

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Modesto, California

August 1, 2013 at 10:30 a.m.

- 
1. [11-90901-E-7](#) ROSA CARDENAS MOTION FOR COMPENSATION BY THE  
SLF-11 Thomas O. Gillis LAW OFFICE OF THE SUNTAG LAW  
DISCHARGED- 9-10-12 FIRM FOR DANA A. SUNTAG,  
TRUSTEE'S ATTORNEY(S), FEES:  
\$10,000.00, EXPENSES: \$110.24  
6-27-13 [[50](#)]

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

Notice and Service Appear to be Correct. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 27, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

**The court's tentative decision is to grant the motion for compensation.** 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:

**FEES REQUESTED**

Suntag Law Firm, Counsel for the Chapter 7 Trustee, makes an First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is May 2, 2011 through the filing of this application. The order of the court approving employment of counsel was entered on May 2, 2011.

**Description of Services for Which Fees are Requested**

General Case Administration: Counsel spent 14.9 hours in this category. Counsel prepared various stipulations, an application for employment, and an application for compensation.

August 1, 2013 at 10:30 a.m.

Efforts to Assess and Recover Property of the Estate: Counsel spent 4.2 hours in this category. Counsel, at the direction of the Trustee, demanded turnover of Debtor's liquor license and assets of the Business from the Debtor. Counsel conversed and met with Debtor's Counsel regarding the same. The Debtor failed to turn over the license and other business assets to the Trustee.

Adversary Proceeding- Fraudulent Transfer: Counsel spent 13.2 hours in this category. Counsel prepared an adversary complaint to avoid the fraudulent transfer by Mr. Duarte. Counsel reached a settlement with opposing counsel and prepared a stipulation for dismissal.

Lawsuit and Sale of Property of the Estate: Counsel spent 20.9 hours in this category. Counsel negotiated with opposing counsel to reach a resolution of the adversary proceeding in which Mr. Duarte agreed to pay the bankruptcy estate \$13,000.00 in exchange for the liquor license and business assets.

## **DISCUSSION**

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

- (i) unnecessary duplication of services; or
- (ii) services that were not--

- (I) reasonably likely to benefit the debtor's estate;
- (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

### **Benefit to the Estate**

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

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

*Id.* at 959.

A review of the application shows that Counsel's services rendered a successful negotiation of the liquor licence and business assets for the benefit of the Estate. The estate has \$12,866.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

### **FEES ALLOWED**

The hourly rates for fees billed in this case are \$295.00/hour for counsel Dana Suntag for 6 hours, \$275.00/hour for Counsel Loris Bakken for 9.9 hours, and \$250.00/hour for counsel Joshua Stevens for 32.3 hours. Counsel asserts the firm reduced the fees from the actual fees of \$13,017.50 to \$10,000.00. The court find that the hourly rates are reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the reduced rate amount of \$10,000.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance of recovery of costs

and expenses in the amount of \$110.24 for postage and copying (at \$.05 per page). The total costs in the amount of \$110.24 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	\$10,000.00
Costs and Expenses	\$ 110.24

For a total final allowance of \$10,110.24 in Attorneys' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Suntag Law Firm is allowed the following fees and expenses as a professional of the Estate:

Suntag Law Firm, Counsel for the Estate  
Applicant's Fees Allowed in the amount of \$10,000.00  
Applicant's Expenses Allowed in the amount of \$110.24,

**IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

2. [13-90901-E-12](#) **ANDREW NAPIER**  
**SAC-7** **Scott A. CoBen**

**CONTINUED MOTION TO VALUE  
COLLATERAL OF MESA LEASING,  
INC.  
5-20-13 [33]**

**CONT. FROM 6-27-13**

Local Rule 9014-1(f)(1) Motion - Stipulation Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, respondent creditor, and Office of the United States Trustee on May 20, 2013. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Value Collateral 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 Motion to Value Collateral is granted and creditor's secured claim is determined to be \$36,800.00.** 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:

On June 14, 2013 the hearing on the Motion to Value Collateral was continued based on the parties' stipulation. No supplemental documents or opposition has been filed to date. Therefore, the court will consider the merits of the motion.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of a 1985 Freightliner Water Truck, 1999 John Deere 9300 Tractor, 2000 John Deere 9300 Tractor, and a Marvin Scraper. The Debtor seeks to value the property at a replacement value of \$36,800.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the vehicle's title secures a purchase-money loan incurred in 2008, more than 910 days prior to filing of the petition, with a balance of approximately \$70,000.00. Therefore, the respondent creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of \$36,800.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Mesa Leasing secured by assets described as a 1985 Freightliner Water Truck, 1999 John Deere 9300 Tractor, 2000 John Deere 9300 Tractor, and a Marvin Scraper is determined to be a secured claim in the amount of \$36,800.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the asset is \$36,800.00 and is encumbered by liens securing claims which exceed the value of the asset.

3. [11-93308-E-11](#) **JOHN-PIERRE MENDOZA** **MOTION TO DISMISS CASE AND/OR**  
**PD-2** **David C. Johnston** **MOTION TO CONVERT CASE FROM**  
**CHAPTER 11 TO CHAPTER 7**  
**6-27-13 [216]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on June 27, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

**The court's tentative decision is to grant the Motion to Dismiss the Case.** 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:

Creditor Deutsche Bank Trust Company Americas as Trustee for RALI2004QA4 and the loan servicer Ocwen Loan Servicing LLC, seek dismissal or, in the alternative, conversion of the Chapter 11 case to a Chapter 7 case pursuant to 11 U.S.C. § 1112(b)(4).

Creditors have four (4) arguments in favor of dismissal:

- 1) Debtor's monthly operating reports evidence a negative cashflow and thus demonstrate that the estate is continuing to suffer losses and diminution.
- 2) Debtor has failed to file a Disclosure Statement as required for Chapter 11 cases, despite having filed over twenty-one (21) months ago.
- 3) Debtor has thus failed to comply with a court order instructing the Debtor to file a Plan and Disclosure statement by May 3, 2013.
- 4) Creditors finally argue that under a Chapter 7 case, the Trustee may be able to sell Debtor's real property assets, with a carve-out for the payment of unsecured claims.

Creditor argues that Dismissal is in the best interest of creditors, as Debtor repeatedly failed to file a confirmable Chapter 11 Plan and failed to take any steps toward reorganization. In the alternative, Creditors seek the conversion of the case to one under Chapter 7.

#### **DEBTOR'S RESPONSE**

Debtor responds, asserting that the case should not be converted into a Chapter 7, but instead consents to a dismissal of the case.

Central to Debtor's argument are the type of creditors involved, and the fact that the Debtor intends to sell off properties which "have marginal or negative cash flow and little or no equity" as a way to "simplify [Debtor's] business operations". Dckt. 240. Additionally, a review of Debtor's petition reveals that the Creditors in this case are primarily secured and that there is one priority unsecured claim, a domestic support obligation, and one unsecured nonpriority creditor at issue.

Debtor argues that under 11 U.S.C. §305(a)(1) the case should be dismissed as "the interests of creditors and the debtor would be better served by such dismissal." Here, Debtor contends that the dismissal would aid the secured creditors, who would be free to enforce their rights if Debtor defaults, not being barred by the automatic stay, and that the only unsecured creditor would be free to collect on their claim as well.

Additionally, the Debtor contends that Moving Party has not met its burden of proof, a preponderance of the evidence, to force a conversion to Chapter 7. Debtor contends, and a review of the docket confirms, that Moving Party has not in fact filed any declaration, albeit Moving Party has provided authorities for their arguments.

Finally, Debtor argues that this filing was not in bad faith, done to simply to invoke the protection of the automatic stay to delay foreclosures, or to thwart litigation from unsecured claimants, as no litigation was pending before or at filing.

