

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Modesto, California

June 11, 2015 at 10:30 a.m.

1.	12-91301 -E-7	FRANCISCO LANDIN	MOTION TO AVOID LIEN OF
	BSH-2	Brian S. Haddix	AMERICAN EXPRESS
			5-27-15 [27]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Chapter 7 Trustee, and Office of the United States Trustee on May 27, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.
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This Motion requests an order avoiding the judicial lien of American Express Bank, FSB ("Creditor") against property of Francisco Landin ("Debtor") commonly known as 1704 Saint Charlotte Lane, Modesto, California (the

"Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$11,999.61. An abstract of judgment was recorded with Stanislaus County on June 1, 2011 which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$134,100.00 as of the date of the petition. The unavoidable consensual liens total \$231,999.61 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$1.00 on Amended Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided in excess of \$11,999.61, subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

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

IT IS ORDERED that the judgment lien of American Express Bank, FSB, California Superior Court for Stanislaus County Case No. 659204, recorded on June 1, 2011, Document No. 2011-0046281 with the Stanislaus County Recorder, against the real property commonly known as 1704 Saint Charlotte Lane, Modesto, California, is avoided in its entirety for all amounts in excess of \$11,999.61 pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

2. [15-90301-E-7](#) ROBERT ERWIN
SCB-2 Martha Lynn Passalacqua

MOTION TO EMPLOY TRIFECTA REAL
ESTATE, INC. AS REALTOR(S)
5-8-15 [[22](#)]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on May 8, 2015. By the court's calculation, 34 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Employ is granted.

Chapter 7 Trustee, Gary R. Farrar, seeks to employ Margeley Bernal of Trifecta Real Estate, Inc. dba RE/MAX Executive ("Agent"), pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Professional to assist the Trustee in marketing and selling the real property of the bankruptcy estate commonly known as 1119 Maple Drive, Oakdale, California.

The Trustee argues that Agent's appointment and retention is necessary to secure the best sale price of the Property given her experience in marketing and selling real estate in Oakdale.

Margeley Bernal, an agent of Trifecta Real Estate, Inc. dba RE/MAX Executive, testifies that she is representing the Trustee as an agent to sell the Property for the benefit of the estate. Ms. Bernal testifies she and the firm do not represent or hold any interest adverse to the Debtor or to the

estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

Time of Employment and Absence of Contract

Though it is common for listing agreements (contract between interested seller and real estate broker) to be signed in California, none is provided as an exhibit to the Motion. The Motion, filed on May 8, 2015, seeks to prospectively engage the services of the real estate professional. (Order authorizing employment are generally given a 30 day retroactive effect so that professionals, in good faith, may begin work right away.)

While the Motion seeks to employ this professional to assist the trustee in the MARKETING and SALE of the property, it appears that as of the time authorization for employment was sought the property had already been locked up in a contract to sell. On May 8, 2015, the Trustee filed another motion seeking authorization to sell the property commonly known as 1119 Maple Drive for \$270,000. Dckt. 28. In the motion it is alleged that this professional:

- A. The Debtor retained Ms. Bernal pre-petition to list and market the Oakdale Property for Sale. ¶ 4.
- B. "The Trustee consulted Ms. Bernal, who performed an analysis of the fair market value of the Oakdale Property. Ms. Bernal determined that the Oakdale Property was worth approximately \$269,000.00." ¶ 5.
- C. The Trustee filed an application to employ Ms. Bernal to market and sell the Property. ¶ 7.
- D. Ms. Bernal has listed the Property for sale on the MLS and other internet sites, as well as the Modesto Bee. ¶¶ 8, 9.

Motion to Sell, Dckt. 28.

Unfortunately, the Motion to Employ "neglects" to disclose Ms. Bernal's employment by the Debtors. Rather, it is framed in a manner to make Ms. Bernal appear to be completely unattached to the Property prior to the Trustee seeking out her professional assistance. The Motion fails to disclose Ms. Bernal's contractual connections with the Debtor and what continuing connection or loyalty she may have to Debtor.

The Motion to Employ and Ms. Bernal's application make it appear that Ms. Bernal will be evaluating and marketing the Property prospectively, not merely relying on work that she has done for someone other than the Trustee.

The Motion does not state the terms of employment, but merely states,

"Upon closing of a Court approved sale of the Oakdale Property, Ms. Bernal may apply to the Court for an order authorizing her compensation, pursuant to Bankruptcy Code Section 330(a), for a sales commission of five percent of the gross sales price."

Motion ¶ 9, Dckt. 22.

In reviewing the Motion for Authorization to Sell the Property, the court notes that the Residential Purchase Agreement is dated April 15, 2015 - 23 days prior to the filing of the Motion to Employ. The court notes that this bankruptcy case was filed on March 28, 2015. The Agreement lists "RE/MAX Executive" as the listing agent for the "seller" and "Weeks Real Estate" as the agent for the Buyer. Exhibit C, Dckt. 32. It would not be surprising to the court that an offer was submitted to Ms. Bernal, as the agent for Debtor, the bankruptcy was filed, and Ms. Bernal then communicated the offer to the Trustee.

It would also not be surprising to the court that a trustee would seek to retain the services of an existing real estate professional to *continue* in the marketing of real property rather than have the disruption of changing real estate brokers. Further, such an arrangement provides a reasonable business accommodation for the real estate professional who has worked long and hard with the pre-petition debtor to try and sell the property, only to have a possible sale fall away because of the debtor's need to file bankruptcy.

Good Faith of the Parties

The present Motion presents the court with a dilemma. The Motion and two declarations under penalty of perjury leave out key information concerning Ms. Bernal's dealings with the Debtor and this Property pre-petition. The Motion and declarations misstate that the Trustee wants to hire Ms. Bernal to prospectively evaluate and market the Property. The facts as they appear from the Motion to Sell is that all the Trustee was doing was hiring Ms. Bernal to bring an existing offer to the Trustee so he could merely accept the offer on April 28, 2015.

Most likely, these events have transpired innocently, with the Trustee, his counsel, and Ms. Bernal attempting to have the offer and acceptance proceed in the most "normal" businesslike manner notwithstanding the bankruptcy filing. However, while presumably innocent, the Motion and declarations misstate the actual facts and terms of employment.

The court gives the Trustee and Ms. Bernal the benefit of the doubt with respect to authorizing the employment. However, the court will require a separate motion for approval of compensation for Ms. Bernal, which shall be supported by competent testimony and other admissible evidence of what Ms. Bernal has done for the Trustee (including pre-bankruptcy services which the Trustee and Ms. Bernal believe should properly be considered for the court to determine the value of Ms. Bernal's professional services). The total compensation, including costs and expenses, shall not exceed 5% of the gross sales price for the Property. FN.1.

FN.1. The Trustee and counsel may feel the court is being unduly harsh in light of their reputation for being honest and hard working. The court is

giving them the benefit of the doubt in approving the employment of Ms. Bernal. The court cannot, and will not, engage in differential application of the law based on whether it appears someone is honest or has not developed a general reputation for honesty. The quickest way for there to be abuses of the bankruptcy laws and breaches of fiduciary duties by trustees and professionals is for the court to take the attitude of "hey, nobody would do anything wrong, they are just trying to make a buck."

Authorization for Employment

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 Counsel, considering the declaration demonstrating that Counsel 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 Margeley Bernal of Trifecta Real Estate, Inc. dba RE/MAX Executive as professional for the Chapter 7 estate on the terms and conditions that the total compensation, including all expenses, shall not exceed 2.5% (50% of the 5% commission which is to be split under the contract for the sale of the Property) of the gross sales price of the real property commonly known as 1119 Maple Drive, Oakdale, California, from the sale which is the subject of the Trustee's Motion to Sell, DCN: SCB 3 (Dckt. 28). No predetermined amount or percentage fee, other than the maximum of 2.5%, is determined by the court as compensation for this professional.

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

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

The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ Margeley Bernal and Trifecta Real Estate, Inc. dba RE/MAX Executive as professional for the Chapter 7 Trustee on the terms and conditions set forth in this Order.

IT IS FURTHER ORDERED that the total compensation, including all expenses, shall not exceed 5% of the gross sales price of the real property commonly known as 1119 Maple Drive, Oakdale, California, from the sale which is the subject of the

Trustee's Motion to Sell, DCN: SCB 3 (Dckt. 28). No predetermined amount or percentage fee, other than the maximum of 2.5% (50% of the 5% commission which is to be split under the contract for the sale of the Property), is determined by the court as compensation for this professional.

IT IS FURTHER ORDERED that Ms. Bernal and Trifecta Real Estate, Inc. May seek the allowance of fees and costs for the service provided by separate motion after the sale has been completed. The court will not approve compensation for this professional as part of the order approving the sale of the property.

3. 15-90301-E-7 ROBERT ERWIN MOTION TO SELL AND/OR MOTION
SCB-3 Martha Lynn Passalacqua FOR COMPENSATION FOR TRIFECTA
REAL ESTATE, INC., REALTOR(S)
5-8-15 [28]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on May 8, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here Movant proposes to sell the "Property" described as follows:

- a. 1119 Maple Drive, Oakdale, California

The proposed purchaser of the Property is Adolfo Navarro and Guadalupe Navarro and the terms of the sale are:

1. Sale price of \$270,000.00
2. Sale is "as is"
3. The initial deposit will be \$5,000.00
4. The sale is subject to overbidding at the hearing to approve the sale.
5. The sale proceeds will be applied as such:
 - a. 5% commission to Ms. Bernal, RE/MAX Executive (\$6,750.00) and Weeks Real Estate (\$6,750.00)
 - b. Estimated closing costs (\$5,400.00)
 - c. Payment of mortgage (estimated \$140,100.76).
 - d. Debtor's exemption (\$75,000.00)
 - e. Remaining balance for the bankruptcy estate.

The Movant also requests in the Motion for final approval of, and authorization to pay, to Margeley Bernal of Trifecta Real Estate, Inc., dba RE/MAX Executive the agreed real estate commission of 5% of the selling price from the sale proceeds at the close of escrow. The Movant filed a Motion to Employ Ms. Bernal, set for hearing at the same time of the instant Motion. As set forth in the order authorizing the employment of Ms. Bernal and Trifecta Real Estate, Inc., the court shall not approve any fees for this professional as part of this Motion. A separate motion for approval of compensation of this professional pursuant to 11 U.S.C. § 330 may be filed within 30 days of the closing of the sale.

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The proposed sale allows for the full satisfaction of the mortgage, provides for the payment to the real

estate broker, provides for the Debtor's exemption, and also leaves remaining funds for the benefit of the estate.

Therefore, the Motion is granted.

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

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

The Motion to Sell Property filed by Gary R. Farrar the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Gary R. Farrar, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Adolfo Navarro and Guadalupe Navarro or nominee ("Buyer"), the Property commonly known as 1119 Maple Drive, Oakdale, California ("Property"), on the following terms:

1. The Property shall be sold to Buyer for \$270,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit 32, Dckt. C and D, and as further provided in this Order.
2. The sale proceeds shall first be applied to closing costs, real estate commission not to exceed 2.5% of the gross sales price of the property to be paid to the real estate agent for the Buyer, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
3. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

IT IS FURTHER ORDERED that all sales proceeds, after payment of the costs and expenses provided in the agreement and the real estate commission to the buyer's real estate agent, shall be disbursed directly from escrow to the Chapter 7 Trustee, who shall hold all such monies pending further order of the court.

IT IS FURTHER ORDERED that if Margeley Bernal and Trifecta Real Estate, Inc. dba RE/MAX Executive, as professionals authorized to be employed by the Trustee desire to be allowed and paid professional fees and expenses (which shall not exceed the aggregate amount of 2.5% of the gross sales price of the Property), a motion for the allowance of such fees and expenses shall be filed and served within, and including, thirty (30) calendar days after the sale of the Property closes. Such motion may be filed by the Chapter 7

Trustee, as well as by the Professionals, if they so choose. Such a motion shall provide the court with testimony under penalty of perjury and properly authenticated evidence of the services provided (either directly to the Trustee or prepetition for which the Trustee has obtained the benefit for the estate).

