UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

May 31, 2018, at 10:30 a.m.

1.	**16-90500-E-11** **HSM-21**	**ELENA DELGADILLO** **Len ReidReynoso**	**MOTION FOR ADMINISTRATIVE EXPENSES** **4-25-18 [325]**

Final Ruling: No appearance at the May 31, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 25, 2018. By the court's calculation, 36 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). 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 Administrative Expenses is granted.

Irma Edmonds, the Chapter 11 Trustee, ("Movant") requests payment of administrative expenses in the amount of $92,884.00, for the fiscal year February 28, 2018, for income taxes owed to the Internal Revenue Service ("IRS") and Franchise Tax Board ("FTB").

Movant argues that her accountant prepared income tax returns and determined that the Estate owes $63,449.00 to the FTB and $29,385.00 to the IRS.

Section 503(b)(1)(A) of the Bankruptcy Code accords administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ." Here, Movant has demonstrated that there are income tax liabilities that the Estate must pay.

Movant having demonstrated that the expenses were necessary, the court finds that paying income taxes is necessary and beneficial to the Estate. The Motion is granted, and Movant is authorized to pay the FTB $63,499.00 and the IRS $29,385.00.

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 filed by Irma Edmonds, the Chapter 11 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Movant is authorized to pay the Franchise Tax Board $63,499.00 and the Internal Revenue Service $29,385.00 as administrative expenses of the Chapter 11 Estate in this case pursuant to 11 U.S.C. § 503(b)(1).

2.	**16-90401-E-7** **WFH-17**	**NATIONAL EMERGENCY MEDICAL SERVICES** **David Johnston**	**MOTION TO PAY** **5-3-18 [257]**

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 holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on May 3, 2018. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Motion for Allowance of Administrative Expenses 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 Administrative Expenses is granted.

Russell Burbank, the Chapter 7 Trustee, ("Movant") requests payment of administrative expenses in the amount of $958.50 for document storage and destruction fees.

Movant argues that document storage fees of $335.00 were incurred with Pacific Records Management from November 2017 through May 2018 and that the company will charge an additional $623.50 to destroy the records. In a related motion to abandon, Movant describes how eighty-five boxes of records have been stored but are no longer necessary to this case and are actually creating a burden for the Estate. Movant wishes to destroy the records and cease incurring expenses for the Estate.

Section 503(b)(1)(A) of the Bankruptcy Code accords administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ." Here, Movant has established that storage fees have been incurred and that an additional fee will be incurred to destroy records that are no longer of benefit to the Estate.

Movant having demonstrated that the expenses were necessary, the court finds that Movant incurring document storage and destruction fees was necessary for Debtor and provided benefit to the Estate. The Motion is granted, and Movant is authorized to pay administrative expenses in the total amount of $958.50 to Pacific Records Management for document storage and destruction.

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 filed by Russell Burbank, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Movant is authorized to pay Pacific Records Management $958.50 as an administrative expense of the Chapter 7 Estate in this case pursuant to 11 U.S.C. § 503(b)(1).

3.	**16-90401-E-7** **WFH-18**	**NATIONAL EMERGENCY MEDICAL SERVICES** **David Johnston**	**MOTION TO ABANDON** **5-3-18 [261]**

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 holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on May 3, 2018. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Motion to Abandon 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 to Abandon is granted.

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

The Motion filed by Russell Burbank ("the Chapter 7 Trustee") requests that the court authorize him to abandon property commonly known as eighty-five boxes of business records stored with Pacific Records Management ("Property"). The Chapter 7 Trustee argues that he is preparing to close the case, but he needs to dispose of remaining records that are being held in storage.

With this case coming to a close, the court finds that there are negative financial consequences for the Estate if it retains the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and authorizes the Chapter 7 Trustee to abandon the Property.

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 Abandon Property filed by Russell Burbank ("the Chapter 7 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted, and the Property identified as eighty-five boxes of business records stored with Pacific Records Management are abandoned to National Emergency Medical Services by this order, with no further act of the Chapter 7 Trustee required.

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to instruct Pacific Records Management to destroy the business records being abandoned.

4.	**16-90401-E-7** **WFH-20**	**NATIONAL EMERGENCY MEDICAL SERVICES** **David Johnston**	**MOTION FOR COMPENSATION FOR BPM LLP, ACCOUNTANT(S)** **5-3-18 [265]**

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 holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on May 3, 2018. By the court's calculation, 28 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.

BPM LLP, the Accountant ("Applicant") for Russell Burbank, 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 July 6, 2017, through April 25, 2018. The order of the court approving employment of Applicant was entered on July 28, 2017. Dckt. 201. Applicant requests fees in the amount of $7,868.50.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. A professional must exercise good billing judgment with regard to the services provided because the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505

B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include general administration, bookkeeping, accounting, and tax compliance. The Estate has $26,910.13 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 REQUESTED

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

General Administration: Applicant spent 14.9 hours in this category. Applicant provided accounting services to assist Client with his administration of the case, including but not necessarily limited to setting up bank accounts, providing accounting information for statute reports and fee applications, and for preparing Monthly Operating Reports to the U.S. Trustee.

Bookkeeping and Accounting: Applicant spent 18.8 hours in this category. Applicant provided services to Client that included, but were not necessarily limited to, maintaining National Emergency Medical Services Association, Inc.'s ("Debtor") records and books and reconciling the various bank accounts for the day to day operations of Debtor's business and for periodic reporting to the court and to the U.S. Trustee.

Tax Compliance: Applicant spent 5.5 hours in this category. Applicant provided services to Client that included, but were not necessarily limited to preparation and filing of Debtor's 2017 State and Federal tax returns and other tax compliance forms as required by law.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Rich Gunn, Partner	1.00 hours	$495.00	$495.00
Serebrakova, Tax Director	0.90 hours	$435.00	$391.50
Jena Lee, Tax Manager	3.80 hours	$280.00	$1,064.00
Lauren Leong, Accountant	9.20 hours	$115.00	$1,058.00
Stephanie Avakian, Senior Accountant	24.30 hours	$200.00	$4,860.00
Total Fees for Period of Application			$7,868.50

FEES ALLOWED

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 $7,868.50 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.

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

Fees $7,868.50

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by BPM LLP ("Applicant"), Accountant for Russell Burbank, 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 BPM LLP is allowed the following fees and expenses as a professional of the Estate:

BPM LLP, Professional employed by the Chapter 7 Trustee

Fees in the amount of $7,868.50

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 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.

5.	**16-90401-E-7** **WFH-21**	**NATIONAL EMERGENCY MEDICAL SERVICES** **David Johnston**	**MOTION FOR COMPENSATION BY THE LAW OFFICE OF WILKE, FLEURY, HOFFELT, GOULD & BIRNEY, LLP TRUSTEES ATTORNEY(S)** **5-3-18 [270]**

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 3, 2018. By the court's calculation, 28 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.

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

Fees are requested for the period July 5, 2017, through April 15, 2018. The order of the court approving employment of Applicant was entered on July 28, 2017. Dckt.202. Applicant requests fees and costs in the amount of $8,500.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include acting as counsel for Client and assisted Client in the prosecution of this case. The Estate has $26,910.13 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 REQUESTED

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

General Case Administration: Applicant spent 21.2 hours in this category. Applicant continued the review and filing of monthly operating reports and monitoring of activity with NAGE and pending elections. Applicant additionally oversaw the transition of the Chapter 11 bankruptcy case into a Chapter 7, including communications with the U.S. Trustee's office. Applicant also prepared and prosecuted a motion for authority to abandon business records, and a motion to pay document storage and destruction fees.

Employment Applications: Applicant spent 6 hours in this category. Applicant prepared its Chapter 7 fee application for itself and reviewed, revised, and served Chapter 7 final fee application for accountant BPM, LLC. Applicant also will appear at the hearing on the fee applications.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Daniel Egan, Attorney	15.2	$405.00 (2017)	$6,156.00
	9	$415.00 (2018)	$3,735.00
Kathryne Baldwin, Attorney	3	$250.00 (2018)	$750.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees for Period of Application			$10,641.00
Less Discount			$2,141.00
Total Requested			$8,500.00

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

Application	Interim Approved Fees	Interim Fees Paid
First Interim	**$31,196.00**	
Second Interim	**$11,461.50**	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$42,657.50	$23,397.00

Costs & Expenses

Pursuant to prior interim applications, the court has allowed costs of $1,274.73.

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks to be paid a single sum of $8,500.00 for its fees incurred for Client. Third Interim and Final Fees and Costs in the amount of $8,500.00 and prior Interim Fees in the amount of $42,657.50 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

Third and Final Costs in the amount of $1,274.73 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.

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

Fees $8,500.00

pursuant to this Application and prior interim fees of $42,657.50 and interim costs of $1,274.73 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 Wilke, Fleury, Hoffelt, Gould & Birney, LLP ("Applicant"), Attorney for Russell Burbank, 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 Wilke, Fleury, Hoffelt, Gould & Birney, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Wilke, Fleury, Hoffelt, Gould & Birney, LLP, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $8,500.00

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

The fees and costs pursuant to this Motion, and fees in the amount of $42,657.50 and costs of $1,274.73 approved pursuant to prior Interim Application, are approved as final fees and costs pursuant to 11 U.S.C. § 330.

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

6. 18-90302-E-7 VICTOR TORRES — **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Wilber Salgado — **5-9-18 [11]**

Final Ruling: No appearance at the May 31, 2018 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on May 11, 2018. The court computes that 20 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on April 25, 2018.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

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

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

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

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

7.	**18-90214-E-7** **MLP-1**	**PERRY GALATI AND KIMBERLY BORBA-GALATI** **Martha Lynn Passalaqua**	**MOTION TO COMPEL ABANDONMENT** **5-14-18 [10]**

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, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 14, 2018. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the 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 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 Perry Galati and Kimberly Borba-Galati ("Debtor") requests the court to order Irma Edmonds ("the Chapter 7 Trustee") to abandon property commonly known as:

A. Perry's Quality Pools;
B. Business Checking Account;
C. Customer List/Business Value & Name;
D. 2010 Chevrolet Silverado 1500;
E. Pool Cleaning Equipment, Computer, etc.; and

F. Accounts Receivables ("Property").

The Declaration of Perry Galati and Kimberly Borba-Galati has been filed in support of the Motion and values the Property at $21,077.54. Debtor argues that the Property has been fully exempted such that there is no equity for the Estate. Reviewing Schedule C, the court notes that the Property has been exempted under various provisions of California Code of Civil Procedure § 703.140 in the full amount of the Property's value.

The court finds that the debt secured by the Property exceeds the value of the Property and that there are negative financial consequences to the Estate caused by retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compel Abandonment filed by Perry Galati and Kimberly Borba-Galati ("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:
>
> A. Perry's Quality Pools;
> B. Business Checking Account;
> C. Customer List/Business Value & Name;
> D. 2010 Chevrolet Silverado 1500;
> E. Pool Cleaning Equipment, Computer, etc.; and
> F. Accounts Receivables ("Property").
>
> and listed on Schedule B by Debtor is abandoned by Irma Edmonds ("the Chapter 7 Trustee") to Debtor by this order, with no further act of the Chapter 7 Trustee required.

8.	**13-91315-E-7** **MDM-13**	**APPLEGATE JOHNSTON, INC.** **George Hollister**	**MOTION FOR COMPENSATION FOR MICHAEL D. MCGRANAHAN, CHAPTER 7 TRUSTEE(S)** **5-10-18 [874]**

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, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 10, 2018. 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.

Michael McGranahan, the Chapter 7 Trustee, ("Applicant") for the Estate of Applegate Johnston, Inc. ("Client"), makes a Request for the Allowance of Fees and Expenses in this case. Fees are requested for the period July 16, 2013, through May 31, 2018.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

Even if the court finds that the services billed by a trustee are "actual," meaning that the fee application reflects time entries properly charged for services, the trustee must demonstrate still that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A trustee must exercise good billing judgment with regard to the services provided because the court's authorization to employ a trustee to work in a bankruptcy case does not give that trustee "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 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 case administration, asset management, litigation, and tax returns. The Estate has $775,897.87 of unencumbered monies to be administered as of the filing of the application. The total monies of the estate administered by the Trustee are $2,171,897.87. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES REQUESTED

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

Case Administration: Applicant spent 132 hours in this category. Applicant liquidated Client's personal property, account receivable, and tax refunds and reached a settlement agreement.

Asset Analysis/Recovery: Applicant spent 115.1 hours in this category. Applicant conducted an auction sale at Client's facility in Modesto, grossing $224,665.26, with net to the estate of $55,296.60 after payment of costs and secured claims.

Tax Matters: Applicant spent 15.8 hours in this category. Applicant corrected Client's tax returns, and refunds were eventually received totaling $336,134.

Litigation Matters: Applicant spent 69.8 hours in this category. Applicant prosecuted or settled approximately thirty preference actions. The gross proceeds collected were approximately $1.1 million; the net to the estate after attorney fees were approximately $460,000.

Applicant requests the following fees:

25% of the first $5,000.00	$1,250.00
10% of the next $45,000.00	$4,500.00

5% of the next $950,000.00	$47,500.00
3% of the balance of $1,171,237.44	$35,137.12
Calculated Total Compensation	$88,387.12
Plus Adjustment	$0.00
Total Maximum Allowable Compensation	$88,387.12
Less Previously Paid	$50,000
Total Third and Final Fees Requested	$38,387.12

The fees are computed on the total sales generated $2,171,897.87 of net monies (exclusive of these requested fees and costs), with an estimated gross value of $775,897.87 remaining in claims currently being pursued. Applicant also reports that he had $1,273.99 in expenses during administration of the case.

FEES ALLOWED

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. § 326(a) and that Applicant effectively used appropriate rates for the services provided. Third and Final Fees in the amount of $38,387.12 and prior Interim Fees in the amount of $50,000.00 are approved pursuant to 11 U.S.C. § 330 are 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.

In this case, the Chapter 7 Trustee currently has $775,897.87 of unencumbered monies to be administered. The Chapter 7 Trustee provided services including case administration, asset management, litigation, and tax returns. Applicant's efforts have resulted in a realized gross of $2,171,897.87 recovered for the estate. Dckt. 876.

This case required significant work by the Chapter 7 Trustee, with full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowable as a commission to the Chapter 7 Trustee.

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

Fees	$38,387.12
Costs and Expenses	$1,273.99

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 Michael McGranahan, the Chapter 7 Trustee, ("Applicant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Michael McGranahan is allowed the following fees and expenses as a professional of the Estate:

Michael McGranahan, the Chapter 7 Trustee

Fees in the amount of $38,387.12
Expenses in the amount of $1,273.99

The fees and costs pursuant to this Motion, and fees in the amount of $50,000.00 approved pursuant to prior Interim Application, are approved as final fees and costs pursuant to 11 U.S.C. § 330.

