

UNITED STATES BANKRUPTCY COURT  
Eastern District of California

**Honorable Ronald H. Sargis**  
Chief Bankruptcy Judge  
Sacramento, California

**May 30, 2019 at 10:30 a.m.**

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1. [15-20102-C-7](#)      MUKHTIAR TAKHER      CONTINUED MOTION FOR  
[15-2058](#)      Walter Dahl      EXAMINATION  
NOS-4           3-6-19 [29]

**RICHARDS V. TAKHER ET AL**  
**ADVERSARY PROCEEDING CLOSED:**  
**05/31/2016**

**No Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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**The Motion For Examination is ~~XXXXXXXXXX~~.**

On March 6, 2019 the Chapter 7 Trustee, Geoffrey Richards ("Trustee") filed a Motion seeking an order requiring Judgment Debtor Robbie Singh Gill Takher ("Judgment Debtor") to appear before the court to furnish information to aid in enforcement of a money judgment obtained by the Trustee against the Judgment Debtor. Dckt. 29.

The court issued an Order on March 12, 2019 granting the Motion and ordering Judgment Debtor to appear on April 3, 2019 at 10:00 a.m. Order, Dckt. 37.

At the April 3, 2019 the court continued the hearing to May 30, 2019. Civil Minutes, Dckt. 39.

At the hearing, ~~XXXXXXXXXXXXXXXXXX~~.

2. [15-20102-C-7](#)      MUKHTIAR TAKHER  
[15-2058](#)              Walter Dahl  
NOS-5

CONTINUED MOTION FOR  
EXAMINATION  
3-6-19 [33]

**RICHARDS V. TAKHER ET AL**  
**ADVERSARY PROCEEDING CLOSED:**  
**05/31/2016**

**No Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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**The Motion For Examination is ~~XXXXXXXXXX~~.**

On March 6, 2019 the Chapter 7 Trustee, Geoffrey Richards ("Trustee") filed a Motion seeking an order requiring Judgment Debtor Robbie Singh Gill Takher's spouse, Meena Takher ("Judgment Debtor's Spouse") to appear before the court to furnish information to aid in enforcement of a money judgment obtained by the Trustee against the Judgment Debtor. Dckt. 33

The court issued an Order on March 12, 2019 granting the Motion and ordering Judgement Debtor's Spouse to appear on April 3, 2019 at 10:00 a.m. Order, Dckt. 38.

At the April 3, 2019 the court continued the hearing to May 30, 2019. Civil Minutes, Dckt. 40.

At the hearing, ~~XXXXXXXXXXXXXXXXXX~~.

3. [16-25205-E-7](#)      **TIMOTHY TAPURO**  
[18-2066](#)              **Peter Macaluso**  
**TAPURO V. COUNTY OF**  
**SACRAMENTO, DEPARTMENT OF**

**TRIAL RE: COMPLAINT FOR**  
**DECLARATORY RELIEF, ETC.**  
**5-11-18 [1]**

**Final Ruling: No appearance at the May 30, 2019 Trial is required.**

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**The Trial is continued to 1:30 p.m. on July 16, 2019, for a status conference if the Adversary Proceeding has not been dismissed by that time.**

On May 29, 2019, a Notice that the Parties have settled this matter was filed. Dckt. 44. It further states that pursuant to the settlement, this Adversary Proceeding will be dismissed.

The Parties have provided the Notice of Settlement, the court continues the trial for a status conference at 1:30 p.m. on July 16, 2019.

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 court having reviewed the Notice of Settlement in this Adversary Proceeding (Dckt. 44), and upon review of the file in this Adversary Proceeding, and good cause appearing,

**IT IS ORDERED** that the court shall conduct a Status Conference in this Adversary Proceeding at 1:30 p.m. on July 16, 2019, if this matter has not been dismissed by the parties by that date.

**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on April 23, 2019. By the court's calculation, 37 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

**The Motion for Approval of Compromise is granted.**

Gary Farrar, the Chapter 7 Trustee, ("Trustee" or "Movant") requests that the court approve a compromise the adversary proceeding entitled *Gary R. Farrar v. Christie Munson*, Adversary Proceeding No. 17-02206 (the "Adversary Proceeding"). The Adversary Proceeding alleged the debtor, Timothy Russell Munson ("Debtor") fraudulently transferred his real property commonly known as 2569 Poppy Drive, Lodi, California (the "Property") to his former spouse Christine Munson ("Settlor").

Movant and Settlor have resolved the claims at issue in the Adversary Proceeding, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit K in support of the Motion, Dckt. 64):

- A. Settlor shall pay to the Trustee \$16,776.00, with \$12,500 to be paid by March 31, 2019, and any balance paid by April 30, 2019.
- B. The Trustee and Settlor shall file a stipulation for dismissal with prejudice of the Adversary Proceeding.

- C. Trustee shall also file a withdrawal of the Notice of Pendency of Action recorded against the Property with the San Joaquin County Recorder on November 16, 2017, document number 2017-133756.

## **CREDITOR'S OPPOSITION**

Unsecured creditor, Matthew and Brooke McCollough ("Creditor") filed an Opposition to the Motion on May 16, 2019. Creditor opposes the Motion on the following grounds:

1. Trustee undervalues the Property.
2. Settlor has additional assets (a 6,000 sq.ft. house on 5.5 acres of land) that Trustee could recover against, which Trustee did not consider.

In support of its Opposition Creditor filed the Declaration of Brooke McCollough. Declaration, Dckt. 68. The McCollough Declaration provides testimony that the Property is currently worth \$900,000.00 based on the recent sales of comparable. *Id.*, ¶¶ 5-6.

McCollough further testifies she is "informed and believes" that Settlor has a 6,000 square foot home on a 5.5 acre lot purchased in 2017, but for which Settlor's parents hold title and Settlor has a beneficial interest. As discussed below, testimony made on "information and belief" does not conform to the requirements of 28 U.S.C. § 1746.

Additionally, Creditor filed as Exhibit "A" a copy of Facebook posts from Settlor. Exhibit A, Dckt. 69. In submitting this statement, no exception to the rule against hearsay is established. *See* FED. R. EVID. 801, *et seq.*

## **TRUSTEE'S REPLY & SUPPLEMENTAL PLEADINGS**

Trustee's Reply and several pleadings were filed in support of the Motion on May 23, 2019. Trustee argues the following:

1. The "reasonably equivalent value" obtainable from the Adversary Proceeding is the value of the Property is determined as of the transfer date.

On this point, as addressed in *Collier on Bankruptcy*, Sixteenth Edition, ¶ 550.02(a), when the trustee recovers the value of the property, rather than the property itself, as provided in 11 U.S.C. § 550(a), such is not limited to the "value" when transferred, but either the value at the time of transfer or the appreciated value at the time of the judgment, whichever is greater.

Depreciation in the value of the property due to market fluctuations may support the bankruptcy court in ordering restitution of the property's value at the time of the transfer. Thus, when property declines in value after the transfer, a trustee may recover the value of the property at the time of the transfer rather than the property.

A thornier issue is whether the estate should be entitled to an increase in the value of the property when the property is more valuable at the time of avoidance and recovery than it was on the date of transfer. At least **some courts have held that the trustee should be entitled to recover the greater of the value of the transferred property at the transfer date or the value at the time of the recovery**, although they acknowledged that the recovery should be reduced by the value of the improvements made by the transferee. **This result is consistent with the section’s goal of “restoration”—putting the estate back where it would have been but for the transfer.** It also serves the equitable underpinnings of restorative justice by **discouraging a “wait and see” approach by transferee defendants holding property, such as stock, that may be subject to wide, rapid swings in value on account of volatile markets.** Likewise, as noted in the legislative record, “a transferee has an opportunity to benefit by delay, and there are possibilities for abuse where the transferred property is appreciating substantially in value.” If the trustee recovers the property, rather than its value, and the transferee had made no improvements to increase the value of the property but the property has appreciated in value as a result of market forces, the trustee should be entitled to the appreciated value and the transferee is not entitled to a lien under section 550(e).

5 Collier on Bankruptcy, Sixteenth Edition, ¶ 550.02(a) (emphasis added).

2. The likelihood of success is questionable because of significant encumbrances on the Property.
3. The court should strike and disregard testimony provided by Creditor on “information and belief.”
4. Creditor declined the opportunity to purchase the claims proposed to be settled herein.
5. Settlor is “judgement-proof” because she owns no asset worth over \$50,000.00, makes only \$2,176.40 monthly, and is a single mother of three children.

The Declaration of Dana Suntag filed with the Reply provides testimony that Creditor was offered by the Trustee the opportunity to purchase the claims proposed to be settled. Declaration ¶¶ 2-3, Dckt. 72. The Suntag Declaration further states Creditor declined that opportunity. *Id.*, ¶ 4.

The Supplemental Declaration of Settlor provides testimony that Settlor does not have an interest in the property as asserted by Creditor. Declaration ¶ 12, Dckt. 74. Settlor’s Supplemental Declaration also describes, generally, Settlor’s financial circumstances. *See* Dckt 74.

The Declaration of Bob Brazeal, a real estate broker with Re/Max, provides testimony that the Property had a value of \$627,000.00 at the time of filing. Declaration ¶ 4, Dckt. 73.

## DISCUSSION

## Inadequacy of Witness Information and Belief Testimony

Creditor has presented to the court a declaration in which the witness provides testimony based on “information and belief.” That declaration is the testimony of a witness presented in writing in lieu of the witness being put on the stand. Non-expert witness testimony must be based on the personal knowledge of the witness. FED. R. EVID. 602. As discussed in Weinstein's Federal Evidence § 602.02:

A witness may testify only about matters on which he or she has first-hand knowledge. Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences. The witness's testimony must be based on events perceived by the witness through one of the five senses.

Recently, the Ninth Circuit Court of Appeal addressed this personal knowledge issue, stating:

Under Rule 602, “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” FED. R. EVID. 602. Rule 602 requires any witness to have sufficient memory of the events such that she is not forced to ‘fill[] the gaps in her memory with hearsay or speculation.’ 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE Evidence § 6023 (2d ed. 2007). Witnesses are not ‘permitted to speculate, guess, or voice suspicions.’ *Id.* § 6026. However, ‘[p]ersonal knowledge includes opinions and inferences grounded in observations and experience.’ *Great Am. Assurance Co. v. Liberty Surplus Ins. Co.*, 669 F. Supp. 2d 1084, 1089 (N.D. Cal. 2009) (citing *United States v. Joy*, 192 F.3d 761, 767 (7th Cir. 1999)). Lay witnesses may testify about inferences pursuant to Rule 701:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. R. EVID. 701.

*United States v. Whittemore*, 776 F.3d 1074, 1082 (9th Cir. 2015).

As discussed in Moore's Federal Practice, Civil § 8.04, the use of “information and belief” is a pleading device for the use in a complaint (or motion) to allow a plaintiff (movant) to fill in the gaps of alleging a claim pending discovery.

[4] Allegations Supporting Claims for Relief May Be Made on Information and Belief

Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief (see § 8.06[5]). However, Rule 11 permits a

pleader, after reasonable inquiry, to set forth allegations that “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery” (see Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions). Courts have read the policy underlying Rule 8, together with Rule 11, to permit claimants to aver facts that they believe to be true, but that lack evidentiary support at the time of pleading. Generally, however, such averments are allowed only when the facts that would support the allegations are solely within the defendant’s knowledge or control.