4. [11-94410-E-7](#) SAWTANTRA/ARUNA CHOPRA CONTINUED MOTION TO EXTEND TIME
HSM-31 Robert M. Yaspan 12-12-14 [[1161](#)]

Final Ruling: No appearance at the June 11, 2015 hearing is required.

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

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

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

The hearing on the Motion to Extend Time to File Objections to Debtors' Claims of Exemptions is continued to 10:30 a.m. on July 23, 2015.

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

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

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

<p>Sawtantra Chopra MD, Inc., Profit Sharing Plan Assets in the Profit Sharing Plan including the following:</p> <p>Chase Acct# ending in 7539 - \$463,755</p> <p>Wells Fargo Investment Account - Approximate value of \$1 million</p> <p>Note & Deed of Trust in favor of Sawtantra Chopra MD, Inc., Profit Sharing Plan as Beneficiary, Onkar Inc., as Trustor secured by properties with the following APNs 033-044-099, 033-044-010, 033-044-012, 033-044-013, 033-044-014, and 033-044-019 - The face value of this note is \$350,000, but Debtor is not sure of the actual value of the note due because Debtor is not sure how much equity exists in these properties.</p> <p>Other Notes - See Attached.</p>	H	\$1,813,755.00
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In the Debtors most recent Schedule C, filed September 20, 2013, the Debtors claimed the retirement plans as exempt in their entirety pursuant to 11 U.S.C. § 522(b)(3)(C).

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

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

Additionally at the Meeting of Creditors, the Trustee questioned the Debtors concerning the carious deeds of trust, for which the Debtors and/or the Sawtantra Chopra MD Profit Sharing Plan were scheduled as beneficiaries the Debtors' responses did not satisfy the Trustee's inquiry into the process and reasons by which one or more deeds of trust, of which Joint-Debtor Aruna

Chopra, individually, was the original beneficiary, came to be included in the Debtors' retirement plans.

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

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

DEBTORS' OPPOSITION

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

1. The time frame for objection to Debtors' exemptions has expired under applicable Ninth Circuit law. Under *In re Smith*, 235 F.3d 472 (9th Cir. 2000), 11 U.S.C. § 348 "preserve[s] actions already taken in the case before conversion. . . section 348(a) establishes the general rule that, in a converted case, the dates of filing, the commencement of the case, and the order for relief remain unchanged." *Id.* at 477. In short, the Debtors argue that once the time frame for objecting to an exemption has expired, the exempt property reverts in the debtor and is no longer subject to objection. In this case, the Debtors state that the time to object to Debtors' claim of objection expired in April 2014.
2. The recent changes to Fed. R. Bankr. P. 1019 cannot change the substantive law on the issue. The Debtors argue that 28 U.S.C. § 2075 sets forth the rule making power of the court and the limitations thereon, making the Bankruptcy Court rules procedural and not creating substantive rights. The 2010 amendment to Fed. R. Bankr. P. 1019 that added section (2)(B) cannot affect this case since it attempts to change the substantive law of the Ninth Circuit. The provision purports to create a new time period for filing objections to exemptions after a conversion. However, since the *Smith* court established the law on this issue in the ninth Circuit and ruled that the exempt property vested in the debtor and that there was no provision in the Bankruptcy Code that could bring the exempt property back into an estate after conversion. The Bankruptcy Rules cannot create substantive rights that are not provided under the Bankruptcy Code. As such, the Trustee cannot rely on Fed. R. Bankr. P. 1019 to bring this Motion and the Motion should be denied.

3. The Motion fails to establish cause for the requested relief. Even if the motion were timely, the Trustee has failed to establish the requisite "cause" under Fed. R. Bankr. P. 4003. Although Rule 4003 does not provide any clarification regarding the meaning of cause, it should be presumed that cause means good cause not just any excuse. As the Bankruptcy Court are courts of equity, the issue of good cause should be determined by balancing the respective benefits and burdens of parties along with other equitable considerations including the principles of laches. The time period to object to the exemptions has been extended at least five times for a total time period of almost three years. The Trustee has been a party to the last four of the extension. The Trustee entirely fails to adequately explain why it has taken almost two years to determine whether to object to the exemptions, why he has not been able to make the decision at this time, and why he should be entitled to more time to do so. The Debtors contend that the Motion fails to provide any specificity regarding the information the Trustee is looking for and what issues, if any, he has with the exemptions. The Debtors argue that an extension of time is extremely prejudicial to Debtors because they are under criminal prosecution and need access to exempt assets to fund their defense. Debtors have been unable to use the funds to pay their criminal attorneys and will soon be deprived of representation in their cases which implicates their Sixth Amendment rights.
4. The motion should be denied because it will significantly impair Debtors' Sixth Amendment Rights. The Trustee has sent letters that have effectively frozen the accounts. Debtors have been unable to use the funds to pay for their criminal attorneys. The trustee is interfering with Debtors' Sixth Amendment right to representation and any extension of time to file the objections will further impair Debtors' constitutional rights. In the present case, the Trustee has sent letters to the investment managers for Debtors' profit sharing plan, effectively freezing the accounts in violation of the Debtors' Sixth Amendment rights. See *United States v. Stein*, 541 F.3d 130, 154 (2d Cir. 2008).

ORDER CONTINUING THE HEARING

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

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

ORDER CONTINUING THE HEARING

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

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

ORDER CONTINUING THE HEARING

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

On May 18, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on June 11, 2015. Dckt 1302.

APPLICABLE LAW

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

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:...

(2) New filing periods

....

(B) A new time period for filing an objection to a claim of exemptions shall commence under Rule 4003(b) after conversion of a case to chapter 7 unless:

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

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

Fed. R. Bankr. P. 1019

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

DISCUSSION

On June 4, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1318.

On June 5, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on July 23, 2015.

5. [11-94410-E-7](#) SAWTANTRA/ARUNA CHOPRA
HSM-32 Robert M. Yaspan

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

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

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

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

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

The hearing on the Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor is continued to 10:30 a.m. on July 23, 2015.

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

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

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

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

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

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

ORDER CONTINUING THE HEARING

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

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

ORDER CONTINUING THE HEARING

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

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

ORDER CONTINUING THE HEARING

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

On May 18, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on June 11, 2015. Dckt. 1303.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 1017(e)(1) provides that the court may extend for cause the time for filing a motion pursuant to 11 U.S.C. §

PMZ Real Estate, the Real Estate Consultant(s) ("Applicant(s)") for Gary Farrar the Chapter 7 Trustee and former Chapter 11 Trustee ("Client"), request Final Approval for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period October 28, 2012 through September 12, 2013. The order of the court approving employment of Applicant was entered on November 19, 2012, Dckt. 418. The Applicant requests final approval of fees previously approved as interim fees on December 22, 2013 in the amount of \$1,127.50, Dckt. 745.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including research and analysis of properties (including, but not limited to, chain of title, deed of trust, comparable sales), physical inspection of properties, and drafting related documents. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES REQUESTED

The Applicant is seeking that the prior interim fees are approved as final fees pursuant to 11 U.S.C. § 330.

Pursuant to prior Interim Fee Applications the court has approved as final pursuant to 11 U.S.C. § 330.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	\$1,127.50	\$1,127.50
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$1,127.50	

In addition, the Applicant is making a First Interim Request for the Allowance of Fees and Expenses in this case in connection with the Applicant's representation of the Client in his Chapter 7 Trustee capacity.

The period for which the fees are requests is for the period October 1, 2014 through March 31, 2014. The order of the court approving employment of Applicant was entered on November 3, 2014. Dckt. 1141. Applicant requests fees in the amount of \$43,005.00 and costs in the amount of \$594.47. FN.1.

FN.1. The Applicant appears to have, in an effort to avoid multiple motions, combined the request for final fees in their representative capacity in the Chapter 11 with the request for interim fees in their representative capacity in the Chapter 7. The court believes the more sound method would have to file two separate motions, under two separate DCNs, to ensure there was no convoluting of fees as well as to make a clean record in what is already a very heavy docket.

The current state of the Motion makes it difficult for the court to mine through a 19-page motion to determine which services go to which applicable time period. In the future, the Applicant should be more cognizant of the formatting and posture of the motions.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including asset distribution, asset investigation, litigation, and claims. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

CHAPTER 11

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 131.5 hours in this category. Applicant assisted Client with responding to tax and accounting concerns, preparing monthly operating reports, attending status conferences, discussing the effect of conversion.

Asset Disposition: Applicant spent 362.1 hours in this category. Applicant analyzed the assets of the estate's while Debtors sought confirmation of a Chapter 11 plan, analyzed the legal and factual issues concerning the estate's real property assets, worked on the Chapter 11 plan, concentrating on the sale or development of the Dale Road property, opposed motions for relief, and worked with Debtors to sell property.

Asset Investigation: Applicant spent 8.1 hours in this category. Applicant investigated life insurance policies, scheduled with significant cash-surrender value, analyzed real estate title issues, analyzed Dale Road Project entitlement issues, and analyzed issues related to retirement assets.

Litigation: Applicant spent 81.6 hours in this category. Applicant advised and represented the Trustee in multiple adversary proceedings resulting in resolution of claims of and against the estate.

Claims: Applicant spent 19.35 hours in this category. Applicant researched and analyzed multiple pre-petition claims, analyzed judgments, writs of attachment, and abstracts of judgment, and analyzed the potential effect of these on the bankruptcy estate.

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 (Effective)	Total Fees Computed Based on Time and Hourly Rate
A. Avery	501.95	\$297.48	\$149,320.77
A. Avery	16.5	\$0.00	\$0.00
H. Nevins	52.6	\$379.50	\$19,961.50
H. Nevins	1.3	\$0.00	\$0.00
M. Steiner	31.2	\$300.00	\$9,360.00
	0	\$0.00	\$0.00
	0	\$0.00	<u>\$0.00</u>
Total Fees For Period of Application			\$178,642.27

The court notes that at some point during the representation Mr. Avery's and Mr. Nevins' rates increased. The Applicant does not provide separate time sheets for the shift. The court, therefore, took the average based on the time sheets provided for purposes of the instant Motion. Mr. Avery's rate went from \$295.00 to \$300.00 and Mr. Nevins' rate went from \$380.00 to \$390.00.

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	\$52,871.33	\$42,000.00
	<u>\$0.00</u>	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$52,871.33	

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$1,190.14 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of \$370.33.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Mileage/Travel Expenses		\$674.86
Filing Fees		\$308.00
Mail		\$21.28
UCC Searches		\$186.00
Total Costs Requested in Application		\$1,190.14

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim Fees in the amount of \$178,642.25 and prior Interim Fees in the amount of \$52,871.33 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid

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

Costs and Expenses

The Second Costs in the amount of \$1,190.00 and prior Interim Costs in the amount of \$370.33 are approved pursuant to 11 U.S.C. § 330] and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court is authorizing that Trustee to pay 100% of the Chapter 11 fees and costs allowed by the court, including the remaining \$10,501.00 held back from the First Interim.

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

Fees	\$178,642.25
Costs and Expenses	\$1,190.14

pursuant to this Application and prior interim fees of \$52,501.00 and interim costs of \$370.33 as final fees pursuant to 11 U.S.C. § 330 in this case.

CHAPTER 7

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.

Asset Disposition: Applicant spent 32.75 hours in this category. Applicant assisted Client with reviewing documents (e.g., Motion for Relief, PMZ Broker Re-employment application, emails, etc.), conducting legal research (e.g., notes and deeds of trust, loans, procedural issues, etc.), corresponding with Trustee and interested parties, revising documents (e.g., settlement offer, demand letters, etc.), preparing for settlement meeting, working on settlement agreement with debtors, and attending settlement meetings with debtors.

