order to compel (if appropriate), and issue discovery sanctions, extending discovery and the other deadlines is a much easier proposition than rushing through a discovery sanctions process.

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

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

The Motion to Compel filed by 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 Compel is denied without prejudice.

5. **16-90513-E-7** **TIRZAH HAMILTON** **MOTION TO COMPEL**
16-9012 **SSA-2** **4-6-17 [41]**
EDMONDS V. HAYES ET AL

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

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

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

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). Based upon language in the Notice of Hearing that objection may be presented at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Debtor (*pro se*), Chapter 7 Trustee, creditors, and Office of the United States Trustee on April 6, 2017. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Motion to Compel was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Compel is denied without prejudice.

Irma Edmonds, the Chapter 7 Trustee, filed this Motion to Compel in Adversary Proceeding 16-09012 for answers to requests for admissions and for production of documents. The court notes that the Motion is word-for-word identical to another Motion to Compel that the Trustee has filed. *Compare* Dckt.

41, *with* Dckt. 35. Presumably, the Trustee meant to address the present Motion to Valerie Tan, but instead, it says Delores Hamilton like in the Trustee's other motion. The Declaration and Memorandum of Points and Authorities state that the Motion is for Valerie Tan, however. *See* Dckt. 43 & 44. The court interprets the misidentification in the Motion as a scrivener's error, but to treat the Motion as being against Valerie Tan would require the court to rewrite the motion and issue an order against someone not correctly named.

The Trustee asserts that a Request for Admissions and Request for Production of Documents were served on all defendants in this proceeding on January 27, 2017, and February 3, 2017, respectively. More than thirty days has elapsed since the date that responses to those requests were due. A letter detailing the default was sent to all parties in this proceeding, and now, the Trustee seeks terminating sanctions, exclusion of evidence at time of trial, deeming requests for admissions as admitted, and monetary fees and costs for the discovery violation and preparation of this Motion.

Review of Motion

As provided in Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, it is the motion that states with particularity the grounds upon which the requested relief is based. The other pleadings provide the legal authorities, arguments, and evidence.

The Motion begins requesting that the court issue an order to compel the responses to requests for admissions and production of documents. Motion, p. 1:26.5–27.5. Then, in the same sentence, the Motion continues to request: (1) exclusion of evidence, (2) sanctions, and (3) fees. *Id.*, 1:27.5.

In paragraph 4 of the Motion, the particular relief requested is stated as:

> 4. Plaintiff requests . . . the subject **Requests for Admissions be deemed admitted** in the current adversary proceeding . . . b) all party **defendants** . . . **not be allowed to offer any conflicting or disputed evidence on** these **issues (admitted in the Request for Admissions**); c) reimbursement of the Trustee's counsel's **reasonable fees and costs** incurred in propounding discovery, preparing and enforcing relief as a result of this motion; d) such other relief the Court deems just; . . . .

Id., 2:20–25, 3:1–2. The actual relief requested in the Motion is to compel production or response, but move immediately to exclude contrary evidence.

The requested relief continues in paragraph 4 of the Motion, stating:

> "[e)] in addition, as to the Requests for Production, **Plaintiff requests defendants** not otherwise currently in bankruptcy **be precluded from introducing any contrary or opposing evidence**, together with **reimbursement of the Trustee's** counsel's reasonable **fees and costs** incurred in propounding discovery, and enforcing relief as set forth in this motion. . . . .

Id. 3:2–5.

The Motion does not seek to "compel" the production or responses, but to sanction Defendants for failing to comply.

NOTICE OF HEARING PROCEDURE

This Motion states that it was "filed" pursuant to Local Bankruptcy Rule 9014-1(f)(2). Presumably that reference is intended to state that the Motion was set for hearing using the abbreviated 14-day notice period permitted under Local Bankruptcy Rule 9014-1(f)(2). Unfortunately, the Local Bankruptcy Rule excludes motions in adversary proceedings from that notice procedure.

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> (2) Motions Set on 14 Days' Notice. Alternatively, unless additional notice is required by the Federal Rules of Bankruptcy Procedure or these Local Rules, the moving party may file and serve the motion at least fourteen (14) days prior to the hearing date.
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> (A) This alternative procedure shall not be used for a motion filed in connection with an adversary proceeding. . . .

The Motion is required to be served in compliance with Local Bankruptcy Rule 9014-1(f)(1), which requires at least twenty-eight days notice.

In reviewing the Certificate of Service, it states that the Motion, Notice and Supporting Pleadings were served on April 6, 2017. Cert. of Serv., Dckt. 46. That is twenty-eight days before the May 4, 2017 hearing.

The Notice of Hearing only states that a hearing will be conducted on May 4, 2017, for the motion to compel, deem admitted, production of documents, and sanctions. Ntc. of Hrg., Dckt. 42. The Notice states that the Motion is "brought" pursuant to Local Rul 9014-1 (without specifying any subsection).

Missing from the Notice is any direction to the persons against whom the relief is requested whether written opposition is required, and if required, the effect of failing to reply. This is addressed by Local Bankruptcy Rule 9014-1(d) which requires for notices in this District:

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> . . .
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LOCAL BANKR. R. 9014-1(d)(3), (4) (emphasis added).

Here, the Notice does not state whether written opposition is required, whether oral opposition may be presented, and the effect of failure to file written opposition.

For these procedural defects, denial of the Motion without prejudice is proper. When the potential sanctions can result in the inability to later present opposition evidence, the "i's" must be dotted, and the "t's" must be crossed. Further, as shown below, there are other challenges with the Motion, making denial without prejudice the correct result based on the substance of what has been presented today.

APPLICABLE DISCOVERY LAW

The Federal Rules of Civil Procedure are incorporated into bankruptcy proceedings in large part. This is true with respect to the discovery provisions (whether in an adversary proceeding or contested matter). Here, Federal Rule of Civil Procedure 37 and incorporating Federal Rule of Bankruptcy Procedure 7037 are cited in the motion as the basis for the relief requested.

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"Meet and Confer" Requirement

Federal Rule of Civil Procedure 37(a)(1) requires that the motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." FN.2.

FN.2. Both the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure are mentioned several times in the court's ruling. A Federal Rule of Civil Procedure will be referred to as "Rule," and a Federal Rule of Bankruptcy Procedure will be referred to as "Bankruptcy Rule."

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

> [T]wo components are necessary to constitute a facially valid motion to compel. First is the actual *certification* document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the *performance*,

> which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer. Each of these two subcomponents must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

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

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

The court first considers whether the Trustee has satisfied the "meet and confer" requirement of Rule 37(a). In the Declaration of Steven Altman, he states that he served Requests for Admissions (First Set) and Request for Production of Documents to all party defendants on January 27, 2017. Dckt. 43, at 2. Both the Motion and the Memorandum of Points and Authorities state that the Request for Production of Documents was served on February 3, 2017. *Compare* Dckt. 41, at 2 (Motion), *and* Dckt. 38, at 2 (Memorandum of Points and Authorities), *with* Dckt. 43, at 2 (Declaration of Steven Altman). It appears that the incomplete statement of dates in the Declaration is an oversight and not intentional misrepresentation of the date the discovery requests were sent. It is clear from the Motion that thirty days has elapsed since service of the requests, and none of the defendants responded to the discovery requests.

Mr. Altman states that he attempted to meet and confer by sending a letter to all defending parties advising them of the default and this prospective Motion. Dckt. 43, at 2; *see also* Dckt. 45, Exhibit 3 (March 31, 2017 letter to Defendant). Mr. Altman also testifies that all defendants failed to make initial disclosures pursuant to Rule 26 and that Tirzah Hamilton ("Debtor") failed to appear and produce documents at a

deposition on March 24, 2017. Dckt. 43, at 2. Despite Mr. Altman informing all of the defendants of the discovery violations, none of them has responded to him. *Id.*

The court has reviewed the March 31, 2017 "meet and confer" letter and determines that it does not satisfy the requirement. *See* Dckt., 45, Exhibit 3. The letter states:

> On January 27, 2017, this office sent to you Request for Admissions in this case. In addition, on February 3, 2017, this office also sent to you Request for Production of Documents in the above case.
>
> Insofar as the Request for Admissions were concerned, responses were due within thirty (30) days, specifically by or before February 26, 2017. With respect to the Production of Documents Request served on you, responses were due on March 5, 2017.
>
> You have failed to answer same in the time required by law.
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> As such, it is contemplated that this office will be moving for a Motion for Order to Compel Answers to Requests for Admissions and Request for Discovery Production, deem admissions, answered, exclude defendant's ability to submit contra evidence proof at time of trial and also seek reimbursement of attorney fees and costs and other relief.

Dckt. 45, Exhibit 3. The letter addresses Defendant's default, but it does not contain any language about the parties resolving the discovery dispute, and it does not make a demand that Defendant respond to the "meet and confer" letter. Instead, the letter skips the confer stage and summarizes sanctions the Trustee will seek in a motion before the court. Nothing in the letter attempts to resolve the discovery violations without court action.

Mr. Altman's efforts do not satisfy the "meet and confer" requirement. The requirement cannot be satisfied by mailing a letter to the nonresponding party explaining the discovery issue. *See Leimbach v. Lane (In re Lane)*, 302 B.R. 75, 78–79 (Bankr. D. Idaho 2003). For this Motion, no evidence has been presented that the parties met and attempted to resolve the discovery problems non-judicially. Instead, what has been presented to the court is that the Trustee did not receive responses of any kind and attempted to "meet and confer" by following the same pattern of mailing documents, which the Trustee knew was not garnering responses.

The "meet and confer" prerequisite has an important function. By "obliging attorneys to certify to the Court that they conferred in good faith," many discovery disputes are resolved without the court's intervention. *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001). The Trustee and Defendant have not met and conferred, according to the pleadings. The Motion is denied without prejudice.

Though Trustee's Counsel may believe that the attempt to "meet and confer" will be futile based on the conduct of Defendants to date, the requirement to try is not subject to a party's subjective "I do not think it will work" exception.

Additional Relief Requested

The Motion generally requests that the court go beyond "compelling" responses to discovery and instead jumps:

> "as to the Requests for Production, Plaintiff requests defendants not otherwise currently in bankruptcy be precluded from introducing any contrary or opposing evidence, together with reimbursement of the Trustee's counsel's reasonable fees and costs incurred in propounding discovery, and enforcing relief as set forth in this motion."

Motion, p. 3:2–5; Dckt. 41.

The Motion does not make it clear what is the basis for such excluding and admissions sanctions. In the Points and Authorities (which is not the motion and does not substitute for the requirements of Rule 7(b)), reference is made to ""BR 7037(c)(2)," "BR 7036(3)," "BR 7037(3)(B)," "BR 7037(4), and "BR 7036;" it is in general terms.

Even adjusting the reference from 7037 to Rule 37, some of these reference do not match up to Federal Rule of Civil Procedure 37.

The court also notes that the requests for forced admissions are generally made, with a copy of the request for admissions presented. The court is not presented in the Motion (which could be set out in an addendum or exhibit) of the specific admissions which are requested to be made. Rather, a copy of the request for admissions document is filed as an exhibit in support of the Motion. Exhibit 1, Dckt. 45. While the court could extrapolate from the Request for Admissions, the better practice is to have the requested items to be ordered admitted clearly stated separately.

For the requested order excluding evidence, it just generally requests that an order be issued excluding evidence related to what was requested to be produced. There is not specific evidence on specific points identified. For the court to issue such an order it would all but ensure a (largely unnecessary) dispute that the court is saddled with at trial. Again, the better practice is to clearly state the issues and factual determinations for which no evidence can be provided by the Defendants.

Denial of Motion Without Prejudice

The court has considered whether to continue the hearing on this Motion (bending the meet and confer requirement to occur after the motion is filed but before any opposition is due) or deny it without prejudice. Denial without prejudice is the right result. That will allow Plaintiff-Trustee to clearly advance the motion before the court and for the court to issue an order that will not be unnecessarily assailable on appeal (if any).

It may be that the "rush" for the Motion is that discovery is set to close on June 30, 2017. Scheduling Order, Dckt. 25. In light of the failure to comply with discovery, if additional discovery time is needed to properly meet and confer, issue an order to compel (if appropriate), and issue discovery

sanctions, extending discovery and the other deadlines is a much easier proposition than rushing through a discovery sanctions process.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compel filed by 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 Compel is denied without prejudice.

6. **16-90513-E-7** **TIRZAH HAMILTON**
16-9012 **SSA-3**
EDMONDS V. HAYES ET AL

MOTION TO COMPEL AND/OR MOTION FOR EXCLUSION OF EVIDENCE BY DEBTOR TIRZAH HAMILTON AT TIME OF TRIAL
4-6-17 [47]

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

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

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

FN.1. Movant is reminded that the Local Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party reused a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, and Office of the United States Trustee on April 6, 2017. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Motion to Compel was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Compel is granted in part and denied without prejudice in part.

Irma Edmonds, the Chapter 7 Trustee, filed this Motion to Compel Tirzah Hamilton, Debtor in Bankruptcy Case No. 16-90513, to produce documents and appear at a deposition. The Trustee also seeks exclusion of contradictory evidence at trial and reimbursement of fees and costs.

The Trustee asserts that a Deposition Notice and Request for Production of Documents were served on Debtor in this proceeding on February 15, 2017. More than thirty days has elapsed since the date that responses were due. Additionally, Debtor failed to appear to give testimony on March 24, 2017. A

letter detailing the default was sent to Debtor on March 30, 2017, but Debtor has not responded to the Trustee in any way regarding the requests or regarding rescheduling the deposition.

The Trustee seeks orders for Debtor to be compelled to respond to discovery requests for production of documents, for Debtor not to be allowed to offer contradictory testimony or evidence on the issues raised by the Trustee in the complaint at trial, and for reimbursement of reasonable expenses bringing this Motion.

APPLICABLE LAW

"Meet and Confer" Requirement

Federal Rule of Civil Procedure 37(a)(1), made applicable in bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7037, requires that a motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." FN.2.

FN.2. Both the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure are mentioned several times in the court's ruling. A Federal Rule of Civil Procedure will be referred to as "Rule," and a Federal Rule of Bankruptcy Procedure will be referred to as "Bankruptcy Rule."

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

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

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

Rule 37 also requires that the moving party must have conferred in good faith or attempted to confer with the opposing party regarding the discovery dispute. *Shuffle Master, Inc.*, 170 F.R.D. at 171. The

court in *Shuffle Master* noted that good faith "cannot be shown merely through the perfunctory parroting of statutory language . . . to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means." *Id.*; *see also Sanchez*, 2008 Bankr. LEXIS 4239, at *3–4. The movant must show good faith and the party need actually attempt a meeting or conference. *Shuffle Master, Inc.*, 170 F.R.D. at 171. Courts have found that "conferment" requirement entails "two-way communication, communication which is necessary to genuinely discuss any discovery issues and to avoid judicial recourse." *Compass Bank v. Shamgochian*, 287 F.R.D. 397, 398–99 (S.D. Tex. 2012).

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

Here, counsel's letter requests that Debtor contact counsel to address the failure to appear. That is adequate under the circumstances of this Adversary Proceeding (notwithstanding the short deadline for Debtor to respond).

Sanctions for Discovery Violations

In the Trustee's Motion, the Trustee cites to Rule 37 and Bankruptcy Rule 7037 and requests an award of fees and expenses as part of this Motion to Compel. Relief is requested pursuant to Rule 37(a)(3)(B) & (a)(5), (b)(2)(A)(I) & (ii), and (c)(2).

Motion to Compel a Discovery Response—Federal Rule of Civil Procedure 37(a)(3)(B)

Rule 37(a)(3)(B) provides a party seeking discovery to have it compelled. The portion of the rule applicable to this Motion states:

> (B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:
>
> . . . .
>
> > (iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

FED. R. CIV. P. 37(a)(3)(B)(iv).

Payment of Expenses—Federal Rule of Civil Procedure 37(a)(5)

Rule 37(a)(5) provides for the payment of expenses if a movant successfully has the court grant a motion to compel. Specifically, the Rule states:

> (5) *Payment of Expenses; Protective Orders.*
>
> (A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—**the court must**, after giving an opportunity to be heard, **require the party or deponent whose conduct necessitated the motion**, the party or attorney advising that conduct, or both to **pay the movant's reasonable expenses incurred in making the motion, including attorney's fees**. But the court **must not order** this payment if:
>
> (I) the **movant filed** the motion **before attempting in good faith to obtain** the disclosure or discovery **without court action**;
>
> (ii) the opposing party's **nondisclosure**, response, or objection was **substantially justified**; or
>
> (iii) **other circumstances** make an award of expenses unjust.
>
> (B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.
>
> (C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(emphasis added).

Sanctions Sought in the District Where the Action is Pending for Not Obeying a Discovery Order—Federal Rule of Civil Procedure 37(b)(2)(A)

When a party disobeys a court's discovery order, Rule 37(b)(2)(A) supplies the following sanctions:

> (2) *Sanctions Sought in the District Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Failure to Admit—Federal Rule of Civil Procedure 37(c)(2)

If a party fails to admit a matter, then Rule 37(c)(2) provides for an award of reasonable expenses, as follows:

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

DISCUSSION

First, the court notes that the Motion does not direct the court to specific portions of Rule 37 that are applicable for each type of relief requested. *See* Dckt. 47 (referring generally to Bankruptcy Rule 7037 and Rule 37). The Memorandum of Points and Authorities does include, however, the following pointed—but inaccurate—references:

> [U]nder BR 7037, which also applies F.R.Civ. P37 to this discovery motion, the Court has the inherent power to compel disclosure and fix appropriate sanctions (**BR 7037(3)(B)**), award the moving party's attorney's fees and costs (**BR 7037(4)**), pay the moving party his fees and costs for having to prove a document genuine at time of trial (**BR 7037(c)(2)**), directing the Requests for Admissions to be deemed admitted and disallowing the noncomplying party the opportunity to introduce opposing or contradictory evidence at time of trial. (**BR 7037(b)(2)(I) and (ii)**).

Dckt. 50, at 3 (emphasis added).

There are no such provisions: BR 7037(3)(B), BR 7037(4), BR 7037(c)(2), and BR 7037(b)(2)(I) and (ii) do not exist. Bankruptcy Rule 7037 applies Rule 37 to adversary proceedings. The provisions that the Trustee cited apparently are Rule 37(a)(3)(B) & (a)(5), (b)(2)(A)(I) & (ii), and (c)(2). The court analyzes the Motion according to those subsections; payment of expenses is discussed last.

"Meet and Confer" Requirement

The court considers whether the Trustee has satisfied the "meet and confer" requirement of Rule 37(a). In the Declaration of Steven Altman, he states that he served Notice of Taking Deposition With Production of Documents (First Set) to Debtor on February 15, 2017. Dckt. 49, at 2. Mr. Altman pleads that more than thirty days has elapsed since service, and Debtor has not responded. Additionally, Debtor failed to appear at a deposition schedule for March 24, 2017.

Mr. Altman states that he attempted to meet and confer by sending a letter to Debtor advising her of the default, attempting to reschedule the deposition, and warning of this prospective Motion. Dckt. 49, at 2; *see also* Dckt. 51, Exhibit 2 (March 30, 2017 "meet and confer" letter).

Debtor has not responded to this Motion, and the court does not have any evidence that a later date was selected for discovery to be produced at a deposition. The court's docket does not list an attorney representing Debtor, but nevertheless, no legal counsel has responded to this Motion for Debtor.

Mr. Altman's efforts satisfy the "meet and confer" requirement. Though the requirement cannot be satisfied by mailing a letter to the nonresponding party merely explaining the discovery issue, it can be satisfied by requesting that the nonresponding party reply within a certain period of time to discuss any discovery matter. *See Leimbach v. Lane (In re Lane)*, 302 B.R. 75, 78–79 (Bankr. D. Idaho 2003). For this Motion, no evidence has been presented that the parties met and attempted to resolve the discovery problems non-judicially. Instead, what has been presented to the court is that the Trustee did not receive responses of any kind and attempted to "meet and confer" by mailing a letter to Debtor.