Nothing in the *Twombly* plausibility standard (see [1], above) prevents a plaintiff from pleading on information and belief. A pleading is sufficient if the pleading as a whole, including any allegations on information and belief, states a plausible claim. On the other hand, if the pleading fails to permit a plausible inference of wrongdoing, or if the allegations are nothing more than legal conclusions, the pleading will not survive a motion to dismiss.

This is incorporated to Federal Rule of Bankruptcy Procedure 9011, which repeats the provisions of Federal Rule of Civil Procedure 11(b), stating:

(b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[.],—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Though allowed as a pleading device, the certification required by 28 U.S.C. § 1746 does not allow testimony in declaration to be provided under penalty of perjury being true because the witness merely “is informed and believes (or desires because likely it would mean the witness party would prevail) it is true.”

§ 1746. Unsworn declarations under penalty of perjury



Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: “I declare (or certify, verify, or state) **under penalty of perjury** under the laws of the United States of America **that the foregoing is true and correct**. Executed on (date).

(Signature).”

(2) If executed within the United States, its territories, possessions, or commonwealths: “**I declare** (or certify, verify, or state) **under penalty of perjury** that the **foregoing is true and correct**. Executed on (date).

(Signature).”

28 U.S.C. § 1746 (emphasis added).

### **Review of Compromise**

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

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

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

## **Probability of Success**

Trustee states there does not appear to be a basis for the Trustee to prevail on an actual fraud claim because at the time of the transfer (1) Settlor and the Debtor were no longer friendly; (2) the Debtor had hidden items of finances from Settlor; (3) and Settlor was awarded the Property in a family court action because she was owed Section 2640 reimbursements that exceeded the equity of the Property. Trustee argues a claim pursuant to 11 U.S.C. § 548 would not prevail because the separate property division constituted a transfer for reasonably equivalent value.

The Trustee's argument is well-taken. Based on the foregoing, the probability of success for the Trustee in the Adversary Proceeding is low.

## **Difficulties in Collection**

In the Motion, and more significantly in the Reply, Trustee argues the Settlor is essentially "judgement-proof" because of her limited income and assets.

Trustee's argument here is well-taken. Settlor had not been demonstrated to have assets which the Trustee could easily collect against if a successful judgement were obtained after a trial on the merits.

## **Expense, Inconvenience, and Delay of Continued Litigation**

Trustee does not discuss what the extent of the expense, inconvenience, and delay of continued litigation would be here.

On the evidence provided, the expense, inconvenience, and delay of continued litigation would be moderate.

## **Paramount Interest of Creditors**

Trustee argues settlement is in the best interests of the creditors because it avoids the risks, delays, and costs discussed above and allows the estate to recover \$16,776 immediately.

This argument is also well-taken.

While Creditor argues that there may be other assets, the Trustee should get more, the Defendant should have more assets, their arguments are little more than speculation. If such valuable assets exist, then Creditor has every economic incentive to provide evidence of such interests to the Trustee. If presented with such evidence, the Trustee would then pursue a greater recovery, with Creditor getting more on its 93% of the general unsecured claims and the Trustee getting more in his commission.

Creditor Brooke McCollough offers here non-expert opinion as to value of Defendant's property. Creditor has not obtained even a broker's price opinion to support Creditor's opinion as to the value of the real estate Creditor does not own.

## Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it allows some recovery on the claims of the Estate despite uncertainty as to the merits of and ability to collect on the claims. The Motion is granted.

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

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

The Motion to Approve Compromise filed by Gary Farrar, the Chapter 7 Trustee, (“Trustee” or “Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Christine Munson (“Settlor”) is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit K in support of the Motion (Dckt. 64).

5. [17-25114-E-7](#)  
[RJ-3](#)

HSIN-SHAWN SHENG  
Richard Jare

MOTION TO COMPEL EMPLOYED  
PROFESSIONALS TO FILE FEE  
APPLICATIONS  
5-13-19 [147]

**APPEARANCES FOR HEARING ON MOTION REQUIRED BY  
TRUSTEE ERIC J. NIMS  
COUNSEL FOR THE TRUSTEE  
DEBTOR HSIN-SHAWN SHENG  
COUNSEL FOR DEBTOR**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 13, 2019. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

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

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**The Motion to Compel is denied .**

The debtor, Hsin-Shawn Cyndi Sheng ("Debtor") filed this Motion seeking an order compelling Desmond, Nolan, Livaich & Cunningham, counsel ("Trustee's Counsel") for the Chapter 7 Trustee, Eric Nims' ("Trustee"), to file an interim fee application.

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

1. Debtor's counsel hopes this is the first item heard on the calendar.

2. Debtor requests judicial notice of pleadings filed with the docket control number RJ-002, which contain evidence to support this Motion.
3. Debtor wishes to reach finality in this case where unsecured claims total only \$10,767.59.
4. Local Bankruptcy rule 2016-2 allows the court to order professionals of the Estate to file fee applications.
5. The administrative fees generated in this case are unreasonable considering the claims.
6. Trustee has acted to “sandbag” the Debtor.
7. It would be appropriate to order Trustee’s Counsel to file an interim fee application no later than June 11th, 2019. Trustee’s Counsel has been employed over a year and a half.

## **DISCUSSION**

Local Bankruptcy Rule 2016-2 relied on by Debtor states the following:

(a) Motion Procedure. Every application for compensation of a Chapter 7 trustee in the categories set forth in paragraph (b) shall be presented by motion noticed and set for hearing pursuant to LBR 9014-1. Such application shall be supported by a narrative statement of the trustee’s services and such other supporting documentation as may be appropriate to satisfy the trustee’s burden of persuasion.

(b) Categories. The procedure specified in paragraph (a) shall be followed for requests that satisfy any of the following criteria:

- 1) Fee requests seeking \$10,000.00, or more;
- 2) Cases in which the trustee seeks fees exceeding the amount remaining to pay unsecured priority and general unsecured claims;
- 3) Cases in which there is a “carve out” for the estate or a “short sale”;
- 4) Cases where the trustee has operated the business of the debtor; or
- 5) Cases in which the court specifically orders such a fee application.

Debtor reads the above rule to indicate, “yes, it is apparently possible for the court to order Trustee’s Counsel to file a fee application.”

However, there are two issues with Debtor’s argument. First, Local Bankruptcy Rule 2016-2 governs compensation of the Chapter 7 Trustee. Here, Debtor is seeking to compel Trustee’s Counsel, and not the Trustee, to file a fee application.

Second, merely pointing to a Local Rule which indicates the court possibly has the authority to make some order is not the same as pointing the court to such authority. No grounds are stated in the Motion explaining why Debtor is entitled to the relief requested.

At the hearing, **XXXXXXXXXXXXXXXXXX**.

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

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

The Motion to Compel filed by the debtor, Hsin-Shawn Cyndi Sheng (“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 is denied.

6. [19-20302-E-13](#) **HSIN-SHAWN SHENG**  
[DPC-3](#) **Richard Jare**

**CONTINUED MOTION TO DISMISS**  
**CASE**  
**4-23-19 [64]**

**APPEARANCES FOR HEARING ON MOTION REQUIRED BY**  
**TRUSTEE ERIC J. NIMS**  
**COUNSEL FOR THE TRUSTEE**  
**DEBTOR HSIN-SHAWN SHENG**  
**COUNSEL FOR DEBTOR**

**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 23, 2019. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Dismiss is granted, and the case is dismissed.**

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that the debtor, Hsin-Shawn Cyndi Sheng ("Debtor"), has not filed, served, and set for confirmation a new proposed plan since the court sustained Trustee's Objection To Confirmation of the prior plan on March 26, 2019. Dckt. 56, 57.

**DEBTOR'S OPPOSITION**

Debtor filed an Opposition on May 15, 2019. Dckt. 72. Debtor states the following:

There are problems as outlined in the various documents and in the request for judicial notice filed today. A modified plan is coming soon. At present the debtor is suffering from diminished income because the Chapter 7 trustee has caused income flow to be suspended. We are acting to rectify this.

*Id.* The Request for Judicial Notice referenced in the Opposition states the following:

The debtor herein requests that the court take judicial notice of Documents 146 through 158 in Case number 17-25114-E-7

Dckt. 73.

Debtor filed her Declaration in support of the Opposition. Declaration, Dckt. 75. The Declaration adds the following explanation to shed light on the Opposition which does not offer any explanation of failure to propose a new plan:

1. I understand that my attorney is showing the trustee and the court the difficulties that I am having in connection with my other pending case. This has caused complications.
2. I do want to continue with the Chapter 13 to save my home from foreclosure. I will be review a modified plan closely as soon as my attorney can prepare one in the next couple days.

*Id.*

## **DISCUSSION**

When the Trustee filed the Motion, Debtor had not filed a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on March 26, 2019.

Debtor's Opposition does not state grounds with particularity (FED. R. BANKR. P. 9013) in support of Debtor's request that the Motion be denied. The court is told the Chapter 7 Trustee in Debtor's Chapter 7 Case, No. 17-25114 ("Chapter 7 Case"), has stopped Debtor's cash flow, and Debtor is working to solve the problem. Debtor then requests the court take judicial notice of several documents filed in Debtor's other case to discover the extent of the "problem" here.

Federal Rule of Evidence 201 governs (and allows) judicial notice of certain adjudicative facts. That rule specifies the court may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. FED. R. EVID. 201(b).

One treatise describes the two categories of facts not subject to reasonable dispute as follows:

The first category of adjudicative facts subject to judicial notice are facts which are "generally known within the territorial jurisdiction of the trial court." **This category requires that the fact to be noticed be of general notoriety in the geographical area of the court, but not of the United States as a whole.** It is also not necessary that the fact be universally known within the territorial jurisdiction, since such a requirement would seem to eliminate the category, no fact being so well known by every inhabitant within the jurisdiction as to be truly "universal."



**This category is also limited to facts presently generally known within the jurisdiction.** Obviously, as time passes, the character of a jurisdiction in terms of its occupations, etc., will change. Accordingly, what a court might properly take judicial note of in the year 1800 might not be a proper subject of judicial notice in the year 2000.

The combined result of these limitations is that many facts judicially noticed in this category may not seem obvious to an observer from another place and another time. Stated differently, facts judicially noted in this subsection of the Rule may often appear somewhat parochial. Since the standard is somewhat less objective than the standard in the second subcategory, this subcategory may be viewed as more subjective.

Facts judicially noticed which fit within this subcategory are of breathtaking variety. The following are examples of that variety: bingo was largely a senior citizen pastime; major hijacking gangs had preyed on interstate and international commerce at Kennedy Airport; credit cards play vital role in modern American society; newspaper was New Jersey's only statewide newspaper, as well as its largest; incubation period of measles; British authorities in Hong Kong had not undertaken any persecution of persons because of race, religion, or political opinion; method for canning baked beans in New England; most establishments that sell beer also sell tobacco products; escape of ammonia gas from refrigeration coils ordinarily does not happen if coil is properly manufactured and installed; calendars have long been affixed to walls by means of a punched hole at the top of the calendar; the Ohio River is navigable.

The following are some examples of similar facts which have been judicially noticed by state courts: passenger trains and freight trains are customarily separated; specific locations deemed valuable sources of gold; Texas cattle fever is a contagious disease; Connecticut River not navigable at specific location; proper season for the planting of cotton seed; existence of the Great Depression.

**The second subcategory** of adjudicative facts are those facts "which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

In this subcategory are facts which, while not generally known to persons within the jurisdiction, nonetheless **are of such nature that they can be definitively established by reference to the appropriate sources.** Within this category are facts capable of being determined precisely by astronomical and mathematical calculations, such as the times of sunrise and sunset, moonrise and moonset, the phases of the moon, what day of the week a given date was, and standard actuarial and life expectancy tables. Facts in this subcategory can also often be introduced as information in learned treatises pursuant to Rule 803(17) of the Federal Rules of Evidence.

