UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

May 21, 2015 at 10:30 a.m.

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1. 13-90901-E-12 ANDREW NAPIER
Scott A. CoBen

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
5-9-13 [1]

Debtor's Atty: Scott A. CoBen

The Status Conference is xxxxxxxxxxxxxxxxxx.

Notes:

Continued from 2/12/15 to be heard in conjunction with the continued hearing on the Plan Receiver fees.

2. 13-90901-E-12 ANDREW NAPIER
RHS-1 Scott A. CoBen

ORDER TO SHOW CAUSE WHY BANKRUPTCY CASE SHOULD NOT BE CONVERTED TO ONE UNDER CHAPTER 7 OR DISMISSED WITH PREJUDICE
4-9-15 [337]

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, 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 Andrew Clyde Napier ("Debtor"), Debtor's Attorney, Trustee, and other parties in interest on April 15, 2015. The court computes that 36 days' notice has been provided.

The court's decision is to sustain the Order to Show Cause and order the case dismissed with prejudice.

On April 15, 2015, the court issues an Order to Show Cause Why Bankruptcy Case Should Not be Converted to One Under Chapter 7 or Dismissed with Prejudice. Dckt. 337. The court ordered that responses to the Order shall be filed and served on or before May 7, 2015. The court further ordered that any replies shall be served and filed on or before May 14, 2015.

DEBTOR'S RESPONSE

The Debtor filed a response to the Order to Show Cause on April 12, 2015. Dckt. 347. The Debtor states that, due to the fact he has been unable to perform under the confirmed plan, that the Debtor consents to dismissing the court with prejudice. The Debtor notes that the dismissal with prejudice would leave the Debtor without a discharge and that he would have address his creditors outside of bankruptcy.

The Debtor argues that conversion to a Chapter 7 would not serve a bona fide productive financial purpose because:

1. It would likely be a no asset case and Debtor would not receive a discharge

2. Secured creditors would incur the expanse and delay of Motions for Relief from Stay

3. A panel trustee with no funds in the estate would have to investigate the assets of the estates which range across central and northern California

4. The Trustee of the United States Trustee would likely bring a bar to discharge action.

5. Assuming the court grants the Motion to Withdraw as Attorney, Debtor will be pro per.

DEERE & COMPANY'S RESPONSE

Deere & Company filed a statement in support of dismissal of the case on April 17, 2015. Dckt. 354.

UNITED STATES TRUSTEE

The UST filed a response on May 6, 2015. Dckt. 355. The UST supports the dismissal of the case with prejudice with the imposition of a one-year prohibition against the Debtor's filing of any subsequent cases. Dismissal would allow the creditors to pursue their remedies. The UST argues that the Debtor has acted in bad faith, has been egregious in his conduct, and has not performed his duties as a Chapter 12 debtor.

The UST argues that a one-year bar is proper. While the UST notes that the case law is uncertain whether there is authority to impose the bar that extends to subsequent cases where there are unrelated new debts, the UST asserts that in light of the Debtor consenting to the imposition of the prohibition, the one-year bar is proper.

In analyzing whether dismissal or conversion is a better course of action, the UST argues that dismissal is better because the Debtor has likely committed fraud which justifies conversion to a Chapter 7 but there is no evidence that such conversion would benefit the creditors. The UST argues that the uncertainty of whether there are any assets that, if liquidated, that would benefit the creditors and estate supports the court being dismissed.

CHAPTER 12 TRUSTEE'S RESPONSE

Jan Johnson, the Chapter 12 Trustee, filed a response on May 8, 2015. Dckt. 357. The Trustee argues that a dismissal with prejudice with a one-year bar for refiling would be in the best interest of the creditors. Like the UST, the Trustee argues that while there appears to be fraud which justifies the conversion to a chapter 7, the Trustee does not believe that a conversion would be in the best interest of the estate and creditors. The Chapter 7 would likely be a no asset case and would result in further administrative costs. Therefore, the Trustee believes that dismissal with a one-year bar for refiling is best in the context of this unique case.

DISCUSSION

The "Current Chapter 12 Case," 13-90901, filed by Debtor is just one in a series of cases filed and broken promises by Debtor. Debtor, in pro se, commenced a Chapter 12 case on March 29, 2010. "First Chapter 12 Case," 10-27953. The First Chapter 12 Case was dismissed on March 15, 2011. Debtor then commenced his "Second Chapter 12 Case," 11-21063, in which he was represented by counsel, on January 14, 2011 (which was two months before the First Bankruptcy Case was dismissed). In the Civil Minutes from the September 5, 2013 Confirmation Hearing in the Current Chapter 12 Case, the court summarized these two prior cases as follows:

> Case No. 10-27953, Filed March 29, 2010; Dismissed March 15, 2011.
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> In Chapter 12 case 10-27953 the Debtor confirmed a Chapter 12 Plan on July 26, 2010. Dckt. 97. The Plan required monthly payments by the Debtor of $28,320.92. Plan, Dckt. 90. The budget that the Debtor provided in support of confirmation listed monthly average income of $83,256. Exhibit A, Dckt. 92. The average monthly expenses shown on the budget were $55,799. On January 20, 2011, the Chapter 12 Trustee filed a motion to dismiss, asserting that the Debtor was $43,057 delinquent in plan payments, with another monthly payment of $19,236.92 being due on February 1, 2011. Motion, Dckt. 176; Declaration, Dckt. 178. No opposition was filed to the motion.
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> Case 11-21063, Filed January 14, 2011; Dismissed May 20, 2013.
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> In Chapter 12 case 11-21063 the Debtor confirmed a Chapter 12 Plan on August 31, 2011. Order, Dckt. 88. Under the terms of the Plan the Debtor was required to make $7,050 a month payments of the Chapter 12 Trustee for a period of 36 months. Plan, Dckt. 77. The Debtor provided his declaration

> in support of confirmation, providing an income and expense projection which was filed as Exhibit A. Declaration, Dckt. 75; Exhibit A, Dckt. 76. For the income projections the Debtor testified to having average gross monthly revenues of $66,000 and monthly non-personal expenses of $56,880. This resulted in his testimony that his average monthly net income was $9,120.00. On March 21, 2013, the Chapter 12 Trustee filed a motion to dismiss asserting that the Debtor was $34,600 in default on the plan payments. Motion, Dckt. 185; Declaration, Dckt. 187. No opposition was filed to the Motion.

Civil Minutes, Dckt. 186.

Since March 2010, Debtor has lived comfortably under the protection of the Bankruptcy Code and, as shown from the record in each of the three cases, has failed to comply with the bankruptcy plans he has confirmed.

In the Current Chapter 12 Case, Debtor confirmed a Chapter 12 Plan in September 2013. Civil Minutes, Dckt. 186. The court confirmed the Chapter 12 Plan, notwithstanding the deficiency of the Debtor's evidence, and credibility.

> While the Debtor testifies in his declaration in support of the Motion to Confirm that he has filed all federal, state and local tax returns, Dckt. 152, it appears that the tax returns for 2012 have not been filed. The IRS cannot determine whether the plan is feasible as it cannot determine the amount of its priority claim.
>
> The Declaration of the Debtor provided in support of the motion consists of a recitation of the Plan terms (how much each creditor is to be paid). Dckt. 152. With respect to how the Debtor will be able to fund the plan, he states that he has temporary work from Gomito Ditching to level farm land. This work is to continue through October 31, 2013, and then resume March 1, 2014, and continue through October 2014. Because the work will stop, the Debtor has not prepared a new budget. The budget presented to the court lists monthly gross income of $76,000.00, expenses of $67,280.00, and average monthly income of $7,720.00. Exhibit A, Dckt. 153.
>
> In his declaration, the Debtor states that Exhibit A is his budget showing $5,100.00 a month in disposable income. This is not the number shown on the budget for average monthly income (which does not list any personal expenses). The Debtor provides no testimony as to how he computes $75,000.00 a month in gross income and the $67,280.00 a month in expenses. The court is not provided with any historical analysis of the income and expenses or evidence to give any credibility to these numbers. This Debtor has filed and confirmed plans in two prior Chapter 13 cases, both of which were dismissed because of substantial defaults under the plans. Clearly the financial information provided by the Debtor to the Chapter 12 Trustee, creditors, and the court did not bear accurate in light of actual events. FN.1. The

Debtor has failed to provide the court with any credible testimony as to the feasibility of this Plan. Rather, he merely provide a "believe me because I say its true" statement. While the Debtor testifies in his declaration in support of the Motion to Confirm that he has filed all federal, state and local tax returns, Dckt. 152, it appears that the tax returns for 2012 have not been filed. The IRS cannot determine whether the plan is feasible as it cannot determine the amount of its priority claim.

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...

(6) The debtor will be able to make all payments under the plan and to comply with the plan;

Court Finding: This element is the most problematic for the Debtor in Possession. For two prior cases the Debtor's in Possession testimony under penalty of perjury as to the financial operation of his business and assurances that the two prior confirmed plan were feasible have turned out to be inaccurate. The declaration in the present case is devoid of any evidence from which the court can determine whether the Debtor's in Possession conclusions that the current Plan is feasible are realistic.

> The Debtor in Possession argues that he has so significantly changed his business in the last several months that no historic data is relevant. He further argues that he has paid a significant amount to creditors under the prior two plan. As the court noted at the hearing, when a person has a business which generates substantial cash flow and has substantial debt to be paid, making partial payment two prior times and defaulting is not a significant victory. Though significant payments were made, significant defaults occurred and significant claims went unpaid.
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> The creditors support the Plan, from which the court infers that they believe the Plan is feasible. The court will rely on this inference as "evidence" presented by the creditors – their withdrawal of oppositions and affirmative support at the confirmation hearing.
>
> Though sketchy at best, the court will find that this plan is "feasible as any possible plan could be in this case" and give the Debtor in Possession and creditors what they want – confirmation of the Plan. As the court admonished the Debtor in Possession at the confirmation hearing, if he defaults under this Plan, the court expects him to immediately address the default with his counsel. In the past, it appears that the Debtor ignored the defaults and left it to the Chapter 12 Trustee to file and obtained orders dismissing the case.

Dckt. 186.

The court made it clear to the Debtor that he, through the assistance of his counsel, was getting his "second second-chance" at reorganization, and should not continue in his previous errors of failing to make the promised plan payments.

The order confirming the Chapter 12 Plan was filed on October 18, 2013. Dckt. 193. On April 8, 2014 (just six months later), the Chapter 12 Trustee filed a motion to dismiss the Current Chapter 12 Case due to Debtor's failure to make the promised plan payments. Motion, Dckt. 206. The amount of the default was $23,320.79, which represented three plan payments. Only five payments have come due since the October 2013 confirmation. The Debtor made only two post-confirmation plan payments (a 60% default rate). Debtor's only response was that filed by his counsel (Debtor failing, or refusing, to provide a declaration under penalty of perjury) that "Debtor will be current by the date of the hearing." Response, Dckt. 216. This response offered no explanation as to how the Debtor, who was already providing his disposable monthly income to fund the Plan and has no extra money, was going to come up with almost $30,000.00 (including the additional payments coming due) to bring the plan current by the hearing date.

At the May 22, 2014 hearing on the Chapter 12 Trustee's motion to dismiss, the court determined,

> In confirming the Plan, the court noted that the Debtor

was getting a second second-chance, and should not squander it. It appears that he has, spending monies for purposes other than performing his confirmed Chapter 12 Plan. His ex-wife, has raised significant issues concerning the information provided to this court under penalty of perjury by Mr. Napier. While the court acknowledges that an ex-spouse may not be the most unbiased, often times an "ex-" (spouse, partner, business associate) may provide accurate information.

The Chapter 12 Trustee reported that the Debtor appeared at the Trustee office today (May 22, 2014) to make a payment of over $30,000.00. Debtor's counsel stated that $25,000.00 of these monies represent an advance payment of future work to be done by the Debtor for a customer. No explanation is provided as to how the Debtor, in the ordinary course of business, without having to "borrow" against future work which has not been done, can make the payments promised under the confirmed Plan.

Cause exists to dismiss this case. However, dismissal does not address the issues raised by Ms. Napier and the investigation which the Chapter 12 Trustee (and possibly the U.S. Trustee) may believe is necessary. Further, given the repeated filing of bankruptcy cases, confirmation of plans, defaults in plans, and dismissal of prior cases by the Debtor, dismissal of the case appears to be of little significance to this Debtor.

Civil Minutes, Dckt. 219. The reference to the allegations of the "ex-" is to Leysa Napier's letter filed with the court on March 27, 2014, which is not under penalty of perjury. Dckt. 202. Her allegations included the Debtor making multiple trips to Las Vegas, Disneyland, Disneyworld, and Hawaii, all undisclosed and all while Debtor availed himself of the protection of the Bankruptcy Code.

To try and save this Current Chapter 12 Case, Debtor sought to amend the Chapter 12 Plan to provide for the appointment of a receiver to handle the monies and make sure that the plan payments were made by Debtor. As noted in the Civil Minutes for August 21, 2014 continued hearing on the Chapter 12 Trustee's motion to dismiss, the U.S. Trustee reported information from the 2004 examination of the Debtor:

UNITED STATES TRUSTEE'S RESPONSE

On July 23, 2014, the United States Trustee filed a response in support for the motion to dismiss. After laying out the background of the case, notably the multiple bankruptcy filings of the Debtor, the United States Trustee reviews subsequent developments since the May 22 continuance.

Following the May 22nd continuance, the United States Trustee performed a Bankruptcy Rule 2004 Examination of the Debtor, pursuant to the June 3, 2014 order authorizing the examination. Dckt. 226. On July 9, 2014, the Debtor produced a number of documents including Debtor's bank statements for

the period covering January 1, 2013 through May 31, 2014 ("Applicable Period"). On July 16, 2014, the Bankruptcy Rule 2004 Examination of the Debtor took place.