## DISCUSSION

A Chapter 11 case may only be dismissed or converted for cause. 11 U.S.C. § 1112(b)(1). The Bankruptcy Code provides a list of causes, which are sufficient to support dismissal or conversion. *Id.* at § 1112(b)(4). Generally, such lists are viewed as illustrative rather than exhaustive; the court should "consider other factors as they arise, and use its equitable powers to reach the appropriate result in individual cases." *Pioneer Liquidating Corp. V. U.S. Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) (citation omitted).

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

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

Creditor has failed to provide evidence in support of their motion to dismiss. No declaration or exhibits have been filed to support the contentions set forth in the motion. However, Debtor now seeks dismissal of the case, as he wishes to sell the properties with negative cash flow and little equity and simplify his business operations. The Debtor asserts that he is negotiating loan modifications and the dismissal of the bankruptcy would simply this process.

The court notes that the Debtor filed a Plan and Disclosure Statement on July 17, 2013, one day before this response. Debtor does not address the reasoning for preparing and filing a plan and disclosure statement, and then seeking dismissal the next day.

Here, a review of the docket shows that Debtor failed to comply with a court order to file a plan and disclosure statement by May 5, 2013. On July 18, 2013, the court reviewed the Debtor's Monthly Operating Reports and determined that they do not reflect positive cash flow from the operation of his properties. Civil Minutes on Motion from Relief from Stay, Dckt. 245. The court determined:

[T]he operation of these properties has resulted in a negative (\$65,000) of cash flow for the estate. The Debtor in Possession has covered up this negative cash flow by borrowing money, using a one-time tax refund, and having

family members pay his living expenses.

*Id.* The court determined that Debtor-in-Possession had not demonstrated that there is any feasible plan and granted relief from the automatic stay to Bank of the Orient. *Id.*

Pursuant to 11 U.S.C. § 1112(b)(4), "cause" includes:

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;...

(E) failure to comply with an order of the court;

Debtor has not shown a reasonable likelihood of rehabilitation. Further, Debtor failed to file a plan within the time designated by the court. Therefore, cause exists to dismiss the case. The motion is granted and the case is dismissed. FN.1.

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FN.1. As the court is sure counsel has explained to the Debtor, in the Eastern District of California subsequently filed bankruptcy cases are assigned (reassigned if initially to another judge) to the judge which had the first case. This avoids any appearance that the dismissal and refiling of cases can be a device to engage in judge shopping.  
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The court shall issue a minute order substantially in the following form holding that:

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

The Motion to Dismiss the Chapter 11 case filed by 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 Dismiss is granted and the case is dismissed.

4. [13-91208-E-7](#) ANGELA PUTT

MOTION FOR WAIVER OF THE  
CHAPTER 7 FILING FEE OR OTHER  
FEE  
6-27-13 [5]

The Clerk of the Court served a corrected notice of hearing, setting this matter to be heard at 1:30 p.m. on August 1, 2013.

The income of the Debtor is \$1,091.51 for a family of 1 person. The Debtor's income will increase by approximately \$200.00 with the termination of furlough days and a termination of a 2.18% salary reduction in July 2013. The court review of the Schedules does not identify assets of the Debtor which reasonably provide a basis for the payment of the Chapter 7 filing fee in this case.

Tentative Ruling: The court finding that the Debtor meets the financial guidelines for a fee waiver, upon consideration of the Debtor's income, assets, the Schedules in this case, and the additional information provided at the hearing, **the court grants the application for waiver of the Chapter 7 filing fees.**

5. [11-93411](#)-E-11 SANJIV/SHEENA CHOPRA  
RMY-35 Robert M. Yaspan

OBJECTION TO CLAIM OF SAWTANTRA  
CHOPRA, CLAIM NUMBER 10  
6-11-13 [[657](#)]

Local Rule 3007-1(c) (1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on, Chapter 11 Trustee, respondent creditor, and Office of the United States Trustee on June 11, 2013. By the court's calculation, 51 days' notice was provided. 44 days' notice is required.

**Final Ruling:** This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c) (1) and (d). 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 respondent 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 Sawtantra Chopra is sustained and the claim is disallowed in its entirety.** No appearance required.

The Proof of Claim at issue, listed as claim number 10 on the court's official claims registry, asserts a \$485,000.00 claim stated for a "Loan - Promissory Note." The Debtor objects to the Claim on the basis that Debtors are not personally liable for the debt. Debtors argue the only evidence provided evidencing a debt are between Sawtantra and Premier Real Estate Development ("PRED").

Debtors offer the Declaration of Sanjiv Chopra, stating that Sawtantra loaned PRED certain sums of money, with the note and deed of trust signed by Sanjiv, as the managing member of PRED. Sanjiv testifies that the money loaned by Sawtantra was used to purchase the property commonly known as 2301 Crows Landing Road, Modesto, California. Sanjiv also testifies that neither he or his wife personally used any of the money PRED received from Sawtantra nor did they execute any individual guarantees of the note.

Debtors also argue that Sawtantra fails to provide any documentation that the claim is a secured claim. Debtors argue that Proof of Claim 10 is devoid of any documentation to support a security interest by Sawtantra in Debtors' assets or even to support any claim against Debtors.

## DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been

filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Here, a review of Proof of Claim No. 10 shows the filing is a simple proof of claim cover sheet, naming creditor "Shawtantra Chopra" for a "loan - promissory note" in the amount of \$485,000.00. Proof of Claim No. 10. The form states the claim is a secured claim on real estate. There are no attached documents evidencing this claim, such as a promissory note or deed of trust.

Debtors have presented a substantial factual basis to overcome the prima facie validity of a proof of claim. The evidence presented by Debtors shows that a promissory note was executed between Sawtantra Chopra and Premier Real Estate Development, LLC, on October 1, 2007. Sanjiv Chopra signed the document as "Premier Real Estate Development, LLC." Sanjiv Chopra also signed as the "Managing Member" of PERD on the Deed of Trust for the 2301 Crows Landing Road, Modesto, California property. It does not appear either Sanjiv or Sheena have any personal obligation on the debt, as the documents name and were executed by Premier Real Estate Development, LLC. Creditor Sawtantra Chopra has not presented any opposition or evidence that the debt is personally owed by either Debtor in this instance.

Therefore, based on the evidence before the court, the creditor's claim is disallowed in its entirety. 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 Sawtantra Chopra filed in this case by Debtors 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 Sawtantra Chopra is sustained and the claim is disallowed in its entirety.

6. 13-90211-E-7      DOUGLAS/TERESA SANDLIN      MOTION TO AVOID LIEN OF  
DEF-2                      David Foyil                      CITIBANK, N.A.  
6-24-13 [[26](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on June 24, 2013. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

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

**The Motion to Avoid a Judicial Lien is granted.** No appearance required.

A judgment was entered against the Debtor in favor of Citibank, N.A. for the sum of \$14,505.85. The abstract of judgment was recorded with Stanislaus County on February 7, 2012. That lien attached to the Debtor's residential real property commonly known as 2309 Pepito Drive, La Grange, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$172,800.00 as of the date of the petition. The unavoidable consensual liens total \$171,774.61 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of \$8,357.99 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

**ISSUANCE OF A COURT DRAFTED ORDER**

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

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

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

**IT IS ORDERED** that the judgment lien of Citibank, N.A., Stanislaus County Superior Court Case No. 686770 recorded on February 7, 2012, Document Number 2012-0010283-00, with the Stanislaus County Recorder, against the real property commonly known as 2309 Pepito Drive, La Grange, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

7. [12-92016-E-7](#)     **JEFF BAKER**  
SLF-3                 **Michael T. McEnroe**  
DISCHARGED 11-30-12

**MOTION FOR COMPENSATION BY THE  
LAW OFFICE OF THE SUNTAG LAW  
FIRM FOR DANA A. SUNTAG,  
TRUSTEE'S ATTORNEY(S), FEES:  
\$2,500.00, EXPENSES: \$0.00  
6-20-13 [[44](#)]**

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

Notice and Service Appear to be Correct. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on June 20, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

**The Motion for Compensation is granted.** No appearance required.

**FEES REQUESTED**

Suntag Law Firm, Counsel for the Chapter 7 Trustee, makes an First and Final request for the Allowance of Fees and Expenses in this case. The period

for which the fees are requested is August 21, 2012 through the date of this application. The order of the court approving employment of counsel was entered on June 17, 2013, with employment authorized effective August 21, 2012.