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

9. **13-91315-E-7 WFH-53** | **APPLEGATE JOHNSTON, INC.** **George Hollister** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF WILKE, FLEURY, HOFFELT, GOULD & BIRNEY, LLP FOR DANIEL L. EGAN, TRUSTEES ATTORNEY(S)** **5-10-18 [886]**

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, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 10, 2018. 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.

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

Fees are requested for the period March 1, 2017, through April 18, 2018. The order of the court approving employment of Applicant was entered on August 29, 2013. Dckt. 929. Applicant requests fees in the amount of $67,785.10 and costs in the amount of $4,869.93 for the fourth and final period in this case. Previously, Applicant has been allowed interim fees for the period of July 18, 2013, through February 28, 2017, in the amount of $692,971.55 and interim costs of $51,524.07.

The Motion also requests final approval of all prior and current interim fees and costs, with the total fees of $760.756.65 and costs of $56,394.00 in this case.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include case administration, asset analysis and recovery, fee/employment applications, avoidance action analysis, avoidance action (settlement), claims administration, and objection, and assisting in the prosecution of this case. The Estate has $775,897.87 of unencumbered monies to be administered as of the filing of the application. The total monies of the estate administered by the Trustee are $2,171,897.87. 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.

Case Administration: Applicant spent 13.8 hours in this category. Applicant represented Client in coordinating professionals and obtaining a no action letter from the Department of Labor in order to close Debtor's pension plan. Applicant also communicated numerous times with other professionals and the Department of Labor.

Asset Analysis and Recovery: Applicant spent 0.6 hours in this category. Applicant evaluated an offer for residual assets.

Fee/Employment Applications: Applicant spent 44.4 hours in this category. Applicant assisted other processionals in preparing interim fee applications. Applicant also prepared its third interim fee application and its final fee application. Applicant prepared and prosecuted an application to employ Californsics to act as an electronic records consultant in connection with attempts to close the pension plan.

Avoidance Action Analysis: Applicant spent 205.5 hours in this category. Applicant represented Client in completing ongoing preference recovery litigation and provided a detailed preference recovery

analysis. Applicant also represented Client in trial and prepared for trial in three adversary proceedings. Applicant also engaged in successful judgment collection actions against ICS Integrated Communications.

Avoidance Action (Settlement): Applicant spent 36.2 hours in this category. Applicant represented Client in negotiating, documenting, and obtaining court approval of settlements. Applicant also represented Client with respect to settlement discussions in six adversary proceedings.

Claims Administration and Objections: Applicant spent 6.7 hours in this category. Applicant advised and represented Client with respect to claims analysis of the AFCO and Westamerica Bank secured claims.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Daniel Egan, Attorney (2018)	22.1	$415.00	$9,171.50
Daniel Egan, Attorney (2017)	197.6	$405.00	$80,028.00
Anthony Eaton, Attorney	62.4	$340.00	$21,216.00
Kathryne Baldwin, Attorney (2018)	5.3	$250.00	$1,325.00
Kathryne Baldwin, Attorney (2017)	5.7	$235.00	$1,339.50
Sharon Brazell, Paralegal	1.5	$180.00	$270.00
Melissa Eaton, Paralegal	0.6	$180.00	$108.00
Less Discount (5%)			**($5,672.90)**
Client-Requested Discount			**($40,000.00)**
Total Fees for Period of Application			**$67,785.10**

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

Application	**Interim Approved Fees**	**Interim Fees Paid**
First Interim	$190,198.00	
Second Interim	$306,169.15	

Third Interim	$196,604.40	
	$692,971.55	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$692,971.55	$554,376.84

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $4,832.93 pursuant to this application. Pursuant to prior interim applications, the court has allowed costs of $51,524.07.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Postage		$1,192.87
Photocopies		$2,905.30
ACE Attorney Services		$518.51
DLE Expenses		$64.41
Federal Express		$84.43
Travel Expenses (Mileage)		$67.41
CourtCall, LLC		$37.00
Additional Discount		($37.00)
Total Costs Requested in Application		$4,832.93

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. Fourth and Final Fees in the amount of $67,785.10 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

Fourth and Final Costs in the amount of $4,832.93 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee under the confirmed plan from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$67,785.10
Costs and Expenses	$4,832.93

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Wilke, Fleury, Hoffelt, Gould & Birney, LLP ("Applicant"), Attorney for Michael McGranahan, 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 Wilke, Fleury, Hoffelt, Gould & Birney, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Wilke, Fleury, Hoffelt, Gould & Birney, LLP, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $67,785.10
> Expenses in the amount of $4,832.93,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.
>
> The fees and costs pursuant to this Motion, and fees in the amount of $692,971.55 and costs of $51,524.07 approved pursuant to prior Interim Application, are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

10. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **MOTION FOR COMPENSATION FOR PENSION MANAGEMENT CONSULTANTS, INC., OTHER PROFESSIONAL(S)**
WFH-54 **George Hollister** **5-10-18 [879]**

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, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 10, 2018. 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.

Pension Management Consultants, Inc., the Consultant ("Applicant") for Michael McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period June 10, 2017, through April 18, 2018. The order of the court approving employment of Applicant was entered on July 11, 2017. Dckt. 803. Applicant requests fees in the amount of $5,255.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. A professional must exercise good billing judgment with regard to the services provided because the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505

B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include preparing and filing documents necessary to terminate Applegate Johnston, Inc.'s pension plan, including filing a final Form 5500 with the Internal Revenue Service. The Estate has $775,897.87 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 REQUESTED

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

Pension Plan Administration: Applicant billed a flat fee of $5,255.00 for two pension plans, as opposed to hourly billing. Applicant administered a 401k plan with ninety-three participants and a separate plan that had no participants.

FEES ALLOWED

Applicant seeks to be paid a single sum of $5,255.00 for its fees incurred for Client. First and Final Fees in the amount of $5,255.00 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.

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

Fees	$5,255.00

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

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

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

The Motion for Allowance of Fees and Expenses filed by Pension Management Consultants, Inc. ("Applicant"), Consultant for Michael McGranahan, 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 Pension Management Consultants, Inc. is allowed the following fees and expenses as a professional of the Estate:

Pension Management Consultants, Inc., Professional employed by the Chapter 7 Trustee

Fees in the amount of $5,255.00,

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 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.

11. 18-90029-E-11 JEFFERY ARAMBEL
MF-14 Reno Fernandez

CONTINUED MOTION TO ASSUME LEASE OR EXECUTORY CONTRACT
4-19-18 [230]

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.

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 creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 19, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Assume 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 Assume is granted~~.

Jeffery Arambel ("Debtor in Possession") moves for court authorization pursuant to 11 U.S.C. § 365 to assume a listing agreement for the sale of properties within the Arambel Business Park with Cushman & Wakefield U.S., Inc. ("Cushman"). The Motion does not seek to assume that portion of the contract which relates to leasing services.

This Motion is filed in conjunction with a motion to authorize the employment of Cushman as a professional by Debtor in Possession. Debtor in Possession has requested that the pre-petition listing agreement be assumed with respect to the sales services because there are pending escrows that will close post-petition for which substantial work was done pre-petition. Debtor in Possession states that this assumption and employment two-step process is being done out of an "abundance of caution" (presumably to avoid any contention that Cushman should not be fairly compensated for the services rendered that are generating this benefit for the Bankruptcy Estate.)

MAY 17, 2018 HEARING

At the hearing, the court noted that this matter had been continued by prior order to 10:30 a.m. on May 31, 2018. Dckt. 318.

DISCUSSION

11 U.S.C. § 365(a) states that a trustee or debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." That section of the Code continues and states that "[i]f there has been a default in an executory contract or unexpired lease of the debtor, the trustee [or debtor in possession] may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee [or debtor in possession] cures, or provides adequate assurance that the trustee [or debtor in possession] will promptly cure, such default." 11 U.S.C. § 365(b)(1)(A).

Here, Debtor in Possession argues that it had entered into a pre-petition listing agreement with Cushman & Wakefield U.S., Inc., to sell and lease various real property at the Arambel Business Park. That pre-petition contract and its terms are identified with particularity (Federal Rule of Bankruptcy Procedure 9013) in the Motion as follows:

A. "For the past 18 months, Cushman has been ably assisting with sales of parcels within the Arambel Business Park, including two favorable pending sales of portions of the Arambel Business Park to PDC Sacramento, LLC."

B. "Because Cushman's right to payment for any commission is expressly conditioned upon closing of the pending sales, Cushman does not hold a prepetition claim. Therefore, Cushman is eligible to be employed under Bankruptcy Code § 327."

C. "In 2016, Cushman was retained by the pre-petition Debtor to serve as broker."

D. "Under the terms of the Listing Agreement, Cushman is entitled to a commission if Debtor in Possession sells or leases any property within the Arambel Business Park. Cushman's commission for a sale is 5% of the gross sales price."

Motion, Dckt. 230. Debtor in Possession concludes that "Assumption of the Listing Agreement is necessary in order to continue with orderly and timely sales of the Arambel Business Park, which Debtor in Possession anticipates will generate significant returns for the Estate, as already demonstrated by the two pending sales to PDC Sacramento. 11 U.S.C. § 365(a)." *Id.* FN.1.

FN.1. The Motion also includes extensive points and authorities, which are not properly placed in the motion. LOCAL BANKR. R. 9004-2.

The Motion also states that for the existing sales there remains post-petition work to be accomplished, and that continuing with Cushman to complete the work will be beneficial to the estate and will minimize the possibility that duplicate fees and damages would be incurred (as paraphrased by the court).

The court has been presented with proposed sales and has approved them so far. The agreement to be assumed would entitle Cushman to commissions based upon how many sales or leases it is able to secure for Debtor in Possession.

No party has opposed the Motion, and part of the court's standard procedure for approving sales is to evaluate and generally approve proposed commissions. This separate agreement between the parties establishes a method for how commissions will be calculated for sales and leases of Debtor in Possession's property.

The Motion is granted, and Debtor in Possession is authorized to assume the Listing Agreement with Cushman & Wakefield U.S., Inc., filed as Exhibit A to the Motion. Dckt. 233.

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 Assume filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> ~~**IT IS ORDERED** that the Motion to Assume is granted, and Debtor in Possession is authorized to assume the Listing Agreement with Cushman & Wakefield U.S., Inc., on the terms as set forth in Exhibit A (Dckt. 233) and in the court's order.~~
>
> ~~**IT IS FURTHER ORDERED** that this "assumption" is made as part of the court authorizing the employment of Cushman as a professional employed by Debtor in Possession as provided in 11 U.S.C. § 327, with all fees, compensation, and all amounts owed to be paid Cushman, whether for pre or post-petition services, as determined under the Bankruptcy Code for professionals employed by a bankruptcy trustee, including 11 U.S.C. §§ 328, 330, and 331.~~

12. **18-90029-E-11** **JEFFERY ARAMBEL** **CONTINUED MOTION TO EMPLOY**
MF-15 **Reno Fernandez** **CUSHMAN & WAKEFIELD U.S. INC. AS BROKER(S)**
4-19-18 [234]

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.

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 parties requesting special notice and Office of the United States Trustee on April 19, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Employ 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 Employ is granted.~~

Jeffery Arambel ("Debtor in Possession") seeks to employ Cushman & Wakefield U.S., Inc., ("Broker") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Broker to assist in selling property within the Arambel Business Park.

The Motion states that the employment is sought only for the marketing and sale of the real properties in Arambel Business Park.

> "The application of JEFFERY EDWARD ARAMBEL, Debtor in Possession herein, requests authority pursuant to Section 327 and 328 of the Bankruptcy Code, Bankruptcy Rules 2014, 2016, and 5002, and the Guidelines of the Office of the United States Trustee, to **employ** Blake Rasmussen of Cushman & Wakefield U.S. Inc. ("Cushman") **as the real estate broker for Debtor in Possession with respect to the proposed sales of parcels within the Arambel Business Park**, ..."

Motion, Dckt. 234 at 1:21–25 (emphasis added).

However, in Paragraph 3 of the Motion, Debtor in Possession makes reference to the pre-petition services having been broader, with Cushman not only assisting in the marketing and sale of the properties, but also the leasing.

> "3. **Debtor wishes to employ** Cushman & Wakefield U.S., Inc. **as real estate broker to assist with the marketing of the Arambel Business Park for sale and negotiation of the terms of any sale with potential buyers.** In 2016, Cushman was retained by the pre-petition Debtor to serve as broker.2 A copy of the Listing Agreement is offered as Exhibit "A" and incorporated herein by reference. Since that time, **Cushman has ably assisted the pre-petition Debtor** in the marketing of the Arambel Business Park **for sale or lease**, resulting in two pending sales to PDC Sacramento, both of which are the subject of separate motions to approve the sales under 11 U.S.C. § 363."

Motion ¶ 3, *Id.*

The Motion then states that for sales, Cushman is to be paid a 5% commission and then sets out a fee schedule for leases. Motion ¶ 5, *Id.*

Then, in the prayer, Debtor in Possession just asks for the employment to be authorized on the "terms set forth in the Listing Agreement." Motion, *Id.* at 7:7–9. Such terms would include leasing services.

At the hearing, Debtor in Possession clarified the scope of the employment, advising the court XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

Need for Employment and Terms

Debtor in Possession argues that Broker's appointment and retention is necessary to carry out marketing and sales negotiations in continuation of a pre-petition agreement. Debtor in Possession seeks to employ Broker with a five percent commission of the gross sales price, along with a sliding scale for leases based on the length of the leases and their types, as follows:

Lease Term	Net Lease	Gross Lease
0 to 60 months	6.00%	5.00%
61 to 120 months	3.00%	2.50%
121 to 300 months	1.50%	1.25%

Blake Rasmussen, an executive managing director and a licensed real estate agent of Broker, testifies that he will be responsible for the proposed sales of the Arambel Business Park. Blake Rasmussen testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

CREDITOR'S LIMITED OBJECTION

SBN V Ag I LLC ("Creditor") filed a Limited Objection on May 3, 2018. Dckt. 264. Creditor states that it is not opposed to employing Broker, but it objects to the extent that the Motion seeks approval of paying proposed commissions from sales proceeds marketed by Broker on Debtor in Possession's behalf. Creditor notes that the Motion does not state such a request explicitly, but Creditor raises its concern now because there is another motion to employ a separate party who would be entitled to additional commissions from certain sales.

MAY 17, 2018 HEARING

At the hearing, the court noted that the matter had been continued to 10:30 a.m. on May 31, 2018, by prior order. Dckt. 319.