The court has reviewed the March 30, 2017 "meet and confer" letter and determines that it satisfies the requirement. *See* Dckt., 51, Exhibit 2. The letter states:

> Your deposition was set for March 24, 2017 at 9:30 a.m. . . . . You failed to attend and also failed to provide the documents requested in the transmittal.
>
> Based upon the foregoing, this office has no recourse but to seek sanctions against you in Bankruptcy Court for your failure to attend the deposition and produce the requisite documents requested.
>
> Unfortunately, pursuant to the Court's Scheduling Order, we are under tight guidelines regarding completion of discovery in this matter.
>
> **If you wish to discuss this matter further** with my office **and coordinate a different date for the deposition** that is acceptable to this office, **please do so in the next 48 hours**.

Dckt. 51, Exhibit 2 (emphasis added).

The "meet and confer" prerequisite has an important function. By "obliging attorneys to certify to the Court that they conferred in good faith," many discovery disputes are resolved without the court's intervention. *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001). The Trustee and Debtor have effectively met and conferred, according to the pleadings. Therefore, this Motion is appropriate.

Motion to Compel a Discovery Response—Federal Rule of Civil Procedure 37(a)(3)(B)

Rule 37(a)(3)(B)(iv) allows the court to compel a discovery response when a party fails to produce documents requested under Rule 34. Rule 34 (as made applicable to adversary proceedings by Bankruptcy Rule 7034) establishes what and how documents may be requested and establishes that responses must be delivered within thirty days. FED. R. CIV. P. 34(a)(1), (b)(1) & (2)(A). A copy of the Request for Production of Documents has been filed with the Motion as Exhibit 1, and the court's review of it shows that the request was made pursuant to Rule 34 and Bankruptcy Rule 7034. Dckt. 51, Exhibit 1.

March 24, 2017, was set as the date for a deposition and for production of documents. Dckt. 51, Exhibit 1. The instant Motion was filed on April 6, 2017. No response to the request has been filed. That failure to cooperate in discovery warrants a sanction by the court pursuant to Rule 37(a)(3)(B)(iv). The court will enter an order compelling Debtor to produce documents at a rescheduled deposition. This portion of the Motion is granted.

Sanctions Sought in the District Where the Action is Pending for Not Obeying a Discovery Order—Federal Rule of Civil Procedure 37(b)(2)(A)

In the Memorandum of Points and Authorities, the Trustee's apparent reference to Rule 37(b)(2)(A) is captured by the request for the court to exclude evidence by Debtor at trial. Dckt. 50, at 2.

A proper request for sanctions under Rule 37(b)(2)(A) requires that the court have issued a prior order providing or permitting discovery in a case. The court entered a scheduling order on February 13, 2017, in which it ordered that "the parties may seek discovery from any source." Dckt. 25, at 2. That order was permission for the parties to conduct discovery.

In the context of Rule 37(b)(2)(A), the Trustee requests that the nonresponding party be barred from introducing contradictory evidence at trial because she failed to appear at a deposition and produce documents. Dckt. 47, at 2.

Based upon the testimony provided by Mr. Altman and upon Debtor's lack of filings on the docket, the court finds that Debtor failed to appear at a deposition, but sanctions pursuant to Rule 37(b)(2)(A) are not warranted yet. The court would be permitted to hold Debtor in contempt of court pursuant to Rule 37(b)(2)(A)(vii), but the court chooses not to issue that sanction at this time. Instead, the court denies the request to bar submission of evidence or deem the unresponded admissions as true.

Failure to Admit—Federal Rule of Civil Procedure 37(c)(2)

Rule 37(c)(2) provides a further sanction after a party fails to admit matters requested under Rule 36. The party requesting the admissions may seek to have the nonresponding party pay reasonable expenses that include attorney's fees incurred in proving that an admission is true.

The Motion does not state clearly that relief is being sought pursuant to Rule 37(c)(2), and while the Memorandum of Points and Authorities includes language requesting the court to order Defendant to "pay the moving party his fees and costs for having to prove a document genuine at time of trial (BR 7037(c)(2))," that inclusion appears to be in error—an extraneously copied clause from another motion. Dckt. 50, at 3. The Trustee has not presented any evidence that and matters in a Request for Admissions have been proven true. Accordingly, granting relief under Rule 37(c)(2) is inappropriate. This portion of the Motion is denied without prejudice.

Failure to Attend One's Own Deposition—Federal Rule of Civil Procedure 37(d)

Rule 37(d) provides sanctions that a moving party may seek when a party fails to attend his or her own deposition. The Trustee may have intended to request relief under that provision (instead of requesting expenses under Rule 37(c)(2)), but there is no mention of it in any of the Trustee's pleadings. Therefore, the court does not analyze it.

Payment of Expenses—Federal Rule of Civil Procedure 37(a)(5)

Last, the court determines whether to award reasonable expenses to the Trustee pursuant to Rule 37(a)(5) for bringing this Motion. When the court grants a motion in part and denies it in part, Rule 37(a)(5)(C) declares that the court grants an opportunity to be heard and then may apportion an award of reasonable expenses.

In his declaration, Mr. Altman provides a task billing for this Motion. That task billing includes:

A. Preparation of Discovery (Requests for Production)—1.1 hours

B. Meet and Confer Letter (Discovery Defaults)—0.3 hours

C. Preparation of Motion to Compel, Sanctions, et al and Supporting Documents and Case Research—4.0 hours

D. Estimated Prospective Hearing Time/Court Preparation Time—1.0 hour

E. Total Time—6.4 hours

Dckt. 49, at 3. Mr. Altman testifies that his normal billing rate is $300.00 per hour. *Id.* For 6.4 hours of work, the requested award of expenses totals $1,920.00.

The court has decided to grant portions of the Motion, which makes a request for payment of reasonable fees under Rule 37(a)(5) appropriate. The court has granted portions of the Motion and denied or denied without prejudice other parts of the Motion. Fees should be apportioned accordingly. Therefore, the court awards expenses for 5.95 hours of work performed with this Motion. An award that seems reasonable to the court is broken down as follows:

A. 1.1 hours for the Request for Production of Documents because the court granted the full request;

B. 0.0 hours for satisfying the "meet and confer" requirement;

C. 2.0 hours for preparation of the Motion, including research, because the court did not award all of the requested relief and because further research should have revealed that some of the requested relief was inaccurate; and

D. 1.0 hours for appearing at the hearing on the Motion, for

E. A total of 4.1 hours, which at $300.00 per hour equals $1,230.00.

The court orders that an award of reasonable expenses in the amount of $1,230.00 shall be payable by Debtor Tirzah Hamilton.

Ruling

The court will enter an order compelling Debtor to produce documents at deposition pursuant to Rule 37(a)(3)(B)(iv) and Federal Rule of Bankruptcy Procedure 7037. The Deposition shall be conducted at **xxxx x.m. on xxxxx, 2017**, at the place designated in the notice of deposition issued by the Plaintiff-Trustee.

At this point, the court denies the request to bar submission of evidence or deem the unresponded admissions as true.

Finally, the court awards fees for bringing this Motion pursuant to Rule 37(a)(5)(C). Though the motion does not expressly state the amount of the relief (attorney's fees) requested, the Motion does make the generic request for reimbursement of attorney's fees. In Trustee's Counsel's declaration, he provides a computation of the wasted time, and expense, to the Estate in Debtor's failure to fulfill her obligations to respond to discovery. Dckt. 49. That amount is $1,920.00, which is for 6.4 hours of time billed at $300.00 per hour. That amount, the time spent, and the hourly rate are reasonable, and such fees are awarded.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compel filed by 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 Compel is granted in part, and pursuant to Federal Rule of Civil Procedure 37(a)(1) and (3)(B) and Federal Rule of Bankruptcy Procedure 7037, Debtor Tirzah Hamilton shall appear at **xxxx x.m. on xxxxx, 2017**, at the place designated in the notice of deposition issued by the Plaintiff-Trustee for her deposition and produce the documents described on Exhibit 1, Dckt. 51.
>
> **IT IS FURTHER ORDERED** that pursuant to Federal Rule of Civil Procedure 37(a)(5)(C) and Federal Rule of Bankruptcy Procedure 7037, the court awards the Trustee $1,920.00 in reasonable expenses for successfully prosecuting this Motion and for the expense incurred by the non-compliance with the discovery notice, which amount is immediately due and payable to the Trustee by Tirzah Hamilton.
>
> 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 Rules of Bankruptcy Procedure (including FED. R. CIV. P. 69 and FED. R. BANKR. P. 7069, 9014).

7. **17-90213-E-12** **J & B DAIRY** **CONTINUED MOTION TO USE CASH COLLATERAL**
PBG-1 **Patrick Greenwell** **4-6-17 [16]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on April 7, 2017. By the court's calculation, 5 days' notice was provided.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were required to file a written response or opposition to 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.

The Motion for Authority to Use Cash Collateral is denied.

On March 17, 2017, J & B Dairy ("Debtor") commenced this voluntary Chapter 12 Case. On April 6, 2017 (twenty days later), J & B Dairy, as the Debtor in Possession ("ΔIP"), filed a Motion for Authority to Use Cash Collateral. Motion, Dckt. 16. This is not the first, or even second, bankruptcy case filed by Debtor. The prior cases and their dispositions are summarized in the chart below:

Case		
17-90129 **Chapter 12 Case** **Atty: Patrick Greenwell**	**Filed: February 23, 2017** **Dismissed: March 15, 2017**	

	Dismissed for failure to timely file schedules and statement of financial affairs. The documents were required to be filed by March 9, 2017. Entry of the order dismissing was delayed one week, with Debtor not filing a motion for extension of time to file documents under after the (delayed) order was entered.	
16-91096 **Chapter 12 Case** **Atty: David Johnston**	**Filed: December 9, 2016** **Dismissed: February 13, 2017**	
	Dismissed for failure to timely file schedules and statement of financial affairs. Documents were originally due by December 23, 2016, with the court having entered an order to extend the filing deadline to January 13, 2017. 16-91096; Dckt. 20. The order dismissing the case was not entered until February 13, 2017.	
16-90923 **Chapter 12 Case** **Atty David Johnston**	**Filed: October 7, 2016** **Dismissed: December 7, 2016**	
	Dismissed for failure to timely file schedules and statement of financial affairs. Documents were originally due by October 21, 2016, with the court having entered an order to extend the filing deadline to January November 14, 2016. 16-90923; Dckt. 14. The order dismissing the case was not entered until December 7, 2016.	

SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS
FILED IN CURRENT CASE – 17-90213

Debtor has filed its Schedules and Statement of Financial Affairs in the current Bankruptcy Case. The financial information provided in the Schedules, Dckt. 12, is summarized as follows:

A. Schedule A/B Real Property

1. Debtor owns no real property.

B. Schedule A/B Personal Property

1. Financial Institution Accounts.....$ 225
2. Milk in Production.....$ 12,500
3. Feed and Growing Feed.....$225,000
4. Cows, Breading Bulls, Calves, Heifers.....$825,000

5. Equipment (one wheel loader).....$ 80,000
6. Misc. Office Equipment.....$ 3,500

C. Schedule D Secured Claims

1. Bank of Stockton (Feed, Cows, Cash).....($777,814)

a. Debtor's Statement of Collateral Value.....$ 0.00

2. Bank of Stockton (Milking Cows, Breeding Bulls, Cows and Heifers).....($799,100)

a. Debtor's Statement of Collateral Value.....$825,000

3. Bank of Stockton (Feed and Growing Feed)...($799,100)

a. Debtor's Statement of Collateral Value.....$225,000

D. Schedule G Executory Contracts and Leases

1. Lease of 8667 Rodden Road Property, Milking Equipment, Milk Tanks, Refer Units, Milking Parlor, Etc.

a. Lessor Teresina N. Silva

Debtor's Statement of Financial Affairs (Dckt. 12) includes the following information:

E. Part 1: Gross Revenues From Business

1. YTD (1/1-3/17 Filing).....$ 65,536
2. 2016.....$ 1,005,865
3. 2015.....$ 2,337,436

F. Part 2: Payments Made Within 90 Days of Bankruptcy Case in excess of $6,425 to any one person

1. No payments listed for rent.
2. Payments for 90 Days of Operation.....$47,268.08

G. Part 2: Payments Made Withing One Year to Insiders

1. Payments Total.....$59,372.78

H. Part 3, Question 17, Identify of Partners, Shareholders, Officers

1. John Knutson (General Partner)
2. Brenda Calhoun Knutson (General Partner)

A review of the Bankruptcy Petition filed by Debtor contains conflicting information. John Knutson, a General Partner, has stated under penalty of perjury in the Petition that Debtor's liabilities are $0.00 to $50,000, and Debtor's assets are $0.00 to $50,000. Dckt. 1 at 3.

REVIEW OF MOTION TO USE CASH COLLATERAL

Debtor's "Motion" to use cash collateral is a hybrid pleading consisting of the motion itself, which must contain the grounds stated with particularity upon which the relief is based (FED. R. BANKR. P. 9013) and the points and authorities, which contains the citations, quotations, arguments, conjecture, and speculation advanced by counsel for the ΔIP. Motion, Dckt. 16. Under the Local Bankruptcy Rules, the motion must be a separate pleading from the points and authorities, which are separate pleadings from each declaration, which are separate pleadings from the exhibits (which may be combined into one document). L.B.R. 9004-1, Revised Guidelines For Preparation of Documents.

In light of the emergency nature of a cash collateral motion involving a dairy, the court considered the "Mothorities," doing the work to identify and separate the grounds (which are being asserted subject to the certifications of FED. R. BANKR. P. 9011) from the citations, quotations, speculation, and argument advanced in the Points and Authorities. Neither counsel nor the ΔIP should presume that the court would do this in future motions.

The grounds stated in the "Motion" are:

A. "4. The Debtor is a California General Partnership with two General Partners, John Knutson and his wife Brenda Knutson. The Debtor's primary business involves a commercial dairy producing non GMO milk and eventually non GMO cheese."

B. "5. Prior to filing this case, the Debtor has one secured lender with a lien on cash collateral. Specifically, Bank of Stockton holds two different Agricultural Loans made by J & B Dairy. . .The loans are evidenced by two different promissory notes. . . As security for the loan, J & B executed two Agricultural Security Agreements pledging their assets as well as commodities and cash proceeds from their sales.

C. "6. Bank of Stockton has called their loans and initiated state court actions to recover their collateral. This would put J & B Dairy completely out of business. The Debtor has filed this case to restructure its debt and pursue a traditional chapter 12 reorganization plan by paying the liquidation value to its un secured creditors and to service its debts to Bank of Stockton over time."

D. "7. As a result of Bank of Stockton's collection activities, milk and cheese production are down. With the automatic stay in place and with the use of cash collateral, Debtor estimates, based upon decades of experience , that they can be back in good production

in a matter of months. They also anticipate a positive cash flow in 2 - 3 months. See Budget submitted herewith as Exhibit "A"."

E. "9. As set forth in the budget, incorporated herein and submitted as Exhibit 'A", the Debtor requires the use of cash collateral to fund all necessary operating expenses of the Debtor's business."

F. "10. The Debtor will suffer immediate and irreparable harm if it is not authorized to use cash collateral to fund the expenses set forth in the Budget. Absent such authorization, the Debtor will not be able to maintain and protect the property."

G. "11. The Bank of Stockton will also suffer immediate and irreparable harm if Debtor is not authorized to use cash collateral to fund expenses set forth in the Budget. The heard is not being adequately fed and milk production is down because of the Bank 's actions. Use of cash collateral ensures adequate food for the heard and increased milk production."

H. "22. The continued operation of the Debtor 's business will preserv [sic] it going concern value, enable the Debtor to capitalize on that value through a reorganization strategy, and ultimately facilitate the Debtor 's ability to confirm a Chapter 12 plan. If the Debtor is not allowed to use cash collateral, it will be unable to operate and potentially cause harm to the property ."

I. "23. The Debtor will use the cash collateral during the interim cash collateral period to feed and care for the heard, produce product for sale, utilities and otherwise maintain and protect the business."

J. "25. If the Debtor cannot use cash collateral, it will be forced to cease operations. By contrast, granting authority will allow the Debtor to maintain operations and preserve the going concern value of its business which will inure to the benefit of any secured creditors and all other creditors."

Motion, Dckt. 16.

On Exhibit A (Dckt. 18) ΔIP lists the expenses for which the use of cash collateral is sought, but does not disclose any income information. The expense information (which the court treats as part of the grounds stated in the Motion for purposes of FED. R. BANKR. P. 9013) is summarized as follows:

A. Variable Expenses, including buying livestock, veterinary, and "other expenses" total monthly.....($52,978)

B. Fixed Expenses (Insurance, Taxes, Accounting) total monthly.....($35,791)

There is no clear line item on Exhibit A stating the monthly cost for feed for the cattle. There is no clear line item for the cost of growing and maintaining feed for the cattle. Exhibit A does not include any compensation for the General Partners, whose extensive efforts would be required for any reorganization.

The specific expenses are:

	Monthly
VARIABLE EXPENSES	
Livestock Purchase	$13,816.00
Breeding and Testing	$466.00
Fertilizers and Chemicals	$0.00
Fuel and Oil	$1,491.00
Labor	$16,026.00
Machine Hire and Outside Services	$4,286.00
Repairs and Maintenance	$2,050.00
Supplies	$2,982.00
Utilities	$3,168.00
Veterinary and Animal Care	$2,078.00
Veterinary - BST	$0.00
Veterinary - Pharmaceuticals	$3,727.00
Other Expenses	$2,888.00
Total Variable Expenses	**$52,978.00**
FIXED EXPENSES	
Partners' Salaries and Personal Draws	$0.00
Insurance - General	$3,171.00
Rent	$12,000.00
Taxes and Licenses	$4,360.00
Legal and Accounting	$600.00
Cow Lease	$15,660.00

Total Fixed Expenses	**35,791.00**
INTEREST EXPENSES	
Unsecured Creditors	$0.00
Secured Creditors	$4,186.00
Total Interest Expenses	**$4,186.00**
PRINCIPAL COSTS	
Unsecured Creditors	$17,117.00
Secured Creditors	$12,114.00
Total Principal Costs	**$29,231.00**
TOTAL EXPENSES	**$122,186.00**

John Knutson, one of the General Partners, has provided his declaration in support of the Motion. Dckt. 19. The testimony in his declaration includes the following:

A. "2. I am sixty eight years old and have worked at, or owned, multiple dairies my entire adult life. I am knowledgeable and experienced about all aspects of dairy production and operation."

B. "7. As a result of Bank of Stockton's collection activities, milk and cheese production are down. With the automatic stay in place and with the use of cash collateral, I estimate, based upon decades of experience, that we can be back in good production in a matter of months. I also anticipate a positive cash flow in 2 - 3 months. See Budget submitted herewith as Exhibit "A"."

C. "9. As set forth in the budget, incorporated herein and submitted as Exhibit 'A", we require the use of cash collateral to fund all necessary operating expenses of our business."

D. "10. J & B Dairy will suffer immediate and irreparable harm if it is not authorized to use cash collateral to fund the expenses set forth in the Budget. Absent such authorization, we will not be able to maintain and protect the property."

Declaration, Dckt. 19.

USE OF CASH COLLATERAL ISSUES TO BE ADDRESSED

Neither in the present Motion nor the Declaration does the ΔIP address how it will have operated, without the use of cash collateral, for the twenty-six (26) days from the March 17, 2017 filing to the April 12, 2017 hearing date set by the court for an initial hearing on the Motion to Use Cash Collateral. The present Motion does not seek any retroactive authorization to use cash collateral. The Statement of Financial Affairs states that no significant expenses have been paid in the ninety-days preceding the filing of this bankruptcy case.

In looking at the prior filed cases:

A. In the prior case, 17-90129, Debtor was in that Chapter 12 case for twenty (20) days and did not seek authorization to use cash collateral.

B. In the prior-prior case, 16-91096, Debtor was in that Chapter 12 case for forty-nine (49) days and did not seek authorization to use cash collateral.

C. In the prior-prior-prior case, 16-90923, Debtor was in that Chapter 12 case for sixty-one (61) days and did not seek authorization to use cash collateral.

No explanation is provided as to how since October 7, 2016, when the first of the four recent bankruptcy cases was filed, Debtor has operated without using any cash collateral.