Asset Investigation: Applicant spent 20 hours in this category. Applicant held telephonic conferences with interested parties, attended staff conferences, corresponded with Trustee and interested parties, reviewed documents (e.g., financials, emails, spreadsheets, orders, etc.), and conducted legal research.

Litigation: Applicant spent 10 hours in this category. Applicant worked on an adversary complaint, corresponded with Trustee and other interested parties, conducted legal research, reviewed documents (e.g., drafts of complaints, debtor's answer to complaint, e-mails, etc.), and revised documents (e.g., related to adversary proceeding).

Claims: Applicant spent 2 hours in this category. Applicant attended staff conferences to discuss claims issues and pending state court litigation,

conducted research regarding debtor's adversary complaint, and corresponded with Trustee and interested parties.

General: Applicant spent 76.2 hours in this category. Applicant reviewed relevant materials, prepared for and attended hearings, corresponded with relevant parties involved in the matter, drafted Motion for Compensation and other documents, conducted legal and factual research and analysis, and provided general case preparation.

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
Aaron A. Avery	132.95	\$300.00	\$39,885.00
Howard S. Nevins	8.0	\$390.00	\$3,120.00
Total Fees For Period of Application			\$43,005.00

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$594.47 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Mileage to Modesto, for attendance at five hearings.		\$85.12
Express delivery to the Hartford Global Annuities Legal Department.		\$20.35
Mileage to Modesto, for meeting with debtors.		\$84.00
Court Filing Fee, for Adversary Complaint.		\$350.00
Process Service		\$55.00
Total Costs Requested in Application		\$594.47

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of \$43,005.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs and Expenses

The First Costs in the amount of \$594.47 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court is authorizing that Trustee pay 80% of the fees (\$34,404.00) and 100% of the costs (\$594.47) allowed by the court.

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

Fees	\$ 43,005.00
Costs and Expenses	\$ 594.47

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

Since the Applicant has conflated the two requests into a single motion, for the sake of clarity and judicial administration, the court will issue two separate orders, one for the final Chapter 11 fees and costs and one for the first interim for the Chapter 7 fees and costs.

CHAMBERS PREPARED ORDER

As to the request for Second and Final Request for Fees and Costs in connection with the Chapter 11 case, 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 for Allowance of Fees and Expenses filed by Hefner, Stark & Marois ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Hefner, Stark & Marois, Professional Employed by Trustee

Fees in the amount of \$178,642.25
Expenses in the amount of \$1,190.14,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$52,501.00 and costs of \$370.33 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 Trustee is authorized to pay the remaining fees allowed by this Order (\$10,501.00) from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

CHAMBERS PREPARED ORDER

As to the request for First Interim Request for Fees and Costs in connection with the Chapter 7 case, the court shall issue a separate supplemental 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 for Allowance of Fees and Expenses filed by Hefner, Stark & Marois ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Hefner, Stark & Marois, Professional Employed by Trustee

Fees in the amount of \$ 43,005.00
Expenses in the amount of \$ 594.47,

The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee is authorized to pay 80% of the fees (\$34,404.00) and 100% of the costs (\$594.47) allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

8. [11-94410-E-7](#) SAWTANTRA/ARUNA CHOPRA
HSM-38 Robert M. Yaspan

MOTION FOR COMPENSATION FOR
GARY FARRAR, CHAPTER 7 TRUSTEE
5-14-15 [[1287](#)]

Final Ruling: No appearance at the June 11, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 31, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Trustee Fees is granted.

Gary Farrar ("Applicant"), the former Chapter 11 Trustee and the current Chapter 7 Trustee for the bankruptcy estate of Sawtantra and Aruna Chopra ("Debtors"), makes a first and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period August 28, 2013 through December 4, 2014. The order of the court approving employment of Applicant was entered on August 28, 2013, through the notice of appointment of interim trustee Dckt. 24. Applicant requests fees in the amount of \$10,082.26 and costs in the amount of \$329.26, for this second period of time.

The total Compensation requested for services as the Chapter 11 Trustee is \$43,579.04.

STATUTORY BASIS FOR TRUSTEE FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits income from sale of properties. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

The Bankruptcy Code limits the maximum amount of fees which a Chapter a Chapter 7 or Chapter 11 trustee may be paid in a bankruptcy case. Pursuant to 11 U.S.C. § 326(a),

In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25% on the first \$5,000 or less, 10% on any amount in excess of \$5,000 but not in excess of \$50,000, 5% on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3% of such monies in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

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 and Auditing Matters: Applicant spent 12.95 hours in this category. Applicant prepared ongoing tax and accounting analysis, preparing Monthly Operating Reports, and reviewed potential tax liabilities.

Asset Analysis and Recovery: Applicant spent 75.75 hours in this category. Applicant inspected and investigated real property assets, reviewed Debtors' allowances, reviewed development plans, participated in negotiations for buyback arrangements, and entered into settlement agreements to resolve certain claims.

Asset Disposition: Applicant spent 10.8 hours in this category. Applicant reviewed Motions for Relief, communicated with the broker in connection with the Trustee's efforts to market and sell Dale Road Project, review and approval of Trustee's motions to abandon certain properties.

Business Operations: Applicant spent 1.0 hours in this category. Applicant signed and filed August 2014 Monthly Operating Report, including Trustee's bond report.

Business Operations: Applicant spent 1.0 hours in this category. Applicant signed and filed August 2014 Monthly Operating Report, including Trustee's bond report.

Case Administration: Applicant spent 121.95 hours in this category. Applicant communicated with the United States Trustee, attended status conferences, review and advise on various litigation matters, review tax basis issues, review possible sale of assets, and review various motions, including Debtors' motions to value.

Trustee requests the following fees:

25% of first \$5,000.00	\$1,250.00
10% of next \$45,000.00	\$4,500.00
5% of next \$756,580.86	\$37,829.04
3% of next \$0.00	\$0.00
Calculated Total Compensation For Chapter 11 Trustee Services	\$43,579.04
Plus Adjustment	\$0.00
Interim Compensation Previously Allowed	<u>(\$15,302.11)</u>
Additional Compensation Requested	\$28,276.93

The Applicant states that during the Chapter 11, the Applicant collected approximately \$806,580.86 for the estate. As the Chapter 11 Trustee, the Applicant states that he distributed the full amount, including the \$313,683.61 distributed to the Chapter 7 estate upon conversion.

FEES AND COSTS & EXPENSES ALLOWED

Fees

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. and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

The Applicant, however, frames this Motion as a Second and Final request for compensation for the Applicant's position as the chapter 11 Trustee. It appears that the Applicant believes that the conversion "resets"

the compensation scheme for trustee compensation. However, the Applicant does not provide any authority that this is proper. The main case cited by the Applicant concerned whether the compensation calculation should include the money disbursed to the Chapter 7 estate following conversion. *In re Fin. Corp. of Am.*, 114 B.R. 221, 225 (B.A.P. 9th Cir. 1990) aff'd and remanded, 946 F.2d 689 (9th Cir. 1991). While not noted by the Applicant, the Ninth Circuit Bankruptcy Appellate Panel did address trustee compensation when a case is converted from a Chapter 11 to a Chapter 7 with the same trustee being appointed in both:

For example in *In re Dinsmore Tire Center, Inc.*, 81 B.R. 136(Bankr.S.Fla.1987), an individual who served as trustee both in Chapter 11 and again in the conversion to Chapter 7 was not allowed a fee that exceeded the Section 326(a) maximum for total disbursements to third parties in both Chapters. 81 B.R. at 137. Without referring specifically to Section 326(c) the court stated:

As chapter 11 trustee he collected this money but did not disburse it. As chapter 7 trustee he disbursed but did not collect this money. The maximum statutory compensation which is set by § 326(a) is for both services. The statutory intent is evaded by calculating the fee twice on this sum.

Dinsmore, supra, 81 B.R. at 137. Importantly, however, the apportionment of the "single fee" was not based on relative disbursements made under each Chapter. Rather, the division of compensation was based on each "trustee's reasonable compensation." 81 B.R. at 137.

Id.

The language of 11 U.S.C. § 326 does not state that the conversion causes for the Trustee's compensation to be finalized in the prior case and restarted in the converted case. In fact, 11 U.S.C. § 326(c) supports the proposition that when a chapter 11 case is converted to a Chapter 7 case, that the compensation for the Trustee's is in light of the entire case, rather than when it was a Chapter 11 and then when it was a Chapter 7. 11 U.S.C. § 326(c) states:

If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be.

The court reads this section to include the situation when a case is converted from a Chapter 11 to a Chapter 7 and the former Chapter 11 Trustee is not appointed as the Chapter 7 Trustee, the total compensation for both trustees cannot exceed the maximum as prescribed by 11 U.S.C. § 326(a). The court finds that this is also analogous when the same trustee is appointed after the conversion.

It appears that it is improper for the court to grant the following compensation as "final" since the case is still pending and further compensation may be necessary. The Applicant even notes that the calculation does not include "non-cash assets distributed to the Chapter 7 estate, some of which may have significant value." Dckt. 1287, pg. 3, fn. 1. As such, it is possible that the Applicant may liquidate and distribute these non-cash assets which will result in further compensation. Therefore, the court will approve the fees as second interim but not final.

The second interim fees in the amount of \$28,276.93 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and 11 U.S.C. § 326(a) are authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case. FN.1.

FN.1. Because the case has not been completed and the court has not yet determined the final amount of distributions which will be made in the case, and the total fees to be claimed by the Chapter 7 and Chapter 11 Trustees, the court cannot determine if this is the final fees for the Trustee. The issue between the Chapter 7 trustee fees and Chapter 11 trustee fees is not merely a priority in payment (as with other professionals) but goes to the maximum trustee's fees which may be paid in the bankruptcy case itself, whether denominated as Chapter 11 or Chapter 7 trustee fees). While the Chapter 11 trustee's fees may include amount computed on monies generated by the Chapter 7 trustee which are handed over to the Chapter 7 trustee to be easily disbursed to creditors, that does not mean that there is a double counting of disbursements, transmogrifying the \$313,683.61 in actual monies delivered by the Chapter 11 trustee to the Chapter 7 trustee into a fictitious \$727,367.22 upon which trustee's may double dip.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as second interim Chapter 11 Trustee fees in this case:

Fees	\$28,276.93
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pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331.

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"), former Chapter 11 Trustee and current 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 Gary Farrar is allowed the following Second Interim fees and expenses as a professional of the Estate:

Fees in the amount of \$28,276.93,

The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.

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

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, and Office of the United States Trustee on April 30, 2015. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Motion to Abandon Property is denied without prejudice.

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

The Motion filed by Mark Robert Stockdale and Jennifer Lynn Stockdale ("Debtor") requests the court to order the Trustee to abandon property commonly known as All God's Children Day Care (the "Property").

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

- A. Debtors filed an original petition under Chapter 7 of the Bankruptcy Code on April 27, 2015.
- B. At the time of entry of the order for relief, debtors were the owners of the business known as All God's Children Day Care. Said Business has no value to the estate herein.
- C. Wherefore, debtors pray that the trustee in above state case be required to abandon said property and for such other relief as just and property pursuant to 11 U.S.C. § 554(b).

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that the business has no value to the estate with no evidence or argument as to why or how the business has no value for the estate. This is not sufficient.

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

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

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a

creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

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

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

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

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

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

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

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities - buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be

claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

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

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

The Motion to Abandon Property filed by Mark Robert Stockdale and Jennifer Lynn Stockdale ("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 denied without prejudice.

10. [15-90414-E-7](#) JESSE SELLERS
Pro se

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
5-5-15 [[16](#)]

Final Ruling: No appearance at the June 11, 2015 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Jesse Michael Sellers, Sr. ("Debtor"), and Trustee on May 5, 2015. The court computes that 37 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 May 5, 2015).