In the response, the United States Trustee notes all of the serious concerns that arose from the Bankruptcy Rule 2004 Examination. These include:

1.During the Applicable Period, the Debtor spent more than $50,000 on airline tickets, hotels and other travel expenses. See Exhibit 8, Dckt. 232; see also Spyksma Declaration, at ¶ 8.3, Dckt. 233;

2.During the Applicable Period, the Debtor spent more than $12,000 at restaurants. See Exhibit 9, Dckt. 232; see also Spyksma Declaration, at ¶ 9, Dckt. 233;

4.During the Applicable Period, the Debtor spent more than $18,000 on goods and services that could be considered luxuries (or, at least, do not appear to have been reasonably necessary for the Debtor's maintenance or support). Exhibit 10, Dckt. 232; see also Spyksma Declaration, at ¶ 10, Dckt. 233;

5. The Debtor failed to disclose his interest in the Tri Counties 6036 bank account on Schedule B. This account was open on the Petition Date. Compare Schedule B, at item 2, Dckt. 1 with Exhibit 4 at p.58, Dckt. 232;

6. The Debtor failed to disclose his rental of a storage space (at StorKwik SelfStorage) on his Schedules and Statements (including on Schedule G). Compare Dckt. 1 with Exhibit 20 at pp. 247-48, Dckt. 232;

7. During the Applicable Period, the Debtor's deposits into his bank accounts totaled only $622,194.16. See Exhibit 1, Dckt. 232; Spyksma Declaration, at ¶11, Dckt. 233. On average, that is less than $37,000 per month ($622,194.16 / 17 months). This is substantially less than what the Debtor reported on his Schedule I($75,000), or what he projected in his Plan Declaration (at least $65,000). In fact, the Debtor's monthly income never once reached $75,000 during the four full months preceding the filing of this case. See Exhibit 11 to the Response. The discrepancy calls into question the accuracy of Schedule I and the Plan Declaration at the time that they were prepared;

8. The $25,000 payment mentioned in the Civil Minutes for the hearing on the Motion to Dismiss was funded by Roy Reeves. According to the Debtor, Mr. Reeves buys and sells dirt. The $25,000 represents an advance for future work. However, even as of July 16, 2014, the Debtor still had not started the work. There is no contract between the parties. Exhibit 20 at pp. 258-62, Dckt. 232;

> 9. As noted above, in his Plan Declaration, the Debtor testified that he had no domestic support obligations. See ¶ 13, supra. While this statement was true, it was arguably misleading. That is because Ms. Leysa Napier had filed an application for spousal support in June 2013. The Debtor filed a responsive declaration on July 12, 2013 (i.e., only 10 days before the Plan Declaration was filed). See Exhibits 14 and 15, Dckt. 232. Unquestionably, the request for spousal support was relevant to the whether the Debtor's plan was feasible.

Civil Minutes, Dckt. 254. The evidence presented by the U.S. Trustee indicates the Debtor had not been truthful with the court and creditors, had not prosecuted the multiple chapter 12 cases and plans in good faith, and has engaged in a scheme of bankruptcy cases to defraud the court and creditors.

As noted by the court, mere dismissal of the Current Chapter 12 Case was inappropriate for two reasons. First, it just played into the Debtor's scheme of using the bankruptcy court and bankruptcy process to defraud and improperly delay. Second, to the extent that the Debtor had a problem (whether gambling, compulsive spending, or other) which caused the misconduct, dismissal could just lead to the complete failure of a potentially viable business and the loss of the value thereof for not only Debtor, but also his ex-wife. Additionally, it would be likely to encourage Debtor to file another non-productive bankruptcy case.

The Chapter 12 Trustee concurred at that point, believing that with the proper financial management, the business could be operated, plan funded, and business preserved. *Id.* The Debtor further argued that the case should not be dismissed, but he be allowed to proceed with a plan, pay creditors, and save his business. *Id.* and Debtor Response, Dckt. 240. Debtor's initial proposal for "financial oversight" was what the court believed was merely a watered down hiring of an accountant, with no oversight responsibility or authority in handling the business finances being given the accountant. Debtor had repeatedly demonstrated that he was incapable of doing himself (or intentionally failing to do), and merely hiring an accountant would not change such conduct.

In addressing defaults and breaches of fiduciary duty, the court determined:

> It is painfully obvious that the Debtor has not followed the terms of the confirmed Plan. The Debtor has been spending an exorbitant amount of money outside of the confirmed Plan. $50,000 for travel expense, $12,000 at restaurants, and $18,000 on luxury goods and services are most certainly not terms of any Chapter 12 confirmed plan. Debtor here took it upon himself to act outside the terms of the Plan and spend money (a large amount of it) on items and services that were not for the betterment of the estate or creditors. FN.3.
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> FN.3. It is equally curious that the Debtor, so strapped for cash and ability to generate a profit, justified confirming a Chapter 12 Plan with a 0.00% dividend to creditors holding general unsecured claims, but during the first year of the Plan has been able to spend $80,000.00 for

travel, lodging, and luxuries. This further impugns the Debtor's credibility and ability to serve as a plan administrator in a bankruptcy case.

Applying the causes under § 1208(c) to the instant case, there are multiple grounds in which dismissal is proper. The Debtor has grossly mismanaged funds by spending superfluous and unnecessary monies on travel, restaurants, and hotels instead of putting that money towards fulfilling the Plan obligations. Through this gross mismanagement, there has been a substantial diminution of the estate (upwards of $80,000 in the past year and a half alone). The multiple filings of the Debtor which all led to dismissal and the inability for the Debtor to follow the terms of the Plan make rehabilitation highly unlikely. Lastly, the Debtor did not disclose the domestic support obligations (or the potential of such, assuming that the Debtor acted in some form of good faith) and failed to timely pay such obligations after confirmation of the plan.

Most notably, the Debtor remains to be delinquent on payments. Failure to make plan payments is sufficient cause to dismiss the case. 11 U.S.C. § 1208(c)(6). On this ground alone, there is sufficient basis to dismiss the case. The evidence concerning the superfluous and unjustifiable spending on non-essential goods suggests that the Debtor willfully ignored the terms of the plan and chose not to make the plan payments in order to take vacations to Las Vegas. Lavish vacations were not part of the Debtor's plan.

Furthermore, the Debtor has not been forthright with the court from the start of this case. In short, the Debtor has only acted in bad faith. Debtor did not disclose an interest in a bank account at the time of filing the petition. Debtor failed to disclose the existence of domestic support obligations. Debtor has provided little to no explanation concerning the discrepancies in Schedules I and J of Debtor's petition and his sworn declarations for the instant motion. Debtor failed to sufficiently explain where large sums of money, such as the $25,00.00 advance for future work in which the Debtor has not provided any contract of the future work nor explanation of the terms of such advance, "magically" appear from to satisfy Debtor's obligations.

Debtor is constantly hiding the ball, hoping that satisfying any deficiencies will cure any and all problems (fraud, misrepresentation, and breach of fiduciary duties) that have run rampant in this case from the get go. Debtor has acted on his own accord in spending estate funds without providing any authorization, justification, or permission. For example, Debtor has not provided any explanation on where he got the past due domestic support obligation payment nor under what authority he was acting under to pay such past due payments. Overall, Debtor has acted egregiously, whether it be

through the gross spending of estate funds outside the Plan's terms or acting without any authority and diminishing the value of his Chapter 12 estate.

The Chapter 12 Trustee and Debtor's suggestion that hiring an accountant will cure the deficiencies and problems that the case has experienced so far is unpersuasive. The plan nor the court should provide for professional "babysitters" so that the Debtor may be left "to drive the tractors off the cliff a fifth time." Such a bookkeeper (or in this situation the non-professional staff of the bookkeeper actually doing the work) would not be able to cure the breaches or prevent them in the future.

The Debtor, first as the Debtor in Possession and then as the Plan Administrator is a fiduciary to the bankruptcy estate and plan estate. The Chapter 12 Plan provides that the property of the estate shall revest in the Debtor upon confirmation. Order, First Amended Chapter 12 Plan attached, ¶ 5.01, Dckt. 193. Even though revested in the Debtor, the property remains subject to the Bankruptcy Code, including 11 U.S.C. § 363. Collier on Bankruptcy, Sixteenth Edition, ¶ 1227.02. The Debtor has chosen to take on the responsibility to serve as the plan administrator, and handle the plan estate monies in the same manner as an independent fiduciary could (and is now proposed) to hold and control those assets. The court would well anticipate the Debtor being the first to the courthouse if the accountant/bookkeeper had used $80,000.00 of the monies for the purposes used by the Debtor through this confirmed Plan.

A trust (fiduciary relationship) is created as a matter of California law when there is a transfer of assets by which one obtains control and another is to share in the profits. ***Schaake v. Eagle Automatic Can. Co.***, 135 Cal. 472 (Cal. 1902). A fiduciary owes a duty "to act with the utmost good faith for the benefit of the other party." ***Persson v. Smart Inventions, Inc.***, 125 Cal. App. 4th 1141, 1160 (2005) (citing ***Bacon v. Soule***, 19 Cal. App. 428, 434 (1912))(internal quotations omitted).

Therefore, because of the delinquent payments and the apparent willfulness in not abiding by the terms of the Plan and the failure to provide any explanation or justification for spending outside the terms of the Plan, the relief is proper pursuant to 11 U.S.C. § 1208. However, it remains to be determined if the relief should be dismissal with only an six month prohibition on filing yet a fourth bankruptcy case in four years, dismissal of the bankruptcy case with prejudice, or conversion to a case under Chapter 7. Alternatively, if the Debtor were to prosecute a plan amendment which provided for an appointment of a receiver to take control of the business and assets for the term of the Plan and the diverted $80,000.00 and additional monies paid to the ex-spouse were accounted for, the court would have yet

another option.

Civil Minutes, Dckt. 254.

Debtor, purporting to have seen the light and being serious about prospectively prosecuting this Current Chapter 12 Case in good faith, proposed a Modified Chapter 12 Plan which provided for the appointment of a state-law receiver to take control of the operation of Debtor's business. The court confirmed that Modified Chapter 12 Plan by order filed on December 14, 2014. Order Confirming, Dckt. 318, with Modified Plan attached. In confirming the Modified Chapter 12 Plan, which provides for the appointment of a receiver, the court stated:

> The Parties' decision to have a receiver appointed to perform the Plan has been made to address a significant, practical, business reality – the Debtor has demonstrated through multiple bankruptcy cases that he is not up to fulfilling the obligations of a plan administrator. In multiple cases the Debtor has confirmed Chapter 12 Plans and in multiple cases he has defaulted on those plans – notwithstanding the business generating substantial revenues.
>
> The appointment of a contractually agreed, Chapter 12 Plan administrator does not do violence to the letter or spirit of 11 U.S.C. § 105(b). The court is not appointing a receiver to take the place of a debtor in possession, Chapter 13 debtor, or a trustee. The receiver is serving in the same function as a "plan administrator" or as a post-confirmation, non-bankruptcy Chapter 11 plan trustee over a trust rather than having property of the estate revested in the debtor.
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> While it would be possible for the Debtor to convert this case to one under Chapter 11 and all of the parties expend more money in confirming a Chapter 11 plan creating such a trust, though the coordination of efforts they have agreed to use a receiver. This has an added benefit for Mr. Bell, as opposed to create some unique position through the Chapter 12 Plan. He knows, through a well established body of California law, the duties of a Receiver. Additionally, he is appointed by this court, and any disputes, issues, or litigation concerning the performance of his duties are in this court, unless ordered otherwise.
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> The court cannot stress enough that this is a unique situation, with large dollar amounts at stake, and the cooperation of all parties in achieving these amendments. If these parties could not reach such a conclusion, the court would have been left with little option but to convert the case to one under Chapter 7 pursuant to 11 U.S.C. § 1208(d).

Civil Minutes, Dckt. 305.

CHAPTER 12 TRUSTEE DECLARATION - FILED APRIL 7, 2015

On April 7, 2015, the Chapter 12 Trustee filed a Declaration giving notice

of yet another default by Debtor in the payments promised, and required, under the confirmed Modified Chapter 12 Plan. Declaration, Dckt. 335. The Trustee reports that Debtor and Debtor's counsel were sent a default letter for $27,000.79 in plan payments. Exhibit A, Dckt. 336. The Trustee also provides a ledger listing the plan payments made by Debtor, with the last being on November 24, 2014. This indicates that the Debtor is in default for the December 2014, and the January, February, and March 2015 plan payments.

DISMISSAL WITH PREJUDICE

As recounted above and in the previously rulings of this court, Debtor has been afforded multiple opportunities to prosecute his chapter 12 cases in good faith, failing each time. The failings have not occurred due to unforeseen financial circumstances, but instead because of Debtor's breaches of fiduciary duties, misrepresentations, false financial information, and improper diversions of property of the bankruptcy estates and the chapter 12 plan estates.

The Bankruptcy Code provides that the dismissal of a bankruptcy case does not bar discharge of debts in a subsequent case, unless the court orders, for cause, otherwise. 11 U.S.C. § 349(a). In discussing the court's discretion to dismiss bankruptcy cases with prejudice (barring discharge of debts in a subsequent case, Collier on Bankruptcy states:

> [2] Dismissal with Prejudice
>
> Although the general rule of section 349(a) is that dismissal of a case is without prejudice, the court is given the discretion to order otherwise for cause. Thus, when dismissal is predicated on grounds that would justify barring the debtor from discharge in the dismissed case or in a subsequent case, the court has the power to dismiss a case with prejudice. This rule must be limited by the requirements of due process. A summary finding of conduct that would bar a discharge under section 727 and a dismissal on that or any other ground may deny a debtor due process if the summary finding would thereafter have the same effect in a later case as a denial of discharge under section 727. Accordingly, the courts should proceed with caution in this area, and dismiss with prejudice only when the debtor's conduct is particularly egregious. As the Court of Appeals for the Tenth Circuit held in Hall v. Vance, dismissal with prejudice is a severe sanction to which courts should resort only infrequently. The court found that it should occur only if there has been both bad faith and prejudice to creditors. Moreover, a dismissal with prejudice should be ordered only after full opportunity for a hearing similar to the opportunity provided on a complaint under section 727 for denial of discharge.
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> The legislative history to section 349(a) indicates that "dismissal of an involuntary [case] on the merits will generally not give rise to adequate cause so as to bar the debtor from further relief."
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> Section 349(a), of course, "refers only to predischarge

> dismissals. If the debtor has already received a discharge, and it is not revoked, then the debtor would be barred under section 727(a) from receiving a discharge in a subsequent liquidation case for six years."

COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 349.02.

The Ninth Circuit Court of Appeals addressed dismissal with prejudice grounds in ***Leavitt v. Soto (In re Leavitt)***, 171 F.3d 1219, 1223-1225 (9th Cir. 1999),

> The phrase "unless the court, for cause, orders otherwise" in Section 349(a) authorizes the bankruptcy court to dismiss the case with prejudice. See also In re Tomlin, 105 F.3d at 937 [chapter 7 case]; 3 Collier on Bankruptcy § 369.01, at 349-2-3 (15th ed. 1997). A dismissal with prejudice bars further bankruptcy proceedings between the parties and is a complete adjudication of the issues. Tomlin, 105 F.3d at 936-37.
>
> "Cause" for dismissal under § 349 has not been specifically defined by the Bankruptcy Code. For Chapter 13 cases, §§ 1307(c)(1) through (10) 7 provide that the bankruptcy court may convert or dismiss, depending on the best interests of the creditors and the estate, for any of ten enumerated circumstances. Although not specifically listed, bad faith is a "cause" for dismissal under § 1307(c). ***Eisen***, 14 F.3d at 470 ("A Chapter 13 petition filed in bad faith may be dismissed 'for cause' pursuant to 11 U.S.C. § 1307(c).") [chapter 7, 11, and 13 cases filed]; ***In re Hopkins***, 201 B.R. at 995 (holding that the debtors' filing of frivolous tax returns with no intention to pay taxes warranted dismissal of a Chapter 13 petition for bad faith). Therefore, it follows that a finding of bad faith based on egregious behavior can justify dismissal with prejudice. ***Tomlin***, 105 F.3d at 937; ***In re Morimoto***, 171 B.R. at 86; ***In re Huerta***, 137 B.R. 356, 374 (Bankr. C.D. Cal. 1992). We hold that bad faith is "cause" for a dismissal of a Chapter 13 case with prejudice under § 349(a) and § 1307(c).
>
> Bad faith, as cause for the dismissal of a Chapter 13 petition with prejudice, involves the application of the "totality of the circumstances" test. ***Eisen***, 14 F.3d at 470. The bankruptcy court should consider the following factors:
>
> (1) whether the debtor "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner," id. (citing ***In re Goeb***, 675 F.2d 1386, 1391 (9th Cir. 1982) [chapter 13 case]);
>
> (2) "the debtor's history of filings and dismissals," id. (citing ***In re Nash***, 765 F.2d 1410, 1415 (9th Cir. 1985) [chapter 13 case];

(3) whether "the debtor only intended to defeat state court litigation," id. (citing ***In re Chinichian***, 784 F.2d 1440, 1445-46 (9th Cir. 1986) [chapter 11 and 13 case])); and

(4) whether egregious behavior is present, ***Tomlin***, 105 F.3d at 937; In re Bradley, 38 B.R. 425, 432 (Bankr. C.D. Cal. 1984).

A finding of bad faith does not require fraudulent intent by the debtor.

Neither malice nor actual fraud is required to find a lack of good faith. The bankruptcy judge is not required to have evidence of debtor illwill directed at creditors, or that debtor was affirmatively attempting to violate the law - malfeasance is not a prerequisite to bad faith.

In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991) (relying on ***In re Waldron***, 785 F.2d 936, 941 (8th Cir. 1986)).

In ***Leavitt***, the conduct which warranted dismissal with prejudice was described as:

As to the first bad faith factor of misrepresentation and inequitable manipulation of the code, Leavitt's dishonesty pervaded the proceedings. He failed to fully disclose his assets and financial dealings. His initial schedules omitted some assets and undervalued others. His expenses were inflated. His first plan offered nothing to his largest unsecured creditor, Soto. This was inequitable, considering Leavitt's available assets and income. When ordered by the bankruptcy court to amend his plan to include at least thirty percent payment to his unsecured creditors, including Soto, Leavitt's amendment proposed only three percent. Finally, Leavitt's failure to disclose receipt of $ 36,000 and the purchase of a new home during the pendency of the case can hardly be considered equitable to his creditors.

At no time did Leavitt volunteer to supplement his petition or his plan to correct the omissions and overstatements in his schedules. He only provided the correct information after a pressing debtor's examination in preparation for the evidentiary hearing. At no time did Leavitt offer the bankruptcy court any reasonable explanation for his conduct. Given the number of financial dealings and the value of the assets omitted, those omissions cannot be considered innocent.

The second factor requires review of the debtor's history of filings and dismissals. The record shows that the petition at issue here was Leavitt's second bankruptcy case in less than six years. Further, Leavitt went on to file three more Chapter 13 petitions in the Bankruptcy Court of the Central District of California with the same goal: avoidance of Soto's judgment. The second petition, SV-96-14767-GM, filed on May 1,

> 1996, was dismissed with prejudice on July 10, 1996. There, the bankruptcy court barred further filings for 180 days, and granted Soto $ 5,500 in sanctions. On August 1, 1996, Leavitt filed his third petition under a different social security number. The third petition was dismissed by the Clerk of the Court on August 15, 1996. The fourth petition, and the subject of a second BAP appeal, was filed with a third social security number. The bankruptcy court dismissed the fourth petition with prejudice as a bad faith filing in violation of the order of dismissal at issue here and the order of dismissal of the second petition, SV-96-14767-GM. In an unpublished decision, the BAP affirmed the bankruptcy court's dismissal of the fourth petition. Leavitt's conduct clearly shows his willingness to use inappropriate filings to seek a discharge of the state court judgment against Soto.
>
> Next, we consider the third factor, that is whether the debtor only intended to defeat state court litigation. Leavitt's actions clearly demonstrate an intent to discharge Soto's state court judgment against him. The timing of his first filing, within two weeks of Soto's judgment, and his three other filings demonstrate that avoidance of Soto's judgment was Leavitt's primary motive.
>
> Fourth, we consider whether egregious behavior is present. Leavitt offers no real justification or excuse for his actions. His clear intention was to use the Bankruptcy system to avoid payment of Soto's judgment. Leavitt's behavior was clearly egregious.
>
> Finally, less offensive conduct has been upheld as grounds for dismissal with prejudice. In Morimoto, 171 B.R. at 86-87, the debtor, a "tax protestor," filed her Chapter 13 petition with the intention of avoiding payment of federal income taxes. In Hopkins, 201 B.R. at 994-95, the debtors failed to file proper income tax returns, and indicated zero taxable income despite W-2 forms showing substantial wages earned. The debtor in Tomlin failed to attend the initial creditors' meeting or to timely file her schedules. 105 F.3d at 941. Morimoto, Hopkins and Tomlin were all properly dismissed with prejudice.

Leavitt v. Soto (In re Leavitt), 171 F.3d at 1225-1226 (emphasis added).

This concept of bad faith and dismissal was addressed by the Ninth Circuit in ***Marshall v. Marshall (In re Marshall)***, 721 F.3d 1032, 1047-1048 (9th Cir. 2012), with respect to dismissal of a Chapter 11 case:

> Under 11 U.S.C. § 1112(b), a Chapter 11 bankruptcy case may be dismissed "for cause." "Although section 1112(b) does not explicitly require that cases be filed in 'good faith,' courts have overwhelmingly held that a lack of good faith in filing a Chapter 11 petition establishes cause for dismissal." ***In re Marsch***, 36 F.3d at 828. The good faith requirement does not depend on a debtor's subjective intent, but rather

"encompasses several, distinct equitable limitations that courts have placed on Chapter 11 filings." Id. Generally, a plan is not filed in good faith if it represents an attempt "to unreasonably deter and harass creditors" and to "achieve objectives outside the legitimate scope of the bankruptcy laws." *Id.*

The question of a debtor's good faith "depends on an amalgam of factors and not upon a specific fact." *Id.* (quoting *Idaho Dep't of Lands v. Arnold (In re Arnold)*, 806 F.2d 937, 939 (9th Cir. 1986)). "[T]he courts may consider any factors which evidence 'an intent to abuse the judicial process and the purposes of the reorganization provisions.'" *Phoenix Piccadilly, Ltd. v. Life Ins. Co. of Va. (In re Phoenix Piccadilly, Ltd.)*, 849 F.2d 1393, 1394 (11th Cir. 1988) (quoting *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 674 (11th Cir. 1984)). A "[d]ebtor bears the burden of proving that the petition was filed in good faith." *Leavitt v. Soto (In re Leavitt)*, 209 B.R. 935, 940 (B.A.P. 9th Cir. 1997) (citing *In re Powers*, 135 B.R. 980, 997 (Bankr. C.D. Cal. 1991)).

In these series of bankruptcy cases filed by Debtor, he has repeatedly demonstrated that he has not filed or prosecuted them for purposes of a good faith reorganization and saving his business, but to hinder, delay, and defraud creditors and divert monies of the bankruptcy estates and the Chapter 12 plan estates in violation of his fiduciary duties as the debtor in possession and plan administrator.

The court has conducted an review of the grounds under 11 U.S.C. § 727 for denying a debtor a discharge. Preliminarily, it appears that Debtor's conduct runs afoul of the following grounds to deny a discharge:

A. Debtor, with intent to hinder, delay, or defraud a creditor or officer of the estate has transferred, removed, concealed property of the debtor within one year of the commencement of the case or property of the estate after the filing of the bankruptcy petition. 11 U.S.C. § 727(a)(2).

B. Debtor has concealed, falsified, or failed to keep or preserve any recorded information from which debtor's financial condition or business transactions might be ascertained. 11 U.S.C. § 727(a)(3).

C. Debtor knowingly and fraudulently or in connection with the case made a false oath or account, or withheld from an officer of the estate any recorded information relating to the debtor's property or financial affairs. 11 U.S.C. § 727(a)(4).

D. Debtor has failed to satisfactorily explain any loss of assets or deficiency of assets to meet debtor's liabilities. 11 U.S.C. § 727(a)(5).

E. Debtor has committed the acts described in 11 U.S.C. § 727(a)(2),(3), (4), or (5) in another bankruptcy case.

CONCLUSION

As discussed *supra* and as reflected in the responses of the Debtor, UST, the Trustee, and Creditor, this case was not filed in good faith, the Debtor committed fraud, and did not fulfill his necessary duties as a Chapter 12 Debtor. As Debtor in Possession, he breached his fiduciary duties to the bankruptcy estate, and then again as the Plan Administrator under the confirmed Chapter 12 Plan in this case, as well as in prior cases. The parties all appear to agree that a conversion to a Chapter 7 in the instant case would not be beneficial since it is likely that the Chapter 7 estate would be a no asset estate. Instead of retaining the Debtor and his estate in bankruptcy, potentially further hindering any creditors from prosecuting their claims against the Debtor, the court agrees that a dismissal with a one-year bar on refiling is proper.

As the court discussed above, the Debtor from the start of this case has not prosecuted this case in good faith. The Debtor failed to file necessary documents, failed to disclose assets, spent funds of the estate on luxury goods and vacations, and the list continues. As Debtor in Possession he has repeatedly violated his fiduciary duties.

The Debtor consents to dismissal with prejudice, the Debtor appears to have concluded that dismissing this case, and addressing all of his debts out of bankruptcy, is preferable to having a Chapter 7 Trustee and U.S. Trustee review further and take the appropriate action and referrals concerning Debtor's and Debtor's in Possession misconduct.

Not only is dismissal proper, but a dismissal with prejudice is appropriate, if not necessary to preserve some ethical and legal integrity to the federal judicial process. Debtor has demonstrated that he and his conduct is everything that a bankruptcy debtor and fiduciary debtor in possession should not be. He has hidden assets. He has failed to fulfill his duties as a debtor. He has failed to fulfill his fiduciary duties as a debtor in possession. He has demonstrated through a series of bankruptcy cases his abuse of the bankruptcy process for his own end. It is a proper result that he not receive the benefits of filing bankruptcy and
should not be allowed to further abuse his creditors and the bankruptcy laws.

In addition, to ensure that the Debtor does not further attempt to immediately further abuse the bankruptcy process, the Debtor is barred from filing, or from causing to be filed, any subsequent petition for relief under the Bankruptcy Code from the dismissal of this case through July 31, 2016 (approximately a period of one year period from the dismissal of this bankruptcy case).

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

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

dismissed with prejudice pursuant to 11 U.S.C. § 349(a).

IT IS FURTHER ORDERED that Andrew Napier, Debtor, is barred from filing, or from causing to be filed, any subsequent petition for relief under the Bankruptcy Code during the period from the entry of this Order through and including July 31, 2016. The Clerk of any bankruptcy court in which Debtor attempts to file a bankruptcy case during the period through July 31, 2016, is authorized to reject and not file that petition.

3. 13-90901-E-12 ANDREW NAPIER
SAC-12 Scott A. CoBen

CONTINUED MOTION FOR COMPENSATION FOR JOHN BELL, OTHER PROFESSIONAL
12-10-14 [312]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on December 10, 2014. 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

The Motion for Allowance of Professional Fees is XXXXXX.

John Bell, the Receiver ("Applicant") appointed by the court under the confirmed Chapter 12 Trustee ("Client"), makes a Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period December 1, 2014 through May 1, 2015. The order of the court approving employment of Applicant was entered on December 12, 2014 through the order confirming the modified plan, Dckt. 311.

Applicant requests an order authorizing the Chapter 12 Trustee to compensate Applicant pursuant to 11 U.S.C. § 330 on a monthly basis at an

amount not to exceed $2,600.00 per month based on a $200.00 hourly rate for the period of December 1, 2014 to May 1, 2015.

Specifically, the Applicant states that the current hourly rate of Applicant is $200.00 per hour. Applicant estimates that he will spend approximately 13 hours per month performing the duties required by the confirmed plan. Applicant will incur considerable out of pocket travel expenses driving throughout the Central Valley to monitor Debtor's business operations. Applicant is therefore requesting the court to authorize the Chapter 12 Trustee to pay Applicant a monthly payment not to exceed $2,600.00 per month for the period of December 1, 2014 to May 1, 2015.

If Applicant spends less than 13 hours a month on this case, Applicant will instruct the Chapter 12 Trustee to pay less than the $2,600.00 per month. If Applicant spends more than 13 hours per month on this case, Applicant will retain the right to file a fee application requesting additional compensation. After this six month time period, Applicant will re-evaluate Applicant's compensation and seek order of the court.

