UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

May 18, 2017, at 10:30 a.m.

1.	**17-90105-E-7** **SSA-1**	**RICK/THERESA UNRUH** **Steven Altman**	**CONTINUED MOTION TO COMPEL ABANDONMENT** **3-15-17 [9]**

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, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on March 15, 2017. By the court's calculation, 29 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 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 Rick Unruh and Theresa Unruh ("Debtor") requests the court to order the Trustee to abandon property commonly known as 11206 Scarlet Oak Drive, Oakdale, California ("Property"). The Property is encumbered by the liens of Ocwen Loan Servicing LLC and Chase Bank, securing claims of $441,276.80 and $101,001.83, respectively. The Declaration of Rick Unruh has been filed in support of the Motion, and it values the Property at $615,000.00 and states that Debtor claims an exemption of $100,000.00.

STIPULATION

On March 31, 2017, Debtor and the Chapter 7 Trustee filed a Stipulation in which the parties agreed to continue the hearing on the matter to 10:30 a.m. on May 18, 2017, to allow the Trustee to evaluate Debtor's valuation of the Property. Dckt. 14.

APRIL 13, 2017 HEARING

At the hearing, the court continued the matter to 10:30 a.m. on May 18, 2017, pursuant to the parties' stipulation. Dckt. 22.

DISCUSSION

No further pleadings have been filed since the April 13, 2017 hearing. The Chapter 7 Trustee has not opposed the Motion.

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 Rick Unruh and Theresa Unruh ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Compel Abandonment is granted, and the Property identified as 11206 Scarlet Oak Drive, Oakdale, California, and listed on Schedule A by Debtor is abandoned by Michael McGranahan, the Chapter 7 Trustee, to Rick Unruh and Theresa Unruh by this order, with no further act of the Trustee required.

2. **17-22713-C-11** **ELAN MEDICAL CORPORATION**
Sarah Stuppi

ORDER TO APPEAR AND SHOW CAUSE WHY A PATIENT CARE OMBUDSMAN SHOULD NOT BE APPOINTED
4-25-17 [8]

No 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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Office of the United States Trustee as stated on the Certificate of Service on April 27, 2017. The court computes that 21 days' notice has been provided.

The Order to Show Cause is xxxxx.

Elan Medical Corporation ("Debtor in Possession") filed this case on April 24, 2017. The court issued an Order to Show Cause Why a Patient Care Ombudsman Should Not Be Appointed. 11 U.S.C. § 333(a)(1) states that in a Chapter 11 case if the debtor is a health care business, then "the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case."

DEBTOR IN POSSESSION'S RESPONSE

Debtor in Possession filed a Response on May 13, 2017. Dckt. 22. Debtor in Possession argues that it does not fit neatly into the definition of "health care business" in 11 U.S.C. § 101(27A). Debtor in Possession states it operates two wellness health centers that provide elective treatments, such as: hormone replacement therapy, aesthetic skin care services (e.g., Botox, chemical peels, and liquid facelifts), and weight loss programs. Debtor in Possession argues that its health care services do not include any diagnosis or treatment of injury, deformity, or disease as specified in the definition of "health care business." Therefore, Debtor in Possession argues that the court does not need to appoint patient care ombudsman.

If Debtor in Possession were classified as a health care business, Debtor in Possession argues that appoint of a patient care ombudsman is not necessary because Debtor in Possession maintains detailed medical records on computer and on paper that are readily available to each patient upon request. Additionally, Debtor in Possession states that its business is supervised routinely by governmental entities, that there are no provider dependency issues, and that the cost of a patient care ombudsman would be burdensome to the Estate.

Definition of Health Care Business

"Health care business" in 11 U.S.C. § 101(27A) means:

(A) any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for–

(i) the diagnosis or treatment of injury, deformity, or disease; and

(ii) surgical, drug treatment, psychiatric, or obstetric care; and

(B) includes–

(i) any–

(I) general or specialized hospital;

(II) ancillary ambulatory, emergency, or surgical treatment facility;

(III) hospice;

(IV) home health agency; and

(V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and

(ii) any long-term care facility, including any–

(I) skilled nursing facility;

(II) intermediate care facility;

(III) assisted living facility;

(IV) home for the aged;

(V) domiciliary care facility; and

(VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

Debtor in Possession indicated on its voluntary petition that it is a health care business as defined in 11 U.S.C. § 101(27A). Dckt. 1, line 7. An inquiry into whether the court should appoint a patient care ombudsman is appropriate according to 11 U.S.C. § 333(a)(1), then.

