UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 21, 2016 at 10:30 a.m.

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1. **12-34203-E-7** **WATSON VENTURES, LLC** **OBJECTION TO CLAIM OF GREG WATSON, CLAIM NUMBER 10 AND/OR MOTION TO SET BAR DATE FOR THE FILING OF ADMINISTRATIVE CLAIMS**
ASF-3 **Pro Se** **6-7-16 [149]**

Final Ruling: No appearance at the July 21, 2016 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor (*pro se*), creditors, parties requesting special notice, and Office of the United States Trustee on June 7, 2016. By the court's calculation, 44 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 Objection to Proof of Claim Number 10 of Greg Watson is sustained and disallowed without prejudice as a priority administrative expense pursuant to 11 U.S.C. §§ 503(b) and 507(a)(2).

Alan Fukushima, the Chapter 7 Trustee, requests that the court disallow the claim of Greg Watson ("Expense Claimant"), Proof of Claim No. 10-1 ("Claim"), Official Registry of Claims in this case. FN.1.

The Claim is asserted to be unsecured priority in the amount of $11,185.65. Objector asserts that the Expense Claimant failed to comply with the notice and hearing requirements under 11 U.S.C. § 503 for the allowance of an administrative expense and the Expense Claimant faired to meet its burden of proof that the claim is entitled to priority. Specifically, the Trustee argues that the only evidence filed in support of the claim is a series of Spanish language documents without any English translation.

FN.1. The Trustee also requested that the court set a bar date for filing administrative claim requests. However, the Trustee appears to have noticed that this was an improper joinder of relief and has filed a separate Motion to Set Bar Date. Therefore, the court will reserve the discussion on any bar date in that Motion.

EXPENSE CLAIMANT'S LIMITED OPPOSITION

The Expense Claimant filed a limited opposition on July 8, 2016. Dckt. 157. The Expense Claimant states that he recognizes that he must file a motion in order to obtain reimbursement for these monies paid for the benefit of the Debtor. The Expense Claimant requests the court allow Expense Claimant to withdraw his claim without prejudicing his right to file his motion for reimbursement of administrative fees.

DISCUSSION

11 U.S.C. § 503 of the Bankruptcy Code provides for the "allowance" of administrative expenses. Section 503(b)(1)(A) allows as administrative expenses "the actual, necessary costs and expenses of preserving the estate." The burden of proving an administrative expense is on the claimant. *Microsoft Corp. v. DAK Indus. (In re DAK Indus.)*, 66 F.3d 1091 (9th Cir. 1995). The claimant must show that the debt asserted to be an administrative expense (1) arose from a transaction with the debtor-in-possession as opposed to the preceding entity; and (2) directly and substantially benefitted the estate. *Id.* In order to keep administrative costs to the estate at a minimum, "the actual, necessary costs and expenses of preserving the estate," § 503(1)(A), are construed narrowly. *In re Palau*, 139 Bankr. 942, 944 (B.A.P. 9th Cir. 1992), *aff'd*, 18 F.3d 746 (9th Cir. 1994).

DISCUSSION

Even as a procedural matter, the Trustee's objections is correct in that the Expense Claimant failed to properly set and notice the request for an allowed administrative expense. The Expense Claimant admits to such. The plain language of 11 U.S.C. § 503(b) states that "[a]fter notice and a hearing." The Expense Claimant appears to be attempting to circumvent that requirement, declaring the claim himself to be an administrative expense. This is improper.

Additionally, the Trustee is correct that the Expense Claimant fails to meet the necessary burden to show that the expense is an allowed administrative expense pursuant to 11 U.S.C. § 503.

In order for a claim to receive priority pursuant to 11 U.S.C. § 507(a)(2), the claim must be an "administrative expense[] allowed under section 503(b). Reviewing the attachments of the Proof of Claim

No. 10, all of the information is in Spanish with no accompanying English translation. The burden of proving an administrative claim is on the claimant – here, the Expense Claimant. The Expense Claimant has facially failed to meet this burden.

Based on the evidence before the court, the Expense Claimant's claim is disallowed without prejudice as a priority administrative claim pursuant to 11 U.S.C. § § 503(b) and 507(a)(2). The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Greg Watson, Expense Claimant filed in this case by Alan Fukushima having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 10 of Greg Watson is sustained and disallowed without prejudice as a priority administrative expense pursuant to 11 U.S.C. § § 503(b) and 507(a)(2).

2. **12-34203-E-7** **WATSON VENTURES, LLC** **MOTION TO ESTABLISH BAR DATE FOR FILING MOTIONS FOR ALLOWANCE OF CHAPTER 11 AND CHAPTER 7 ADMINISTRATIVE CLAIMS 6-21-16 [154]**
ASF-4 **Pro Se**

Final Ruling: No appearance at the February 5, 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 (pro se), creditors, parties requesting special notice, and Office of the United States Trustee on June 21, 2016. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Set Administrative Claims Bar Date 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 Set Administrative Claims Bar Date is granted.

Alan Fukushima, Chapter 7 Trustee, filed the instant Motion to Set Administrative Claims Bar Date on June 21, 2016. Dckt. 154.

Trustee requests that the court set the deadline to file administrative claims incurred while this case was in Chapter 11 (from August 1, 2012 to November 9, 2012) or Chapter 7 (from November 9, 2012 to date) as September 4, 2016, pursuant to Fed. R. Bankr. P. 3003(c)(3). Trustee argues that this is to understand the magnitude and the amount of the administrative expenses that have been incurred in ordered to determine the distributions to creditors holding allowed claims.

Trustee states that he would provide notice to interested parties stating that no claim that is based upon rights accruing during the period that the above-captioned case has been pending under chapter 11 or chapter 7, shall be allowed against the estate unless it is the subject of a proof of claim filed on or before September 4, 2016. The notice would also state that the deadline to file a motion seeking administrative priority for any such proof of claim is September 4, 2016.

APPLICABLE LAW

Fed. R. Bankr. P. 3003(c) provides:

(c) Filing of proof of claim

(1) Who may file

> Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

(2) Who must file

> Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) Time for filing

> The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).

DISCUSSION

The court finds that, in order to allow the Trustee to learn of the scope of possible administrative claims, September 4, 2016 provides sufficient time for any creditor or indenture trustee to file a proof of claim. The Trustee shall provide notice to all interested parties of this deadline to file an administrative proof of claim and/or motion seeking administrative priority for any such proof of claim.

Therefore, the Motion is granted and the court sets the date for creditors or indenture trustee to file a proof of administrative claim for September 4, 2016.

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 Set Administrative Claims Bar Date filed by 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 date to fil a proof of

administrative claim is September 4, 2016.

IT IS FURTHER ORDERED that on or before August 4, 2016, Trustee shall mail a Notice of Administrative Expense Bar Date to all parties in interest.

3. **14-26919-E-7** **RODERICK ROBBINS** **MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH RODERICK DARRYL ROBBINS**
HSM-4 **Stephen Murphy** **6-30-16 [131]**

No Tentative Ruling: The Motion for Approval of Compromise 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 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, creditors, parties requesting special notice, and Office of the United States Trustee on June 30, 2016. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

The Motion for Approval of Compromise 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 For Approval of Compromise is xxxxx.

Geoffrey Richards, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Roderick Robbins, Debtor ("Settlor"). The

claims and disputes to be resolved by the proposed settlement are those arising from the Debtor's interest, as the sole probate estate beneficiary, in residential real property commonly known as 136 Dolphin Ct., San Francisco, California ("Property"). The parties have determined that it would be preferable to have the Debtor attempt to sell the Property from the Probate Estate to the Bankruptcy Estate.

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. 135):

A. The Debtor, solely in his capacity as Personal Representative in the Probate Case, and solely on behalf of the Probate Estate, will engage counsel acceptable to the Trustee to represent the Debtor in the Probate Case with said professional's compensation to be paid solely from the Probate Estate.

B. The Debtor will engage the services of a licensed real estate professional to list and sell the Property pursuant to a written listing agreement, with said professional's compensation to be paid solely from the Probate Estate.

C. The Debtor shall sell the Property to the individual or entity approved by the Probate Court. The sale of the Property will be consummated only after approval by the Probate Court, upon noticed motion, subject to the opportunity for overbidding in the Probate Court. The Debtor, through Probate Counsel, will ensure that the proper procedure is followed to ensure that the motion to approve the sale, and opportunity for overbidding are properly noticed and brought before the Probate Court. The purchase and sale agreement entered into with respect to the Property shall state that the sale of the Property is subject to Probate Court approval and overbidding.

D. All proceeds from the sale of the Property are to be held in the Probate Counsel's client trust account after payment of encumbrances of the Property, prorated real property taxes, the seller's share of customary closing costs, real estate commissions, and any amounts required to be withheld for state and federal taxes. The Debtor shall ensure that all appropriate tax returns are filed for the Probate Estate, and all state and federal taxes arising in the Probate Estate, including those arising from the sale of the Property, are promptly paid from the Net Sale Proceeds. Compensation and reimbursement of expenses of other professionals employed by the Debtor in the Probate Case shall also be paid from the Net Sale Proceeds according to the procedural requirements of the Probate Court. Any required Probate Court costs (i.e. filing fees and similar fees) shall also be paid from the Net Sale Proceeds.

E. Within ten business days after payment of all amounts from the Net Sale Proceeds described in the Agreement, Debtor shall, with notice to the Trustee and opportunity to oppose, seek approval from the Probate Court of his final accounting in connection with the Probate Case, and petition for distribution of the Net Sale Proceeds and any other funds in the Probate Estate to the Bankruptcy Estate. All Bankruptcy Estate Funds shall be distributed solely to the Bankruptcy Estate. All Bankruptcy Estate Funds shall irrevocably be property of the Bankruptcy Estate in their entirety, and the

Debtor shall make no claim that any portion thereof is anything other than solely, and exclusively property of the Bankruptcy Estate. The Debtor shall not seek any claim or right to payment from the Bankruptcy Estate of any portion of the Bankruptcy Estate Funds, or to seek any administrative or other claim or right to payment for compensation, fees, or reimbursement of costs in the Bankruptcy Case. The Debtor waives the right to exempt any portion of the Bankruptcy Estate Funds.

F. The Trustee reserves his ability to seek to enforce any and all of his rights and remedies in the event of a default under the Agreement by the Debtor.

Basis for Debtor Providing Estate Administrator Services

In the pleadings, the Debtor is identified as the sole beneficiary of the probate estate. All of the monies from the probate estate are to go to the bankruptcy trustee. Debtor expressly agrees that he will not claim any part of the monies received by the bankruptcy estate from the probate estate, including the Debtor not seeking the recover of any expenses, compensation, or fees.

The Trustee testifies in connection with the Debtor spending all of the time and effort, for free, to get the property sold:

> "8. The Debtor and I have discussed the options for marketing and selling the Property, including the distribution of the Property to the Bankruptcy Estate so I can market and sell the Property. Due to the Debtor's familiarity with the Property, as well as the increased efficiency of administration in both the Probate Case and this Bankruptcy Case, I have concluded that It would be preferable to have the Debtor attempt to sell the Property through the Probate Case and distribute the net proceeds from the sale of the Property from the Probate Estate to the Bankruptcy Estate."

Declaration ¶ 8, Dckt. 133.

Quite possibly the judge has become too jaded after years of law practice and recent years on the bench, but the general observation is that people do not work for free just to sell property for someone else.

At the hearing, the Trustee explained that xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

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, the Trustee and Debtor work together in order to orderly and equitably deal with the Property, given the probate nature of the Property, for the eventual benefit of the estate and creditors.

Probability of Success

The Trustee states that this factor weighs in favor of settlement. The Trustee argues that the Agreement represents a compromise of the parties' respective rights and interest for the benefit of the estate. Given the unique facts surrounding the probate and bankruptcy interest in the Property, the compromise allows for the expeditious sale of the Property through the Probate Court.

Difficulties in Collection

The factor favors settlement because it mitigates the expenses and delays that would inherently occur if the sale of the Property went through the Bankruptcy Court.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that proceeding with the sale in any other way would result in higher administrative expenses that would diminish the value to the parties.