DEBTOR IN POSSESSION'S REPLY

Debtor in Possession filed a Reply on May 24, 2018. Dckt. 336. Debtor in Possession states expressly that the present Motion does not seek to approve commissions for Broker from any contemplated sales of property at the Arambel Business Park.

Instead, Debtor in Possession argues that the Motion seeks approval of employment with a compensation structure based upon commissions rather than a lodestar rate.

DISCUSSION

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Cushman & Wakefield U.S., Inc., as Broker for the Chapter 11 Estate on the terms and conditions set forth in the Listing Agreement filed as Exhibit A, Dckt. 237.

The court does not pre-authorize any commission requested by Broker in this case. Instead, the court approves employment that contemplates compensation based upon earning commissions from sales

and leases, not as demonstrated through a lodestar analysis. Approval of any commission is subject to the provisions of 11 U.S.C. § 328 and review of fees at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Cushman & Wakefield U.S., Inc., as Broker for Debtor in Possession ~~on the terms and conditions as set forth in the Listing Agreement filed as Exhibit A, Dckt. 237.~~

13. **18-90029-E-11** **JEFFERY ARAMBEL** **MOTION TO ASSUME LEASE OR EXECUTORY CONTRACT**
MF-17 **Reno Fernandez** **5-15-18 [305]**

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 creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 15, 2018. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion to Assume was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, 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, ----------.

The Motion to Assume is denied.

Jeffery Arambel ("Debtor in Possession") moves for court authorization pursuant to 11 U.S.C. § 365 to assume a consulting services agreement with Crestmont Development, LLC, ("Crestmont") with respect to project management services at Arambel Business Park.

11 U.S.C. § 365(a) states that a trustee or debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." That section of the Code continues and states that "[i]f there has been a default in an executory contract or unexpired lease of the debtor, the trustee [or debtor in possession] may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee [or debtor in possession] cures, or provides adequate assurance that the trustee [or debtor in possession] will promptly cure, such default." 11 U.S.C. § 365(b)(1)(A).

Debtor in Possession states that he entered into an agreement with Crestmont in 2007 to transform the Arambel Business Park from a tract of land to a business park. Debtor in Possession states

that the agreement was not reduced to writing, but he argues that he agreed to pay Crestmont $3,200.00 per month. Once the project moved forward, the parties restructured the compensation portion to be 5.00% for Crestmont of the gross sales price of any property sold within the park during the agreement's term based upon Crestmont supporting the marketing and sale of property within the business park.

Debtor in Possession argues that Crestmont has been instrumental in recent years in securing sales of property without the assistance of a broker. At this time, Debtor in Possession states that its obligations to Crestmont are executory, with commissions owed to Crestmont when certain pending sales close.

Review of Evidence and Grounds Asserted

In the Motion, it is stated that in 2007 Debtor entered into an oral contract with Crestmont Development, LLC and its principal Joseph B. Hollowell III. Mr. Hollowell is also identified as the spouse of an officer of a prospective purchaser of property from Filbin Land & Cattle Company. Motion ¶ 5 and FN. 2, Dckt. 305. It is asserted that both Crestmont and Mr. Hollowell were to assist Debtor with "transforming" Arambel Business Park from a large tract of land from its **present** agriculture use outside of the town of Patterson to a "master-planned business park within Patterson."

The Motion then alleges with particularity the following grounds relating to the alleged "services" to be provided by Crestmont and Hollowell "to" Debtor:

> A. "Immediately after being retained, **Crestmont began diligently working on the entitlement process to make the parcels marketable**. Specifically, **Crestmont** started **working** with the City of Patterson and the General Plan Action Committee **to bring the Arambel Business Park into the City's planned expansion** of its General Plan area. In 2010, the City approved the Arambel Business Park to be included in the General Plan area. In 2011, after the City included Arambel Business Park in its General Plan, Mr. Arambel and Crestmont made application to the City for annexation and full entitlement of the Project."

Motion ¶ 6, Dckt. 305 (emphasis added).

> B. 7. **Crestmont's role was to advise Mr. Arambel** on the entitlement strategy and manage all aspects of the entitlement process, including but not limited to the following:
>
> • **Working with engineering and architectural firms** to timely prepare and submit all necessary entitlement applications, planning documents, and maps;
>
> • **Continuously meeting with City staff**, engineers and architects to promptly respond to and address all documents;

• **Managing the California Environmental Quality Act process** from hiring the necessary consultants to prepare the Environmental Impact Report (the "EIR"), to managing their timelines, reviewing and making comments on the EIR and taking the EIR to Planning Commission and City Council for final approval;

• **Negotiating development agreements** and other required service and entitlements with the City and other administrative bodies and obtaining approvals of the same;

• **Continuously meeting with Planning Commissioners**, City Council members, and Stanislaus Local Agency Formation Commission (the "LAFCO") members; and

• **Attending all public hearings and meetings**, including Planning Commission hearing, City Council meetings, and LAFCO hearings.

Motion ¶ 7, *Id.* (emphasis added).

C. 8. **After seven years of work by Crestmont and the prepetition Debtor**, the LAFCO gave final approval to the entitlement process in December 2013. **Crestmont then immediately began assisting the prepetition Debtor with the marketing and sale** of the business park. In **March 2014, Crestmont successfully negotiated the purchase and sale of 93 acres upon** which 1.5 million square-foot distribution center was built for Restoration Hardware. With Crestmont's knowledge of the business park's entitlements, it played a key role in getting the purchase and sale agreement from execution in April 2014 to escrow closing in June 2014. **Crestmont managed all aspects of transaction, which did not involve any brokers.**"

Motion ¶ 8, *Id.* (emphasis added).

D. "9. After closing of the sale, **Crestmont also assisted the purchaser of the Restoration Hardware parcel** with obtaining all of their necessary approvals from the City of Patterson to construct the 1.5 million square foot distribution center and in so doing **made sure that those approvals required that all infrastructure to be installed for Restoration Hardware would benefit the remaining parcels in the business park,** allowing for more than $5 million in infrastructure improvements to be made for the benefits of the entire business park, including a 1.5 million-gallon water tank, further increasing the value of the business park."

Motion ¶ 9, *Id.* (emphasis added). As discussed below, the "relationship" between Debtor, Crestmont, and Hollowell causes the court some concerns when it is stated to be merely an oral contract for employment. The allegations in this paragraph make it appear that Crestmont and Hollowell may have been representing multiple parties after a transaction, concerning the transaction, and those respective parties independent rights and interests.

E. 10. **Crestmont continued to market the property throughout 2014, 2015, and 2016. In 2016,** Crestmont assisted the prepetition Debtor with the retention of CBRE for expanded reach in the industrial market. **That engagement was later moved over to Cushman Wakefield because the brokers left CBRE to go with Cushman Wakefield**. Prior to filing of the petition, Crestmont managed the Cushman Wakefield relationship, and **Crestmont remains actively engaged in the marketing efforts by having bi-weekly conference calls to discuss the best way to market the property** and share market information and prospects. **Crestmont's intimate knowledge** of the business park's entitlements is invaluable to the marketing process.

Motion ¶ 10, *Id.* (emphasis added).

F. 11. Crestmont worked with Cushman to finalize the 2017 sale of a 56-acre parcel to LBA Realty. **Crestmont managed all aspects of the due-diligence process and closing. Crestmont was a key player** in the prepetition Debtor's execution the March **2017 purchase and sale agreement related to a 107-acre parcel in the business park to PDC Sacramento for approximately $18 million**. The proposed end user has certain height requirements which are not standard in many commercial and industrial developments. Crestmont worked closely with the City of Patterson to change the height ordinance to permit the height requirements needed by this user to greatly improve our chances of closing the transaction. Crestmont's relationship with PDC Sacramento was also pivotal in negotiating the post-petition contract for the sale of a 43.2-acre parcel in the Project for approximately $6.5 million. Both of these contracts have been presented to the Court for approval. **Crestmont's intimate knowledge with the business park's entitlements and agreements coupled with its relationship with PDC Sacramento is crucial to getting these agreements past the due-diligence phase and into closing.**

Motion ¶ 11, *Id.* (emphasis added).

G. 12. **Crestmont continues to maintain all the files and documents related to the business park's entitlements** and is well versed in discussing the same with potential buyers. Furthermore, Crestmont's working relationship with the City of Patterson has a proven success rate as Crestmont has brought Walmart, Amazon, RH, CVS, Taco Bell and

other users to Patterson. In addition, Crestmont has successfully entitled and marketed other projects within the City, including the West Patterson Business Park, Patterson Gardens, Villages of Patterson, and a retail center.

Motion ¶ 12, *Id.* (emphasis added).

Testimony in Support of Motion

No declaration is provided by Debtor in Possession in support of this Motion. Rather, the only declaration provided is that of Joseph B. Hollowell III. Dckt. 308. In his Declaration, Mr. Hollowell testifies:

A. He is the "principal" of Crestmont Development, LLC. (He does not state that he is the managing member or who the other members of this LLC are for whom Debtor in Possession is seeking relief.)

Declaration ¶ 1, Dckt. 308.

B. "3. In 2007, **Mr. Arambel retained my firm** to assist him with transforming what is now the Arambel Business Park from a large tract of land adjacent to Interstate 5 from agriculture use outside of Patterson's city limits to a master-planned business park within Patterson. **Under the agreement, which was not reduced to writing**, Mr. **Arambel agreed to pay Crestmont a monthly fee of $3,200.** After we obtained full entitlements for the project, **the agreement was modified to remove the monthly fee and to provide a commissioned based compensation of 5% of the gross sales price** of any property sold within the business park during the term of our agreement based upon Crestmont's continuing efforts to support the marketing and sale of the properties within the business park."

Declaration ¶ 3, *Id.* (emphasis added). This testimony conflicts slightly with the Motion, in which it is stated that Debtor "[r]etained Crestmont Development, LLC, and its principal Joseph B. Hollowell III . . . ." Motion, Dckt. 305 at 2:10–11.

C. "5. Immediately after being retained, **I began diligently working** on the entitlement process to make the parcels marketable. Specifically, **I started working with** the City of Patterson and the General Plan Action Committee to bring the Arambel Business Park into the City's planned expansion of its General Plan area. In 2010, the City approved the Arambel Business Park to be included in the General Plan area. In 2011, after the City included Arambel Business Park in its General Plan, **we made application** to the City for annexation and full entitlement of the business park."

Motion ¶ 5, *Id.* (emphasis added). This testimony focuses on the personal actions of Mr. Hollowell, except to the final reference as to "we made application." It is not clear if the "we" consists of Mr. Hollowell and Debtor, or Mr. Hollowell and Crestmont.

D. 6. **My role was to advise Mr. Arambel** on the entitlement strategy and manage all aspects of the entitlement process, including but not limited to the following:

• **Working with engineering and architectural** firms to timely prepare and submit all necessary entitlement applications, planning documents, and maps;

• **Continuously meeting with City staff**, engineers and architects to promptly respond to and address all documents;

• **Managing the California Environmental Quality Act process** from hiring the necessary consultants to prepare the Environmental Impact Report (the "EIR"), to managing their timelines, reviewing and making comments on the EIR and taking the EIR to Planning Commission and City Council for final approval;

• **Negotiating development agreements** and other required service and entitlements with the City and other administrative bodies and obtaining approvals of the same;

• **Continuously meeting with Planning Commissioners**, City Council members, and Stanislaus Local Agency Formation Commission (the "LAFCO") members; and

• **Attending all public hearings and meetings**, including Planning Commission hearings, City Council meetings, and LAFCO hearings.

Motion ¶ 6, *Id.* (emphasis added).

E. "7. **After seven years of work by Crestmont and the prepetition Debtor**, the LAFCO gave final approval to the entitlement process in December 2013. I then immediately began assisting the prepetition Debtor with the marketing and sale of the business park."

Motion ¶ 7, *Id.* (emphasis added). Here, the Declaration shifts back to Crestmont. Additionally, it is stated that there was seven years of work. The Declaration states that Mr. Hollowell was paid $3,200 per month for services until all the entitlements were obtained. Then, it was switched to a 5% commission/interest.

F. "8. In January 2014, **I began marketing the business park to brokers and developers**. In March 2014, **I successfully negotiated the purchase and sale** of 93 acres to Weeks Robinson for over $15,000,000. This parcel

> of land was slated for a 1.5 million square foot distribution center to be used by Restoration Hardware. **With my knowledge** of the business park's entitlements, **I played a key role** in getting the purchase and sale agreement from execution in April 2014 to escrow closing in June 2014. This transaction happened very fast and I managed all aspects of it. **No brokers were involved with this deal."**

Motion ¶ 8, *Id.* (emphasis added). With the entitlements in place and Mr. Hollowell working on a sale, where there were no other "brokers" representing Debtor, Mr. Hollowell (or Crestmont) getting paid a 5% commission might not sound unreasonable. But where there is a licensed broker getting paid a 5% commission, then Mr. Hollowell's commission then raises the "commissions" for a sale of property with all of the entitlements in place to 10%.

G. "9. **After** the June 2014 **closing**, I **assisted Weeks Robinson in obtaining all of their necessary approvals** from the City of Patterson to construct the 1.5 million-square-foot distribution center and in so doing **made sure that their approvals required that all infrastructure to be installed on their parcel would benefit the remaining parcels in the business park**. My active role in assisting Mr. Arambel and Weeks Robinson allowed for over $5,000,000 in infrastructure improvements to be made to benefit the business park, including the sewer collection and pump station, road improvements, 16-inch water transmission lines plus a future 1.5 million-gallon water tank valued at $4,500,000."

Motion ¶ 9, *Id.* (emphasis added). Here, Mr. Hollowell testifies that he "represented" Debtor in the sale, then the buyer in exercising its rights and interests in the property purchased, but did so in such a way as he "Made sure that their [buyer's] approvals required that all infrastructure to be installed on their parcel would benefit the remaining parcels in the business park." Motion, *Id.* at 3:18–19.

H. "10. **I continued to market the property** throughout **2014, 2015, and 2016**. In 2016, I assisted the prepetition Debtor with the retention of CBRE for expanded reach in the industrial market. That engagement was later moved over to Cushman Wakefield because the brokers left CBRE to go with Cushman Wakefield. Prior to filing of the petition, **I managed the Cushman Wakefield relationship, and I remain actively engaged in the marketing efforts** by having bi-weekly conference calls to discuss the best way to market the property and share market information and prospects. **My intimate knowledge** of the business park's entitlements is invaluable to the marketing process."

Declaration ¶ 10, *Id.* (emphasis added). It appears that Mr. Hollowell or Crestmont was the "listing broker" providing real estate and marketing services until recently. There is nothing in the record to indicate that Crestmont or Mr. Hollowell are licensed real estate brokers or licensed real estate agents.