The following are examples of facts in this subcategory which have received

judicial notice: August 6, 1976, was neither Sunday nor a Federal legal holiday; Father's Day, 1979, was June 17; closing stock prices on a specific date; life expectancy tables to calculate damages in persona injury case; present value table; time of sundown on specific date.

60 AM. JUR. PROOF OF FACTS 3d 175 (Originally published in 2001)(emphasis added).

The Federal Rules of Evidence permit courts to take judicial notice of **facts**, not documents. It is not a tool to be used for when counsel wants to shortcut the filing of documents as exhibits along with a declaration authenticating and explaining the documents.

What Debtor's counsel actually asks here is that the court review documents that have already been filed with the court. These documents are within the court's records.

In reviewing the documents referenced, the court first notes that the range of documents does not pin-point any document to enlighten the court. Docket Number 146 in Debtor's Chapter 7 Case is a Proof of Service.

In digging through the range of pages provided, two motions are filed: a motion to convert the Chapter 7 case to one under Chapter 11, and a motion to compel professionals of the estate to file fee applications. Bankr. E.D. Cal. No. 17-25114, Dckts. 147, 149. In reviewing those motions the general allegation is that the chapter 7 trustee is attempting to liquidate Debtor's property to pay unsecured claims and administrative expenses in the case.

While it may appear to the Debtor that the filing of these motions creates a self-evident explanation for why the hearing on this Motion needs to be continued, such is not so clear to the court.

Rather, it appears that Debtor's Chapter 13 case relies on assets of the Debtor which may be administered in Debtor's pending Chapter 7 case.

Whether those assets are administered or whether allegations made by Debtor in the motion to convert the Chapter 7 case to 11 are correct, the question remains why creditors in this case should be forced to sit and wait on a result.

### **1<sup>st</sup> Amended Plan Filed May 23, 2019**

Debtor's 1<sup>st</sup> Modified Plan has been filed. Dckt. 80. With respect to the required Plan payments, the additional provisions state:

Section 7.10 - - NonStandard Provisions, for section 2.01, merely expanded entries:

Monthly plan payments. To complete this plan, Debtor shall submit to the supervision and control of Trustee on a monthly basis the sum of \$ Debtor shall pay \$1000 for each of the first 6 months and thereafter \$3500 from future earnings. This monthly plan payment is subject to adjustment pursuant to section 3.07(b)(2) below and it must be received by Trustee not later than the 25th day of each month beginning the month after the order for relief under chapter 13. The

monthly plan payment includes all adequate protection payments due on Class 2 secured claims.

Dckt. 80 at 9.

For the Citibank, N.A., as Trustee, claim, Debtor states that she will seek a loan modification. *Id.*, ¶ 7.02. The adequate protection payment (11 U.S.C. § 361) to be made Citibank, N.A., as Trustee, on its (\$1,272,304.32) secured claim, for which there is a (\$673,126.03) pre-petition arrearage, Proof of Claim No. 2, is to be \$565.00. This is stated by the Debtor to only be sufficient to pay the projected costs of insurance and property taxes, with this payment to “resume” in July 2019. *Id.* ¶ 7.04.

Then, beginning in September 2019, the monthly adequate protection payment will increase to \$2,700, of which \$1,120 a month is for property taxes and insurance, and \$1,580 for “principal and interest.” *Id.*

On her Amended Schedule I Debtor states that her monthly gross income is \$6,336, which consists of \$1,234 of business/rental income, \$1,198.00 of Social Security, and \$3,904.00 of “INCREASED Draws & Income Stream/Bangeter Investment (which Debtor states will only be available if she confirms a Chapter 13 Plan). Dckt. 25 at 1-2. Generating the business/rental income is dependent on the Chapter 7 Trustee in the Debtor’s Chapter 7 case abandoning the property generating the income to Debtor. *Id.*

On Amended Schedule J Debtor states that she has (\$2,836) in monthly expenses, excluding mortgage payments, property taxes, and insurance. *Id.* at 4-6. These expenses include (\$225.00) to maintain “Hyatt & Diamond” timeshares. However, for the next five years Debtor’s expenses provide:

\$550 for food and housekeeping supplies

Assuming \$75 a month for housekeeping supplies, that leave  
\$475 for food, which is a 30 day month averages (\$5.27) per meal.

\$250 for transportation - Debtor listing a 2014 C250 Mercedes Benz on Schedule A/B (Dckt. 1 at 13).

The \$250.00 a month is for gas, maintenance, repairs, registration. Assuming \$50 a month for maintenance and repairs and \$20 for registration, that leaves \$150 for gas. At \$4.00 a gallon, Debtor can purchase 38 gallons a month, which at an average of 20 miles to the gallon gives Debtor a driving range of 760 miles.

\$71 for entertainment

\$150 for medical and dental expenses

These appear to present a challenging economic scenario for Debtor.

On Schedule A/B Debtor lists the property securing the Citibank, N.A., as Trustee, claim to have a value of \$940,000.00

Using the Microsoft Loan Calculator Program, *if* the creditor modifies the loan balance down to what Debtor says the property is worth, *and if* the creditor fully amortizes the new loan balance over thirty years, *and if* the creditor allows a 5% interest rate for a 100% loan to value ratio loan, then *just the monthly principal and interest payment* would be (\$5,046.12). Debtor tells us in the Plan that monthly escrow amount for property taxes and insurance is (\$1,120.00). Thus, just the monthly payments for principal, interest, taxes, and insurance would be (\$6,166.12).

Given that in Debtor's austere budget above there is only \$3,500.00 on net monies after the payment of her other reasonable and necessary expenses (Amended Schedule J, Dckt. 25 at 4-5), the Debtor falls short each month by (\$2,666.12) in having funds to pay a projected modified loan.

### **Debtor's Chapter 7 Case**

On May 13, 2019, Debtor and her counsel filed a Motion to Convert her Chapter 7 case to one under Chapter 11. 17-25114; Motion, Dckt. 149. In the Motion Debtor asserts that the Chapter 7 Trustee "has acted inappropriately in attempting to sell outside of the ordinary course of business, WITHOUT A COURT ORDER, property of the estate in an amount grossly disproportionate to the minuscule amount of unsecured claims." *Id.* at p. 2:1-4. Debtor notes that she has already received her Chapter 7 discharge in that bankruptcy case.

Debtor further asserts that the Trustee making demand for the Investment Fund brokered by Bangerter Financial Services, Inc. which Debtor had to be turned over to the Trustee is improper. Debtor is not arguing whether the investments are property of the bankruptcy estate, but asserts that by the Trustee instructing the sale of the investments so that they can be liquidated into cash to be administered by the bankruptcy estate is an improper "sale" of property of the bankruptcy estate without court order.

Debtor objects that the trustee has, by instructing Fidelity Investments to "remit those funds to the bankruptcy estate" tried to sell property without a court order.

*Id.*, p. 4:10-12. Debtor asserts that such sale of all the investment is unreasonable in that there are only (\$9,800) in general unsecured claims to be paid.

In the Trustee's Opposition, he states that he has not instructed the sale of such investments, just that he asserts the right to control property of the bankruptcy estate. *Id.*; Opposition, Dckt. 161. The Trustee asserts that when he asserted control over the investments the Debtor was attempting to sell the investments. The Trustee projects that \$40,200.00 is all that is required to administer the Chapter 7 estate. *Id.*, ¶ 23.

With the assistance of her former counsel in this case, Debtor filed her original Schedules on August 30, 2017. *Id.*; Dckt. 32. On Schedule A Debtor stated under penalty of perjury that her real property had a value of only \$830,000. *Id.*; Dckt. 32 at 2. She listed two other properties, one with a value of \$850,000 and the other with \$215,000. *Id.* at 3.

### **Turnover of Property of the Estate**

In the Chapter 7 Case the Trustee obtained an order for the Debtor to turn over the Barrington Terrace Real Property listed on the Schedules that was property of the Bankruptcy Estate. *Id.*; Order,

Dckt. 109. The court's Findings of Fact and Conclusions of law in granting the Turnover Motion, include:

Debtor's Response fails to acknowledge that a bankruptcy estate has been created and that, pursuant to Bankruptcy Code § 541(a)(1), the bankruptcy estate includes all legal or equitable interests of the debtor as of the commencement of the case. Rather, **Debtor appears to exempt herself from federal law** as enacted by Congress, assert that she can file Chapter 7 and **ignore the law**, and **assert that Chapter 7 exists as her personal tool** to use (and abuse) against others.

...

The court notes **that Debtor has chosen (or refused) to provide any testimony** in opposition to this Motion, instead using the two paragraph arguments of her counsel as a shield between her and the Motion. **Debtor's counsel ignores 11 U.S.C. § 541 and the obligations of the Chapter 7 Trustee to control, assemble, and manage all property of the bankruptcy estate.** 11 U.S.C. § 704, 721.

*Id.*; Civil Minutes, p. 5; Dckt. 108 (emphasis added).

### **Apparent Quick Conclusion of Chapter 7 Case**

There exists a very modest amount of claims and administrative expenses in the Chapter 7 case (at least modest in light of the very valuable investments which Debtor states exists and should not be "sold" by the Chapter 7 Trustee). A Debtor working in good faith with the Trustee could quickly identify the investments to be liquidated, claims and expenses paid, and Chapter 7 case closed. Then, all of the remaining property of the bankruptcy estate would be abandoned back to the Debtor when the Chapter 7 case was closed.

There would be no need to convert the case to one under Chapter 11 and incur \$20,000 to \$30,000 in Chapter 11 plan confirmation and administration expenses - so long as the Debtor was working to prosecute her Chapter 7 case in good faith. To the extent a trustee was attempting to act improperly and waste property of the bankruptcy estate by unnecessarily liquidating property of the bankruptcy estate, the Debtor and/or the U.S. Trustee seeking relief from the court would quickly put an end to such "shenanigans" (as a former law clerk for this court would say).

### **MAY 29, 2019 HEARING**

At the May 29, 2019 hearing, the court continued the hearing on the Motion to May 30, 2019.

### **RULING**

Though Debtor has filed a proposed Modified Plan, based on the information provided such does not appear to be an economically feasible plan. Debtor's declaration in support of the Motion is consistent with the court's view that when Debtor chose to file her now Chapter 7 case she was long on assets and short on creditors. Possibly, it was as simple as Debtor sought to retain a residence that she could not afford, under any circumstances to pay for, was unrealistic in the prior case, got it converted to Chapter 7, and is now seeking to relive the early Chapter 13 days of the prior case.

Based on the foregoing, cause exists to dismiss this case. 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 13 case filed by The Chapter 13 Trustee, David Cusick (“Trustee”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted, and the case is dismissed.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, and Office of the United States Trustee on May 2, 2019. By the court’s calculation, 28 days’ notice was provided. 28 days’ notice is required.

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

**The Motion to Avoid Judicial Lien is granted.**

**Review of Motion**

This Motion requests an order avoiding the judicial lien of “Capital One” against property of David Holden Wood and Harmony Ann Wood (“Debtor”) commonly known as 17409 Lawrence Way in Grass Valley, California (“Property”).

Pursuant to Debtor’s Schedule A, the subject real property has an approximate value of \$300,000.00 as of the petition date. Dckt. 1. The unavoidable senior consensual liens that total \$216,154.00 as of the commencement of this case are stated on Debtor’s Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$75,000.00 on Schedule C. Dckt. 1.

The Judgment Lien was recorded on January 14, 2019, which was only 80 days before the commencement of this bankruptcy case on April 5, 2019.