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 in the best interest of the creditors and the Estate. The proposed methodology for selling the Property and the interplay between the Probate Estate and the Bankruptcy Estate will result in the most~~

~~efficient and beneficial means to gain the best value for the estate. 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 Geoffrey Richards, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve Compromise between Movant and Roderick Robbins, the Debtor ("Settlor") ~~is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion(Docket Number 135).~~

4. **14-29231-E-11 RLC-20** **MIZU JAPANESE SEAFOOD BUFFET, INC.** **Stephen Reynolds** **MOTION TO EMPLOY SUN AND ASSOCIATES AS ACCOUNTANT(S)** **6-10-16 [194]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Plan Administrator, creditors, parties requesting special notice, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 45 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Employ is denied.

Mizu Japanese Seafood Buffet, Inc., the Debtor-in-Possession, seeks to employ Accountant, Kit Sun, nunc pro tunc, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Accountant to assist Debtor-in-Possession to review financial information for filing Monthly Operating Reports, computing tax liabilities, calculating shareholder wages and dividend draws, assisting in preparation of reports in support of Plan, and preparation of tax returns.

Kit Sun, an associate of Sun and Associates, Inc., testifies that she is representing Debtor-in-Possession for all required accounting services. Ms. Sun testifies she and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Retroactive Relief Requested

The Motion requests that the order be given retroactive approval all the way back to October 4, 2014 – 625 days in the past. The grounds asserted in the motion for granting such retroactive relief consists of - - - - - - - - nothing. No grounds are asserted. The Ninth Circuit Court of Appeals has well established law on when, and on what conditions, a bankruptcy judge may properly grant retroactive authorization to employ a professional. In re THC Financial Corp;, 837 F.2d 389, 392 (9th Cir. 1988):

> "In this circuit, a retroactive award of fees for services rendered without court approval is not necessarily barred. *Cohen v. U.S. (In re Laurent Watch Co.)*, 539 F.2d 1231, 1232 (9th Cir. 1976). A court may exercise its discretion to award fees for valuable but unauthorized services. *Matter of Triangle Chemicals, Inc.*, 697 F.2d 1280, 1287-88 (5th Cir. 1983); *Stolkin v. Nachman*, 472 F.2d 222, 226-27 (7th Cir. 1973). "
>
> The district court concluded correctly that such awards should be limited to exceptional circumstances where an applicant can show both a satisfactory explanation for the failure to receive prior judicial approval and that he or she has benefited [sic] the bankrupt estate in some significant manner. See *Triangle Chemicals*, 697 F.2d at 1289 (all requiring a benefit to the estate); *In re Twinton Properties Partnership*, 27 Bankr. 817, 819-20 (Bankr. M.D. Tenn. 1983) [**9] (using these criteria among others to justify a retroactive award); *In re Orchid Island Hotels, Inc*., 18 Bankr. 926, 933 (Bankr. D. Haw. 1982); and *Holiday Mart*, 18 Bankr. at 216. "

In this case the Chapter 11 Plan was confirmed on February 10, 2015. A year and one-half has passed since the Debtor in Possession was terminated and the Plan Administrator succeeded to that fiduciary. All of the possible services provided for the Debtor in Possession occurred prior to February 10, 2015.

In her declaration filed on June 10, 2016 (a year and one-half after the plan was confirmed), Kit Sun fails to testify as to why only now authorization for the now terminated Debtor in Possession to hire the accountant is made. Kit Sun fails to provide any testimony that no payments have been made for this work done over the almost two year period prior to confirmation.

While the court may have generously looked on any possible explanation (excuse) presented, here Sun Kit and the Plan Administrator appear to believe that no compliance with the Bankruptcy Code and well established Ninth Circuit Law is required ----- at least of them.

This unfortunately dooms the motion.

REVIEW OF MOTION AND DECLARATION

Though based on the Motion and Supporting Declaration, if a trustee or debtor in possession was seeking to employ Sun Kit going forward, taking into account all of the relevant factors in connection with the employment, it appears that Accountant does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided. Though the court could, grant the motion prospectively, the Accountant and Plan Administrator have cut the corner and presumed that "if they tell the court, the order will be signed." That, unfortunately, is not how a federal judge must exercise federal judicial power. See *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); concluding that while the court's order was improper, it was a final order, but that it is incumbent on federal judges to grant relief as allowed by the law, not merely because no opposition is filed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to 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 denied.
>
> **IT IS FURTHER ORDERED** that on or before August 15, 2016, Kit Sun and Sun and Associates, Inc. shall file a report, executed under penalty of perjury, detailing all of the services provided and monies paid (whether for fees, costs, reimbursements, or other reasons), during the period commencing September 15, 2014 and ending on February 10, 2016, and any monies paid after February 10, 2016 for any services, costs, and expenses paid to Kit Sun or Sun and Associates, Inc. relating to Mizu Japanese Seafood Buffet, Inc., which was serving as the Debtor in Possession in this bankruptcy case, during said period

5.	**16-20852-E-11 DNL-1**	**MATHIOPOULOS 3M FAMILY LIMITED PARTNERSHIP J. Luke Hendrix**	**CONTINUED MOTION TO USE CASH COLLATERAL 4-21-16 [40]**

Continued from 5/5/16

Tentative Ruling: The Motion for Authority 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-in-Possession, creditors and Office of the United States Trustee on February 25, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Authority 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.

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

The Motion for Authority to Use Cash Collateral is granted.

Mathiopoulos 3M Family Limited Partnership ("Debtor-in-Possession") filed the Motion for Authority to Use Cash Collateral on July 7, 2016. Dckt. 60.

PRIOR MOTION FOR AUTHORITY TO USE CASH COLLATERAL

Mathiopoulos 3M Family Limited Partnership ("Debtor-in-Possession") filed the Motion for Authority to Use Cash Collateral on April 21, 2016. Dckt. 40.

Mathiopoulos 3M Family Limited Partnership ("Debtor-in-Possession") filed the first Motion for Authority to Use Cash Collateral on February 25, 2016. Dckt. 13.

BACKGROUND

The Debtor-in-Possession owns real property identified as 3105, 3111, 3119, 3125, 3127, 3129, 3133, 3137, 3141, and 3145 Penryn Road, Penryn, California ("Property"). The Property consists of a business center with approximately 30,700 square feet of rentable building space, with tenants that the Debtor-in-Possession rents out to commercial tenants.

The Debtor-in-Possession states that Wells Fargo Bank, N.A. ("Creditor") asserts a first deed of trust and assignment of rents against the Property to secure a promissory note with a balance of approximately $2,900,000.00.

Debtor-in-Possession argues that it is vital and necessary for the continued operation of the business to use cash collateral to pay necessary preserve the Property, including property taxes, business expenses, and Property upkeep.

Debtor-in-Possession anticipates that by using the cash collateral it will generate post-petition accounts receivable and/or accumulated cash sufficient to provide adequate protection to the secured creditors.

The Debtor-in-Possession offers a portion of the accounts receivable and accumulated cash it will generate post petition as replacement collateral to the Creditor, to the extent that the Creditor's collateral is diminished from the Debtor-in-Possession's use of cash collateral. The replacement liens on post-petition accounts receivable and cash shall be of the same scope, in the same priority, and subject to the same infirmities and defenses as existed pre-petition.

Debtor-in-Possession requests the court authorize the use of rents generated from the Property to pay the business expenses through May 31, 2016, and any other related payments necessary to preserve the Property through May 31, 2016, and any other related payments necessary to preserve the Property through May 31, 2016 in an amount not to exceed $3,000.00, as well as the April 2016 taxes in the amount of $21,113.93, which is due April 10, 2016.

STIPULATION

On February 25, 2016, the Debtor-in-Possession and the Creditor filed a Stipulation for use of cash collateral and adequate protection payments. Dckt. 17. The Stipulation provides for the following:

1. Creditor consents to Debtor-in-Possession's use of the rents from the Property to pay the expenses through May 31, 2016, and any other related payments necessary to preserve the Property through May 31, 2016 in an amount not to exceed $3,000.00.

2. Creditor consents to Debtor-in-Possession's use of the rents from the Property to pay the April 2016 property taxes.

3. Debtor-in-Possession shall provide adequate protection payments to Creditor in the form of

monthly interest payments at the nondefault contract rate under Creditor's promissory note ($13,193.11), beginning March 15, 2016 and continuing thereafter on the 15th day of each month through May 2016.

4. Creditor's lien against the Property and security interest in the rents from the Property which Debtor-in-Possession held, had an interest or had the rights to as of the February 12, 2016 are referred to collectively herein as the "Pre-Petition Collateral."

5. Creditor's pre-petition lien and security interests, if any, in the Pre-Petition Collateral will remain duly perfected, enforceable, unavoidable and effective as of the Petition Date without delivery, filing or recordation of any financing statements, instruments or other documents after the petition date.

6. Creditor is hereby granted, effective as of the petition date, a valid, duly perfected and unavoidable lien against and security interest ("Post-Petition Lien") in all rents which Debtor-in-Possession has or in the future holds, has an interest in or has any rights to. The Post-Petition Replacement Lien shall only be valid if Creditor has an allowed secured claim and only granted to secure Creditor's claims against Debtor-in-Possession's estate in an amount equal to any post-petition diminution in the value of the Pre-Petition Collateral, and will be subordinated to the compensation and expense reimbursement (excluding professional fees) allowed to any trustee appointed in the case. The Replacement Liens shall be in addition to all claims, security interest, liens and rights existing in favor of Creditor, and automatically valid, duly perfected, enforceable, unavoidable and effective as of the petition date, without execution, delivery, filing or recordation of any financing statements, instruments or other documents; and no filing or recordation or other act in accordance with any applicable local, state, federal or common law rules or regulations shall be necessary to create or to perfect such lien and security interest. Notwithstanding any of the foregoing, the Replacement Liens do not include any liens on claims for relief arising under the Bankruptcy Code (11 U.S.C.) §§ 506(c), 544, 545, 547, 548, and 549.

7. Debtor-in-Possession shall prepare or obtain and furnish to Creditor the following on or before the following dates:

   a. On or before March 18, 2016,

      i. A current rent roll for the Property;

      ii. Copy of all leases and modification to said leases of current tenants of the Property; and

      iii. Debtor-in-Possession's 2014 tax return.

   b. On or before the fifteenth of each month, starting April 15, 2016, a copy of the current rent roll for the Property or a statement it has not changed from the precious one provided and copies of the leases of any new tenants and modification to any current leases of the Property that have not already been provided to Creditor.

c. On or before fifteen days after it is completed, a copy of the 2015 tax return.

8. Upon ten business days written notice from Creditor, Debtor-in-Possession shall make the Property available for one or more physical inspections of the Property, so that Creditor may conduct and complete inspections including but not limited to appraisals and environmental reviews.

9. Creditor does not consent to any surcharge of its interest in the Property, Pre-Petition Collateral or Post-Petition Collateral under 11 U.S.C. § 506(c), and neither the negotiation nor the execution, approval or implementation of this Agreement is or may be deemed to be consent to such surcharge. Further, Debtor-in-Possession waives any right to seek a surcharge of Creditor's interests in the Property, Pre-Petition Collateral or Post-Petition Property under 11 U.S.C. § 506(c), provided this waiver is only effective during the period in which Debtor-in-Possession is authorized to use cash collateral.

10. Neither the treatment of Creditor under this Agreement and/or Creditor's acceptance of any of the payments pursuant to this Agreement violates any of the commonly labeled "one-form-of-action" or "anti-deficiency" rules, including, but not limited to, those set forth in Sections 726, 580a, 580b, and 580d of the California Code of Civil Procedure, nor does it affect any rights of Creditor to proceed with its pending foreclosure action for the remaining amounts owing should Creditor's foreclosure no longer be stayed in the future pursuant to the bankruptcy.