It also appears that Debtor has not paid any rent, for at least the 90 days prior to the commencement of this case (no payments to the named lessor stated on the Statement of Financial Affairs). No claim is listed for the Lessor on Schedule F. The Lessor, Teresina Silva, to whom the Debtor states that it has a lease (Schedule H) and owes $12,000.00 a month in rent (Exhibit A) is not even listed on the Verification of Master Mailing List filed by Debtor (Dckt. 4), which has been signed by John Knutson.

APRIL 12, 2017 HEARING

At the hearing, the ΔIP requested time to file additional pleadings to address issues identified by the court and Creditor. Dckt. 30. The Parties agreed to an interim use of cash collateral to preserve the herd, which is included in Creditor's collateral.

ΔIP stated that it anticipated a check to be received from Pacific Gold Milk Producers to be issued on Friday, April 14, 2017, in an estimated amount of approximately $25,000.00 to $35,000.00. Bank of Stockton and ΔIP agreed that the monies from said check may be used by the ΔIP to pay the following expenses: Labor, Hay, Grain, Power, Rent, and Dairy Supplies.

The court ordered ΔIP to file and serve supplemental pleadings on or before April 20, 2017. Opposition was to be filed on or before April 28, 2017. On April 13, 2017, the hearing was continued to 10:30 a.m. on May 4, 2017. Dckt. 32.

ΔIP'S SUPPLEMENTAL BRIEF

ΔIP filed a Supplemental Brief on April 21, 2017, one day later than the court set as the deadline at the April 12, 2017 hearing. *See* Dckt. 32 (setting a filing deadline of April 20, 2017). Notwithstanding ΔIP failing to comply with the simple filing deadline, the court considers the additional information in the Supplemental Brief and Declaration.

ΔIP begins by stating that the brief covers a history of the business, recent events, and future viability—all of which are "supported" in the Declaration of John Knutson, General Partner. *See* Dckt. 44.

Before considering the Supplemental Brief containing the arguments and explanations of counsel for ΔIP, the court first reviews the Declaration of John Knutson that provides the evidence for what counsel argues in the Supplemental Brief.

The Declaration of John Knutson, providing his personal knowledge testimony (FED. R. EVID. 601, 602) under penalty of perjury consists of the following:

A. "1. I am one of the General Partners for J&B Dairy, Debtor in the above-captioned bankruptcy case."

B. "3. I have provided most of the information that is set forth in our Supplemental Brief and other items were provided by our management team."

C. "4. I have read the Supplemental Brief and know of its contents. I hereby incorporate by reference the Supplemental Brief dated April 20, 2017, as though fully set forth herein."

At this point the court notes that the "declarant" chooses not to provide any clear, personal testimony. Rather, he merely says whatever the attorney has written in the Supplemental Brief is true. But if something turns out not to be true, then "declarant" can choose to say, "No, I didn't incorporate that. See, I didn't actually say that in my 'declaration.'"

D. "5. The contents of the Supplemental Brief are true of my own knowledge. The projections of income, expenses and cash flow are based upon my experience and knowledge and I believe them to be true and accurate."

Declaration, Dckt. 44.

The carefully chosen language of "declarant" is troubling for the court. He fails or refuses to actually provide testimony, but only make a collective blessing of what the attorney has argued in the Supplemental Brief. Also, "declarant" fails to provide any testimony of how the financial information and conclusions were generated, but only states that he "believes," but is apparently unwilling to say they actually are, true. "Declarant" has created an obvious escape hatch to any of his testimony that is shown to be untrue—he merely says that he "believed it" (most likely because his attorney tells him that "if you so believe then you win").

The Declaration provides no personal knowledge testimony, but is merely a backhanded blessing of the arguments of ΔIP counsel in the Supplemental Brief.

In the Supplemental Brief ΔIP's counsel argues that the Debtor pre-petition and now the ΔIP:

A. Signed a contract for raw milk sales to Pacific Gold Milk Products for a premium of $5.00 over Class 4B California milk prices—

    1. Increased milk production by 23,916.70 gallons from January 1, 2017, to 31 March, 2017;

B. Will implement a herd management program that utilizes cull beef sales, bull calf sales, and free martin sales to offset the costs for replacement cows—

    1. Also shopping auction yards for best pricing on replacement animals

        a. Recently replaced 125 animals at an average price of $1,476.00 per head;

C. Has instituted a heifer raising program as part of a herd management program to reduce the overall costs of replacements and to increase the herd naturally—

    1. Veterinary inspections performed quarterly or as needed (last done on January 14, 2017),

    2. Testing performed quarterly (last done on January 21, 2017), and

    3. Consultations with a dairy cow nutritionist regularly (last done on April 6, 2017);

D. Has contacted a cattle broker and established a contract to increase the herd—

    1. Lease for 235 cows for forty-eight months at $60.00 per head per month,

    2. Purchase of springing heifers/close-ups as dairy budget permits;

E. Has sourced non-GMO feeds that are more affordable and provide all the necessary components to promote higher milk production and herd health—

    1. Lowered fee cost per head per day from $6.60 to $4.62;

F. Has decreased its payroll expense—

    1. Staff has been reduced to five employees (down from ten) in January 2017,

2. Payroll has been reduced from $18,659 in January 2017 to approximately $13,000 in April 2017; and

G. Has reduced overall expenses and increased its revenue—

1. Photo cell sensors and new timers are being installed on all outside lights,

2. ΔIP has applied for a Pacific Gas & Electric program that is available for improvements and energy reduction rebates,

3. ΔIP has free weekly meetings with a consultant experienced in accounting and business practices.

ΔIP asserts that an independent appraiser valued the dairy's herd of cows at $1,800.00 per head, more than Creditor's appraisal of $1,700.00 per head. The appraiser valued the herd as a whole at $652,525.00.

ΔIP attached as Exhibit C various estimated data about income and expenses for the next year. Dckt. 45, Exhibit C. At this point, the court notes that no witness has authenticated Exhibit C, explained how it was prepared, or properly authenticated it. FED. R. EVID. 901, 902.

The income and expenses for Debtor J&B Dairy are summarized as follows:

	Income	**Expenses**
April 2017	$49,491.00	$41,480.00
May 2017	$153, 702.00	$159,296.00
June 2017	$144,797.00	$144,457.00
July 2017	$156,484.00	$140,993.00
August 2017	$175,383.00	$151,452.00
September 2017	$175,539.00	$162,304.00
October 2017	$188,856.00	$177,459.00
November 2017	$188,279.00	$153,310.00
December 2017	$184,600.00	$149,837.00
January 2018	$179,064.00	$155,409.00
February 2018	$166,524.00	$144,797.00
March 2018	$187,981.00	$151,345.00
Total	$1,797,151.00	$1,732,139.00

RULING

ΔIP's Supplemental Brief refers to some prior events that caused the dairy to suffer production shortages, but ΔIP, despite the court's discussion at the April 12, 2017 hearing, has not explained how it has been able to operate through four bankruptcy cases without using any cash collateral.

The Supplemental Brief is largely in the nature of trying to encourage the court that Debtor is a viable, ready-for-growth business that should be allowed to spend cash collateral to meet its expenses. ΔIP even provided a projection of the companies income and expenses for the next year, but the court has no reason to believe that the projections will true or that they are accurate or that they were compiled by a competent accountant authorized to be employed in this case.

The supporting "evidence" is thin on anything to provide the court with concrete finances or showing that the continued operation of the dairy will not further deplete the Creditor's collateral.

Creditor is correct in pointing out that ΔIP offers no adequate protection, other than "when this all succeeds, Creditor will be fine." Some of what ΔIP's counsel argues just does not make sense. Though struggling, he argues that milk production has been increased by 23915.7 gallons from January through March 2017. But he also argues that for a month and one half Debtor had no access to proceeds from sale of Non-GMO milk, and production dropped. He states that the dairy operates 24 hours a day, 365 days a year. But the court cannot identify where there exists a 24/7/365 staff for such an operation. Looking at the expenses in the budget, Exhibit 2, there is only $14,000 to $18,000 a month for employees. Assuming two persons a shift, three shifts a day, that requires six "workers," in addition to management. Workers cannot work 7 days a week 52 weeks a year, so the staffing most likely would be increased to 10 persons. If just the 10 workers are paid, that results in labor costs of only $1,800 per person per month for "labor." No provision is made in the budget for employment taxes and employer contributions.

ΔIP discloses that there is apparently some other business, Valley Oak Dairy, but nothing about such a business has been disclosed on any of the bankruptcy Petitions filed by Debtor or on the Schedules.

The Milk Contract (Exhibit 1, Dckt. 45) which is touted as the cornerstone of any reorganization provides that the Buyer agrees to buy "up to" 6,000 gallons of milk per day. Presumably this means that ΔIP is guaranteed to sell 6,000 a day, so long as the milk can be produced. This contract has been in effect since December 1, 2016, but ΔIP does not provide any historical data on the production, the "up to" purchase amounts, and the profit/loss generated from such sales.

A declaration of Len Van Gaalen, Jr. has been improperly filed as an Exhibit in support of the Motion. Exhibit B, Dckt. 45. In the appraisal to the declaration, Mr. Van Gaalen states that he inspected the cattle on March 6, 2017. In his appraisal Mr. Van Gaalen misidentifies the Debtor and ΔIP as "JBN." He also states that he was "given a very limited amount of time in which to conduct the appraisal." Mr. Van Gaalen states that the milk cows "total 332," but he does not identify the cows that he appraised. He concludes that the milk cows have a value of $597,600. The court takes this as the gross value, not including costs of care, transport, and sale if ΔIP's plans do not work out.

Creditor disagrees and presents its counter appraisal. Declaration of Donna Morasci, Dckt. 52. Her conclusions are much more dire as to the condition of the Creditor's collateral.

The court does not find ΔIP's contentions to be persuasive, even not considering the counter evidence presented by Creditor. On Amended Schedule D Debtor states that Creditor is owed $799,100.00, but the collateral has only a value of $601,000.00. Debtor admits that Creditor's secured claim, for which the collateral is the milking cows, breeding bulls, and calves/heifers, is $200,000 under water.

While wanting to continue to use Creditor's collateral consisting of the dairy herd, ΔIP has nothing to offer as the cows age. What ΔIP does say is that to add to the herd, the cash collateral they will be using will not be to provide replacement collateral, but to lease cows from somebody else. As Creditor's collateral dries up, there is no replacement provided by ΔIP.

ΔIP has not shown that it can adequately protect the undersecured interests of Creditor in the cash collateral and collateral (cows) to be used. What ΔIP has shown is that it will use the milk value in the short run to operate, and hopefully build up the business, but if that fails, it is Creditor who will suffer the loss.

Debtor filed this bankruptcy case on March 17, 2017. On the Statement of Financial Affairs Debtor states that the gross income for 2017 to the March 17, 2017 date of filing was $65,536. Statement of Financial Affairs Part 1, Question 1; Dckt. 12 at 22. Giving Debtor the benefit of the doubt that this is only for the first two months of the year, this is $32,768 a month.

For 2016 Debtor states that the gross income was $1,005,865, which is $83,000 a month, and for 2015 it was $2,337,436, which averages $194,786 a month. *Id.* From 2015 to 2016 there was a 57.3% drop in the monthly gross income, and then from 2016 to 2017 the drop in monthly gross revenues is another 60% drop in gross income.

But the forward looking budget projects that the gross income balloons from $153,702 in May 2017 to $187,981 in March 2018. Just looking at the "modest" increase for May 2017, that is a 369% increase from the February 2017 gross revenues. Such a projection, without clear evidentiary support is not believable.

The Motion to Use Cash Collateral 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 for Authority to Use Cash Collateral filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is to Use Cash Collateral is denied.

8. **17-90213-E-12** **J & B DAIRY** **MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION**
AAS-1 **Patrick Greenwell** **4-17-17 [34]**

BANK OF STOCKTON VS.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, and Office of the United States Trustee on April 18, 2017. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Relief from the Automatic Stay is granted.

J & B Dairy ("Debtor") commenced this bankruptcy case on March 17, 2017. Bank of Stockton ("Movant") seeks relief from the automatic stay with respect to assets identified as all Farm Products and Livestock (including all increase and supplies), fluid milk and cream, as well as all agricultural commodities and farm products of every type and description, accounts, and proceeds of accounts receivable, contract rights, and cash and non-cash proceeds from the sale, and exchange or disposition of collateral pledged and possessed by Debtor ("Assets"). The moving party has provided the Declarations of Reed Rosenberg, Donna Morasci, and Arthur Small II to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. Dckts. 26–28.

The Rosenberg Declaration provides testimony that Debtor has not made payments on two loans that came due on August 5, 2016. Dckt. 37. The Declaration states that Debtor, according to signed security agreements, was not supposed to sell any of the Assets unless the names, addresses, and sales schedules were

delivered to Movant prior to sale, but those conditions were never met before sales by Debtor. Movant argues that since February 2016, the herd size has shrunk from 638 Holstein cows and 12 bulls to 350 Holstein cows and 2 bulls without any record explaining the loss.

Movant also argues that Debtor has made unauthorized use of cash collateral, has failed to remit collateral sales proceeds, has failed to maintain the Assets, and has failed to timely propose a plan.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by the assets is determined to be $779,100.00, as stated in the Rosenberg Declaration, while the value of the Property is determined to be $433,740.00, as stated in the Donna Morasci Declaration. Dckt. 38.

DISCUSSION

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay because of unauthorized use of cash collateral, of failure to remit cash proceeds from sales of Movant's collateral, a plan has not been timely proposed, and the debtor and the estate have not maintained the Assets such that they have decreased in value sharply. 11 U.S.C. § 362(d)(1); *Freightliner Mkt. Dev. Corp. v. Silver Wheel Freightlines, Inc.*, 823 F.2d 362, 368–69 (9th Cir. 1987) (requiring debtor to seek affirmative express consent from parties with an interest in cash collateral before commencing use); *In re Ellis*, 60 B.R. 432; *In re Watford*, 159 B.R. 597, 600–01 (M.D. Ga. 1993) (finding that debtor's failure to remit cash proceeds from sale of bank's collateral constitutes ground for relief from stay for cause).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375–76 (1988). Debtor has not presented any evidence to the court. Based upon the evidence submitted by Movant and not presented by Debtor, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2).

The court has denied the Debtor in Possession's ("ΔIP") motion to use cash collateral. ΔIP has no ability to care for the main portion of the collateral, the herd of cattle.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States

Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

However, this Motion has been set in conjunction with the hearing on the ΔIP's motion to use cash collateral, which has been denied. Without the use of cash collateral the ΔIP cannot care for the dairy herd. The court cannot ignore that these animals need to be cared for. It is commonly known that a dairy herd requires even more care and maintenance, including milking, than other animals that can just be left to graze in the field.

The court waives the 14-day stay of enforcement that arises pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3).

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by Bank of Stockton ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Property, under its security agreement, loan documents granting it a lien in the asset identified as all Farm Products and Livestock (including all increase and supplies), fluid milk and cream, as well as all agricultural commodities and farm products of every type and description, accounts, and proceeds of accounts receivable, contract rights, and cash and non-cash proceeds from the sale, and exchange or disposition of collateral pledged and possessed by Debtor ("Assets"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Property to the obligation secured thereby.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.
>
> No other or additional relief is granted.

9. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH JOHNSON ELECTRONICS**
WFH-48 **George Hollister** **4-10-17 [772]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on April 10, 2017. By the court's calculation, 24 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (twenty-one-day notice).

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Approval of Compromise is granted.

Michael McGranahan, the Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with Johnson Electronics ("Settlor"). The claims and disputes to be resolved by the proposed settlement related to pre-petition transfers in an alleged amount of $19,598.25.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 775):

A. Settlor shall pay $11,000.00 to the Estate.

B. Movant shall give to Settlor a general release of all claims, including but not limited to claims related to the adversary proceeding.

C. Movant shall dismiss the adversary proceeding and agrees that Settlor shall be entitled to file an amended claim pursuant to 11 U.S.C. § 502(h) and agrees that the claim will be allowed.

The Motion pleads that the settlement amount of $11,000.00 has been paid to the Estate already.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met.

Probability of Success

Movant argues that Settlor asserts an ordinary course of business defense arguing that a lapse in time between due date of the payments and the actual payment was consistent with ordinary terms in the industry and the ordinary course of business between the parties. Movant asserts that Settlor has the burden of proof on that point, however, and has not yet proven it. Nevertheless, Movant recognizes that a defense of ordinary course of business does not follow bright line rules, and he recognizes that there is a risk to litigation.

Settlor also asserts that payment by joint check does not constitute a transfer of an interest in property by the debtor, but Movant argues that Settlor's defense does not apply because the joint check agreement was made within the preference period. Overall, Movant recognizes that there is some risk to litigation of the adversary proceeding.

Difficulties in Collection

Movant states that he is unaware of any impediments to collection.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that litigation and post-trial collection could incur up to $9,000.00 in expenses.

Paramount Interest of Creditors

Movant is unaware of any opposition by creditors but will evaluate any filed opposition.

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because the settlement amount is equal to the approximate amount that would go to the Estate as net recovery from litigation. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Michael McGranahan, the Trustee ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Johnson Electronics ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 775).

10. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH WPCS INTERNATIONAL-SUISUN CITY, INC.**
WFH-49 **George Hollister** **4-10-17 [777]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on April 10, 2017. By the court's calculation, 24 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (twenty-one-day notice).

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Approval of Compromise is granted.

Michael McGranahan, the Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with WPCS International – Suisun City, Inc. ("Settlor"). The claims and disputes to be resolved by the proposed settlement arise from two pre-petition transfers made to Settlor in the total amount of $78,091.94.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 780):

A. Settlor shall pay $15,000.00 to Movant as trustee of the Estate.

B. Movant and Settlor jointly and severally release one another from any and all claims relating to the adversary proceeding.

C. Settlor shall be allowed to file an amended claim asserting an additional claim pursuant to 11 U.S.C. § 502(h).

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met.

Probability of Success

Movant notes that Settlor argues that one of the transfers—for $71,949.37—had been properly served with a preliminary notice, and therefore, the joint check issuing it did not constitute a transfer of the debtor's property. Movant believes that Settlor's argument may have merit if Settlor is able to prove that the preliminary notice was served properly. The transfer for $6,142.57 is not covered by that defense, however, because no preliminary notice was served.

Settlor has also defended that the $71,949.37 transfer is protected from avoidance pursuant to 11 U.S.C. § 547(c)(1) because Settlor had given up its stop notice rights contemporaneously with receipt of payment. Movant argues that the additional defense raises the risk of litigating successfully.

Difficulties in Collection

Movant states that he is unaware of any impediment to collection.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that litigation and post-trial collection efforts could cost up to $9,000.00.

Paramount Interest of Creditors

Movant is not aware of any opposition by creditors but will consider any filed opposition.

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because Movant has acknowledged a considerable risk in recovering funds from the $71,949.37 transfer, which would leave recovery from the $6,142.57 transfer. The settlement amount of $15,000.00 more than doubles the amount that Movant would have recovered for the Estate from any successful litigation of the lesser transfer. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Michael McGranahan, the Trustee ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and WPCS International – Suisun City, Inc. ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 780).

11. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **MOTION TO AMEND**
15-9047 **WFH-1** **3-21-17 [55]**

MCGRANAHAN V. INTEGRATED COMMUNICATIONS SYSTEMS

Final Ruling: No appearance at the May 4, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant's Attorney on March 21, 2017. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

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

The Motion to Amend Judgment has been dismissed without prejudice by the Plaintiff-Trustee (Movant) and is removed from the calendar.

Michael McGranahan, the Chapter 7 Trustee, ("Movant") filed this Motion to Amend Judgment of March 7, 2017, in this Adversary Proceeding, No. 15-9047, to correct the defendant's name. The complaint alleged that Integrated Communications Systems was the defendant in this proceeding, and the court's judgment used that name.

Defendant answered the complaint on August 19, 2015, and stated that its actual name is ICS Integrated Communications Systems. *See* Exhibit B, Dckt. 57; Dckt. 9. Movant asserts that Defendant participated in the adversary proceeding fully through judgment and that at no time was there any confusion as to Defendant's identity.

Movant requests that the court's judgment be amended to insert "ICS" at the beginning of Defendant's name. Movant's request to amend the court's March 7, 2017 judgment is warranted, and the judgment shall be amended to append the initials "ICS" to the beginning of each reference to Defendant's name.