LEYSA NAPIER OPPOSITION

Leysa Napier filed an opposition to the instant motion on January 8, 2015. Dckt. 324. Ms. Napier opposes the employment of Applicant. Ms. Napier requests that she be appointed as bookkeeper/receiver. Attached to the opposition are various exhibits, including the Notice for the instant Motion and state court order on Modification of Spousal Support.

JANUARY 15, 2015 HEARING

At the hearing, the court granted the Motion as follows:

A. The Chapter 12 Trustee is authorized to pay John Bell, the Plan Receiver, interim compensation for fees and expenses of $2,800.00 a month. Of this the fees are authorized to not more than $2,600.00 a month and expenses of not more than $200.00 a month.

B. The Receiver shall bill his time at a rate of not more than $200.00 an hour.

C. The expenses for which the Plan Receiver may be reimbursed shall be determined in the same manner as which a receiver appointed by a California State Court.

D. The payment of interim fees and expenses are subject to final review and authorization at the time of, and a condition to, the court discharging the Plan Receiver.

E. The Plan Receiver shall file a Quarterly Report of Fees and Costs, which shall be filed on or before the 14th day after the end of each calendar quarter (with the first Report due on or before April 14, 2015 for the period from the date of appointment through March 2015), providing copies the billing statements provided the Chapter 12 Trustee and a summary of the fees, costs, and payments made to the Plan Receiver. The Plan

Receiver shall serve, at the time of filing, copies of the Quarterly Reports of Fees and Costs to any party in interest filing with the court and serving on the Plan Receiver a Request for Copies of Quarterly Report of Fees and Costs.

F. The court shall conduct a continued hearing on this Motion at 10:30 a.m. on May 21, 2015. On or before April 15, 2015 the Plan Receiver shall file any Supplemental Pleadings concerning any modifications to the order authorizing the interim payment of fees and costs. On or before April 29, 2015, any party in interest shall file Oppositions to the Supplemental Pleadings, and on or before May 6, 2015, the Replies, if any, to Oppositions shall be filed and served.

Dckt. 328.

MAY 21, 2015 HEARING

No supplemental papers have been filed in connection with the instant Motion.

At the hearing, -----

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 Allowance of Fees and Expenses filed by John Bell ("Applicant"), the Plan Receiver under the Confirmed Chapter 12 Plan in this case, having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that xxxxx

4. 13-90901-E-12 ANDREW NAPIER **MOTION BY SCOTT A. COBEN TO**
SAC-13 Scott A. CoBen **WITHDRAW AS ATTORNEY**
4-12-15 [340]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 12, 2015. By the court's calculation, 38 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

The Motion to Withdraw as Attorney is denied without prejudice.

Scott CoBen, counsel for Andrew Napier ("Debtor"), filed the instant Motion to Withdraw as Attorney on April 12, 2105. Dckt. 340.

Mr. CoBen argues that withdrawal is proper because the Debtor has failed to make any effort to perform on the plan that Mr. CoBen states he took great effort to get confirmed.

Mr. CoBen also argues that permissive withdrawal is proper because if the case remains in bankruptcy, it is unlikely that Debtor would follow the advice of Mr. CoBen, making it difficult to carry out his employment.

Lastly, Mr. CoBen states that the withdrawal would not prejudice the case.

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 case to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. ***Williams v. Troehler***, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. 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***, 21 Cal. App. 4th 904 (Cal. App. 1st Dist. 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 915. 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).

The termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdrawal 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 probably 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 when to situations where:

(1) Client:

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

(f) breaches an agreement or obligation to the member as to expenses or fees.

(5) The client knowingly and freely assents to termination of the employment; or

Cal. R. Prof'l. Conduct 3-700(C).

DISCUSSION

Mr. CoBen, in an attempt to withdraw as Debtor's counsel, cites to the Debtor's failure to fulfill the requirements of the confirmed Chapter 12 plan even in light of Mr. CoBen counseling Debtor to perform. Mr. CoBen's entire Motion is premised on the Debtor failing to follow the advice of counsel to perform under the confirmed plan.

Unfortunately, this is not sufficient for the court to grant a permissive withdrawal under Cal. R. Prof'l. Conduct 3-700(C). Mr. CoBen does not offer any specifics as to the Debtor's actions that shows the debtor has made it "unreasonably difficult" to continue representation. While the court recognizes that this Debtor and case are unusual and there is a myriad of issues concerning the acts of the Debtor, Mr. CoBen has not shown that withdrawal as counsel is proper in this case.

Without more justification from Mr. CoBen to show that representation of the Debtor has risen to the level of "unreasonably difficult" and without the Debtor's consent, the Motion is denied without prejudice.

Additionally, the Debtor has consented to the dismissal of this bankruptcy case with prejudice and a one year bar of filing any new bankruptcy case. Mr. CoBen's representation of the Debtor in this bankruptcy case has come to an end, as far as any further attempts to prosecute a bankruptcy plan. The dismissal will resolve Mr. CoBen's concerns that the Debtor will not communicate with him or follow Mr. CoBen's legal advice concerning performing the Chapter 12 Plan or prosecution of this case.

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

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

The Motion to Withdraw as Attorney filed by Scott CoBen, having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

5. 11-94410-E-7 SAWTANTRA/ARUNA CHOPRA
Robert M. Yaspan

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
5-5-15 [1258]

Final Ruling: No appearance at the May 21, 2015 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Bradley J. Epstein, Sawtantra Chopra and Aruna Chopra ("Debtor"), Trustee, and other such other parties in interest as stated on the Certificate of Service on May 7, 2015. The court computes that 14 days' notice has been provided.

The court issued an Order to Show Cause based on Movant's, Oakwood Office Park Property Owners Association, failure to pay the required fees in this case for Motion for Relief from Automatic Stay, dckt. No. 1233 ($176.00 due on April 21, 2015).

The court's decision is to discharge the Order to Show Cause, and the contested matter shall proceed in this court.

The court's docket reflects that the default in payment which is the subjection of the Order to Show Cause has been cured.

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 discharged, no sanctions ordered, and the Contested Matter, motion for relief from automatic stay (DCN: SYC-1) shall proceed in this court.

6. 11-94410-E-7 SAWTANTRA/ARUNA CHOPRA CONTINUED MOTION TO EXTEND TIME
HSM-31 Robert M. Yaspan 12-12-14 [1161]

Final Ruling: No appearance at the February 12, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 14, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Extend Time to File Objections to Debtors' Claims of Exemptions is continued to 10:30 a.m. on June 11, 2015.

Gary Farrar, the Chapter 7 Trustee, filed the instant Motion for Order Extending Time to File Objections to the Debtors' Claims of Exemptions. Dckt. 1161.

The current deadline to file objections to the Debtors' claims of exemptions is presently set for December 15, 2014. Dckt. 1092, Notice of Conversion to Chapter 7, Meeting of Creditors, and Deadlines. The Trustee requests that the deadline for the Trustee to object to the Debtors' claims of exemptions be extended until February 16, 2015. The Motion to Extend the deadline was filed on December 12, 2014.

The Trustee argues that cause exists because, prior to the conversion of the case to Chapter 7, the Debtors filed a number of schedule amendments. The Debtors' most recent Schedule B, filed September 20, 2013, lists the following assets:

Sawtantra Chopra MD, Inc., Profit Sharing Plan Assets in the Profit Sharing Plan including the following: Chase Acct# ending in 7539 - $463,755 Wells Fargo Investment Account - Approximate value of $1 million Note & Deed of Trust in favor of Sawtantra Chopra MD, Inc., Profit Sharing Plan as Beneficiary, Onkar Inc., as Trustor secured by properties with the following APNs 033-044-099, 033-044-010, 033-044-012, 033-044-013, 033-044-014, and 033-044-019 - The face value of this note is $350,000, but Debtor is not sure of the actual value of the note due because Debtor is not sure how much equity exists in these properties. Other Notes - See Attached.	H	$1,813,755.00

In the Debtors most recent Schedule C, filed September 20, 2013, the Debtors claimed the retirement plans as exempt in their entirety pursuant to 11 U.S.C. § 522(b)(3)(C).

Prior and subsequent to the Meeting of Creditors, the Trustee and his counsel have requested current account statements for the retirement plans and original documentation related to the loans scheduled as assets of this estate, including those purportedly in the retirement plans, but non have been provided. By email dated November 6, 2014, Debtors' counsel informed the Trustee that the Debtors do not have the originals of the promissory notes although they are still looking for them. Dckt. 1165, Exhibit C.

At the Meeting of Creditors, held November 13, 2014, the Trustee requested on the record that the Debtors provide the Trustee with a current account statement for the Debtors' retirement assets. The Debtors have not provided him with the requested statements. The only documents the Trustee states the Debtors have provided in response to the Trustee's request are tax returns for their pension plan for the years 2001-2012.

Additionally at the Meeting of Creditors, the Trustee questioned the Debtors concerning the carious deeds of trust, for which the Debtors and/or the Sawtantra Chopra MD Profit Sharing Plan were scheduled as beneficiaries the Debtors' responses did not satisfy the Trustee's inquiry into the process and reasons by which one or more deeds of trust, of which Joint-Debtor Aruna Chopra, individually, was the original beneficiary, came to be included in the Debtors' retirement plans.

Trustee states that on November 18, 2014, Trustee's counsel reiterated to Debtors' counsel the Trustee's request for current account statement for the Debtors' retirement plans and discussed issues related to the notes/deeds of trust purportedly in the plans. Trustee's counsel followed up the call with an email to Debtors' counsel. By email on November 21, 2014, Trustee's counsel followed up with a more detailed email to Debtors' counsel, reiterating the Trustee's request again. Trustee states that no current account statement has been provided to the Trustee or Trustee's counsel.

Obtaining a precise accounting of the retirement plans, their balance, and

information concerning exactly what assets are currently contained in the plans, and how those assets came to be in the plans, is important to the Trustee's evaluation of the Debtors' claims of exemptions.

DEBTORS' OPPOSITION

The Debtors filed an opposition to the instant Motion on January 29, 2015. Dckt. 1187. The Debtors state that the Motion should be denied because it: (1)it fails to establish cause to grant relief; (2) the Trustee is guilty of laches; and (3) granting the Motion would significantly impair Debtors' Sixth Amendment right to representation. The Debtors make the following arguments:

1. The time frame for objection to Debtors' exemptions has expired under applicable Ninth Circuit law. Under ***In re Smith***, 235 F.3d 472 (9th Cir. 2000), 11 U.S.C. § 348 "preserve[s] actions already taken in the case before conversion. . . section 348(a) establishes the general rule that, in a converted case, the dates of filing, the commencement of the case, and the order for relief remain unchanged." Id. at 477. In short, the Debtors argue that once the time frame for objecting to an exemption has expired, the exempt property revests in the debtor and is no longer subject to objection. In this case, the Debtors state that the time to object to Debtors' claim of objection expired in April 2014.

2. The recent changes to Fed. R. Bankr. P. 1019 cannot change the substantive law on the issue. The Debtors argue that 28 U.S.C. § 2075 sets forth the rule making power of the court and the limitations thereon, making the Bankruptcy Court rules procedural and not creating substantive rights. The 2010 amendment to Fed. R. Bankr. P. 1019 that added section (2)(B) cannot affect this case since it attempts to change the substantive law of the Ninth Circuit. The provision purports to create a new time period for filing objections to exemptions after a conversion. However, since the Smith court established the law on this issue in the ninth Circuit and ruled that the exempt property vested in the debtor and that there was no provision in the Bankruptcy Code that could bring the exempt property back into an estate after conversion. The Bankruptcy Rules cannot create substantive rights that are not provided under the Bankruptcy Code. As such, the Trustee cannot rely on Fed. R. Bankr. P. 1019 to bring this Motion and the Motion should be denied.

3. The Motion fails to establish cause for the requested relief. Even if the motion were timely, the Trustee has failed to establish the requisite "cause" under Fed. R. Bankr. P. 4003. Although Rule 4003 does not provide any clarification regarding the meaning of cause, it should be presumed that cause means good cause not just any excuse. As the Bankruptcy Court are courts of equity, the issue of good cause should be determined by balancing the respective benefits and burdens of parties along with other equitable considerations including the principles of laches. The time period to object to the exemptions has been extended at least five times for a total time period of almost three years. The Trustee has been a party to the last four of the extension. The Trustee entirely fails to adequately explain why it has taken almost two years to determine whether to object to the

exemptions, why he has not been able to make the decision at this time, and why he should be entitled to more time to do so. The Debtors contend that the Motion fails to provide any specificity regarding the information the Trustee is looking for and what issues, if any, he has with the exemptions. The Debtors argue that an extension of time is extremely prejudicial to Debtors because they are under criminal prosecution and need access to exempt assets to fund their defense. Debtors have been unable to use the funds to pay their criminal attorneys and will soon be deprived of representation in their cases which implicates their Sixth Amendment rights.

4. The motion should be denied because it will significantly impair Debtors' Sixth Amendment Rights. The Trustee has sent letters that have effectively frozen the accounts. Debtors have been unable to use the funds to pay for their criminal attorneys. The trustee is interfering with Debtors' Sixth Amendment right to representation and any extension of time to file the objections will further impair Debtors' constitutional rights. In the present case, the Trustee has sent letters to the investment managers for Debtors' profit sharing plan, effectively freezing the accounts in violation of the Debtors' Sixth Amendment rights. See ***United States v. Stein***, 541 F.3d 130, 154 (2d Cir. 2008).

ORDER CONTINUING THE HEARING

On February 9, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1197.

On February 10, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on March 26, 2015.

ORDER CONTINUING THE HEARING

On March 19, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1208.

On March 23, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on May 21, 2015. Dckt. 1222.

APPLICABLE LAW

Fed. R. Bankr. P. 1019 states in relevant part:

> When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:...
>
> (2) New filing periods
>
> ....
>
> (B) A new time period for filing an objection to a

claim of exemptions shall commence under Rule 4003(b) after conversion of a case to chapter 7 unless:

(I) the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13; or

(ii) the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7 case.