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

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

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

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

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

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

Movant and Settlor has 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 is set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 422):

- A. Movant shall pay \$280,00.00 to Settlor from the tax refunds.
- B. In consideration of the settlement payment, the Settlor will release its liens on all remaining collateral and will cause to be filed proper UCC-Termination Statements, will withdraw any and all existing proofs of claims, it will not maintain any unsecured claim for deficiency against the estate.

REVIEW OF MOTION AND SUPPORTING AUTHORITIES

The Motion recounts the history of this case and the financially enlightened efforts of the Trustee and WestAmerica Bank to get the property of the Estate liquidate. An agreement was reached with WestAmerica Bank to allow for surcharge, to the extent WestAmerica Bank has a lien, for the Estate's expenses in liquidating the property. From the auction proceeds the Trustee has paid WestAmerica Bank \$119,064.42, received for the Estate \$40,988.03 for expenses, and paid the auctioneer \$9,316.15.

The Trustee has recovered monies from two bank accounts. The Motion does not state the amount, but directs the court to page 18 of Exhibit C, the Trustee's Cash Receipts and Disbursement Record. This states that \$231,986.87 was received from the Trustee from Central Community Bank. Exhibit C, p. 18; Dckt. 422. WestAmerica Bank asserts that these monies are proceeds of its collateral.

The Trustee further states in the Motion that an additional \$91,576.85 has been received from a bank account at WestAmerica Bank. For this \$91,576.85, WestAmerica Bank asserts that it has a lien on these monies, but also contended that \$65,000 of the monies were payable to Atascadero Glass. WestAmerica Bank consented to the Trustee using \$3,823.00 of these monies to pay for insurance on the Bank's collateral pending the auction. The Trustee has paid \$22,753.85 of these monies to WestAmerica Bank (Exhibit C, p. 17; Dckt. 244) and is holding the \$65,000.00 which may be payable to Atascaderosso Glass.

The court has authorized the Trustee to disburse \$142,348.68 to WestAmerica Bank, which includes \$58,613.19 of pre-petition tax refunds which had been deposited into the WestAmerica Bank account.

The court has modified the automatic stay to allow WestAmerica Bank to collect the remaining accounts receivable as part of its collateral. The Trustee reports that WestAmerica Bank has collected \$167,458.49.

After the filing of the bankruptcy case, the Trustee has received \$388,319.05 in tax refunds from the Internal Revenue service for the 2009, 2011, 2012, and 2013 tax years. This bankruptcy case was filed on July 16, 2013.

WestAmerica Bank asserts a pre-petition lien against the post-petition paid tax refunds (which are for pre-petition tax years of 2009, 2011, and 2012, and for the 2013 tax year in which the case was filed).

The Trustee has not disputed, or asserted an objection to, the general lien of WestAmerica Bank in equipment, general intangibles, accounts receivable, and proceeds of equipment of the Debtor. The Trustee has disputed as unperfected any lien in titled vehicles.

The Trustee reports that as of December 10, 2014, WestAmerica Bank asserts a claim in the amount of \$466,566.83 (see Exhibit B, Bank's Payoff computation; Dckt. 422). Updating that amount for collection of accounts receivable, the Trustee projects the current remaining claim to be \$367,694.78.

WestAmerica Bank assets that its remaining collateral consists of the post-petition received tax refunds for 2009, 2011, and 2012 tax years totaling \$336,134.00 and the \$65,000.00 of monies in which Atascadero Glass may have an interest.

The Trustee believes that any remaining collateral should be subject to an 11 U.S.C. § 506(c) surcharge for the expenses of the Trustee in preparing and filing tax returns, which have generated the refunds. The Trustee further disputes that WestAmerica Bank is entitled to the \$65,000 of monies that would otherwise be paid to Atascadero Glass.

The Trustee proposes to settle the remaining lien interests asserted by WestAmerica Bank by paying the Bank \$280,000.00. The Bank will also release its lien on the remaining accounts receivable.

The Points and Authorities filed by the Trustee repeat the Motion, cite Federal Rule of Bankruptcy Procedure 9019, and quote the bankruptcy code decision in *In re America West Airlines* as it relates to the general grounds considered by the court in deciding whether a compromise should be approved.

The court is unsure of the legal basis for the dispute and how it is properly being compromised. No legal authorities are presented on the issue of a creditor having an enforceable lien on post-petition paid federal tax refunds. See 31 U.S.C. § 3727.

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 Construction)*, 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 Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (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); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlor has granted a corresponding release for Debtor and the Estate.

Probability of Success

The Movant states that he is unlikely to obtain a better result by objecting to the Settlor's claim. The Settlor's secured claim is the lesser of the amount of its total claim or the value of its remaining security. Since the Settlor asserts an interest in the 2009, 2011, and 2012 tax returns and possibly an interest in the Atascadero Glass proceeds, the Settlor's claim may range from \$336,134 to \$367,694.78. The Movant states that while there may be grounds to object, the proposed settlement allows for the release of all claims for less than the possible secured claim amount.

However, what the court is struggling with based on the Motion and supporting pleadings is what dispute is being compromised. As discussed above, while the claim is stated to be in the range of \$336,134 to \$367,694.78, the collateral identified by the court is \$336,134.00. While there is a general reference to other possible accounts receivable, WestAmerica Bank and its collection agents have been actively working, and recovering substantial payments from the account debtors.

The \$280,000 settlement pre-supposes that there is a significant likelihood that WestAmerica Bank would have a perfected, enforceable lien against the post-petition paid tax refunds (for which it appears that the Trustee filed the tax returns which generated the refunds). If the \$50,073 2013 tax refund (the bankruptcy case being filed in the July 2013) is not included, then there is only \$286,061 in tax refunds relating to pre-petition tax years.

The court is unsure as to what has been "compromised" by WestAmerica Bank for any settlement to be approved by the court.

Difficulties in Collection

Movant states this is neutral since the Movant is not seeking collection from the Settlor.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that litigation would result in significant costs if the Movant litigated under 11 U.S.C. § 506(c). The Movant estimates that if the matter was litigated, litigation expenses would cause unnecessary legal expenses.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be

consumed by the additional costs and administrative expenses created by further litigation.

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 the Movant to purchase or prosecute the property, claims, or interests of the estate to 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/is not] in the best interest of the creditors and the Estate. The proposed settlement allows for the Trustee to settle the claims of the WestAmerica Bank in collateral having a value of \$xxxxxxxxxxxx for a lump sum settlement payment of \$xxxxxxxxxxxx. The settlement further allows the Movant to avoid the unnecessary legal expenses in litigating the claim under 11 U.S.C. § 506(c). The motion is granted.

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

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

The Motion to Approve Compromise filed by Michael D. McGranahan, the Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Approve Compromise between Movant and Westamerica Bank ("Settlor") is denied/granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion(Docket Number 422).

12. [14-90521-E-7](#) DAVID RICE
[14-9019](#) KWS-1
TURLOCK IRRIGATION DISTRICT V.
RICE

CONTINUED MOTION FOR
COMPENSATION FOR KEN
WHITTALL-SCHERFEE, PLAINTIFF'S
ATTORNEY
3-20-15 [[88](#)]

Final Ruling: No appearance at the June 11, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant (*pro se*), Chapter 7 Trustee, and the Office of the United States Trustee on March 20, 2015. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion for Prevailing Party Attorneys' Fees is granted.

Turlock Irrigation District, the Plaintiff ("Plaintiff"), makes a Request for the Allowance of Fees and Expenses in this Adversary Proceeding.

The Plaintiff is seeking reimbursement of reasonable attorneys' fees and costs incurred by Plaintiff in the legal representation by its counsel in Adversary Proceeding No. 14-09019 pursuant to California Civil Code § 1882.2.

The Plaintiff is seeking total fees and expenses in the amount of \$19,422.20.

BACKGROUND

On May 22, 2014, Plaintiff filed its complaint initiating the Adversary Proceeding pursuant to 11 U.S.C. § 523(a)(4), as well as Cal. Civ. Code § 1882-1882.6 to object to the dischargeability of the underlying debt owed to Plaintiff by David Rice ("Defendant-Debtor").

On July 17, 2014, the court entered the default of Defendant-Debtor due to his failure to file any response to the Complaint. On August 6, 2014, the Defendant-Debtor filed a Motion to Set Aside Entry of Default which the court denied without prejudice on August 21, 2014. Dckt. 31. The Defendant-Debtor

filed a second Motion to Set Aside Entry of Default on September 8, 2014 which the court denied on October 2, 2014. Dckt. 50.

On August 14, 2014, the Plaintiff filed a Motion for Entry of Default Judgment which the court denied on November 20, 2014. Dckt. 69.

On March 4, 2015, the court conducted a trial in the instant Adversary Proceeding. On March 10, 2015, the court issued its Judgment after Trial, which ordered that judgment be entered in favor of Plaintiff in the amount of \$15,236.13 and that the judgment is nondischargeable. Dckt. 85. The Judgments also ordered Plaintiff to file a costs bill and a motion for allowance of attorneys' fees and costs by March 20, 2015.

APRIL 20, 2015 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on June 11, 2015 for the Plaintiff to file a supplemental task-billing of the requested fees and costs. Dckt. 99.

SUPPLEMENTAL DECLARATION

The Plaintiff filed a supplemental declaration on May 28, 2015. Dckt. 103. The declaration provides the following task-billing:

<u>Category</u>	<u>Hours</u>	<u>Fees</u>
Case Evaluation	1.3	\$338.00
Correspondence	1.3	\$338.00
Complaint Drafting	3.1	\$806.00
Written Discovery	2.0	\$754.00
Default Judgment Requests	21.7	\$5,642.00
Motions in Adversary Proceeding	14.0	\$3,640.00
Pretrial Matters	6.1	\$1,586.00
Trial Preparation	13.9	\$3,614.00
Trial	4.0	\$1,040.00
Post-Trial Matters	5.0	\$1,300.00
TOTAL		\$19,058.00

Additionally, the Plaintiff requests the following in costs:

<u>Category</u>	<u>Fees</u>
Clerks Filing Fees	\$293.00

CourtCall Fees	\$71.20
TOTAL	\$364.20

APPLICABLE LAW

Cal. Civil Code § 1882

Under California Civil Code § 1882.1:

A utility may bring a civil action for damages against any person who commits, authorizes, solicits, aids, abets, or attempts any of the following acts:

- a. Diverts, or causes to be diverted, utility services by any means whatsoever.
- b. Makes, or causes to be made, any connection or reconnection with property owned or used by the utility to provide utility service without the authorization or consent of the utility.
- c. Prevents any utility meter, or other device used in determining the charge for utility services, from accurately performing its measuring function by tampering or by any other means.
- d. Tampers with any property owned or used by the utility to provide utility services.
- e. Uses or receives the direct benefit of all, or a portion, of the utility service with knowledge of, or reason to believe that, the diversion, tampering, or unauthorized connection existed at the time of the use, or that the use or receipt, was without the authorization or consent of the utility.

If a utility is successful in any civil action brought pursuant to § 1882.1, "the utility may recover as damages three times the amount of actual damages, if any, plus the cost of the suit and reasonable attorney's fees." Cal. Civ. Code § 1882.2.

Prevailing Party Attorneys' Fees

Unless authorized by statute or contractual provision, attorney fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a

lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

DISCUSSION

The Plaintiff has established that under § 1882.1, the Plaintiff is entitled to "the cost of the suit and reasonable attorney's fees." Cal. Civ. Code § 1882.2. The Plaintiff is the prevailing party for purposes of attorney's fees as evidenced by the Judgment After Trial issued by the court which states that "judgment is entered in favor of [Plaintiff] and against [Defendant-Debtor]." Dckt. 85

After a review of the Plaintiff's raw time sheet and the supplemental task-billing, the fees requested appear to be necessary and reasonable. Given the scope of the issues in the Adversary Proceeding as well as a review of the task-billing and the amount of hours expended in each category, the total of \$19,058.00 in attorney's fees is proper. This amount includes the fees incurred in connection with the instant Motion.