11. Termination Events. Debtor-in-Possession's right to use the cash collateral will automatically cease and terminate on the earliest occurrence of any of the following "Termination Events":

a. On June 1, 2016;

b. The date on which the order approving this Agreement is reversed, revoked, stayed or rescinded;

c. The entry of any order granting Creditor or any other creditor relief from the automatic stay with regard to any of the Property or rents;

d. The date on which Debtor-in-Possession shall grant or file an application or motion with the court for approval of any security interest in or lien on the assets of Debtor-in-Possession or Debtor-in-Possession's estate senior to Creditor's security interest or liens other than the security interest and liens created in favor of Creditor by the order approving this agreement;

e. The date on which Debtor-in-Possession files any objection to the validity, amount, allocability, unavoidability, perfection or priority of Creditor's pre-petition, security interest or liens as set forth herein;

f. Entry of an order confirming any Chapter 11 plan in this bankruptcy case;

g. Entry of an order converting this case, for any reason, to a case under a different

Chapter of the Bankruptcy Code;

h. Entry of an order appointing a trustee or examiner in the within Chapter 11 case;

i. Entry of an order dismissing the Chapter 11 case; and

j. The service by Debtor-in-Possession of a motion or notice of a motion to

i. Convert this Chapter 11 case, for any reason, to a case under a different Chapter of the Bankruptcy Code;

ii. To appoint a trustee or examiner in this Chapter 11 case or

iii. To dismiss this Chapter 11 case.

12. Debtor-in-Possession's right to use the cash collateral will also automatically cease and terminate on the occurrence of any of the following. "Additional Termination Events" if Debtor-in-Possession does not cure the specified default within 10 business days after Creditor provides written notice of such default to Debtor-in-Possession's counsel and the Creditor's committee (or the twenty largest unsecured creditors if no committee has been formed):

a. Debtor-in-Possession's breach of any provision of this Agreement (other than those covered in the preceding paragraph);

b. Debtor-in-Possession's breach of any provision of the loan documents that does not conflict with this Agreement or the Bankruptcy Code and Rules, or

c. Debtor-in-Possession's failure to comply with any requirement of the Bankruptcy Code or Rules.

13. Notwithstanding that a Termination Event has occurred or will occur, Debtor-in-Possession and Creditor can, without further order of the court, extend the effect of this Agreement to any date they both agree to in writing in an agreement filed with the court. Such specified date will then be treated as the Expiration Date, and all the terms of this Agreement will apply accordingly.

Dckt. 17.

MARCH 10, 2016 HEARING

After the hearing, the court issued the following order:

The Motion for Authority to Use Cash Collateral filed by Debtor-in-Possession pursuant to the terms of the Stipulation with Wells Fargo Bank, N.A. ("Creditor') having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Use Cash Collateral is granted, pursuant to this order, for the period March 1, 2016 through May 31, 2016, that the cash collateral may be used through May 31, 2016, to pay the following expenses, granting the Debtor-in-Possession a variance of ten percent in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

EXPENSE	**AMOUNT**
Adequate Protection Payment to Wells Fargo	$13,193.11 per month
Property Insurance	$1,045.41 per month
Pacific Gas and Electric	$200.00 per month (approximate)
Recology Auburn (garbage)	$400.00 per month (approximate)
Telephone for business	$150.00 per month (approximate)
Pest control	$123.60 per month (approximate)
Telephone for Fire and Security	$120.00 per month (approximate)
Life Insurance Policies (4)	$617.82 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	$500.00 per month (approximate)

EXPENSE	**AMOUNT**
Placer County Water Agency	$1,000.00 due February 2016 and $1,000.00 due April 2016 (approximate amount due every two months)

Sewer	$2,275.00 due March 2016 (due every three months)
Stanley Security for Fire Alarm	$101.13 due March 2016 (due every three months)

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition rents in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim, which replacement lien is perfected by the issuance of this order, no further act of creditors required.

IT IS FURTHER ORDERED Debtor-in-Possession waives any right to seek a surcharge of Creditor's interests in the Property, Pre-Petition Collateral or Post-Petition Property under 11 U.S.C. § 506(c), only for the expenses which are authorized to be paid with the cash collateral during the period in which Debtor-in-Possession is authorized to use cash collateral by this order.

IT IS FURTHER ORDERED that if Creditor asserts that an event for the "automatic" termination of the use of cash collateral has occurred, Creditor shall file an ex parte motion for order terminating use of cash collateral and supporting pleadings (evidence of the event of termination) and lodge with the court a proposed order termination the use of cash collateral. Creditor shall immediately serve (electronically and by First Class Mail) the ex parte motion and supporting pleadings and provide telephonic notice to counsel for the Debtor in Possession and the U.S. Trustee. If the Debtor in Possession disputes the event of termination, counsel for Debtor in Possession shall notify the court and counsel for Creditor. The court may, upon review the ex parte motion set an emergency hearing *sua sponte* or may rule on the ex parte motion without hearing.

IT IS FURTHER ORDERED the hearing on the Motion is continued to 10:30 a.m. on May 5, 2015, to consider a supplemental to the Motion to extend the authorization to use cash collateral. On or before April 21, 2016, the Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the May 5, 2016 hearing. Any opposition to the requested use of cash collateral shall be filed and served on or before April 28, 2016.

Dckt. 29.

MAY 5, 2015 HEARING

After the hearing, the court issued the following order:

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

The Motion for Authority to Use Cash Collateral filed by Debtor-in-Possession pursuant to the terms of the Stipulation with Wells Fargo Bank, N.A. ("Creditor') having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Use Cash Collateral is granted, pursuant to this order, for the period May 5, 2016 through July 31, 2016, that the cash collateral may be used through July 31, 2016, to pay the following expenses, granting the Debtor-in-Possession a variance of ten percent in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

EXPENSE	**AMOUNT**
Property Insurance	$1,045.41 per month
Pacific Gas and Electric	$300.00 per month (approximate)
Recology Auburn (garbage)	$500.00 per month (approximate)
Telephone for business	$200.00 per month (approximate)
Pest control	$123.60 per month (approximate)
Telephone for Fire and Security	$120.00 per month (approximate)
Life Insurance Policies (4)	$675.00 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	$1,500.00 per month (approximate)

EXPENSE	**AMOUNT**
Placer County Water Agency	$1,500.00 due June 2016(approximate amount due every two months)
Sewer	$2,275.00 due June 2016 (due every three months)
Stanley Security for Fire Alarm	$101.13 due June 2016 (due every three months)

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition rents in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim, which replacement lien is perfected by the issuance of this order, no further act of creditors required.

IT IS FURTHER ORDERED the Debtor-in-Possession shall continue to make the monthly adequate protection payments of $13,193.11 to Wells Fargo Bank, N.A.

IT IS FURTHER ORDERED Debtor-in-Possession waives any right to seek a surcharge of Creditor's interests in the Property, Pre-Petition Collateral or Post-Petition Property under 11 U.S.C. § 506(c), only for the expenses which are authorized to be paid with the cash collateral during the period in which Debtor-in-Possession is authorized to use cash collateral by this order.

IT IS FURTHER ORDERED that if Creditor asserts that an event for the "automatic" termination of the use of cash collateral has occurred, Creditor shall file an ex parte motion for order terminating use of cash collateral and supporting pleadings (evidence of the event of termination) and lodge with the court a proposed order termination the use of cash collateral. Creditor shall immediately serve (electronically and by First Class Mail) the ex parte motion and supporting pleadings and provide telephonic notice to counsel for the Debtor in Possession and the U.S. Trustee. If the Debtor in Possession disputes the event of termination, counsel for Debtor in Possession shall notify the court and counsel for Creditor. The court may, upon review the ex parte motion set an emergency hearing *sua sponte* or may rule on the ex parte motion without hearing.

IT IS FURTHER ORDERED the hearing on the Motion is continued to 10:30 a.m. on July 21, 2016, to consider a supplemental to the Motion to extend the authorization to use cash collateral. On or before July 7, 2016, the Debtor in Possession shall file and serve supplemental pleadings for the further use of cash

collateral and notice of the July 21, 2016 hearing. Any opposition to the requested use of cash collateral shall be filed and served on or before July 14, 2016.

Dckt. 49.

INSTANT MOTION

The Debtor-in-Possession states that it estimates that the regularly reoccurring expenses will be incurred during the period of August 1, 2016 and September 30, 2016.

Debtor-in-Possession estimates the following expenses that will be incurred during the period of August 1, 2016 and September 30, 2016. The Debtor-in-Possession indicates that while the expenses are identical, there have been some increases in the anticipated amount.

EXPENSE	**AMOUNT**
Property Insurance	$1,045.41 per month
Pacific Gas and Electric	$300.00 per month (approximate)
Recology Auburn (garbage)	$500.00 per month (approximate)
Telephone for business	$200.00 per month (approximate)
Pest control	$123.60 per month (approximate)
Telephone for Fire and Security	$120.00 per month (approximate)
Life Insurance Policies (4)	$675.00 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	$1,500.00 per month (approximate)
	_____
Total Cash Collateral Request	$5,168.01

Debtor-in-Possession also provides for proposed use for cash collateral as to non-monthly expenses:

EXPENSE	**AMOUNT**
Placer County Water Agency	$1,500.00 due August 2016(approximate amount due every two months)
Sewer	$2,275.00 due September 2016 (due every three months)
Stanley Security for Fire Alarm	$101.13 due September 2016 (due every three months)
	_____
Total Cash Collateral Request	$3,876.13 through September 30, 2016

WELLS FARGO BANK'S CONSENT

Wells Fargo Bank, N.A. filed a consent to the request on July 14, 2016. Dckt. 64.

APPLICABLE LAW

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

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--
>
> (A) such sale or such lease is consistent with such policy; or
>
> (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--
>
> (I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

> (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

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

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

DISCUSSION

In the instant case, the Debtor-in-Possession is seeking authorization of the court to use cash collateral to pay necessary expenses to avoid immediate and irreparable harm to the estate and Property.

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).

Here, the Debtor-in-Possession and Creditor have filed a stipulation in which the Creditor consents to the Debtor-in-Possession's use of cash collateral. The adequate protection payment proposed is $13,193.11, beginning March 14, 2016, and continuing thereafter on the 15th day of each month through May 2016. The court finds that the adequate protection payment is sufficient given the facts of the instant case.

The court authorizes the use of cash collateral, pursuant to the order of the court, for the period July 21, 2016 through September 30, 2016, including the required adequate protection payments. 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 the Property shall be held in a cash collateral account and separately accounted for by the Debtor in Possession.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Authority to Use Cash Collateral filed by Debtor-in-Possession pursuant to the terms of the Stipulation with Wells Fargo Bank, N.A. ("Creditor')

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

IT IS ORDERED that the Motion to Use Cash Collateral is granted, pursuant to this order, for the period July 21, 2016 through September 30, 2016, that the cash collateral may be used through September 30, 2016, to pay the following expenses, granting the Debtor-in-Possession a variance of ten percent in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

EXPENSE	**AMOUNT**
Property Insurance	$1,045.41 per month
Pacific Gas and Electric	$300.00 per month (approximate)
Recology Auburn (garbage)	$500.00 per month (approximate)
Telephone for business	$200.00 per month (approximate)
Pest control	$123.60 per month (approximate)
Telephone for Fire and Security	$120.00 per month (approximate)
Life Insurance Policies (4)	$675.00 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	$1,500.00 per month (approximate)

EXPENSE	**AMOUNT**
Placer County Water Agency	$1,500.00 due August 2016(approximate amount due every two months)

Sewer	$2,275.00 due September 2016 (due every three months)
Stanley Security for Fire Alarm	$101.13 due September 2016 (due every three months)

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition rents in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim, which replacement lien is perfected by the issuance of this order, no further act of creditors required.

IT IS FURTHER ORDERED the Debtor-in-Possession shall continue to make the monthly adequate protection payments of $13,193.11 to Wells Fargo Bank, N.A.

IT IS FURTHER ORDERED Debtor-in-Possession waives any right to seek a surcharge of Creditor's interests in the Property, Pre-Petition Collateral or Post-Petition Property under 11 U.S.C. § 506(c), only for the expenses which are authorized to be paid with the cash collateral during the period in which Debtor-in-Possession is authorized to use cash collateral by this order.