Fed. R. Bankr. P. 1019

The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b)(1). The court may extend this deadline, so long as the request for the extension of time was filed prior to the expiration of the deadline. Fed. R. Bankr. P. 4004(b)(1).

DISCUSSION

On May 15, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1295.

On May 18, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on June 11, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for to extend the Deadline to File a Objection To Claim of Exemptions of the Debtors filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion is continued to 10:30 a.m. on June 11, 2015.

7. 11-94410-E-7 SAWTANTRA/ARUNA CHOPRA
HSM-32 Robert M. Yaspan

CONTINUED MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
12-23-14 [1167]

.

Final Ruling: No appearance at the February 12, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on December 23, 2014. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor is continued to 10:30 a.m. on June 11, 2015.

Gary Farrar, the Chapter 7 Trustee, filed the instant Motion to Extend Deadline to File a Complain Objecting to Discharge of the Debtor on December 23, 2014. Dckt. 1167.

The Trustee states that the deadline to file a complaint objecting to the discharge of the Debtors is set for December 29, 2014. The Trustee requests that the deadline for the Trustee to file a complaint objecting to the discharge of the Debtors be extended until February 27, 2015.

The Trustee argues that cause exists because this is an extraordinarily complex case, involving many assets, and intense disputes between the Debtors and creditors regarding allegations of pre-petition criminal wrongdoing. This case was pending for some time in a Chapter 11 to provide the Debtors an opportunity to confirm a plan based around the Dale Road Project. The efforts to reorganized failed and all the estate's real property assets were abandoned

except a single Dale Road Parcel and an office building in Modesto. The case was converted to a Chapter 7 and the Trustee is attempting to administer the estate's remaining assets.

The Trustee states that he has been diligent in his investigation of the Debtors' financial affairs. An undisclosed issue which arose in the Debtors' disclosure statement filed prior to the conversion of the case was a $310,000.00 loan from the Debtors' adult son and daughter-in-law which was discovered at the Meeting of Creditors. The Trustee requires additional time to consider the responses of the Debtors concerning this loan and whether additional investigation is needed. Furthermore, the Debtors stated that they would file amended schedule of creditors who were not previously listed.

The Trustee is also awaiting records of the current account statement for the Debtors' retirement assets as well as information concerning various notes and deeds of trusts, which the Debtors have not yet provided. The Trustee states that he expects the Debtors will provide this information voluntarily or the Trustee will make additional motions for the production of such information.

ORDER CONTINUING THE HEARING

On February 9, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1200.

On February 10, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on March 26, 2015.

ORDER CONTINUING THE HEARING

On March 19, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1211.

On March 22, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on May 21, 2015. Dckt. 1223.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 1017(e)(1) provides that the court may extend for cause the time for filing a motion pursuant to 11 U.S.C. § 707(b). The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b). The court may extend this deadline, so long as the request for the extension of time was filed prior to the expiration of the deadline. Fed. R. Bankr. P. 9006(b)(1).

DISCUSSION

On May 15, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1298.

On May 18, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on June 11, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for to extend the Deadline to File a Complaint Objecting to the Discharge of the Debtors filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion is continued to 10:30 a.m. on June 11, 2015.

8. 14-91520-E-7 JOANN TEEM
WFH-1 Gilbert B. Vega

MOTION TO EMPLOY DANIEL L. EGAN AS ATTORNEY(S)
5-7-15 [28]

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

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

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

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

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

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

The Motion to Employ is granted.

Chapter 7 Trustee, Michael D. McGranahan, seeks to employ Counsel Wilke, Fleury, Hoffelt, Gould & Birney, LLP, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Counsel to assist the Trustee in:

1. Assisting the Trustee in the sale of Debtor's equity interests in Varni Corporation

2. Investigating the Debtor's financial affairs, assets, and liabilities.

3. Assisting the Trustee with the employment of other professionals as needed to administer the Debtor's estate.

4. Assisting the Trustee with claim analysis and objections, if necessary.

5. Assisting the Trustee with preference, fraudulent transfer and avoidance actions, if necessary.

6. Assisting the Trustee with other issues that arise during the administration of the estate.

The Trustee argues that Counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present interests in Varni Corporation as well as disability insurance payments. The Trustee states that Counsel will aid in determining the estate's interest in these items and the best legal course of action.

Daniel L. Egan, an associate of Wilke, Fleury, Hoffelt, Gould & Birney, LLP, testifies that he is representing. Mr. Eagen testifies he and the firm currently represent or have represented clients in matters adverse to a number of creditors. Furthermore, Mr. Eagen's declaration notes that he or the firm has represented certain creditors who are parties to the instant bankruptcy case. However, none of the representation relates to any claims in this case or appear to represent a disproportionate amount of work for a law firm the size of Wilke, Fleury, Hoffelt, Gould & Birney, LLP.

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

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

The Chapter 7 Trustee failed to attach a copy of the Agreement outlining the terms of employment. The Motion does not provide information as to the hourly rate of the attorneys nor any specifics of the scope of representation. Mr. Eagen's declaration provides the hourly rate of two attorneys who are "expected to work" on the instant case. However, as stated by Mr. Eagen, the Trustee and the firm have not entered into an agreement. Dckt. 30. Instead, Mr. Eagen testifies that the "Trustee, however, has offered to pay my firm the usual and customary hourly fees for such services."

In light of the court having to approve all fees and expenses as required by 11 U.S.C. §§ 330 and 331, and such employment being subject to 11 U.S.C. § 328, the failure to provide a copy of the engagement letter (though

preferred) is not fatal.

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 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, with the employment authorized effective April 7, 2015 (thirty days before the filing of the Application).

9. 12-90029-E-7 SSA-2 KENNETH/LISA WATT David Foyil

MOTION FOR TURNOVER OF PROPERTY 4-21-15 [39]

Final Ruling: No appearance at the May 21, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.
Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 21, 2015. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The Motion for Turnover is granted.

Irma C. Edmonds, Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover and accounting of all monies payable under the stipulated judgment in favor of the Debtors payable by defendants Robin Dimiceli, Mark Smith, and Rene Smith (collectively "Defendants") to Debtors or through their state court counsel, Kenneth M. Foley, in the state court case ***Watt v. Dimiceli***, et al, Superior Court of Calaveras County, Case No. 15CV40588. The Trustee further requests that, to the extent that defendants' counsel Yelda Barlett, has paid monies to Plaintiffs or through their counsel, Mr. Foley, an accounting of all monies paid and a further order directing both counsel Barlett and Debtors to direct any further payments to the Chapter 7 Trustee.

BARTLETT ACCOUNTING LETTER

Ms. Barlett, Defendant's counsel, filed a letter addressing the Motion on May 4, 2015. Dckt. 46. Ms. Bartlett states that Ms. Dimiceli has made the following payments to the Chapter 7 Trustee: (1) Check #3027 in the amount of $1,500.00 dated February 27, 2015. This payment was for three payments of $500.00 owed to Debtors. The next payment is due on June 1, 2015. Ms. Dimiceli has informed Ms. Bartlett that she will continue to make payments directly to the Trustee.

Ms. Bartlett also states that her office made two payments to the Debtors directly as such:

(1) Check # 228 in the amount of $4,000.00 dated April 8, 2015.

(2) Check #229 in the amount of $6,000.00 dated April 10, 2015.

Ms. Bartlett states that these were sent to Debtor's counsel. Ms. Bartlett believes that these checks were turned over to the Trustee.

TRUSTEE'S REPLY

The Trustee filed a reply on May 13, 2015. Dckt. 47. The Trustee states that based on the responses received that neither of the parties oppose the turnover. The Trustee states that Debtor's counsel, Mr. Foley, provided the Trustee an accounting of monies received and turned over to the estate in the sum of $10,000.00.

The Trustee requests that the court grant the further relief prayed for in her Motion in the following respects:

1. An order directing both counsel Bartlett and her clients, defendants Robin Dimiceli, Mark Smith, and Rene Smith, to direct any further payments arising from the settlement agreement to the office of the Chapter 7 Trustee, Irma Edmonds, c/o P.O. Box 3608, Pinedale, CA 93650, until all payments required under the Stipulated Judgment and Order are paid in full.

2. Each party to bear their own costs or fees in connection with the present motion advanced by the Trustee.

3. The court have continuing jurisdiction over this matter until all settlement proceeds owing to the Debtors are turned over to the

Trustee.

DISCUSSION

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

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

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

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

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

DISCUSSION

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

Based on the evidence presented, the settlement funds from the underlying state court case ***Watt v. Dimiceli, et al.***, Superior Court of Calaveras County, Case no. 15CV40588, is property of the estate, pursuant to 11 U.S.C. § 541. As such, the turnover of such property to the Trustee is proper. Given the fact that the settlement amount is to be paid continuously until the full settlement amount is paid, the court finds that payment to the Trustee directly is in the best interest of the parties as both a matter of law and as a matter of administrative ease.

Therefore, the Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Turnover of Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Turnover of Property is granted.
>
> **IT IS FURTHER ORDERED** that Defendants Robin Dimiceli, Mark Smith, and Rene Smith and Defendants' counsel, Yelda Bartlett in the state court case ***Watt v. Dimiceli, et al.***, Superior Court of Calaveras County, Case no. 15CV40588 shall forward all payments that come due and are unpaid at the time of the order and any future payments arising from the settlement agreement due to Plaintiff-Debtors Kenneth and Lisa Watt to the office of the Chapter 7 Trustee, Irma Edmonds, c/o P.O. Box 3608, Pinedale, California.

10. 14-90929-E-7 SASHI PAL **MOTION TO DISMISS CASE**
UST-4 Brian S. Haddix **4-14-15 [49]**

Final Ruling: No appearance at the May 21, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 14, 2015. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Case has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 the Chapter 7 Bankruptcy Case is granted and the case is dismissed.

This Motion to Dismiss the Chapter 7 bankruptcy case of Sashi S.S. Pal, ("Debtor") has been filed by U.S. Trustee Tracy Hope Davis. Trustee asserts that the case should be dismissed based on the following grounds.

A. The Debtor has stipulated to the dismissal of the case with a 4-year bar against the Debtor filing a new bankruptcy case

B. The Chapter 7 Trustee filed a report of no distribution so the dismissal would not prejudice creditors.

STIPULATION

Attached to the Motion is a stipulation of the parties. Dckt. 52. The stipulation provides for the following:

1. The Debtor consents to the dismissal of the bankruptcy case. The Debtor further agrees that the order dismissing the bankruptcy case shall prohibit the Debtor from filing, or from causing to be filed,

any subsequent petition for relief under the Bankruptcy Code for a period of four years from the date of entry of the Order.

2. Upon dismissal of the bankruptcy case and the entry of the Order with the 4-year bar to refile, the UST shall seek the dismissal of the Adversary Proceeding, No. 15-09004-E, without prejudice.

3. The Debtor hereby acknowledges that he has had the opportunity to seek advice from legal counsel, and that he understands the legal consequences that he will suffer if the court enters the Order pursuant to the Stipulation.

4. The Debtor waives all rights to appeal the entry of the Order.

5. If the court rejects the stipulation, the parties shall be free to proceed litigating the merits of the Adversary Proceeding.

RULING

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

Cause exists to dismiss this case pursuant to 11 U.S.C. § 707.

The parties have entered into a stipulation in which the Debtor agrees to the underlying bankruptcy case being dismissed with a four-year bar in which the Debtor may not file a new bankruptcy. The Debtor signed the stipulation and the stipulated Motion.

The underlying Adversary Proceeding was filed by the UST seeking judgment denying the Debtor's discharge in the bankruptcy case. Adversary Proceeding No. 15-09004-E. The Debtor is currently incarcerated and he is currently limited in ability to effectively respond to the allegations made in the Adversary Proceeding.

The stipulated dismissal provides for the dismissal of the Adversary Proceeding without prejudice if the court enters an order dismissing the bankruptcy case with the four-year filing bar.

In light of the Debtor's incarceration and the stipulation between the parties, the court finds cause to dismiss the case. Pursuant to the stipulation, the Debtor is barred from filing, or from causing to be filed, any subsequent petition for relief under the Bankruptcy Code for a period of four years from the date of entry of the Order. Upon the issuance of the Order, the UST shall seek a dismissal of the Adversary Proceeding without prejudice.

The motion is granted and the case is dismissed.

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

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

The Motion to Dismiss the Chapter 7 case filed by the U.S. Trustee Tracy Hope Davis having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted and the case is dismissed pursuant to 11 U.S.C. § 707 and the Stipulation filed by the United States Trustee and the Debtor (Dckt. 52).

IT IS FURTHER ORDERED that Debtor Sashi Pal is barred for a period of four (4) years from the date of the instant Order from filing, or causing to be filed, any subsequent petition for relief under the Bankruptcy Code.

IT IS FURTHER ORDERED that the Clerk of the Bankruptcy Court and deputy clerks operating under the direction and control of the Clerk of the Court, are authorized to reject any petition attempted to be filed by Debtor Sashi Pal fo the four-year period of this injunction issued in this order.

11. 14-90931-E-7 JEFFREY TRUESDAIL
HCS-2 Brian S. Haddix

MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM\CRABTREE\SUNTAG, TRUSTEE'S ATTORNEY(S)
4-21-15 [59]

Final Ruling: No appearance at the May 21, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 21, 2015. 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Herum, Crabtree, Suntag, the Attorney ("Applicant") for Eric J. Nims the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period September 16, 2014 through April 23, 2015. The order of the court approving employment of Applicant was entered on October 7, 2014, Dckt. 43. Applicant requests fees in the amount of $4,675.00 and costs in the amount of $111.40.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or

professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

(a) Is the burden of the probable cost of legal [or other

professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including case administration and strategies on how to handle property of the estate, opposing a motion to compel abandonment, and negotiating disputes regarding sale of property of the estate. The estate has $59,432.00 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 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 8.5 hours in this category. Applicant assisted Client with preparing employment application, advising Client on possible discharge objections, advising on Motions for Relief, and preparing application for compensation.

Opposition to Motion to Compel Abandonment: Applicant spent 10.7 hours in this category. Applicant helped Movant oppose Debtor's Motion to Compel Abandonment of the Mineral Rights and Potential Tax Refund. The Applicant prepared and filed an opposition and appeared at the hearing. The Applicant helped negotiate with Debtor to withdraw motion and drafted stipulation to remove the motion from calendar.