As for the costs requested, Plaintiff 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 on-line access to bankruptcy and state law and cases); phone, email, and facsimile; and secretarial support. The costs requested by Plaintiff include CourtCall for \$71.20. This is traditionally not granted as costs without some justification as to why the Plaintiff's attorney was unable to attend the hearing in person. The Plaintiff fails to provide any such justification, and, therefore, the request for CourtCall cost is disallowed. The court allows, however, costs in the amount of \$293.00.

Therefore, upon review of the time sheets and for good cause, Plaintiff is awarded:

Fees	\$19,058.00
Costs and Expenses	\$293.00

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 Prevailing Party Attorneys' Fees filed by Modesto Irrigation District, the prevailing Plaintiff in this Adversary Proceeding, ("Plaintiff") 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 Plaintiff is awarded \$19,351.00 in attorneys' fees and costs as the prevailing party.

This award of attorneys' fees and costs shall be enforced as part of the Judgment entered by this court in this Adversary Proceeding. Judgment, Dckt. 85.

13. [12-93049-E-11](#) MARK/ANGELA GARCIA
[15-9013](#) DMW-2
GARCIA ET AL V. G STREET
INVESTMENTS, LLC. ET AL

MOTION TO DISMISS ADVERSARY
PROCEEDING
5-11-15 [[10](#)]

Final Ruling: No appearance at the June 11, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on, Plaintiffs Attorney, Trustees Attorney, and Office of the United States Trustee on May 11, 2015. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss the Adversary Proceeding is itself dismissed without prejudice as moot, the Plaintiff-Debtors having filed an Amended Complaint.

G Street Investments, LLC ("Defendant") filed the instant Motion to Dismiss Adversary Complaint on May 11, 2015. Dckt. 10. The Defendant seeks dismissal under Fed. R. Civ. P. 12(b)(6), stating that Mark and Angela Garcia ("Plaintiff-Debtors") failed to state any claim, given the Plaintiff-Debtors failed to provide any factual allegations, allegation of jurisdiction, or any statement as to the relief sought.

On May 30, 2015, the Plaintiff-Debtors filed an Amended Complaint, which contains substantially more information (which much of it reading as a points and authorities) as well allegations. The amended complaint is 8 pages long, as compared to the original complaint which was only 2 pages long. Pursuant to Federal Rule of Civil Procedure 15(a) and Federal Rule of Bankruptcy Procedure 7015, Plaintiff may amend the complaint once, as a matter of right. Such amendment must occur within twenty-one days after serving the complaint or twenty-one days after the responsible pleading to the complaint is filed

(including a Rule 12(b) motion). Here, the Rule 12(b) motion to dismiss was filed on May 11, 2015 and the First Amended Complaint filed on May 30, 2015 - nineteen days later.

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

A Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) requires the court to look at the complaint. Here, since the Plaintiff-Debtors have filed an amended complaint following the instant Motion being filed, the grounds for the Motion are moot.

Therefore, in light of the Plaintiff-Debtors filing an amended complaint and the amended complaint appearing to be substantially different than the original complaint, the Motion to Dismiss is dismissed without prejudice, as moot.

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 filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed without prejudice as moot, the Plaintiff-Debtors having filed an Amended Complaint as permitted by Fed. R. Civ. P. 15(a)(1)(B) and Fed. R. Bankr. P. 7015.

14. [10-94467](#)-E-7
CWC-4

TINA BROWN
Michael R. Germain

CONTINUED MOTION FOR CONTEMPT
7-11-13 [[63](#)]

Proper Service: The Order to Appear was served through the Bankruptcy Noticing Center on February 19, 2015. Cert. of Service, Dckt. 165. The court computes that 17 days notice of the hearing was provided to David Foyil and Timothy Brown.

The Motion for Contempt is ~~XXXXXXX~~

In connection with Adversary Proceeding 12-9003 entered a judgment; which is final, no appeal taken; determining that the bankruptcy estate owned three vehicles which were in the possession of Timothy Brown. Mr. Brown was ordered to turn over the vehicles. When he failed to do so, corrective sanctions were ordered. When he repeatedly violated the court's order to turn over the vehicles, the Trustee obtained a monetary judgment for the value of the vehicles, in addition to the corrective sanctions previously ordered by the court.

JUNE 9, 2015 HEARING

Chapter 7 TRUSTEE'S June 4, 2015 Status Report

The Trustee filed a status report on June 4, 2015. Dckt. 169. The Trustee states that on December 4, 2014, the Defendant Tim Brown filed a Chapter 13 case. Case No. 14-91596. On March 3, 2015, the case was voluntarily converted to a Chapter 7 case.

The Trustee states that he has been working with the Chapter 7 Trustee, Gary Farrar, towards identifying assets of the estate. The Meeting of Creditors was concluded on May 28, 2015 and a Notice to Creditors to File Proof of Claim Due to Possible Recovery of Assets was issue don May 29, 2015.

At the hearing the Trustee reported ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~.

CHAPTER 7 TRUSTEE'S DECEMBER 11, 2014 STATUS REPORT

The Chapter 7 Trustee filed a status report on December 11, 2014. Dckt. 157.

In the status report, the Trustee states that as of December 10, 2014, the Debtor has failed to comply with the court's order. No vehicles or required documents or information has been turned over to the Trustee. No monetary sanctions have been paid to the Trustee.

On August 6, 2014, the court entered a supplemental Order for Election of Monetary Damages under Judgment (Dckt. 41) and Authorized Enforcement of Monetary Sanctions (10-49477, DCN: CWC-4) and Judgment Through Combined Writ of Execution and Other Judgment Enforcement ("Supplemental Order"). This Supplemental Order was forwarded to the Trustee's Special Counsel, David Cook,

on August 11, 2014. On November 10, 2014, the court entered an Order Granting Motion for Assignment of Rights, Restraining Order and Turnover (12-09003; DCN: CCA-1).

On November 18, 2014, the court entered an Order Authorizing Process Server to Levy Execution (12-09003; Dckt. 72). On December 2, 2014, Bank of America advised David Cook of a safe deposit box in the name of Debtor, Tim Brown, which they had frozen pursuant to the Temporary Restraining Order.

On December 4, 2014, Defendant Timothy Brown filed a Chapter 13 case, Case No. 14-91596, in the Eastern District of California, Modesto Division, assigned to Judge Bardwil.

Special counsel, David Cook and Defendant's counsel, David Foyil, have entered into a Stipulation to Modify Automatic Stay to Continue Freeze Upon Safety Deposit Box Pending Further Order of the Court.

DECEMBER 18, 2014 HEARING

The court continued the hearing to February 12, 2015. Dckt. 159.

FEBRUARY 6, 2015 HEARING

Since the December 18, 2015 hearing, no supplemental pleadings have been filed.

At the hearing, the court reviewed the Schedules filed by Tim Brown in the Chapter 13 Case. In those Schedules, Mr. Brown states under penalty of perjury that he has possession of the 1997 Harley Davidson Red Fat Boy and the 2007 Chevrolet Corvette which he was previously ordered to turn over. In addition, he states under penalty of perjury that he has the 2008 Harley Davidson Crossbones which was the subject of this court's prior orders. On Schedule B Debtor states under penalty of perjury that all three of the vehicles are "Asset of Related Chapter 7 Bankruptcy Estate In re Brown, Tina." 14-91596; Amended Schedule B, Dckt. 40

Mr. Brown is represented by David Foyil in the Chapter 13 case. Mr. Foyil represented Mr. Brown in earlier contempt proceeding and Mr. Foyil was ordered, and did pay, sanctions to the Trustee. Mr. Foyil also represented Mr. Brown when he stated to the court that all of the vehicles would be turned over to the Trustee in this case in September 2013. Civil Minutes, Dckt. 76, and Order, Dckt. 78.

Tim Brown having lists on Schedule three vehicles which he admits are property of this Bankruptcy Estate, the court is at a loss as to why said vehicles have not been turned over to this Chapter 7 Trustee. Given that Debtor is represented by counsel, David Foyil, the continued improper possession of property of this bankruptcy estate is mystifying.

The court continued the hearing and ordered David Foyil to appear at the continued hearing to address the admitted possession and control of property of this Bankruptcy Estate by Tim Brown.

FEBRUARY 13, 2015 ORDER

On February 13, 2015, the court issued the following order:

The court conducted a continued hearing on this Motion for Contempt relating to the failure of Tim Brown to comply with prior orders of this court. The court noted that in Tim Brown's current bankruptcy case he lists three vehicles which have previously been determined to be property of the Tina Brown estate to be property in which he has an interest and lists on Schedule B of his Chapter 13 Petition. Case N. 14-91596. Further, Tim Brown states under penalty of perjury on such Schedule B that the vehicles are property of the Tina Brown bankruptcy estate. David Foyil, Tim Brown's attorney in this bankruptcy case is also Tim Brown's attorney in his Chapter 13 case. Tim Brown stating under penalty of perjury that the vehicles are property of the Tina Brown bankruptcy estate, cause exists for an explanation as to why he continues in possession or control of such property which he lists on his Schedule B under penalty of perjury.

Therefore, upon review of the current motion, files in this case, the statements of penalty of perjury by Tim Brown on his Schedule filed in his Chapter 13 case, and good cause appearing;

IT IS ORDERED that the hearing on the Motion is continued to 10:30 a.m. on March 5, 2015.

IT IS FURTHER ORDERED that David Foyil, who has appeared previously appeared in this case as counsel for Tim Brown and is currently Tim Brown's attorney of record in Chapter 13 case 14-91596, to address the following:

A. That under penalty of perjury Tim Brown states on Amended Schedule B in Chapter 13 case 14-91596 that 1997 Harley Davidson Red Fat Boy Motorcycle, 2007 Chevrolet Corvette, and 2008 Harley Davidson Crossbones are each "Asset of Related Chapter 7 Bankruptcy Estate in re Brown, Tina,"

B. Admitting that the property is not Tim Brown's, why he lists the property on his Schedules, admits that they are owned by the Tina Brown bankruptcy estate, and has failed to turn over such property to the Trustee in the Tina Brown case; and

C. Provide the name, address, and relationship to Tim Brown of any person that Tim Brown asserts is in possession of each of the above vehicles.

IT IS FURTHER ORDERED that David Foyil shall appear at the March 5, 2015 hearing in person, no telephonic appearance permitted.

IT IS FURTHER ORDERED that Tim Brown and David Foyil, and each of them, shall file a written response listing the names, addresses, and relationship of each person who is in

possession of each of the vehicles shall be filed and served on or before February 28, 2015.

Dckt. 162.

MARCH 5, 2015 HEARING

David Foyil, the attorney for Tim Brown, and Tim Brown failed to comply with the order of the court to provide the information concerning the location of the assets. Mr. Foyil told the court that due to short staffing, his office did not read the requirement for a written response in the order. No reason for Tim Brown's failure to comply with the order was provided.

It was also reported to the court that Tim Brown has converted his case to one under Chapter 7. The election to convert was filed on March 3, 2015.

The court continued this hearing to June 11, 2015, and stated that the court will issue an order to show cause why Mr. Brown is not incarcerated until he discloses the location of the vehicles and the person holding the vehicles, or such persons and locations that he has knowledge of the vehicles being in possession thereof.

CHAPTER 7 TRUSTEE'S JUNE 4, 2015 STATUS REPORT

The Trustee filed a status report on June 4, 2015. Dckt. 169. The Trustee states that on December 4, 2014, the Defendant Tim Brown filed a Chapter 13 case. Case No. 14-91596. On March 3, 2015, the case was voluntarily converted to a Chapter 7 case.

The Trustee states that he has been working with the Chapter 7 Trustee, Gary Farrar, towards identifying assets of the estate. The Meeting of Creditors was concluded on May 28, 2015 and a Notice to Creditors to File Proof of Claim Due to Possible Recovery of Assets was issue don May 29, 2015.