I. "11. **I worked with Cushman to finalize the 2017** sale of a 56-acre parcel to LBA Realty. **I managed all aspects** of the due-diligence process and closing. **I was a key player** in the prepetition Debtor's execution the March 2017 purchase and sale agreement related to a 107-acre parcel in the business park to PDC Sacramento for approximately $18 million. The proposed end user has certain height requirements which are not standard in many commercial and industrial developments. I worked closely with the City of Patterson to change the height ordinance to permit the height requirements needed by this user to greatly improve our chances of closing the transaction. My relationship with PDC Sacramento was also pivotal in negotiating the post-petition contract for the sale of a 43.2-acre parcel in the business park for approximately $6.5 million. Both of these contracts have been presented to the Court for approval. **My intimate knowledge with the business park's entitlements** and agreements coupled with its relationship with PDC Sacramento is crucial to getting these agreements past the due-diligence phase and into closing."

Motion ¶ 11, *Id.* (emphasis added).

J. "12. **I continue to maintain all the files and documents** related to the business park's entitlements and am well versed in discussing the same with potential buyers. Furthermore, my working relationship with the City of Patterson has a proven success rate as I brought Walmart, Amazon, RH, CVS, Taco Bell and other users to Patterson. In addition, Crestmont has successfully entitled and marketed other projects within the City, including the West Patterson Business Park, Patterson Gardens, Villages of Patterson, and a retail center."

Motion ¶ 12, *Id.* (emphasis added).

Agreement Presented for Approval

The proposed written agreement to replace the represented oral agreement has been filed as Exhibit A in support of the Motion. Dckt. 309. This is titled as a "Consulting Services Agreement, which is effective as of January 17, 2018 (the day this bankruptcy case was filed). This Agreement is just between Crestmont and Debtor in Possession. The "services" to be provided are stated to include, but not be limited to:

"1. Consultant's Responsibilities.

a. Services. The Consultant shall provide Owner certain non-exclusive services, including without limitation, the following (collectively "Services");

> • Assist Owner to obtain all approvals related to the Project by developing and continuing relationships with local regulatory officials and serving as a liaison between local officials and Owner regarding the Project;
>
> • Provide project management and construction management. oversight services for the Project;
>
> • Attend meetings and/or hearings with City of Patterson and Owner as needed to assist in the facilitation of information regarding the Project;
>
> • Manage the real estate brokers and help support· them as they develop a comprehensive marketing plan to sell Property within the Project;
>
> • Any and all services needed to ensure development and sale of Property within the Project;
>
> • Any and all other services agreed to by the Parties in writing."

Agreement, ¶ 1.a.; Dckt. 309 at 3.

The compensation shall be a flat fee of 5% of the gross sales price of each property subject to the agreement that is sold.

The Agreement has an interesting indemnification clause, by which Debtor in Possession would obligate the Bankruptcy Estate and then the post-confirmation Debtor as follows:

> 9. Indemnification. **Regardless of the legal theory or theories alleged**, the **owner shall Indemnify** and **hold harmless the Consultant**, its officers, directors, members, managers successors, and assigns harmless **from and against any and all claims,. actions, damages, costs, fees, fines, penalties, charges, expenses, demands, liabilities, loss or deficiency and obligations of every kind and description**, contingent or otherwise, including, without limitation, attorneys' fees and casts, and expenses incident to any suit, action, claim or proceeding, **directly or indirectly arising out of or resulting from owner's acts or omissions** and the acts **or** omissions of **Owner's** employees, **agents**, **contractors**, or **representatives**."

Agreement ¶ 9, *Id.* (emphasis added). Read literally, Crestmont, as the Owner consultant/agent/contractor/representative is held harmless and indemnified for damages and harms caused by Crestmont, the Owner's consultant/agent/contractor/representative who caused damage and harms.

Nature of Relationship as Presented

Given the multi-year "handshake" relationship stated to exist and the testimony given, the conduct of Crestmont and Hollowell do not indicate that of a third-party consultant or contractor, but that of an owner or a person assigned a portion of the profits of the owner. Merely stating that Crestmont's

portion of the owner's profit will be computed as a percentage of the "gross" sales price is not contrary to such interest in the owner's profit (net monies after true third-party, non-owner interests are paid for the services they rendered). Rather, it merely cuts out all of the potential arguing over what is a reasonable expense to be included in computing the net profit.

The court finds it interesting that Crestmont and Hollowell were paid monthly until all of the entitlements were obtained. Then, with the entitlements in place, then a 5% fee/commission/contingent fee was put in place for the sale of the Property. As repeated a number of times, Mr. Hollowell was paid monthly to get the entitlements in place, and then once in place, it was his "special knowledge" of the entitlements that is used to get the 5% fee/commission/contingent fee when the properties were sold.

The court also notes that Hollowell's testimony is that he and Crestmont actively marketed and "represented" Debtor in selling the real property. There is no evidence presented that Crestmont or Mr. Hollowell were licensed real estate brokers or were licensed real estate agents working for licensed real estate brokers. California Business and Professions Code §§ 10130, 10131, and 10133 (emphasis added) provide:

§ 10130. License requirement; License endorsement; Violation

> **It is unlawful for any person to** engage in the business of, **act in the capacity of**, advertise as, or assume to act as **a real estate broker or a real estate salesperson within this state without first obtaining a real estate license from the department**, or to engage in the business of, act in the capacity of, advertise as, or assume to act as a mortgage loan originator within this state without having obtained a license endorsement.
>
> The commissioner may prefer a complaint for violation of this section before any court of competent jurisdiction, and the commissioner and his or her counsel, deputies, or assistants may assist in presenting the law or facts at the trial.
>
> It is the duty of the district attorney of each county in this state to prosecute all violations of this section in their respective counties in which the violations occur.

§ 10131. "Real estate broker"

> A real estate broker within the meaning of this part is a **person** who, **for a compensation** or in **expectation of a compensation**, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:
>
> > (a) **Sells or offers to sell**, buys or offers to buy, **solicits prospective sellers or purchasers** of, **solicits or obtains listings of**, or **negotiates the purchase, sale or exchange of real property** or a business opportunity.

(b) **Leases or rents or offers to lease or rent**, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

(e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

§ 10133. Persons and services excluded

(a) The acts described in Section 10131 are not acts for which a real estate license is required if performed by:

(1) **A regular officer** of a corporation or a **general partner** of a partnership **with respect to real property owned** or leased **by the corporation or partnership**, respectively, or in connection with the proposed purchase or leasing of real property by the corporation or partnership, respectively, if the acts are not performed by the officer or partner in expectation of special compensation.

(2) A **person holding a duly executed power of attorney** from the owner of the real property with respect to which the acts are performed.

(3) **An attorney at law** in rendering legal services to a client.

(4) **A receiver, trustee in bankruptcy or other person acting under order of a court** of competent jurisdiction.

(5) A **trustee for the beneficiary of a deed of** trust when selling under authority of that deed of trust.

> (b) The **exemptions** in subdivision (a) are **not applicable to a person** who uses or attempts **to use them for the purpose of evading the provisions of this part**.

If Crestmont has an interest in the property, or the net proceeds, then there could appear to be an argument that the prior listing, marketing, and sale activities, may not have been consistent with the law. But it would also mean that Crestmont and Hollowell do not get to be paid like a creditor, but as having some type of interest in the net proceeds—after creditors (secured and unsecured) who effectively financed the Debtor/Crestmont/Hollowell development of the Property are paid.

With Debtor having hired Cushman & Wakefield as its licensed real estate broker and now Debtor in Possession being authorized to hire Cushman & Wakefield as the licensed real estate broker for the fiduciary Debtor in Possession, giving Crestmont and Mr. Hollowell an additional 5% fee/commission/continent fee effectively creates a 10% real estate commission arising from the sale. There has been no showing that a 10% real estate commission is warranted.

Further, the testimony shows that Crestmont and Mr. Hollowell were paid $3,200 per month to do all of the entitlement work and to obtain all of the specialized information of Debtor and now the Bankruptcy Estate for which the additional 5% fee/commission/continent fee is justified/demanded. With that information in place (having been paid to so "learn") and paying Cushman & Wakefield a 5% commission, if Crestmont and Mr. Hollowell work for a year on a $15,000,000 sale of property, then Crestmont and Mr. Hollowell would demand payment of $750,000 as the 5% fees/commission/contingent fee, rather than the $38,400 in $3,200 per month payments that were warranted when it was doing the "hard work" of continuously meeting, and working, and justifying, and structuring everything necessary to get the entitlements in place so a licensed real estate broker can find a buyer for and handle a sale of the Property. Clearly, the $750,000 is not for the additional work done, but a portion of Debtor's equity in the development after the creditors are paid.

The court also finds it interesting that this multi-million dollar development agreement, the marking and sale of property by Crestmont and Mr. Hollowell, and the conversion to a 5% fee/commission/contingent fee was not in writing. That there is no correspondence or writing documenting any terms is strange. That Debtor in Possession fails to provide his testimony in support of the Motion catches the court's attention. That there is nothing more than Mr. Hollowell testifying that he or Crestmont should be paid 5% of the gross sales price, on top of the 5% paid to the licensed real estate broker is unusual. FN.1

FN.1. Debtor in Possession, Crestmont, Mr. Hollowell, and their respective counsel may also want to consider the California Statute of Frauds and how it applies to the conduct of the parties pre- and post-petition. CAL. CIV. CODE § 1624. This directly affects what "agreement" may exist that can be "assumed" as requested in the Motion.

The Motion is denied.

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

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

The Motion to Assume filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Assume is denied, and Debtor in Possession is not authorized to assume any Consulting Services Agreement with Crestmont Development, LLC, filed as Exhibit A (Dckt. 309) or stated orally, as may have been asserted to exist.

This denial is without prejudice to any rights or interests Crestmont Development, LLC or Joseph B. Hollowell III, separately or jointly, acquired pursuant to any real estate development agreements they had with Debtor, to the extent that such agreements are enforceable and permissible under applicable law.

14. 18-90029-E-11 JEFFERY ARAMBEL
MF-18 Reno Fernandez

MOTION TO EMPLOY CRESTMONT DEVELOPMENT, LLC AS CONSULTANT(S)
5-15-18 [311]

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 creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 15, 2018. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, 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, ----------.

The Motion to Employ is denied.

Jeffery Arambel ("Debtor in Possession") seeks to employ Crestmont Development, LLC ("Consultant") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Consultant to manage the Arambel Business Park through the California entitlement process.

Debtor in Possession argues that Consultant's appointment and retention is necessary to assist Debtor in Possession obtaining approvals for the business park from regulatory officials, to provide project and construction management oversight, to manage real estate brokers, and to report on City of Patterson meetings. Debtor in Possession proposes to pay Consultant a 5.00% fee going forward of the gross sales price of each real property sold at the Arambel Business Park running through December 31, 2024.

Debtor in Possession argues that Consultant's employment should be approved retroactively as of the petition date—January 17, 2018—because Consultant has provided due diligence services that have advanced proposed sales of property.

Joseph Hollowell, III, owner of Crestmont Development, LLC, testifies that he manages the full entitlements at Arambel Business Park, representing 825 acres. He testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Denial of Motion to Assume Pre-Petition Contract

The court has denied the request of Debtor in Possession to "assume" an alleged pre-petition "oral contract' between Crestmont Development, LLC ("Crestmont") and Debtor. The court's concerns, analysis, and observations are about the actual relationship between Crestmont Development, LLC, Joseph B. Hollowell III (managing member of Crestmont), and Debtor. Rather than being an arms' length service provider, the nature of the relationship is more akin to Crestmont or Hollowell having an interest in the profits generated from the sale of Properties owned by Debtor.

As with the prior Motion to Assume, Debtor in Possession offered no testimony in support of the employment. Rather, it is left to Mr. Hollowell to testify. In his current Declaration, Mr. Hollowell describes his experiences as a developer (not a licensed real estate broker or licensed real estate agent). In substance, it appears that Mr. Hollowell asserts the right to receive 5% of the gross sales price for the Property because of all the knowledge and information he has gained over the years in obtaining the entitlements (for which Crestmont and he were paid $3,200 per month for the services). Having obtained that information, and holding all the books and records pertaining to such entitlements, he asserts that he and Crestmont are entitled to a 5% commission when the licensed real estate broker is able to consummate a sale of any of the Property.

The court incorporates herein its ruling on the Motion to Assume, which is set forth in the Civil Minutes for the May 31, 2018 hearing for said Motion, DCN: MF-17.

Denial of Motion to Employ

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Consultant, considering the declaration demonstrating that Consultant does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court denies the motion to employ Crestmont Development, LLC, as Consultant for the Chapter 11 Estate. The present Motion and supporting evidence are consistent with that in the Motion to Assume—Crestmont and Mr. Hollowell (to the extent he asserts a separate right) have moved beyond being an independent contractor and now appear to be claiming a right in the profits generated from the sale of the Property. As discussed in the prior Motion, merely saying that the 5% is computed on the gross sales amount does not mean that it is not part of Debtor's profit. Computing on the gross amount is a convenient device to avoid disputes over what should be considered a *bona fide* expense so far as dividing the "profit" from the sale.

From the evidence presented, Crestmont and Mr. Hollowell have moved from being employed to being a "co-developer" with Debtor, using the services of others to generate a profit. Crestmont and Mr. Hollowell may recover their 5%, to the extent that such a contract exists and is enforceable under applicable law, but do so after the actual creditors who made the profit possible are paid.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is denied, and Debtor in Possession is not authorized to employ Crestmont Development, LLC, as Consultant for Debtor in Possession
>
> This denial is without prejudice to any rights or interests Crestmont Development, LLC or Joseph B. Hollowell III, separately or jointly, acquired pursuant to any real estate development agreements they had with Debtor, to the extent that such agreements are enforceable and permissible under applicable law.

15. 18-90029-E-11 JEFFERY ARAMBEL
MF-12 Reno Fernandez

CONTINUED MOTION TO SELL FREE AND CLEAR OF LIENS
4-5-18 [200]

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 in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on April 5, 2018. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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.

The Motion to Sell Property is granted.

The Bankruptcy Code permits Jeffery Arambel, Debtor in Possession, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell a portion of the Arambel Business Park comprising approximately 42.3 acres of land near the intersection of Rodgers Road and Keystone Pacific Parkway in Patterson, California (being all of APN 021-022-055 and [non-specified] portions of APNs 021-022-061 and 021-022-062) (the "Property"). FN.1.