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

- a. Gross value of Lien Property ..... \$300,000.00
- b. Less: Superior liens (if any) .....-\$216,154.00
- c. Gross Equity ..... \$83,846.00
- d. Less: Judicial lien held by Tri Counties Bank .....-\$22,046.00

e. Net Equity ..... \$77,049.00  
**f. Less: Exemption claimed by Debtors-..... \$100,000.00**  
g. Net Impaired exemption.....\$-22,951.00

Motion ¶ 10, Dckt. 10(emphasis added).

This calculation conflicts with the evidence provided. Debtor’s Schedule C claims an exemption of only \$75,000.00 and not \$100,000.00. *See* Schedule C, Dckt. 1.

The proper calculation of the avoidable lien is as follows:

Gross value of Lien Property	\$300,000.00
Less: Superior liens (if any)	(\$216,154.00)
Exemption claimed by Debtors	(\$75,000.00)
	-----
Value Before Judicial Lien	\$8,846.00
Judicial lien held by Tri Counties Bank	(\$22,951.00)
	=====
Amount of Impairment by Judicial Lien	(\$14,105.00)

The court applying the arithmetical formula specified in 11 U.S.C. § 522(f)(2)(A), there is \$8,846.00 in equity to support the judicial lien. Therefore, the Judicial Lien impairs the Debtor’s exemption of the real property, and is avoided for all amounts in excess of \$8,846.00, subject to the provisions of 11 U.S.C. § 349(b)(1)(B).



## **ISSUANCE OF A COURT DRAFTED ORDER**

An Order (not a minute order) substantially in the following form shall be prepared and issued by the court:

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by David and Harmony Ann Wood (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Judgment Lien of Tri Counties Bank, for the judgment in California Superior Court for Nevada County Case No. CL 18-083195, recorded on January 14, 2019, Document No. 20190000882 with the Nevada County Recorder, against the real property commonly known as 17409 Lawrence Way, Grass Valley, California, is avoided for all amounts in excess of \$8,846.00 pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

8. [19-22126-E-7](#)  
[LBG-2](#)

DAVID/HARMONY WOOD  
Lucas Garcia

MOTION TO AVOID LIEN OF CAPITAL  
ONE  
5-2-19 [15]

**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.

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

**Sufficient Not Notice Provided.** The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, and Office of the United States Trustee on May 2, 2019. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

As discussed below, the real party in interest has not been served.

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

**The Motion to Avoid Judicial Lien is denied without prejudice.**

#### **Identification of Real Party in Interest and Service**

The Motion identifies the creditor here as "Capital One." In reviewing the California Secretary of State's business search engine<sup>FN.1</sup>, no such corporation or entity is registered to do business in California.<sup>FN.2</sup>

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FN.1. <https://businesssearch.sos.ca.gov/>

FN.2. In addition to the name being facially incorrect, Debtor's Exhibit 2, a copy of the recorded abstract judgement, lists the creditor to be Capital One Bank(USA), N.A. Dckt. 18.

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"Capital One" is nationally known creditor. The corporate name for that corporation as reflected in the Secretary of State's website is Capital One, National Association. The agent listed for service of process is listed to be:

CORPORATION SERVICE COMPANY WHICH WILL DO BUSINESS IN  
CALIFORNIA AS CSC - LAWYERS INCORPORATING SERVICE

Further, the principal address (for doing business in California) is stated to be:

1680 CAPITAL ONE DRIVE, MCLEAN, VA 22102

Beyond the California Secretary of State's website, Capital One Bank (USA), N.A. is a federally insured institution. The correct address for service can be confirmed at the FDIC webpage for federally insured financial institutions. The address for the creditor here is stated to be:

4851 Cox Road  
Glen Allen, VA 23060  
Henrico County <sup>FN.3.</sup>

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FN.3. [https://research.fdic.gov/bankfind/detail.html?bank=33954&name=Capital%20One%20Bank%20\(USA\)%2C%20National%20Association&searchName=CAPITAL%20ONE%20BANK%20\(USA\)%2C%20NATIONAL%20ASSOCIATION&searchFdic=&city=&state=&zip=&address=&searchWithin=&activeFlag=&searchByTradename=false&tabId=2#](https://research.fdic.gov/bankfind/detail.html?bank=33954&name=Capital%20One%20Bank%20(USA)%2C%20National%20Association&searchName=CAPITAL%20ONE%20BANK%20(USA)%2C%20NATIONAL%20ASSOCIATION&searchFdic=&city=&state=&zip=&address=&searchWithin=&activeFlag=&searchByTradename=false&tabId=2#)  
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The Proof of Service states under penalty of perjury that service was made on the following addresses for the creditor:

Hunt and Henriques, Attorneys at Law  
151 Barnal Road, Suite 8  
San Jose, CA 95119-1306

By Certified Mail:

Capital One  
Attn: Officer  
Po Box 30285  
Salt Lake City, UT 84130

Proof of Service, Dckt. 19.

The method of service, by certified mail, was a correct method of service. FED. R. BANKR. P. 7004(h), 9014(b). However, service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92–93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) (“Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.”).

A “Google It” search indicates that the post office box address used was one used for “general correspondence” by the creditor. <sup>FN.4.</sup>

The Proof also addresses the attorneys who were listed on the recorded abstract of judgement. Exhibit 2, Dckt. 18. However, service on an insured depository institution’s attorney is only effective where the institution has appeared by its attorney. FED. R. BANKR. P. 7004(h)(1).

**Review of Motion**

This Motion requests an order avoiding the judicial lien of “Capital One” against property of David Holden Wood and Harmony Ann Wood (“Debtor”) commonly known as 17409 Lawrence Way in Grass Valley, California (“Property”).

Pursuant to Debtor’s Schedule A, the subject real property has an approximate value of \$300,000.00 as of the petition date. Dckt. 1. The unavoidable senior consensual liens that total \$216,154.00 as of the commencement of this case are stated on Debtor’s Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$75,000.00 on Schedule C. Dckt. 1.

Two issues arise in the Motion. First, there is no recorded abstract of judgement filed with the court. *See* Exhibit 2, Dckt. 18.

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

a. Gross value of Lien Property .....	\$300,000.00
b. Less: Superior liens (if any) .....	-\$216,154.00
c. Gross Equity .....	\$83,846.00
d. Less: Judicial lien held by Capital One.....	-\$6,797.00
e. Net Equity .....	\$77,049.00
<b>f. Less: Exemption claimed by Debtors-.....</b>	<b>\$100,000.00</b>
g. Net Impaired exemption.....	-\$22,951.00

Motion ¶ 10, Dckt. 15(emphasis added).

This calculation conflicts with the evidence provided. Debtor’s Schedule C claims an exemption of only \$75,000.00 and not \$100,000.00. *See* Schedule C, Dckt. 1.

Based on the foregoing, the court shall deny the motion without prejudice.

An order substantially in the following form shall be prepared and issued by the court:

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by David Holden Wood and Harmony Ann Wood (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.

9. [17-22347](#)-E-11 UNITED CHARTER LLC  
[JJG-15](#) Jeffrey Goodrich

CONTINUED MOTION TO USE CASH  
COLLATERAL  
3-12-19 [340]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors, parties requesting special notice, and Office of the United States Trustee on March 12, 2019. Dckt. 347. The court set the hearing for March 21, 2019, requiring 9 days’ notice. Order, Dckt. 338. 9 days’ notice was provided.

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

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**The Motion for Authority to Use Cash Collateral is granted, and the hearing is continued to **xx:xx a.m. on xxxx, 201x.****

The Debtor in Possession, United Charter, LLC (“ΔIP”), moves for an order approving the use of cash collateral from ΔIP’s real property identified as an industrial warehouse property located in Stockton, California (“Property”). Debtor in Possession requests the use of cash collateral to pay an average of \$7,785 per month of budgeted property-related expenses such as property taxes, insurance, utilities and maintenance that EWB had approved for payment.

### Stipulation

Along with the Motion, ΔIP filed a Stipulation between ΔIP, and creditors East West Bank (“EWB”) and Wayne Bier (“Bier”). Dckt. 339. The Stipulation consents to the aforementioned expenses sought to be paid by ΔIP, as well as a variance of 10 percent in any individual line item expense as long as the total amount used does not exceed five percent of the monthly budget.

Pursuant to the Stipulation and as a adequate protection for the use of cash collateral, the  $\Delta$ IP has offered, and EWB and Bier have agreed to accept:

- (a) Replacement liens in post-petition rents to the same extent, and with the same validity and priority, as such lenders held in the cash collateral expended, to the extent the DIP's use of such cash collateral resulted in a reduction of such lender's secured claim; and
- (b) Turnover to EWB of all net rents received between August 1, 2018 and May 31, 2019 after payment of the previously approved or to be authorized monthly and one-time expenses described in the Stipulation and this Motion.

### **SUPPLEMENT TO MOTION**

$\Delta$ IP filed a Supplement to the motion on May 17, 2019. Dckt. 400. The Supplement requests the following:

1. Authorization to use cash collateral for the monthly budgeted expenses of \$5,878 for the period of June 1, 2019 through August 31, 2019.
2. Upon the  $\Delta$ IP's filing of an amendment to the Supplement, determine the amounts necessary for tenant improvements to the remaining leased space.
3. Grant EWB and Bier the requested replacement liens.

The Supplement also provides a detailed overview of efforts to obtain contractor bids for the requested tenant improvements, that electrical plans may need to be acquired to solicit future bids, and notes there was a fire on one of the leased properties which losses will be entirely covered by insurance.

Because of the fire,  $\Delta$ IP's counsel states that the Supplement is incomplete and requests a continuance of the hearing in the event no amendment is filed prior to the hearing.

### **LIMITED OBJECTION OF EWB**

EWB filed a Limited Objection to the use of cash collateral on May 22, 2019. Dckt 402. EWB consents to  $\Delta$ IP's use of the cash collateral in the amounts necessary for maintenance, subject to EWB's review of the budgeted amount to be specified in further detail by  $\Delta$ IP. EWB notes no other amounts have been requested in the Supplement.

EWB notes further it has filed a motion for relief from the automatic stay set for hearing June 12, 2019 on the grounds there is no adequate protection.

EWB requests that if this Motion is granted, the order granting the Motion provide as follows:

1. EWB shall be granted a valid, duly perfected, enforceable and non-avoidable replacement lien and security interest of the same priority as EWB's prepetition lien, in all post-petition cash collateral, and
2. Entry of the court's order approving use of cash collateral shall constitute a validly perfected first lien and security interest upon the post-petition collateral and no filing, recordation or other act in accordance with any applicable local, state or federal law shall be necessary to create or perfect such lien and security interest.

## **RESPONSE OF BIER**

Bier filed a Response consenting to the use of cash collateral for the monthly budgeted expenses of \$5,878 for the period of June 1, 2019 through August 31, 2019. Dckt. 404. Bier's consent is given on the condition the grant of a replacement lien in the post-petition rents in the same priority, validity, and extent as they existed in the cash collateral expended.

Bier notes he believes the Property is valued at \$7,230,000.00, and states he will be opposing the motion for relief filed by EWB.

## **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 lease 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.



Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 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**

Both EWB and Bier have consented to the use of cash collateral for the monthly budgeted expenses of \$5,878 for the period of June 1, 2019 through August 31, 2019.

At the hearing, **xxxxxxxxxxxxxxxxxx**.

$\Delta$ IP has shown that the proposed use of cash collateral is in the best interest of the Estate. The proposed use provides for various expenses to maintain the collateral, including payment of taxes, utilities, and repair costs.