Factors for the Court to Consider

When considering whether to appoint a patient care ombudsman under 11 U.S.C. § 333(a)(1), the court uses the following non-exclusive factors:

A. The cause of the bankruptcy;

B. The presence and role of licensing or supervising entities;

C. Debtor's past history of patient care;

D. The ability of the patients to protect their rights;

E. The level of dependency of the patients on the facility;

F. The likelihood of tension between the interests of the patients and the debtor;

G. The potential injury to the patients if the debtor drastically reduced its level of patient care;

H. The presence and sufficiency of internal safeguards to ensure appropriate level of care; and

I. The impact of the cost of an ombudsman on the likelihood of a successful reorganization.

In re Valley Health Sys., 381 B.R. 756, 761 (Bankr. C.D. Cal. 2008) (citing *In re Alternate Family Care*, 377 B.R. 754, 758 (Bankr. S.D. Fla. 2007)); *see also In re Denali Family Servs.*, No. A13-00114-GS, 2013 Bankr. LEXIS 1713, at *4–5 (Bankr. D. Alaska Apr. 24, 2013) (citation omitted) (citing *In re Flagship Franchises of Minn., LLC*, 484 B.R. 759, 762 (Bankr. D. Minn. 2013) (collecting cases)).

Four additional non-exclusive factors that the court may consider are:

A. The high quality of the debtor's existing patient care;

B. The debtor's financial ability to maintain high quality patient care;

C. The existence of an internal ombudsman program to protect the rights of patients; and

D. The level of monitoring and oversight by federal, state, local, or professional association programs that renders the services of an ombudsman redundant.

In re Valley Health Sys., 381 B.R. at 761 (citing 3 COLLIER ON BANKRUPTCY ¶ 333.02, at 333-4 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2007)).

No one factor is determinative, and the court determines how much weight to give each factor depending upon the circumstances in a case. *In re Denali Family Servs.*, 2013 Bankr. LEXIS 1713, at *5 (citation omitted).

REVIEW OF SCHEDULES

On May 8, 2017, the Schedules were filed in this case. No real property was listed on Schedule A/B as owned, with two leasehold address listed. Dckt. 15 at 6. For personal property, there is approximately $27,000 in bank accounts and cash. *Id.* at 1. Approximately $20,000 is listed or office equipment and furniture. *Id.* at 4. All medical devices are reported to be leased. *Id.* at 5.

On Schedule B it is also disclosed that Debtor in Possession corporation leases a 2016 Tesla Model S. *Id.*

The major personal property assets listed are causes of action having a value of $3,750,000.00. *Id.* at 7. These claims are identified as being against former contractors and employees, including claims for "cyber breaches."

Only one creditor is listed on Schedule D having a secured claim—U.S. Bank with a $40,000 secured claim. FN.1.

FN.1. It is not clear which entity with the two words "U.S. Bank" in its name is the creditor in this case. The FDIC lists nineteen (19) federally insured financial institutions with those two words in their names. https://research.fdic.gov/bankfind/results.html?name=U.S.+Bank&fdic=&address=&city=&state=&zip=&bankUrl=. The California Secretary of State lists no active corporations, limited liability companies, or limited partnerships with those two words in its name. https://businesssearch.sos.ca.gov/.

MAY 18, 2017 HEARING

As stated in 11 U.S.C. § 333(a), "**the court shall order**, not later than 30 days after the commencement of the case, the **appointment of an ombudsman** to **monitor the quality of patient care and to represent the interests of the patients** of the health care business **unless the court finds** that the **appointment of such ombudsman is not necessary** for the protection of patients under the specific facts of the case." (Emphasis added.)

At the hearing, Debtor stated that **xxxxxxxxxxxxxxxxxxxx**.

At the hearing the U.S. Trustee stated **xxxxxxxxxxxxxxxxxxxxxxx**.

At the hearing, patient representatives stated **xxxxxxxxxxxxxxxxxxxxx**.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is **xxxxx**.

3.	**13-91315-E-7** **WFH-47**	**APPLEGATE JOHNSTON, INC.** **George Hollister**	**MOTION FOR COMPENSATION BY THE LAW OFFICE OF WILKE, FLEURY, HOFFELT, GOULD & BIRNEY, LLP FOR DANIEL L. EGAN, TRUSTEE'S ATTORNEY(S)** **4-20-17 [782]**

Final Ruling: No appearance at the May 18, 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's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on April 20, 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.

Wilke, Fleury, Hoffelt, Gould & Birney, LLP, the Attorney ("Applicant") for Michael McGranahan, the Chapter 7 Trustee ("Client"), makes a Third Interim Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period July 1, 2016, through February 28, 2017. The order of the court approving employment of Applicant was entered on August 29, 2013. Dckt. 92. Applicant requests fees in the amount of $196,604.40 and costs in the amount of $13,262.53.

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 litigating avoidance actions, settling preference actions, and pursuing the remaining pending suits. The estate has $676,080.03 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 4.80 hours in this category. Applicant represented the Trustee in preparing and prosecuting a motion for authority to pay taxes.