Dismissal of Motion Without Prejudice

On April 26, 2017, Movant filed a "Supplemental Statement" that the Movant deems the Motion moot because the judgment has been satisfied. Movant further states that the motion "may be dismissed without prejudice."

No opposition has been filed to the Motion. The court accepts the "Supplemental Statement" as the dismissal of the Motion to Amend without prejudice.

12.	**15-90358-E-11** **MHK-22**	**LAWRENCE/JUDITH SOUZA** **Anthony Asebedo**	**CONTINUED MOTION BY ANTHONY ASEBEDO TO WITHDRAW AS ATTORNEY** **2-27-17 [506]**

Final Ruling: No appearance at the May 4, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on February 27, 2017. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

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

The Motion to Withdraw is granted.

Meegan, Hanschu & Kassenbrock ("Movant"), attorney of record for Lawrence Souza and Judith Souza ("Debtor in Possession"), filed a Motion to Withdraw as Attorney as Debtor in Possession's counsel in the bankruptcy case. Movant states the following:

1. Movant has not received prompt or complete responses to communications with and requests for information from Debtor in Possession.

2. Movant and Debtor in Possession have differed about the strategy and conduct of the case to the point that routine tasks become unreasonably difficult.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on March 21, 2017. Dckt. 514. Debtor in Possession argues that withdrawal should not be allowed because Movant has been involved in numerous transactions throughout this case, and any change in counsel at this time would incur more expenses for the Estate.

Debtor in Possession believes that communication was hindered because their primary contact with Movant was through paralegal Mary Gillis, who was replaced by Anastasia Hoang. Ms. Hoang, Debtor in Possession argues, then moved to Fitzgerald, Felderstein, Willoughby and Pazcuzzi, LLP, which represents David Flemmer as trustee in the Souza Propane, Inc. case. Debtor in Possession argues that there was a delay in communication while they determined if there was a conflict of interest from the transfer.

Debtor in Possession admits that they have differed with Movant about case strategy and state that they "need to assume a more global perspective than that required of [Movant]." Debtor in Possession states that they "are often personally involved in working with prospective buyers of real estate, realtors and property management to expedite and achieve the best results for the benefit of the estate, requiring . . . extra time and energy."

If the Motion is granted, Debtor in Possession states that they will need more time to retain new counsel, and they "suggest moving any decision regarding this situation to the already scheduled Status Hearing on August 24, 2017, at 2:00 P.M."

ORDER SPECIALLY SETTING AN INITIAL HEARING

The court issued an Order on April 10, 2017, specially setting an initial hearing on this matter. Dckt. 545. The court recognized that much has been accomplished in this case and determined that an initial hearing was necessary to understand why communication has failed between Debtor in Possession and their counsel.

The court ordered the personal, in-court appearances of Lawrence Souza, Judith Souza, Anthony Asebedo, and David Meegan.

APRIL 12, 2017 INITIAL HEARING

The court conducted an Initial Hearing on the Motion on April 12, 2017, in the Sacramento Division Courthouse. Dckt. 548. The court noted that it continued the U.S. Trustee's Motion to Convert or Dismiss this case to 10:30 a.m. on May 4, 2017. At the initial hearing, the parties presented their concerns to the court, as well as Debtor in Possession expressing a desire to work with current counsel, or if that was not possible, then reasonable time to obtain replacement counsel. Current counsel for Debtor in Possession stated that, in addition to affording Debtor in Possession time to obtain replacement counsel if necessary, he would again communicate with Debtor in Possession about the plan alternative, as well as whether a conversion to Chapter 7 was in Debtor's interest.

The court continued the hearing to allow the parties to communicate and address the organizational issues that may hamper the decision-making by Debtor in Possession.

APRIL 13, 2017 HEARING

The court having concluded its initial hearing, the court continued the hearing on the matter to 10:30 a.m. on May 4, 2017. Dckt. 551.

ORDER APPROVING SUBSTITUTION OF ATTORNEYS FOR DEBTORS

The court issued an Order Approving Substitution of Attorneys for Debtors on April 26, 2017. Dckt. 574. The court approved the substitution of David Johnston as legal counsel in place of Anthony Asebedo and David Meegan.

APPLICABLE LAW

District Court Rule 182(d) governs the withdrawal of counsel. LOCAL BANKR. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. Cal. L.R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, No. 1:08cv01523 OWW GSA, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. June 23, 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554 (Cal. Ct. App. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 559.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. Cal. L.R. 180(e).

Termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdraw from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. CAL. R. PROF'L CONDUCT 3- 700(A)(2).

The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probable cause and for the purpose of harassing or maliciously injuring any person and (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act. CAL. R. PROF'L CONDUCT 3-700(B).

Permissive withdrawal is limited to certain situations, including the one relevant for this Motion:

(1) The client

> (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.

CAL. R. PROF'L. CONDUCT 3-700(C)(1)(d).

DISCUSSION

The court having issued an order approving the substitution of David Johnston as legal counsel for Debtor in Possession in place of Anthony Asebedo and David Meegan, this Motion is warranted. Anthony Asebedo and David Meegan are permitted to withdraw as legal counsel, and the Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Withdraw as Attorney filed by Debtor in Possession's Counsel 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 Withdraw as Attorney is granted, and Anthony Asebedo and David Meegan are permitted to withdraw as counsel for Debtor in Possession Lawrence Souza and Judith Souza.
>
> The withdrawal has been effectuated by the Substitution of Attorney filed on April 24, 2017 (Dckt. 573) and Order thereon (Dckt. 574) by which David Johnston has substituted as counsel for the Debtors in Possession, and Anthony Asebedo and David Meegan, and their firm, are authorized to withdraw from representation of the Debtor in Possession.

13. **15-90358-E-11** **LAWRENCE/JUDITH SOUZA** **MOTION FOR COMPENSATION FOR RYAN, CHRISTIE, QUINN & HORN, ACCOUNTANT(S)**
MHK-25 **Anthony Asebedo** **3-29-17 [532]**

Final Ruling: No appearance at the May 4, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on March 29, 2017. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Ryan, Christie, Quinn & Horn, the Accountant ("Applicant") for Lawrence Souza and Judith Souza, Debtor in Possession("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 23, 2016, through March 20, 2017. The order of the court approving employment of Applicant was entered on September 9, 2016. Dckt. 403. Applicant requests fees in the amount of $38,415.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature,

the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). A professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

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

A review of the application shows that the services provided by Applicant included determining income tax consequences from prior and projected sales of assets, reviewing individual tax returns, reviewing monthly operating reports, and preparing tax returns. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES REQUESTED

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

General Case Administration: Applicant spent 16.3 hours in this category. Applicant communicated with Debtor in Possession and counsel, checked for conflicts, and made multiple requests for documents from Debtor in Possession.

Tax-Related Matters: Applicant spent 104.6 hours in this category. Applicant determined potential income tax consequences, determine tax attributes available to the estate, and determined that post-petition sales of property prior to its retention resulted in gains to the estate.

Correspondence: Applicant spent 47.4 hours in this category. Applicant made multiple requests to secure specific records, had numerous telephone calls with Debtor in Possession and their tax preparer, and spoke with bankruptcy counsel as well. Applicant also spent significant time educating Debtor in Possession and their historical tax preparer about the tax consequences associated with pre-petition foreclosures and post-petition sales of real property.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Paul Quinn, CPA	119.5	$250.00	$29,875.00
Deborah Monis, CPA	48.8	$175.00	$8,540.00
	0	$0.00	$0.00
	0	$0.00	$0.00

	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees For Period of Application			$38,415.00

FEES ALLOWED

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of $38,415.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Fees $38,415.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Ryan, Christie, Quinn & Horn ("Applicant"), Accountant for the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Ryan, Christie, Quinn & Horn is allowed the following fees and expenses as a professional of the Estate:
>
> Ryan, Christie, Quinn & Horn, Professional employed by the Debtor in Possession
>
> Fees in the amount of $38,415.00,
>
> as an interim allowance of fees and expenses pursuant to 11 U.S.C. § 331 and subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Debtor in Possession or Chapter 7 Trustee, if the case is converted, is authorized to pay the fees allowed by this Order

from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case or a Chapter 7 case, if converted.

14. 15-90358-E-11 UST-1 — LAWRENCE/JUDITH SOUZA — David Johnston — COUNTER MOTION TO CONVERT TO A CASE UNDER CHAPTER 13 — 4-20-17 [569]

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

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

Local Rule 9014-1(i) Countermotion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on April 20, 2017. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. LOCAL BANKR. R. 9014-1(i) (requiring filing and service by the last day that opposition to the original motion is due).

The Countermotion to Convert was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(i). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, **----------**.

The Countermotion to Convert the Chapter 11 Bankruptcy Case to a Case under Chapter 13 is denied.

This Countermotion to Convert the Chapter 11 bankruptcy case of Lawrence Souza and Judith Souza ("the Souzas"), who have been the debtors in possession since commencing this bankruptcy case on April 10, 2015, to a case under Chapter 13 has been filed by the Souzas in response to the United States Trustee's Motion to Convert the Case to One Under Chapter 7. Dckt. 500. The Souzas assert that the case should be converted based on the following grounds:

A. The case was filed voluntarily.

B. The case has not been converted from another chapter of the Code.

C. The Souzas are individuals with regular income, namely Social Security retirement benefits and pension benefits with noncontingent, liquidated secured and unsecured debts within the limits set by Congress.

D. When the Chapter 11 case was filed, there were several contingent claims for which the Souzas may have had liability, but many of those claims were fully paid by the sale of assets in *In re Souza Propane, Inc.*, No. 14-91633.

E. Many of the Souzas' assets have been sold during the course of this case.

F. The Souzas meet the requirements of 11 U.S.C. § 1112(d) by requesting conversion and by there being no discharge issued already in this case.

APPLICABLE LAW

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

The Bankruptcy Code Provides:

> (d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—
>
> (1) the debtor requests such conversion;
>
> (2) the debtor has not been discharged under section 1141(d) of this title . . . .

11 U.S.C. § 1112(d)(1) & (2).

As another bankruptcy court has noted, neither the Code nor its legislative history explain how the court should exercise discretion when considering a motion to convert a Chapter 11 case to one under Chapter 13. *In re Tornheim*, 181 B.R. 161, 169 (Bankr. S.D.N.Y. 1995). Courts have analyzed the reverse position, therefore—conversion from Chapter 13 to Chapter 11 under 11 U.S.C. § 1307(d). *See, e.g.*, *id.*

Additionally, conversion to Chapter 13 is limited by the provisions of 11 U.S.C. § 1112(f). Under that section of the Code, "the debtor must already meet the eligibility requirements" of the requested chapter. *In re Tornheim*, 181 B.R. at 169. What a debtor seeks from the court is not absolute relief to convert to Chapter 13; it is discretionary relief. *See id.*

A debtor must show "both eligibility to be a debtor under the new chapter and a reasonable prospect for a successful [rehabilitation]." *Id.* (citing *In re Funk*, 146 B.R. 118, 124 (D.N.J. 1992)). Part of what a court considers is whether a debtor "has caused unreasonable or prejudicial delay or is unable to effectuate a plan." *Id.* (citing *In re Funk*, 146 B.R. at 122–23; *Anderson v. United States ex rel. Small Bus. Admin. (In re Anderson)*, 165 B.R. 445, 448–49 (S.D. Ind. 1994)).

DISCUSSION

The court begins with the countermotion itself, which must state with particularity the grounds upon which the requested relief is based. The grounds are summarized as follows:

A. "On April 10, 2015, the [Souzas] filed a voluntary petition in this Court under Chapter 11 of Title 11, ..."

B. "The Debtors are eligible to be debtors in a Chapter 13 case.

1. They are individuals with regular income, namely Social Security retirement benefits and pension benefits."

C. "[Souzas] noncontingent, liquidated unsecured debts are less than $394,725 and their noncontingent, liquidated secured debts are less than $1,184,200."

D. When their Chapter 11 petition was filed, there were a number of contingent claims on which the Debtors might have had liability. Many of those claims were fully paid by the sale of substantial assets in the related case of In re Souza Propane, Inc., case number 14-91633."

No points and authorities has been filed by the Souzas. There is no analysis of what debts the Souzas had when the bankruptcy case was filed. There is no legal definition of what constitutes "contingent" claims for purposes of the 11 U.S.C. § 109(e) eligibility analysis for the Souzas in this case that was filed two years ago.

E. "Many of the Debtors' assets have been sold during the course of their personal Chapter 11 case."

As above, no points and authorities has been filed and there is no analysis of or legal basis for the assertion that post-petition payments and changes in claims relates back to the commencement of the filing of the Souzas' bankruptcy case.

F. "The Debtors will be able to propose a feasible plan under Chapter 13."

No draft Chapter 13 Plan, no testimony of how and what will be proposed as a plan. Rather, after being in this Chapter 11 case for two years, only the argument of the Souzas' new counsel that a "plan is coming" is provided to the court.

Dckt. 569.

The countermotion is supported by the Declaration of Lawrence Souza, one of the two debtors who is currently one of the two debtors in possession in this case. Mr. Souza's testimony is summarized as follows:

A. "On April 10, 2015, my wife and I filed a voluntary petition in this Court under Chapter 11 of Title 11, United States Code."

B. "My wife and I are eligible to be debtors in a Chapter 13 case."

Mr. Souza elects to provide the court with his personal legal conclusion as to eligibility. No basis has been shown that Mr. Souza has knowledge of the bankruptcy laws or has any basis for expressing such a legal opinion. Either Mr. Souza "demands" that his case be converted, therefore he is eligible, or he elects to blindly sign whatever "declaration" his new attorney puts in front of him because he is assured, "Sign This And You Win!" FN.1.

FN.1. Souzas' new counsel is well known by them, as he was the attorney who filed the Chapter 11 case for their business, Souza Propane. 14-91633. The Souza Propane case was filed on December 17, 2014 and a motion to appoint a Chapter 11 trustee was filed by the court on January 15, 2015 (29 days after the case was filed). One of the serious problems was that the Souza Propane debtor in possession, for which the Souzas were the responsible persons, was funding it post-petition operation with unauthorized unsecured credit being provided by the Souzas to the Souza Propane estate.

C. "We are individuals with regular income, namely Social Security retirement benefits and pension benefits. Our noncontingent, liquidated unsecured debts are less than $394,725 and our noncontingent, liquidated secured debts are less than $1,184,200."

Mr. Souza does not provide any testimony about how he reaches such conclusions, merely "finds" that he had debts under the 11 U.S.C. § 109(e) eligibility limits.

D. "When the petition was filed, there were a number of *contingent* claims on which 10 we might have had liability. Many of those claims were fully paid by the sale of substantial 11 assets in the related case of In re Souza Propane, case number 14-91633."

As stated above, no points and authorities is provided as to what constitutes "*contingent*" claims. Mr. Souza demonstrates no legal knowledge as to what constitutes a "contingent" claim for purposes of 11 U.S.C. § 109(e). Mr. Souza provides no testimony as to what he personally, to the extent he can provide testimony as to what constitutes a "contingent claim," defines as a contingent claim. Mr. Souza does not identify the claims asserted to be "contingent," what the respective "contingencies" were, and how such "contingencies" were rendered ineffective.

E. "Many of our assets have been sold during the course of our personal Chapter 11 case. At this point, it makes more sense to be in a case under Chapter 13 where we can make a single payment to the Chapter 13 Trustee, avoid the need for debtor-in-possession accounts, monthly operating reports, and quarterly fees when our only substantial income will be Social Security benefits and pension benefits."

Mr. Souza appears to admit that all of the debts existed, not that they were contingent. Then, during the Chapter 11 case (outside a confirmed plan), the Souzas acting as debtors in possession and their prior counsel, were allowed to sell property of the bankruptcy estate (rather than being forced by the court to comply with the Bankruptcy Code and expeditiously confirm a plan. On its face, Mr. Souza's declaration states that only because some of his debts have been paid post-petition he is now claiming that such debts did not exist as of the commencement of this case.

Further, Mr. Souza's declaration manifests a belief that because the Souzas want it, they can rewrite the Bankruptcy Code to serve their personal needs. He laments the Chapter 11 estate having incurred substantial professional fees. However, that is because this has been a very complicated Chapter 11 case, tied to the even more complex Chapter 11 case filed by Souza Propane (a case in which the Souzas could not fulfill their duties as the responsible persons for that debtor in possession, and the appointment of a trustee was necessary). Merely because the Souzas believe converting the case to one under Chapter 13 so they can avoid the obligations of a debtor in possession and the costs and expenses of a Chapter 11 case, such a desire/demand on their part does not amend the Bankruptcy Code as written by Congress.

F. "We will be able to propose a feasible plan under Chapter 13 and request conversion of our Chapter 11 case to a Chapter 13 case."

Though the Souzas are two years into their Chapter 11 case without a plan, Mr. Souza's testimony is limited to his conclusion that they can propose a plan, his conclusion that the plan will be feasible, and his desire that the Souzas be freed of the Chapter 11.

Declaration, Dckt. 571.

11 U.S.C. § 109(e) Eligibility for Chapter 13

Congress has established the eligibility requirements for an individual to seek relief under Chapter 13. Those provisions are:

"§ 109. Who may be a debtor

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $ 394,725 and noncontingent, liquidated, secured debts of less than $ 1,184,200 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $ 394,725 and noncontingent,

liquidated, secured debts of less than $ 1,184,200 may be a debtor under chapter 13 of this title."

11 U.S.C. § 109(e). This eligibility requirement breaks down into several straightforward requirements that can be paraphrased as follows:

A. The debtor must be an individual.

The Souzas are two individual human beings, meeting this requirement.

B. The debtor must have regular income.

While stating the conclusion that the Souzas have regular income of "Social Security" and unspecified "pension benefits," no information is provided as to the amount of this income and how much of it can be used to fund a plan.

C. **On the date of filings** of the bankruptcy petition -

1. The debtor must have noncontingent, liquidated, unsecured debts of less than $ 394,725; and

2. The debtor must have noncontingent, liquidated, secured debts of less than $ 1,184,200.

On this point, the Souzas and their counsel are very careful not to state how much noncontingent, liquidated unsecured and secured debt they had **on the date of filing their bankruptcy petition** on April 14, 2015 (two years prior to the hearing on this Countermotion). Mr. Souza appears to admit in his declaration that **the amount of secured and unsecured debt they have now, two years after the case is filed**, is less than the jurisdictional limits only due to post-petition sales of property and payment of claims outside of a Chapter 11 plan.

The analysis of the law (for which no points and authorities is provided by the Souzas) begins with the effect of the conversion of a bankruptcy case. Congress has established the law on that in 11 U.S.C. § 348(a) which provides (emphasis added):

§ 348. Effect of conversion

(a) **Conversion of a case** from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) [not applicable to 11 U.S.C. § 109(e) eligibility determination] of this section, **does not effect a change in the date of the filing of the petition**, the commencement of the case, or the order for relief."

Though the Souzas may want to treat a conversion to be as if they have not reaped the benefits of being Chapter 11 debtors in possession for two years and deem their case as if it were filed in May 2017, such is not permitted by the Bankruptcy Code as enacted by Congress.

In *Slack v. Wilshire Ins. Co. (In re Slack)*, the Ninth Circuit panel applied the plain language of 11 U.S.C. § 109(e) to state that the determination is made as of the date the bankruptcy petition was filed. 187 F.3d 1070 (9th Cir. 1999). The court will not look to post-petition events to change the "when the petition was filed" determination date. *Id.* at 1073. In *Slack* the issue was whether a tort liability claim was "liquidated" when the petition was filed. As previously established in the Ninth Circuit, the debt is "liquidated" for purposes of the 11 U.S.C. § 109(e) eligibility requirements if the amount owed on the disputed debt was readily determinable. *Fostvedt v. Dow (In re Fostvedt)*, 823 F.2d 305, 306 (9th Cir. 1987). A mere dispute as to liability does not render the debt "unliquidated." *In re Slack*, 187 F.3d at 1075.

Two years later, the Circuit addressed the proper determination of eligibility in *Scovis v. Henrichsen (In re Scovis)*, beginning (and possibly ending) with the claims information included in good faith in the bankruptcy schedules attested to under penalty of perjury by the debtor. 249 F.3d 975 (9th Cir. 2001).