FN.1. The court notes that both the Motion and Purchase and Sale Agreement do not identify what "portions" of APNs 021-022-061 and 021-022-062 are to be purchased. It appears that the proposed deed, Schedule 12(a)(I) to the Purchase and Sale Agreement (Dckt. 206 at 31), states that Exhibit A to the deed (which exhibit is not provided) will "depict" the property sold. Presumably, such depiction will be consistent with the general, non-specific representation of the property sold in the Motion and the Purchase and Sale Agreement. However, very expensive, long litigation has flowed from substantially less ambiguity.

The introduction to the Motion also makes reference to there being an "Option to purchase additional ±30.0 acres of Arambel Business Park ([non-specific] Portions of APNs 021-022-061 and 021-022-062)." Motion, Dckt. 200 at 1:23. No sales price for the additional ±30.0 acres subject to the option is stated at this part of the Motion.

The Motion further requests authorization to pay all commissions, taxes, and closing costs, which commissions include the real estate broker's commission of 5% to Cushman & Wakefield and a project managment commission of 5% to Crestmont Development, LLC. As discussed below, the court has authorized the employment of Cushman & Wakefield, and the payment of the 5% commission to the licensed real estate broker (which may be divided with other real estate brokers representing other parties to the transaction) is authorized to be paid.

However, Debtor in Possession has not been authorized to employ Crestmont Development, LLC, nor has Debtor in Possession been authorized to assume any alleged oral pre-petition contract. No payment to Crestmont Development, LLC is authorized.

APRIL 26, 2018 HEARING

At the hearing, Debtor in Possession's counsel noted that the wrong purchase and sale agreement was attached to the Motion—one in which the reported option was not included. Dckt. 261. Counsel stated that the correct version would be filed with supplemental exhibits.

Counsel also disclosed that a third-party has a right of first refusal to purchase a portion of the property to be sold. Debtor in Possession and other parties in interest were ordered to file supplemental pleadings addressing that point and how it needs to be accounted for at the continued hearing.

At the hearing, Debtor in Possession reported that the request for waiver of the fourteen-day stay of enforcement was being dropped because it is not necessary for the sale as proposed.

The court continued the hearing to 10:30 a.m. on May 8, 2018.

CREDITOR'S RESPONSE

LBA RV-COMPANY XXVII, LP ("Creditor") filed a Response on May 3, 2018. Dckt. 274. Creditor discloses that it holds a pre-petition, recorded right of first refusal. Creditor reports that Debtor in Possession contacted Creditor on May 2, 2018, to communicate that the right of first refusal was being revoked and to announce that an amended purchase offer was being proposed.

Creditor prays that the court deny the Motion without prejudice until Debtor in Possession complies with the right of first refusal.

MAY 8, 2018 HEARING

At the hearing, the court announced that the hearing had been continued by prior order to 10:30 a.m. on May 31, 2018. Dckt. 294.

DEBTOR IN POSSESSION'S SUPPLEMENTAL DECLARATION

Debtor in Possession filed a Supplemental Declaration on May 7, 2018. Dckt. 286. Debtor in Possession states that the terms of the Option are included in Section 35 of the purchase agreement and that a "conceptual site plan" has been filed as Exhibit 10 to show the approximate boundaries of the Property to be sold and of the property affected by the Option. *See* Dckt. 287.

Debtor in Possession states that after the April 26, 2018 hearing, he discussed the sale with PDC Sacramento and agreed to amend the purchase agreement by increasing the purchase price and reducing the due diligence period, among other changes. *See* Exhibit 9, *id.*

Debtor in Possession notes that he provided a right of first refusal to Creditor that is affected by this sale. He states that under the terms of the right of first refusal, Creditor has seven business days to exercise its right once notice has been provided, which Debtor in Possession states happened on May 2, 2018, for the proposed amended sale. *See* Exhibit 13, *id.*

Debtor in Possession also notes that the California Employment Development Department recorded a release of its post-petition lien on April 17, 2018, recorded in Stanislaus County. *See* Exhibit 14, *id.*

REVIEW OF MOTION

The Motion states that the proposed purchaser of the Property is PDC Sacramento, LLC, and the terms of the sale are:

A. Estimated purchase price of $6,446,678 at $3.50 per square foot;

B. The final boundaries of the Property will be determined by the Final Survey, as defined by the Purchase and Sale Agreement;

C. Deposit of $50,000.00 paid into escrow during initial deposit;

D. At the end of a due-diligence period, PDC Sacramento will deposit an additional $50,000.00 for a total of $100,000.00;

E. A 5% broker's commission to Cushman & Wakefield;

F. A 5% project-management commission to Crestmont Development LLC;

G. Sale free and clear of the liens of senior secured lien "Metlife" and substantially pay down the junior lien "Summit";

H. The due-diligence period shall end 120 days after entry of the court's order approving the sale, and the sale shall close within thirty days of the ending of the due-diligence period; and

I. Escrow fees, recording fees, transfer taxes, and other closing costs not to exceed 1.5% of the gross purchase price.

With respect to the Option, the Motion states that subject to the same terms as for the sale of the Property,

A. PDC Sacramento will have an option through March 1, 2019, to purchase an additional approximately 30 acres on the same terms as this sale, except that the option shall only have a thirty-day due-diligence period followed by a thirty-day closing period;

B. The optional purchase has a sales price of $3.50 per square foot, for an estimated total sales price of $4,573,800. The land covered by the option is immediately adjacent to the north boundary line of the Property; and

C. PDC Sacramento must give written notice of its intent to exercise the option not later than 60 days before March 1, 2019.

From the Motion, the exact property subject to the Option is not clearly identified. Movant has provided supplemental exhibits that include the missing language that clarifies how the Option affects the proposed sale. *See* Exhibit 9 at § 35, Dckt. 287.

Proposed Amendment to the Sale

The proposed amendment to the sale contains three key changes to the original agreement. First, the purchase price is now agreed to calculated at $3.75 per square foot after the final survey of total square footage. Second, the inspection date (due diligence period referred to by Debtor in Possession) has been reduced from 120 to 15 days following the effective date, which, third, has been changed from the date of court approval to the date of signed amendment—May 1, 2018. Exhibit 11, *id.*

Sale Free and Clear

The Motion seeks to sell the Property free and clear of the lien of Metlife and Summit. The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

> "(f) The trustee [or debtor in possession] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f)(1)–(5).

For this Motion, Movant asserts that Metropolitan Life Insurance Co., SBN V Ag I LLC, and Employment Development Department ("Creditors") are likely to consent to such a sale. This proposed sale is likely to benefit the estate by substantially paying down MetLife's senior secured lien on the Property, if it has not already been done with the associated sale of 107 acres of the Arambel Business Park, in which case, it will also substantially pay down Summit's junior lien. Movant argues that this will reduce the claims against other assets of Debtor, which secure the liens and claims of other creditors.

Additionally, Movant argues that the court should authorize the sale free and clear of the EDD's lien because its interest is subject to a *bona fide* dispute. The EDD did not record its lien until January 24, 2018, several days after Debtor filed its voluntary bankruptcy petition in this case. Movant asserts that this lien is void because it violated the automatic stay.

Real Estate Commission

The real estate broker that Debtor in Possession has been authorized to employ is Cushman & Wakefield U.S., Inc., for which the real estate commission (subject to 11 U.S.C. § 328) is 5%. To pile an additional 5% commission for Crestmont Development LLC for working on the transaction would drive the costs just for the "real estate commissions" to 10%. No showing has been made for there being a 10% commission.

The court addresses in the ruling denying the Motion to Assume (the alleged oral consulting agreement) Contract with Crestmont Development, LLC some of the series deficiencies in the legal and evidentiary basis for such a contract. Civil Minutes for May 31, 2018 hearing, DCN:MF-17.

No payment to Crestmont Development, LLC is authorized.

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

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

The Motion to Sell Property filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Jeffery Arambel, Debtor in Possession, is authorized to sell pursuant to 11 U.S.C. § 363(b), (f)(2) and (f)(4) to PDC Sacramento, LLC, or its assignee ("Buyer"), the unincorporated property commonly known as a portion of the Arambel Business Park comprising approximately 42.3 acres of land near the intersection of Rodgers Road and Keystone Pacific Parkway in Patterson, California (being all of APN 021-022-055 and portions of APNs 021-022-061 and 021-022-062) ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $3.75 per square foot for approximately $6,909,705.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit 1, Dckt. 206; First Amendment, Exhibit 11, Dckt. 287; and as further provided in this Order.

B. The Property is sold free and clear of the liens of Metropolitan Life Insurance Co., SBN V Ag I LLC, and Employment Development Department, creditors asserting secured claims, pursuant to 11 U.S.C. § 363(f)(2) and (f)(4), with the liens of such creditors attaching to the proceeds in the same priority and amount as the liens existed against the Property. Debtor in Possession shall hold the sale proceeds; after payment of the closing costs, other secured claims, and amount provided in this order; pending further order of the court.

C. The sale proceeds shall first be applied to closing costs, real estate commissions (to the extent expressly authorized below in this order), prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

D. Debtor in Possession is authorized to execute any and all documents reasonably necessary to effectuate the sale.

E. Debtor in Possession is authorized to pay a real estate broker's commission to Cushman & Wakefield U.S., Inc, in an amount not to exceed five percent (5%) of the actual purchase price upon consummation of the sale, which may be divided with other licensed real estate brokers representing Buyer.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) ~~is not waived for cause~~.

IT IS FURTHER ORDERED that this Order authorizing the sale of Property pursuant to the terms and conditions of the Purchase Sale Agreement (Exhibit 1) is only for the property identified above in this Order, and the court does

not authorize an option agreement for the purchase and sale of any other real or personal property.

IT IS FURTHER ORDERED that this court retains exclusive federal jurisdiction (28 U.S.C. § 1334(e)) over the Property to be sold, identifying the property to be sold as authorized by the Order, identifying the property to be sold in the Purchase and Sale Agreement, interpretation of the Purchase and Sale Agreement, all claims for damages from or enforcement of the Purchase and Sale Agreement, and each and every other issue, claim, defense, or right, without limitation, relating to the Purchase and Sale Agreement, performance thereof, and this Order.

16. 18-90029-E-11 JEFFERY ARAMBEL — MOTION TO EMPLOY JUDITH G. CALLAWAY AS ACCOUNTANT(S)
MF-16 Reno Fernandez — 5-3-18 [266]

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.

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 creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 3, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is xxxxxxxxxxxxxxx.

Jeffery Arambel ("Debtor in Possession") seeks to employ Judith Callaway ("Accountant") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in

Possession seeks the employment of Accountant to provide bookkeeping services for the period January 1, 2017, through December 31, 2017, and to prepare federal and California individual tax returns.

Debtor in Possession argues that Accountant's appointment and retention is necessary to prepare tax returns and ongoing reporting as ordered by the court, while providing assistance to Arch & Beam Global, LLC, in its role as a restructuring and financial advisor.

Judith Callaway, a Certified Public Accountant of Judith G. Callaway, CPA, testifies that she has agreed to provide bookkeeping services for the 2017 calendar year and to prepare federal and state tax returns. She testifies she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Term of Employment

The Motion seeks to "prospectively" employ the Accountant for the 2017 Calendar year. However, it is currently 2018, with this bankruptcy case having been filed on January 17, 2018. Thus, it is an impossibility for Accountant to provide "bookkeeping services for 1/1/17 through 12/31/17." Motion, Dckt. 266 at 2:2–3.

It may be that Debtor in Possession is seeking to employ the Accountant to reconstruct (or construct) the 2017 books and records for the Bankruptcy Estate. That may be necessary to prepare and file the 2017 state and federal tax returns.

Or it may be that Debtor in Possession is seeking to employ the Accountant for the 2018 fiscal year and to prepare the 2018 federal and state tax returns.

At the hearing, Counsel for the Debtor in Possession explained **xxxxxxxxxxxxxxxxxxxx**.

$5,000 Retainer

The Motion seeks authorization for Debtor in Possession to pay, and for Accountant to receive, a $5,000 Retainer. The necessary grounds for a retainer to secure the future payment of Accountant's fees, rather than having Debtor in Possession promptly paying Accountant's fees when allowed by the court, is stated with particularity in the Motion as follows:

> 13. Payment of the retainer is necessary in order to obtain a competent accountant to assist in the administration of the within case. Bankruptcy Code Section 105(a) provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. The proper administration of the case is in the best interests of the estate.

Motion ¶ 13, Dckt. 266.

That generic statement does not identify particular grounds why a retainer is necessary. The $5,000 retainer does not reflect such substantial work by Accountant that there is a substantial amount at risk for providing the services. The Motion does not identify the source of the retainer monies, other than as "unencumbered monies of the bankruptcy estate."

The last Monthly Operating Report Filed, on April 26, 2018, for the month of January 2018 (amended), shows income totaling $7,000 in the form of "gift income from sister." Dckt. 259. Debtor in Possession does not appear to have $5,000 to pay a retainer, if the court were to approve such.

Even if authorized to pay, Accountant will have to hold the retainer until the court approves interim or final fees. As stated in the Motion, the hourly billing rates for various persons in the office will be $85–$215 per hour. The bookkeeping services are to be $85 per hour. For preparing the 2017 tax returns, the services are to be billed at $215.00 per hour.

At the hearing, Counsel for Debtor in Possession explained xxxxxxxxxxxxxxxxxxxx.

~~Taking into account all of the relevant factors in connection with the employment and compensation of Accountant, considering the declaration demonstrating that Accountant does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Judith G. Callaway as Accountant for the Chapter 11 Estate on the terms and conditions set forth in the Engagement Letter re: Employment Agreement filed as Exhibit B, Dckt. 269. Approval of the retainer is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.~~

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

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

The Motion to Employ filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Judith Callaway as Accountant for Debtor in Possession on the terms and conditions as set forth in the Engagement Letter re: Employment Agreement filed as Exhibit B, Dckt. 269.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by Accountant in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

17. **18-90030-E-11** **FILBIN LAND & CATTLE CO., INC.** **MOTION TO EMPLOY JUDITH G. CALLAWAY AS ACCOUNTANT(S)**
MF-9 **Michael St. James** **5-3-18 [148]**

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.

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 creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 3, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is xxxxxxxxxxxxxxx.

Filbin Land & Cattle Co., Inc. ("Debtor in Possession") seeks to employ Judith Callaway ("Accountant") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Accountant to provide bookkeeping services for January 1, 2017, through December 31, 2017, and to file federal and state tax returns.

Debtor in Possession argues that Accountant's appointment and retention is necessary to prepare tax returns, to provide ongoing reports ordered by the court, and to assist Arch & Beam Global, LLC, in restructuring with accounting issues. Debtor in Possession seeks to compensate Account with a $5,000.00 retainer.