IT IS FURTHER ORDERED that if Creditor asserts that an event for the "automatic" termination of the use of cash collateral has occurred, Creditor shall file an ex parte motion for order terminating use of cash collateral and supporting pleadings (evidence of the event of termination) and lodge with the court a proposed order termination the use of cash collateral. Creditor shall immediately serve (electronically and by First Class Mail) the ex parte motion and supporting pleadings and provide telephonic notice to counsel for the Debtor in Possession and the U.S. Trustee. If the Debtor in Possession disputes the event of termination, counsel for Debtor in Possession shall notify the court and counsel for Creditor. The court may, upon review the ex parte motion set an emergency hearing *sua sponte* or may rule on the ex parte motion without hearing.

IT IS FURTHER ORDERED the hearing on the Motion is continued to 1:30 p.m. on September 20, 2016 (specially set to the court's Chapter 13 Calendar due to hearing date limitations), to consider a supplemental to the Motion to extend the authorization to use cash collateral. On or before September 6, 2016, the Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the September 20, 2016 hearing. Any opposition to the requested use of cash collateral may be presented orally at the hearing.

6.	16-20852-E-11 DNL-1	MATHIOPOULOS 3M FAMILY LIMITED PARTNERSHIP J. Luke Hendrix	MOTION TO USE CASH COLLATERAL 7-7-16 [60]

Final Ruling: No appearance at the July 21, 2016 hearing is required.

The motion appearing to be an erroneous duplicate docket entry, **this matter is removed from calendar.**

7. **14-29361-E-7** **WALTER SCHAEFER** **CONTINUED MOTION FOR CONTEMPT**
DNL-15 **Douglas Jacobs** **11-4-15 [238]**

Continued from 3/24/16

Final Ruling: No appearance at the July 21, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on November 4, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion for Contempt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

The Motion for Contempt is dismissed without prejudice.

Kimberly J. Husted ("Trustee") moves for an order holding Walter H. Schaefer ("Debtor") in contempt for violating court orders, Dckt. 101 and 135. Trustee seeks (1) compulsory sanctions in an amount no less than $5,000.00 per day; or (2) ordering that the Debtor be imprisoned until such time as the Debtor complies with the court's orders.

FN.1. The court notes that the Motion contains a typographical error, misidentifying the trustee as J. Michael Hopper moving for an order of contempt. The court recognizes Kimberly J. Husted as the duly-appointed Trustee of the above-captioned bankruptcy estate.

ALLEGED CONDUCT OF DEBTOR IN VIOLATION OF PRIOR COURT ORDERS

Trustee alleges that Debtor violated court orders directing the Debtor to turn over certain real properties located in Costa Rica, corporations organized under the laws of Costa Rica which hold interests in the real properties, and ordering the Debtor to direct the Debtor's agents, attorneys, and brokers to comply with the Trustee's and her attorneys' instructions. Trustee provides the court with an exhaustive factual background, to contextualize the issue at hand, urging the court to grant the instant Motion. Trustee alleges the following:

Among the assets of the Debtor's bankruptcy estates is the Debtor's interest in:

A. Certain real property commonly known as Los Delfines, Bayside, Unit #2, Tambor, Costa Rica ("First Condominium");

B. Certain real property commonly known as 184 Los Delfines, Tambor, Costa Rica ("Undisclosed Condominium");

C. Certain unimproved lots in Costa Rica identified as Guanacaste Nos. 37920-000 and 37922-000 ("Lots"); and

D. Corporations organized under the laws of Costa Rica which hold title to the aforementioned real properties and identified as Morena Velar S.A. ("Velar"), Free Solutions Imperial S.A. ("Free Solutions"), Bayside Tambor JVM Dos S.A. ("Bayside"), and 3101495080 S.A. ("Lot Corporations").

The court has conducted multiple prior hearings on this Motion and the prior Civil Minutes address in detail the issues.

The parties have proceeded to resolve many of these matters, using this process to reasonable solve issues rather than merely battle.

JANUARY 7, 2015 HEARING

At the hearing, Trustee's counsel acknowledged that significant process has been made. The shares of stock have been signed over, $4,100 of the rental income, and copies of some of the rental agreements.

The parties requested that the hearing be continued as they address the remaining information items. The hearing on the Motion for Contempt was continued to 10:30 a.m. on March 24, 2016

DEBTOR'S STATUS REPORT - Filed March 8, 2016

The Debtor filed a Status Statement on March 8, 2016. Dckt. 309. The Debtor states that he has directed his attorneys and agents to sign over any and all interest in the properties or corporations immediately to the Trustee's Costa Rican Attorney, which has allegedly been done. The Debtor states that all papers necessary to effect the transfers have been signed and delivered.

The Debtor states he had all keys to the various properties delivered to the Trustee's attorney. The Debtor has provided the accounting of all monies spent. Neither the Debtor nor hi attorney know of any act requested of the Debtor or his attorney hat has not bee completed.

TRUSTEE'S ADDITIONAL STATUS REPORT - Filed March 17, 2016

The Trustee filed a status report on March 17, 2016. Dckt. 311. The Trustee states that following the December hearing, the Debtor turned over $4,100.00 to the Trustee and represented that the sum was all the money left over in the Costa Rican accounts in which rental monies were deposited.

On January 5, 2016, the Debtor executed a declaration that provided an accounting of the rental monies received on the properties. The Debtor explained that all rents collected were place in and all the expenses were taken out of two account in Costa Rica - a Free Solutions Account and a Morena Velar Account. The Debtor further explained that he received $21,300.00 in rents and incurred $17,077.00 in expenses, of which approximately $153.00 per month was being automatically withdrawn for utilities.

Following the January hearing, the Trustee states that account statements for the two bank accounts through November 2015 were turned over. The account reflects that there were beginning balances (as of the petition date) of approximately $5,342.76 and approximately $11,964.56 when the case was converted. The statements also reflect:

1. The Debtor collected approximately $21,300.00 in rents

2. $7,858.01 of the funds were clearly used for personal expenses;

3. Approximately $10,016.46 of the funds were used for expenses related to the condos;

4. There were no automatic withdrawals approximating $153.00 per month for utilities; and

5. There were ending balances that aggregated $5,738.81, of which $4,100.00 was turned over.

The Trustee further states that additional account statements for December 2015 and January 2016 were turned over on March 16, 2016. The account statements reflect that nearly all of the ending balances were consumed for personal expenses. In addition, despite the Debtor's statements regarding the $4,100 that was turned over to the Trustee, there were additional sums remaining and the Debtor had withdrawn $4,500.00 at or near the time the funds were turnover.

The Debtor has agreed to stipulate to turnover the funds consumed for his personal benefit. In addition, the Trustee anticipates transferring the real properties in Costa Rica to new entities to assist her in their marketing sale.

MARCH 24, 2016 HEARING

At the hearing, the Trustee reported at the hearing that the only remaining issue relates to the turnover of the rents. Of the $21,000 of the rent monies, some of the expenditures were solely personal, and additional monies not turned over to the Trustee.

There is about $9,000.00 at issue, with a stipulation and order for turnover of amounts.

The Debtor reports that there is some money used by Debtor for personal expenses. Debtor thinks the amount is less than $9,000.00.

The court continued the hearing to 10:30 a.m. on July 21, 2016.

STATUS REPORT

The Trustee filed a status report on July 14, 2016. Dckt. 329.

The Trustee reports that at the March 24, 2016 hearing, and after an accounting was provided, the parties were encouraged to enter into an agreement to resolve the amount of monies to be turned over. The Debtor has advised that he does not have the funds to satisfy the amount of rental monies the Debtor used (other than the monies already turned over) and the Trustee does not dispute that the Debtor does not have the funds. As such, the parties entered into a stipulation that provided for turnover and a judgment in the amount of $7,858.01 (which is the balance of the rental monies owed). The judgment allows the Trustee to enforce the order using California's enforcement of judgment laws in the event the Trustee believes the Debtor is able to satisfy the judgment (and if there is not a surplus).

As a result of the contempt proceeding, the Trustee was able to gain full control of the real properties in Costa Rica. The Trustee's local counsel is in the process of transferring the properties to estate controlled entities and the Trustee will thereafter market the properties.

The Trustee is satisfied with the contempt proceedings. As such, the Trustee is agreeable to however the court would like to proceed, including a withdrawal of the motion.

WITHDRAWAL

The Trustee having filed a "Status Report" for the pending Motion, the "Status Report" requesting the Motion be withdrawn being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an *ex parte* motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion, and good cause appearing, **the court dismisses without prejudice the Trustee's Motion for Contempt**.

The withdrawal of this Motion comes after months of growing cooperation and the effort of the Trustee, Trustee's counsel, Debtor's counsel, and Debtor. The court expressly acknowledges the good efforts of these parties in taking what could have been a much more contentions, and unnecessarily difficult situation, and finding the "gentle-persons" resolution.

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.
>
> A Motion for Contempt having been filed by the Trustee, the Trustee having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Contempt is dismissed without prejudice.

8. **15-20081-E-7** **JANET ROBINSON** **CONTINUED MOTION FOR CONTEMPT**
DNL-9 **Pro Se** **12-23-15 [129]**

Continued from 3/24/16

Final Ruling: No appearance at the July 21, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion for Contempt is dismissed without prejudice.

J. Michael Hopper, the Chapter 7 Trustee, filed the instant Motion for Contempt on December 23, 2015. Dckt. 129. The Trustee seeks an order holding Janet Robinson ("Debtor") in contempt for failing to comply with the court's order directing the Debtor to turn over, among other things, certain real property located at 725 Acacia Avenue, Richmond, California and the post-petition rents for the Acacia Property, and certain real property generally located at 681 8th Street, Richmond, California.

The Trustee requests compulsory sanctions in an amount no less than $2,500.00 per day or the Debtor be incarcerated until such time as the Debtor complies with the court's order.

Trustee alleges that Debtor's Amended Schedule B, filed April 8, 2015, disclosed for the first time the Debtor's one-sixth interest in the probate estate of her father. At that time, Debtor represented the 8th Street Property as the sole asset of the probate estate, and never disclosed the Debtor's interest in the Acacia Property.

At the second meeting of creditors, the Debtor confirmed that she had an interest in the 8th Street Property, and stated that the Subject Property was generating $1,275.00 in rental income, and monthly mortgage payments approximated in the amount of $268.00. At the fourth, and final, meeting of Creditors, the Debtor failed to provide any of the requested documentation and information related to the other purported owners of the 8th Street Property.

Trustee asserts that as part of its investigation, a public record search was caused to be performed. The

public record reflected that, on the petition date, the 8th Street Property was solely in the Debtor's name. The same day the Grant Deed for the 8th Street Property was recorded, a Grand Deed was recorded that reflects that Julietta C. Robinson conveyed to Debtor and five other individuals the Acacia Property. Public records reflect that the title to this property remains in the Debtor's name.

Trustee notes that on September 3, 2015, this court entered an order granting the Trustee's motion to sell the 8th Street Property. Dckt. 90.

Trustee alleges that to date, Debtor has not provided any documentation or information related to the 8th Street Property, the post-petition rents collected, the Acacia Property, and the owners of the Acacia Property from the Debtor's counsel.

OCTOBER 29, 2015 TURNOVER ORDER

On October 29, 2015, the court granted the Trustee's Motion for Turnover and ordered the following:

> **IT IS ORDERED** that the Motion for Turnover of Property is granted.
>
> **IT IS FURTHER ORDERED** that Janet L. Robinson ("Debtor"), shall deliver on or before noon on November 20, 2015, possession of the property, including:
>
> 1. All post-petition rents, and accounting thereof, collected by the Debtor on account of certain real property located at 681 8th Street, Richmond, California;
>
> 2. Rent in the sum of $8,925.00 collected from February 2015 to August 2015, on account of the 8th Street Property;
>
> 3. Certain real property located at 725 Acacia Avenue, Richmond, California; and
>
> 4. Any post-petition rents collected on account of the Acacia Property.
>
> (the "Property") 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.
>
> **IT IS FURTHER ORDERED** that the monies turned over shall be in the form of a cashier's check or other certified funds issued by a bank or credit union with physical branches in California or a money order issued by an entity with has physical locations in California. The cashier's check, certified funds, or money order, and any documents relating to the possession or control of other property to be turned over, shall be delivered to the Trustee at the following address: J. Michael Hopper, Trustee, c/o of Desmond, Nolan, Livaich & Cunningham, Attn: J. Luke Hendrix, 1830 15th Street, Sacramento, California 95811.