> "We now simply and explicitly state the rule for determining Chapter 13 eligibility under § 109(e) to be that eligibility should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith."

Id. at 982.

In their present Motion the Souzas eschew any statement of what their secured and unsecured debts were as of the filing of the bankruptcy petition on April 10, 2015. The court's review of Schedules D, E, and F attested to under penalty of perjury by the Souzas discloses the following general information:

A. Schedules D filed by the Souzas –

1. Original Schedule D, Filed April 10, 2015; Dckt. 1.

a. Noncontingent, Liquidated, Undisputed Secured Claims Totaled.....($2,914,682.01)

2. Amended Schedule D Filed June 19, 2015; Dckt. 72.

a. Noncontingent, Liquidated, Undisputed Secured Claims Totaled.....($2,914,682.01)

B. Schedules E Filed by the Souzas –

1. Original Schedule E Filed April 10, 2015; Dckt. 1.

a. Noncontingent, Liquidated, Undisputed
Unsecured Priority Claims Totaled.....($2,169.63)

C. Schedule F Filed by the Souzas

a. Original Schedule F Filed April 10, 2015; Dckt. 1.

(1) Noncontingent, Liquidated, Undisputed
General Unsecured Claims Totaled.....($1,762,455.79)

For a number of claims, they are listed as contingent, unliquidated, and disputed for a dollar amount of "unknown," for claims relating to lawsuits involving the Souzas.

b. First Amended Schedule F Filed May 8, 2015; Dckt. 53.

(1) Noncontingent, Liquidated, Undisputed
General Unsecured Claims Totaled.....($1,843,375.13)

Again, the Souzas list as "unknown" the dollar amount for any claims stated to be unliquidated, contingent, or disputed.

c. Second Amended Schedule F Filed July 14, 2015; Dckt. 91.

(1) Noncontingent, Liquidated, Undisputed
General Unsecured Claims Totaled.....($1,472,459.77)

Again, the Souzas list as "unknown" the dollar amount for any claims stated to be unliquidated, contingent, or disputed.

d. Third Amended Schedule F Filed August 27, 2015; Dckt. 135.

(1) Noncontingent, Liquidated, Undisputed
General Unsecured Claims Totaled.....($1,486,855.14)

Again, the Souzas list as "unknown" the dollar amount for any claims stated to be unliquidated, contingent, or disputed.

e. Fourth Amended Schedule F Filed Jul7 21, 2016; Dckt. 376.

(1) Noncontingent, Liquidated, Undisputed
General Unsecured Claims Totaled.....($1,486,855.14)

Again, the Souzas list as "unknown" the dollar amount for any claims stated to be unliquidated, contingent, or disputed.

Accepting the Souzas' statements under penalty of perjury as to the amount of secured and unsecured debt, made years before their current desire to get out of Chapter 11 and into Chapter 13, the noncontingent, liquidated, undisputed debts as of the filing of the petition were:

A. Secured Debt.....($2,914,682.01)

B. Unsecured Debtor (Priority and Non Priority).....($1,489,024.77),

both of which are well in excess of the 11 U.S.C. § 109(e) limits of $1,184,200 for secured claims (146% of the maximum) and $394,725 for unsecured claims (277% of the maximum).

Both in the Motion and Mr. Souza's declaration the word "*contingent*" is thrown in (in italic for emphasis), but never defined. It appears that the word is used as an incantation for which there is but one outcome—the Souzas get what they demand from the court, no questions asked.

In addition to the Souzas having stated previously that the above debt is not "contingent," it was not previously asserted (in the period of time the Souzas were not trying to create the appearance that they could have qualified as Chapter 13 debtors in April 2015) because there is no indication that any of the debt is "contingent." The Ninth Circuit Court of Appeals addressed what is a "contingent" debt for purposes of 11 U.S.C. § 109(e) in *Fostvedt v. Dow (In re Fostvedt)*. The statement of the law by the Ninth Circuit Court of Appeals is:

> "Second, the rule is clear that **a contingent debt is "one** which the debtor will be **called upon to pay only** upon the **occurrence or happening of an extrinsic event** which will **trigger the liability of the debtor** to the alleged creditor." *Brockenbrough v. Commissioner*, 61 Bankr. 685, 686 (W.D. Va. 1986), quoting *In re All Media Properties, Inc.*, 5 Bankr. 126, 133 (Bankr. S.D. Tex. 1980), *affd. per curiam*, 646 F.2d 193 (5th Cir. 1981). "Where a contract was entered into by parties who did not contemplate that any further act had to be completed in order to trigger contractual liability, then such liability would not be contingent." *Lambert*, 43 Bankr. at 922."

Fostvedt, 823 F.2d at 306–07 (emphasis added).

It appears that the liquidated, noncontingent, undisputed debts of the Souzas may well be even greater, in that it appears that they excluded (listing the amount as "unknown") claims that creditors had against them arising in pending litigation. Merely because a debt has not been reduced to judgment does not render it contingent.

The Souzas have not shown this court that they are eligible to be debtors in a Chapter 13 case. To the contrary, the available evidence, including all the Schedules D, E, and F filed under penalty of perjury by the Souzas, establishes that they are not eligible to be Chapter 13 debtor.

The Countermotion 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 Countermotion to Convert the Chapter 11 case to one under Chapter 13 filed by Lawrence Souza and Judith Souza 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 Countermotion to Convert is denied.

15. 15-90358-E-11 UST-1 — LAWRENCE/JUDITH SOUZA — Anthony Asebedo — CONTINUED MOTION TO CONVERT CASE TO CHAPTER 7 OR MOTION TO DISMISS CASE — 2-22-17 [500]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, the former Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on February 22, 2017. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

The Motion to Convert the Chapter 11 Bankruptcy Case to a Case under Chapter 7 is granted, and the case is converted to one under Chapter 7.

This Motion to Dismiss the Chapter 11 bankruptcy case of Lawrence Souza and Judith Souza has been filed by Tracy Hope Davis ("Movant"), the United States Trustee. Movant asserts that the case should be dismissed or converted based on the following grounds:

A. The Debtor in Possession (ΔIP), the two individual debtors who filed the voluntary Chapter 11 case, has not proposed a plan in the case's two-year history, causing prejudicial delay against creditors.

B. ΔIP owes quarterly fees of $975.

ΔIP'S DECLARATION IN OPPOSITION

ΔIP filed a Declaration in Opposition on March 30, 2017. Dckt. 537. ΔIP states in the declaration that the delinquent quarterly fees were paid on February 23, 2017.

Debtor acknowledges that a plan has not been proposed in this case and argues that the reason for the delay is that Debtor has been uncertain about tax consequences for various sales of real property that were owned by Souza Properties, Inc., Debtor's wholly-owned S-Corporation. Debtor states that a Certified Public Accountant that the court approved to be employed told Debtor that 2014 tax returns were incorrect and would need to be amended before 2015 tax returns could be filed. Debtor claims to be seeking "an experienced CPA to prepare the amended [2014] return," after which they would be closer to proposing terms for a plan.

APRIL 13, 2017 HEARING

At the hearing, the court noted that this matter could be influenced by whether the court decides to grant a motion to withdraw as attorney, and therefore, the court continued the hearing on this matter to 10:30 a.m. on May 4, 2017. Dckt. 558.

The court has granted the motion to withdraw, it effectively having been rendered moot by the ΔIP substituting in replacement counsel for the prior attorneys for ΔIP.

APPLICABLE LAW

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

The Bankruptcy Code Provides:

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

11 U.S.C. § 1112(b)(1).

DISCUSSION

No further pleadings have been filed since the April 13, 2017 hearing, except for a Countermotion for the court to convert this case to one under Chapter 13. The Countermotion (Dckt. 569) has been denied by separate order of the court. The court does not repeat that ruling in these Civil Minutes, but incorporates it herein by this reference. In short, the ΔIP's arguments that it meets the dollar eligibility requirements of 11 U.S.C. § 109(e) as of the filing of the petition are not well founded in law or fact. The very statements under penalty of perjury by Lawrence and Judith Souza in the Schedules belie their current attempts to have this court improperly convert this case to one under Chapter 13.

The U.S. Trustee argues that the case should be converted because of ΔIP's failure to propose a Plan of Reorganization two years into this case. The U.S. Trustee emphasizes that prior status reports indicate that ΔIP's former counsel, who has now been substituted out in favor of the counsel who sought to have the case converted to one under Chapter 13, had drafted a disclosure statement and outline of a plan as early as June 2016, and possibly August 2015. The Trustee argues that not having provided those documents yet is prejudicial delay.

ΔIP argues that other factors delayed proposing any plan terms, however. ΔIP has argued that while they are attempting to sell various properties, their sales are subject to market conditions. Additionally, Debtor has been investigating how those property sales would affect taxes to them as individuals because the properties are owned by a S-Corporation that is property of the estate. Finally, ΔIP indicates that an accountant will need to help amend and file tax returns from prior returns, and after that point, ΔIP intends to propose a plan.

The court has allowed ΔIP use cash collateral, sell property of the estate, and administer the estate outside of a confirmed plan for two years due to the complexity of the companion bankruptcy case of Souza Propane. 14-91633. The Souza Propane case was filed on December 17, 2014. Lawrence and Judith Souza, the debtors and ΔIP in this case were the responsible person for the debtor in possession Souza Propane. That case was filed by ΔIP's current counsel, who was recently subbed-in to replace ΔIP's prior counsel.

In Souza Propane, the court ordered the appointment of a Chapter 11 Trustee on January 15, 2015, just twenty-nine days after the case was commenced. 14-91633; Order, Dckt. 56. The grounds for converting the case included the responsible persons for Souza Propane failing to properly perform their duties for that debtor in possession. This included making unauthorized unsecured loans to the bankruptcy estate, being unable to obtain post-petition financing to operate the propane business (purchase inventory), and the responsible persons had not filed the required monthly operating report for December 2015. *Id.*; Civil Minutes, Dckt. 70.

While ΔIP has paid the very small quarterly US Trustee payment that was in default, ΔIP has demonstrated that there is no intention to prosecute a Chapter 11 plan in this case. ΔIP, along with changing counsel has filed a counter motion stating that ΔIP needs to convert this case to one under Chapter 13. Such a conversion is impossible.

It being clear that ΔIP having no intention of pursuing a Chapter 11 plan, apparently because the ΔIP did not like what has to be in a Chapter 11 plan, believes having the case improperly converted to one under Chapter 13 will allow the ΔIP to run the case as they want, without regard to the bankruptcy laws.

At this point, the question becomes what is in the best interests of the estate and creditors – conversion or dismissal. 11 U.S.C. § 1112(b). The U.S. Trustee does not state with particularity (FED. R. BANKR. P. 9013) what grounds weigh in favor of conversion and what grounds weigh in favor of dismissal. While the court can just deny a motion when sufficient grounds are not stated with particularity in the motion, here, it is clear that relief is proper, so it has been left to the court to make that determination. FN.1.

FN.1. The court can anticipate the response from the U.S. Trustee, "judge, you just need to read our eight page points and authorities. Buried between the extensive citations, quotations, arguments, and conjecture, you can find, and state for us, the grounds for the proper relief. It is not the place of the court to assemble motions for parties.

The Motion seeks to have this case converted to one under Chapter 7 as the preferred relief. Though not stated, the court infers that it is the U.S. Trustee's determination based on the facts of this case that such conversion is in the best interests of creditors and the bankruptcy estate.

The last Monthly Operating Report filed by ΔIP is for February 2017. Dckt. 512. ΔIP has not filed one for March 2017, even though it was due by the 15th of April 2017. For February 2017, ΔIP reported $645.00 in rent monies and $7,223 from "Shareholder, Partners, or Other Insiders." *Id.* at 3. The court is unsure how these two human beings, as individual debtors, have shareholders or partners. To the extent that they are funding the estate and bankruptcy case by borrowing monies from other family members, such borrowing has not been authorized. FN.2.

FN.2. It appears that there may be a more benign answer. On the attachments to the Monthly Operation Report is a handwritten ledger in which the "income" is identified as "Judy - Retirement," "Lawrence – S.Sec.," and "Judy - S.Sec." The court interprets this as the "Shareholder, Partners, Other Insiders" income is just the regular monthly retirement and Social Security income for the two Debtors. However, the Second Amended Monthly Operating Report for December 2016 (Dckt. 496) lists $21,734 in "Funds from Shareholders, Partners, or Other Insiders." However, the court cannot readily identify from the attachments to the Second Amended Monthly Operation Report for December 2016, the source of the monies beyond the retirement and Social Security income.

In weighing the two options, the court concludes that conversion to one under Chapter 7 is appropriate for several reasons. Much water has been allowed to pass under the bridge in allowing the ΔIP to administer this case for the past two years. Dismissal after such long period of operation and issuance of numerous orders raises the specter of confusion for all parties in interest.

Second, the transactions between and rights of the estate relating to the Souza Propane bankruptcy case are complex. Dismissing this case could well through a shadow over those proceedings,

who has what rights and interests, and what this bankruptcy estate currently has to administer and disburse to creditors.

Third, though ΔIP has had the opportunity to address creditor claims and take advantage of the benefits of this Chapter 11 case, ΔIP has failed to do so. Dismissing this case may merely subject creditors to further cost, expense, and time to try and address what the two Debtors may try to do to their advantage outside of the structure of bankruptcy.

Fourth, as discussed above, the assets of the estate and interests in businesses are not simple, and it will take the unbiased eye of a Chapter 7 trustee to determine what should be recovered for the estate and creditors and what should be abandoned.

Fifth, it may well be that what is in the best interests of the estate and creditors may well be in the best interests of these two Debtors. After two years, the ΔIP has not presented a plan to the court. Though professing that conversion to Chapter 13 is proper (which it clearly is not) and that a plan is feasible, ΔIP offered no inkling of what a plan could be. There was no proposed Chapter 13 Plan provided as an exhibit to support the Countermotion. There was no testimony by the ΔIP what the plan would or could be. Merely, ΔIP's assurance that some plan, at some time, which would someway be feasible, will be presented. It may be that the ΔIP has such an unrealistic understanding of their remaining assets and future income, as well as the law, that they would just continue in a downward spiral outside of bankruptcy losing further assets and impairing their future.

Therefore, upon cause having been shown, the court orders this case converted to one under Chapter 7.

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 11 case filed by Tracy Hope Davis, 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, and the case is converted to one under Chapter 7.

16. 15-90358-E-11 LAWRENCE/JUDITH SOUZA MOTION TO COMPEL ABANDONMENT
MHK-27 Anthony Asebedo 4-6-17 [539]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on April 6, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Compel Abandonment is granted.

After notice and a hearing, the court may order the trustee or debtor in possession to abandon property of the Estate that is burdensome to the Estate or is 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 Lawrence Souza and Judith Souza ("Debtor in Possession") requests the court to order the Trustee to abandon property commonly known as 201 West Syracuse Avenue, Turlock, California ("Property"). The Property is encumbered by the liens of: (1) Federal National Mortgage Association, by Seterus, Inc. ($130,699.77); (2) The Money Brokers, as agent for beneficiaries that are assignees of the Curtis Family Trust est. May 27, 1994 ($295,291.06); (3) U.S. Internal Revenue Service ($206,873.96); (4) U.S. Internal Revenue Service ($37, 612.31). The Declaration of Lawrence Souza has been filed in support of the Motion, and he states that according to a Certified Public Accountant, a proposed sale of the Property at $80,000.00 would incur tax liability of approximately $16,250.00. Dckt. 541.

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 caused by 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.

CHAMBERS PREPARED ORDER

The court shall issue an Order (not a minute order) substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compel Abandonment filed by Lawrence Souza and Judith Souza ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted, and the Property identified as 201 West Syracuse, Turlock, California, and listed on Schedule A by Debtor is abandoned by Lawrence Souza and Judith Souza, as Debtor in Possession, to Lawrence Souza and Judith Souza by this order, with no further act of the Trustee required.

17. 14-91565-E-7 RICHARD SINCLAIR CONTINUED MOTION TO RECONSIDER
HSM-10 Pro Se 2-28-17 [575]

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

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

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

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that a hearing will be held to reconsider granting a motion to approve compromise, and the hearing will be based upon submitted pleadings as well as argument at the hearing. Based upon the language that there may submissions at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2).

Sufficient Notice Provided. No Proof of Service has been filed. FN.2. All documents with this Motion were required to be served with 14 days' notice. Nevertheless, the natural opponents to this Motion have filed oppositions, indicating to the court that service was provided. Additionally, the court continued the hearing, thereby remedying any initial defect in service.

FN.2. Movant filed the Notice of Motion and "Memorandum of Points and Authorities" (the Memorandum is really Debtor's Motion) in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9004(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

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

The Motion to Reconsider was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Reconsider is denied.

Richard Sinclair ("Debtor") filed the instant case on November 24, 2014. Dckt. 1. On January 9, 2017, the court issued its Memorandum Order and Decision granting a Motion for Approval of Compromise with Capital Equity Management Group, Inc., formerly known as California Equity Management Group, Inc.; New Century Townhomes of Turlock Owners Associations, formerly known as Fox Hollow of Turlock Owners' Association; and Andrew B. Katakis (collectively, "Katakis et al."). Dckt. 535.

REVIEW OF MOTION TO RECONSIDER

On February 28, 2017, Debtor filed this instant Motion to Reconsider, claiming that "new or different facts and circumstances exist . . . that this Court had not considered." Dckt. 575, at 1. Using the arguments stated in the Points and Authorities that are part of the Motion, Debtor asserts:

A. Debtor was not included in the negotiations that resulted in the settlement approved by the court.

B. Debtor believes that he has claims against Katakis et al. for: (1) stalking since "extortion verbalizations" on February 2003.

C. The Trustee did not obtain dismissals for Debtor for the State Court Judgment obtained by Katakis et al. in *Mauctrust, LLC v. Katakis et al.*, California Superior Court, Stanislaus County, Case No. 332233, *aff'd* Cal. DCA 5th Cir. No. F058822 and Cal DCA No. F06497; and obtained by Katakis et al. in *Fox Hollow of Turlock Owner's Association v. Sinclair*, E.D. Cal. Case No. 1:03-cv-054439.

D. By settling the estate's claims which Debtor disclosed on his Schedules, the Trustee has taken away Debtor's "ammunition" to object alleged fraud in obtaining the State Court Judgment.

E. The Trustee and Court did not read the 2,000 pages of exhibits about what Debtor asserts are Katakis et al.'s and their attorney's "wrongful and unlawful action."

F. Judge Sargis (this bankruptcy judge) " chastised Richard Sinclair for his fraudulent behavior even on February 23, 2017, but also had not heard or read Richard Sinclair's evidence."

G. The court refused to rule on "motions" filed with the court. (No specific "motions" are identified in the Motion now before the court.)

H. Debtor asserts that since there is no time limit for asserting that fraud was committed on the state court, then the court should not let the Trustee settle any such possible claims.

I. Debtor has been "disable" since 2009, including "including 4 major surgeries and a stroke and the recovery periods for all."

J. This bankruptcy court has found that Debtor was not disabled. "No prior Court had followed what this Court said was required to not "dfeny" Richard Sinclair Due Process."

K. Debtor did not assert any of these frauds on the State Court due to disabilities.

L. Debtor states he suffered from a stroke in 2015.

M. By Spring and Summer of 2016 Debtor had finally gathered evidence of the asserted fraud committed by Katakis et al. and their attorney.

N. No court has reviewed the "2000 pages of evidence" of such fraud.

O. Debtor tried to file in 2016 a motion for fraud on the court, but it was blocked by Katakis et al.

P. Katakis et al. have committed criminal foreclosure which blocks the State Court Judgment obtained by Katakis et al.

Q. The judgments—the State Court Judgment and the recent District Court Judgment—will continue to be owed by Defendant-Debtor (as nondischargeable debt), even though the Trustee has settled the claims of the bankruptcy estate.

R. Katakis et al. have been "stalking" Debtor for 13 years, and will continue to do so with the State Court Judgment and the District Court Judgment.

Motion, Dckt. 575.