The Motion is granted, and  $\Delta$ IP is authorized to use the cash collateral for monthly budgeted expenses of \$5,878 for the period June 1, 2019 through August 31, 2019.

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, United Charter, LLC (“ΔIP”) 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, pursuant to this order, for the period June 1, 2019 through August 31, 2019, and the cash collateral may be used to pay the monthly budgeted expenses of \$5,878, along with a variance of five percent of the monthly total budget:

**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. For the replacement liens, such liens are deemed arising from the existing deeds of trust and perfected as of the date such deeds of trust were recorded with the County Recorder.

10. [18-26393-E-7](#)  
[HSM-1](#)

JOHNNY/DIANE MCCOY  
Howard Nevins

**MOTION FOR COMPENSATION BY  
THE LAW OFFICE OF HEFNER,  
STARK AND MAROIS, LLP FOR  
HOWARD S. NEVINS, TRUSTEE'S  
ATTORNEY(S)  
1-25-19 [19]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 10, 2019. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

**The Motion for Approval of Compensation is granted.**

The Chapter 7 Trustee, Michael Dacquisto ("Trustee") filed a motion on January 25, 2019 seeking to employ Howard S. Nevis, Esq. ("Counsel") for a flat rate fee of \$8,000.00. The Chapter 7 Trustee sought the employment of Counsel to assist Trustee in pursuing rights of the Estate in insurance proceeds after a fire caused Debtor loss of real and personal property. Counsel would also assist with general case administration.

The services to be performed for the flat fee of \$8,000.00 were stated in the Motion to be defined as:

resolving issues in connection with the estate's interest in and rights to certain insurance proceeds obtained by the Debtors from loss of real and personal property due to fire,

the Debtors' claims of exemptions as to such assets and insurance proceeds therefrom, and in connection with the payment of claims of creditors.

Counsel also will assist the Trustee with limited incidental general bankruptcy services as are required in the case, including seeking Counsel's employment and compensation pursuant to this Motion.

Motion ¶ 6, Dckt. 19.

On February 21, 2019, the court granted that motion, approving employment on a fixed fee of \$8,000.00. Civil Minutes, Dckt. 29. In its Order granting the motion, the court further ordered that upon completion of the services provided under the terms of the employment, Counsel shall file a supplemental declaration describing the services actually provided, and shall give notice of the supplemental declaration. Order, Dckt. 31.

### **SUPPLEMENTAL DECLARATION**

On May 10, 2019 Counsel filed its Supplemental Declaration and Notice thereof. Dckts. 44, 45. The Supplemental Declaration provides testimony that the following services were provided:

1. Counsel analyzed issues in connection with the Debtors' claims of exemptions, and claim to insurance proceeds, related to destruction of their home and personal property in the 2018 Camp Fire.
2. Counsel advised the Trustee in connection with a settlement agreement resolving disputes between the Debtors and the bankruptcy estate concerning the Debtors' claims of exemptions. Counsel drafted the settlement agreement and drafted and prosecuted a motion to approve the compromises of controversies. Pursuant to the parties' settlement, the Debtors agreed to pay to the Trustee an amount sufficient to pay in full: (1) all filed claims that are allowed in this case, and (2) all approved/allowed administrative claims.
3. Counsel performed general administrative tasks as appropriate, including case initiation. Counsel drafted and prosecuted the motion to employ counsel on a fixed fee basis, including this supplemental declaration and notice.
4. Counsel communicated with the Trustee and/or counsel for the Debtors, as applicable, with respect to the above issues.

Declaration, Dckt. 44 at p. 2:23-3:9. The Supplemental Declaration further states that 19 hours were expended by Counsel (through Howard Nevins and Aaorn Avery, whom generally charge an hourly rate of \$420.00 and \$340.00, respectively). *Id.* at ¶ 7.

## **DISCUSSION**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The flat fee of \$8,000.00 is approved as a final fee pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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 Approval of Compensation filed by Howard S. Nevins, Esq. (“Counsel”) as counsel for Michael Dacquisto, 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 fixed rate of \$8,000.00 for services provided by Counsel authorized by prior Order of the court (Dckt. 31) pursuant to 11 U.S.C. § 328 is approved as final fees and costs pursuant to 11 U.S.C. § 330.

11. [17-28324-E-7](#)  
[HSM-7](#)

**MORTIMER/ARLENE JARVIS**  
Aaron Avery

**MOTION FOR COMPENSATION BY  
THE LAW OFFICE OF HEFNER, STARK  
& MAROIS, LLP FOR AARON A.  
AVERY, TRUSTEE'S ATTORNEY(S)**  
5-9-19 [133]

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

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

-----

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 9, 2019. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00).

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

**The Motion for Allowance of Professional Fees is granted.**

Hefner, Stark, & Marois, LLP, the Attorney ("Applicant") for Geoffrey Richards, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period January 5, 2018, through May 30, 2019. The order of the court approving employment of Applicant was entered on January 29, 2018. Dckt. 33. Applicant requests fees in the amount of \$23,400.00.

## APPLICABLE LAW

### Reasonable Fees

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

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

### Lodestar Analysis

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

### Reasonable Billing Judgment

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

Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant’s services for the Estate include general case administration, asset investigation and disposition, review of claims, and litigation. The Estate has \$57,000.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

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

General Case Administration: Applicant spent 19.70 hours in this category. Applicant performed initial review of Debtors' motions to avoid lien and abandonment motion; researched related complex legal issues; drafted stipulation and order to extend deadline to object to claims of exemptions; performed case initiation services, including initial evaluation and conflicts analysis for employment of counsel; drafted application to employ counsel and related papers; obtained employment order from court; reviewed Debtors' bankruptcy filings, including all schedules and statement of financial affairs; assisted Trustee in preparation for creditors' meeting; drafted employment application for Trustee's real estate professional; addressed limited tax-related issues with Trustee and CPA, as appropriate; analyzed issues with Trustee related to distributions; and, drafted and prosecuted Counsel's compensation Application.

Asset Investigation: Applicant spent 9.70 hours in this category. Applicant reviewed and communicated with Trustee on various occasions regarding the assets in the case, strategy for administering same, legal and procedural issues; advised and represented Trustee in connection with negotiations with counsel for both the Debtors and the estate's largest creditor; researched complex legal issues in connection with avoidable/subordinate portions of liens on real property of the estate, ability to administer property for the benefit of the estate and creditors; advised and represented Trustee in connection with certain turnover efforts; and, advised and represented Trustee in connection with certain negotiations related to avoidable transfer.



Asset Disposition: Applicant spent 67.00 hours in this category. Applicant researched legal and factual issues in connection with avoidable/subordinate liens on real property; communicated with California Employment Development Department in connection with its lien; communicated with ICC in connection with its lien, avoidable portion, claim; reviewed and analyzed Debtors' motions to avoid ICC lien and to compel abandonment of real property; advised Trustee in connection with same and in development of strategy; drafted opposition to Debtors' motion to compel abandonment, and appeared at hearings; advised and represented Trustee in settlement negotiations in connection with administration of real property, including carve out, and resolution of complex lien issues; drafted complex settlement agreement between Trustee, Debtors, and ICC, resolving such issues; drafted and prosecuted related compromise motion; advised Trustee in connection with issues related to administration/sale of real property, liens, closing and payoff issues, solar lease and insurance issues; communicated with Trustee's real estate professional in connection with same; drafted motion to approve sale of real property; advised and represented Trustee in connection with his efforts to administer other miscellaneous assets; and, drafted settlement agreement and drafted and prosecuted compromise motion resolving litigation against Debtors' adult son and daughter-in-law.

Claims: Applicant spent 1.60 hours in this category. Applicant communicated with California Employment Development Department in connection with its lien, subordinate portion; reviewed proof of claim; advised Trustee in connection with same; and, advised Trustee in connection with distribution issue.

Litigation: Applicant spent 16.70 hours in this category. Applicant drafted complaint to avoid and recover fraudulent transfer to Debtor's son and daughter-in-law; pre-filing communications with defendants' counsel; performed litigation initiation activities, including filing and serving complaint, drafting adversary proceeding cover sheet, reviewing and analyzing defendants' answer; participated in discovery conference; drafted discovery plan; drafted initial disclosures, drafted status report; advised and represented Trustee in connection with settlement efforts, including initial unsuccessful efforts to seek mediation of disputes, and ultimately in successful negotiations to settle the adversary proceeding; reviewed defendants' financial information supporting settlement discussions; drafted stipulation and order to extend discovery cutoff pending approval of settlement; and, drafted stipulation and order dismissing adversary proceeding following approval of compromises of controversies.

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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Aaron Avery	111.40	\$340.00	\$37,876.00
Howard Nevins	3.30	\$420.00	\$1,386.00
<b>Total Fees Incurred for Period of Application</b>			\$39,262.00
<b>Total Fees Requested</b>			\$23,400.00

## FEES ALLOWED

### Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$23,400.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court authorizes the Chapter 7 Trustee to pay the fees allowed by the court.

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

Fees	\$23,400.00
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pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Hefner, Stark, & Marois, LLP (“Applicant”), Attorney for Geoffrey Richards, the Chapter 7 Trustee / Debtor in Possession / Chapter 13 Debtor / Official Committee of Creditors Holding General Unsecured Claims], (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Hefner, Stark, & Marois, LLP is allowed the following fees and expenses as a professional of the Estate:

Hefner, Stark, & Marois, LLP, Professional employed by the Chapter 7 Trustee:

Fees in the amount of \$23,400.00

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

**IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the fees and costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and Office of the United States Trustee on May 23, 2019. By the court's calculation, 7 days' notice was provided. The court set the hearing for May 30, 2019. Dckt. 91.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----

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**The Motion to Compel Abandonment is granted.**

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

The Motion filed by Michael Bruce Pollard and Jurhee Michelle Pollard ("Debtor") requests the court to order the Chapter 7 Trustee, Sheri L. Carello ("Trustee"), to abandon property commonly known as 8352 Lake Firest Drive, Sacramento, California ("Property").

The Declaration of Debtor has been filed in support of the Motion and values the Property at \$358,634.00. Dckt. 87. The Property is encumbered by the lien of Village Capitol, securing a claim of \$226,022.36 and Debtor claimed an exemption of \$175,000.00 on Schedule C. Dckt. 1.

Debtor and the Trustee filed a Stipulation on May 28, 2019 providing that Debtor shall pay \$30,000.00 upon demand from the Trustee from the proceeds of any pending escrow, which funds will pay all claims in this case. Dckt. 92.

Upon review of the Stipulation between the parties, the court shall granted the Motion.

**CHAMBERS PREPARED ORDER**

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

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

The Motion to Compel Abandonment filed by Michael Bruce Pollard and Jurhee Michelle Pollard (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Compel Abandonment is granted, and the Property identified as 8352 Lake Firest Drive, Sacramento, California listed on Schedule A by Debtor is abandoned by Sheri L. Carello (“the Chapter 7 Trustee”) to Michael Bruce Pollard and Jurhee Michelle Pollard by this order, with no further act of the Chapter 7 Trustee required.

**IT IS FURTHER ORDERED** Debtor shall pay \$30,000.00 upon demand from the Trustee from the proceeds of any pending escrow.

13. [16-21585-E-11](#)  
[FWP-40](#)

AIAD/HODA SAMUEL  
Pro Se  
11-9-18 [[1292](#)]

**CONTINUED MOTION FOR  
ADMINISTRATIVE EXPENSES**

**Final Ruling:** No appearance at the May 30, 2019 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on November 9, 2018. By the court’s calculation, 31 days’ notice was provided. 28 days’ notice is required.