Avoidance Action (General): Applicant spent 401.90 hours in this category. Applicant represented the Trustee in continuing to prosecute actions to recover avoidable transfers, conducted and responded to discovery (written discovery and twelve depositions); responded to a series of demands for electronically-stored data, worked with a consultant to produce requested data; prepared for and then settled

dispute as to electronic data; argued two motions for summary judgment; represented the Trustee in pretrial statements, attended hearings, and prosecuted an adversary proceeding through trial.

Avoidance Action (Settlement): Applicant spent 97.90 hours in this category. Applicant represented the Trustee in activities to attempt to settle ongoing preference actions, attended four BDRP mediations, negotiated with defendants, settled with ten defendants, filed motions for court approval of settlements.

Fee/Employment Applications: Applicant spent 38.70 hours in this category. Applicant prepared three fee applications, including ones for itself and ones for Grimbleby Coleman CPAs, Inc. and Capitol Digital Document Solutions, LLC.

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**
Daniel Egan, attorney	337.40	$395.00	$133,273.00
	102.1	$405.00	$41,350.50
Anthony Eaton, attorney	95.70	$330.00	$31,581.00
	0.60	$340.00	$204.00
Steven Williamson, attorney	0.70	$330.00	$231.00
Rickaye Harris, paralegal	2.50	$125.00	$312.50
	0	$0.00	$0.00
Total Fees For Period of Application			$206,952.00

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

Application	**Interim Approved Fees**	**Interim Fees Paid**
First Interim	$190,198.00	$152,158.40
Second Interim	$306,169.15	$244,935.32

Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$496,367.15	

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $13,262.53 pursuant to this application. Pursuant to prior interim applications, the court has allowed costs of $38,261.54.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Postage		$1,701.20
DLE Airfare		$277.97
Photocopies		$3,996.50
ACE Attorney Services		$393.85
DLE Express		$758.58
Federal Express		$101.06
Conference Call		$13.36
Court Reporter Fees		$6,020.01
Total Costs Requested in Application		$13,262.53

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks to be paid a single sum of $196,604.40 for its fees incurred for Client. Third Interim Fees and Costs in the amount of $196,604.40 are approved pursuant to 11 U.S.C. § 331, and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

Third Interim Costs in the amount of $13,262.53 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.

The court authorizes the Trustee to pay 80% of the fees and 100% of the costs allowed by the court.

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

Fees	$196,604.40
Costs and Expenses	$13,262.53

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 Wilke, Fleury, Hoffelt, Gould & Birney, LLP ("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 Wilke, Fleury, Hoffelt, Gould & Birney, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Wilke, Fleury, Hoffelt, Gould & Birney, LLP, Professional employed by the Trustee
>
> Fees in the amount of $196,604.40
> Expenses in the amount of $13,262.53,
>
> 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 80% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

4. **14-91520-E-7** **JOANN TEEM** **MOTION FOR ORDER CLOSING CASE**
WFH-5 **Gilbert Vega** **WITHOUT ABANDONING ASSETS TO DEBTOR**
4-20-17 [58]

Final Ruling: No appearance at the May 18, 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, and Office of the United States Trustee on April 20, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Order Closing Case Without Abandoning Assets to Debtor 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 hearing on the Motion for Order Closing Case Without Abandoning Assets to Debtor is continued to 10:30 a.m. on June 8, 2017.

JoAnn Teem ("Debtor") received a discharge in this case on March 16, 2015. Dckt. 26. On April 20, 2017, Michael McGranahan, the Chapter 7 Trustee, filed this Motion for Order Closing Case Without Abandoning Assets to Debtor pursuant to 11 U.S.C. 554(c) on the basis that the Estate holds an interest in shares of a corporation that the Trustee has sought offers for, but no offers have materialized. The Trustee believes that the Estate's interest has significant value, but it is not liquid at this time.

NOTICE OF CONTINUED HEARING

On May 5, 2017, the Trustee filed a Notice of Continued Hearing for this matter. Dckt. 63. The Notice states that the hearing is continued to 10:30 a.m. on June 8, 2017.

RULING

The Trustee having filed a Notice of Continued Hearing, and no party opposing it, the hearing on the Motion is continued to 10:30 a.m. on June 8, 2017.

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 Order Closing Case Without Abandoning Assets to Debtor filed by Michael McGranahan, 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 hearing on the Motion is continued to 10:30 a.m. on June 8, 2017.

5. **16-90830-E-7** **BRIAN BETTENCOURT**
WFH-3 **Elizabeth Berke-Dreyfuss**

MOTION FOR COMPENSATION BY THE LAW OFFICE OF WILKE, FLEURY, HOFFELT, GOULD & BIRNEY, LLP FOR DANIEL L. EGAN, TRUSTEE'S ATTORNEY(S)
4-18-17 [81]

Final Ruling: No appearance at the May 18, 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 April 18, 2017. By the court's calculation, 30 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 First and Final Allowance of Professional Fees is granted.