In the actual Points and Authorities portion of the Motion, Debtor cites the court to California Code of Civil Procedure 1008 as a basis for reconsidering the order granting the motion and approving the settlement. Debtor offers no explanation how the California Code of Civil Procedure governs the procedures and powers of a federal court to reconsider a prior ruling. Debtor does cite to several district court and bankruptcy court cases on the point of reconsideration.

Evidence Submitted in Support of Motion

Debtor has two main drumbeats. First, the court refuses to consider his evidence. Second, that he has been disabled, precluding him from acting on the claims he now alleges exist. The court will address these points in detail below.

Debtor provides his Declaration in support of the Motion. Dckt. 577. In it, he states many personal factual findings and conclusions of law. As with his other contested matters and adversary proceedings in this court, it is long on conclusions and dictates to the court, but short on actual factual testimony.

The Declaration admits that "much time has passed," stating that the judgments have been obtained against him by "fraud." He testifies that Katakis et al. acquired lots in the Fox Hollow Property by interfering with a contract that others had with GMAC to purchase lots. This statement, as addressed below, is in direct conflict to the findings of fact and conclusions of law in support of the State Court Judgment that has been affirmed on appeal. This court has, under the doctrine of collateral estoppel, accepted those findings and determinations in connection with granting a motion for summary judgment in Adversary Proceeding 15-9009.

He states that the State Court Judgment was obtained while he was disabled, arguing that Judge Wanger in the District Court Action had made such a determination. Debtor directs the court to Exhibit 93a, without stating what it is. There is no Exhibit "93a" filed by Debtor. Exhibit 93a is a Memorandum Opinion and Decision on a motion to withdraw as counsel for Debtor and Debtor's motion for a continuance. Dckt. 580. In that Memorandum Opinion and Decision on the Motion, based on Debtor's testimony and "notes" from a doctor, the District Court concluded that "the fact that Mr. Sinclair is temporarily disabled does not, of itself, preclude him from representing himself in pro per." Exhibit 93, p. 10:21–24; Dckt. 580. This indicates that whatever "disability" that Debtor asserted, it was temporary and did not preclude Debtor (who was a licensed attorney at the time) from participating in the District Court Case.

Debtor testifies that the alleged claims date back to 2003 and that Debtor communicated with Mr. Katakis about it in 2003. Debtor cites the court to Exhibit 1. Exhibit 1 is a letter written on Debtor's law firm letterhead dated January 27, 2013. Dckt. 578. In it Debtor asserts that a crime has been committed and that if Mr. Katakis does not cease, Debtor will immediately commence judicial action.

Debtor then testifies that he had a settlement with Katakis et al. in 2007, which Katakis et al. breached in 2009 to get the State Court Judgment. Thus, Debtor states, due to the actions in 2007 and 2008, Katakis et al. had caused Debtor harm in excess of $12,425,000.00. Further, he alleges that in 2009 Debtor was aware of such claims.

Debtor argues that whatever Katakis et al. allege is owed on the State Court Judgment should be credited to the $12,425,000.00 that Debtor states was owed in 2009.

Debtor contends that this court (bankruptcy) denied him his 5th and 14th Amendment Rights because he was incompetent and disabled. Though the court considered the issue in 2015, Debtor testifies that now, in 2017, "I have written him for confirmation and will provide it at the hearing."

Debtor testifies, "The Court [not identifying what court] also managed to remove all evidence that Mr. Katakis, CEMG and Fox Hollow of Turlock, owe Richard Sinclair $ 12.425 million and that they have no damages. Further, that Mr. Katakis, is or was then, the owner of Fox Hollow of Turlock Owners Assocaition [sic] and Director and President and CEMG are or were both owned by Mr. Katakis and all have immense unclean hands."

Debtor has filed Exhibits 1 through 107, Dckts. 578–83, totaling 1,803 pages. No index of exhibits is provided. Few of the Exhibits are authenticated in the declaration. The cover pages to each of the exhibit documents state that they are filed as a "Request for Judicial Notice." However, no indication of how or why such documents are properly subject to judicial notice is provided. Federal Rule of Evidence 201 limits judicial notice to:

A. Only Adjudicative (not Legislative) Fact;

B. That Cannot be Reasonably Disputed Because:

1. It is generally known within the trial court's territorial jurisdiction; or

2. Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

A sampling of the unaddressed, unindexed Exhibits include the following:

A. Exhibit 1 – January 27, 2003 Letter from Debtor to Mr. Katakis asserting claims against Mr. Katakis;

B. Exhibit 4 – Adjustable Rate Note dated July 6, 1988, Gregory Mauchley borrower;

C. Exhibit 9 – Contact History Report, Gregory Mauchley borrower;

D. Exhibit 53 – Articles of Incorporation of Fox Hollow of Turlock Owner's Association;

E. Exhibit 69 – Series of Letter, Emails, and Documents;

F. Exhibit 74 – Agreement for Purchase and Sale of Promissory Notes and Real Property: California Equity Management Group, Inc., Buyer, and Contimortgage Corporation, seller;

G. First Exhibit 81 – Portion of Transcript from some hearing;

H. Exhibit 84 – Notice of Completion for Fox Hollow Subdivision, Dated February 18, 1998.

I. Exhibit 94 – November 8, 2002 Letter from Debtor to Andrew Katakis stating that he and his clients are "anxious to proceed with the litigation;"

The exhibits also include long letter strings and email threads of various communications. For recorded documents included as exhibits, they are not certified or authenticated by any witnesses. FED. R. EVID. 901, 902. It is unclear which, if any, of the exhibits qualify for "judicial notice" as permitted by Federal Rule of Evidence 201.

Rather, it appears that the Exhibits are a large "dump of documents" on the court, which documents appear to well predate not only the hearing on the Motion to Approve the Settlement in 2017, but the filing of the bankruptcy case in 2014, and the State Court Judgment in 2009—some dating back to the 1990's.

TRUSTEE'S OPPOSITION

Gary Farrar, the Chapter 7 Trustee, filed an Opposition to this Motion to Reconsider on March 30, 2017. Dckt. 613. The Trustee asserts that the Motion suffers from both procedural and substantive defects.

On the procedural side, the Trustee argues that Debtor has ignored the local rules for the preparation of documents by combining multiple documents into one filing and by omitting a Docket Control Number on the supposed motion. The Trustee argues that the consistent procedural deficiencies in Debtor's filings, especially after being warned to correct them by the court, are enough to deny the Motion.

Substantively, the Trustee notes that the Motion does not clearly state whether it is based upon Federal Rule of Civil Procedure 59(e) or 60(b) but should be denied under either one. The Trustee states that "[r]ather than articulating a basis for reconsideration . . . , the Debtor's Motion simply restates and rehashes many of the same arguments, or variations of the same arguments, he has previously made about the alleged misdeeds of Mr. Katakis and his entities." Dckt. 613, at 3. The Trustee emphasizes that Debtor had ample time and opportunity to oppose the original motion for approval of compromise—which Debtor in fact did oppose. To the Trustee, the current Motion is just Debtor seeking "another bite at the apple in challenging the merits of the approved compromise." Dckt. 613, at 3.

Additionally, the Trustee notes that Debtor has not presented any newly discovered evidence or intervening change in controlling law, and he stresses that Debtor's disagreement with the court's determination of fairness and equity does not amount to the court's order approving the compromise being "clearly erroneous."

The Trustee stresses that neither Debtor nor his family members offered to "overbid" the amount for the claims at issue at the December 15, 2016 hearing. At this point, the court observes that while the Trustee uses the term "overbid" with respect to the hearing on the Motion to Approve the Compromise, that terminology is not correct.

To afford Defendant-Debtor and his allies (his wife Deborah Sinclair and Kathryn Machado, PhD ("Dr. Machado"), his sister, the trustee of Defendant-Debtor's purported irrevocable trust and the managing member of limited liability companies, all of whom received significant transfers of assets from Defendant-Debtor prior to his commencing the Bankruptcy Case) an opportunity, the court gave them the option to

exercise a right of first refusal to purchase all of the asserted $40 Million of claims for the $40,000.00 offered by Katakis et al., which Defendant-Debtor believed the Trustee was significantly undervaluing. Memorandum Opinion and Decision for Motion to Approve Compromise, Dckt. 535; Order providing for right of first refusal, Dckt. 499.

Defendant-Debtor and his sister, Dr. Machado, the trustee of the Defendant-Debtor's purported irrevocable trust and managing member of the limited liabilities companies, all of which were recipients of property transfers from Defendant-Debtor prior to the commencement of the Bankruptcy Case, appeared at the hearing for the motion to approve the Katakis et al. settlement obtained by the Trustee. As addressed by this court in the Memorandum Opinion and Decision (*Id*.; Dckt. 535), if these claims were worth significantly more than the $40,000.00 settlement amount (Defendant-Debtor asserting they were worth 1000-times more), then either the wife or sister, using the significant assets transferred to them by Defendant-Debtor, could have, and likely would have, purchased such claims. Neither took advantage of such rights of first refusal. When pressed on the point at the hearing, Dr. Machado's counsel advised the court that all Dr. Machado wanted was to be done with the Defendant-Debtor's bankruptcy proceedings and not have to come back to the bankruptcy court.

The Trustee states that no further argument is necessary because Debtor has not presented any basis that complies with the Federal Rules of Civil Procedure, instead merely relying on rearguing what this court has heard already.

KATAKIS ET AL.'S OPPOSITION

Katakis et al. filed a Memorandum of Points and Authorities in Opposition to the Motion to Reconsider on March 30, 2017. Dckt. 616. Katakis et al. argues first that Debtor failed to plead any relief pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014 like the court directed in its February 14, 2017 order.

Similar to the Trustee, Katakis et al. argues that Debtor "has totally failed to establish the grounds for reconsideration such as newly discovered evidence that is material to the decision." Dckt. 616, at 8. Katakis et al. insists that Debtor has merely reargued the original motion.

Katakis et al. asserts that Debtor has abandoned his court-offered option to request that the court amend its order granting approval of compromise pursuant to Federal Rule of Bankruptcy Procedure 7052. Having not pursued the Motion according to that ground, Katakis et al. claims that Debtor has completely failed to pursue this Motion properly procedurally, and even if he had, Debtor has not presented any authorized grounds for the court to reconsider its original order.

Throughout the Memorandum in Opposition, Katakis et al. reasserts its responses to Debtor's arguments from the original motion—which have been restated in the present Motion—and pleads that Debtor has not presented anything new for the court to consider now but has instead continued with his improper litigation strategy of arguing whatever he wants over and over again despite the court telling him that he is wrong and that his arguments are improper.

APPLICABLE LAW

The relief requested by Debtor is to have the prior order vacated pursuant to Federal Rule of Civil Procedure Rule 60(b), as made applicable by Federal Rule of Bankruptcy Procedure 9024, which governs the reconsideration of a judgment or order. This is the federal law governing proceedings in federal court that is analogous to the inapplicable citation to California Code of Civil Procedure 1008 in Debtor's Motion/Points and Authorities. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts that, if taken as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); *see also Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463 (citations omitted).

Debtor has cited the court to additional case law regarding a motion for reconsideration. Debtor cites the court to *In re Oak Park Calabasas Condo. Ass'n*, 302 B.R. 682 (Bankr. C.D. Cal. 2003). That case addresses the provisions under Rule 59 and Bankruptcy Rule 9023 for a new trial or order amending a prior judgment. Rule 59 provides:

> "Rule 59. New Trial; Altering or Amending a Judgment
>
> (a) In General.
>
> (1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues–and to any party–as follows:
>
> (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or
>
> (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.
>
> (2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment."

In re Oak Park Calabasas Condo. Ass'n states that a motion for reconsideration brought under Federal Rule of Civil Procedure 59 "should not be granted unless it is based on one or all of the following grounds: (1) to correct manifest errors of law or fact upon which the judgment is based; (2) to allow the moving party the opportunity to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; or (4) to reflect an intervening change in controlling law." *In re Oak Park Calabasas Condo. Ass'n*, 302 B.R. at 683. That court defined "manifest injustice" as "an error in the trial court that is direct, obvious, and observable, such as a defendant's guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds." *Id.* "Manifest error" was defined as "an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." *Id.* This district has followed that ruling. *See Barboza v. Cal. Ass'n of Prof'l Firefighters*, No. CIV. S-08-519 FCD/GGH, 2009 U.S. Dist. LEXIS 77737, at *6–7 (E.D. Cal. Aug. 14, 2009).

As addressed by the D.C. Circuit Court of Appeals in *Grumman Aircraft Eng'g Corp. v. Renegotiation Board*, 482 F.2d 710,721 (1973):

> Ordinarily Rule 59 motions for either a new trial or a rehearing are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings. *Echevarria v. United States Steel Corp.*, 7 Cir., 392 F.2d 885, 892 (1968); *Rue v. Feuz Construction Co.*, D. D.C., 103 F. Supp. 499, 502 (1952). See also 6A J. MOORE, FEDERAL PRACTICE para. 59.07 (1972). The Government attempts to avoid applicability of this well established

> principle, one that is required for the orderly disposition of judicial business, by arguing that it had no "occasion" to raise the executive privilege claim before the District Court opinion was handed down.
>
> We disagree. First of all, the Government had sufficient "occasion" to raise all its legal claims long before the District Court took the case under advisement. . . . Since we cannot disturb the District Court's ruling on a Rule 59 motion absent a finding of abuse of discretion, see *Atchison, Topeka & Santa Fe R. Co. v. Jackson*, 10 Cir., 235 F.2d 390, 394 (1956); *Mayer v. Higgins*, 2 Cir., 208 F.2d 781 (1953); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971), plainly no reversal is called for.

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

In addressing the present Motion, and the contentions of Debtor, the court again notes that Debtor is an attorney who was formerly licensed to practice law in the State of California. Though disbarred, this court has concluded, and continues to conclude, that Debtor is a highly educated, experienced attorney and business person. *See* 14-91565; Memorandum Opinion and Decision, Dckt. 535. He is highly capable of presenting his positions, advocating his arguments, and fully engaging the judicial process. In the context of a motion for summary judgment in an adversary proceeding, this court has reviewed the extensive, almost two decades long, battles between Katakis et al. and Debtor, citing back to two recent decisions in this bankruptcy case. The first is the Memorandum Opinion and Decision granting the motion approving the compromise that is now at issue in the Motion to Reconsider. Dckt. 535. The second is this court's Memorandum Opinion and Decision sustaining the Chapter 7 Trustee's objection to Debtor's claim of a personal injury exemption in the "malicious prosecution suit" (term as used by Debtor on Schedules B and C filed under penalty of perjury) against Katakis Plaintiffs. *Id.*, Dckt. 558. Those decisions contain extensive discussions of the litigation between Katakis et al. and Debtor, as well as Debtor's general litigation strategy.

As discussed by the court in the two Memorandum Opinions and Decisions referenced above, Debtor has manifested in this court a litigation strategy of saying whatever he believes to be to his advantage, without regard to it being legally or factually supportable. The prominent part of Debtor's (who it must be remembered is a highly educated, experienced attorney, notwithstanding having been disbarred) litigation strategy is to delay, deter, and prevent the court from addressing matters on the merits, working hard to stay in what the court has identified as a "litigation death spiral" with Katakis et al.

Asserted Disability

Debtor contends that he has been deprived of his Constitutional and substantive law rights because he has been, and possibly is, "disabled." The alleged disability was thoroughly considered by this court and debunked as false. This "disability" contention is little more than a dodge raised by Debtor whenever the litigation he spawns turns negative for him—and his having no disability during the same period to continue his litigation against others.

The court issued a detailed decision concluding that Debtor was competent and that the purported disability was a sham. 14-91565; Civil Minutes, Dckt. 337. While professing a "disability," Debtor was actively prosecuting the Bankruptcy Case. Debtor appeared to be "disabled" only with respect to the U.S. Trustee attempting to have the case converted and Katakis et al. conducting discovery. The court findings in the Civil Minutes recount the conduct of Debtor that was inconsistent with the professed disability. *Id*.

In the Memorandum Opinion and Decision approving the proposed settlement of claims between Katakis et al. and the Chapter 7 Trustee, this court addressed not only Debtor's use of an alleged "disability" to delay judicial proceedings, but Debtor's conscious litigation strategy of asserting claims, rights, and defenses, without regard to whether they had any legal merit or were supported by facts, so long as they fit within his narrative to advance his position. Memorandum Opinion and Decision, pp. 14:27–20:16, Dckt. 535. Based on his conduct in the proceedings in the Bankruptcy Case and the adversary proceedings related thereto, this court has concluded that Debtor's litigation strategy in this court is to say whatever he thinks can serve his interests, irrespective of the legal merit or truth, to deflect the court from making any decision. This would then allow Debtor to continue in his never ending litigating and relitigating disputes with Katakis et al.

This court has extensively discussed the alleged "disability" asserted by Debtor, his failure to provide any credible evidence, and the extraordinary steps taken by the court to ensure that if a disability existed (as opposed to merely a strategy to delay rulings of the court and abuse the judicial process) in the Memorandum Opinion and Decision on the Motion for Summary Judgment in *Katakis et al. v. Sinclair*, Adv. No. 15-9009, Dckt. 107. The court incorporates by reference that Decision.

When Debtor asserted that disabilities existed, the court repeatedly requested that the doctors who Debtor professed stated he was disabled come forward (as opposed to Debtor merely testifying what he said the doctors said to him), no doctors ever provided the court with any testimony or information to the court.

This court, to the extent that a disability might have actually existed and Debtor was unable to communicate the need to his doctor for such expert testimony, instructed the Clerk of the Court to send a copy of the detailed order identifying the need for such information to the doctor identified by Debtor. The order expressly requested that the doctor purported to be treating Debtor provide such information, which would appear to be consistent with that doctor's obligations to her patient if Debtor actually suffered from such alleged disability. No doctor stepped forward to present such information in support of the alleged disability asserted by Debtor.

Throughout the bankruptcy case proceeding, at Debtor's side was Kathryn Machado, PhD, his sister and the trustee of Debtor's asserted irrevocable trust and limited liability companies into which he

transferred property pre-petition. If Debtor was actually incapacitated, his sister, who was by his side and is also highly educated (having earned a PhD) would have gone to state court to have a conservator appointed for him or sought a personal representative appointed in federal court. Not only did the sister not do this, she was so confident in his competency that she had Debtor represent her in the Bankruptcy Case up until the time he was initially suspended from the practice of law in July 2015 (which, not coincidently, is when Debtor professed to have an undocumented "disability"). Then, even after he had been disbarred, Dr. Machado had Debtor by her side "advising" her for several months after his disbarment until the court required her to obtain counsel (since a trust and limited liability companies were the actual parties, not her individually in *pro se*).

Further, while contending that he was or has been "disabled," Debtor was actively prosecuting a 36-day trial against Katakis et al., an appeal of that state court decision in 2009, the award of attorneys' fees motion for Katakis et al. in the State Court Action, the appeal of the attorneys' fees award, and then this bankruptcy case as the Chapter 11 debtor in possession. In addition to Dr. Machado being at Defendant-Debtor's side at proceedings in the Bankruptcy Case, she also employed Defendant-Debtor (while he was the fiduciary debtor in possession of the bankruptcy estate), to be her attorney and defend her against potential fraudulent conveyance claims for the transfers she had received pre-petition.

The court continues to determine that the asserted "disability" is a sham and fraud being perpetrated by Debtor.

Original Opposition Presented to Motion to Approve Compromise

Debtor filed his Opposition to the Motion to Approve Compromise. Dckt. 487. In it he asserted:

A. The compromise is not fair and equitable, as Debtor asserts that he now has $40 Million in claims against Katakis et al.

B. Debtor wants to vacate (alleging fraud dating back to before the 2009 judgment) the 2009 State Court Judgment, which has been affirmed on appeal, for in excess of $1,000,000 in attorney's fees and costs that Katakis et al obtained against him.

C. The settlement is so small that Katakis et al. will continue to stalk and use criminal foreclosure methods, and continue to deny Debtor his 5th and 14th Amendment Rights.

D. Debtor wants to file a Fourth Amended Complaint in the litigation he desires to pursue against Katakis et al.

E. Debtor has previously submitted 1,500 pages of documents showing that Katakis et al. have "lied."

F. If Katakis et al. will give up their State Court Judgment and the judgment they seek in the District Court RICO action (which has now been granted Katakis et al.) and pay millions of dollars to Debtor, he will go along with the settlement.