Dckt. 114.

APPLICABLE LAW

Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposes under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see *Price v. Lehitine*, 564 F. 3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemptor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehitine*, 564 F.3d at 1058.

Once an alleged contemptor's noncompliance with a court order is established, the burden shifts to the alleged contemptor to produce sufficient evidence of its inability to comply to raise a question of fact. *In re Icenhower*, 755 F.3d 1130, 1139 (9th Circuit 2014)(internal citations and quotations omitted).

DISCUSSION

From the information provided for by the Trustee and a review of the instant case, the Debtor failed to comply with the court's order and turnover:

1. All post-petition rents collected by the Debtor on account of certain real property located at 681 8th Street, Richmond, California;

2. Rent in the sum of $8,925.00 collected from February 2015 to August 2015, on account of the 8th Street Property;

3. Certain real property located at 725 Acacia Avenue, Richmond, California; and

4. Any post-petition rents collected on account of the Acacia Property.

Pursuant to the court's order, the Debtor had until noon on November 20, 2015 to turnover the properties, rents, and accounting to the Trustee. As testified by the Trustee in his declaration, the Debtor failed to comply. The Trustee testifies that on November 25, 2015, the Debtor's counsel provided a narrative response explaining that expenses the Debtor incurred related to the 8th Street Property apparently offset any rents collected. Dckt. 131. However, the Trustee states that no documentation was provided in support and no information or documentation was provided relating to the Acacia Property.

The Trustee states that through his counsel, on November 29, 2015 and December 7, 2015, attempted to obtain a substantiative response and compliance with the court's order. The Debtor's counsel responded on December 8, 2015 stating that the Debtor was not "tech savvy" and that the Debtor required an additional week. The Trustee allowed for an extension until December 14, 2015. However, the Debtor has still failed to comply.

It is apparent from the facts around this case that the Debtor has wilfully failed to comply with the court order to turnover the property. The Trustee offered the Debtor an additional 24 days to comply with the court's specific order. To date the Debtor was failed to take advantage of this extension. Rather, the Debtor and Debtor's counsel provided a "narrative" of how the rent monies were used and claim the Debtor's lack of computer knowledge as reasons for failing to comply. This is unacceptable.

JANUARY 7, 2016 HEARING

At the hearing counsel for Ms. Robinson appeared and consented to the entry of the Order. Counsel for Ms. Robinson and the Trustee stated that they were working on providing the information and the granting of the motion and the continued hearing was consistent with their efforts.

The court issued the following order:

> **IT IS ORDERED** that the Motion for Contempt is granted.
>
> **IT IS FURTHER ORDERED** that Janet L. Robinson ("Debtor"), shall deliver on or before noon on January 21, 2016, possession of the property, including:
>
> 1. All post-petition rents, and accounting thereof, collected by the Debtor on account of certain real property located at 681 8th Street, Richmond, California;
>
> 2. Rent in the sum of $8,925.00 collected from February 2015 to August 2015, on account of the 8th Street Property;
>
> 3. Certain real property located at 725 Acacia Avenue, Richmond, California; and
>
> 4. Any post-petition rents collected on account of the Acacia Property.

(the "Property") 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.

IT IS FURTHER ORDERED that if the Debtor fails to turnover the Property by noon on January 21, 2016, the Debtor shall be sanctioned $250.00 per day until the Debtor has turned over the Property.

IT IS FURTHER ORDERED that the sanctions shall be in the form of a cashier's check or other certified funds issued by a bank or credit union with physical branches in California or a money order issued by an entity with has physical locations in California. The cashier's check, certified funds, or money order, and any documents relating to the possession or control of other property to be turned over, shall be delivered to the Trustee at the following address: J. Michael Hopper, Trustee, c/o of Desmond, Nolan, Livaich & Cunningham, Attn: J. Luke Hendrix, 1830 15th Street, Sacramento, California 95811.

IT IS FURTHER ORDERED that further hearing on the Motion shall be conducted at 10:30 a.m. on February 25, 2016, for the court to consider:

A. The effectiveness of the $250.00 a day corrective sanctions;

B. Issuance of an order computing the amount of the corrective $250.00 sanction to the date of the hearing if the Debtor failed to comply with the turnover order;

C. Whether the court should order incarceration as a corrective sanctions;

D. Whether the court should order the corrective sanction of the dismissal with prejudice of this bankruptcy case if the Debtor does not comply with the prior turnover over by a future specified date; and

E. Such other sanctions as proper.

Dckt. 138.

FEBRUARY 23, 2016 HEARING

Prior to the February 23, 2016 Hearing, no supplemental papers have been filed in connection with the instant Motion.

At the hearing, the Trustee reported that there remains the issue of the turnover of the rents from the Eight Street Property. The Debtor has asserted that a portion of the rent monies were used to make

mortgage payments and expenses. The Trustee's investigation shows that no mortgage payments were made by Debtor.

For the asserted expenses, the Trustee has not found evidence of payments made by the Debtor. The Trustee is now going to investigate with the providers of the services to determine if they were actually made by the Debtor. The Trustee believes that the receipts for the "work done" have been fabricated.

The Debtor's counsel responded, stating counsel may be filing a motion to withdraw, but desired additional time to clearly communicate the ramifications if Debtor does not comply with the turnover order relating to the rents.

At the hearing, the court continued the Motion to 10:30 a.m. on March 24, 2016.

MARCH 24, 2016 HEARING

No supplemental papers were filed in connection with the instant Motion since the continuance.

At the hearing, the Trustee reports that there still remains to be turned over approximately $8,000. The Trustee's review of the records does not show mortgage payments having been made and the expenses not having been paid by Debtor. The companies who are ported to have done the work reported to the Trustee that they did not do the alleged work.

It appears that from the property of the estate already sold ($110,208.88 proceeds, Trustee's Report, Dckt. 116), the Trustee can make a large dividend distribution to creditors holding unsecured claims. There is only one large unsecured claim - that held for student loans asserted in the amount of $111,522.84. The other five general unsecured claims total approximately $2,526.00. It appears likely that the Trustee can generate sufficient monies for an 100% dividend, interest, and have a surplus estate for the Debtor. Under these very unique facts, to the extent that sanctions are appropriate, it currently appears that such should be determined when the actual impact of the estate is fully determined, and Debtor has been afforded every opportunity to correct her conduct.

The court continued the hearing to 10:30 a.m. on July 21, 2016.

STATUS REPORT

The Trustee filed a status report on July 15, 2016. Dckt. 171.

The Trustee states that, as a result of the contempt proceeding, the Trustee was provided information related to the other owners of the Acacia Property along with their contact information. Through this information, the Trustee was able to communicate with the other owners, explain the estate's interest, and negotiate a sale without the need for a 11 U.S.C. § 363(h) sale. Betty Robinson-Harris, the Debtor's sister and co-owner of the Acacia Property, agreed to purchase the estate's one-fifth interest in the property subject to all claims for a net to the estate in the amount of $30,000.00. In addition, she obtained insurance for the property.

The Trustee anticipates having the sale motion heard on August 18, 2016. Moreover, the funds

from the sale (in addition to the other funds collected) will provide for a substantia return to estate creditors. As such, the Trustee is satisfied with the contempt proceedings. As such, the Trustee is agreeable to however the court would like to proceed, including a withdrawal of the motion.

WITHDRAWAL

The Trustee having filed a “Status Report” for the pending Motion, the "Status Report" requesting the Motion be withdrawn being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion, and good cause appearing, **the court dismisses without prejudice the Trustee's Motion for Contempt**.

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.
>
> A Motion for Contempt having been filed by the Trustee, the Trustee having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Contempt is dismissed without prejudice.

9. **16-22282-E-7** **GEORGE UPTON** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se **6-17-16 [59]**

Final Ruling: No appearance at the July 21, 2016 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on George Dallas Upton III ("Debtor"), Trustee, and other parties in interest on June 17, 2016. The court computes that 34 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case ($335.00 due on April 12, 2016).

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. July 19, 2016 Docket Entry Report.

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.

10. **14-29284-E-7** **CHARLES MILLS** **MOTION TO EMPLOY WEST AUCTIONS,**

DNL-22 **Lucas Garcia** **INC. AS AUCTIONEER(S) AND/OR MOTION FOR COMPENSATION FOR WEST AUCTIONS, INC., AUCTIONEER(S)**
6-30-16 [412]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on June 30, 2016. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Employ is granted.

Chapter 7 Trustee, Kimberly Husted, seeks to employ Auctioneer, West Auctions, Inc., pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Counsel to assist the Trustee in auctioning assets of the bankruptcy estate, including memorabilia, slot machine, juke box, and art.

The Trustee argues that Counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present assets of the estate which the Trustee seeks to auction for the benefit of the estate. The terms and conditions are summarized as follows:

1. West will receive compensation of 20% of the gross sale proceeds, plus reimbursement of expenses in the amount of $498.77 (i.e. storage, trailer rental, mileage, and labor). The expenses are particularly described as follows: (I) storage rental: $296.00 for four months; (II) trailer rental: $20.37; (III) mileage: $32.40; and (IV) labor: $150.00.

2. The estate shall be paid all net proceeds of the sale due to the estate within 30 working days of any auction pursuant to California Civil Code § 1812.607(I).

3. All gross proceeds of sale shall be maintained separate from West's personal or general funds and accounts pursuant to California Civil Code § 1812.607(j).

4. At the conclusion of the sale conducted by West, West shall provide the U.S. Trustee and the Trustee an itemized statement of the assets sold, the name of each purchaser, and the price received for each asset or for the assets as a whole, as required by Fed. R. Bankr. P. 6004(f)

Dennis West, of West Actions, Inc., testifies that he is representing and aiding the Trustee in selling the assets of the bankruptcy estate. Mr. West 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.

The Motion does not provide the court with a projection of the estimated gross sales proceeds or a method by which the court can determine that a 20% commission represents a fair commission for what is actually sold. Though it most likely is, as requested, the court would be issuing a blank-check order.

Authorization to Employ

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Auctioneer, considering the declaration demonstrating that Auctioneer 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 West Auctions, Inc. as auctioneer for the Chapter 7 estate on the terms and conditions set forth in the Agreement filed as Exhibit A, Dckt. 416. 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 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 West Auctions, Inc. as auctioneer for the Chapter 7 Trustee on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit A, Dckt. 416.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the 20% commission on sale proceeds up to the amount of $25,000.00, and reimbursement of expenses in the amount of $498.77 (i.e. storage, trailer rental, mileage, and labor). The expenses are particularly described as follows: (I) storage rental: $296.00 for four months; (II) trailer rental: $20.37; (III) mileage: $32.40; and (IV) labor: $150.00. For any amounts in excess thereof, further order of the court is required pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that no compensation in excess of the amounts provided in the forgoing paragraph 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 West Auctions, Inc. is not authorized to charge or collect a buyer's premium or any other amounts from a buyer of the estate property auctioned. This does not limit the right of West Auctions, Inc. to collect any sales taxes or other amounts which are paid to a governmental entity arising from the sale of this property of the Bankruptcy Estate.
>
> **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.

11. **14-29284-E-7** **CHARLES MILLS** **MOTION TO SELL**
DNL-23 **Lucas Garcia** **6-30-16 [407]**

Tentative Ruling: The Motion to Sell 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 whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on June 30, 2016. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

The Motion to Sell 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 Sell Property is granted.

The Bankruptcy Code permits the Kimberly Husted, Chapter 7 Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 36. Here Movant proposes to sell the "Property" described as follows:

A. Various sports memorabilia including sports jerseys, football helmets and autographed sports equipment ('Memorabilia")

B. Antique slot machine ("Slot Machine")

C. Wurlitzer Juke Box ("Juke Box")

D. Various art work, pictures and paintings ("Art")

The proposed auction is scheduled to take place as an internet auction to be held by the Trustee's Auctioneer from August 9, 2016 through August 11, 2016, and if necessary and appropriate thereafter, through further internet and in-person sales following the primary internet auction. The sale of the assets will be on an "as is" and "where is" basis, with no representations or warranties, express or implied, with respect to the assets.