Wilke, Fleury, Hoffelt, Gould & Birney, LLP, 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 January 19, 2017, through March 31, 2017. The order of the court approving employment of Applicant was entered on February 28, 2017. Dckt. 44. Applicant requests fees in the amount of $1,500.00.

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). 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 negotiating and settling a dispute between Debtor and the Estate. The estate has $5,990.00 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 REQUESTED

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

Settlement: Applicant spent 6.4 hours in this category. Applicant negotiated a settlement with Debtor, filed a motion with the court for its approval, and was able to recover $6,000.00 for the Estate.

Fee/Employment Application: Applicant spent 2.1 hours in this category. Applicant prepared an application for its employment and prepared this application for allowance of fees.

General Case Administration: Applicant spent 0.6 hours in this category. Applicant responded to a creditor inquiry and evaluated a motion to abandon.

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**
Daniel Egan, attorney	9.1	$405.00	$3,685.50

	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			$3,685.50

FEES ALLOWED

Applicant seeks to be paid a single sum of $1,500.00 for its fees incurred for Client. First and Final Fees and Costs in the amount of $1,500.00 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.

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

Fees $1,500.00

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 Wilke, Fleury, Hoffelt, Gould & Birney, LLP ("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 Wilke, Fleury, Hoffelt, Gould & Birney, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Wilke, Fleury, Hoffelt, Gould & Birney, LLP, Professional employed by the Trustee
>
> Fees in the amount of $1,500.00,
>
> 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.

6. **16-90830-E-7** **BRIAN BETTENCOURT** **AMENDED MOTION TO COMPEL**
WRB-2 **Elizabeth Berke-Dreyfuss** **ABANDONMENT**
4-13-17 [72]

Final Ruling: No appearance at the May 18, 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, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 13, 2017. By the court's calculation, 35 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 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 Brian Bettencourt ("Debtor") requests the court to order the Trustee to abandon property commonly known as 609 Roxbury Lane, Modesto, California ("Property"). The Property is encumbered by the liens of Alabama Metal Industries Corporation and Quicken Loans, securing claims of $21,546.88 and $320,682.00, respectively. The Declaration of Brian Bettencourt has been filed in support of the Motion and values the Property at $415,000.00.

The Declaration states that Debtor and his spouse own the Property as joint tenants. In the Motion, Debtor estimates a 6% cost of sale to sell the Property. The Motion shows both joint tenants holding a $50,000.00 homestead exemption in the Property as well. With cost of sale and Debtor's exemption considered, the Motion pleads that each joint tenant would have a negative interest after payment of the liens from any sale of the Property.

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 Brian Bettencourt ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted, and the Property identified as 609 Roxbury Lane, Modesto, California and listed on Schedule A by Debtor is abandoned by Michael McGranahan, the Chapter 7 Trustee, to Brian Bettencourt by this order, with no further act of the Trustee required.

7.	**16-90830-E-7** **WRB-3**	**BRIAN BETTENCOURT** **Elizabeth Berke-Dreyfuss**	**MOTION TO AVOID LIEN OF ALABAMA METAL INDUSTRIES CORPORATION** **4-12-17 [66]**

Final Ruling: No appearance at the May 18, 2017 hearing is required.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor's Attorney, and Office of the United States Trustee on April 12, 2017. No service on the Creditor or agent for service of process for Creditor is stated. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Alabama Metal Industries Corporation ("Creditor") against property of Brian Bettencourt ("Debtor") commonly known as 609 Roxbury Lane, Modesto, California ("Property"). The court notes that Carrie Bettencourt, Debtor's spouse, filed her own bankruptcy case on October 28, 2016, listed the Property on Schedule A, and claimed an exemption of $50,000.00 according to California Code of Civil Procedure § 704.730 on Amended Schedule C. Case No. 16-90981, Dckt. 1 & 23.

A judgment was entered against Debtor, solely, in favor of Creditor in the amount of $21,546.88. An abstract of judgment was recorded with Stanislaus County on October 5, 2012, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $415,000.00 as of the date of the petition. The unavoidable consensual lien that totals $320,682.00 as of the commencement of this case is stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $50,000.00 on Schedule C.

When calculating the formula in 11 U.S.C. § 522(f)(2), a court deducts "nonavoidable encumbrances on co-owned property . . . from the total value of the property before a debtor's fractional interest is determined." *All Points Capital Corp. v. Meyer (In re Meyer)*, 373 B.R. 84, 91 (B.A.P. 9th Cir. 2007). In Debtor's case, that means deducting $320,682.00 (senior lien to Quicken Loan) from $415,000.00 (the Property's value), which equals $94,318.00. From that remainder, Debtor has a one-half interest as a joint tenant, or $47,159.00. As noted above, Debtor has fully exempted his interest in the Property.