G. Katakis et al. have violated Debtor's rights since 2003.

H. Katakis et al. have blocked Debtor's efforts to vacate the $1,000,000 2009 judgment.

I. Debtor asserts that success is very good that he could vacate the 2009 State Court Judgment, that has been affirmed on appeal.

J. The $40,000 settlement is only 0.1% of the $40 Million value of claims that Debtor asserted that he had against Katakis et al.

K. That Debtor's 5th and 14th Amendment Rights have been abridged in the State Court and bankruptcy court.

L. "It had taken a few years for Sinclair to obtain some of the records submitted by Katakis and Durbin which advised Katakis that he did not own and knew he did not own the 4 conti lots when he foreclosed."

M. "Criminal foreclosure fraud blocks Katakis judgment for 28 Unclean Hands and also prohibits a defense judgment for Unclean Hands which cannot be granted if the is an intentional tort by Katakis or fraudulent behavior."

N. Exhibit 1 to the Opposition is a letter dated January 27, 2003, asserting "claims" against Katakis et al.

These are the same arguments, contentions, and positions that Debtor asserts are "new" or not considered by the court previously. Debtor is wrong on both counts.

What Debtor really argues now is that the court ruled on the Motion for Approval of Compromise and did not agree with Debtor and his desires. Debtor argues that the court did not read "the 2000 pages of exhibits about [Andrew] Katakis and [Greg] Durbin's wrongful and unlawful action." Dckt. 575, at 3. Debtor claims that the court "had not heard or read [Debtor's] evidence." Dckt. 575, at 4. This argument is essentially that Debtor had many, many documents that he did not submit to the court in his Opposition, but now asserts that the court should have provided "legal services" to get those documents for Debtor.

Debtor stresses that "[t]he Court needs to reconsider its order approving the compromise" because the compromise between Katakis et al. and the Chapter 7 Estate guarantees "that Katakis will continue to stalk and assault [Debtor] beyond the 13 years he has already committed stalking," allegedly. Dckt. 575, at 6.

This argument falls apart for several reasons. First, the court considered the substance of the now asserted-to-be $40 Million of claims. The court considered the litigation, the 2009 State Court Judgment, that has been affirmed on appeal, and Debtor's assertion that in 2017 he now will move promptly and easily to set aside the 2009 judgment (which judgment he has prosecuted two appeals on since 2009). Second, the court gave Debtor and his allies the ability to "buy" from the bankruptcy estate, with a right of first refusal, these claims that Debtor now states have such substantial value for the meager $40,000 (in Debtor's opinion)

that was tendered by Katakis et al. Not only did Dr. Machado, the trustee of the purported irrevocable trust and managing member of the limited liability companies into which Debtor transferred property prior to filing his bankruptcy case, refuse, but Dr. Machado made it clear that she wanted nothing further to do with Debtor's bankruptcy case. Third, Debtor offers no evidence of or plausible grounds for why he has not taken the action to simply and successfully vacate the 2009 State Court Judgment, while all the time be able to litigate the 36-day trial, two appeals of the 2009 State Court Judgment, and then prosecute as debtor in possession his Chapter 11 case.

Debtor's Manufacture of "New" $40 Million of Claims Against Katakis et al.

Though having more than two decades of dealings in his scheme involving the Fox Hollow Property and more than a decade of having the purported claims against Katakis et al., Debtor did not take any action to assert such "rights" and "claims." In more recent time, during the period of 2010 through the Summer of 2015, Debtor litigated a 36-day trial, the appeal of the Final State Court Judgment, and the Bankruptcy Case as debtor in possession, but did not see $40 Million value in such claims to be prosecuted by him.

To the extent that such $40 Million in claims existed, Debtor had to list them on his Schedules, which are made under penalty of perjury, filed in this case. No such claims were disclosed by Debtor when he filed his Chapter 11 case or in any schedules (original or amended) filed by Debtor in his Bankruptcy Case. Rather, the existence of such alleged claims was advanced by Debtor in the Bankruptcy Case when the Chapter 7 Trustee was moving toward a settlement resolving the almost two decades of disputes and any claims (which, whether disclosed or not, are property of the bankruptcy estate) between Katakis et al. and Debtor.

All that was listed by Debtor for such claims was, "Katakis case for malicious prosecution plus Truax case...approx $6 million." 14-91565; Schedule B filed in Debtor's Bankruptcy Case, Dckt. 42 at 3.

As addressed above, it was not and is not merely the court's determination that these asserted claims do not have the $40 Million of value (or any), but that of Deborah Sinclair, Debtor's wife, and Dr. Machado, Debtor's sister who is the trustee of the purported irrevocable trust of Debtor and managing member of the limited liability companies, all of whom received transfers of assets from Debtor prior to his filing this bankruptcy case. None of them saw there being sufficient value to pay $40,000 (using the right of first refusal given by the court) to purchase the claims which Debtor: (1) now claims exist and (2) now claims to have $40 Million in value.

As with most of Debtor's litigation strategy, the contentions are not based on facts (for which evidence is provided) or law, but merely the demands of Debtor.

Failure to Provide any Newly Discovered Evidence

Debtor stated in the Motion that his ground for this Motion is that new evidence exists for the court to consider. Dckt. 575, at 1. Debtor has absolutely failed to present any new information to the court, however. As both the Trustee and Katakis et al. note, Debtor—an experienced, highly-educated, self-

admitted excellent attorney—has continued to prosecute matters in this court with a strategy that he will say whatever he wants, regardless of its persuasiveness or truthfulness, as long as he thinks it may help him win. The court is accustomed to Debtor's game and will not be hoodwinked into granting Debtor's motions when they have no support.

Instead, what Debtor argues is that he has stale, old claims (which he did not list on Schedule B, under penalty of perjury) which he did not previously disclose. He has a stale, old contention that the 2009 State Court Judgment, affirmed on appeal, can be "easily" set aside for fraud because Katakis et al. are "bad people." But Debtor (who is a highly educated, experienced attorney and business person) offers no credible, good faith explanation as to why in 2009, 2010, 2011, 2012, 2013, 2014, and 2015 (while serving in 2015 as the debtor in possession) he did not quickly prosecute such contention that he presents as one which is assured of victory.

All of these contentions, and evidence (including Debtor's contention that he was disabled in 2009) relating thereto, well predated the November 2016 Motion to Approve the Compromise, the order from which is now at issue before this court. The evidence predated the December 2015 conversion of the Chapter 11 case to one under Chapter 7. The evidence predated the November 2014 commencement of this bankruptcy case by Debtor and Debtor being protected by the bankruptcy laws and having the obligation to prosecute such claim (if it actually existed and had merit). The evidence existed in 2009, 2010, 2011, 2012, and 2013, while the Debtor actively litigated the 36-day trial from which the State Court Judgment was entered, the first appeal of that judgment (which was affirmed), the attorney's fee motion on remand, and the second appeal on the judgment which was affirmed.

This court's Memorandum Opinion and Decision, issued on January 9, 2017, is as true now as it was at the beginning of the year. *See* Dckt. 535. In that Opinion, the court reviewed the pleadings in this and other matters extensively, even highlighting that Debtor's claims have surprisingly and suddenly increased under penalty of perjury from $6 million to $25 million to more than $40 million. *See* Dckt. 535, at 24–25. As previously determined by the court:

> It appears that the valuations of these claims by Debtor-Sinclair are not based on rational analysis, but whatever number Debtor-Sinclair believes supports whatever he is attempting to do, or prevent from someone else doing, in this bankruptcy case. In his November 16, 2016 filed Status Report, Debtor-Sinclair states that he now computes the damages as his "losses" caused by Katakis et al. Status Report, p. 3:3–4. The court is not provided with any explanation as to what "losses" have occurred since November 2014 that have caused the value of this asset to increase to whatever portion of the $6 Million stated on Schedule B under penalty of perjury when this case was filed to now $40 Million. No explanation has been provided how "losses" could have occurred since November 2014, when Debtor-Sinclair commenced this bankruptcy case and the automatic stay has protected Debtor-Sinclair and the property of the bankruptcy estate. Additionally, no declaration or credible explanation is provided as to what "assets" the bankruptcy estate or Debtor-Sinclair could have for such "losses" to be incurred, Debtor-Sinclair having transferred all significant assets to his wife, the Sinclair Trust, and the limited liability companies prior to the commencement of this case.

Id., p. 25:11–24. Contrary to Debtor's assertion that the court ignored what Debtor presented, the court considered it, but just did not agree with Debtor's contention that there are such hugely valuable claims that have materialized since the bankruptcy case was filed or existed prior to Debtor filing the case (but, if they existed, Debtor failed to disclose on Schedule B filed under penalty of perjury).

Conclusion

This Motion, like how the court determines most of what Debtor has done not only in this court, but in the state court, is part of his overall litigation strategy to delay, deter, and prevent the court from addressing matters on the merits, working hard to stay in what the court has identified as a "litigation death spiral" with Katakis et al. This court reviewed the Debtor's say whatever, regardless of the actual facts, and argue whatever, without regard to the legal merits, litigation strategy so long as it fits Debtor's narrative to keep the court from ruling on the merits in the court's Memorandum Opinion and Decision on the Motion for Approval of Compromise. *See* Memorandum, p. 14:27–20:16, Dckt. 535.

This court also addresses the use of such evidentiary unsupported and legally meritless litigation strategy, and the similar filings of other courts, in the Memorandum Opinion and Decision on the Motion for Summary Judgment in Adversary Proceeding No. 15-9009, Dckt. 107.

The court concludes, again, that the Motion for Approval of Compromise was warranted and in the best interest of the Estate. Debtor fails to show grounds under either Rule 59(e) or Rule 60(b) for relief from the prior order. No newly discovered evidence has been provided to the court. No error of law has been shown.

Rather, Debtor has clearly demonstrated that no such claims exist or that to the extent any could exist such claims cannot be litigated and liquidated quickly and easily. Despite being an experienced, highly-educated, self-admitted excellent attorney, Debtor has been unable even to assert the claims for more than a decade. That inability has not been because Debtor lacked access to state and federal courts. This failure to act has not been caused by any disability. Debtor has been actively litigating with Katakis et al. for more than a decade in various courts. FN.3.

FN.3. Debtor's repeated, unsupported other than by his own statements or conclusions, assertion that he has been disabled apparently for years piqued the court's curiosity as to what is readily accessible on LEXIS-NEXIS and Westlaw for cases in which Debtor has been a party or attorney since 2009. A review of LEXIS-NEXIS discloses the following:

A. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2017 U.S. Dist. LEXIS 49638.

1. March 21, 2017 Denial of Motion to Reconsider Decision and to enter judgment for Katakis et al. against Debtor under RICO and breach of CC&Rs for $5,833,175.84.

B. Sinclair on Discipline, Cal. Supreme No. S230942, 2016 Cal. LEXIS 3065.

1. Supreme court order dismissed after State Bar Court proceedings.

C. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2015 U.S. Dist. LEXIS 111881.

1. August 24, 2015 Order denying Debtor's motion for new trial.

D. *Hetrick v. Deutsche Bank National Trust Company*, Cal. Dist. Ct. App. No. F067675; 2014 Cal. App. Unpub. LEXIS 8467.

1. November 24, 2014 Opinion affirming summary judgment against Debtor (as attorney for the plaintiff in the underlying action)

E. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2014 U.S. Dist. LEXIS 161694.

1. Order denying Debtor's motion for new trial and for entry of final judgment.

F. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2014 U.S. Dist. LEXIS 136490.

1. Order adopting findings and recommendations of magistrate judge denying Debtor's motion for leave to amend court schedule and to reinstate dismissed counterclaim. Sanctions dismissing counterclaim dated back to 2011.

G. *Mauctrust, LLC v. Truax*, Cal. Dist. Ct. App. No. C069486, 2014 Cal. App. Unpub. LEXIS 4879.

1. July 11, 2014 Opinion reversing demurrer to Debtor's (as a party and attorney for other parties) complaint.

H. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2014 U.S. Dist. LEXIS 44842.

1. March 31, 2014 Order denying Debtor's (as attorney for other parties) to apply res judicata from the State Court Action.

I. *Sinclair v. Katakis*, Cal. Dist. Ct. App. No. F058822, 2013 Cal. App. Unpub. LEXIS 509.

1. Opinion affirming judgment obtained by Katakis et al. against Debtor.

J. *Sinclair v. Katakis*, Cal. Dist. Ct. App. No. F060497, 2013 Cal. App. Unpub. LEXIS 502.

1. January 23, 2013 Opinion affirming $750,000 attorney's fee in favor of Katakis et al. and against Debtor.

K. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2013 U.S. Dist. LEXIS 49905.

1. April 5, 2013 Order $4,600 of sanctions to be paid by Debtor.

L. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2013 U.S. Dist. LEXIS 45971.

1. March 29, 2013 Order denying Debtor's motion to enforce purported 2007 settlement.

M. *Stein v. Bank of America, N.A.*, E.D. Cal. 10-cv-02827, 2012 U.S. Dist. LEXIS 179847.

1. December 18, 2012 Order dismissing action, for which Debtor was the attorney for plaintiff, with prejudice and to notify State Bar that Debtor failed to pay previously ordered monetary sanctions and "repeated failure to respond to the Court's orders."

N. *Stein v. Bank of America, N.A.*, E.D. Cal. 10-cv-02827, 2012 U.S. Dist. LEXIS 166628.

1. November 21, 2012 Order denying Debtor's motion (as counsel for Plaintiff) to compel discovery and extend discovery.

O. *Fox Hollow of Turlock Association v. Mauctrust, LLC*, E.D. Cal. 1:03-cv-5439, 2012 U.S. Dist. LEXIS 141080.

1. September 28, 2012 Order: (1) Denying Debtor's motion to reconsider denial of his prior motion in April 2011 (Debtor stating that he was in "[a]n ongoing San Francisco Superior Court trial"); (2) Enforcing prior order that Debtor could not represent certain other persons in the action due to conflicts of interest; (3) Denial of request for sanctions against Debtor, but stating, "Richard Sinclair and other Defendants are warned that all court orders must be obeyed or serious sanctions (both monetary and litigation) are likely in the future;" (4) Ordering Debtor to comply with order for production of documents.

P. *Van Upp v. Van Upp*, N.D. Cal. No.11-04408, 2012 U.S. Dist. LEXIS 102283.

1. Order on appeal affirming bankruptcy court order denying Debtor's motion (as counsel for appellant) to dismiss bankruptcy case.

Q. *Carrasco v. HSBC Bank USA, N.A.*, N.D. Cal. No. C-11-2711, 2012 U.S. Dist. LEXIS 28096.

1. March 2, 2012 Order dismissing Debtor's (as counsel for plaintiff) complaint for lack of federal court jurisdiction and failure to state a claim.

R. *Carrasco v. HSBC Bank USA, N.A.*, N.D. Cal. No. C-11-2711, 2012 U.S. Dist. LEXIS 25496.

1. February 28, 2012 Order denying Debtor's (as attorney for plaintiff) motion for temporary restraining order. The grounds for denying the motion included: (1) lack of jurisdiction and (2) failure to show basis on the merits.

S. *Van Upp v. Wendel, Rosen, Black and Dean, LLP (In re Van Upp)*, N.D. Cal. No. 11-00178, 2011 U.S. Dist. LEXIS 97794.

1. August 30, 2011 Order on appeal affirming bankruptcy court order on trustee fees and overruling opposition of Debtor (as attorney for appellant debtor).

T. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2011 U.S. Dist. LEXIS 89115.

1. August 10, 2011 Order compelling Debtor to produce documents. In the order the court notes that the "Court has previously ruled on the exact issues presented in this motion. Nonetheless, Mr. Sinclair, in his supposed representation of Lairtrust and Capstone, continues to make the same baseless objections."

U. *Stein v. Bank of America, N.A.*, E.D. Cal. 10-cv-02827, 2011 U.S. Dist. LEXIS 84724.

1. August 1, 2011 Order dismissing Debtor's (as attorney for plaintiff) complaint for failure to state a claim, with leave to amend.

V. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2011 U.S. Dist. LEXIS 69199.

1. June 28, 2011 Order requiring Debtor (as attorney for defendants/counter claimants) to file more definite statement for twelve causes of action counterclaim he filed.

W. *Fox Hollow of Turlock Association v. Mauctrust*, LLC, E.D. Cal. 1:03-cv-5439, 2011 U.S. Dist. LEXIS 68558.

1. June 27, 2011 Order denying Debtor's second motion to disqualify opposing counsel. The court concluding, "Simply stated, Mr. Sinclair's perceived

wrongs effected by Mr. Durbin and Mr. Dunn do not alter the relevant facts upon which this Court's prior rulings were based. Mr. Sinclair's attempt to disqualify Mr. Durbin and Mr. Dunn based on the same legal theories and without new, relevant factual information, convinces the Court that this motion is yet another attempt to delay these proceedings and/or increase the costs of litigation in violation of Federal Rule of Civil Procedure 11(b)."

X. *Fox Hollow of Turlock Association v. Mauctrust, LLC*, E.D. Cal. 1:03-cv-5439, 2011 U.S. Dist. LEXIS 59418.

1. June 3, 2011 Order compelling Debtor to respond to discovery. The court also awarded sanctions fo $3,886.00 in sanctions to be paid by Debtor, concluding "Defendants [Debtor and his son] have not acted in good faith in attempting to resolve this dispute and their responses to discovery were not substantially justified.

Y. *Fox Hollow of Turlock Association v. Mauctrust, LLC*, E.D. Cal. 1:03-cv-5439, 2011 U.S. Dist. LEXIS 46272.

1. April 28, 2011 Order staying Debtor from prosecuting claims under asserted 2007 settlement.

Z. *In re Van Upp*, N.D. Cal. No. 10-01699, 2011 U.S. Dist. LEXIS 36703.

1. March 25, 2011 Order dismissing appeal filed by Debtor (as counsel for appellant) for failure to prosecute.

AA. *Stein v. Bank of America, N.A.*, E.D. Cal. 10-cv-02827, 2011 U.S. Dist. LEXIS 17658.

1. February 22, 2011 Order dismissing Debtor's (as attorney for plaintiff) causes of action from complaint for failure to state a claim, with leave to amend.

BB. *Fox Hollow of Turlock Association v. Mauctrust, LLC*, E.D. Cal. 1:03-cv-5439, 2011 U.S. Dist. LEXIS 5842.

1. January 20, 2011 Order staying Debtor's (as attorney) cross-claims pending resolution of the State Court Action.

CC. *Unlu v. Wells Fargo Bank, N.A.*, N.D. Cal. No. 10-05422, 2011 U.S. Dist. LEXIS 2343.

1. January 7, 2011 Order denying Debtor's (as attorney for plaintiff) motion for temporary restraining order.

DD. *In re Van Upp*, N.D. Cal. No. 10-01699, 2010 U.S. Dist. LEXIS 142473.

1. December 21, 2010 Order denying Debtor's (as attorney for debtor) motion for the district court to withdraw the reference of debtor's bankruptcy case to the bankruptcy court.

EE. *Sinclair v. Fox Hollow of Turlock Owners Association*, E.D. Cal. No. 03-cv-05439, 2010 U.S. Dist. LEXIS 134488.

1. December 20, 2010 Order denying Debtor's (as party and attorney for other defendants) motion to dismiss the complaint.

FF. *Van Upp v. Bradlow*, N.D. Cal. No. 10-02559, 2010 U.S. Dist. LEXIS 113953.

1. October 26, 2010 Order dismissing Debtor's (as attorney for plaintiff) complaint for a lack of jurisdiction.

GG. *In re Sargent*, Cal. Dist. Ct. App. No. F057141, 2010 Cal. App. Unpub. LEXIS 8357.

1. October 21, 2010 Opinion affirming judgment against Debtor (as counsel for appellant).

HH. *Fox Hollow of Turlock Owners' Association v. Sinclair*, E.D. Cal. 03-5439, 2010 U.S. Dist. LEXIS 10420.

1. February 5, 2010 Order granting Debtor's motion for a continuance to March 1, 2010, and to allow law firm to withdraw from representing Debtor and other parties.