15. [15-90269-E-7](#) DEANNA COLLINS MOTION TO AVOID LIEN OF CACH,
MLP-1 Martha Lynn Passalacqua LLC
5-11-15 [[10](#)]

Final Ruling: No appearance at the June 11, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Chapter 7 Trustee, and Office of the United States Trustee on May 11, 2015. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Cach, LLC ("Creditor") against property of Deanna Collins ("Debtor") commonly known as 2024 Nimrood Drive, Ceres, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$2,639.41. An abstract of judgment was recorded with Stanislaus County on August 12, 2014, which encumbers the Property.

Pursuant to the Debtor's Schedule A, Debtor's interest, as a joint tenant, in the subject real property has an approximate value of \$74,975.00 as of the date of the petition. However, Debtor does not state in her declaration the value of the property. Schedule A states that the only other joint tenant is Debtor's son-in-law. Based on that statement, the court concludes that the real property has a value of \$150,000.00, yielding a joint interest value of \$75,000 for Debtor (the court rounds up the last \$25 for ease of computing).

Schedule A further states that the Property is subject to a secured claim in the amount of \$49,000. This appears to be the lien against the entire property, not merely Debtor's joint tenancy interest.

In both the Motion and in her declaration under penalty of perjury Debtor subtracts the full amount of the \$49,000 secured claim from only her 50% value

as a joint tenant. This in effect gives the other joint tenant, Debtor's son-in-law, a free one-half joint tenant interest. That does not appear proper.

While Debtor's testimony under penalty of perjury that there is a negative (\$24,000) in value for this judgment lien is incorrect (and false), even under the correct computation there is no value for this judgment lien in the property after the senior lien and homestead exemption (after adjusting for the \$25 computational rounding).

The unavoidable consensual liens total \$49,000.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of \$49,975.00 on Schedule C. The value of the property is \$149,950. After subtracting the \$49,000.00 secured claim, Debtor's 50% joint tenant interest has a value of \$50,475.00. After applying the homestead exemption of \$49,975.00, there is a value of \$500.00. However, such value is illusory, as Debtor has claimed a homestead exemption under California Code of Civil Procedure § 704.730 only in the amount of \$49,975.00, while her actual exemption is at least \$75,000.00. The court infers that Debtor would increase her claimed homestead to the full \$75,000.00, rather than taking a lesser amount, rather than having the lien remain on the Property for \$500.00.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

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

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

IT IS ORDERED that the judgment lien of Cach, LLC, California Superior Court for Stanislaus County Case No. 2005302, recorded on August 12, 2014, Document No. 2014-0052479 with the Stanislaus County Recorder, against the real property commonly known as 2024 Nimrod Drive, Ceres, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

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

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

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

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

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

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

The Motion to Abandon Property is granted.

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

The Motion filed by Deanna Lynn Collins ("Debtor") requests the court to order the Trustee to abandon property commonly known as 2024 Nimrood Dr, Ceres,

California (the "Property"). This Property is encumbered by the lien of Cal State Home Mortgage, securing claim of \$49,000.00. Debtor has also claimed an exemption in the Property in the amount of \$49,975.00. The Declaration of Deanna Lynn Collins has been filed in support of the motion and values her share of the Property to be \$74,975.00.

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

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

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

The Motion to Abandon Property filed by Deanna Lynn Collins ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the Property identified as:

1. 2024 Nimrood Dr, Ceres, California

and listed on Schedule A by Debtor is abandoned to Deanna Lynn Collins by this order, with no further act of the Trustee required.

17. [15-90174-E-7](#) SABRINA AFIFI
[15-9010](#) UST-1
U.S. TRUSTEE V. AFIFI

MOTION FOR ENTRY OF DEFAULT
JUDGMENT
4-13-15 [[16](#)]

Final Ruling: No appearance at the June 11, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant (*pro se*), Chapter 7 Trustee, and Turlock Irrigation District on April 13, 2015. By the court's calculation, 59 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Default Judgment is granted.

The United States Trustee ("UST") filed the instant Motion for Default Judgment on April 13, 2015. Dckt. 16. The Trustee requests that the court enter a default judgment pursuant to Fed. R. Civ. P. 55(b)(2) as incorporated by Fed. R. Bankr. P. 7055 in favor of the UST.

The instant Adversary Proceeding was filed on February 27, 2015. In the complaint, the UST is seeking: (1) Injunction against filing another bankruptcy case under 11 U.S.C. §§ 105 and 349 and (2) Denial of discharge in the current case under 11 U.S.C. § 727(a)(4)(A).

The UST argues that Sabrina Afifi (" Defendant-Debtor") failed to file an answer or to request for an extension within the time provided.

The Clerk entered the Defendant-Debtor's default pursuant to Fed. R. Bankr. P. 7055(a). Dckt. 12.

FACTS

In the Complaint, UST is seeking: (1) Injunction against filing another bankruptcy case under 11 U.S.C. §§ 105 and 349 and (2) Denial of discharge in the current case under 11 U.S.C. § 727(a)(4)(A).

UST alleges that the Defendant-Debtor has now filed seven bankruptcy cases in which they have failed to satisfy her duties as debtor. The Underlying Case is the Defendants' eighth bankruptcy case since 2013. Each of the prior cases was dismissed. The following table reflect the Defendant-Debtor's bankruptcy history:

Case No.	Filed	Dismissed	Reason
13-91614-E-7	September 4, 2013	September 16, 2013	Failure to timely file documents. Dckt. 20
13-91702-E-7	September 20, 2013	October 7, 2013	Failure to timely file documents. Dckt. 22
13-91823	October 10, 2013	October 28, 2013	Failure to timely file documents. Dckt. 47
14-91457-E-7	October 28, 2013	November 10, 2014	Failure to timely file documents. Dckt. 20
14-91528-E-7	November 13, 2014	February 19, 2015	Failure to appear at Meeting of Creditors. Dckt. 30
15-90009-D-13	January 6, 2015	January 20, 2015	Failure to timely file documents. Dckt. 10.
15-90061-D-13	January 22, 2015	February 9, 2015	Failure to timely filed documents. Dckt. 11

ANALYSIS

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment of nondishchargeability of a claim is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986); *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006)(citing *In re*

Kubick, 171 B.R. 658, 659-60 (B.A.P. 9th Cir. Alaska 1994)). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)); *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, *In re McGee*, 359 B.R. at 772, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *Id.* at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775. Finally, Federal Rule of Civil Procedure 9(b), made applicable through Federal Rule of Bankruptcy Procedure 7009, raises the bar by requiring that allegations of fraud be stated with particularity.

In *Kubick*, the Bankruptcy Appellate Panel held that the Bankruptcy Court must exercise its independent duty, arising under Federal Rule of Bankruptcy Procedure 55(b)(2), to determine the sufficiency of the plaintiff's claim before entering a default judgment. *In re Kubick*, 171 B.R. at 662. In *Kubick*, the plaintiff-creditor filed a complaint objecting to Debtor's discharge. *Id.* at 171 B.R. at 659. The debtor did not file a response, and the court granted the plaintiff's motion for default judgment without a hearing. *Id.* On appeal, the Bankruptcy Appellate Panel held that the plaintiff's complaint could not support a default judgment, because it merely recited the statutory elements without sufficiently alleging elements of the claim. *Id.* at 662. In vacating the judgment, the Bankruptcy Appellate Panel held that the Bankruptcy Court must exercise its discretion to determine the legal sufficiency of the complaint before entering a default judgment. *Id.*

Furthermore, in *McGee* the Bankruptcy Appellate Panel affirmed that the Bankruptcy Court may require Plaintiff to present evidence in support of its complaint. *In re McGee*, 359 B.R. at 775. In *McGee*, the creditor filed a complaint to establish its claim as nondischargeable under Federal Rule of Bankruptcy Procedure 532(a)(2)(B). *Id.* at 767. When the defendant-debtor failed to appear, the Bankruptcy Court entered a default. *Id.* at 768. However, the court denied a motion for default judgment, because the creditor did not offer direct proof supporting an essential element of their claim: that they relied on the defendant's fraudulent misrepresentations. *Id.* On appeal, the Bankruptcy Appellate Panel affirmed, holding that merely *pleading* a prima facie case, without proving one, does not entitle the creditor to a default judgment. *Id.* at 774. The Bankruptcy Court properly used its discretion in requiring competent, admissible evidence before granting a default judgment. *Id.* at 775.

Applying these factors to determine whether the court should exercise its discretion, the court finds that the Defendant-Debtors will not be prejudiced by the court considering the merits of the present Motion, as they has had ample opportunity to respond to the claims.

11 U.S.C. §§ 105 and 349: prohibiting the Defendants from filing a new bankruptcy case for three years

Section 349(a) governs a dismissal of a bankruptcy case with prejudice. It states:

(a) Unless 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; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

11 U.S.C. § 349.

Section 349 establishes the general rule that a dismissal of a case is without prejudice. However, Section 349 also "expressly grants a bankruptcy court the authority 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, at least for some period of time.'" *In re Leavitt*, 209 B.R. 935, 939 (B.A.P. 9th Cir. 1997) (citing 3 Collier On Bankruptcy § 349.01, at 349-2-3 (15th ed.1997)). A dismissal with prejudice is a complete adjudication of the issues presented by the pleadings and a bar to further action between the parties. *Id.* (citing *In re Tomlin*, 105 F.3d 933-37 (4th Cir. 1997)).

The Bankruptcy Code does not explicitly define "cause" for purposes of Section 349. Case law suggests that "egregious" conduct must be present. *Id.* Cases have found that "if a debtor engages in egregious behavior that demonstrates bad faith and prejudices creditors. . . will a bankruptcy court forever bar the debtor from seeking to discharge then existing debt." *Tomlin*, 105 F.3d at 937. Bad faith is a justifiable cause for dismissing with prejudice under Section 349. *Landis v. Pinedo (In re Pinedo)*, No. 11-61500-B-13, 2011 Bankr. LEXIS 5655 at *2 (Bankr. E.D. Cal. Dec. 30, 2011).

When determining if bad faith exists, courts should ask "whether the debtor 'misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or an otherwise [filed his . . . [petition or] plan in an inequitable manner.'" *In re Eisen*, 14 F.3d 469 (9th Cir. 1994) (quoting *In re Nash*, 765 F.2d 1410, 1415 (9th Cir. 1985)). "A debtor's history of filings and dismissals is relevant." *Id.* Some factors that a court may consider when evaluating a debtor's history of filings include: "(1) the time between the prior case and the present one; (2) whether the second case was filed to obtain the favorable treatment afforded by the automatic stay; (3) the effort made to comply with the prior case plan; (4) the fact that Congress intended the debtor to achieve its goals in a single case; (5) any other facts the court finds relevant." *In re Huerta*, 137 B.R. 356,367 (Bankr. C.D. Cal 1992).

Under 11 U.S.C. § 105(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).

In exercising these general statutory powers, a bankruptcy court may "'carry out' the provisions of the Code" but must "yield to specific prohibition found elsewhere." *Law v. Siegel*, 134 S.Ct. 1188, 1194 (2014).

Here, UST has shown sufficient basis for dismissal with prejudice. Applying the factors for bad faith filing outlined in *In re Huerta* to the instant case, it is apparent that the Defendant-Debtors were acting in bad faith, justifying a dismissal with prejudice under Section 349. The instant bankruptcy case is the eighth one in the past four years, signaling an abuse of the bankruptcy system, especially since "Congress intended to debtor to achieve its goals in a single case." *Huerta*, 137 B.R. at 367. All of the prior cases have been dismissed because of the failure of Defendant-Debtor to file timely documents or to attend the Meeting of Creditors.