Judith Callaway, a Certified Public Accountant of Judith G. Callaway, CPA, testifies that she will provide bookkeeping services and tax preparation for the 2017 calendar year. She testifies she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Term of Employment

The Motion seeks to "prospectively" employ Accountant for the 2017 Calendar year. However, it is currently 2018, with this bankruptcy case having been filed on January 17, 2018. Thus, it is an impossibility for Accountant to provide "bookkeeping services for 1/1/17 through 12/31/17." Motion, Dckt.148 at 2:2–3.

It may be that Debtor in Possession is seeking to employ Accountant to reconstruct (or construct) the 2017 books and records for the Bankruptcy Estate. That may be necessary to prepare and file the 2017 state and federal tax returns.

Or it may be that Debtor in Possession is seeking to employ Accountant for the 2018 fiscal year and to prepare the 2018 federal and state tax returns.

At the hearing, Counsel for the Debtor in Possession explained **xxxxxxxxxxxxxxxxxxxx**.

$5,000 Retainer

The Motion seeks authorization for Debtor in Possession to pay, and for Accountant to receive, a $5,000 Retainer. The necessary grounds for a retainer to secure the future payment of Accountant's fees, rather than having Debtor in Possession promptly paying Accountant's fees when allowed by the court, is stated with particularity in the Motion as follows:

> 13. Payment of the retainer is necessary in order to obtain a competent accountant to assist in the administration of the within case. Bankruptcy Code Section 105(a) provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. The proper administration of the case is in the best interests of the estate.

Motion ¶ 13, Dckt. 148.

That generic statement does not identify particular grounds why a retainer is necessary. The $5,000 retainer does not reflect such substantial work by Accountant that there is a substantial amount at

risk for providing the services. The Motion does not identify the source of the retainer monies, other than as "unencumbered monies of the bankruptcy estate."

The last Monthly Operating Report Filed, on April 26, 2018, for the month of January 2018 (amended), shows income totaling $7,000 in the form of "gift income from sister." Dckt. 259. Debtor in Possession does not appear to have$5,000 to pay a retainer, if the court were to approve such.

Even if authorized to pay, Accountant will have to hold the retainer until the court approves interim or final fees. As stated in the Motion, the hourly billing rates for various persons in the office will be $85–$215 per hour. The bookkeeping services are to be $85 per hour. For preparing the 2017 tax returns, the services are to be billed at $215.00 per hour.

At the hearing, Counsel for Debtor in Possession explained xxxxxxxxxxxxxxxxxxxx.

~~Taking into account all of the relevant factors in connection with the employment and compensation of Accountant, considering the declaration demonstrating that Accountant does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Judith Callaway as Accountant for the Chapter 11 Estate on the terms and conditions set forth in the Engagement Letter re: Employment Agreement filed as Exhibit B, Dckt. 151. Approval of the retainer is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.~~

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

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

~~The Motion to Employ filed by Filbin Land & Cattle Co., Inc. ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Judith Callaway as Accountant for Debtor in Possession on the terms and conditions as set forth in the Engagement Letter re: Employment Agreement filed as Exhibit B, Dckt. 151.~~

~~**IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.~~

~~**IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.~~

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by Accountant in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

18. **18-90029-E-11** **JEFFERY ARAMBEL**
MF-19 **Reno Fernandez**

MOTION TO EXTEND EXCLUSIVITY PERIOD FOR FILING A CHAPTER 11 PLAN AND MOTION/APPLICATION TO EXTEND EXCLUSIVITY PERIOD FOR FILING A CHAPTER 11 PLAN AND DISCLOSURE STATEMENT FILED BY DEBTOR JEFFERY EDWARD ARAMBEL 5-17-18 [322]

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.

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 creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 17, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Disclosure Statement was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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, ----------.

The Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Disclosure Statement is xxxxxxxxxxxxxxx.

Jeffery Arambel ("Debtor in Possession") requests that the court extend the time period in 11 U.S.C. § 1121(b) & (c)(3) by 120 days pursuant to 11 U.S.C. §§ 105(a) and 1121(d). Debtor in Possession argues that this is a large case (more than $200 million in assets and $50 million in debt) that has several sales of real property either closing or pending. In particular, Debtor in Possession stresses that the non-governmental claim deadline passed recently, and several claims were filed around it, including one claim for $40 million that Debtor in Possession has not had sufficient time to analyze.

APPLICABLE LAW

In his Mothorities (FN.1), Debtor in Possession does not direct the court to any provision under Chapter 11 as the basis for the relief requested, but relies on 11 U.S.C. § 105(a), which states:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate **to carry out the provisions of this title**. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (emphasis added). The court's power under Section 105(a) must be tied to another section of the Bankruptcy Code, according to the provisions set forth by Congress.

FN.1. The term "Mothorities" is one used by this court when counsel eschew following the Local Bankruptcy Rules, in this case 9004-1, and do not prepare a separate motion and a separate points and authorities, but exempt themselves from the Local Bankruptcy Rules and stitch together a Frankenstein's monster "Mothorities," combining the arguments, citations, and quotations of a points and authorities into the required grounds stated with particularity in the motion (Federal Rule of Bankruptcy Procedure 9013).

Debtor in Possession does not direct the court to the provisions of 11 U.S.C. § 105(d), in which Congress provides that the district court or bankruptcy court judge before whom the bankruptcy case is pending:

> (d) The court, on its own motion or on the request of a party in interest–
>
> (1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and
>
> (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that–
>
> (A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or
>
> (B) in a case under chapter 11 of this title–
>
> **(I) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;**

> (ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;
>
> **(iii) sets the date by which a party in interest other than a debtor may file a plan;**
>
> (iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;
>
> (v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or
>
> (vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 105(d) (emphasis added). Though not cited to by Debtor in Possession, the court considers this basis, in addition to the "hail mary" provisions of 11 U.S.C. § 105(a).

11 U.S.C. § 1121 creates statutory deadlines and dates when persons other than the debtor in possession may file a plan, and 11 U.S.C. § 105(d) provides a statutory basis for the court to modify those dates.

Section 1121 states, in part:

> (b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.
>
> . . . .
>
> (d) (1) Subject to paragraph (2), on request of a party in interest made within the respective periods specified in subsection (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.
>
> (2) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.

11 U.S.C. § 1121(b), (d). A party moving for the period to be extended must establish that there is cause for an extension. *See In re New Meatco Provisions, LLC*, No. 2:13-bk-22155-PC, 2014 Bankr. LEXIS 914, at *7–8 (Bankr. C.D. Cal. March 10, 2014) (citing *In re Dow Corning Corp.*, 208 B.R. 661, 663 (Bankr.

E.D. Mich. 1997); *In re Newark Airport/Hotel Ltd. P'ship*, 156 B.R. 444, 451 (Bankr. D.N.J. 1993), *aff'd*, 155 B.R. 93 (D.N.J. 1993)).

Determining whether cause exists depends upon the facts presented to the court. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 352 B.R. 578, 586 (Bankr. S.D.N.Y. 2006). A number of factors may indicate cause, including:

A. The size and complexity of a case;

B. The necessity of sufficient time to permit a debtor to negotiate a plan of reorganization and to prepare adequate information;

C. The existence of good faith progress toward reorganization;

D. Whether a debtor is paying bills as they become due;

E. Whether a debtor demonstrates reasonable prospects for filing a viable plan;

F. Whether a debtor has made progress in negotiating with creditors;

G. How much time as elapsed in the case;

H. Whether a debtor seeks an extension to pressure creditors into submitting to demands; and

I. Whether an unresolved contingency exists.

208 B.R. at 664–65; *see also Official Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem'l Hosp. (In re Henry Mayo Newhall Mem'l Hosp.)*, 282 B.R. 444, 452 (B.A.P. 9th Cir. 2002) (explaining that there are several factors analyzed commonly upon an extension request).

OPPOSITION OF AMERICAN AGCREDIT, FLCA

American Agcredit, FLCA ("Agcredit") filed an Opposition. Agcredit notes the following:

A. Debtor in Possession has not filed timely Monthly Operating Reports.

B. Agcredit believes that Debtor in Possession has listed Agcredit's collateral for sale at a grossly overstated price. Agcredit is further "annoyed" (court phraseology) because Debtor in Possession has not communicated with Agcredit about such marketing and sale.

C. Debtor's and Debtor in Possession's filings in support of attempts to consolidate this case with the related Filbin Land Company case contained materially inaccurate facts.

D. The records show that Debtor suffered substantial losses in the years leading up to the filing of this case and attempted to borrower his way out of it.

E. The Bankruptcy Estate has no source for meaningful income, with the liquidation of assets as being the only avenue for reorganization.

F. It appears that there is no farming operation ongoing for the Bankruptcy Estate.

G. Debtor, who is serving as Debtor in Possession, has historically overvalued his properties and has been unable to sell properties.

Opposition, Dckt. 344.

DISCUSSION

Here, Debtor in Possession stresses the size of this case in terms of assets and debt, both many millions of dollars. Debtor in Possession argues that at least one professional employed in this case has not sufficient time to completely help Debtor in Possession negotiations and preparing financial disclosures, reports, and projections for Chapter 11 plan. Debtor in Possession argues that good faith exists as evidenced by several sales of property that have been occurring in this case.

In negotiating with creditors, Debtor in Possession demonstrates that negotiations with at least one creditor have resulted in sale proceeds being released in satisfaction of certain claims. There are additional sales pending that could result in more proceeds for funding a plan. Finally, this case has been pending for 134 days, and Debtor in Possession submitted its request for extension exactly 120 after the case was filed.

Agcredit is not unfounded in its opposition. Debtor did not get this case started effectively. He stumbled, signed documents under penalty of perjury that clearly were not accurate, and effectively treated this as an "average" bankruptcy case—not one with purported hundreds of millions of dollars of assets. As the court noted, lead counsel for Debtor and Debtor in Possession "got too far out over his skis" to pushing paper that he thought needed to be filed.

Initially, the court thought that some of this could well be based on different "practices" in a neighboring District. However, reviewing the rules and procedures in that District disabused the court of such a possible explanation.

Here, Debtor in Possession has made some headway, eventually hiring professionals to develop a plan, to effectively market property, to proceed with the orderly restructuring (even if by partial liquidation) of this estate and the estate in the related Filbin Land Company case.

But Debtor in Possession continues to be challenged in the prosecution of this and the related case (for which he is the responsible representative of that debtor in possession). In this case, the last monthly operating report is for January 2018, the month in which this case was filed. The Amended January 2018 Monthly Operating Report shows that the only income to the Estate in this case has been a $7,000 gift in January 2018 from Debtor's sister. Dckt. 259 at 2.

In the Filbin Land and Cattle case, there has only been one Monthly Operating Report filed, that being for January 2018. 18-90030, Dckt. 42. From a review of that Monthly Operating Report, the court is unsure what income the Filbin bankruptcy estate had in January 2018.

In the present case, Debtor in Possession has struggled through several motions, including the ones seeking to assume an oral contract, orally amended, to provide for payment of a 5% fee/commission/contingent fee to Crestmont Development, LLC or Joseph B. Hollowell III. Crestmont claims to have control of the information concerning the entitlements for the Estate's properties, Debtor having paid Crestmont and Hollowell monthly to assist Debtor in obtaining those rights. Crestmont and Hollowell (who are not licensed real estate brokers or agents) purport to have marketed and sold real property of Debtor pre-petition.

Notwithstanding those "challenges," Debtor, serving as Debtor in Possession, and his attorneys have rallied, obtained the services of various necessary professionals, and have made some progress to obtaining sales of several properties. Conversely, Debtor in Possession appears to also be slogging through "routinely asking for relief, because . . . . . "

There do not appear to be any creditors "chomping at the bit" to advance a creditor's plan. A core of creditors appear to recognize the "headway" being made by the debtors in possession in the two related cases.

While big in dollars, the concepts in this case do not appear as complex as feared by Debtor in Possession. It is accurate that approximately six weeks ago the court authorized the employment of the professionals that appear to be key to getting the economic foundation in place for any plan.

However, Debtor in Possession has not come forward with testimony in support of this Motion. The business professionals hired have not come forward with testimony in support of this Motion. Rather, it is merely counsel arguing points. As with the early motions to substantively consolidate this and the related case (without any accurate schedules filed or evidence provided) or to have the cases administered through one case, this appears to be the "standard" motion whereby a debtor in possession asks for "more time" to hold everyone on the sidelines.

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**.

Debtor in Possession requested an extension 120 days after the case was filed, the very last day to comply with 11 U.S.C. § 1121(d)(1), and there is cause to extend the exclusivity period for Debtor in Possession to file a plan of reorganization. The Motion is granted, and the exclusivity period of 11 U.S.C. § 1121(b) for Debtor in Possession to file a plan of reorganization and disclosure statement is extended 120 days through September 14, 2018. The exclusivity period of 11 U.S.C. § 1121(c)(3) is extended through November 13, 2018.

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 Extend Exclusivity Period filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Extend Exclusivity Period is granted, and the exclusivity period of 11 U.S.C. § 1121(b) for Debtor in Possession to file a plan of reorganization and disclosure statement is extended 120 days through September 14, 2018.

IT IS FURTHER ORDERED that the exclusivity period of 11 U.S.C. § 1121(c)(3) is extended for Debtor in Possession through November 13, 2018.

19. 18-90029-E-11 JEFFERY ARAMBEL — MOTION TO EMPLOY BRAUN INTERNATIONAL AS APPRAISER(S)
MF-20 Reno Fernandez — 5-17-18 [326]

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 creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 17, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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, ----------.

The Motion to Employ is granted.

Jeffery Arambel ("Debtor in Possession") seeks to employ Braun International ("Appraiser") pursuant to Local Bankruptcy Rule 9014-1(f)(2) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Appraiser to provide valuation services for two ranch properties.

Debtor in Possession argues that Appraiser's appointment and retention is necessary to value properties with an eye toward future motions under 11 U.S.C. § 506(a). Debtor in Possession seeks to employ Appraiser for a flat fee of $14,400.00.

Anthony Fitzgerald, a director of Braun International, testifies that he will lead the appraisal of two ranch properties totaling more than seven thousand acres of land based upon his experience and certifications for appraising land. He testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Appraiser, considering the declaration demonstrating that Appraiser does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Braun International as Appraiser for the Chapter 11 Estate on the terms and conditions set forth in the Agreement for Valuation Services filed as Exhibit A, Dckt. 329. Approval of the retainer is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Braun International as Appraiser for Debtor in Possession on the terms and conditions as set forth in the Agreement for Valuation Services filed as Exhibit A, Dckt. 329.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by Appraiser in connection with this matter, regardless of

whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

20.	**16-90139-E-7** **BJ-10**	**AJAVA SYSTEMS, INC.** **David Johnston**	**MOTION FOR COMPENSATION FOR CAPITOL DIGITAL DOCUMENT SOLUTIONS LLC, OTHER PROFESSIONAL(S)** **4-26-18 [230]**

Final Ruling: No appearance at the May 31, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 26, 2018. 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.