### **Description of Services for Which Fees are Requested**

General Case Administration: Counsel spent 6.4 hours in this category. Counsel reviewed Debtor's schedules, prepared Suntag's employment application, prepared a stipulation, and prepared this application for compensation.

Recovery of Property of the Estate: Counsel spent 9.4 hours in this category. Counsel conducted an investigation into the potential value and success of Debtor's personal injury claim and aided the Trustee in the decision of whether to pursue the claim.

### **DISCUSSION**

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

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

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

### **Benefit to the Estate**

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

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

*Id.* at 959.

A review of the application shows that Counsel's services rendered a successful negotiation of the liquor licence and business assets for the benefit of the Estate. The estate has \$12,866.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

A review of the application shows that, although Counsel's efforts did not lead to recovery, its efforts to investigate the potential value and success of Debtor's personal injury claim were reasonably calculated to benefit the estate. The estate has \$12,000.00 to be administered as of the filing of the application.

### **FEES ALLOWED**

The hourly rates for fees billed in this case are \$315.00/hour for counsel Dana Suntag for 2.6 hours, \$295.00/hour for counsel Loris Bakken for 2.7 hours, and \$250.00/hour for counsel Joshua Stevens for 9.0 hours. Counsel asserts that the fees were reduced from actual fees of \$4,000.00. The court find that the hourly rates are reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the voluntarily reduced amount of \$2,500.00 are approved and authorized

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

Counsel for the Trustee also seeks the allowance of recovery of costs and expenses in the amount of \$37.05 for postage and copying (at \$.05 per page). The total costs in the amount of \$37.05 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	\$2,500.00
Costs and Expenses	\$ 37.05

For a total final allowance of \$2,537.05 in Attorneys' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Suntag Law Firm is allowed the following fees and expenses as a professional of the Estate:

Suntag Law Firm, Counsel for the Estate  
Applicant's Fees Allowed in the amount of \$2,500.00  
Applicant's Expenses Allowed in the amount of \$37.05,

**IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

8. [10-92531-E-7](#) DONALD HICKS  
WFH-7 Susan L. Moore  
DISCHARGED 10-12-10

MOTION FOR COMPENSATION FOR  
ATHERTON AND ASSOCIATES, LLP,  
ACCOUNTANT(S), FEES: \$3,266.00,  
EXPENSES: \$0.00  
6-28-13 [[77](#)]

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

Notice and Service Appear to be Correct. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 28, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

**The Motion for Compensation is granted.** No appearance required.

FEES REQUESTED

Atherton & Associates, Accountant to the Chapter 7 Trustee, makes an First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is November 16, 2010 through June 30, 2013. The order of the court approving employment of accountant was entered on December 2, 2010. Accountant states her role was limited to preparation of the estate's tax returns, correspondence regarding the information necessary to prepare the returns and preparation of this motion.

**Description of Services for Which Fees are Requested**

Correspondence Regarding Tax Returns: Accountant spent 1.6 hours in this category for total fees of \$368.00. Accountant reviewed provided information and exchanged correspondence in order to prepare the tax returns for 2011 and 2012.

Preparation and Filing of Tax Returns: Accountant spent 12 hours in this category for total fees of \$2,760.00. Accountant prepared and filed tax returns for the years of 2011, 2012, and 2013.

Preparation of this Fee Application: Accountant spent 0.6 hours in this category for total fees of \$138.00. Accountant reviewed time records and the Declaration in support of the Application.

Benefit to the Estate

Appearing that after this application for fees, Accountant's representation was reasonable. The estate has \$17,015.23 to be administered as of the filing of the application.

FEES ALLOWED

The hourly rates for fees billed in this case are \$230.00/hour for accountant Maria Stokman for 14.2 hours. The court find that the hourly rates are reasonable and that accountant effectively used services and rates. The total accountants' fees in the amount of \$3,266.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Accountants' Fees	\$3,266.00
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For a total final allowance of \$3,266.00 in Accountants' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by accountant having been presented to the court, and upon review of the pleadings, evidence, arguments of accountant, and good cause appearing,

**IT IS ORDERED** that Atherton & Associates, Accountant to the Chapter 7 Trustee, is allowed the following fees and expenses as a professional of the Estate:

Atherton & Associates, Accountant to the Chapter 7 Trustee Applicant's Fees Allowed in the amount of \$3,266.00,

**IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

9. [13-90832-E-7](#) BILLY/REBECCA MILES  
ALB-1 Arthur L. Barnes

MOTION TO AVOID LIEN OF  
BECHAROFF CAPITAL CORPORATION  
6-28-13 [[22](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee and respondent creditors on June 28, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

**The Motion to Avoid a Judicial Lien is granted.** No appearance required.

A judgment was entered against the Debtor in favor of Becharoff Capital Corporation for the sum of \$14,327.13. The abstract of judgment was recorded with Tuolumne County on February 13, 2012. That lien attached to the Debtor's residential real property commonly known as 21352 Crystal Falls Drive, Sonora, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$170,000.00 as of the date of the petition. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730(a)(3)(c) in the amount of \$175,000.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

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

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



not wish to do a Skype teleconference. A teleconference using the auspices of the US Embassy in China was rejected. Counsel asserts he timely informed the Trustee of the inability to set up a conference before the last First Meeting of Creditors. Counsel states that his client will be here for the entire month of August for his daughter's wedding and they expect to attend the continued First Meeting of Creditors on August 20, 2013, if the court permits.

Debtor having addressed the communication difficulties and the testimony of counsel that Debtor will be in the country and able to attend the continued 341 meeting on August 20, 2013, the court continues the hearing on the motion to dismiss to 10:30 a.m. on September 5, 2013.

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

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

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion to Dismiss is continued to 10:30 a.m. on September 5, 2013.

11. [12-91736-E-12](#) ANTONIO GOMES  
TOG-15 Thomas O. Gillis

MOTION FOR COMPENSATION FOR  
THOMAS O. GILLIS, DEBTOR'S  
ATTORNEY(S), FEES: \$21,792.50,  
EXPENSES: \$406.44  
6-27-13 [[158](#)]

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

Notice and Service Appear to be Correct. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 27, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

**The court's tentative decision is to grant the Motion for Compensation.** 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:

#### FEES REQUESTED

Thomas O. Gillis, Counsel for Debtor, makes an Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is June 20, 2012 through June 18, 2013. The order of the court approving employment of counsel was entered on July 26, 2012.

#### Description of Services for Which Fees are Requested

Case Administration: Counsel spent 33.20 hours in this category. Counsel prepared the Statement of Financial affairs and schedules, prepared status reports and attended status conference hearings.

Meeting of Creditors: Counsel spent 3.3 hours in this category. Counsel prepared the client and attended the 341 meeting. This includes Gillis Law Portugese interpreter.