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

INSUFFICIENT SERVICE

Though the Motion would appear to be substantively warranted, the Motion has not been served on Alabama Metal Industries Corporation, the actual creditor. The Certificate of Service merely states that it was served on Harold Glassberg, Esq., "Counsel for Alabama Indus. Metal Corp.)." Dckt. 71. Mr. Glassberg appears on the pleadings relating to the state court judgment and lien to be avoided. Exhibit F, Abstract of Judgment; Dckt. 70.

Federal Rule of Bankruptcy Procedure 9014(b) requires that motions be served in the same manner as summons and complaints as provided in Federal Rule of Bankruptcy Procedure 7004. For a corporation, Federal Rule of Bankruptcy Procedure7004(b)(3) [emphasis added] allows for service by First Class Mail requiring as follows:

> "(3) **Upon a** domestic or foreign **corporation** or upon a partnership or other unincorporated association, by **mailing** a copy of the summons and complaint **to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process** and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

A search of the California Secretary's of State website discloses that Alabama Metal Industries Corporation is a Delaware corporation, having a mailing address in Buffalo, New York, and has CT Corporation Systems as the registered agent for service of process. FN.1.

FN.1. https://businesssearch.sos.ca.gov/CBS/Detail.

There is nothing presented showing that Mr. Glassberg is an officer, managing agent, general agent, or appointed agent to receive service of process. It does appear that Mr. Glassberg and his law firm were engaged to be legal counsel in a state court proceeding.

Failure to properly serve legal pleadings results in a void judgment or order, one that survives even the contention that a purchaser down the line was a bona fide purchaser for value. *OC Interior Servs., LLC v. Nationstar Mortgage, LLC*, 7 Cal. App. 5th 1318, 1332–33 (2017). Proper service is not merely a "procedural" nicety, but a Constitutional requirement. See discussion in *Sillman v. Walker (In re Sillman)*,

2014 Bankr. LEXIS 292, at *14–17 (Bankr. E.D. Cal. 2014), *affrm.*, *Walker v. Sillman (In re Sillman)*, 2015 U.S. Dist. LEXIS 35301 (E.D. Cal. 2015).

Given this defect in service, the court denies the Motion without prejudice. Given that Movant will have to fully serve the new motion, denial without prejudice rather than continuing the matter is preferred. Movant can then consider whether service should be made pursuant to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2), selecting the date for hearing that most conveniently fits counsel and Movant's schedule.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to 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 Motion to Avoid the Judgment Lien of Alabama Metal Industries Corporation is denied without prejudice.

8. **16-90634-E-7** **LESTER/ANA RODRIGUEZ** **MOTION TO DISMISS ADVERSARY PROCEEDING**
16-9018 **MB-3**
CHAIREZ V. RODRIGUEZ ET AL **4-19-17 [38]**

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 Plaintiff and Plaintiff's Attorney on April 19, 2017. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

Lester Rodriguez and Ana Rodriguez ("Defendant") move for the court to dismiss Margarita Chairez's ("Plaintiff") First Amended Complaint ("FAC, " Dckt. 34). The grounds stated in the Motion are discussed below.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition on May 3, 2017. Dckt. 42. The court notes that the Opposition is nearly identical to Plaintiff's Opposition to Defendant's Second Motion to Dismiss. *Compare* Dckt. 26, *with* Dckt. 42. Plaintiff makes the following identical statements as support for opposing the Motion:

A. Plaintiff was employed by Defendant as a cook from December 7, 2011, through March 17, 2013, by oral agreement for $10.00 per hour.

B. Plaintiff was not paid properly between April 11, 2012, through March 17, 2013.

C. Plaintiff entered into an agreement with Defendant by which she would be paid weekly payments to cover the balance due.

D. Defendant made five payments, totaling $1,390.75, but no more.

E. A labor commissioner found that Defendant intentionally failed to pay Plaintiff and awarded a judgment for Plaintiff in the amount of $5,105.05 in wages, $2,968.00 in liquidated damages, $1,800.00 in penalties, and $378.21 in interest.

The new substantive portion of Plaintiff's Opposition is an allegation that when Plaintiff attempted to collect the owed wages before the labor commissioner intervened, Defendant allegedly threatened to have Plaintiff arrested and deported. Dckt. 42, at 2.

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a); FED. R. BANKR. P. 7008. "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim that would entitle plaintiff to relief. *Williams v. Gorton*, 529 F.2d 668, 672–73 (9th Cir. 1976) (citing *Conley v. Gibson*, 355 U.S. 41, 45 (1957)). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *Kossick v. United Fruit Co.*, 365 U.S. 731, 732 (1961); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988) (citations omitted).