II. *In re Van Upp*, Bankr. N.D. Cal. No. 09-31932, 2010 Bankr. LEXIS 2382.

1. July 19, 2010 Order denying Debtor's (as attorney for debtor) motion to dismiss the bankruptcy trustee.

Contrary to Debtor's contention that he has been disabled since 2009, the above district court and appellate cases demonstrate an active law practice during that time. That is consistent with this court's determination that Debtor is a highly educated, experienced attorney (notwithstanding having been disbarred).

Debtor is not credible now, nor has he been in the past, that what was stated under penalty of perjury on Schedule B to be part of $6 million in claims has grown in types of claim and amount to $40 million. Debtor offers nothing new, but merely re-re-restates what he has argued before, both in this court, the district court, and state courts. Debtor offers no explanation as to why, if such valuable claims existed or such an "easy" voiding of the State Court Judgment could be obtained, why he did not do it during 2010, 2011, 2012, 2013, 2014, and 2015, while he actively litigated in state and federal trial courts and the state appellate court.

Debtor's current motion is just another in a multi-decade-long string of meritless litigation, rearguing lost arguments and pressing claims without regard to factual or legal support. See Memorandum Opinion and Decision Granting Motion for Summary Judgment, Adv. Pro. No. 15-9009, Dckt. 107, for a detailed discussion.

Therefore, in light of the foregoing, 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 Reconsider filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.

18. **14-91565-E-7** **RICHARD SINCLAIR** **MOTION TO DISMISS ADVERSARY PROCEEDING**
16-9008 **HAR-1**
CALIFORNIA EQUITY MANAGEMENT GROUP, INC. ET AL V. SINCLAIR
4-6-17 [35]

Final Ruling: No appearance at the May 4, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant (*pro se*), Chapter 7 Trustee, creditors, and Office of the United States Trustee on April 6, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Adversary Proceeding is granted, and the adversary proceeding is dismissed.

Plaintiffs California Equity Management Group, Inc., Fox Hollow of Turlock Owners' Association, and Andrew Katakis move the court to dismiss this adversary proceeding objecting to Richard Sinclair's ("Defendant-Debtor") discharge.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 7041 governs the dismissal of adversary proceedings. The rule incorporates Federal Rule of Civil Procedure 41 and provides further instruction for adversary proceedings based upon objection to a debtor's discharge. For proceedings in which the complaint objects to a debtor's discharge, Federal Rule of Bankruptcy Procedure 7041 specifies that the complaint "shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper."

DISCUSSION

Plaintiffs allege that they have assessed the costs of continuing with this adversary proceeding, have weighed those costs against any possible recovery from Defendant-Debtor's estate, and have concluded that their best course of action is to resolve this adversary proceeding by seeking its dismissal.

A review of the proof of service shows that the Chapter 7 Trustee, United States Trustee, and all creditors were served with notice of this Motion. Dckt. 38. Service upon those parties satisfies the criterion of Federal Rule of Bankruptcy Procedure 7041 that particular parties be served of a motion to dismiss an adversary proceeding when the complaint in the proceeding objects to a debtor's discharge.

Additionally, Plaintiffs state that the "Trustee or any party in interest may request to be substituted in place of Plaintiffs." No party has filed any pleading to this Motion either objecting to it or seeking to substituted into the adversary proceeding in Plaintiff's stead. The court treats silence by the non-filing parties as acquiescence to granting the Motion.

The Motion to Dismiss is granted, and Adversary Proceeding 16-09008 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 Adversary Proceeding filed by the Plaintiffs 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 Adversary Proceeding is granted, and Adversary Proceeding 16-09008 is dismissed.

19.	**12-92176-E-7** **TPH-2**	**LARRY/JANET MACEDO** **Thomas Hogan**	**CONTINUED MOTION TO AVOID LIEN OF CITIBANK (SOUTH DAKOTA), N.A.** **3-23-17 [26]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on March 23, 2017. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Citibank (South Dakota) N.A. ("Creditor") against property of Larry Macedo and Janet Macedo ("Debtor") commonly known as 2833 Whitewood Court, Oakdale, California ("Property").

APRIL 13, 2017 HEARING

Debtor attached an abstract of judgment as Exhibit 4, and the court's review of it showed that there was no proof that the judgment had been recorded. Without the recording information, the court could not issue an order identifying the lien to be avoided. The court continued the hearing on the Motion to 10:30 a.m. on May 4, 2017, to allow Debtor to show proof of recording of the judgment. Dckt. 33.

REVIEW OF SUPPLEMENTAL EXHIBIT 1

A judgment was entered against Debtor in favor of Creditor in the amount of $10,763.13. An abstract of judgment was recorded with Stanislaus County on December 5, 2011, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $170,000.00 as of the date of the petition. The unavoidable consensual liens that total $172,066.57 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Citibank (South Dakota) N.A., California Superior Court for Stanislaus County Case No. 649233, recorded on December 5, 2011, Document No. 2011-0099436-00 with the Stanislaus County Recorder, against the real property commonly known as 2833 Whitewood Court, Oakdale, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

20. **16-90083-E-7 SSA-13** | **VALLEY DISTRIBUTORS, INC.** **Iain Macdonald** | **MOTION FOR COMPENSATION FOR STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY** **4-3-17 [276]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 3, 2017. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Steven Altman, the Attorney ("Applicant") for Irma Edmonds, the Chapter 7 Trustee ("Client"), makes a Second Interim Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 1, 2016, through February 1, 2017. The order of the court approving employment of Applicant was entered on February 18, 2016. Dckt. 30. Applicant requests fees in the amount of $13,200.00 and costs in the amount of $770.15.

UNITED STATES TRUSTEE'S OBJECTION

Tracy Hope Davis, the United States Trustee for the Eastern and Northern Districts of California and the District of Nevada, filed an Objection on April 20, 2017. Dckt. 288. The U.S. Trustee opposes $4,770.00 sought as reimbursement for fees generated from drafting fee and employment applications. The U.S. Trustee is concerned that the task billing portion of the requested fees for fee and employment applications is larger than any other portion of the requested fees.

The U.S. Trustee opposes two specific portions of the fee and employment application section. First, the U.S. Trustee asserts that $1,350.00 billed for an employment application of an auctioneer is excessive and should be reduced. The U.S. Trustee cites to *In re Coxeter* for the proposition that "courts have recognized that it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application [and] have endorsed percentage cuts as a practical means of trimming fat from a fee application." No. 11-35325-B-11, 2012 WL 7070198, at *5 (Bankr. E.D. Cal. Nov. 6, 2012).

Second, the U.S. Trustee opposes $1,020.00 in billed fees for an employment application for "Tom Wilson Computer Consultant." Specifically, the U.S. Trustee states that no such employment application exists on the docket for this case.

APPLICANT'S REPLY

Applicant filed a Reply on April 25, 2017. Dckt. 296. First, Applicant argues that a Motion to Employ Tom Wilson has been filed, but it was not on file when the U.S. Trustee objected.

Applicant also argues that the time spent to employ Huisman Auctions was reasonable and necessary, especially noting that his employment resulted in $385,063.50 in gross proceeds for the Estate. Applicant maintains that the hours he billed are accurate and that they were necessary for the benefit of the Estate. Additionally, Applicant stresses that the amounts billed are within reasonable parameters in this case. Applicant seeks full award of the fees requested.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including recovering an insurance policy and negotiating a stipulation for relief from the automatic stay to pursue insurance in state court. The estate has $373,784.03 of unencumbered monies to be administered as of the filing of the application.

Concerns of the U.S. Trustee

The U.S. Trustee has raised concerns about two sets of charges relating to applications for employment of professionals, for which the fees total $4,440.00. The U.S. Trustee points out that this is 36% of the total interim fees requested by Applicant at this time. The U.S. Trustee directs the court to two specific applications: (1) $1,350.00 for the employment application of the auctioneer and $1,020.00 billed for the employment of Tom Wilson Computer Consultant (which application had not been filed when the U.S. Trustee reviewed Applicant's Motion).

It is appropriate for the U.S. Trustee, as well as the trustee or debtor in possession and counsel for the trustee or debtor in possession to be ever vigilant for the efficient use of monies of the estate. As all parties know, the court requires that pleadings be proper and evidence admissible. The court requires that fee applications be well documented and the fees charged reasonable. It is not necessarily true that all motions for approval of fees are mere "templates" which can be used interchangeably between cases. It is true that there is much of such applications that are "boilerplate" and consistent statements of the law as to what can be allowed as fees and expenses.

The U.S. Trustee opposes two specific portions of the fee and employment application section. First, the U.S. Trustee asserts that $1,350.00 billed for an employment application of an auctioneer is excessive and should be reduced. The U.S. Trustee cites to *In re Coxeter* for the proposition that "courts have recognized that it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application [and] have endorsed percentage cuts as a practical means of trimming fat from a fee application." No. 11-35325-B-11, 2012 WL 7070198, at *5 (Bankr. E.D. Cal. Nov. 6, 2012).

Second, the U.S. Trustee opposes $1,020.00 in billed fees for an employment application for "Tom Wilson Computer Consultant." Specifically, the U.S. Trustee states that no such employment application exists on the docket for this case.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 10.50 hours in this category. Applicant handled coordination and compliance activities, including preparation of statement of financial affairs, schedules, list of contracts, United States Trustee interim statements, and operating reports. Applicant also contacted the United States Trustee and made general creditor inquiries.

Efforts to Assess and Recover Property of the Estate: Applicant spent 6.40 hours in this category. Applicant identified and reviewed potential assets, including causes of action and non-litigation recoveries, especially related to an insurance policy that was not listed on the original schedules.

Business Operation: Applicant spent 0.50 hours in this category. Applicant handled issues related to Debtor in Possession operating in Chapter 11 such as employee, vendor, and tenant matters.

Claims Administration and Objection: Applicant spent 8.30 hours in this category. Applicant inquired about specific claims, filed bar date motions, analyzed claims, and recommended whether to object or to allow claims.

Fee & Employment Applications: Applicant spent 15.90 hours in this category. Applicant prepared employment and fee applications for himself and for others, attended hearings for the applications, and followed up with employed professionals regarding cash collateral budget for expenses.

Relief from Stay Proceeding: Applicant spent 2.40 hours in this category. Applicant reviewed a proposed stipulation for relief from the automatic stay to allow state court litigation against insurance, reviewed the court's ruling on the motion, and communicated with counsel about the relief being only to pursue insurance in state court.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Steven Altman, attorney	44.0	$300.00	$13,200.00
Total Fees For Period of Application			$13,200.00

Pursuant to prior Interim Fee Applications the court has approved fees pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330. Dckt. 239.

Application	**Interim Approved Fees**	**Interim Fees Paid**
First Interim	$28,050.00	$28,050.00
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$28,050.00	

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $770.15 pursuant to this application. Pursuant to prior interim applications, the court has allowed costs of $1,862.10. Dckt. 239.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying	$0.10	$271.40
Postage		$498.75
		$0.00
		$0.00
Total Costs Requested in Application		$770.15

FEES AND COSTS & EXPENSES ALLOWED

Review of U.S. Trustee's Objections

The U.S. Trustee first opposed $1,350.00 billed for the employment of Huisman Auctions, Inc. One of the factors that the court considers with fee applications is how much time is spent on a billed service. 11 U.S.C. § 330(a)(3)(A). According to Applicant's invoices, Applicant spent 4.50 hours on the employment application for Huisman Auctions, Inc. As the U.S. Trustee notes, fee and employment applications are ones that are template-based and (usually) are simple enough to modify for new employment applications. Four and a half hours exceeds the amount of time that the court would expect for an experienced attorney to compile such applications.

The court begins with the Motion at issue for David Huisman of Huisman Auctions, Inc. Motion, Dckt. 254. This is a motion to obtain court approval of the fees and expenses of the auctioneer (an 11 U.S.C. § 330 motion). A review of the motion to approve compensation for the Auctioneer indicates that it addressed not only the compensation and reimbursement pursuant to the employment order, but also additional expenses necessary because the Auctioneer's expenses had run in excess of what had been previously addressed in the employment order. Motion, Dckt. 254. This necessitated stating in the motion with particularity the grounds for which the additional expenses were proper. FED. R. BANKR. P. 9013. The motion includes such grounds stated with sufficient particularity.

Two declarations are included with the motion to approve compensation for the auctioneer. The first is a four page declaration of the Chapter 7 Trustee. Dckt. 256. The second declaration is from David Husmain, the Auctioneer. Dckt. 257. Both declarations contain personal knowledge testimony (FED. R. EVID. 601, 602), in which they demonstrate the basis for having such personal knowledge. This can be contrasted to many declarations the U.S. Trustee and the court see, which are little more than the "declarant" signing a statement of legal conclusions and personal factual findings merely because the attorney wrote it and promised that "if you sign it, you win."

The exhibits in support of the Huisman compensation application includes an accounting to the sales proceeds and documentation of the expenses. Dckt. 258.

All of the above require active participation of the Trustee's counsel (the Applicant) to have properly prepared and be satisfied that he complies with the certifications and warranties made under Federal Rule of Bankruptcy Procedure 9011.

The Applicant also had a hearing to attend on the motion for the Auctioneer's compensation, with one hour of time billed for the hearing.

In considering these pleadings, in a rough sense the court could see the following time expended in preparing the pleadings: (1) review of auction sale documents, communicate with Trustee, and assemble documents; 0.7 hours; (2) motion drafting and revising, 1 hour; (3) drafting two declarations, communicating with declarants, revisions, 2 hours; (4) final review of documents; 0.5 hours. This totals 4.2 hours. Add one hour for the required hearing, and the total time that would not be shocking would be 5.2 hours. At a $300 hourly rate (reasonable for Applicant and services provided), that would total $1,560.00. The actual fees for these services total $1,350.00, an amount the court does not find unreasonable.

The second set of fees identified by the Trustee are those for an employment application for Tim Wilson as a computer consultant. Dckt. 290. The Motion explains the need for the employment, the scope of service, and compensation methodology. Mr. Wilson's declaration and the Trustee's declaration are provided. Dckts. 292, 293. These appear to be "standard" disinterestedness declarations. An exhibit document is provided with Mr. Wilson's curriculum vitae and the employment agreement.

As the Trustee points out, the fees at issue are for the Wilson motion to employ and a companion motion to employ another computer consultant. Dckts. 282, 284, 285, and 286.

The fees identified by the U.S. Trustee for preparing and filing this employment application are $1,020.00. It is not unreasonable for the Applicant to spend approximately 1.7 hours of time for each of the motions to employ. It appears that the U.S. Trustee's objection was driven in large part by the two motions having not been filed by the time the U.S. Trustee was reviewing the Motion for Compensation before the court.

The court notes that this is Applicant's second interim application. As stated in the Motion, for the First Interim Application the court has allowed (subject to final approval pursuant to 11 U.S.C. § 330) first interim fees of $28,050.00. Dckt. 239. The employment applications for the First Interim Application are stated to be $1,350.00. Exhibit 3, Task Billing Statement, Dckt. 208. When added to the employment and fee applications of $4,770.00 in the present application, the total fees are $6,220—for both employment and three compensation motions. The total fees requested for the first and second fee applications total $41,250.00. The $6,220.00 in fee application and compensation motions is approximately 15% of the total fees. For purposes of an interim fee application, this is not *per se* unreasonable.

At this point, the court finds, for this Second Fee Application, the amount of the requested fees in the amount of $13,200.00 to be reasonable.

Fees

The court finds that the hourly rates, as reduced above, are reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim Fees in the amount of $13,200.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

Second Interim Costs in the amount of $770.15 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$13,200.00
Costs and Expenses	$770.15

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Steven Altman ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Steven Altman is allowed the following fees and expenses as a professional of the Estate:
>
> Steven Altman, Professional employed by the Trustee
>
> Fees in the amount of $13,200.00
> Expenses in the amount of $770.15,
>
> as an interim allowance of fees and expenses pursuant to 11 U.S.C. § 331 and subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

21. **16-90083-E-7 SSA-14** | **VALLEY DISTRIBUTORS, INC. Iain Macdonald** | **MOTION TO EMPLOY JOSEPH WOICIK AS CONSULTANT 4-7-17 [282]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 7, 2017. By the court's calculation, 27 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). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Employ is granted.

Irma Edmonds, the Chapter 7 Trustee, seeks to employ Joseph Woicik as a computer consultant, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. The Trustee seeks the employment of Counsel to assist the Trustee analyze a server belonging to Valley Distributor, Inc. ("Debtor").

The Trustee argues that Counsel's appointment and retention is necessary because Mr. Woicik provided technical support to Debtor for computer- and network-related issues from June 1999 through January 2016.

Mr. Woicik testifies that he has reviewed Debtor's schedules, the filed claims, and a sample mailing matrix, and he testifies that he does not hold any interest adverse to Debtor or to the Estate and that he has no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Mr. Woicik, considering the declaration demonstrating that he 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 Joseph Woicik as computer consultant for the Chapter 7 estate on the terms and conditions set forth in the Computer Forensic Agreement filed as Exhibit B, Dckt. 286. The approval of the hourly fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and the Chapter 7 Trustee is authorized to employ Joseph Woicik for the Chapter 7 Trustee on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit B, Dckt. 286.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received 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.

22. 16-90984-E-7 MRG-1 | **EDWARD/SUSAN LARSEN** **Michael Germain** | **MOTION TO COMPEL ABANDONMENT 4-19-17 [30]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 19, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Compel Abandonment is denied without prejudice.

After notice and a hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or is 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 Edward Larsen and Susan Larsen ("Debtor") requests the court to order the Trustee to abandon a time share in property commonly known as 90 North Point Street #632 MB37E, San Francisco, California ("Property").

TRUSTEE'S NON-OPPOSITION

Michael McGranahan, the Chapter 7 Trustee, entered a statement of non-opposition on April 21, 2017.

DISCUSSION

Grounds Stated in Motion

The grounds stated with particularity in the Motion (FED. R. BANKR. P. 9013) are in pertinent part as follows:

A. "Debtors, . . . ask the Court to make and enter an Order . . . that . . . Trustee . . . shall abandon property of the estate (specifically, a time-share interest listed on ScheduleD as 22 "Fairmont Ghirardelli, 90 North Point Street # 632 MB37E, San Francisco, CA 941 09"). . . ."

B. "[T]he subject property of the Estate is burdensome and/or of inconsequential value and benefit to the Estate."

C. "[T]he probable fair market value of the subject time-share interest, based upon recent sales of identical time-share interests, and with secured claims and transaction costs factored in, it is probable that the Estate would take a net loss on the sale of the time-share."

Motion, Dckt. 30. The Motion makes no allegation as to the value of the timeshare, the costs and expenses, or any grounds, if found to be supported by the evidence could be the basis for the court granting the requested relief. Rather, the above does identify the property and then makes the legal conclusion that it is burdensome and/or (it appears that Debtor may not know what Debtor is alleging) of inconsequential value.

Minimum Pleading—FED. R. BANKR. P. 9013

The Supreme Court has provided in Federal Rule of Bankruptcy Procedure 9013 that the basic motion pleading practice in district court (FED. R. CIV. P. 7) must be complied with in the bankruptcy case itself (as well as in adversary proceedings, FED. R. BANKR. P. 7007).

"Rule 9013. Motions: Form and Service

> A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. **The motion shall state with particularity the grounds therefor**, and shall set forth the relief or order sought. . . ."

FED. R. BANKR. P. 9013 (emphasis added).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan 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 the automatic stay, 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 to other parties in a bankruptcy case and to 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.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

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 pleading with particularity 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." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in 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 any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

It is true that the Motion states that factual and legal grounds are found in the Memorandum of Points and Authorities, the Declaration of Edward Larsen, and the attached Exhibit 1 and directs the court to read all of the other documents to state, for Debtors, whatever grounds the court thinks helps Debtor win. The court generally declines an opportunity to do associate attorney work and assemble motions for parties.

Trustee's Non-Opposition

The Trustee has made a Docket Entry statement of "non-opposition." Nothing further is provided by the Trustee.

Denial of Motion Without Prejudice

At this point, to grant the Motion the court would be little more than granting relief merely because the Debtor asked for it and the Trustee says he does not disagree, but the court has no basis for determining that the requirements for abandonment exist. The Supreme Court has admonished trial judges not to merely issue orders for whatever is asked, irrespective of the judge determining that the relief is proper, merely because no one opposes it. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); *see also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

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