Finance: Counsel spent 11.80 hours in this category. Counsel prepared documents for Motion to Use Cash Collateral, reviewed and responded to objections and attended hearings.

Asset Analysis and Recovery: Counsel spent 4.7 hours in this category. Counsel established values on equipment, livestock, and fields.

Fee/Employment Applications and Objections: Counsel spent 6.6 hours in this category. Counsel prepared the applications seeking authority for employment and all supporting documents, including the order authorizing employment. Counsel prepared the application for attorney fees and expenses.

Motion to Dismiss: Counsel spent 2.4 hours in this category. Counsel reviewed Trustee's Motion to Dismiss, prepared and filed response and attended the hearing.

Plan and Disclosure Statement: Counsel spent 17.2 hours in this category. Counsel prepared and filed Chapter 12 plan, reviewed and responded to objections, attended the hearing, and prepared and circulated the order approving the plan.

### **Case Events and Status**

Though filed in June of 2012, no Chapter 12 Plan has been confirmed in this case. The Debtor in Possession has been inching closer, with a stipulation having been reached with Seterus on the value of its secured claim to be paid through a plan in this case. Stipulation and Order, Dckts. 143, 150. On June 13, 2013, the court continue the hearing on the Amended Motion to Confirm a Chapter 12 plan to afford the Debtor in Possession the to file and serve further supplemental pleadings to provide evidence in support of the income, expense, and budget arguments made by the Debtor in Possession. Additionally, the Debtor in Possession failed to provide any budget projections in support of confirmation. The hearing was continued to August 22, 2013. Civil Minutes, Dckt. 153. The court's order continuing the hearing required the Debtor in Possession file their supplemental pleadings by July 12, 2013, and any opposition filed by August 2, 2013.

On July 29, 2013, the Debtor in Possession filed a motion to extend the time to file supplemental pleadings from the July 12, 2013 date due to illness of counsel.

### **Benefit to the Estate**

Though not clearly stated in the Motion, the court interprets counsel's contention to be that the Debtor in Possession and counsel are working to confirmation of a plan which allows the estate's business operation to be preserved. However, in this Chapter 12 case the court does not have monthly operating reports and the Debtor in Possession has so far been unable to provide the court with any credible financial information.

A reorganization is a winding path, in which incremental victories ultimately add up to confirmation. Counsel has been working to achieve such a goal.

### **FEES ALLOWED**

The hourly rates for fees billed in this case are \$325.00/hour for counsel Gillis for 55.70 hours and \$150.00/hour for paralegals for 24.60 hours. The court find that the hourly rates are reasonable and that counsel effectively used appropriate counsel and rates for the services provided Total first interim professional fees for Counsel are allowed pursuant to 11 U.S.C.

§ 331, which are subject to final review pursuant to 11 U.S.C. § 330, in the amount of \$21,792.50. The court commonly authorizes the payment of 50% of the fees on an interim basis. Therefore, the court authorizes the Trustee to pay 50% of the allowed fees, which is \$10,896.25, from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 12 case.

Counsel for the Trustee also seeks the allowance of recovery of costs and expenses in the amount of \$406.44 for postage and court call fees. The total costs in the amount of \$406.44 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The Fees and Costs are approved pursuant to 11 U.S.C. § 331 as interim fees and costs, which are subject to final review and approval pursuant to 11 U.S.C. § 330.

Counsel is allowed,, the following amounts as interim compensation pursuant to 11 U.S.C. § 331 as a professional in this case:

Attorneys' Fees	\$21,792.50
Costs and Expenses	\$406.44

The Chapter 12 Trustee is authorize to pay \$13,075.50 of the fees and \$406.00 of the costs from unencumbered monies of the estate as otherwise permitted under the Bankruptcy Code.

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

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

The Motion for Allowance of Fees and Expenses filed by counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Thomas O. Gillis is allowed as First Interim Fees and Costs pursuant to 11 U.S.C. § 331, the following fees and expenses as a professional of the Estate:

Thomas O. Gillis, Counsel for the Estate  
Applicant's Fees Allowed in the amount of \$21,792.50  
Applicant's Expenses Allowed in the amount of \$406.44,

**IT IS FURTHER ORDERED** that this is a interim allowance of fees, which is subject to a final review and allowance pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay \$13,075.50 of the the allowed fees and \$406.44 of the allowed expenses from unencumbered funds of the Estate as permitted under the Bankruptcy Code in a Chapter 12 case.

12. [12-91442-E-11](#) ALEXANDRINO/DURVALINA  
PD-1 VASCONCELOS  
Thomas O. Gillis

MOTION FOR APPROVAL OF  
STIPULATION RE: TREATMENT OF  
CLAIM UNDER DEBTORS' PROPOSED  
CHAPTER 11 PLAN OF  
REORGANIZATION  
7-1-13 [[140](#)]

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

Correct Notice Not Provided. Movant failed to file a Proof of Service with the Motion. The court is unable to determine if proper notice and service were provided to the proper parties.

**Tentative Ruling:** The Motion to Approve Stipulation 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 court's tentative decision is to deny the Motion to Approve Stipulation.** 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:

Creditor Wells Fargo Bank, N.A. failed to file a Proof of Service with the Motion. The court is unable to determine if proper notice and service were provided to the proper parties. Even if Movant provides a sufficient proof of service at the hearing, the Motion would still be denied based on the following:

Creditor Wells Fargo Bank, N.A. moves the court for an order approving the stipulation regarding the treatment of claim under Debtor's proposed Chapter 11 plan. The Motion is filed pursuant to Federal Rule of Bankruptcy Procedure 4001(d) (1). Creditor states the parties have reached an agreement regarding adequate protection payments, conditions by which the automatic stay shall terminate and the treatment of Wells Fargo's claim in the Debtor's proposed Plan.

The material provisions of the stipulation state that the Debtor will pay creditor Wells Fargo Bank, N.A. in full, including arrearage payments, at a monthly payment by Debtor's of \$331.06. Additionally, the stipulation requires Debtors to maintain their real property taxes and insurance. Finally, the stipulation states that if there is a default under these terms that the automatic stay shall be terminated, if Debtor's do not cure the default within thirty (30) days.

Debtor's filed a Non-Opposition on July 19, 2013.

## DISCUSSION

Federal Rule of Bankruptcy Procedure 4001(d) specifies how a creditor obtains approval of a stipulation and order for relief from the automatic stay to be, in pertinent part,

(d) Agreement Relating to Relief From the Automatic Stay, Prohibiting or Conditioning the Use, Sale, or Lease of Property, Providing Adequate Protection, Use of Cash Collateral, and Obtaining Credit.

(1) Motion; Service.

(A) Motion. A motion for approval of any of the following shall be accompanied by a copy of the agreement and a proposed form of order:

(i) an agreement to provide adequate protection;

(ii) an agreement to prohibit or condition the use, sale, or lease of property;

(iii) an agreement to modify or terminate the stay provided for in §362;

(iv) an agreement to use cash collateral; or

(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property....

(B) Contents. The Motion shall consist of... a concise statement of the relief requested...that lists, or summarizes, and sets out the location within the relevant documents of, all material provisions of the agreement...

(C) Service. The motion shall be served on: (1) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity the court directs....

(3) Disposition; Hearing. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than seven days'

notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

Here, the Motion fails to state the material provisions of the agreement, as required by Federal Rule of Bankruptcy Procedure 4001(d)(1)(B). While the provisions are listed in the Memorandum of Points and Authorities filed in support of the Motion, the rule requires that the material provisions be listed in the Motion itself.