This is not a situation where "well intentioned but least sophisticated consumers" tripped over "technicalities of federal law." In each of the previous seven bankruptcy cases, the Defendant-Debtor did not meet the bare minimum requirements of filing necessary documentation. In fact, in 6 of the cases, the Defendant-Debtor merely made a skeletal filing, without providing any necessary and required information. While the court is cognizant that the Defendant-Debtor has filed these pro-per, the repeated failure to make the minimum filing requirement is evidence that the Defendant-Debtor has unfairly manipulated the Bankruptcy code.

All of these facts support the conclusion that Defendant-Debtors have acted egregiously and in bad faith by filing multiple bankruptcies in a short period of time and having the prior ones dismissed due to failures on part of the Defendant-Debtor.

Furthermore, due to the particularly egregious acts of the Defendant-Debtors in the multiple bad faith filings and under this court's authority under Section 105, this court finds that an injunction barring the Defendant-Debtors from filing any subsequent petition for relief under the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of California for a period three-year proper.

11 U.S.C. § 727(a)(4)(A): denying Defendants' discharge in the Underlying Case

11 U.S.C. § 727 provides, in relevant part:

(a) The court shall grant the debtor a discharge, unless-. .

(4) the debtor knowingly and fraudulently, in or in connection with the case -

(A) made a false oath or account

11 U.S.C. § 727.

The burden of proof is on the moving party "to show by a preponderance of the evidence that the debtor's case falls within one of the enumerated exceptions of § 727(a), thereby permitting the Court to deny the debtor a discharge." *In re Wells*, 426 B.R. 579, 587-88 (Bankr. N.D. Tex. 2006).

Here, the UST has shown that the Defendant-Debtor has violated § 727(a)(4)(A). A review of the Defendant-Debtor's petition in the underlying bankruptcy case shows that, once again, the Defendant-Debtor made a skeletal filing. Nowhere in the skeletal filing does the Defendant-Debtor disclose these seven prior cases. This omission of the seven previous cases was made knowingly and fraudulently, as the Defendant-Debtor had knowledge of these cases being filed, as evidenced by her being pro per, and was in an effort to have the automatic stay placed in effect.

This court finds that the Defendant-Debtor knowingly and fraudulently made a false account of her previous seven bankruptcy cases and is, therefore, not entitled to discharge, pursuant to 11 U.S.C. § 727(a)(4)(A).

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 Entry of Default Judgment filed by United States Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the Defendant-Debtor Sabrina Afifi is denied her discharge in Bankruptcy Case No. 15-90174-E-7 pursuant to 11 U.S.C. § 727(a)(4)(A).

IT IS FURTHER ORDERED that the Defendant-Debtor is prohibited from filing, or from causing to be filed, any subsequent petition for relief under the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of California, for a period of three-years.

18. [13-91189](#)-E-11 MICHAEL/JUDY HOUSE
RMY-14 Robert M. Yaspan

CONTINUED MOTION FOR APPROVAL
OF STIPULATION TO EXTEND ORDER
ON MOTION TO AUTHORIZE USE OF
CASH COLLATERAL THROUGH
DECEMBER 31, 2014
9-18-14 [[200](#)]

Tentative Ruling: The Motion for Approval of Stipulation to Extend Order on Motion to Authorize Use of Cash Collateral Through December 31, 2014 was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice, creditors and Office of the United States Trustee on February 19, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Approval of Stipulation to Extend Order on Motion to Authorize Use of Cash Collateral Through December 31, 2014 was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

No opposition was presented at the hearing. The Defaults of the non-responding parties are entered by the court.

<p>The Motion to Authorize Use of Cash Collateral Through September 30, 2015 is granted.</p>

Debtors-in-Possession Michael House and Judy House ("Debtors-in-Possession") request an interim order authorizing Debtor-in-Possession to continue to use the cash collateral through September 30, 2015, (b) granting adequate protection to certain pre-petition secured parties for the use of their cash collateral, (c) prescribing the form and manner of notice and setting the time for further hearings regarding the continued use of cash collateral. FN.1.

FN.1. The court notes that the Debtors-in-Possession yet again filed this Motion under the wrong DCN. The Debtors-in-Possession have failed multiple times to follow court order at filing the request under the continued DNC, rather than as a new one. The court *sua sponte* corrects this oversight and analyzes the request under the correct docket control number ("RMY-14") to ensure consistency on the docket. The court reminds Debtor-in-Possession and Debtor-in-Possession's counsel that any further Motion for continued use of cash-collateral shall use the docket control number RMY-14 so that there is a connection between the previous granting of use. That is why the court has continued the instant Motion to allow the Debtor-in-Possession to request further use under the same DCN.

The court notes that if the Debtors-in-Possession do not file any future requests under this DCN, as ordered, the court will deny without prejudice any standalone requests for authorization to use cash collateral.

PRIOR ORDERS

Through the Amended Order entered on September 9, 2013, the court authorized the use of cash collateral through February 28, 2014, including the required adequate protection payments. The court granted the payment of expenses, and provided that the cash collateral may be used monthly, commencing July 1, 2013, through and including February 28, 2014.

The court set a further hearing on the Motion for 10:30 a.m. on February 13, 2014. The Debtors in Possession were ordered to file and serve any new proposed budget and supplemental pleadings for any further use of cash collateral on or before January 13, 2014.

On October 6, 2014, the court authorized the use of cash collateral through December 31, 2014. Dckt 231.

On January 7, 2015, the court authorized the use of cash collateral through and including March 31, 2015. Dckt. 251. The court also continued the hearing to March 5, 2015 to allow for further request.

On March 5, 2015, the court authorized the use of cash collateral through and including February 19, 2015. Dckt. 269. The court also continued the hearing to June 11, 2015 to allow for further request.

Current Motion

Debtor-in-Possession states that the approval of the use of cash collateral will enable Debtor-in-Possession to pay expenses necessary to personal and business related expenses. Debtor-in-Possession alleges that

without the use of cash collateral, Debtor-in-Possession's property may be lost, utilities can be discontinued, and Debtor-in-Possession will not be able to pay for certain personal expenses.

Debtor-in-Possession has pledged the rental income as collateral on the farm-rental properties located at 6231 Smith Road, Oakdale, California ("Smith Ranch"), and 2107 South Stearns Road, Oakdale, California ("Triumph Ranch")(collectively the "Properties"). Debtor-in-Possession will be setting up cash collateral accounts for each of the Properties, and the income for each property will be allocated to the cash collateral account.

The accompanying Memorandum of Points and Authorities states that Debtors-in-Possession own the subject properties that generate rental income. The amounts claimed pursuant to the deeds of trust against each of the Properties are as follows:

Property Description	Position	Lienholder	Amount Claimed Due as of June 25, 2013	Assignment of Rents	Exhibit
Smith Ranch	1st	Oak Valley Community Bank	\$103,690.98	Yes	A
Smith Ranch	2nd	Arthur and Karen House Trust	\$5,500.00	Yes	B
Triumph Ranch	1st	American AG Creditor	\$383,618.93	Yes	C
Triumph Ranch	2nd	Arthur and Karen House Trust	\$5,500.00	Yes	D
Smith Ranch/Triumph Ranch (lien amounts against both properties)	3rd on Smith Ranch; 3rd on Triumph Ranch	Petaluma Acquisition	\$851,497.31	Yes	E and F, respectively

Debtors-in-Possession Michael and Judy House ("Debtors-in-Possession") move the court for entry of an interim order and final order (a) authorizing Debtors-in-Possession to use cash collateral, (b) granting adequate protection to certain pre-petition secured parties for the use of their cash collateral and (c) prescribing the form and manner of notice and setting the time for the final hearing on the Motion.

The Creditors claiming an assignment of rents are:

- A. Arthur and Karen House Trust by virtue of its first position deed on Smith Ranch.
- B. Oak Valley Community Bank by virtue of its second position deed of trust on the Smith Ranch.

- C. American AG Credit by virtue of its first position deed of trust on the Triumph Ranch.
- D. Arthur and Karen House Trust by virtue of its second position deed of trust on the Triumph Ranch.
- E. Petaluma Acquisition by virtue of its third position deed of trust on the Smith Ranch and its third position deed of trust on the Triumph Ranch.

It is anticipated that all secured parties will consent to the use of the cash collateral subject to Debtor-in-Possession continuing to pay all of the contractually due payments and subject to the following budget (with a 20% line by line potential variance):

Income	Expense	Amount
Rental income from Smith and Triumph Properties		26,210.00
Other Income (no subject to cash collateral) including, but not limited to real estate commissions, Valk Care, pasture rent, Disney Store income and School Board stipend		4,300.00
	Payment to Petaluma	(6,275.72)
	Payment to AG Credit	(4,223.98)
	Payment to Oak Valley Community Bank	(1,704.76)
	Payment to Arthur and Karen House Trust (Triumph Ranch)	(5,500.00)
	Fund for Emanuel O. Amaral Settlement	(\$1,200.00)
	Expenses for Ranches	(1,370.00)
	Rent	(1,500.00)
	Utilities	(1,500.00)
	Home Maintenance	(25.00)
	Food	(500.00)
	Clothing	(100.00)
	Medical and Dental	(50.00)
	Transportation	(250.00)
	Recreation	(50.00)
	Charitable Contributions	(30.00)

	Life Insurance	(920.00)
	Health Insurance	(1,100.00)
	Insurance for Ranch, Auto and House	(2,500.00)
	Income Tax	(500.00)
	Photography Expenses	(200.00)
	Trustee's Fees	(325.00)
	Payments for Additional Dependents not living at home	(200.00)
	Attorneys' Fees Carve Out (to be paid only after court approval)	(1,000.00)
	Monthly Cash Flow Profit	480.62

DISCUSSION

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtors-in-Possession have the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. See *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

Debtors-in-Possession state that they are current on the payments under the current order authorizing their use of cash collateral, and are current on their compliance obligations with the United States Trustee.

Debtor-in-Possession seeks authorization to use cash collateral to pay personal expenses post petition taxes, utilities, insurance and maintenance on the rental properties pursuant to the above-referenced budget. Debtor-in-Possession will pay the contractual amounts due on the secured loans for the institutional lenders and payments to the Arthur and Karen House Trust as set forth in the Budget, except as to the Smith Property. Pursuant to the tentative settlement agreement with the Karen House Trust, there will no longer be any adequate protection payments for the Smith Ranch Property but instead the sum of \$1,200.00 per month shall be paid to a fund that will be used to settle the boundary dispute with Emanuel O. Amaral. The adequate protection payment will be held in Mr. Altman's trust account subject to further court order.

The court authorizes the use of cash collateral, pursuant to the order of the court, for the period May 28, 2015 through September 30, 2015, including the required adequate protection payments. Only expenses relating to the property from which the cash collateral is generated may be paid with cash collateral for that property. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by the Debtor in Possession. All surplus Cash Collateral from each property shall be held in a cash collateral account and separately accounted for by the Debtor in

Possession. The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). Here, the existence of a substantial equity cushion and the adequate protection payment protect the creditors' (namely the Arthur and Karen House Trust by virtue of their second position deed of trust on the Smith Ranch, the Oak Valley Community Bank, American AG Credit, and Petaluma Acquisition) interests.

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 Authorize Use of Cash Collateral filed by the Debtors-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 Use Cash Collateral is granted, pursuant to this order, for the period May 28, 2015, through September 30, 2015, and the cash collateral may be used, through an including September 30, 2015, to pay the following monthly expenses:

Expense	Amount
Payment to Petaluma	(6,275.72)
Payment to AG Credit	(4,223.98)
Payment to Oak Valley Community Bank	(1,704.76)
Payment to Arthur and Karen House Trust (Triumph Ranch)	(5,500.00)
Fund for Emanuel O. Amaral Settlement	(\$1,200.00)
Expenses for Ranches	(1,370.00)
Rent	(1,500.00)
Utilities	(1,500.00)
Home Maintenance	(25.00)
Food	(500.00)
Clothing	(100.00)
Medical and Dental	(50.00)
Transportation	(250.00)
Recreation	(50.00)
Charitable Contributions	(30.00)
Life Insurance	(920.00)
Health Insurance	(1,100.00)
Insurance for Ranch, Auto and House	(2,500.00)
Income Tax	(500.00)

Photography Expenses	(200.00)
Trustee's Fees	(325.00)
Payments for Additional Dependents not living at home	(200.00)
Attorneys' Fees Carve Out (to be paid only after court approval)	(1,000.00)

IT IS FURTHER ORDERED that only expenses relating to the property from which the cash collateral is generated may be paid with cash collateral for that property. No use of cash collateral is authorized for any other purposes, including plan payments or use of any "profit" by the Debtors in Possession. All surplus Cash Collateral from each property shall be held in a cash collateral account and accounted for by the Debtors in Possession.