At the time of the hearing the court announced the proposed sale an 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: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed auction is in the best interest of the Estate. The Trustee has hired competent Auctioneer to execute a multi-day internet auction, which will likely result in the largest return to the estate. The instant case has had its fair share of dark times but the parties, through cooperation, appear to have the case back on track. The instant proposed auction is in the best interest of the estate, Debtor, and parties in interest. 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 Kimberly Husted 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 Kimberly Husted, the Chapter 7 Trustee, through West Auctions, Inc., is authorized to sell pursuant to 11 U.S.C. § 363(b) the Property commonly known as:
>
> A. Various sports memorabilia including sports jerseys, football helmets and autographed sports equipment ('Memorabilia")
>
> B. Antique slot machine ("Slot Machine")
>
> C. Wurlitzer Juke Box ("Juke Box")
>
> D. Various art work, pictures and paintings ("Art")
>
> (Collectively "Property"), on the following terms:
>
> 1. The Property shall be sold at auction conducted by West Auctions, inc.
>
> 2. The sale proceeds shall first be applied to costs and expenses due third-parties and to West Auctions, Inc. as permitted by the court in the order

authorizing employment of said auctioneer, 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.

12. **16-22487-E-11** **MARTY/RONDA BOONE** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se **7-6-16 [46]**

DEBTOR DISMISSED:
05/19/2016
JOINT DEBTOR DISMISSED:
05/19/2016

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Marty Marciano Boone and Rhonda Boone("Debtors"), Trustee, and other parties in interest on July 6, 2016. The court computes that 15 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 ($30.00 due on June 21, 2016).

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

The court's docket reflects that the default in payment which is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: [$30.00].

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 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 sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

13. **16-22487-E-11** **MARTY/RONDA BOONE** **MOTION FOR REHEARING WITH AFFIDAVIT IN SUPPORT**
Pro Se **5-24-16 [31]**

DEBTOR DISMISSED:
05/19/2016
JOINT DEBTOR DISMISSED:
05/19/2016

Tentative Ruling: The Motion to Vacate 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 Not Provided. No Proof of Service has been filed.

The Motion to Vacate is denied.

On April 20, 2016, Marty Boone and Ronda Boone, the Debtor and Debtor in Possession, commenced the above-captioned Chapter 11 case. Pursuant to the Debtor's *ex parte* motion, the court extended the time for Debtor to file the necessary Schedules and Statement of Financial Affairs in this case to May 18, 2016. Order, Dckt. 18.

On May 18, 2016, the court conducted the Chapter 11 Status Conference in this Chapter 11 case. The Debtor in Possession failed to appear at the Status Conference. Civil Minutes, Dckt. 22. No Schedules or Statement of Financial Affairs were filed as of the May 18, 2016 Status Conference. Failing to comply

with the court's status conference order and not appearing at the Status Conference, the court ordered the Chapter 11 case dismissed. *Id.*

On May 19, 2016, after the court announced at the Status Conference the case was dismissed, the order dismissing the case was entered. Additionally, on May 19, 2016, Debtor untimely filed the Schedules and Statement of Financial Affairs.

On May 24, 2016, Debtor filed an *ex parte* motion (Dckt. 31) for rehearing on the dismissal of the case. The court addressed in detail the deficiencies in the *ex parte* motion in the Memorandum and Order denying motion for rehearing. Order, Dckt. 31. The Order identifies "curious" language in the motion, affidavits, Schedules and Statement of Financial Affairs, which appear to quality the statements, warranties, and statements under penalty of perjury which Debtor is required to be make in seeking bankruptcy relief form the court.

CURRENT MOTION FOR RELIEF

The current Motion is titled "Motion Seeking Relief From a Mistake and Inadvertence." Dckt. 38. The parties filing the motion are identified as, "Marty-Marciano and Ronda of the Boone Estate" ("Movant"). *Id.*, p. 1:17.5.

The Debtors in this case, as listed on the Petition (Dckt. 1) under penalty of perjury are "Marty Marciano Boone" and "Ronda Boone." The signature blocks on page 6 of the Petition appear to have the following signatures, "Marty-Marciano : Boone" and "Rhonda : Boone." The ":" placed in the signatures is inconsistent with the names stated on the Petition. The "Marty-Marciano and Rhonda of the Boone Estate" is inconsistent with both. It appears that the rights and interest so the individual debtors have devolved to a separate legal entity, the "Boone Estate" (possibly a probate estate) and the Debtors who filed the bankruptcy case are not before the court. The signature blocks revert to the names of the persons signing the pleadings as "Marty-Marciano: Boone" and "Ronda : Boone." To the extent that the Debtors are filing the Motion, the court interprets this different reference to be an affirmative statement by the persons filing it that they are not doing so as the Debtors.

As stated in the Motion, Memorandum, and other pleadings filed in this case, it is made to appear that Marty Marciano Boone and Ronda Boone are not the debtors in this bankruptcy case, but that the actual entity filing bankruptcy is the "Boone Estate."

Grounds Stated in Motion and Memorandum

The Motion states that "Marty-Marciano and Ronda of the Boone Estate pray for relief under the operation of laws and in the nature of Federal Rule of Bankruptcy Procedure, Rule 9024," and Federal Rule of Civil Procedure 60(b)(1), (c), which is incorporated into Federal Rule of Bankruptcy Procedure 9024. The Motion does not allege what grounds exist for granting relief pursuant to Rule 60(b)(1) or 60(c).

Though the grounds must be stated with particularity in the motion itself (Fed. R. Bank. P. 9013), the Memorandum in Support of the Motion (Dckt. 42) appears to state such grounds. In light of the nature of the motion and the moving party appearing in *pro se*, the court considers the "grounds" as appear in the Memorandum. The grounds are:

A. The person identified as "Ronda of the Boone Estate" spoke with a person at the Office of the U.S. Trustee (Sue Wolny) on May 6. Sue Wonly had called and left a voice message requesting a forwarding address, mail sent to the address the U.S. Trustee had was returned undeliverable. The message stated that the mail related to a mandatory meeting.

B. Ronda of the Boone Estate provided an address on Marshfield in Vallejo, California.

C. As of May 20, 2016, no "documentation" was received in relation to any mandatory meetings.

D. On May 9, 2016, "we" received the Initial Debtor Interview Packet that was sent on May 6, 2016. A copy of that Packet is provided as Exhibit A, which is attached to the Affidavit of "Marty-Marciano and Ronda of the Boone Estate" (Dckt. 40, p. 8-24). Exhibit A includes the following documents:

1. Letter dated April 21, 2016 from the U.S. Trustee addressed to "Marty Marciano and Ronda Boone." The information in the letter includes:

a. "An Initial Debtor Interview ('IDI') will be held on **May 18, 2016, at 10:00 AM and will be conducted in our offices at 5011 Street, Suite 7-500, Sacramento, CA 95814.**" [Emphasis in original.]

b. "Typically, the IDI lasts approximately 90 minutes. If you are unable to attend the IDI at the scheduled time, please contact me immediately . Debtors will not be excused from attending an IDI prior to the §341(a) meeting of creditors."

c. "This questionnaire, along with applicable requested documentation, is be completed and provided to the United States Trustee, Attention: Carla K. Cordero **no later than 12:00 noon on May 11, 2016**. Electronic submission of the documents to Carla.K.Cordero@usdoi .gov is preferred; however paper documents are also acceptable. Please do not submit the questionnaire and documents via fax." [Emphasis in original.]

This letter makes express reference to an Initial Debtor Interview to be conducted on May 19, 2016.

The Ritter Court address on the U.S. Trustee correspondence is the same as the residence and mailing address stated by Marty Marciano Boone and Ronda Boone on the Petition. Dckt. 1 at 2. The address on the current pleading from the "Boone Estate" in the upper left hand corner of the pleadings is "In Care of: Alameda County Post Office, 201 Thirteenth Street Number, Oakland, California." On June 7, 2016, Marty and Ronda Boone filed a Change of Address that not only changed the address to "201 Thirteenth Street Number 28182, Oakland California," but also changed the name of the party submitting the Change of Address to "Marty and Ronda Boone, Boone Estate." Dckt. 37. This Change of Address is signed by "Ronda Boone."

E. On May 10, 2016, "we" received the court's order granting the extension of time to file the

Schedules, Statement of Financial Affairs, and other documents.

F. "Rhonda of the Boone Estate" spoke with Sue Wolny at the May 18, 2016 meeting, nor would she be able to attend the May 26, 2016 First Meeting of Creditors due to a "scheduling conflict."

G. "Rhonda of the Boone Estate" spoke with Edmund Gee (U.S. Trustee attorney) and advised him she was not available to attend the May 26, 2016 First Meeting of Creditors. Attorney Gee advised her that the meeting could not be changed, it having been noticed to creditors.

H. Neither "Marty or Rhonda of the Boone Estate" have received any such documents by certified mail, and that each of them are entitled to service by certified mail because, "In the nature of of Title 31 U.S. Code Section 5312, Subsection (a)(2)(U) and Title 31 United States Code Section 5312, Subsection (a)(5) persons involved in real estate closing and settlements and representative of estates are financial institutions and therefore are entitled to service via Certified Mail."

Memorandum ¶ 12, Dckt. 42.

The court's review of 31 U.S.C. § 5312 discloses that it does not provide any mandate for Marty Marciano Boone, Rhonda Boone, "Marty or Rhonda of the Boone Estate," "Rhonda of the Boone Estate" or "Marty-Marciano of the Boone Estate" to be served by certified mail. 31 U.S.C. § 5312 is definition section for as part of the Records and Reports on Monetary Instruments Transactions provisions of the Federal Money and Finance Code. The term "financial institution" is defined, for purposes of 31 U.S.C. §§ 5311 et seq., to include " (U) persons involved in real estate closings and settlements." The term person includes a representative of an estate. 31 U.S.C. § 5312(a)(5). No provision is made for there being a certified mail requirement of the purposes of 31 U.S.C. § 5311 et seq., much less for federal judicial proceedings under the Bankruptcy Code (Title 11 of the U.S. Codes).

No explanation is provided as to how these provisions enhance the rights of any representative of the estate which is now purported to have filed bankruptcy. Such a contention is in clear conflict with the Federal Rules of Bankruptcy Procedure promulgated by the Supreme Court and as supplemented by Congress. Service in bankruptcy proceeds is permitted to be made by First Class Mail. *See* Fed. R. Bankr. P. 2002, 7004(b), 9014. In adversary proceedings and contested matters Congress added paragraph (h) to Federal Rule of Bankruptcy Procedure 7004 to specify that certified mail for service of pleadings must be made for *federally insured* financial institutions. No contention is made that Marty Boone, Rhonda Boone, or the representative of the Boone Estate are federally insured financial institutions, or that they are financial institutions as required by Federal Rule of Bankruptcy Procedure 7004(h) for the requirement to apply, or even financial institutions as defined by Section 3 of the Federal Deposit Insurance Act (the definition used in Fed. R. Bankr. P. 7004(h)).

Eligibility Of An Estate to Be Debtor

In this Motion and other pleadings filed, the parties signing the documents are stated as being some type of representative of the "Boone Estate." Congress has expressly excluded "estates" from the definition

of persons eligible to be a debtor under the Bankruptcy Code. Probate estate and non-business trusts are excluded from the definition of "person," with only a "person" authorized to be a debtor.