### **De Facto Plan Terms**

The proposed stipulation states the agreed terms which the Debtors will use in a confirmed Chapter 11 Plan for the payment of the Wells Fargo Bank, N.A. secured claim. In substance, Wells Fargo Bank, N.A. and the Debtor in Possession seek to have the court "confirm" a one creditor plan without the distraction of a plan, disclosure statement, voting, and the court making the required determinations under 11 U.S.C. § 1129. In the Motion, reference is made to Federal Rule of Bankruptcy Procedure 4001(d), which does not relate to confirmation of Chapter 13 Plans but stipulations for relief from the automatic stay.

### **Repeated Failures to Comply with the Federal Rule of Bankruptcy Procedure and Local Bankruptcy Rules**

Counsel for Wells Fargo Bank, N.A. regularly appears in this court and knows of the even, uniform enforcement of the basic pleading rules under the Federal Rule of Civil Procedure, Federal Rule of Bankruptcy Procedure, the Local Bankruptcy Rules, and the Revised Guidelines for Preparation of Pleadings. There is no excuse for the filing of the Motion which does not comply with Federal Rule of Bankruptcy Procedure 9013 (the motion fails to state with particularity the relief requested). The court can only conclude that this is a knowing, willful, and intentional failure to comply with the Rules and counsel's law firm is making a statement that they will practice law as they determine the Rules should be applied to make their practice the most profitable. Such may be their choice, but that is not a binding instruction on the court to follow the dictates of counsel.

As counsel knows, this court has repeatedly addressed the basic requirement of stating with particularity the grounds for relief in the Motion itself. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007, 9013. Rather than doing that, counsel instructs the court to read the memorandum of points and authorities, the stipulation, and anything else that counsel chooses to submit to the court at any time, as well as the arguments which may be presented at the hearing, as the grounds for the motion. The court declines the opportunity to draft a motion for counsel.

The motion is denied without prejudice.

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

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

The Motion to Approve Stipulation filed by the 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 is denied without prejudice.

13. [13-90643-E-12](#) **GARY/CHRISTINE TAYLOR** **CONTINUED MOTION TO VALUE**  
**ADJ-3** **Anthony D. Johnston** **COLLATERAL OF ONEWEST BANK, FSB**  
**5-30-13 [39]**

**CONT. FROM 6-27-13**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, parties requesting special notice and Office of the United States Trustee on May 30, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Value Collateral 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 Motion to Value Collateral is granted and the secured claim is determined to be \$813,000.00.** 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 Parties filed a stipulation to continue the hearing. The court continued the hearing to allow Creditor to procure an expert valuation of the property.

**Debtor's Motion**

The motion is accompanied by the Debtors' declaration. The Debtors are the owners of the subject real property commonly known as 4124 S. Gratton Road, California. The Debtors seek to value the property at a fair market value of \$750,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. See Fed. R.

Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

### **Creditor's Opposition**

Creditor Deutsche Bank National Trust Company, as Trustee of the IndyMac INDX Mortgage Trust 2007-AR15, Mortgage Pass-through Certificates, Series 2007-AR13 Under the Pooling And Servicing Agreement Dated June 1, 2007, as serviced by OneWest Bank, FSB, opposes Debtors' valuation and submits an appraisal on the subject real property in the amount of \$813,000.00. Creditor offers the Declaration of Gary Lev, a licensed real estate appraiser with 12 years' experience, who opines that the value of the property is \$813,000.00.

### **DISCUSSION**

Debtors base the value of the residence considering its size, condition, including condition of the almond trees, location and the decline in values in Stanislaus County over the past 8 years. Appraiser Gary Lev bases his valuation of the real property on six (6) comparables within about 18 miles of the subject real property, the property being located in a rural area. Based on the evidence presented to the court, the valuation provided by Creditors carries more evidentiary weight. If Debtor's dispute the evidence presented by Creditors, the court will set an evidentiary hearing regarding the valuation of the subject real property. Based on the evidence before the court, the subject real property is valued at \$813,000.00.

The first deed of trust secures a loan with a balance of approximately \$1,037,909.48. Therefore, the respondent creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of \$813,000.00. See 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Debtors 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 pursuant to 11 U.S.C. § 506(a) is granted and the claim of Creditor Deutsche Bank National Trust Company, as Trustee of the IndyMac INDX Mortgage Trust 2007-AR15, Mortgage Pass-through Certificates, Series 2007-AR13 Under the Pooling And Servicing Agreement Dated June 1, 2007 secured by a deed of trust recorded against the real property commonly known as 4124 S. Gratton Road, Denair, California, is determined to be a secured claim in the amount of \$813,000.00, and the

balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$830,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

14. [13-90643-E-12](#) GARY/CHRISTINE TAYLOR MOTION FOR APPROVAL OF  
ADJ-5 Anthony D. Johnston ASSUMPTION OF UNEXPIRED LEASE  
7-17-13 [[59](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 17, 2013. By the court's calculation, 15 days' notice was provided. 21 days' notice is required.

**Final Ruling:** The moving party having filed an Amended Notice of Hearing on July 23, 2013, changing the date of the hearing to 10:30 a.m. on August 22, 2013, **the hearing on this matter is continued to 10:30 a.m. on August 22, 2013.** The rescheduled hearing date is to comply with the notice requirements of Federal Rule of Bankruptcy Procedure 2002(a)(2). No appearance required at the August 1, 2013 hearing is required.

15. [13-90748-E-7](#) WYNTRESS BALCHER MOTION TO COMPEL ABANDONMENT  
PBG-1 Patrick B. Greenwell 7-16-13 [17]

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, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 16, 2013. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to grant the Motion to Abandon Real Property.** 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:

Debtor Wyntress Sidell Balcher ("Debtor") requests the court to order the Trustee to abandon the real property commonly known as 18864 Manzanita Drive, Twain Harte, California. This property is encumbered by the lien of OneWest Bank FSB, securing claims of \$343,408.21. Debtor filed her Declaration asserting the value of the subject real property to be \$410,000.00. Debtor has also claimed their homestead exemption in the amount of \$66,592.00, pursuant to California Code of Civil Procedure § 704.730.

Debtor argues that she has attempted to sell the property but has been unsuccessful, until the sale price was lowered to \$385,000.00. Debtor attests that the house is now in escrow to be sold for that amount. Debtor argues that under such a sale, for \$385,000.00, will pay for the liens on the house, totaling \$343,408.00. With costs of sale and commissions, Debtor will net approximately \$14,179.91. Trustee has filed a report of no distribution on June 28, 2013.

## DISCUSSION

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

Since the debt secured by the property and Debtor's exemption exceeds the value of the property, and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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

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

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

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

**IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the real property identified as:

18864 Manzanita Drive, Twain Harte, California

on Schedule A by the Debtor is abandoned to Wyntress Sidell Balcher, the Debtor, by this order, with no further act of the Trustee required.

16. [08-90957-E-7](#)      **POWER GENERATION AND  
MDP-2                      ENGINEERING, INC.  
David C. Johnston**

**MOTION FOR ADMINISTRATIVE  
EXPENSES AND MOTION TO EMPLOY  
MARK D. PONIATOWSKI AS ATTORNEY  
FOR CREDITOR  
5-29-09 [[246](#)]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on June 19, 2013. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion for Administrative Expenses and Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1). The failure of the Trustee, the Debtors, or 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 as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

**The court's tentative decision is to deny the Motion for Administrative Expenses and Motion to Employ without prejudice.** 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:

Creditor Holt of California moves the court for an order allowing its administrative claim pursuant to 11 U.S.C. § 503(b) for legal services provided to the estate of Debtor Power Generation & Engineering Inc. and for *nunc pro tunc* employment of the Law Offices of Mark D. Poniatowski Professional Corporation and for payment of his services.