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**
Dana Suntag, Esq.	4.9	$325.00	$1,592.50
Dana Suntag, Esq.	.5	$315.00	$157.50
Loris Bakken, Esq.	2.1	$295.00	$619.50

Ricardo Aranda, Esq.	5.3	$250.00	$1,325.00
Wendy Locke, Esq.	3.0	$225.00	$675.00
Dean Fillon, paralegal	.2	$90.00	$18.00
Audrey Dutra, paralegal	3.2	$90.00	$288.00
	0	$0.00	$0.00
Total Fees For Period of Application			$4,675.50

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $76.10 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		$36.80
Copies	$0.10 FN.1.	$37.30
Total Costs Requested in Application		$76.10

FN.1. The court notes that the Applicant charged $0.20 per copy. In the Eastern District of California, the allowed cost per copy is $0.10. The court has made the proper adjustments to reflect the proper cost per page.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $4,675.00 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.

Costs and Expenses

The First and Final Costs in the amount of $76.10 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	$4,675.00
Costs and Expenses	$76.10

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 Herum, Crabtree, Suntag ("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 Herum, Crabtree, Suntag is allowed the following fees and expenses as a professional of the Estate:
>
> Herum, Crabtree, Suntag, Professional Employed by Trustee
>
> Fees in the amount of $4,675.00
> Expenses in the amount of $76.10,
>
> The Fees and Costs pursuant to this Applicant are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

12. 12-93049-E-11 MARK/ANGELA GARCIA **MOTION TO COMPEL**
DMW-2 **Mark J. Hannon** **5-4-15 [588]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 4, 2015. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

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

The Motion to Abandon Property is denied.

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

The Motion filed by G Street Investments, LLC ("Creditor") requests the court to order the Trustee to abandon all of the rents, issues, and profits

that the John Bell, the Chapter 11 Trustee, has collected from the real property commonly known as 900 G Street, Modesto, California (the "Property").

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

A. Creditor has a properly perfected security interest in Property. It has a legal right to be paid Property. Property is part of its secured claim.

B. Bankruptcy Code Section 522(b) does not and did not cut off Creditor's interest in Property.

C. The Trustee has not filed a motion to use Property under Section 363 of the Bankruptcy Case. Consequently, Property is sitting in an account without being paid to the only party with a right to use it, Creditor, in violation of its applicable non bankruptcy and Ninth Circuit bankruptcy law rights, in a fashion that produces no benefit to the estate.

D. According to the Trustee's operating reports that have been filed in this case, accrued Property as of March 31, 2015 totals $12,740.00

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that because the Trustee has not moved for use of the Property that it belongs to the Creditor, without citing a single statute or Code section in support. This is not sufficient.

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

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

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is

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

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

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

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

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

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

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

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

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

ABANDONMENT OF PROPERTY

While the Creditor states that "the grounds for this motion are very simple," the Creditor has failed to state with particularity any grounds or provide the court with the legal authorities that support the Trustee abandoning property of the estate to a creditor. It appears that this motion is improperly being used to circumvent the required motion for relief from the automatic stay (and payment of the required filing fee).

In the Motion it is alleged that "These authorities confirm that Secured Creditor has the right to take possession of its cash collateral. The court should authorize Secured Creditor to receive Cash Collateral directly from the Trustee under these authorities." Motion, p. 4:1-3. This misstates that authorities and shows that Secured Creditor "does not have the right" to take possession of the rents from Trustee at this time.

The authorities cited by Creditor do stand for the proposition that the rents are cash collateral and subject to Creditor's security interest (presuming that the factual allegations of creditor are accurate). But the rents, cash collateral, are property of the bankruptcy estate. 11 U.S.C. § 541(a)(6).

When property is abandoned, it is generally abandoned back to the debtor. As discussed Collier on Bankruptcy, in some limited circumstances it may be "abandoned" to a creditor who already has possession of the property of the estate. Collier on Bankruptcy, Sixteenth Edition, ¶ 544.02[3]. The court's survey of the annotations to 11 U.S.C. § 554 (LEXIS-NEXIS) did not identify one case under these circumstances in which "abandonment" to Creditor would be proper. Creditor has not provided the court with any authority for such a proposition.

It appears that the present motion is intended to be a shortcut to avoid creditor (1) seeking relief from the automatic stay, (2) commencing the necessary action to obtain an order and writ of possession compelling the trustee to deliver possession of the property of the estate to Creditor, and (3) Creditor then exercising its lien rights to apply the additional collateral to the debt.

Based on the relief requested in the Motion, Creditor may well be setting itself up for a violation of automatic stay claim. Creditor requests that the

Trustee continue to operate the property and receive rents. Then the court wants the court to authorize Creditor to receive the rents (which if received by the Trustee is property of the bankruptcy estate) monthly from the Trustee. It appears that such rents would continue to be property of the estate, while subject to creditor's lien and possession of its collateral. It is a basic principal under Division Nine of the California Commercial Code that for there to be a security interest, the property must be owned by someone other than the creditor. Cal. Com. Code §§ 9102(12) and (73). The order sought by Creditor does not authorize the exercise of any lien rights against the "collateral" for which possession from the Trustee is requested.

The Motion could appear to be one in which a writ of possession or mandatory injunction is requested by which the Trustee is ordered to turn over possession of the rents to Creditor. Either requires an adversary proceeding. Fed. R. Bank. P. 7001.

No proper grounds have been provided for the court ordering the Chapter 7 Trustee to *abandon* the property of the estate consisting of the rents to Creditor. If Creditor wants relief from the automatic stay to enforce its rights in the appropriate state court, it can seek relief from the automatic stay (and pay the modest filing fee). If instead it seeks to appropriately invoke federal court jurisdiction and file the adversary proceeding in this court, it may so do (and pay the appropriate filing fee). What Creditor cannot do is make up a "motion to abandon" property of the estate to a lien holder which includes a mandatory injunction in lieu of the appropriate contested matters, adversary proceedings, and state court actions.

Therefore, 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 Abandon Property filed by G Street Investments, LLC ("Creditor") 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.

13. 12-93049-E-11 MARK/ANGELA GARCIA
MJH-15 Mark J. Hannon

OBJECTION TO CLAIM OF G STREET INVESTMENTS, LLC, CLAIM NUMBER 22 AND 23
4-2-15 [556]

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

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

Below is the court's tentative ruling.

Local Rule 3007-1 Objection to Claim - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 2, 2015. By the court's calculation, 49 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 22 and 23 of G Street Investments, LLC is overruled without prejudice.

Mark Anthony Garcia and Angela Marie Garcia, the Debtor in Possession ("Objector") requests that the court limit the claim of G Street Investments, LLC ("Creditor"), Proof of Claim No. 22 and 23 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the total amount of $947,919.02. Objector asserts that the claims should be limited to the amount Creditor paid for the claims which is $495,000.00.

The Objector argues that Iain MacDonald purchased the secured debt owed

to LSC Realty California, LLC for $0.50 cents on the dollar and has filed claims in the instant case for the full amount of the debt. Mr. MacDonald, who is the owner of the Creditor, filed a motion for relief from the automatic stay to be able to foreclose on the commercial property of Mr. MacDonald's former clients. The Objector asserts that Mr. MacDonald concealed his investment in the commercial loans from his former clients and the court.

The Objector requests that the court limit the claim of Creditor to a secured sum of $495,000.00, to order that no unsecured claim exists, and that the secured sum be paid at an interest rate of 5.250% interest, amortized over 30 years, which is the sum of $3,353.00 monthly. The Objector further requests that in the event that the Creditor has been overpaid since its acquisition of the rents, this sum should be repaid to the estate or applied to the principal.

CREDITOR'S RESPONSE

The Creditor filed a response to the instant Motion on May 6, 2015. Dckt. 596. The Creditor, who titles the response a "Countermotion," argues that the Objection fails to state any claim upon which relief can be granted.

The Creditor asserts that the court should order Fed. R. Bankr. P. 7012 to apply pursuant to Fed. R. Bankr. P. 9014(b). The Creditor, through asserting that Fed. R. Bankr. P. 7012 should apply, argues that the Objector fails to state a claim upon which relief can be granted and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Under this framework, the Creditor states that because the Objector relies on equitable subordination under 11 U.S.C. § § 105 and 510(c), the relief can only be obtained through an adversary proceeding pursuant to Fed. R. Bankr. P. 7001(8).

Next, the Creditor argues that the Objection fails on its face to comply with Local Bankr. R. 3007-1(a) which requires that the Objector include the date the challenged proofs of claim were filed and the amount of the objectionable claim. The Creditor asserts that the Objector failed to comply with the Rule.

Lastly, the Creditor argues that the Objection fails because it fails to plead any basis for equitable subordination if the court chooses to consider the merits. The Creditor asserts that there are no allegations that Creditor engaged in inequitable conduct, that the purchase of the undisputed secured debt has injured creditors or conferred any unfair advantage on Creditor, or that subordination of the secured debt would not be inconsistent with the Code. The Creditor asserts that it is not Iain MacDonald and, even if it were, the identity of the holder of a defaulted secured loan does not alter the Objector's obligations with respect to that loan or the fact that the collateral for that loans found by this court has no equity for the estate.

OBJECTOR'S REPLY

The Objector filed a reply on May 12, 2015. Dckt. 610. The Objector first asserts that the court has equitable power outside of adversary proceedings and that the court can subordinate all or part of an allowed claim and transfer any lien securing such subordinated claim to the bankruptcy estate. Here, the Objector has filed both the instant Objection and an adversary complaint.

The Objector next argues that a fiduciary cannot go into a pending reorganization bankruptcy case of his client, purchase claims for cents on the dollar, and then assert the entire claim. The Objector relies on a 1988 Eastern District of Louisiana bankruptcy case.

The Objector further argues that the Objection is adequately plead to obtain equitable subordination. The Objector asserts that Mr. MacDonald acted in a fiduciary capacity, as a former attorney, and breached his fiduciary duties to the Objector when he arranged for the acquisition of the commercial loans in this case and then asserted for payment in full or nearly in full to the detriment of the unsecured creditors. The Objector asserts that Mr. MacDonald has inside knowledge of the Objector. Alternatively, the Objector argues that Mr. MacDonald has wanted to have the case of his former clients liquidated, and hired attorneys to continue to reach this goal.

The Objector asserts that the Creditor has not offered any factual evidence to contradict the facts and evidence in the Objection. Lastly, the Objector states that the Creditor's argument that the instant Objection is filed three years after the case is a miscategorization since the transfer of the claims did not happen until October 2014.

APPLICABLE LAW

11 U.S.C. § 510 provides for the subordination of claims in certain contexts. Specifically, 11 U.S.C. § 510 states, in relevant part:

> (c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may--
>
> > (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
> >
> > (2) order that any lien securing such a subordinated claim be transferred to the estate.

Fed. R. Bankr. P. 7001 outlines the matters that require an adversary proceedings. In pertinent part, the Fed. R. Bankr. P. 7001 states:

> An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:. . .
>
> (8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;

DISCUSSION

It is abundantly clear based on the Federal Rules of Bankruptcy Procedure that a "proceeding to subordinate any allowed claim or interest" requires an adversary proceeding.

The Objector relies on a 1988 bankrutpcy case from the Eastern District

of Louisiana as justification under 11 U.S.C. § 105 that the court can invoke its equitable powers to find that the creditor can not assert the full amount of its purchased claim. Cite.

However, the Supreme Court in ***Law v. Seagel***, ___ U.S. ___, ***134 S. Ct. 1188 (2014)***, and the Ninth Circuit Court of Appeals in ***Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations***, 502 F.3d 1086 (9th Cir. 2007) have made it abundantly clear that the court's equitable powers under 11 U.S.C. § 105 is not a ***carte blanche*** for the court to ignore specific code sections and rules based on the esoteric idea of "equity." As phrased by the Seventh Circuit Court of Appeals,

> "These powers may be exercised only 'within the confines of the Bankruptcy Code.' ***Norwest Bank Worthington v. Ahlers***, 485 U.S. 197, 99 L. Ed. 2d 169, 108 S. Ct. 963 (1988). The bankruptcy court does not have 'free-floating discretion,' to create rights outside the Code, In the Matter of Chicago, Milwaukee, St. Paul and Pacific R.R. Co., 791 F.2d 524, 528 (7th Cir. 1986), but the court may exercise its equitable powers in a manner consistent with the Code. ***In re SPM Mfg. Corp.***, 984 F.2d 1305, 1311 (1st Cir. 1993)."

This reference to the "Code" is equally applicable to the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure promulgated by the Supreme Court or enacted by Congress. Here, the Objector is requesting that the court ignore the specifics of Fed. R. Bankr. P. 7001, which are promulgated by the Supreme Court, to allow the Objector to seek subordination of the Creditor's claim in lieu of an Adversary Proceeding. The reason for an adversary proceeding is obviously, issues of equitable subordination are sufficiently complex that trying to decided them on law and motion practice is unreasonable to the parties and court.

The Objector, in their reply, state that the Creditor's objection concerning Fed. R. Bankr. P. 7001(8) requiring an adversary proceeding for subordination is "faulty legal reasoning and is an incorrect statement of bankruptcy law." Dckt. 610. However, the Objector does not provide any support that the explicit requirements of Fed. R. Bankr. P. 7001 for an adversary proceeding for the subordination of a claim. Instead, the Objector cites to a Ninth Circuit Bankruptcy Appellate Panel decision concerning the necessary showing for subordination of 11 U.S.C. § 510(c). ***In re Palmdale Hills Prop., LLC***, 423 B.R. 655, 664 (B.A.P. 9th Cir. 2009) aff'd, 654 F.3d 868 (9th Cir. 2011). However, nowhere in the B.A.P.'s ruling is there an indication that the subordination could be dealt with outside of the adversary proceeding. ***Id.*** In fact, the Bankruptcy Appellate Panel specifically found that:

> The bankruptcy court correctly recognized that a separate procedure was required to litigate the merits of Debtors' equitable subordination claim. See Rule 7001(8) (a request to subordinate an allowed claim or interest requires an adversary proceeding except when a debtor's plan provides for the relief). As one court explained:
>
> > When the defendant debtor through complex and bona fide affirmative defenses or counterclaims seeks affirmative counter relief it is not proper to attempt to determine

> that issue in the adequate protection hearing and thereby determine finally the amount of the debt which in turn will determine the extent of the creditor's interest which he is entitled to have protected. Rather, the counterclaims or affirmative defenses may be severed out and the modification of stay tried on the assumption that the creditor will prevail on the counterclaim.
>
> *In re Poughkeepsie Hotel Assocs. Joint Venture*, 132 B.R. at 290.