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

**The hearing on the Motion for Allowance of Administrative Cost is continued to  
XXXXXXXXXXXX**

Scott M. Sackett, the duly appointed Chapter 11 Trustee (“Movant”) requests payment of future expenses that are anticipated to be incurred as administrative expenses. Specifically, the Motion is based upon to-be-determined fees, costs, damages, time or other expenses projected to be incurred by the Trustee related to the civil complaint filed by Debtor, Hoda Samuel on August 28, 2018 in the United States District Court, Eastern District of California, Sacramento Division, Case No. 18-cv-02343.

#### **REVIEW OF MOTION**

The Motion (Dckt. 1292) sets forth and states with particularity (FED.R. BANKR. P. 9013) the following grounds and relief requested from the court:

The asserted administrative expenses are those for “fees, costs, damages, time or other expenses projected to be incurred by the Trustee related to the civil complaint filed by Debtor, Hoda Samuel on August 28, 2018 in the United States District Court, Eastern District of California, Sacramento Division, Case No. 18-cv-02343.”

Motion, p. 1:21-24; Dckt. 1292.

The amount is not liquidated at this time.

Because the amount is unlimited, the Trustee requests that the court have all otherwise surplus funds of the estate reserved and no distributed to Debtor Hoda Samuel.

*Id.*, p. 1:24-26.

The Trustee was appointed on May 6, 2016.

*Id.* ¶ 3.

The attorneys of Felderstein, Fitzgerald, Willoughby, and Pascuzzi (“FFWP”) were authorized to be employed as counsel for Trustee effective May 10, 2016.

*Id.* ¶ 4.

On August 28, 2018, Debtor Hoda Samuel filed a pro se complaint in the United States District Court (“District Court Complaint”). In that action, on October 9, 2018, Debtor Hoda filed a motion to amend the District Court Complaint. Trustee is named as a defendant in the District Court Complaint. Debtor Hoda Samuel has filed a motion to amend the District Court Complaint to add FFWP and attorneys in that firm to a first amended complaint.

*Id.* ¶¶ 5, 8; and Exhibit 1, Dckt. 1294.

The Trustee requests allowance and payment of all fees, costs, damages, time, or other expenses (collectively defined as “Recoverable Amounts) that the Trustee incurs in responding to the District Court Complaint action. FFWP and its attorneys have filed a similar motion.

Motion ¶ 11, Dckt. 1292.

On September 27, 2018, the court entered its order confirming the Trustee’s First Amended Chapter 11 Plan of Liquidation in this bankruptcy case.

*Id.* ¶ 6.

No stay pending appeal of the order confirming the First Amended Plan of Liquidation has been issued.

*Id.* ¶ 7.

Debtor Aiad Samuel filed an attachment to another notice of appeal which makes reference to it supporting an appeal of the bankruptcy judge confirming the First Amended Plan of Liquidation in this bankruptcy case. <sup>FN. 1</sup>

*Id.*

-----

FN. 1. A review of the Docket in this case discloses that on November 29, 2018, the Bankruptcy Appellate Panel issued Orders dismissing appeals as untimely, but further states that with respect to the order confirming the Chapter 11 Plan:

Appellant submits that with respect to timeliness, "[t]his issue has now been settled by an Amendment made by Mr. Aiad Samuel to include the proposed Plan in the appeal BAP #18-1252." See Response at 2. A review of the bankruptcy courts docket indicates that on October 11, 2018, Aiad Samuel filed a document stating that he intended to appeal the order denying recusal as well as the plan confirmation order. Bankruptcy Court Docket at 1263 (Document Filed Debtor Aiad Samuel) •1 We disagree. The October 11, 2018 paper does not save these appeals.

1 However, we construe this document as a timely appeal by Mr. Samuel from the September 27, 2018 order confirming the Chapter 11 plan and will open this notice of appeal as BAP Appeal No. EC-18-1318.

BAP Orders Denying Motion for Stay Pending Appeal and Dismissing Appeals (August 8, 2018 Order denying motion to recuse), p. 5; Dckts. 1333 and 1335.

Thus, it appears that the Bankruptcy Appellate Panel indicates that an appeal of the order confirming the plan is pending.

-----  
Several different legal grounds are asserted for the right to recover legal fees and expenses as administrative expenses, including:

California Code of Civil Procedure §§ 425.16 et seq. (Anti-SLAPP statute);

Federal Rule of Civil Procedure 11;

The case law setting for the principles requiring leave before commencing litigation against a receiver or bankruptcy trustee or other officers appointed in bankruptcy cases; and

The court's inherent powers.

*Id.*, p. 3:25-28, 4:1-7.

Because the amount of the administrative expenses has not been determined and the litigation is pending, the Trustee requests that final hearing on this Motion be continued until the District Court Complaint and action relating thereto is completed.

*Id.*, p.3:8-13.

Because the amount could exceed any surplus in the bankruptcy case (which amount is not stated in the Motion), none of the surplus should be disbursed to the Debtors in this case until the final amounts of the requested administrative expenses are determined.

*Id.*, p. 5:14-21.

Whether an administrative expense exists at this point is speculative. The potential for such expense is shown, but such is a “potential” based on future events which the court cannot evaluate as an administrative expense, Anti-SLAPP damages, Rule 11 sanctions from the district court, or damages flowing from unauthorized litigation against an officer or authorized professional representing such officer in a bankruptcy case.

The court cannot “allow” such an expense today. Movant recognizes this in the Motion, noting that at this time administrative expenses are an open issue, the amount of surplus under the Chapter 11 Plan of Liquidation cannot be determined, and therefore requests that the court authorize the Plan Administrator to hold all potential surplus monies generated under the Plan until the final determination of the requested administrative expenses are finally determined.

However, the Plan Administrator cannot disburse purported “surplus monies” in light of the possible administrative expenses.

The Motion does not assert the amount of such potential surplus and how a proper reserve can be determined. Neither of the two Debtors have filed any opposition to the Motion and the request to delay any potential surplus disbursements prior to any required priority administrative expenses be finally determined.

## **SUPPLEMENTAL MOTION FOR ALLOWANCE OF ADMINISTRATIVE CLAIMS**

Scott Sackett, the Chapter 11 Trustee (“Trustee”) filed a Supplemental Motion on January 10, 2019. Dckt. 1355. Trustee states the amount of the claim is unliquidated at this time, and requests that the court defer determination of the amount of this claim until the litigation is completed and that the Estate reserve all funds and other assets that might otherwise be distributed to the Debtors pending determination.

Trustee argues in the Supplemental Motion that notwithstanding the Motion Debtors do not actually have a surplus, because any surplus is contingent on the litigation yet to be resolved. Trustee relies on the Plan, which states “In no event shall any distribution to the Debtors be made prior to the Court having approved the Plan Administrator’s and the Professional Persons’ final fee applications, the Plan Administrator’s final accounting, and the payment of all allowed fees and all Allowed Claims.” Plan, Section 6.6, p. 22:17-19. The Trustee further identifies “at least” 10 items to be resolved that will require further expenditure of Estate funds, including:

- Completing final tax returns and potential tax refunds
- Resolving the cure amount for 209 Prairie Circle
- Brake Master Class 3A Claim
- Debtors’ Bankruptcy Appeal



Litigation in the district court (referenced as “Samuel  
Litigation”)  
USA Class 2A secured claim  
Claim objections  
Reporting  
Administration of final assets  
Final reports and fee applications

Along with Trustee’s Supplemental Motion, filed as Exhibit C, is a claims payment projection sheet. Exhibit C, Dckt. 1358. The Exhibit provides an overview of claims paid, cash on hand, remaining claims to be paid, post confirmation expenses, and estimated litigation costs (though merely stating “amount unknown” as to the litigation).

## **MOVANT’S REPLY**

Movat filed a Reply on April 12, 2019. Dckt. 1381. Movant’s Reply notes the court’s prior civil minutes states the following:

Several different legal grounds are asserted for the right to recover legal fees and expenses as administrative expenses, including:

California Code of Civil Procedure §§ 425.16 et seq (Anti-SLAPP statute);

Federal Rule of Civil Procedure 11;

The case law setting forth the principles requiring leave before commencing litigation against a receiver or bankruptcy trustee or other officers appointed in bankruptcy cases; and

The court’s inherent powers.

(Civil Minutes, Dckt 1377), and seeks to clarify Movant is also seeking fees based on 11 U.S.C. §§ 330 and 503, and Section 6.8.7 of the Confirmed Plan for indemnity.

## **MOVANT’S STATUS REPORT**

Movant filed a status Report on May 16, 2019. Dckt. 1397. Movant requests the motion again be continued until the fees requested have been liquidated, and the following description of remaining matters which may increase the Estate’s expenditures:

1. The Plan Administrator is working with his professionals to file an amended tax return for 2017 to assert administrative loss carryback claims arising from the recent filing of the estate’s tax return for 2018 that the Plan Administrator estimates could result in a refund of approximately \$100,000. The Plan Administrator expects to file the amended 2017 return by late June/mid-July 2019. It typically takes the IRS a few months to process the amendment and issue the refund, but it can take a year or more.

2. The Plan Administrator sent a check to the attorneys for the claimant in the amount of \$8,550.74, which is the stipulated cure amount. As of May 7, 2019, that check has not cleared and the claimant has still not provided an accurate cure amount.
3. The Debtors continue to prosecute an appeal of a Sacramento County Superior Court judgment entered in favor of Brake Masters and against the Debtors. The Plan Administrator is informed and believes that the appeal has been fully briefed as of April 13, 2018 but still awaits oral argument, if any, and a ruling by California's Third District Court of Appeal regarding the Debtors' appeal. The Plan Administrator expects a supplemental motion by Brake Masters for additional fees and costs incurred as a result of the Debtors' appeal before making payment to Brake Masters from the \$175,000 reserved for this claim.
4. The appeal by the Debtors of the order confirming the Plan has been dismissed.
5. Hoda Samuel continues to prosecute the complaint that she filed against Movant and his counsel. On April 30, 2019, the District Court granted Hoda Samuel's third request for a 30 day extension of time to file her amended complaint.
6. The Magistrate Judge in the District Court issued proposed findings and recommendations regarding matters related to the satisfaction of the USA Claim pursuant to the Plan, which were adopted by the District Court. Debtor Hoda Samuel has filed four appeals to the Ninth Circuit relating to these District Court orders.
7. The Plan Administrator has informally resolved all of the potential objections to Claim Nos. 26-28 filed by Pacific Property Advisors without the need and expense of formal claim objections and has paid Pacific Property Advisors and paid the compromised amounts.
8. The Plan Administrator has filed and served all quarterly reports as required by the United States Trustee's office and the Plan. See Plan, Section 6.3.5.
9. The Plan Assets include the residential rental properties located at 209 Prairie Circle, Sacramento, California and 148 Estes Way, Sacramento, California (collectively, the "Residential Properties"). The Plan Administrator has continued to administer the Residential Properties collecting rent, making required repairs, maintaining insurance, and paying property taxes as required.
10. Administration of this bankruptcy case is not yet complete. The primary ongoing expense and impediment to closing this case continues to be the

Debtors' continued prosecution of litigation in multiple venues: (i) Brake Masters appeal, (ii) District Court complaint, and (iii) 9th Circuit appeals regarding the USA's criminal restitution judgment. Upon completion of administration, the Plan Administrator will file his final report and any final fee applications.

Status Report, Dckt. 1397 at p. 2:19-5:13.

## **DISCUSSION**

At the hearing, **XXXXXXXXXXXXXXXXXX**.