Capitol Digital Document Solutions LLC dba Califorensics, the Electronic Data Experts ("Applicant") for Michael McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period November 15, 2017, through January 8, 2018. The order of the court approving employment of Applicant was entered on December 6, 2017. Dckt. 188. Applicant requests fees in the amount of $5,000.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant's services for the Estate include computer forensics and evidence management. The Estate has $194,151.98 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 REQUESTED

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

Computer Forensics: Applicant spent 26.25 hours in this category. Applicant provides expertise with regards to review and inspection of electronic records ("E-Data") found on computer file servers and associated computer hard drives.

Evidence Management: Applicant spent 1.5 hours in this category. Applicant takes possession of electronic records and information, accesses the records and information, and provides the records and information to Client.

General Case Administration: Applicant spent 1.25 hours in this category. Applicant reviewed and responded to emails with Client. Applicant attended meetings with Client.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Evelyn Ho	16.5	$340.95	$5,625.68
Simon Varley	7.5	$340.95	$2,557.13
Allison Young	5.0	$340.95	$1,704.75
Total Fees Computed			$9,887.50
Discount Agreed to by Applicant			($4,887.50)
Total Fees for Period of Application			$5,000.00

In the application filed on April 26, 2018, Applicant provided an hourly rate of $350.00 for each professional. Applicant also provided a pre-discount blended hourly rate of $340.95. In order to correctly calculate the total fees computed of $9,887.50 as reflected in the application, the court has chosen to use the blended rate of $340.95 in the table above.

FEES ALLOWED

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 $5,000.00 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.

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

Fees $5,000.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Capitol Digitial Document Solutions LLC dba Californsics ("Applicant"), Electronic Data Experts for Michael McGranahan, 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 Capitol Digital Document Solutions LLC dba Califorensics is allowed the following fees and expenses as a professional of the Estate:

Capital Digital Document Solutions LLC dba Califorensics, Professional employed by the Chapter 7 Trustee

Fees in the amount of $5,000.00,

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 allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

21. 16-90139-E-7 BJ-8 | **AJAVA SYSTEMS, INC.** **David Johnston** | **MOTION FOR COMPENSATION FOR GRIMBLEBY COLEMAN CPAS, INC., ACCOUNTANT(S)** **4-26-18 [215]**

Final Ruling: No appearance at the May 31, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 26, 2018. 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.

Grimbleby Coleman CPAS, Inc., the Accountant ("Applicant") for Michael McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period December 14, 2016, through April 16, 2018. The order of the court approving employment of Applicant was entered on December 14, 2016. Dckt. 136. Applicant requests fees in the amount of $8,246.50.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. A professional must exercise good billing judgment with regard to the services provided because the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign to run up a professional fees and expenses tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505

B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include corporate tax returns for year 2014 to 2016, preference analysis, employment application, and fee application. The Estate has $194,151.98 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 REQUESTED

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

Corporate Tax Return: Applicant spent 27.1 hours in this category. Applicant prepared tax returns for year 2014 to 2016, input information onto tax return, reviewed and completed tax returns.

Preference Analysis: Applicant spent 4.7 hours in this category. Applicant gathered documents, reviewed correspondence from trustee and discussed preference payment analysis.

Employment Application: Applicant spent 3.5 hours in this category. Applicant reviewed bankruptcy application, and checked for conflicts.

Fee Application: Applicant spent 4 hours in this category. Applicant prepared time records for fee application.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Jeffrey Coleman, CPA	1.9	$209.83	$398.68
Debbie Sanders, CPA	35.3	$209.83	$7,407.00
Donae Caravalho, CPA	2.1	$209.83	$440.64
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees for Period of Application			$8,246.32

The professionals who billed time have different hourly rates. Applicant provides that Jeffrey Coleman bills an hourly rate of $385, Debbie Sanders bills an hourly rate of $200, and Donae Cravalho bills an hourly rate of $250. The blended hourly rate in this case is $209.83, which is what was used to calculate the fee request.

FEES ALLOWED

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 $8,246.50 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.

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

Fees $8,246.50

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Grimbleby Coleman CPAS, Inc. ("Applicant"), Accountant for Michael McGranahan, 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 Grimbleby Coleman CPAS, Inc. is allowed the following fees and expenses as a professional of the Estate:

Grimbleby Coleman CPAS, Inc., Professional employed by the Chapter 7 Trustee

Fees in the amount of $8,246.50

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 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.

22. **16-90139-E-7** **AJAVA SYSTEMS, INC.** **MOTION FOR COMPENSATION BY THE LAW OFFICE OF BOUTIN JONES INC. FOR MARK GORTON, TRUSTEES ATTORNEY(S)**
BJ-9 **David Johnston** **4-26-18 [222]**

Final Ruling: No appearance at the May 31, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 26, 2018. 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.

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

Fees are requested for the period February 29, 2016, through April 9, 2018. The order of the court approving employment of Applicant was entered on April 18, 2016. Dckt. 67. Applicant requests fees in the amount of $55,000.00 and costs in the amount of $1,094.34.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include the resolution of the debtor's lease obligations with its landlord and the sale of personal property assets to landlord. The Estate has $194,151.98 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 7.7 hours in this category. Applicant investigated cases status, analyzed schedules and statement of financial affairs, considered payment of small ordinary course expenses, wrapped up the Estates and communicated with Client and various parties in interest.

Asset Analysis and Recovery: Applicant spent 6.7 hours in this category. Applicant investigated the estate assets, assisted Client in dealing with an uncooperative account who had records, reviewed account receivable data, conferred with various creditors and their counsel concerning potential claims and whether they were worth pursuing, and dealing with a utility company's failure to turnover a deposit.

Asset Disposition: Applicant spent 68.7 hours in this category. Applicant assisted Client to sell the Estate's personal property and settle the landlord's administrative expense claim for post-rejection storage costs. Applicant's service included (a) efforts to conduct an auction (b) investigation regarding the landlord's rights concerning trade fixtures, the equipment, the unexpired lease and expenses related to removal, restoration and storage; (c) negotiation, documentation and obtaining court approval of a sale of the Estate's equipment to the landlord; (d) negotiation, documentation and obtaining court approval of a related settlement of the landlord's claims to disputed equipment and for removal, restoration and storage expenses; and (e) closing the sale and settlement transactions.

Employment and Fee/Employment Applications: Applicant spent 20.3 hours in this category. Applicant's services included (a) conducting diligence, preparing Client's application to employ Applicant together with supporting declaration and disclosures and the order thereon; (b) preparing a motion to employ an auctioneer that was never filed because the auction efforts collapsed; (c) reviewing and commenting on Client's engagement of Californsics as computer forensic consultant; and (d) preparing this application for final compensation.

Avoidance Action Analysis: Applicant spent 19.3 hours in this category. Applicant's efforts included (a) meeting with Client and his accountant regarding the Estate's business records; (b) negotiating with attachment lien creditors and a UCC lien creditor who perfected with the preference period to release their liens by stipulation; (c) investigating a potential action against the debtor's health plan, making demand and receiving adequate proof of defense; (d) investigating potential action against Noracle, New Century and Schreiber Food and making demands.

Claims Administration and Objections: Applicant spent 43.1 hours in this category. Applicant reviewed the secured proofs of claim of two attachment lien creditors and a UCC lien creditor and the claims docket and reported to Client. Applicant prosecuted claims objections against three creditors.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Tom Mouzes	1.7	$410.00	$697.00
Mark Gorton	173.3	$410/425	$70,107.00
BJ Susich	0.3	$350.00	$105.00
John Christianson	0.2	$430.00	$86.00
Mike Kuzmich	3.4	$395.00	$1,343.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees for Period of Application			$72,338.00

The blended hourly rate in this case, prior to the billing adjustment, is $408.04. At Client's request and to facilitate a distribution to the unsecured claims, Applicant has elected to discount the fees to $55,000.00.

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $1,094.34 pursuant to this application.

The costs requested in this Application included the cost of computer assisted research on Westlaw, a telephonic conference call charge and the clerk's filing fee for the motion to sell assets.

Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as online access to bankruptcy and state laws and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include basic legal research and telephone services. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be charged in addition to the professional fees requested as compensation. The court disallows $1,094.34 of the requested costs.

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks to be paid a single sum of $55,000.00 for its fees and expenses incurred for Client. First and Final Fees in the amount of $55,000.00 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.

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

Fees	$55,000.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Boutin Jones Inc. ("Applicant"), Attorney for Michael McGranahan, 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 Boutin Jones Inc. is allowed the following fees and expenses as a professional of the Estate:

Boutin Jones Inc., Professional employed by the Chapter 7 Trustee

Fees in the amount of $55,000.00

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 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.

23. **16-90139-E-7** **AJAVA SYSTEMS, INC.** **MOTION FOR COMPENSATION FOR**
MDM-4 **David Johnston** **MICHAEL D. MCGRANAHAN, CHAPTER 7 TRUSTEE(S)**
4-23-18 [210]

Final Ruling: No appearance at the May 31, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on April 23, 2018. By the court's calculation, 38 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.

Michael McGranahan, the Chapter 7 Trustee, ("Applicant") for the Estate of Ajava Systems, Inc. ("Client"), makes a Request for the Allowance of Fees and Expenses in this case. Fees are requested for the period February 26, 2016, through April 20, 2018.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). A professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R.

103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by a trustee are "actual," meaning that the fee application reflects time entries properly charged for services, the trustee must demonstrate still that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A trustee must exercise good billing judgment with regard to the services provided because the court's authorization to employ a trustee to work in a bankruptcy case does not give that trustee "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 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 investigation of potential assets, including preferences, and inspection of equipment in the presence of two auctioneers. Applicant also conducted a review of inventory and the initiation of UCC searches. Applicant negotiated an agreement with the landlord to purchase equipment in-place and as-is. Applicant also worked closely with a computer data expert and conducted a review of the findings, which included financial and accounting data from the debtor's computer system. The Estate has $194,151.98 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 REQUESTED

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

Asset Analysis/Recovery: Applicant spent 10.10 hours in this category. Applicant inspected facility, prepared for auction, met with landlord, met with auctioneer, and provided oversight and review of assets being prepared for sale.

Asset Disposition: Applicant spent 20.60 hours in this category. Applicant provided oversight and coordination of sales of assets, provided follow-up and resolution to various issues related to the sales and a review of the sales ledger.

Case Administration: Applicant spent 23.80 hours in this category. Applicant provided services related to review of documents, email and phone communications, and coordination of schedules with other professionals.

Claims Administration: Applicant spent 10.90 hours in this category. Applicant reviewed claims and prepared draft objections.

Fee Employment Application: Applicant spent 7.50 hours in this category. Applicant provided engagement letter and follow-up communication with professional e-data expert.

Litigation: Applicant spent 4.00 hours in this category. Applicant provided preference analysis and review of financial records, including responses to preference demands.

Tax Matters: Applicant spent 3.20 hours in this category. Applicant reviewed files, IRS letter, and tax returns, as well as conducted follow-up communication via emails.

Applicant requests the following fees:

25% of the first $5,000.00	$1,250.00
10% of the next $45,000.00	$4,500.00
5% of the next $950,000.00	$9,896.31
Calculated Total Compensation	**$15,646.31**
Plus Adjustment	$0.00
Total Maximum Allowable Compensation	$15,646.31
Less Previously Paid	$0.00
Total First and Final Fees Requested	$15,646.31

FEES ALLOWED

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. § 326(a) and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $15,646.31 are approved pursuant to 11 U.S.C. § 330 are 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 REQUESTED AND ALLOWED

Applicant also requests reimbursement of expenses in the reduced amount of $881.86 for postage, mileage, court conference calls, copies, and miscellaneous out-of-pocket expenses. First and Final Costs pursuant to 11 U.S.C. § 330 are 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.

RULING

In this case, the Chapter 7 Trustee currently has $194,151.98 of unencumbered monies to be administered. Applicant provided services including the investigation of potential assets and the inspection and inventory of on-premise equipment. Applicant also initiated UCC searches. Applicant negotiated an agreement with the landlord to purchase equipment in-place and as-is. Applicant also worked closely with a computer data expert and conducted a review of the findings, which included financial and accounting data from the debtor's computer system. Applicant's efforts have resulted in a realized gross of $247,926.10 recovered for the estate. Dckt. 210.

This case required significant work by the Chapter 7 Trustee, with full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowable as a commission to the Chapter 7 Trustee.

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

Fees	$15,646.31
Costs and Expenses	$881.86

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 Michael McGranahan, the Chapter 7 Trustee, ("Applicant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Michael McGranahan is allowed the following fees and expenses as a professional of the Estate:
>
> Michael McGranahan, the Chapter 7 Trustee
>
> Fees in the amount of $15,646.31
> Expenses in the amount of $881.86,

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

24. **12-90645-E-7** **MICHAEL/BOBBI LINDER** **MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH SETTLEMENT FUND TRUSTEES**
MHK-2 **Scott Mitchell** **5-2-18 [33]**

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

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

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

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that written responses must be filed by May 17, 2018 (fourteen days before the hearing), but it also states that the parties must attend the hearing. Based upon the language that the parties must attend the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 2, 2018. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice).

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the 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 Compromise is granted.

Eric Nims, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Michael Linder and Bobbi Linder ("Settlor"). The claims and

disputes to be resolved by the proposed settlement are from a products liability claim from pre-petition medical implant procedures.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit C in support of the Motion, Dckt. 37):

A. Gross settlement award of $136,000.00;

B. Court-ordered assessment of $3,050.00;

C. Attorney's fees of $48,944.20;

D. Expenses of $8,666.41; and

E. Net to Settlor of $75,339.39.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met.

Probability of Success

Movant argues that he has not information about whether Settlor's products liability claim would be viable outside of the procedure involved in the class action lawsuit, but he argues that this factor is not

applicable because the gross settlement amount is available through the MDL procedure established by the District Court in the class action.

Difficulties in Collection

Movant states that he has no information about whether the parties who might be found liable in the products liability suit would be able to pay, but because the funds are available now, he argues that this factor supports approving the settlement.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that the litigation would be complex, expensive, and time-consuming if litigated outside of the settlement procedure spawned from the class action.

Paramount Interest of Creditors

Movant argues that the settlement will result in full payment to allowed unsecured claims, plus a surplus to Settlor.