Under the Supreme Court's formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

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

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

Section 523(a)(2)(A) & (6) of the Code state:

> (a) A discharge . . . does not discharge an individual debtor from any debt–
>
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; . . . [or]
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity . . . .

REVIEW OF MOTION

The Motion responds to Plaintiff's claims with the following argumentative grounds:

A. The FAC and evidentiary record fail to include any facts to support that Defendant knowingly made false representations with intent to deceive Plaintiff.

B. The FAC raises only one new allegation, that in addition to the implied promise to pay wages at the inception of the employment relationship, another promise to pay was made on April 11, 2012.

C. Plaintiff makes the conclusory deduction that Defendant's failure to fully pay Plaintiff since the April 11, 2012 promise was made raises a reasonable inference that Defendant knew such representation was false when made with the intention to deceive Plaintiff.

D. The FAC and evidentiary record are devoid of any other contemporaneous statements or information to infer that Defendant knew of the falsity of any representations when made by Plaintiff.

E. Plaintiff's allegations about pay are contradictory because she argues in separate portions of the FAC that Defendant "did not pay" her and that Defendant "did not fully pay" her.

F. Defendant made at least five payments to Plaintiff after she quit working, manifesting Defendant's intent to pay.

G. Except for the promise to pay wages, no other representations are found in the FAC or anywhere else in the evidentiary record to support a finding that Plaintiff's choice to continue working despite not being paid was justified.

REVIEW OF FAC

What the Plaintiff has alleged and what is in the FAC begins and ends with the FAC itself. For purposes of this Motion to Dismiss, the court reads the allegations stated in the FAC to include the following as relevant to the present Motion:

A. Plaintiff is a former employee of Defendant-Debtor. FAC ¶ 8; Dckt. 34.

B. Plaintiff obtained an award from the California Labor Commissioner in November 2013. *Id.*, ¶ 9. A copy of the Award is Exhibit A to the FAC and incorporated therein.

C. The Award, Exhibit A, provides:

1. Plaintiff is awarded $10,711.97 against Defendant-Debtor, comprised of the following:

   a. $5,105.05 for wages
   b. $2,968.00 for liquidated damages
   c. $ 378.21 for interest
   d. $ 90.68 for post hearing interest
   e. $ 370.00 for filing fee

2. The Findings of Fact stated in the Award include:

   a. "Plaintiff was employed by Defendant to perform personal services as a Cook, for the period December 7, 2011 through March 17, 2013, in the County of Stanislaus, California, under the terms of an oral agreement at the final rate of compensation of $10.00 per hour." Exhibit A, Award p. 2:13–16.

   b. "Labor Code §203 mandates that an employee's wages shall continue for up to thirty (30) days if his wages are not paid according to §201 .and or §202 and the employer's failure to pay was willful." *Id.*, p. 3:24–27.

   c. "The definition of 'willful', for the purposes of Labor Code §203, has been determined by the California courts and is summarized at

Title 8, California Code of Regulations §13520 . . . ." *Id.*, p. 3:27, 4:1–2.

D. "On or about April11, 2012, debtors told [Plaintiff] that she would be paid if she would continue to perform services as their employee." FAC ¶ 11.

E. "In making this statement, [Defendant-Debtor] knew it was false and maliciously did not intend to pay [Plaintiff] . . . ." *Id.*

F. "[Defendant-Debtor] did not pay from the period of Apri111, 2012, through March 17, 2013, and made no attempt to fully pay her wages despite [Plaintiff's] demands from the [Defendant-Debtor] during that period." *Id.*

G. "[t]he Labor Commissioner found that debtor's failure to make wage payments was 'willful' under California Labor Code Sec. 203." *Id.*

The term "willful" in this context is defined in the California Administrative Code to be "[e]mployer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." 8 CAL. C. REG. 13520.

H. "[Plaintiff] relied on the representations of the debtors and continued to work as an employee from April11, 2012 through March 17, 2013, to her detriment." FAC ¶ 12.

I. "On or about March 17, 2013, [Defendant-Debtor] and [Plaintiff] entered into an agreement whereby the [Defendant-Debtor] agreed that they would pay [Plaintiff] weekly to cover the wages due from the period of April 11, 2012 through March 17, 2013." FAC ¶ 14.

J. "In making this statement, debtors knew it was false and maliciously did not intend to pay Plaintiff/ Creditor as debtor did not fully pay the Plaintiff/ Creditor's wages . . . ." FAC ¶ 15.