Id. at 664.

The court does not understand what grounds, outside the 11 U.S.C. § 105 powers that the Objector relies on, would justify the court to ignore the specified procedures of the Federal Rules of Bankruptcy Procedure and allow the Objector to circumvent the need for an adversary proceeding.

As stated by the Objector, an Adversary Proceeding has been filed seeking the equitable subordination of the Creditor's claim. Adversary Proceeding No. 15-09013. It is here, as required by Fed. R. Bankr. P. 7001(8), where the merits of the objection and claim should be litigated.

Therefore, the Objection is overruled 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 Objection to Claim of G Street Investments, LLC, filed in this case by Mark Anthony Garcia and Angela Marie Garcia, 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 Objection is overruled without prejudice.

14. 12-93049-E-11 MARK/ANGELA GARCIA **MOTION FOR COMPENSATION FOR**
PA-3 Mark J. Hannon **KRISTIN KIRCHNER, ACCOUNTANT(S)**
4-30-15 [583]

Final Ruling: No appearance at the May 21, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 30, 2015. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

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

The hearing on the Motion for Allowance of Professional Fees is continued to 10:30 a.m. on July 2, 2015.

Kristin Kirchner, the Accountant ("Applicant") for John Bell the Chapter 11 Trustee ("Client"), makes a Second Interim Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period January 1, 2014 to December 31, 2014. The order of the court approving employment of Applicant was entered on January 11, 2015, Dckt. 276. Applicant requests fees in the amount of $31,880.79.00 and costs in the amount of $438.29.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the

service was rendered toward the completion of, a case under this title;

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

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

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

Further, the court shall not allow compensation for,

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

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

TASK BILLING

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

Included in the motion is Applicant's raw time and billing records, which has not been organized into categories. Rather than organizing the activities which are best known to Applicant, it is left for the court, U.S. trustee, and other parties in interest to mine the records to construct a task billing. The court declines the opportunity to provide this service to Applicant, instead leaving it to Applicant who intimately knows the work done and its billing system to correctly assemble the information. FN.1.

FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young associate (not the present judge) developed a system in which he used different color highlighters to code the billing

statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different tasks.

There are substantial amounts being billed by Applicant in this case, with the interim fees now being in excess of $41,000.00. On the surface, there appears to be little headway being made by the Trustee. The court, U.S. Trustee, and other parties in interest need to have Applicant identify and clearly state the tasks being undertaken, the people doing the work, the hourly rates for the tasks, and the total charges to properly consider the fee application.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Kristin Kirchner ("Applicant"), Accountant for the Trustee having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Application for Fees and Expenses is continued to July 2, 2015, at 10:30 a.m. Applicant shall file a supplemental declaration and supporting documents as necessary, to provide the court, U.S. Trustee, and other parties in interest requesting copies of such supplemental pleadings, with an explanation of the fees requested and a task billing analysis which specifically groups the time and charges by the various task areas for such services.
>
> **IT IS FURTHER ORDERED** that the Task Billing Analysis, and any other Supplemental Pleadings, shall be filed and served on or before June 5, 2015, and Opposition filed and served on or before June 19, 2015. Notice of the Continued Hearing and filing of Opposition shall be filed and served on or before June 5, 2015.

15. 14-90558-E-7 KENNETH/TRACYE ASSENG **MOTION TO COMPEL ABANDONMENT**
CLH-1 **4-9-15 [37]**

Final Ruling: No appearance at the May 21, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 9, 2015. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion for Motion to Abandon Property is granted.

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

The Motion filed by Kenneth Joseph Asseng and Tracye Kay Asseng ("Debtor") requests the court to order the Trustee to abandon property commonly known as 1412 Jackellon Lane, Modesto, California (the "Property"). This Property is encumbered by the lien of Chase Bank, securing claim of $5,800.00. The Declaration of Tracye Kay Asseng has been filed in support of the motion and values the Property to be $100,000.00.

The Debtors exempted $100,000.00 in the Property on Schedule C, pursuant to California Code of Civil Procedure § 704.710.

The Trustee issued a statement of non-opposition to this Motion. May 7, 2015 Docket Entry.

The court finds that the debt secured by the Property and the exempted amount exceeds the value of the Property, and that there are negative financial

consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by Kenneth Joseph Asseng and Tracye Kay Asseng ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. 1412 Jackellon Lane, Modesto, California
>
> and listed on Schedule A by Debtor is abandoned to Kenneth Joseph Asseng and Tracye Kay Asseng by this order, with no further act of the Trustee required.

16. 15-90358-E-11 LAWRENCE/JUDITH SOUZA **MOTION TO USE CASH COLLATERAL**
MHK-1 David M. Meegan **4-30-15 [32]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 30, 2015. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Use Cash Collateral is granted.

Lawrence and Judith Souza, the Debtor-in-Possession, filed the instant Motion to Use Cash Collateral on April 30, 2015. Dckt. 32.

The Debtors-in-Possession holds fee title to the following properties:

PROPERTY LOCATION	TYPE OF RENTAL
121 W. Syracuse Ave.	Single Family Residential
200 W. Syracuse Ave./842 N. Golden State Blvd.	Single Family Residential

201 W. Syracuse Ave.	Single Family Residential
223 W. Syracuse Ave.	Single Family Residential
235 W. Syracuse Ave.	Single Family Residential
87 W. Canal Drive	Single Family Residential
97 W. Canal Drice	Single Family Residential
830 N. Golden State Blvd.	Commercial

The Debtors-in-Possession states that each of the properties are encumbered. The Curtis Family Trust Dated May 27, 1994 ("Creditor") holds three different deeds of trust that secure three separate obligations, and two of those deeds encumber more than one of the properties. The Internal Revenue Service has also recorded two Notices of Tax Lien on all the properties. The following chart describes the encumbrances:

RENTAL	CREDITOR	RECORDATION DATE	ASSIGNMENT OF RENTS?
121 Syracuse	Maiman Revocable Trust A/Deed of Trust	3/8/11	yes
	Internal Revenue Service	4/26/11; 3/26/12	No
200 Syracuse	Stanislaus County/unpaid property taxes	n/a	No
	Curtis Family Trust/ Deed of Trust	9/21/05	Yes
	Internal Revenue Service	4/26/11; 3/26/12	No
235 Syracuse	Seterus/Deed of Trust	4/25/05	No
	Curtis Fam. Trust/ Deed of Trust	8/25/10	Yes
	Internal Revenue Service/ Tax liens	4/26/11; 3/26/12	No

830 Golden State	Stanislaus County/ Unpaid Property Taxes	n/a	No
	Curtis Fam. Trust/Deed of Trust	9/30/05	Yes
	Internal Revenue Service/Tax lien	4/26/11;3/26/12	No
87 Canal	Provident Credit Union/Deed of Trust	10/16/02	Yes
	Curtis Fam. Trust/ Deed of Trust	8/25/10	Yes
	Internal Revenue Service/ Tax liens	4/26/11;3/26/12	No
97 Canal	Provident Credit Union/ Deed of Trust	10/16/02	Yes
	Curtis Fam. Trust/ Deed of Trust	8/25/10	Yes
	Internal Revenue Service/ Tax Liens	4/26/11;3/26/12	No

The Debtors-in-Possession have opened a segregated bank account of the purpose of holding all rents and for paying necessary expenses. Only rents from the properties are deposited into this account.

The Debtors-in-Possession expect to obtain property insurance proceeds for 121 Syracuse and request the authority to use the proceeds to rehabilitation expenses for that property so that it can be rented to new tenants. The insurance proceeds will be $10,850.00 for damages.

The Debtors-in-Possession state that the use of cash collateral to pay ongoing expenses of the properties will ensure that the properties remain occupied and that there will be continued collection of rent. The Debtors-in-Possession propose that the use of cash collateral be restricted to those expenses described below within a 20% variance for each category of expense and that case remaining after the payment of the same be retained by the Debtors-in-Possession in the rental bank account.

121 W. Syracuse Ave.

	April	May	June	July	August	September
Revenue						
Rent	0	0	900	900	900	900
Insurance Proceeds	$10,850.00	0	0	0	0	0
Expenses						
Insurance Premium	$81.00	$81.00	$81.00	$81.00	$81.00	$81.00
Utilities	$100.00	$100.00	$100.00	$100.00	$100.00	$100.00

200 W. Syracuse Ave./842 N. Golden State Blvd.

	April	May	June	July	August	September
Revenue						
Rent	$800.00	$800.00	$800.00	$800.00	$800.00	$800.00
Expenses						
Late property tax installment			$601.00			
Insurance Premium	$235.00	$235.00	$235.00	$235.00	$235.00	$235.00
Utilities	$30.00	$30.00	$30.00	$30.00	$30.00	$30.00
Management fees	$64.00	$64.00	$64.00	$64.00	$64.00	$64.00
Reserve for misc. maintenance exp.	$50.00	$50.00	$50.00	$50.00	$50.00	$50.00

235 W. Syracuse Ave.

	April	May	June	July	August	September

Revenue						
Rent	$1,195.00	$1,195.00	$1,195.00	$1,195.00	$1,195.00	$1,195.00
Expenses						
Insurance Premium	$85.00	$85.00	$85.00	$85.00	$85.00	$85.00
Utilities	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Management fees	$96.00	$96.00	$96.00	$96.00	$96.00	$96.00
Reserve for misc. maintenance exp.	$25.00	$25.00	$25.00	$25.00	$25.00	$25.00

87 W. Canal Street

	April	**May**	**June**	**July**	**August**	**September**
Revenue						
Rent	$875.00	$875.00	$875.00	$875.00	$875.00	$875.00
Expenses						
Insurance Premium	$77.00	$77.00	$77.00	$77.00	$77.00	$77.00
Utilities	$65.00	$65.00	$65.00	$65.00	$65.00	$65.00
Management fees	$70.00	$70.00	$70.00	$70.00	$70.00	$70.00
Reserve for misc. maintenance exp.	$100.00	$100.00	$100.00	$100.00	$100.00	$100.00

97 W. Canal Street

	April	**May**	**June**	**July**	**August**	**September**
Revenue						
Rent	$900.00	$900.00	$900.00	$900.00	$900.00	$900.00
Expenses						

Insurance Premium	$61.00	$61.00	$61.00	$61.00	$61.00	$61.00
Utilities	$65.00	$65.00	$65.00	$65.00	$65.00	$65.00
Management fees	$72.00	$72.00	$72.00	$72.00	$72.00	$72.00
Reserve for misc. maintenance exp.	$50.00	$50.00	$50.00	$50.00	$50.00	$50.00

830 N. Golden State Blvd.

	April	**May**	**June**	**July**	**August**	**September**
Revenue						
Rent	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00
Expenses						
Late property tax installment				$2,135.00		
Insurance Premium	$76.00	$76.00	$76.00	$76.00	$76.00	$76.00
Utilities	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Management fees	$80.00	$80.00	$80.00	$80.00	$80.00	$80.00
Reserve for misc. maintenance exp.	$25.00	$25.00	$25.00	$25.00	$25.00	$25.00

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a Debtor-in-Possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a Debtor-in-Possession, the Debtor-in-Possession can use, sell, or sell property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally

> identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--
>
> (A) such sale or such lease is consistent with such policy; or
>
> (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--
>
> (I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
>
> (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Fed. R. Bankr. P. 4001(b) provides the procedures in which a trustee or Debtor-in-Possession may move the court for authorization to use cash collateral. In relevant part, Fed. R. Bankr. P. 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

Debtors-in-Possession have shown that the use of cash collateral as proposed is in the best interest of estate and is in the ordinary course of business. The proposed budgets provide for the continued upkeep of the Debtors-in-Possession's rental properties to ensure that the properties can continue to attract and retain tenants for the continued income to the estate. The Debtors-in-Possession have created a separate rental income account in which the Debtors-in-Possession are depositing the rental income from the properties and the expenses are deducted from that account.

The Debtors-in-Possession have shown that the authorization for the use of cash collateral, including the insurance proceeds for the rehabilitation of the 121 W. Syracuse Ave. property, for the period of April 10, 2015 through September 30, 2015 for the payment of the ongoing and normal expenses.