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 Administrative Expense and Delay the Determination and Disbursement of Plan Surplus Proceeds filed by Scott Sackett, the Chapter 11 Trustee and Plan Administrator under the Confirmed Chapter 11 Plan of Liquidation ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion is continued to **XXXXXXXXXX**.

**Final Ruling:** No appearance at the May 30, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on November 9, 2018. By the court’s calculation, 31 days’ notice was provided. 28 days’ notice is required.

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

**The hearing on the Motion for Allowance of Administrative Cost is continued to is continued to ~~XXXXXXXXXXXXXXXXXX~~.**

Felderstein Fitzgerald Willoughby & Pascuzzi LLP (“FFWP”), the bankruptcy attorneys for Scott M. Sackett, the duly appointed Chapter 11 Trustee (the “Trustee”) requests payment of administrative expenses that are anticipated to be incurred. Specifically, the Motion is based upon to-be-determined fees, costs, damages, time or other expenses projected to be incurred by the Trustee related to the civil complaint filed by Debtor, Hoda Samuel on August 28, 2018 in the United States District Court, Eastern District of California, Sacramento Division, Case No. 18-cv-02343.

#### REVIEW OF THE MOTION

The Motion (Dckt. 1298) sets forth and states with particularity (Fed.R. Bankr. P. 9013) the following grounds and relief requested from the court:

The asserted administrative expenses are those for “fees, costs, damages, time or other expenses projected to be incurred by the Trustee related to the civil complaint filed by Debtor, Hoda Samuel on August 28, 2018 in the United States District Court, Eastern District of California, Sacramento Division, Case No. 18-cv-02343.”

Motion, p. 1:22-25; Dckt. 1292.

The amount is not liquidated at this time.

Because the amount is unlimited, the FFWP requests that the court have all otherwise surplus funds of the estate reserved and no distributed to Debtor Hoda Samuel.

*Id.*, p. 1:25-27.

The Trustee was appointed on May 6, 2016.

*Id.* ¶ 3.

The attorneys of Felderstein, Fitzgerald, Willoughby, and Pascuzzi (“FFWP”) were authorized to be employed as counsel for Trustee effective May 10, 2016.

*Id.* ¶ 4.

On August 28, 2018, Debtor Hoda Samuel filed a *pro se* complaint in the United States District Court (“District Court Complaint”). In that action, on October 9, 2018, Debtor Hoda filed a motion to amend the District Court Complaint. Trustee is named as a defendant in the District Court Complaint. Debtor Hoda Samuel has filed a motion to amend the District Court Complaint to add FFWP and attorneys in that firm to a first amended complaint.

*Id.* ¶¶ 5, 8; and Exhibit 1, Dckt. 1300.

The FFWP requests allowance and payment of all fees, costs, damages, time, or other expenses (collectively defined as “Recoverable Amounts) that FFWP incurs in responding to the District Court Complaint action. The Trustee has filed a similar motion.

Motion ¶ 11, Dckt. 1292.

On September 27, 2018, the court entered its order confirming the Trustee’s First Amended Chapter 11 Plan of Liquidation in this bankruptcy case.

*Id.* ¶ 6.

No stay pending appeal of the order confirming the First Amended Plan of Liquidation has been issued.

*Id.* ¶ 7.

Debtor Aiad Samuel filed an attachment to another notice of appeal which makes reference to it supporting an appeal of the bankruptcy judge confirming the First Amended Plan of Liquidation in this bankruptcy case. <sup>FN. 1</sup>

*Id.*

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FN. 1. A review of the Docket in this case discloses that on November 29, 2018, the Bankruptcy Appellate Panel issued Orders dismissing appeals as untimely, but further states that with respect to the order confirming the Chapter 11 Plan:

Appellant submits that with respect to timeliness, "[t]his issue has now been settled by an Amendment made by Mr. Aiad Samuel to include the proposed Plan in the appeal BAP #18-1252." See Response at 2. A review of the bankruptcy courts docket indicates that on October 11, 2018, Aiad Samuel filed a document stating that he intended to appeal the order denying recusal as well as the plan confirmation order. Bankruptcy Court Docket at 1263 (Document Filed Debtor Aiad Samuel) •1 We disagree. The October 11, 2018 paper does not save these appeals.

1 However, we construe this document as a timely appeal by Mr. Samuel from the September 27, 2018 order confirming the Chapter 11 plan and will open this notice of appeal as BAP Appeal No. EC-18-1318.

BAP Orders Denying Motion for Stay Pending Appeal and Dismissing Appeals (August 8, 2018 Order denying motion to recuse), p. 5; Dckts. 1333 and 1335.

Thus, it appears that the Bankruptcy Appellate Panel indicates that an appeal of the order confirming the plan is pending.

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Several different legal grounds are asserted for the right to recover legal fees and expenses as administrative expenses, including:

California Code of Civil Procedure §§ 425.16 et seq. (Anti-SLAPP statute);

Federal Rule of Civil Procedure 11;

The case law setting for the principles requiring leave before commencing litigation against a receiver or bankruptcy trustee or other officers appointed in bankruptcy cases; and

The court's inherent powers.

*Id.*, p. 3:25-28, 4:1-7.

Because the amount of the administrative expenses has not been determined and the litigation is pending, the Trustee requests that final hearing on this Motion be continued until the District Court Complaint and action relating thereto is completed.

*Id.*, p.3:8-13.

Because the amount could exceed any surplus in the bankruptcy case (which amount is not stated in the Motion), none of the surplus should be disbursed to the Debtors in this case until the final amounts of the requested administrative expenses are determined.

*Id.*, p. 4:14-20.

Whether an administrative expense exists at this point is speculative. The potential for such expense is shown, but such is a “potential” based on future events which the court cannot evaluate as an administrative expense, Anti-SLAPP damages, Rule 11 sanctions from the district court, or damages flowing from unauthorized litigation against an officer or authorized professional representing such officer in a bankruptcy case.

The court cannot “allow” such an expense today. FFWP recognizes this in the Motion, noting that at this time since should administrative expenses are an open issue, the amount of surplus under the Chapter 11 Plan of Liquidation cannot be determined, and therefore requests that the court authorize the Plan Administrator to hold all potential surplus monies generated under the Plan until the final determination of the requested administrative expenses are finally determined.

However, the Plan Administrator cannot disburse purported “surplus monies” in light of the possible administrative expenses.

The Motion does not assert the amount of such potential surplus and how a proper reserve can be determined. Neither of the two Debtors have filed any opposition to the Motion and the request to delay any potential surplus disbursements prior to any required priority administrative expenses be finally determined.

## **SUPPLEMENTAL MOTION FOR ALLOWANCE OF ADMINISTRATIVE CLAIMS**

Scott Sackett, the Chapter 11 Trustee (“Trustee”) filed a Supplemental Motion on January 10, 2019. Dckt. 1355. Trustee states the amount of the claim is unliquidated at this time, and requests that the court defer determination of the amount of this claim until the litigation is completed and that the Estate reserve all funds and other assets that might otherwise be distributed to the Debtors pending determination.

Trustee argues in the Supplemental Motion that notwithstanding the Motion Debtors do not actually have a surplus, because any surplus is contingent on the litigation yet to be resolved. Trustee relies on the Plan, which states “In no event shall any distribution to the Debtors be made prior to the Court having approved the Plan Administrator’s and the Professional Persons’ final fee applications, the Plan Administrator’s final accounting, and the payment of all allowed fees and all Allowed Claims.” Plan, Section 6.6, p. 22:17-19. The Trustee further identifies “at least” 10 items to be resolved that will require further expenditure of Estate funds, including:

- Completing final tax returns and potential tax refunds
- Resolving the cure amount for 209 Prairie Circle
- Brake Master Class 3A Claim
- Debtors’ Bankruptcy Appeal
- Litigation in the district court (referenced as “Samuel Litigation”)
- USA Class 2A secured claim
- Claim objections
- Reporting
- Administration of final assets
- Final reports and fee applications

Along with Trustee's Supplemental Motion, filed as Exhibit C, is a claims payment projection sheet. Exhibit C, Dckt. 1358. The Exhibit provides an overview of claims paid, cash on hand, remaining claims to be paid, post confirmation expenses, and estimated litigation costs (though merely stating "amount unknown" as to the litigation).

## **MOVANT'S REPLY**

Movat filed a Reply on April 12, 2019. Dckt. 1383. Movant's Reply notes the court's prior civil minutes states the following:

Several different legal grounds are asserted for the right to recover legal fees and expenses as administrative expenses, including:

California Code of Civil Procedure §§ 425.16 et seq (Anti-SLAPP statute);

Federal Rule of Civil Procedure 11;

The case law setting forth the principles requiring leave before commencing litigation against a receiver or bankruptcy trustee or other officers appointed in bankruptcy cases; and

The court's inherent powers.

(Civil Minutes, Dckt 1378), and seeks to clarify Movant is also seeking fees based on 11 U.S.C. §§ 330 and 503, and Section 6.8.7 of the Confirmed Plan for indemnity.

## **MOVANT'S STATUS REPORT**

Movant filed a status Report on May 16, 2019. Dckt. 1399. Movant requests the motion again be continued until the fees requested have been liquidated, and the following description of remaining matters which may increase the Estate's expenditures:

1. The Plan Administrator is working with his professionals to file an amended tax return for 2017 to assert administrative loss carryback claims arising from the recent filing of the estate's tax return for 2018 that the Plan Administrator estimates could result in a refund of approximately \$100,000. The Plan Administrator expects to file the amended 2017 return by late June/mid-July 2019. It typically takes the IRS a few months to process the amendment and issue the refund, but it can take a year or more.
2. The Plan Administrator sent a check to the attorneys for the claimant in the amount of \$8,550.74, which is the stipulated cure amount. As of May 7, 2019, that check has not cleared and the claimant has still not provided an accurate cure amount.
3. The Debtors continue to prosecute an appeal of a Sacramento County Superior Court judgment entered in favor of Brake Masters and against



the Debtors. The Plan Administrator is informed and believes that the appeal has been fully briefed as of April 13, 2018 but still awaits oral argument, if any, and a ruling by California's Third District Court of Appeal regarding the Debtors' appeal. The Plan Administrator expects a supplemental motion by Brake Masters for additional fees and costs incurred as a result of the Debtors' appeal before making payment to Brake Masters from the \$175,000 reserved for this claim.

4. The appeal by the Debtors of the order confirming the Plan has been dismissed.
5. Hoda Samuel continues to prosecute the complaint that she filed against Movant and his counsel. On April 30, 2019, the District Court granted Hoda Samuel's third request for a 30 day extension of time to file her amended complaint.
6. The Magistrate Judge in the District Court issued proposed findings and recommendations regarding matters related to the satisfaction of the USA Claim pursuant to the Plan, which were adopted by the District Court. Debtor Hoda Samuel has filed four appeals to the Ninth Circuit relating to these District Court orders.
7. The Plan Administrator has informally resolved all of the potential objections to Claim Nos. 26-28 filed by Pacific Property Advisors without the need and expense of formal claim objections and has paid Pacific Property Advisors and paid the compromised amounts.
8. The Plan Administrator has filed and served all quarterly reports as required by the United States Trustee's office and the Plan. See Plan, Section 6.3.5.
9. The Plan Assets include the residential rental properties located at 209 Prairie Circle, Sacramento, California and 148 Estes Way, Sacramento, California (collectively, the "Residential Properties"). The Plan Administrator has continued to administer the Residential Properties collecting rent, making required repairs, maintaining insurance, and paying property taxes as required.
10. Administration of this bankruptcy case is not yet complete. The primary ongoing expense and impediment to closing this case continues to be the Debtors' continued prosecution of litigation in multiple venues: (i) Brake Masters appeal, (ii) District Court complaint, and (iii) 9th Circuit appeals regarding the USA's criminal restitution judgment. Upon completion of administration, the Plan Administrator will file his final report and any final fee applications.