K. "Plaintiff/ Creditor relied on the representations of the debtors to her detriment and injury." FAC ¶ 16.

L. "Plaintiff/Creditor has been damaged in the sum of $10,711.94, plus interest." FAC ¶ 17.

DISCUSSION

Plaintiff's New Allegation in Opposition

The court has noted already that the only substantive addition to Plaintiff's Opposition to this Motion since opposing the prior Motion to Dismiss is an allegation that Defendant threatened to have Plaintiff arrested and deported if she tried to collect unpaid wages. *See* Dckt. 42, at 2.

That allegation is not stated in the FAC, however. If Plaintiff intends to rely on that allegation as part of her grounds for this Adversary Proceeding, then Plaintiff should have included such an allegation in the FAC. At this stage, the court considers the pleadings in the FAC, not extraneous matters and so-called "evidence." The court does not include Plaintiff's allegation stated in the Opposition as part of this Motion.

Determining the Adequacy of the FAC

The FAC denominates two claims for relief, both based upon 11 U.S.C. § 523(a)(2)(A) & (6). Plaintiff has presented them as separate claims because of the dates of certain events. The first claim focuses on an alleged April 11, 2012 conversation in which Defendant is claimed to have told Plaintiff that she would be paid if she continued to work. The second claim sets forth that there was an agreement on March 17, 2013, by which Defendant agreed to pay Plaintiff weekly amounts of the past due wages.

Since a hearing on a motion to dismiss the original complaint, Plaintiff has adopted the court's comments and has stated more than a formulaic recitation of the elements for relief. The changes clear the hurdle established by the Supreme Court in *Iqbal* and *Twombly*, but the court has additional considerations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). For instance, even taking the complaint's allegations as true, the complaint must rise above a speculative level without the court having to rely on unreasonable inferences and conclusions of fact and law. *See, e.g.*, *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).

Here, the FAC rises above a speculative level. As mentioned before, the major changes in the FAC are the additions of an alleged conversation on April 11, 2012, and a payment agreement on March 17, 2013. For the April 11, 2012 conversation, Plaintiff insists that the court agree with her conclusion that Defendant had no intention on April 11, 2012, to pay Plaintiff because Defendant ended up not paying Plaintiff from April 11, 2012, through March 17, 2013. A promise to pay followed by nonpayment may indicate wrongdoing at inception, but the nonpayment is not proof on its own that the promise was made fraudulently. *See, e.g.*, *Barnes v. Roberts (In re Roberts)*, 538 B.R. 1, 10 (Bankr. C.D. Cal. 2015) (citing *Citibank (S.D.) N.A. v. Lee (In re Lee)*, 186 B.R. 695, 699 (B.A.P. 9th Cir. 1995)) ("When the misrepresentation is a promise to perform in the future, the subsequent failure to perform is not enough to prove the promise was fraudulent; rather it must be shown that the debtor did not intend to perform at the time the promise was made.").

Regarding the first claim for relief, Plaintiff asserts that Defendant told her on April 11, 2012, that she would be paid if she continued to be Defendant's employee and that Defendant knew that the

statement was false when made. Dckt. 34, at 2. Plaintiff asserts that she relied upon that representation to her detriment. 11 U.S.C. § 523(a)(2)(A) does not grant a discharge for services acquired by false representation. The basic elements for a nondischargeable debt for actual fraud are: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081 (9th Cir. 2000). The U.S. Supreme Court clarified that it is all "actual fraud" which is nondischargeable, beyond the "affirmative misrepresentation" actual fraud discussed in *Turtle Rock. Husky Int'l Elecs., Inc. v. Ritz*, ___ U.S. ___, 136 S. Ct. 1581 (2016) (concluding that a "fraudulent conveyance" obligation could also constitute actual fraud for purposes of 11 U.S.C. § 523(a)(2)(A)).

As to nondischargeability for damages caused by willful and malicious conduct, the elements of such a claim are: (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199 (9th Cir. 2010). Malice may be inferred based on the nature of the wrongful act. *Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551, 554 (9th Cir. 1991).

Here, for the 11 U.S.C. § 523(a)(2)(A) claims, the FAC states actual allegations of Defendant-Debtor's affirmative misrepresentation, that it was known false (not intending to perform), there was an intent to deceive in making the misrepresentation, Plaintiff relied, and Plaintiff was damaged. Defendant-Debtor disagrees, stating that the "evidence" will not and does not support such allegations. However, such "evidence" is relevant at trial or summary judgment, not in a Rule 12(b) motion to dismiss.

With respect to the 11 U.S.C. § 523(a)(6) claims, Plaintiff asserts that Defendant-Debtor intentionally induced Plaintiff to continue to work, that Defendant-Debtor did so intentionally, that Defendant-Debtor did not intend to pay Plaintiff for her work, and there is no excuse for Defendant-Debtor not paying Plaintiff for a year's worth of wages.