Therefore, the court authorizes the use of cash collateral for the period of April 10, 2015 through September 30, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Authority to Use Cash Collateral filed by Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the cash collateral may be used to pay the following expenses, granting the Debtor-in-Possession a variance of 20% in any individual line item expense, plus the amount in maintenance reserve, as long as the total amount used does not exceed the total amount allowed:

121 W. Syracuse Ave.

	April	May	June	July	August	September
Revenue						
Rent	0	0	900	900	900	900
Insurance Proceeds	$10,850.00	0	0	0	0	0
Expenses						
Insurance Premium	$81.00	$81.00	$81.00	$81.00	$81.00	$81.00
Utilities	$100.00	$100.00	$100.00	$100.00	$100.00	$100.00

200 W. Syracuse Ave./842 N. Golden State Blvd.

	April	May	June	July	August	September
Revenue						
Rent	$800.00	$800.00	$800.00	$800.00	$800.00	$800.00
Expenses						
Late property tax installement			$601.00			

Insurance Premium	$235.00	$235.00	$235.00	$235.00	$235.00	$235.00
Utilities	$30.00	$30.00	$30.00	$30.00	$30.00	$30.00
Management fees	$64.00	$64.00	$64.00	$64.00	$64.00	$64.00
Reserve for misc. maintenance exp.	$50.00	$50.00	$50.00	$50.00	$50.00	$50.00

235 W. Syracuse Ave.

	April	May	June	July	August	September
Revenue						
Rent	$1,195.00	$1,195.00	$1,195.00	$1,195.00	$1,195.00	$1,195.00
Expenses						
Insurance Premium	$85.00	$85.00	$85.00	$85.00	$85.00	$85.00
Utilities	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Management fees	$96.00	$96.00	$96.00	$96.00	$96.00	$96.00
Reserve for misc. maintenance exp.	$25.00	$25.00	$25.00	$25.00	$25.00	$25.00

87 W. Canal Street

	April	May	June	July	August	September
Revenue						
Rent	$875.00	$875.00	$875.00	$875.00	$875.00	$875.00
Expenses						
Insurance Premium	$77.00	$77.00	$77.00	$77.00	$77.00	$77.00
Utilities	$65.00	$65.00	$65.00	$65.00	$65.00	$65.00
Management fees	$70.00	$70.00	$70.00	$70.00	$70.00	$70.00
Reserve for misc. maintenance exp.	$100.00	$100.00	$100.00	$100.00	$100.00	$100.00

97 W. Canal Street

	April	May	June	July	August	September
Revenue						
Rent	$900.00	$900.00	$900.00	$900.00	$900.00	$900.00
Expenses						
Insurance Premium	$61.00	$61.00	$61.00	$61.00	$61.00	$61.00
Utilities	$65.00	$65.00	$65.00	$65.00	$65.00	$65.00
Management fees	$72.00	$72.00	$72.00	$72.00	$72.00	$72.00
Reserve for misc. maintenance exp.	$50.00	$50.00	$50.00	$50.00	$50.00	$50.00

830 N. Golden State Blvd.

	April	May	June	July	August	September
Revenue						
Rent	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00
Expenses						
Late property tax installment				$2,135.00		
Insurance Premium	$76.00	$76.00	$76.00	$76.00	$76.00	$76.00
Utilities	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Management fees	$80.00	$80.00	$80.00	$80.00	$80.00	$80.00
Reserve for misc. maintenance exp.	$25.00	$25.00	$25.00	$25.00	$25.00	$25.00

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.

17. 15-90358-E-11 LAWRENCE/JUDITH SOUZA
MHK-4 David M. Meegan

MOTION TO EMPLOY SEQUOIA PROPERTY MANAGEMENT AS PROPERTY MANAGER , AND/OR MOTION FOR COMPENSATION FOR SEQUOIA PROPERTY MANAGEMENT, OTHER PROFESSIONAL(S)
4-30-15 [37]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 30, 2015. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The hearing on the Motion to Employ is continued to 10:30 a.m. on June 11, 2015.

Debtor's in Possession, Lawrence James Souza and Judith Louise Souza, seeks to employ Sequoia Property Management ("Property Manager"), pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. FN.1. The services shall include assisting the Debtor in Possession in

advertising the availability of the rental property, collecting rents each month from tenants, and paying necessary expenses related to maintenance of each of the rental property.

FN.1. The court notes that the title to this pleading states it is "Debtors' Motion to Employ...." Dckt. 37. Further, that "Debtors" seek authorization to compensate the property manager. The Motion further states that "Debtors" are joint owners of the properties to be managed. If the court were to grant the relief as literally requested, it would be the Debtors personally who were authorized to employ the Property Manager. However, the properties are not "owned" by the Debtors, but are property of the bankruptcy estate. 11 U.S.C. § 541(a). The Debtors are not personally in control of the property of the estate, but only in their fiduciary capacities as "debtors in possession." 11 U.S.C. § 1107.

While this reference to "Debtors" is clearly inadvertent, there is a significant legal difference between the "Debtors" as combatants in the bankruptcy case and the "Debtors in Possession" as the fiduciary to the bankruptcy estate in lieu of a trustee. The Debtors in Possession need to clearly identify themselves as such and seek relief in their fiduciary capacity when so acting.

When creating definitions within a pleading, it is inappropriate to use the word "debtor" as the term to mean "debtor in possession." Such leads to unnecessary confusion and may mislead a debtor into thinking that he, she, or it has no fiduciary duties to the bankruptcy estate. Common short definitional terms, if "debtor in possession" is deemed too long to use in the pleading, include "DIP" or "ΔIP" (if a reference to a "DIP" is considered derogatory by the debtor in possession).

The Debtor-in-Possession is also seeking authorization of ongoing payment to Property Manager without need for further court approval.

The Debtor in Possession argues that Property Managers's appointment and retention is necessary because it provides for the continued management of the Debtor-in-Possession's eight rental properties which continue to be occupied

Diedre Thomas, owner and manager of Sequoia Property Management, testifies that she is providing property management services for the Debtor-in-Possession's rental properties since 1994. Thomas testifies she and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee

basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Unfortunately, the Debtor-in-Possession does not provide a copy of the employment agreement. Without such agreement, the court cannot determine whether the terms of the representation is in the best interest of the estate, Debtor-in-Possession, or creditors. Further, the court cannot authorize the Debtor in Possession to enter into any such "Agreement," consisting of unknown terms and conditions.

Therefore, to offer the Debtor-in-Possession the opportunity to file a copy of the Agreement, the court continues the hearing to 10:30 a.m. on June 11, 2015. The Debtor-in-Possession shall file and serve a copy of the agreement as well as any other supplemental papers on or before May 22, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is continued to 10:30 a.m. on June 11, 2015. The Debtor-in-Possession shall file and serve a copy of the agreement as well as any other supplemental papers on or before May 22, 2015.

18. 14-91565-E-11 RICHARD SINCLAIR
15-9008 HAR-1
CALIFORNIA EQUITY MANAGEMENT GROUP, INC. ET AL V. SINCLAIR

MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION
4-23-15 [11]

Final Ruling: No appearance at the May 21, 2015 hearing is required.

The court having stayed all matters in the instant Adversary Proceeding pending further order of this court and having modified the automatic stay as to allow California Equity Management Group, inc. and Fox Hollow of Turlock Owners' Association, and each of them, and their attorneys, agents and representatives, to litigate to final judgment, including all appeals therefore, the claims, rights, and interests asserted in *Fox Hollow of Turlock Owners' Association, et al. v. Mauctrst LLC, et al., and all consolidated actions*, United States District Court, Eastern District of California, case no. 03-5439 (Dckt. 19),

The Motion is dismissed 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 for Summary Judgment having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed without prejudice as moot, the Adversary Proceeding having been stayed.

19. 14-91565-E-11 RICHARD SINCLAIR
15-9009 HAR-1
KATAKIS ET AL V. SINCLAIR

MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION
4-23-15 [11]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), and Office of the United States Trustee on April 23, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Summary Judgment and/or Motion for Summary Adjudication is denied without prejudice.

Andrew Katakis, California Equity Management Group, Inc. and Fox Hollow of Turlock Owners' Association ("Plaintiffs") filed the instant Motion for Summary Judgment or in the Alternative Summary Adjudication Against Defendant Richard Sinclair on April 23, 2015. Dckt. 11.

The Plaintiffs state the summary judgment is appropriate in the instant Adversary Proceeding because there is no triable issue of fact.

The instant Adversary Proceeding was filed on February 23, 2015. Adversary Proceeding No. 15-09009. The complaint seeks a determination that a judgment

obtained against Richard Sinclair ("Defendant-Debtor") in Stanislaus County Superior Court, Case No. 332233 in the amount of $1,337,073.72 be determined a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(2)(A), (4), and (6).

OPPOSITION AND REPLY

The Defendant-Debtor filed an opposition on May 7, 2015. Dckt. 20. The Plaintiffs filed a reply to the opposition on May 14, 2015. Dckt. 25.

However, in light of the Motion failing to state grounds with particularity in the motion for which relief is proper (Fed. R. Civ. P. 7(b)) and the Motion being denied without prejudice, the court will not address the extensive arguments presented in the opposition and reply, much of which relates to matters not within the scope of a motion for summary judgment based on the Complaint filed in this Adversary Proceeding.

MOTION

The Motion states the following grounds with particularity pursuant to Fed. R. Civ. P. 7 upon which the request for relief is based:

A. "The Motion is made on the ground that there is no triable issue of fact, and Plaintiffs are entitled to Summary Judgment or Partial Summary Adjudication against Defendant as a matter of law."

B. "The Motion is based on the Memorandum of Points and Authorities, the Statement of Undisputed Facts, the Complaint to Determine Dischargeability of Judgment in the Amount of $1,337,073.72, the Request for Judicial Notice, all pleading and papers on file with the Court in this case, and upon such further evidence and authority as Plaintiffs may present prior to or at the hearing."

C. "Plaintiffs seek a determination that a judgment obtained against Defendant-Debtor in the amount of $1,337,073.72 be determined a non-dischargeable debt pursuant to § 523(a)(2)(A), (4), and (6)."

D. "The Judgment was entered in the Stanislaus County Superior Court, Case No. 332233 in which Defendant-Debtor, among others, was a plaintiff naming as defendants the three Plaintiffs in this adversary proceeding."

E. "After a 36-day trial, the judgment was entered against Defendant-Debtor for attorneys' fees based on a theory of unclean hands."

F. "The judgment was appealed by Debtor was affirmed on appeal."

G. "Additional attorneys' fees and cost were awarded on the appeal resulting in the current balance of the Judgment, including interest at 10% through the filing of the case in the amount of $1,337,073.72."

H. "The state court action was filed by Debtor to recover lots in the Fox Hollow project that were purchased by Plaintiff California Equity Management Group, Inc. either from Fox Hollow of Turlock Owners' Association or lenders following the foreclosure by the lender, or in the case of Conti, a lender, by the purchase of one lot from Conti along with three notes secured by deeds of trust which were ultimately foreclosed by Plaintiff California Equity Management Group, Inc."

I. "All of the security instruments and the formation documents of the Home Owners' Association contained attorneys' fees provision."

J. "The trial court found not only that the foreclosure sales could not be set aside but determined that Defendant-Debtor's actions in bringing the state court action to avoid the transfers was initiated following acts by Defendant-Debtor that resulted in a finding by the state court of unclean hands which in turn resulted in the award of attorneys fees, based on the documents involved in the foreclosures."

K. "Many of the wrongful acts found by the state court fit within the elements of § 523(a)(2)(A), (4), and (6)."

L. "The wrongful acts that fit within the elements of § 523(a)(2)(A), (4), and (6) establish a pattern of fraud, misrepresentation and willful malicious acts that resulted in the finding of unclean hands."

M. "The same pattern of unclean hands must now be determined to make the judgment a non-dischargeable debt of Defendant-Debtor."

The Motion does not comply with the requirements of Fed. R. Civ. P. 7(b) because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that the state court made findings of "unclean hands," and then makes a generic reference to 11 U.S.C. § 523(a)(2)(A), (4), and (6). The Motion fails to plead the "acts" which would be the grounds for nondischargebility upon which Plaintiff relies.

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

The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

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

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

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

On its face, the Motion states the debt is for an "[a]ward of attorneys' fees, based on the documents involved in the foreclosures." Nowhere are grounds stated as to how the "unclean hand" concept, and the acts relating thereto, applies to the attorneys' fees awarded based upon the "documents."

Here, the Plaintiffs merely restate the state court history and that the findings by the state court may or may not have some bearings on the instant Adversary Proceeding. The Plaintiffs do not mention the doctrines of res judicata or collateral estoppel in the Motion in which any of the findings by the state court would have preclusive effect. Instead, the Plaintiffs conclusively state that the state court findings "fit within the elements" of 11 U.S.C. §§ 523(a)(2)(A), (4), and (6).

Due to the failure of the Plaintiffs to state with particularity and failing to state grounds for relief in the Motion as required by Fed. R. Civ. P. 7(b), the Motion is denied without prejudice.

MEMORANDUM OF POINTS AND AUTHORITIES

Even though the Motion fails to comply with Fed. R. Civ. P. 7, a review of the Memorandum of Points and Authorities shows that if the court were to waive the basic pleading requirements, a "Mothorities" (a mash-up of the Motion and Points and Authorities) fairs no better. The Memorandum provides 6 pages of summaries of what the Plaintiffs state are 28 findings of fact resulting in the finding of unclean hands on the part of the Defendant-Debtor which was incorporated into the court of appeals decision. However, Plaintiff fails to provide the court with actual quotes of the actual findings made by the state court in granting the judgment. After providing for abbreviated versions of the alleged findings, the Plaintiffs cite to certain portions of these findings

and state, conclusively, that they meet the elements of the § 523 grounds. However, the Plaintiffs do not provide for any analysis that ***res judicata*** or collateral estoppel applies. Instead, the Plaintiffs cite to generic concepts of the doctrine and then conclude that the findings of the state court justify summary judgment.

While it is possible that there are sufficient grounds in the Memorandum that would justify the application of res judicata or collateral estoppel which then satisfy the elements of 11 U.S.C. §§ 523(a)(2)(A), (4), and (6), the Plaintiffs, much like in the Motion, rely on blanketed and conclusive statements without pleading with particularity. Even construing the Memorandum as a "Mothorities," the Plaintiffs fail to state grounds upon which the relief may be granted.

FN.1. The court declines the opportunity to be assigned associate attorney work to comb through all the pleadings and exhibits to identify, state for Plaintiff's the evidence and grounds, apply the law to such evidence and grounds, and then advocate in support of the Motion for Plaintiff. The herculean nature of combing just the seven hundred and thirty-four (734) pages of exhibits is demonstrated by Plaintiff's inability to identify where in the record the court can find the "undisputed facts" listed on the Statement of Undisputed Facts. Dckt. 14. The best that Plaintiffs' counsel could do, even with their intimate, decades long knowledge of this litigation, is to identify the citation to the supporting evidence for the alleged undisputed fact being somewhere in the "State Court Findings." ***Id.***

CONCLUSION

The parties in this Adversary Proceeding have been deadlock in litigation for well over a decade. While the parties have every right to litigate their rights and the strategy they choose, the court emphasizes that the parties shall comply with the Federal Rules of Civil Procedure, Federal Rules of Bankrutpcy Procedure, and Local Bankruptcy Rules. Here, the instant Motion fails to state with particularity the grounds for summary judgment as required by Fed. R. Civ. P. 7(b), and even the "Mothorities" fails to show grounds for the relief generally requested under 11 U.S.C. § 523(a)(2)(A), (4), and (6). Therefore, the Motion is denied without prejudice.

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

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