Status Report, Dckt. 1399 at p. 2:19-5:13.

## DISCUSSION

At the hearing, **XXXXXXXXXXXXXXXXXX**.

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 Administrative Expense and Delay the Determination and Disbursement of Plan Surplus Proceeds filed by Scott Sackett, the Chapter 11 Trustee and Plan Administrator under the Confirmed Chapter 11 Plan of Liquidation (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion is continued to **XXXXXXXXXX**.

**Tentative Ruling:** The Motion For Compensation 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.**

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 25, 2019. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

**The Motion for Allowance of Professional Fees is granted.**

Felderstein Fitzgerald Willoughby & Pascuzzi LLP, the Attorney (“Applicant”) for Scott M. Sackett, the Chapter 11 Trustee (“Client”), makes a Fifth Interim Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 17, 2018, through March 31, 2019. The order of the court approving employment of Applicant was entered on May 19, 2016. Applicant requests fees in the amount of \$16,129.50 and costs in the amount of \$795.99.

## **APPLICABLE LAW**

### **Reasonable Fees**

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

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

### **Lodestar Analysis**

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

## Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant’s services for the Estate include general case administration, prosecution of fee applications, and services related to an adversary proceeding. The court finds the services were beneficial to Client and the Estate and were reasonable.

## FEES AND COSTS & EXPENSES REQUESTED

### Fees

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

Administrative Expense Motions: Applicant spent 5.9 hours in this category. The services performed in this category include drafting motions of Applicant and Client for administrative expense claims; drafting, filing and service of supplements to Applicant and Client’s motions for administrative claims; and exchanging email correspondence with Client regarding the hearing on the motions for administrative claims.

Adversary Proceeding #1: Applicant spent 9.7 hours in this category. The services performed in this category include reviewing and analyzing the *pro per* complaint filed by Hoda Samuel in the Samuel Litigation; performing legal research regarding and drafting a motion to dismiss and alternative motion to strike the Samuel Litigation; reviewing the order regarding dismissal of the Samuel Litigation with leave to amend; monitoring case filings and deadlines in the District Court case; reviewing and

analyzing Hoda Samuel's motions to extend time to file an amended Complaint and the Court's orders granting the extensions; and exchanging email correspondence with Client regarding the extensions.

Applicant's Fee Applications: Applicant spent 13.3 hours in this category. The services performed in this category include the drafting and prosecution of Applicant's fourth interim fee application.

General Case Administration: Applicant spent 4.3 hours in this category. The services performed in this category include preparing for and attending the December 10, 2018, hearings on three fee applications, two administrative claim motions and the motion for order authorizing loan modification filed by the Debtor's secured lender; performing legal research; and participating in a telephone conference with Client regarding preparation of supplements to the administrative claims.

Fee Applications: Applicant spent 15.8 hours in this category. The services performed in this category include drafting, filing and serving the first interim fee applications for Gonzales & Associates, Inc.; drafting, filing and serving the second and final fee application of Client as Chapter 11 Trustee; evaluating the status of multiple professional fee applications and the possible need to file reply briefs; performing legal research regarding Trustee compensation; and participating in telephone conference with the Trustee prior to the December 10, 2018, hearing on multiple fee applications.

Reporting: Applicant spent 0.5 hours in this category. The services performed in this category include reviewing, filing and serving the Trustee's monthly operating reports.

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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Jason E. Rios	27.7	\$405.00	\$11,218.50
Jennifer E. Niemann	3.3	\$395.00	\$1,303.50
Karen L. Widder	18.5	\$195.00	\$3,607.50
<b>Total Fees for Period of Application</b>			\$16,129.50

**Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$795.99 pursuant to this application.

The costs requested in this Application are,

<b>Description of Cost</b>	<b>Cost</b>
Photocopies	\$529.10
Postage	\$266.89
<b>Total Costs Requested in Application</b>	<b>\$795.99</b>

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Fifth Interim Fees in the amount of \$16,129.50 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

**Costs & Expenses**

Fifth Interim Costs in the amount of \$795.99 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

The court authorizes Plan Administrator under the confirmed plan to pay the fees and costs allowed by the court.

Applicant is allowed, and Plan Administrator under the confirmed plan is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	\$16,129.50
Costs and Expenses	\$795.99

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

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

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

The Motion for Allowance of Fees and Expenses filed by Felderstein Fitzgerald Willoughby & Pascuzzi LLP (“Applicant”), Attorney for Scott Sackett, the Chapter 11 Trustee, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Felderstein Fitzgerald Willoughby & Pascuzzi LLP is allowed the following fees and expenses as a professional of the Estate:

Felderstein Fitzgerald Willoughby & Pascuzzi LLP, Professional employed by the Chapter 11 Trustee:

Fees in the amount of \$16,129.50  
Expenses in the amount of \$795.99,

as an interim allowance of fees and expenses pursuant to 11 U.S.C. § 331 and subject to final review and allowance pursuant to 11 U.S.C. § 330.

**IT IS FURTHER ORDERED** that Plan Administrator under the confirmed plan is authorized to pay the fees and costs allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.



## FINAL RULINGS

16. [18-26021-E-7](#)      **KENNETH/SUSAN RODGER**      **MOTION FOR COMPENSATION BY**  
[BLF-2](#)                **Gerald White**                     **THE LAW OFFICE OF BAKKEN LAW**  
     **FIRM FOR LORIS L. BAKKEN,**  
     **TRUSTEE'S ATTORNEY(S)**  
     **4-8-19 [55]**

**Final Ruling:** No appearance at the May 30, 2019 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on April 8, 2019. By the court's calculation, 52 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

<p><b>The Motion for Allowance of Professional Fees is granted.</b></p>
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Bakken Law Firm fka Schneeweis-Coe & Bakken, LLP, the Attorney ("Applicant") for Kimberly Husted, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 24, 2018, through May 9, 2019. The order of the court approving employment of Applicant was entered on November 6, 2018. Dckt. 19. Applicant requests fees in the amount of \$6,450.00 and costs in the amount of \$256.21.

## APPLICABLE LAW

### Reasonable Fees

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

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

### Lodestar Analysis

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

### Reasonable Billing Judgment

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

Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant’s services for the Estate include general case administration, and asset investigation and disposition. The Estate has \$18,500.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

**FEES AND COSTS & EXPENSES REQUESTED**

**Fees**

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

General Case Administration: Applicant spent 3.8 hours in this category. Applicant prepared the employment and fee applications.

Asset Disposition: Applicant spent 22.4 hours in this category. Applicant reviewed offers to purchase, communicated, drafted sale agreement addendums, and prosecuted a motion to sell for various property of the Estate.

Asset Investigation: Applicant spent 2.6 hours in this category. Applicant assessed the potential sale of a commercial property of the Debtor.

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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Loris Bakken	20.6	\$300.00	\$6,180.00
Loris Bakken	1.8	\$150.00	\$270.00

<b>Total Fees for Period of Application</b>	<b>\$6,450.00</b>
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**Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$256.21 pursuant to this application.

The costs requested in this Application are,

<b>Description of Cost</b>	<b>Per Item Cost, If Applicable</b>	<b>Cost</b>
Postage		\$109.11
Copies	\$0.10	\$147.10
<b>Total Costs Requested in Application</b>		<b>\$256.21</b>

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$6,450.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

**Costs & Expenses**

First and Final Costs in the amount of \$256.21 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court authorizes the Chapter 7 Trustee / Debtor in Possession / Plan Administrator under the confirmed plan to pay the fees and costs allowed by the court.

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

Fees	\$6,450.00
Costs and Expenses	\$256.21

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

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

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

The Motion for Allowance of Fees and Expenses filed by Bakken Law Firm fka Schneweis-Coe & Bakken, LLP (“Applicant”), Attorney for Kimberly Husted, the Chapter 7 Trustee, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Bakken Law Firm fka Schneweis-Coe & Bakken, LLP is allowed the following fees and expenses as a professional of the Estate:

Loris Bakken, Professional employed by the Chapter 7 Trustee:

Fees in the amount of \$6,450.00

Expenses in the amount of \$256.21,

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

**IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the fees and costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

17. [18-24787-E-7](#)  
[BLF-2](#)

LARRY/CATHY STRAUSS  
Richard Hall

MOTION FOR COMPENSATION FOR  
LORIS L. BAKKEN, TRUSTEE'S  
ATTORNEY  
4-16-19 [27]

**Final Ruling:** No appearance at the May 30, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on April 16, 2019. By the court's calculation, 44 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

**The Motion for Allowance of Professional Fees is granted.**

The Bakken Law Firm fka Schneweis-Coe & Bakken, LLP, the Attorney ("Applicant") for Kimberly J. Husted, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 23, 2018, through May 30, 2019. The order of the court approving employment of Applicant was entered on October 23, 2019. Dckt. 15. Applicant requests fees in the amount of \$2,390.58 and costs in the amount of \$50.58.

## APPLICABLE LAW

### Reasonable Fees

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

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

### Lodestar Analysis

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

### Reasonable Billing Judgment

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

Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant’s services for the Estate include general case administration and recovery of property of the Estate. The Estate has \$14,000.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

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

General Case Administration: Applicant spent 3.7 hours in this category. Applicant’s services in this category included preparation of the fee agreement and employment application, stipulation to extend deadline for the chapter 7 trustee to object to exemptions and object to discharge.

Efforts to Assess and Recover Property of the Estate: Applicant spent 4.1 hours in this category. Applicant’s services in this category included communication with the Internal Revenue Service regarding the return of funds asserted to be fraudulently transferred.

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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Lorris Bakken	7.8	\$300.00	\$2,340.00
<b>Total Fees for Period of Application</b>			\$2,340.00



**Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$50.58 pursuant to this application.

The costs requested in this Application are,

<b>Description of Cost</b>	<b>Per Item Cost, If Applicable</b>	<b>Cost</b>
Postage		\$26.68
Copies	\$0.10	\$23.90
<b>Total Costs Requested in Application</b>		<b>\$50.58</b>

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$2,390.58 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

**Costs & Expenses**

First and Final Costs in the amount of \$50.58 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

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

Fees	\$2,390.58
Costs and Expenses	\$50.58

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

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

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

The Motion for Allowance of Fees and Expenses filed by Bakken Law Firm fka Schneweis-Coe & Bakken, LLP, (“Applicant”), Attorney for Kimberly J. Husted, the Chapter 7 Trustee , (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Bakken Law Firm fka Schneweis-Coe & Bakken, LLP, is allowed the following fees and expenses as a professional of the Estate:

Loris Bakken, Professional employed by the Chapter 7 Trustee:

Fees in the amount of \$2,390.58  
Expenses in the amount of \$50.58,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee / Chapter 13 Debtor / Debtor in Possession / Plan Administrator.

**IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the fees and costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

18.    [18-21577-E-7](#)            **CONSTANCE CHERRONE**            **MOTION TO CONTINUE HEARING**  
       [RLG-3](#)                     **Robert Goldstein**                     **3-25-19 [41]**

The Motion To Continue Hearing was considered and resolved at the April 4 and April 24, 2019 hearings on the Motion To Avoid Lien of Patricia A. Turnage.

The Contested Matter, DCN:RLG-3, has been fully resolved by final order of the court (Dckt. 56), and **the hearing on the Motion to Continue is removed from the calendar.**