In a "Second Claim" for relief, Plaintiff argues she and Defendant entered into a wage repayment agreement on the day that she quit working. Dckt. 34, at 3. Plaintiff states Defendant-Debtor knew that a promise to repay Plaintiff was false and was made maliciously because Defendant-Debtor made only five payments. 11 U.S.C. § 523(a)(6) states a discharge will not be granted for a willful or malicious injury made by a debtor.

While stated as a "Second Claim," the FAC further alleges that the misrepresentations/willful and malicious conduct continued through a repayment agreement entered into between Plaintiff and Defendant-Debtor. The obligation asserted to be owed is the same—the unpaid wage claim that has been reduced to a California Labor Commission Award.

Plaintiff's pleading in the FAC gets Plaintiff past this Motion to Dismiss, sufficiently stating alleged claims under 11 U.S.C. § 523(a)(2)(A) and (a)(6). That is not to say that the evidence will bear these claims out. That is not to say that the evidence will support a factual and legal determination that all of the damages for unpaid wages arise from a "justified" reliance. But that evidence which Defendant-Debtor

asserts exists (or does not exist) will have to be properly presented to the court. The court does not convert this Rule 12(b) motion to a summary judgment proceeding under Rule 12(d).

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 Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss the First Amended Complaint is denied. Lester Rodriguez and Ana Rodriguez, and each of them, shall file and serve their answers to the First Amended Complaint on or before June 1, 2017.

9. **16-90139-E-7** **AJAVA SYSTEMS, INC.** **MOTION FOR COMPENSATION BY THE LAW OFFICE OF HUGHES LAW CORPORATION FOR GREGORY J. HUGHES, CREDITORS' ATTORNEY(S) 4-19-17 [151]**
CDH-6 **David Johnston**

Final Ruling: No appearance at the May 18, 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 April 19, 2017. By the court's calculation, 29 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 hearing on the Motion for Allowance of Professional Fees is continued to 10:30 a.m. on June 29, 2017.

Hughes Law Corporation, the Attorney ("Applicant") for Schreiber Foods, Inc., Agri-Dairy Products, Inc., and Ball Metal Food Container, LLC, Creditors ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period January 4, 2016, through April 12, 2017. Applicant requests fees in the amount of $16,493.00 and costs in the amount of $355.00.

STIPULATION TO CONTINUE HEARING

On May 4, 2017, the parties filed a "Stipulation" to continue the hearing on the matter to 10:30 a.m. on June 29, 2017, because both parties are unavailable for the May 18, 2017 hearing. Dckt. 156. The court deemed the "Stipulation" to be a joint "motion" as required by Federal Rule of Bankruptcy Procedure 9013 and Local Bankruptcy Rule 9014-1(j).

ORDER CONTINUING HEARING

On May 9, 2017, the court entered an order continuing the hearing to 10:30 a.m. on June 29, 2017. Dckt. 157.

10.	**16-90083-E-7 SSA-15**	**VALLEY DISTRIBUTORS, INC. Iain Macdonald**	**MOTION TO EMPLOY TOM WILSON AS CONSULTANT 4-24-17 [290]**

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 24, 2017. By the court's calculation, 24 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 Tom Wilson as 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 in accessing and extracting information from Debtor's computer server.

The Trustee argues that Mr. Wilson's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate because the Trustee believes that Debtor's computer server

contains information relevant or helpful to the investigation of Debtor's financial affairs, and information from the server may lead to preference or fraudulent conveyance actions.

Tom Wilson testifies that he does not represent or 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.

The Computer Forensic Agreement filed as Exhibit B states that Mr. Wilson will be paid $120.00 per hour for his work and that he will inform the Trustee if his work will exceed five hours. Exhibit B, Dckt. 294. The agreement states that he is being employed "to access, analyze, retrieve the financial information of the [Valley Distributor, Inc.] computers presently held in the possession of" the Trustee. *Id.*

Taking into account all of the relevant factors in connection with the employment and compensation of Mr. Wilson, considering his 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 Tom Wilson 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. 294. 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 Tom Wilson as computer consultant for the Chapter 7 Trustee on the terms and conditions as set forth in the Computer Forensic Agreement filed as Exhibit B, Dckt. 294.

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 the hourly rate of $120.00 is authorized, subject to the provisions of 11 U.S.C. § 328.

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.

11. **16-90984-E-7** **EDWARD/SUSAN LARSEN** **CONTINUED MOTION TO COMPEL ABANDONMENT**
MRG-1 **Michael Germain** **4-19-17 [30]**

Final Ruling: No appearance at the May 18, 2017 hearing is required.

Local Rule 9014-1(f)(2) Motion—Final, No Hearing.

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.

The Motion to Compel Abandonment has been granted by prior order of the court, and **the matter is removed from the calendar.**