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 will pay all allowed claims in this case and then provide net proceeds for Settlor. 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 Eric Nims, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Michael Linder and Bobbi Linder ("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 C in support of the Motion (Dckt. 37).

25. 12-93049-E-11 GRF-2 | **MARK/ANGELA GARCIA** **Mark Hannon** | **MOTION FOR COMPENSATION FOR GARY R. FARRAR, OTHER PROFESSIONAL(S)** **4-25-18 [973]**

Final Ruling: No appearance at the May 31, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Plan Administrator, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on April 25, 2018. By the court's calculation, 36 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.

Gary Farrar, the Plan Administrator ("Applicant") for Mark Garcia and Angela Garcia, Chapter 11 Debtor ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period March 3, 2017, through May 31, 2018. The order of the court approving employment of Applicant was entered on February 28, 2017. Dckt. 939. Applicant requests fees in the amount of $14,160.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

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

A review of the application shows that Applicant's services for the Estate include auditing/accounting, case administration, and asset disposition. 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.

Accounting/Auditing: Applicant spent 34.9 hours in this category. Applicant communicated with Client regarding payments, insufficient funds, and overdraft protection. This included banking activity, the interim fee application and preparing a letter to the IRS.

Asset Disposition: Applicant spent 5.1 hours in this category. Applicant provided communications to creditors, Chapter 11 Trustee, and Client's counsel, related to the close of escrow of a sale of property and the status of the transaction.

Case Administration: Applicant spent 7.2 hours in this category. Applicant deposited proceeds of sale of property with the court, communicated with the court and the title company, prepared status reports, and appeared in person at status conferences.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Gary Farrar	47.2	$300.00	$14,160.00
Total Fees for Period of Application			$14,160.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $0.00 pursuant to this application.

The costs listed as incurred in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Mailing		$89.40
Mileage		$97.20
		$0.00
Less Discount Authorized by Applicant		($186.60)
Total Costs Requested in Application		$0.00

FEES ALLOWED

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of $14,160.00 are approved pursuant to 11 U.S.C. § 331, and subject to final review pursuant to 11 U.S.C. § 330, and authorized to be paid by the Plan Administrator under the confirmed plan from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11case.

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

Fees $14,160.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Gary Farrar ("Applicant"), Plan Administrator for Mark Garcia and Angela Garcia, Chapter 11 Debtor, ("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 Gary Farrar is allowed the following fees and expenses as a professional of the Estate:

Fees in the amount of $14,160.00

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

IT IS FURTHER ORDERED that Plan Administrator is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

26. 18-90253-E-7 MLP-1 | **ADRIANA ARROYO** **Martha Lynn Passalaqua** | **MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13** **5-15-18 [16]**

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

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 15, 2018. By the court's calculation, 16 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice).

The Motion to Convert was not 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 to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is denied without prejudice.

Adriana Arroyo ("Debtor") seeks to convert this case from one under Chapter 7 to one under Chapter 13. The Bankruptcy Code authorizes a one-time, near-absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

INSUFFICIENT NOTICE OF MOTION

Debtor provided sixteen days' notice of this Motion. Federal Rule of Bankruptcy Procedure 2002(a)(4) requires a minimum of twenty-one days' notice of the hearing. Debtor has provided five days fewer than the minimum. Therefore, the Motion is denied without prejudice.

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

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

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR PROVIDES SUFFICIENT NOTICE OF THE MOTION

Debtor asserts that the case should be converted because of her "current financial situation," but she does not explain any further what grounds may exist for converting. She states that she intends to file a plan that will propose a 48% dividend to general unsecured claims. Dckt. 18.

Unfortunately, while saying that she wants to prosecute this case, Debtor has failed to appear for the scheduled Meetings of Creditors. *See* May 24, 2018 Docket Entry Report by Trustee. While Debtor's Motion says that she now seeks to convert to Chapter 13 because she would be denied a discharge under Chapter 7, her failure to appear at the First Meeting of Creditors creates the appearance that the conversion is being made in an attempt to hide something.

~~Here, Debtor's case has not been converted previously, and Debtor qualifies for relief under Chapter 13. Notice was provided to the Chapter 7 Trustee, Office of the United States Trustee, and other interested parties. No opposition has been filed.~~

~~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 Convert filed by Adriana Arroyo ("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 Convert is granted, and the case is converted to a proceeding under Chapter 13 of Title 11, United States Code.~~

27. **18-90071-E-7** **PRAVINKUMAR/MADHUKANTA GANDHI** **MOTION TO DISMISS CASE**
RAC-2 **David Johnston** **5-3-18 [25]**

Final Ruling: No appearance at the May 31, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 3, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Case is granted.

The Patel Law Firm, P.C., ("Movant") requests that the court dismiss Pravinkumar Gandhi and Madhukanta Gandhi's ("Debtor") bankruptcy case with prejudice pursuant to 11 U.S.C. §§ 101, 105, and 707(a) and Federal Rule of Bankruptcy Procedure 2004. Movant asserts that it performed legal services for Debtor during 2008 and 2009 and holds a debt against them for $151,020.12.

Movant asserts that the parties entered into a settlement agreement on August 1, 2011, by which Debtor agreed to pay the debt through monthly installments. Movant alleges that Debtor made one payment and then no more.

Movant believes that Debtor then engaged in a scheme to avoid payment on the debt and to hide fraudulent transfers. Movant presents the following pattern:

A. On March 5, 2015, Debtor filed bankruptcy case No. 15-90219, which was dismissed on March 16, 2015, for failure to timely file documents.

B. On May 12, 2015, Debtor filed bankruptcy case No. 15-90459.

C. On July 7, 2015, the court, pursuant to a Rule 2004 request, ordered Debtor to produce documents and to appear for examination.

D. On October 7, 2015, the court dismissed the case after Debtor failed to respond.

E. On December 14, 2015, Debtor filed bankruptcy case No. 15-91196, which was dismissed on December 28, 2015, for failure to timely file documents.

F. On March 7, 2016, Debtor filed bankruptcy case No. 16-90179.

G. On May 5, 2016, the court, pursuant to a Rule 2004 request, ordered Debtor to produce documents and to appear for examination.

H. On August 9, 2016, the court dismissed the case after Debtor failed to respond.

Movant reports that it obtained a judgment in the Superior Court of California, County of Stanislaus on July 7, 2016, against Debtor in the amount of $158,806.19, along with two orders to appear for examination. Those examinations were scheduled to occur on February 9, 2018.

On February 8, 2018, Debtor filed the instant bankruptcy case. Pursuant to a Rule 2004 request, the court against ordered Debtor to appear for examination and to produce documents. No documents have been produced by Debtor.

APPLICABLE LAW

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

Section 707(a) provides three examples of "cause" that would justify dismissal of a Chapter 7 case:

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

> (3) failure of the debtor in a voluntary case to file, within 15 days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by section 521(a)(1), but only on a motion by the United States trustee.

11 U.S.C. § 707(a). Those examples are merely illustrative, however, and the court may dismiss the case on other grounds when cause is found to exist. 6 COLLIER ON BANKRUPTCY ¶ 707.03 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The court has substantial discretion in ruling on a motion to dismiss under Section 707(a). *Id.*

Furthermore, 11 U.S.C. § 349(a) provides that, "[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed . . ." Therefore, the court has discretion, when there is cause, to deny the debtor the benefits of the general rule, *i.e.*, to dismiss the case with prejudice thereby preventing the debtor from obtaining a discharge with regard to the debts existing at the time of the dismissed case. *See Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1223 (9th Cir. 1999); 3 COLLIER ON BANKRUPTCY ¶ 349.02 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Dismissal with prejudice is a drastic remedy reserved for extreme situations. *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 922 (B.A.P. 9th Cir. 2011). This usually is permitted "only in the face of a clear record of delay or contumacious conduct." *Durham v. Fla. E. Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967).

DISCUSSION

Movant asserts that the case should be dismissed or converted because of an alleged three-year attempt to avoid Movant and its claim against Debtor. Movant illustrates that this is the fifth bankruptcy case since the debt was incurred, with all of them being dismissed. Movant also notes that Debtor has consistently not complied with Rule 2004 examination orders, and Movant notes that it also holds a state court judgment against Debtor.

While Movant offers numerous examples, Movant fails to argue why, pursuant to 11 U.S.C. § 349, the case should be dismissed with prejudice.

Therefore, due to Debtor's failure to comply with the court's orders for Rule 2004 examination, cause exists to dismiss this case pursuant to 11 U.S.C. § 707.

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 7 case filed by The Patel Law Firm, P.C., ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

28.	**15-90680-E-7** **18-9001**	**JO GIBSON** **RSL-1**	**MOTION TO DISMISS NAVIENT CORPORATION AND/OR MOTION FOR SUMMARY JUDGMENT** **5-1-18 [10]**
	GIBSON V. NATIONAL RECOVERIES ET AL		

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff and Plaintiff's Attorney on May 1, 2018. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Party is granted.

Navient Solutions, LLC ("Defendant") moves for dismissal of itself from this Adversary Proceeding on the ground that is not an interested party to the lawsuit. Defendant asserts that dismissal is appropriate pursuant to Federal Rule of Civil Procedure 21.

Defendant argues that it was a former servicer of certain Direct Stafford Loans owed to the United States Department of Education on which Jo Gibson ("Plaintiff-Debtor") is or was liable. Defendant reports that it was operating under the name Sallie Mae, Inc., in the past.

Before Plaintiff-Debtor filed the underlying bankruptcy case (No. 15-90680), Defendant states that its responsibilities as servicer for the student loans was terminated due to default on the loan obligations, and Defendant claims that it has had no connection them ever since, not even as a servicer.

Defendant argues that it "has no interest in the . . . loans whatsoever," leaving it with no authority to litigate dischargeability in this Adversary Proceeding. Dckt. 10 at 2.

Defendant argues that Plaintiff-Debtor does not owe any debt to Defendant or to the named defendant, Navient Corporation.

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on May 17, 2018. Dckt. 17. Plaintiff-Debtor does not oppose dismissing Defendant from this Adversary Proceeding, but Plaintiff-Debtor states that she does oppose any dismissal of this case.

Plaintiff-Debtor states that she will be filing a motion to substitute parties for the correct parties in interest and will be filing an amended complaint upon the successor defendant.

DISCUSSION

Federal Rule of Civil Procedure 21 (emphasis added) states:

> Misjoinder of parties is not a ground for dismissing an action. **On motion** or on its own, **the court may at any time**, on just terms, add or **drop a party**. The court may also sever any claim against any party.

Here, Defendant has stated repeatedly in clear terms that it is not an interested party to this Adversary Proceeding because it does not hold or service any student loan debt upon which Plaintiff-Debtor is obligated, precluding Defendant from litigating whether the debt is dischargeable through bankruptcy.

Additionally, Plaintiff-Debtor has agreed that dismissal of Defendant as a party is warranted for not being the correct party to the suit. No party has moved for the entire case to be dismissed, just for Defendant to be dismissed for not being the correct party to litigate here.

Therefore, the Motion is granted, and Defendant is dismissed without prejudice as a party to this Adversary Proceeding.

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 Party filed by Navient Solutions, LLC, ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted, and Navient Solutions, LLC, is dismissed without prejudice from Adversary Proceeding No. 18-9001.

29.	**17-90981-E-11 MHK-1**	**THE LIVING CENTERS OF FRESNO, INC. David Johnston**	**CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 4-11-18 [43]**

RONALD LOEB, ET AL. VS.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on April 11, 2018. By the court's calculation, 15 days' notice was provided. The court set the hearing for 2:00 p.m. on April 26, 2018. Dckt. 55.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor in Possession, 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 Debtor in Possession stated an Opposition for which the court determined that further briefing and final hearing was warranted.

The Motion for Relief from the Automatic Stay is granted.

Ronald Loeb, Edwin Loeb, Carolyn Radford, and Becky Griffin, as assignees of The Loeb Living Trust ("Movant") seek relief from the automatic stay with respect to The Living Centers of Fresno, Inc.'s ("Debtor in Possession") real property commonly known as 4576 E. Shields Avenue, Fresno, California ("Property"). Movant has provided the Declaration of Ronald Loeb to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Ronald Loeb Declaration states that Movant transferred the Property to Debtor in Possession in exchange for a promissory note and deed of trust, securing an obligation of $540,000.00. The Declaration states that Debtor in Possession failed to pay the obligation when it came due in October 2015 and had made only six monthly payments. The Declaration states that no payments have been made on the obligation since June 2015.

APRIL 26, 2018 HEARING

At the hearing, Debtor in Possession asserted that the Property was necessary because it is where treatment is provided. Also, Debtor in Possession contended that its revenues are not rents, but payments for the treatment services provided. Also, the property tax installment was stated to have been paid for April 2018. Movant questioned whether there is an effective reorganization happening. Dckt. 64.

The court continued the hearing to 10:30 a.m. on May 31, 2018, requiring opposition by May 11, 2018, and any replies by May 18, 2018. Dckt. 66.

DISCUSSION

No further pleadings have been filed since the April 26, 2018 hearing.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $505,031.23 (including $412,069.83 secured by Movant's first deed of trust), as stated in the Loeb Declaration and the Proofs of Claim. The value of the Property is determined to be $380,000.00, as stated in the Loeb Declaration as an admission of a party opponent.

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988). Movant has

successfully argued that there is no equity in the Property, but Movant has not presented any argument as to the second element that the Property is not necessary for an effective reorganization. Movant states that Debtor in Possession is not likely to obtain confirmation of a plan of reorganization. That is not the same as arguing that property is specifically not necessary in this case.

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

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant argues that the lack of payment, the general lack of a prospect of an ability to reorganize in Chapter 11, and the failure to pay real property taxes all show that the Property is not necessary, warranting waiving the stay. Those arguments show cause to grant relief from the automatic stay, but they do not demonstrate why the court should waive the fourteen-day stay as imposed by the Supreme Court. With no real grounds for such relief specified, the court will not grant additional relief.

In the Motion, Movant did not plead adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3). However, this matter has been continued since April 26, 2018, to afford Debtor in Possession the opportunity to file written opposition as requested at the prior hearing. No opposition has been filed. Sufficient grounds exist, with the continuance of the hearing and there being no opposition, to waive the fourteen-day stay of enforcement.

No other or additional relief is granted by the court.

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 Relief from the Automatic Stay filed by Ronald Loeb, Edwin Loeb, Carolyn Radford, and Becky Griffin, as assignees of The Loeb Living Trust ("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 automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Ronald Loeb, Edwin Loeb, Carolyn Radford, and Becky Griffin, as assignees of The Loeb Living Trust, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the

Property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the real property commonly known as 4576 E. Shields Avenue, Fresno, California.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

No other or additional relief is granted.