The Motion seeks three different types of relief:

- (1) to have the court allow an administrative claim,
- (2) to allow *nunc pro tunc* employment of the Law Offices of Mark D. Poniatowski, and
- (3) for payment of his services in the sum of \$7,957.50.

While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014, which does not incorporate Rule 9018 for contested

matters. The Movant have improperly attempted to join three separate motions with three separate claims for relief.

As with the present Motion, the reason for not incorporating Rule 7018 into contested matters is in part based on the short notice period for motions and the substantive matters addressed by the bankruptcy court in motions. These include sales of property, disallowing claims, avoiding interests in real and personal property, confirming plans, and compromising rights of the estate - proceedings which in state court could consume years. In the bankruptcy court, such matters may well be determined on 28 days notice. Allowing parties to combine claims and create potentially confusing pleadings would not only be a prejudice to the parties, but put an unreasonable burden on the court in the compressed time frame of bankruptcy case law and motion practice. The Motion is denied for this independent ground.

In the Notice of Motion and Motion, Movant states with particularity the following grounds (Fed. R. Bankr. P. 9013) for the relief requested:

- A. Holt of California, Inc. will seek an order allowing an administrative claim pursuant to,
  - 1. 11 U.S.C. § 503,
  - 2. 11 U.S.C. § 327, and/or
  - 3. 11 U.S.C. § 330.
- B. The amount of the administrative expense is \$7,957.50.
- C. The Motion seeks the payment of legal fees for the Law Offices of Mark D. Poniatowski for legal services provided to the bankruptcy estate.
- D. The Motion seeks to have Mark D. Poniatowski approved *nunc pro tunc* as legal counsel for the bankruptcy estate.
- E. The Motion seeks fees since Holt of California, Inc. believes that it was left to represent the interests of all creditors holding general unsecured claims because no committee of creditors was appointed in this case.
- F. Holt of California, Inc.'s involvement protected the interests of creditors with respect to the sale and preserving of assets.

Motion, Dckt. 425. From the Motion, the court is left to guess what legal basis exists for an administrative expense, as 11 U.S.C. § 503(b) has 21 subsections of possible administrative expenses. While Movant may contend that it should be obvious, it eluded Movant clearly stating the basis. From the grounds stated with particularity, the court cannot and will not grant Holt of California, Inc. an administrative expense.

The court is also mystified at Holt of California, Inc. seeking to have Mark D. Poniatowski forcibly appointed as counsel for the estate. Mr. Poniatowski has actively represented Holt of California, Inc., a creditor in

this case with an adverse interest to the estate. Such an adverse interest renders Mark D. Poniatoski not disinterested as required by 11 U.S.C. § 327, thereby precluding him from being employed and being paid any fees.

From the Motion, and the supporting pleadings, the court cannot tell or quantify what specific benefit that Holt of California, Inc. provided the bankruptcy estate. While the Trustee has filed a statement of non-opposition, he provides no explanation for allowing this administrative expense and forcing the trustee to employ Hold of California, Inc.'s counsel as counsel for the Trustee.

The court has been presented with a heavily redacted set of cryptic billing records for counsel. Again, there is no way to understand how the item on the redacted billing records were for the benefit of the estate. Counsel does not state in the motion or disclose in his declaration whether Holt of California, Inc. is attempting to recover 100% of its legal fees from the estate or merely the pro rata share that represents the general unsecured claims not held by this creditor.

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

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

The Motion to for Allowance of Administrative Expenses and Motion to Employ filed by the 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 is denied without prejudice.

17. [12-91565-E-7](#)    **EVERETT HUNTER**  
[12-9023](#)            **Pro Se**  
**EIDSON V. HUNTER, JR.**

**CONTINUED MOTION FOR ENTRY OF  
DEFAULT JUDGMENT**  
4-17-13 [[70](#)]

No Tentative Ruling.

18. [11-90266-E-11](#) JOHNNY/TAMARA MATTHEWS  
UST-2 David C. Johnston

CONTINUED MOTION TO CONVERT  
CASE FROM CHAPTER 11 TO CHAPTER  
7 AND/OR MOTION TO DISMISS CASE  
5-29-13 [[228](#)]

CONT. FROM 6-27-13; 7-18-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, creditors holding the 20 largest unsecured claims, and all creditors on May 29, 2013. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion to Convert Case from Chapter 11 to Chapter 7 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to grant the Motion for Conversion of Chapter 11 Case and convert the case to one under Chapter 13 at the election of the Debtors.** 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 Acting United States Trustee seeks conversion of this case to Chapter 7 pursuant to 11 U.S.C. § 1112(a), on the basis that Debtors have failed to confirm a plan within 45 days of its filing and have no ability to file a plan and disclosure statement by the 300th day post-petition as required by 11 U.S.C. § 1112(e)(2).

On June 13, 2013 the parties filed a stipulation to continue the hearing to July 18, 2013 at 10:30 a.m. due to the recent hospitalization of Debtors' Counsel. (Dckt. 234).

On July 15, 2013 the parties filed a stipulation to continue the hearing to August 1, 2013 at 10:30 a.m. due to the recent hospitalization of Debtors' Counsel. (Dckt. 242).

**Trustee's Motion**

The Acting United States Trustee ("UST") in this case argues that the Debtor's case be dismissed or converted pursuant to 11 U.S.C. § 1121(E)(2). The Trustee notes that Debtors have failed to confirm a plan within 45 days after it has been filed, as required by 11 U.S.C. §1129(e).

Additionally, the Trustee notes that debtors are unable to file a plan, nor an accompanying disclosure statement, within the 300 day post-petition period required by 11 U.S.C. §1121(e)(2), as applicable for a small business debtor under 11 U.S.C. § 101(51D), because the November 21, 2011 deadline has passed.

Finally, under 11 U.S.C. §1112(b)(4)(A) Trustee argues that there is no likelihood of rehabilitation, as they have "reduced cash by \$110 over the 27 months they have been in chapter 11. There is no likelihood of rehabilitation because Debtors are now time-barred from filing a confirmable plan of rehabilitation." Dckt 230.

### **Debtor's Response**

Debtor's argue that they have good reason for the delayed filings, namely:

1) The ownership of Debtor's real property is in question, as a result of issues stemming from the "Lehman Brothers melt down," which has impacted Debtor's loan.

2) Debtor had to defend against an erroneous foreclosure on Debtor's A&W Rootbeer property by Wells Fargo Bank, N.A.

Furthermore, Debtors argue that their cash position has improved, and that the appearance of a reduction in Debtor's cash position was due to Debtor's erroneous accounting methods for monthly operating reports.

Finally, the Debtor agrees that under 11 U.S.C. §1129(e) it is effectively impossible for a plan to be properly filed. As such, Debtor agrees that the case should be converted from a Chapter 11 to a Chapter 13.

The court notes that Debtors filed a Motion to Convert Case to Chapter 13 on July 26, 2013, set to be heard on August 22, 2013.

### **DISCUSSION**

A Chapter 11 case may only be converted for cause. 11 U.S.C. § 1112(b)(1). The Bankruptcy Code provides a list of causes, which are sufficient to support dismissal or conversion. *Id.* at § 1112(b)(4). Generally, such lists are viewed as illustrative rather than exhaustive; the court should "consider other factors as they arise, and use its equitable powers to reach the appropriate result in individual cases." *Pioneer Liquidating Corp. V. U.S. Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) (citation omitted).

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the

creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b) (1).

Debtors filed their petition on January 24, 2011 and designated the case as a small business case. In a small business case, the debtor must file the plan within 300 days after the order for relief. 11 U.S.C. § 1121(e) (2). Section 1121(e) (2)'s 300-day period has expired; November 21, 2012, is 300 days after January 24, 2011. No request for extension or any evidence has been offered as to why filing an extension was not possible. Therefore, the Debtors are unable to offer an amended plan.