> Based on these indicia, we conclude that the Code's definition of "person," and therefore its definition of "debtor," excludes insolvent decedents' estates. Other courts that have addressed this question have uniformly embraced this view. See *In re Estate of Whiteside*, 64 B.R. 99, 102 (Bankr. E.D. Cal.1986); *In re Estate of Patterson*, 64 B.R. 807, 808 (Bankr. W.D. Tex.1986); *In re Jarrett*, 19 B.R. 413, 414 (Bankr.M.D.N.C.1982); *In re 299 Jack-Hemp Assocs.*, 20 B.R. 412, 413 (Bankr. S.D. N.Y. 1982); *In re Estate of Brown*, 16 B.R. 128, 128 (Bankr. D. D.C.1981). These courts generally have opined that Congress elected not to extend bankruptcy jurisdiction to insolvent decedents' estates because the individual states have developed, through their probate systems, a comprehensive and specialized machinery for the administration of such estates. See *Jarrett*, 19 B.R. at 414; *299 Jack-Hemp Assocs*., 20 B.R. at 413. Some of the courts have also noted that the policy of the Bankruptcy Code is to give individuals a "fresh start" through discharge of their debts, and that this policy is not furthered by bankruptcy administration of decedents' estates. See *Jarrett*, 19 B.R. at 414; cf. *In re Estate of Hiller*, 240 F. Supp. 504, 504 (N.D. Cal.1965) (interpreting 1898 Bankruptcy Act); *Adams v. Terrell*, 4 Wood. 337, 4 F. 796, 801 (W.D. Tex.1880) (in the case of an insolvent decedent's estate, "death has already discharged [the decedent] of all personal liability").

Goerg v. Parungao (In re Goerg), 844 F.2d 1562, 1566 (11th Cir. 1988), *cert. den.* 488 U.S. 1034 (1989).

REVIEW OF SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS

In the prior Memorandum and Order, the court noted specific deficiencies in the Schedules and Statement of Financial Affairs. Order, Dckt. 32. The court incorporates those deficiencies and discussion into this ruling by this reference.

On June 21, 2016, Debtor filed Amended Schedules and Statement of Financial Affairs. Dckt. 43. In reviewing the Schedules and Statement of Financial Affairs the court notes the following:

A. Schedule A/B - Real Property (*Id.* at 1).

1. Only property listed by Debtor is 155 Ritter Court.

2. Debtor's interest is stated to be Fee Simple and Life Estate. Given that a life estate is a sub-interest of the fee simple ownership of real property, these interests are inconsistent.

3. The value of the property is $324,599.00.

4. The property is community property.

B. Schedule A/B - Personal Property

1. No interests in any trust, corporations, partnerships, businesses or other such entities is listed. *Id.* at 4-10.

2. $845,000.00 in amounts owed by others to Debtor, with the following specific information: "Unsecured Laons [sic] Royal Soverign [sic] Group 800,000.00 Bable Pay 45,000. *Id.* at 7.

C. Schedule C Exemptions

1. Amended Schedule C exemptions are claimed pursuant to 11 U.S.C. § 522(b)(2). *Id.* at 11-12. Merely citing to 11 U.S.C. § 362(b)(2) does not state exemptions for any particular assets, but makes reference to a general section stating that exemptions may apply. Further, California has opted-out from such federal exemptions and any exemptions must be specifically claimed as provided under California law. Cal. C.C.P. § 703.130, "Pursuant to the authority of paragraph (2) of subsection (b) of Section 522 of Title 11 of the United States Code, the exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code (Bankruptcy) are not authorized in this state."

2. No exemption is asserted in the $845,000.00 asset for the obligations owed by others to Debtor.

D. Schedule D, Creditors with Secured Claims.

1. A creditor identified as Boone Estate/Trust. *Id.* at 13.

   a. If this is the same "Boone Estate" as "Marty-Marciano and Honda of the Boone Estate" identified in the affidavits, it appears that the creditor is the Debtor, and conversely the Debtor is stated to be its own creditor.

   b. The collateral is identified as the is 155 Ritter Court property, and the secured claim is "unliquidated," the lien exists by agreement, and that the lien is "Discharge."

   c. The debt owed to "Boone Estate/Trust" was incurred on 05/18/2006.

   d. The address for "Boone Estate/Trust" is 201 Thirteenth Street, Number 28182, Oakland, California.

   e. The "Boone Estate/Trust" claim is $357,588.00.

2. "Wells Fargo" is identified as a creditor having an "unliquidated" secured claim in the amount of $10,917.38, which is secured by a 2007 BMW 328I.

E. Schedule E/F, Unsecured Claims.

1. Debtor lists Ocwen Loan Servicing having a $357,588.00 unsecured claim that is "unliquidated." *Id.* at 15.

    a. Of this, $57,588.00 is stated to be non-priority, and the balance of $300,000.00 is a priority unsecured claim.

    b. The basis for Ocwen Loan Servicing having a priority claim is stated to be "Mortgage Note."

2. Debtor lists the Internal Revenue Service as having an "unliquidated," "disputed" claim of $93,943.00 is a non-priority unsecured claim and $900,000.00 is a priority unsecured claim. *Id.*

    a. The basis for the Internal Revenue Service having a priority claim is stated to be "Setoff and Recoupment.

3. Debtor lists the California Franchise Tax Board as having two priority claims.

    a. The first is in the amount of $05,569.00 [sic], of which $05,569.00 [sic] is stated to be a non-priority unsecured claim. *Id.* at 16.

        (1) The basis for this being a priority claim is "Setoff and Recoupment."

    b. The second is in the amount of $8,971.70, of which $8,971.70 is stated to be a non-priority unsecured claim. *Id.*

        (1) The basis for this being a priority claim is "Setoff and Recoupment."

4. For Creditors with general unsecured claims, Debtor lists two creditors with general unsecured claims which total $17,046.00.

F. Amended Schedule I. *Id.* at 20-22.

1. After paying the asserted necessary reasonable monthly expenses, Debtor (whomever it is) has a negative ($328.00) of Monthly Net Income. There is no Monthly Net Income to fund a Chapter 11 Plan.

G. Statement of Financial Affairs, Part 2, Question 4; Wages from employment or operation of business. *Id.* at 24.

1. Debtor states having income of $64,300 in 2016, $182,000.00 in 2015, and $154,609.00 in 2014.

H. Statement of Financial Affairs, Part 2, Question 5; Other income. *Id.*

1. Debtor states having rental income of $4,500.00 in 2016, $9,100.00 in 2015, and

$9,100.00 in 2014.

I. Statement of Financial Affairs, Part 4, Question 10; Foreclosure. *Id.* at 27.

1. Debtor states that within one year of the commencement of this bankruptcy case Deutsche Bank National Trust foreclosed on property described as "Lot 55."

a. On Schedule, the collateral for the "Boone Estate/Trust" secured claim is "Lot 55 APN 0152-300-550 Mortgage Note."

PRIOR CHAPTER 7 CASE

On March 3, 2016, Debtor Marty Marciano Boone and Ronda Boone commenced a voluntary Chapter 7 case. 16-21985. That case was dismissed on April 18, 2016. The prior Chapter 7 case was dismissed due to Debtor's failure to file the Schedules and Statement of Financial Affairs. 16-21985; Order, Dckt. 19. In the prior Chapter 13 case Deutsche Bank National Trust Company, Trustee, filed a motion for relief from the stay to proceed with a state court unlawful detainer action against Debtor. *Id.*, Dckt. 11. Deutsche Bank National Trust Company, Trustee, asserted that it was the purchaser at an October 19, 2015, foreclosure sale of the 155 Ritter Court property. The motion for relief was denied as moot, the Chapter 7 bankruptcy case having already been dismissed. *Id.*; Order, Dckt. 23.

FAILURE TO NOTICE HEARING

Marty-Marciano and Ronda of the Boone Estate, have filed a "Notice For Motion." Dckt. 39. The "Notice" does not set a hearing date. The "Notice" fails to state if a written response is required or call be stated orally at the hearing (if a date was set). L.B.R. 9014-1(d).

Attached as an exhibit to the two Affidavits filed in support of the Motion, are certificate of service. The Certificate states that on June 21, 2016, a copy of a Notice of Hearing was mailed to various creditors. Dckt. 41 at 36. In the Memorandum in Support of the Motion, it is stated that an Amended Notice of Hearing was sent on June 7, 2016. However, the Amended Notice states that it is to "hear the Motion for Rehearing recorded on June 1, 2016." That is not the motion which is now before the court. No credible explanation is provided for how a notice mailed for the rehearing of some matter is a proper notice of hearing for a motion filed twenty days after the "Motion for rehearing recorded on June 1."

RULING DENYING MOTION FOR RELIEF FROM ORDER DISMISSING BANKRUPTCY CASE DUE TO MISTAKE AND INADVERTENCE

Relief has been sought by Marty-Marciano and Ronda of the Boone Estate (if they are the Marty Marciano Boone and Ronda Boone) for relief from the order dismissing the bankruptcy case pursuant to Federal Rule of Civil Procedure 60(b)(1), and Federal Rule of Bankruptcy Procedure 9024. The Memorandum in Support of the Motion does not state how Rule 60(b)(1) is properly applied to the grounds asserted and evidence presented to grant such relief.

The court reconsidering or vacating a judgment or order is governed by Federal Rule of Civil

Procedure 60(b), as made applicable in this case by Federal Rule of Bankruptcy Procedure 9024, which incorporates minor modifications that do not apply here. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying in prospectively is no longer equitable; or

(6) Any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The court uses equitable principles when applying Rule 60(b)Fed. R. Civ. P. 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3rd ed. 1998). A precondition to the granting of such relief is that the movant show that he or she has a meritorious claim or defense. See 12-60 Moore's Federal Practice Civil § 60.24; *Brandt v. American Bankers Insurance Company of Florida*, 653 F.3d 1108, 111 (9th Cir. 2011); *Falk v. Allen*, 739 F.2d 461, 462(9th Cir. 1984) ("We agree with the Third Circuit that three factors should be evaluated in considering a motion to reopen a default judgment under Rule 60(b): (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default. See *Gross v. Stereo Component Systems*, 700 F.2d 120, 122 (3d Cir. 1983) ("Gross"); see also *United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983) (adopting Third Circuit test).")

Read most charitably, as stated in the Memorandum in Support, the address used by Debtor when filing the case was one in which mail was returned to the U.S. Trustee. On May 19, 2016, the Initial Debtor Review Packet was received (by either Debtor or Movant, the pleadings are not clear). Memorandum, ¶ 4.

Then on May 10, 2016, the order of the court extending to May 18, 2016 the time for Debtor to file the Schedules and Statement of Financial Affairs was received. *Id.*, ¶ 5. On May 19, 2016 the court entered its order dismissing the Chapter 11 case. Dckt. 27. On May 19, 2016, as the court was issuing the order dismissing the bankruptcy case, someone filed Schedules and Statement of Financial Affairs. Dckt. 24. The Schedules contained material deficiencies as noted by the court in the prior Order (Dckt. 32).

Movant offers no reason as to why Debtor would be surprised by the dismissal of the bankruptcy case for the failure to timely file the documents. Further, no excusable neglect is offered as to why the Schedules and Statement of Financial Affairs were not timely filed. It appears that most of the arguments and testimony offered by Movant goes to the U.S. Trustee and the required meeting with the debtor in possession with the U.S. Trustee. The case was not dismissed due to any failures relating to the documents required by or meeting with the U.S. Trustee.

The Movants have offered Amended Schedules and Statement of Financial Affairs, with the "persons" identified as signing these Schedules and Statement of Financial Affairs as "By: Marty-Marciano : Boone" and "By Ronda : Boone." Dckt. 43 at 34. However, the Debtors are Marty Marciano Boone and Ronda Boone. Petition, Part 1; Dckt. 1. While it may appear to be slight, the difference appears to be significant to Movant. Then, Movants appear to be (or intend to legally present themselves as) someone different, identifying themselves as Marty-Marciano and Ronda of the Boone Estate. Motion, p. 2:6, Dckt. 38.

The court has carefully reviewed the Schedules and Statement of Financial Affairs to attempt and distill, though not alleged or evidence provided in any declaration, how there appears to be a "Meritorious Defense" to the dismiss. In this context, what ways heavily is does it appear that there is any bona fide, good faith attempt being made toward a restructuring or reorganization. It does not. Taken at face value, Amended Schedule J provides information (purporting to be under penalty of perjury" that expenses exceed income each month. Thus, no money to fund a Chapter 11 Plan. Schedule E/F states that there are priority unsecured claims, but the legal basis for contending that Ocwen Loan Servicing (listed as having a claim based on a mortgage note) has a priority claim.