IT IS FURTHER ORDERED the hearing on the Motion is continued to 10:30 a.m. on September 24, 2015, to consider a supplemental to the Motion to extend the authorization to use cash collateral. On or before September 10, 2015, the Debtors in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the June 11, 2015 hearing. Any opposition to the requested use of cash collateral shall be filed and served on or before September 17, 2015.

19. [13-91189](#)-E-11 MICHAEL/JUDY HOUSE
RMY-16 Robert M. Yaspan

MOTION TO EXTEND TIME
5-22-15 [[273](#)]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, creditors holding the 20 largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on May 22, 2015. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

<p>The Motion for Extension of Time to File Their Supplemental Schedules is granted and the Debtors-in-Possession shall file all necessary supplemental schedules required by Fed. R. Bankr. P. 1007(h) on or before September 3, 2015.</p>
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Michael and Judy House ("Debtors-in-Possession") filed the instant Motion for Extension of time to File Their Supplemental Schedules on May 22, 2015. Dckt. 273.

The Debtors-in-Possession state that Debtor Judy House's father passed away on May 2, 2015. The Debtors-in-Possession believe that Debtor Judy House will receive an inheritance from two family trusts, which is shared amount her and her siblings.

The Debtors-in-Possession allege that they are in the process of determining the assets and the value of such. There is both real estate and investments that the Debtors-in-Possession state may take awhile to determine how the assets will be distributed and handled.

Debtors-in-Possession argue that it will take 45-60 days to determine the necessary information to file a supplemental schedule regarding the inheritance. The Debtors-in-Possession request that the court extend the time for filing the supplemental schedules for 45-60 days.

Fed. R. Bankr. P. 1007 states the following, in relevant part:

(h) Interests acquired or arising after petition

If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.

Fed. R. Bankr. P. 1007(c) states that:

Except as provided in § 1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

The court finds that, given the recent passing of Debtor Judith House's father and the subsequent inheritance that will take time to administratively distribute, the court finds cause to extend the time to file supplemental schedules. The Debtors-in-Possession shall file all necessary supplemental scheduled on or before September 3, 2015.

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

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

The Motion for Extension of Time to File Their Supplemental Schedules for filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the Debtors-in-Possession shall file all necessary supplemental schedules required by Fed. R. Bankr. P. 1007(h) on or before September 3, 2015.

20. [13-91189](#)-E-11 MICHAEL/JUDY HOUSE
RMY-17 Robert M. Yaspan

MOTION TO EMPLOY CHAPPELL
SURVEYING SERVICES AS
SURVEYOR(S)
5-28-15 [[278](#)]

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

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

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

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

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

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

The Motion to Employ is granted.

Debtor in Possession, Michael House and Judy House, seeks to employ Professional Chappell Surveying Services, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Professional to assist the Debtor in Possession in surveying the new property boundaries arising from the proposed settlement between Debtors-in-Possession and Emanuel Amaral and working with the governmental agencies on approval of the legal descriptions. The proposed

settlement arises from an adversary proceeding involving a boundary dispute between Debtors-in-Possession and Mr. Amaral involving a road, and certain amount of roadside access near the ranches, that was used to, among other things, bring chicks, equipment, feed and workers to and from the poultry sheds.

The Trustee argues that Professional's appointment and retention is necessary to continue to settle the boundary dispute between Mr. Amaral and Debtors-in-Possession and to survey the properties to a mutually agreeable conclusion.

Brett Chappell, an associate of Chappell Surveying Services, testifies that he is being retained to surveying new lot lines between the properties and preparing legal descriptions and working with governmental agencies for approval of the new lines. Chappell testifies he and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Counsel, considering the declaration demonstrating that Counsel 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 Chappell Surveying Services as Professional for the Debtor in Possessions on the terms and conditions set forth in the Work Order filed as Exhibit 2, Dckt. 282. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

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

The Motion to Employ filed by the 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 the Debtor in Possession is authorized to employ Chappell Surveying Services as professional for the Debtor in Possession on the terms and conditions as set forth in the Work Order, Exhibit 2, Dckt. 282.

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 counsel 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.

IT IS FURTHER ORDERED that the Debtors in Possession are authorized to pay a \$1,500.00 deposit to this professional, which shall be held in trust pending further order of the court. The source of the \$1,500.00 deposit shall be from the monies permitted to be carved out each month from the cash collateral for attorneys' (professional fees). Debtors in Possession do not identify any other source for the extra \$1,500.00 for the deposit.

21. [13-91189](#)-E-11 MICHAEL/JUDY HOUSE
RMY-18 Robert M. Yaspan

MOTION FOR ENTRY OF INTERIM
ORDERS AND/OR, MOTION TO USE
CASH COLLATERAL, MOTION FOR
ADEQUATE PROTECTION,
MOTION/APPLICATION TO SCHEDULE
FURTHER HEARINGS
5-28-15 [[284](#)]

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

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

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

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

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

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

This Docket Entry and item on the calendar was misidentified, the matter having been addressed and an order thereon issued for DCN: RMY-14. **This matter is removed from the Calendared.**

22. [14-91197-E-7](#) NICOLAS PEREZ AND MARIA MOTION FOR TURNOVER OF PROPERTY
SSA-2 MOSQUEDA DEPEREZ 4-27-15 [[59](#)]
 Thomas O. Gillis

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, creditors and Office of the United States Trustee on April 27, 2015. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

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

The Motion for Turnover is granted.

Michael D. McGranahan, Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover of the following:

1. Turnover of 2014 Federal and state filed tax returns of the Debtors
2. Turnover of all 2014 Federal and state tax refunds collected by the Debtors
3. An accounting and turnover of all rents collected on the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039 from the Debtors from commencement of case on August 27, 2014 to the present and continuing

4. Copies of keys or access codes for the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039 from the Debtors and the names, addresses and phone numbers for each tenant residing in the subject properties since the commencement of this case.
5. Turnover of the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039
6. Copies of insurance for the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039 from the Debtors.

MODESTO IRRIGATION DISTRICT'S NON-OPPOSITION

Modesto Irrigation District ("Creditor") filed a non-opposition on May 19, 2015. Dckt. 66. The Creditor states that it holds a first priority lien in both properties under Cal. Water Code § 25806. The Creditor states that it has no objection to the court granting the instant Motion provided that all of Creditor's rights as a senior lien holder in the two properties in question are fully preserved and are not prejudiced by any turnover or transfer made as a result of granting the Motion.

DEBTOR'S RESPONSE

The Debtor filed a response to the instant Motion on May 28, 2015. Dckt. 68. The Debtor states that she is moving the court to dismiss the instant case because it was filed by mistake. Debtors are requesting relief pursuant to Fed. R. Civ. P. 60. If Debtor's Motion to Dismiss is denied, Debtor agrees that the requested turnover and inspection orders may be made.

The Debtor states that she will file a Motion to Dismiss. No such motion has yet to be filed.

Debtor opposes sanctions for the fact that the Debtor originally filed this case pro per. The Debtor hired current counsel, Mr. Gillis, for the adversary proceeding brought against co-debtor. Mr. Gillis later agreed to take the underlying case but became ill and was unable to respond to the Trustee's inquiries.

The Debtor requests that the instant Motion be continued to be heard with the Debtor's Motion to Dismiss on July 2, 2015.

TRUSTEE'S FINAL REPLY

The Trustee filed a final reply on June 1, 2015. Dckt. 73. The Trustee states that the Trustee and Trustee's counsel have refused to turnover the properties, documents, and information requested.

The Trustee argues that he provided additional time due to Mr. Gillis' illness. However, the Trustee states that the Debtor and Debtor's counsel still

have not turned over the property requested. The Trustee argues that the Debtor's request to wait for the dismissal is improper because it is a tactic to avoid the Debtor having to turn over the information.

The Trustee argues that the Debtor and Debtor's counsel should be responsible for fees and costs for their failure to comply with the Trustee's request to turnover. The Trustee argues that he has expended over \$1,500.00. The Trustee requests that any propriety of granting fees and costs in this Motion should be continued until Trustee's counsel, Mr. Altman, returns from an "international engagement" to present further evidence and argument.

APPLICABLE LAW

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

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

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

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

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

DISCUSSION

A review of the instant Motion as well as the accompanying paper shows that turnover is proper. The Trustee has provided evidence of multiple letters sent to Debtor and Debtor's counsel concerning the necessity of turning over the property at issue in the instant Motion. The Debtor and Debtor's counsel

appear to have not responded to any of the Trustee's correspondences and instead requests that the court continue this hearing to be heard with the Debtor's Motion to Dismiss. However, the Debtor has not filed such a Motion, nor is the granting of the instant Motion contingent on the Motion to Dismiss being denied.

The Debtor has a duty, pursuant to 11 U.S.C. § 542, to turn over property of the estate. The Debtor and Debtor's counsel have failed to comply with this statutory duty. Instead, the Debtor appears to rely on Mr. Gillis' illness and the yet-to-be-filed Motion to Dismiss to avoid the Debtor's obligations. The Trustee has made multiple attempts to have the Debtor turn over the property without the need of the instant Motion. Unfortunately, those efforts were in vain.

The court finds that the Property is property of the estate and entitled to be turned over to the Trustee. The Debtor shall deliver on or before **xxxx** the following property:

1. Turnover of 2014 Federal and state filed tax reutrns of the Debtors
2. Turnover of all 2014 Federal and state tax refunds collected by the Debtors
3. An accounting and turnover of all rents collected on the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039 from the Debtors from commencement of case on August 27, 2014 to the present and continuing
4. Copies of keys or access codes for the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039 from the Debtors and the names, addresses and hone numbers for each tenant residing in the subject properties since the commencement of this case.
5. Turnover of the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039
6. Copies of insurance for the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039 from the Debtors.

As to the issue of attorney's fees, the Trustee has failed to provide any time sheets to justify any fees requested and has failed to cite any authority to entitle the Trustee to attorney's fees. If the Trustee wishes to seek sanctions, the Debtor may file a separate motion seeking such. See Fed. R. Civ. P. 18. However, for purposes of this Motion, the Trustee has not provided sufficient information to entitle the Trustee to fees, and the request is denied without prejudice.

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

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

The Motion for Turnover of Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Turnover of Property is granted.

IT IS FURTHER ORDERED that Nicolas Perez and Maria Mosqueda DePerez, and each of them, (collectively referred to as "Debtors") shall deliver on or before [date], possession of the real property

1. Turnover of 2014 Federal and state filed tax returns of the Debtors
2. Turnover of all 2014 Federal and state tax refunds collected by the Debtors
3. An accounting and turnover of all rents collected on the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039 from the Debtors from commencement of case on August 27, 2014 to the present and continuing
4. Copies of keys or access codes for the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039 from the Debtors and the names, addresses and hone numbers for each tenant residing in the subject properties since the commencement of this case.
5. Turnover of the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039
6. Copies of insurance for the real property at 4903 Ebbett Way, Modesto, California, APN 009-039-037 and the real property at 136 Algen Ave., Modesto, California, APN 056-049-039 from the Debtors.

with all of their personal property, personal property of any other persons which Debtors, and each of them, allowed access to the Property; and any other person or persons that Debtors, and each of them, allowed access to the Property removed from the Property.