No Amended Plan was filed after the Debtors withdrew their prior proposed plan on April 4, 2013. Dckt. 180.

Debtors now propose to convert this case, which has been pending since January 24, 2011, over two and a half years, to one under Chapter 13. The Debtors explain the delay as relating to disputes concerning title to property and priority of liens. Though the process for the resolution of such issues could have been made part of a confirmed plan, that did not occur.

Substantial progress has been made in this case and it appears that a confirmed plan may be in the offing. Conversion of the case to one under Chapter 13 may be possible, but dislocating the parties to another judge could well cause an otherwise unnecessary disruption in the case if there remain issues in dispute for which the "situational knowledge" of the current judge may be of value.

If the parties are in concurrence, 11 U.S.C. § 1129(e) may not be an impediment to confirmation of a Chapter 11 case. However, if no dispute exists, at this point it may well be significantly more cost effective to prosecute the case as a Chapter 13.

Premised on there being little dispute remaining between the parties, the court grants the motion, and at the election of the Debtors, converts the case to one under Chapter 13.

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.



\$5,573.49 for the period of August 15, 2011 through August 31, 2012. In sum, Wilke Fleury seeks final allowance of a total of \$93,847.00 in fees and \$6,152.41 in costs incurred in its representation of the Trustee in this case.

The order of the court approving employment of counsel was entered on December 21, 2010.

### **Review of Prior Interim Fee Applications**

On October 5, 2011, the court entered an order allowing fees in the amount of \$44,552.50 and costs in the amount of \$2,576.48 on the first interim application. On November 15, 2012, the court entered an order allowing fees in the amount of \$30,606.50 and costs in the amount of \$2,997.01. Wilke Fleury states that a total of \$12,735.48 in previously approved fees remains unpaid.

### **Description of Services for Which Additional Fees are Requested**

Asset Analysis and Recovery: Counsel spent 29.2 hours in this category for total fees of \$7,861.50. Counsel assisted the Trustee in analyzing Debtor's accounts receivable. Counsel assisted Trustee in pursuing the turnover of a post-petition retainer the Debtor paid to the Priest Amistadi Creedon accounting firm.

Asset Disposition: Counsel spent 1.9 hours in this category for total fees of \$552.50. Counsel assisted the Trustee in analyzing the need to move for authority to disburse funds from a blocked account.

Case Administration: Counsel spent 8.1 hours in this category for total fees of \$2,042.50. Counsel consulted with the Trustee about the status of the case. Counsel prepared necessary motions to prosecute this case.

Fee/Employment Applications: Counsel spent 28 hours in this category for total fees of \$7,707.50. Counsel prepared and filed its own application for second interim allowance of fees, and this application for third interim and final allowance of fees and costs. Counsel prepared and filed a fee application on behalf of Grimbleby Coleman, the accounting firm employed by the estate.

During this final period, the second senior counsel billed \$5,292.50 in fees (\$330 per hour) and the senior associate billed \$12,835.50 (\$275/\$285 an hour).

### **Benefit to the Estate**

The Application for the Final Approval of Fees does not provide the court with an overview of the progress of this case or the benefit associated with the representation of the Trustee by counsel. Clearly, there has been substantial work required. In light of counsel requesting almost \$100,000.00 in legal fees, the court reviews this case and the services provided.

The bankruptcy case was commenced on September 27, 2009. The Trustee initially employed Kenneth Jorgensen as his attorney. Order of Employment, Dckt. 17. The Trustee changed attorneys, seeking to employ Wilke Fleury,

Holffelt, Gould & Birney, LLP on December 1, 2010. Motion, Dckt. 62. Counsel has continuously served in that capacity since that time.

Counsel first sought the allowance of interim fees for the period of October 27, 2010 through July 20, 2011. Motion, Dckt. 139. The total fees requested were \$44,552.50 and expenses of \$2,576.48. Of these, \$16,260.50 were for the senior counsel (billing \$370/\$385 an our) and \$13,512.50 second senior counsel (billing \$295/\$310 an hour). (68% of the total fees) Fees were also billed for five other attorneys. The task billing analysis discloses that \$8,290.00 was for "Employment/Administration" and \$22,105.50 for asset sales and addressing a (complicated) dispute with Caterpillar. The court allowed all of the fees and costs on an interim basis. Order, Dckt. 145.

Counsel sought a second interim allowance of fees for the period of July 21, 2011 through August 31, 2012. Motion, Dckt. 177. Counsel sought fees of \$30,606.50 and costs of \$2,997.01. Significant services as described on the task billing analysis include: (1) \$9,988.00 in fees for asset recovery (2004 examination of principal of Debtor, review of documents), (2) \$14,022.50 in fees to recover assets from the month of the principal of the Debtor (recovery of \$12,500) and J&L Water Service (\$3,000), and (3) \$3,027.00 in fees relating to claims objections (which included release of alien and carve-out from sales proceeds for creditors holding general unsecured claims. For these services senior counsel billing \$3,619.00 in fees (\$385 an hour) and second senior counsel billed \$10,715.00 in fees (\$310/\$325 an hour). Most of the work during this period, \$16,100.00 in fees, was done by the senior associate (\$250 an hour). The court allowed all of the requested fees and expenses on an interim basis.

The assistance of counsel has allowed the Trustee to resolve a number of issues, pay secured claims through the liquidation of assets, obtain a carve out for creditors holding general unsecured claims (after payment of administrative expenses), pay prior approved interim and final administrative expenses, and the Trustee is currently holding \$117,611.97 to be administered as of the filing of the application.

#### FEES ALLOWED

In considering the case as a whole, there have been substantial legal issues addressed by counsel. This was not a "routine" Chapter 7 liquidation. Substantial legal fees are warranted.

However, this case has not been without its issues in the representation, which colors a review of Counsel and the billing rates for the attorneys. This court has previously addressed a serious breach of ethics in connection with the accounting firm Priest Amistadi Creedon in being employed by the Trustee, those accountings seeking to be paid \$4,000.00 in compensation by the Trustee, and the Trustee, with the guidance of counsel, supporting the payment of such fees. The court's findings of fact and conclusions of law are stated in the Civil Minutes for the June 13, 2013 hearing on the motion of Priest Amistadi Creedon for the allowance of \$4,040 in fees. Dckt. 206.

The court has reviewed the current fee application and Counsel seeks to bill and have paid \$6,225.50 in attorneys fees for the representation of the Trustee in connection with agreeing to paying Priest Amistadi Creedon \$4,040 in

fees. As addressed in the court's ruling, these accountants were entitled to fees of \$0.00 in that they did not meet the qualifications under 11 U.S.C. § 327 - not disinterested. The Trustee had discovered and terminated the services of the accountants because they were secretly being employed by the Debtor and principal of the Debtor post-petition while also purporting to serve as disinterested accountants for the Trustee. The Trustee sought approval for employment of replacement accountants, for which the order was entered by the court on June 11, 2011 (Dckt. 132). Accountants misrepresented in their declaration in support of their being employed that they had no post-petition connections with the Debtor and related parties.

The court was particularly concerned in that the Trustee and counsel ignored the requirements of 11 U.S.C. § 327 and supported (affirmative non-opposition filed by the Trustee) the allowance of \$4,040 in accountant fees. The basis was that the Trustee had been paid, on behalf of the estate, \$8,000.00 of the fee retainer in dispute. Therefore, it was fine with the Trustee for the court to approve fees for a professional who did not meet the minimum qualifications under 11 U.S.C. § 327.