There is one "secured claim" which exhausts the value of the Ritter Court property. Amended Schedule D, Dckt. 43 at 13. The creditor of that "claim" is identified as Boone Estate/Trust. But Movant state that they are "of the Boone Estate."

Complicating the statements, purported to be under penalty of perjury, there is an admission that Deutsche Bank National Trust conducted a foreclosure sale on "Lot 55" on October 19, 2015, for property which had a value of $324,559.00. Statement of Financial Affairs Question 10; Dckt. 43. In the prior Chapter 7 case, Deutsche Bank National Trust, as Trustee, sought relief from the automatic stay for having foreclosed on the 155 Ritter Court property on October 19, 2015. 16-21986; Motion, Dckt. 11. Then, on Amended Schedule A/B, it is stated that the value of the 155 Ritter Court property is $324,559.00 – exactly the sale value as the Lot 55 which is stated to have been foreclosed on October 19, 2015.

The court cannot find any credible reason asserted by Movants for the Debtors to prosecute the Chapter 11 case. The court cannot find any credible basis for or evidence of an possible ability of the Debtors to prosecute the Chapter 11 case in an attempt to find some possible reorganization.

There is no credible showing that the dismissal of this bankruptcy case due to the failure to timely file Schedules and Statement of Financial Affairs arose from excuse or excusable neglect sufficient to grant relief pursuant to Federal Rule of Civil Procedure 60(b)(1).

Therefore, upon review of the ex parte Motion filed by "Boone Estate" and "Marty-Marciano and Ronda of the Boone Estate, the evidence presented, the files in this case, and good cause appearing;

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.

Upon review of the Motion filed by "Boone Estate," "Marty-Marciano : Boone," and "Ronda : Boone," supporting pleadings, pleadings, evidence, arguments; and good cause

appearing,

IT IS ORDERED that the Motion to Vacate is denied.

14. 15-28108-E-11 RLC-6 **WILLARD BLANKENSHIP** **CONTINUED APPROVAL OF DISCLOSURE STATEMENT FILED BY DEBTOR**
4-1-16 [82]

No Tentative Ruling: The Motion to Approve Disclosure Statement 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, creditors, parties requesting special notice, and Office of the United States Trustee on April 4, 2016. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion to Approve Disclosure Statement 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 Approve Disclosure Statement is xxxxx

JULY 21, 2016 HEARING

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

At the hearing, xxxx

JUNE 23, 2016 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on July 21, 2016.

Amended Plan and Amended Disclosure Statement

On June 17, 2016, the Debtor-in-Possession filed a "First Amended Plan of Reorganization Dated June 17, 2016." Dckt. 117. This amended plan differs from the one filed on June 6, 2016. The Debtor in Possession filed First Amended Disclosure Statement on June 6, 2016. Dckt. 113.

The Amended Plan and Amended Disclosure Statement are the result of significant work of adversaries - a debtor in possession and judgment lien creditor. Though the efforts of these parties and their counsel, they have successfully advanced this case, demonstrative the constructive give and take of a reorganization envisioned by Congress.

While making significant strides, there remain several points which the court believes needs to be clarified in the Plan and Disclosure Statement before the Disclosure Statement can be approved. The court summarizes the Plan and proposed treatment of claims, identifying the issues to be addressed as follows.

I. Funding of Plan

A. The funding of the plan is clear. The Plan Administrator, the Debtor, will obtain a reverse mortgage on his residence (to be funded in two tranches - the initial reverse mortgage and one year later drawing the maximum amount available on a credit line for the reverse mortgage), sell real property located in Indiana, and sell his interest in an entity identified as Apnea Associates.

The First Amended Plan states that all non-exempt assets, "including" the above will be sold. It is not clear in the Plan what other assets will be required to be sold under the Plan. The court has approved a settlement for the Debtor in Possession in which the estate has recovered $1,029.00. Order, Dckt. 73. Those monies are being held in the attorney for the Debtor in Possession client trust account. It is not clear from the Plan how this asset is to be disbursed.

In the Plan, the timing of the reverse mortgage is anticipated to be in August 2016. Class 1 Treatment, First Amended Plan pg. 4; Dckt. 117. However, in the Means for Implementation Section of the Plan, p. 8:17-19, it is stated that the reverse mortgage is projected to be funded in June 2016. FN.1.

FN.1. The court recognizes that the development of this plan has taken time, and most likely these conflicting references exist due to the time it has taken in the good faith negotiations and collaboration in coming up with the current plan. However, avoiding as much ambiguity as possible will benefit everyone in the performance of the confirmed plan.

For the sale of the Apnea Associates Stock and the Indiana farm property, no provisions are made for how the property will be marketed, the method used for sale, or any time line for the sale to be completed. As drafted, the projected distribution of the proceeds from the sale will be "whenever the heck the property may be sold, however it may be marketed, and with whomever and on whatever terms (whether commercially reasonable or not) may be set by the Plan Administrator-Debtor. While the court does not

believe there is a secret, nefarious intention in the drafting of these plan terms, getting it right from the start will avoid possible good faith disputes later over what creditors and the Plan Administrator-Debtor may believe are reasonable. (As well as saving the court what would have been an otherwise avoidable headache of having to decide such dispute.)

II. Administrative Expenses

A. The Plan states that there is a $3,821.73 administrative expense owed someone because Debtor in Possession used an American Express Card to pay unidentified "ordinary" expenses, including a computer. First Amended Plan, Sec. II, ¶ 3; *Id.* There is no explanation as to why Debtor's "ordinary expenses" are elevated to administrative expense status.

Additionally, the court has not approved the allowance of an administrative expense for the Debtor or Debtor in Possession for the $3,821.73.

It is not clear from the Plan that such administrative expense, if any, is first subject to being allowed by the court. To avoid any misunderstanding that confirmation of the plan may be a stealth allowance of an administrative expense, it must first be allowed by the court pursuant to a separate motion and order.

III. Treatment of Secured Claims

A. Class 2, the Secured Claims of Michael Kletchko and Patrick Ruiedin

1. To be paid from the initial distribution on the reverse mortgage, with no minimum amount stated. It is projected that the reverse mortgage will close and payment made within thirty days of the effective date of the plan.

The court will not confirm a plan which does not specify an amount, or method of computing an amount of a distribution, through the Chapter 11 Plan. As written (clearly not intentionally), the Plan Administrator-Debtor could get a $1.00 reverse mortgage and pay such amount to the creditor.

2. The second payment to the Class 2 Creditors shall be made a year later from the credit line/loan facility that is part of the reverse mortgage. Again, it does not state the amount, or method of computing the amount of the credit facility distribution for the Class 2 secured claim.

From the prior hearings and the constructive discussions by counsel for the respective parties, the court "knows" that it is intended for the initial reverse mortgage distribution to be the maximum amount available and for the credit line/loan facility to draw the maximum amount for distribution to the Class 2 claim. However, that is not provided for in the Plan, the new "contract" between the Debtor and his creditors.

3. As part of the consideration for this treatment, the Class 2 Creditors have agreed to "release" their judgment liens against the Indiana Property and

the residence which is the subject of the refinance. The Debtor in Possession has an adversary proceeding pending to avoid the lien pursuant to 11 U.S.C. § 547 as a preference.

The terms of the Plan do not state how the release of the liens will be given, when it will be given, and how this provision will be enforced. Additionally, it is not clear whether the "release" of the lien is being obtained by a judgment avoiding the liens. If so avoided, then the liens are preserved for the benefit of the bankruptcy estate and creditors pursuant to 11 U.S.C. § 551. If not so avoided, the Plan and Disclosure Statement are not clear that the Debtor in Possession and Plan Administrator-Debtor would be waiving or not enforcing such rights and interests of the estate.

4. The Plan treatment also states that the Class 2 Creditors are voluntarily reducing their (asserted to be avoidable) secured claim to $916,762.16.

The Plan does not specify how such reduction is to be documented.

5. The Plan treatment also provides for all rights and remedies of the estate against Prudential Reality and "any other known or unknown tortfeasors" to the Class 2 Creditors. These assigned rights ***include*** all liabilities for which Debtor was responsible in *Kletchko v. Blankenship*.

From the prior hearings, the court understood that the assigned rights related to the sale of property to the Class 2 creditors and the defense of Debtor in *Kletchko v. Blankenship*. As drafted, this Plan provision appears to include any and all possible claims and rights of the Estate, against any person in the world, for any possible event (such as a claim for breach of duty by an investment broker, whiplash claim for a parking lot rear ender, and the like - even if "unknown" and undisclosed in the bankruptcy case). It also includes giving standing to the Class 2 Creditors to object to the claim of Debtor's defense counsel for the services rendered in the *Kletchko v. Blankenship* action.

For the court to include a plan with such a provision is merely the court closing its eyes and telling the parties to do whatever they want, and the plan distributes whatever these parties say at some later date.

IV. Class 3 General Unsecured Claims.

A. The plan provides that general unsecured claims will receive two distributions from the reverse mortgage. Plan, p. 6:16-18. Additionally, distributions will be made from the sale of Indian Property (but apparently from no other assets).

This language appears to be inconsistent for the treatment of the Class 2 secured claim, which is to be funded from the reverse mortgage and the credit line/loan facility. Additionally, this leaves hanging how the proceeds of the liquidation of other non-exempt assets (such as the Apnea Associates) will be disbursed, if at all.

B. It further states that the Class 2 Claims will be paid pro rata with the allowed Class 3 Claims. However, the Class 3 Claims will be paid only from the second reverse

mortgage distribution (the credit line/loan facility).

This conflicts with the first sentence in the treatment. Also, if the Class 2 claims are dividing the proceeds pro rata, such is: (1) not true for the first distribution in 2016 from the reverse mortgage and (2) no provision is made for how the Class 2 Claim will participate "pro rata." Will it be the gross amount of the Class 2 Claim? Will it be the remaining balance after application of the additional distributions the Class 2 Claim is receive, such as the initial reverse mortgage payment and monies received on the claims and rights assigned to the Class 2 Claim.

V. Marketing and Sale of Indiana Property and Apnea Associates Interest.

A. No provision is made in the Plan for the marketing of the Indiana Property and the stock. The Debtor in Possession has not obtained authorization to engage the services of a real estate broker to begin evaluating the property and marketing it for sale. The court, as well as creditors, is not provided with any benchmark for the good faith marketing and sale of these assets through the Plan.

A. C. WILLIAMS FACTORS PRESENT

__Y__Incidents that led to filing Chapter 11
__Y _Description of available assets and their value
____Anticipated future of the Debtor
__Y__Source of information for D/S
__Y__Disclaimer
__Y__Present condition of Debtor in Chapter 11
__Y__Listing of the scheduled claims
__Y__Liquidation analysis
____Identity of the accountant and process used

__N__Future management of the Debtor
__Y__The Plan is attached

In re A. C. Williams, 25 B.R. 173 (Bankr. N.D. Ohio 1982); *see also In re Metrocraft,* 39 B.R. 567 (Bankr. N.D. Ga. 1984).

DISCUSSION:

1. Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains "adequate information" to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).

2. "Adequate information" means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and

records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

3. Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g., In re A. C. Williams, supra.*

4. There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bank. N.D. Ga. 1984). "Adequate information" is a flexible concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. *In re Michelson*, 141 B.R. 715, 718-19 (Bankr. E.D. Cal. 1992).

5. The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D. Pa. 1982).

Determination of whether there is "adequate information" is a subjective determination made by the bankruptcy court on a case by case basis. In re Texas Extrusion Corp., 844 F.2d 1142 (5th Cir. 1988), cert. denied 488 U.S. 926 (1988). Non-bankruptcy rules and regulations concerning disclosures do not govern the determination of whether a disclosure statement provides adequate information. 11 U.S.C. § 1125(d), *Yell Forestry Products, Inc. v. First State Bank*, 853 F.2d 582 (8th Cir. 1988).