Though the court's ruling on the accountants' fee application was made on June 13, 2013, and the present application was not filed until July 3, 2013, it appears that Counsel has left in all of the fees relating to these fees and the Trustee electing to "look the other way" as part of his deal with the accountants who misrepresented to the Trustee and court that they were disinterested.

In reviewing the time entries it appeals that substantial time and fees relate to the associate talking with others, review invoices, and what appears to be "wringing his hands" over this issue. It appears that there was little if any supervision or mentoring by the senior attorneys on this case. This causes the court to question whether the other fees charged in this case suffer from the same maladies.

The court allows \$1,111.00 of the fees relating to the accountants' fees, the investigation by Counsel, and the grand deal struck for the Trustee to get \$8,000.00 and the accountants \$4,040.00. The court disallows (\$5,114.50) in fees.

The court has also reviewed the hourly billing rates charged. \$385.00 for the senior counsel in this case is not reasonable and the court has not been presented with a basis that his services in this case warrant such amount. The court reduces his allowed hourly rate by 10%, which is effectively \$346.50 based on his latest hourly rate. For the second senior counsel, her hourly rate is reduced 10%, which is effectively an hourly rate of \$279.00 based on her latest hourly rate. In determining a reasonable hourly rate, the court has considered the level of supervision or mentoring in light of the \$6,225.50 billed to recover \$8,000.00 from the accountants, and the Trustee's agreement to let the accountants be paid \$4,040.00 when such was not permitted by the Bankruptcy Code.

The adjustments to the bill based on the 10% reduction in hourly rates is computed as follows:

	Senior Counsel	Second Senior Counsel
First Interim Application	\$16,260.50	\$13,512.00
Second Interim Application	\$3,629.00	\$10,715.00
Third Interim Application	<u>\$0.00</u>	<u>\$5,292.00</u>
Total Fees Billed	\$19,889.50	\$29,519.00
10% Reduction	(\$1,988.95)	(\$2,951.90)

The court reduces the total fees allowed Counsel by (\$4,940.85) to account for the 10% adjustment in the hourly rate for the senior counsel and second senior counsel billing for services provided to the Trustee.

The hourly rates for fees billed in this case are \$325/hour (2012) and \$330/hour (2013) for counsel Megan Lewis for 16.2 hours and \$275/hour (2012) and \$280/hour (2013) for counsel Steven Williamson for 46.2 hours. The court find that the hourly rates, and the 10% reduction, are reasonable and that counsel effectively used appropriate counsel and rates for the services provided.

The total attorneys' fees for the period of September 1, 2012 through June 30, 2013 in the amount of \$13,013.50 are approved, less the 10% hours rate adjustments. The court computes the total fees approved in this case for counsel to be as follows:

First Interim Application.....\$44,552.50  
Second Interim Application.....\$30,606.50  
Third Interim Application.....\$13,013.50  
10% Hourly Rate Adjustments.....(\$ 4,940.85)

Total Fees Approved for Counsel.....\$83,231.65.

The Chapter 7 Trustee is authorized to pay from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case, these total fees after providing full credit for all payments made on the fees pursuant to the interim fee orders.

Counsel for the Trustee also seeks the allowance of recovery of costs and expenses in the amount of \$578.92 for photocopies (at \$.10 per page) and postage. Combined with the previous requests for fees, the total allowance of recovery and costs and expenses is \$6,152.41. The total costs in the amount of \$6,152.41 are approved and the remaining unpaid fees are authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	\$83,231.65
Costs and Expenses	\$ 6,152.41

For a total final allowance of \$89,384.06 in Attorneys' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Wilke Fleury is allowed the following fees and expenses as a professional of the Estate:

Wilke Fleury, Counsel for the Estate  
Applicant's Fees Allowed in the amount of \$83,231.65  
Applicant's Expenses Allowed in the amount of \$6,152.41,

**IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

20. [10-93791-E-7](#) FAGUNDES AND SON, INC.  
WFH-13 Carl W. Collins

MOTION FOR COMPENSATION FOR  
GRIMBLEBY COLEMAN, CPAS, INC.,  
ACCOUNTANT(S), FEES: \$7,879.50,  
EXPENSES: \$0.00  
7-3-13 [[211](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on July 3, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

**Final Ruling:** The First and Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent 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 First and Final Application for Fees is granted.** No appearance required.

#### **FEES REQUESTED**

Grimbleby Coleman, CPAs, Inc. ("Accountant"), Accountant for the Chapter 7 Trustee, Michael D. McGranahan, makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period May 17, 2011 through February 9, 2013. The order of the court approving employment of counsel was entered on June 11, 2011.

#### **Description of Services for Which Fees Are Requested**

Preparation and filing of 2010 Form 1120S Corporate Tax Return: Accountant spent 22.30 hours in this category for total fees of \$2,964.00. Accountant prepared and filed a 2010 Form 1120S corporate tax return on behalf of the estate. This involved a review of the Debtor's financial statements, reconciliation of fixed assets, review of prior tax filings, analysis of gain or loss from the sale of assets, reconciliation of retained earnings, discussions with the Trustee and preparation and filing of the Form.

Preparation and filing of 2011 Form 1120S Corporate Tax Return:

Accountant spent 6.6 hours in this category for total fees of \$1,086.50. Accountant prepared and filed a 2011 Form 1120S corporate tax return on behalf of the estate. This involved a review of the Debtor's financial statements, reconciliation of fixed assets, review of prior tax filings, analysis of gain or loss from the sale of assets, reconciliation of retained earnings, discussions with the Trustee and preparation and filing of the Form.

Preparation and filing of 2012 Form 1120S Corporate Tax Return:

Accountant spent 6.6 hours in this category for total fees of \$955.50. Accountant prepared and filed a 2012 Form 1120S corporate tax return on behalf of the estate. This involved a review of the Debtor's financial statements, reconciliation of fixed assets, review of prior tax filings, analysis of gain or loss from the sale of assets, reconciliation of retained earnings, discussions with the Trustee and preparation and filing of the Form.

Preparation of Trustee's Application to Employ Accountant:

Accountant spent 2.3 hours in this category for total fees of \$287.50. Accountant assisted the Trustee in preparing the Application to employ Accountant in this case, which involved reviewing the employment application and performing a conflicts check.

Correspondence, Research, Accessing Client Records: Accountant spent 86.35 hours in this category for total fees of \$2,008.50. Accountant assisted the Trustee in gathering financial information necessary to prepare tax returns; assisted the Trustee with payroll information, retrieval of financial records, review of financial records, prepared asset depreciation schedules and analyzed sale of assets.

Preparation of Fee Application: Accountant spent 3.5 hours in this category for total fees of \$577.50. Accountant assisted the Trustee in the preparation of this fee application, which involved preparation and review of the time records for those who worked on the matter.

**FEES ALLOWED**

The hourly rates for the fees billed in this case are \$260.00/hour and \$290/hour for J. Coleman; \$160/hour and \$175/hour for D. Carvalho; \$125/hour, \$150/hour and \$165/hour for D. Sanders; \$90/hour for K. Sanders; \$95/hour for M. Kelly; and \$140/hour for S. Brunnet. The court finds that the hourly rates reasonable and that Accountant effectively used appropriate skill and rates for the services provided. The total accountant' fees in the amount of \$7,879.50 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Accountant' Fees	\$7,879.50
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For a total final allowance of \$7,879.50 in Accountant' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Accountant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Grimbleby Coleman, CPAs, Inc. is allowed the following fees and expenses as a professional of the Estate:

Grimbleby Coleman, CPAs, Inc., Accountant for the Estate  
Applicant's Fees Allowed in the amount of \$7,879.50

**IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

21. [13-90998-E-7](#)  
JAD-1

CHRISTOPHER TRAYER AND  
DIANA URIARTE-TRAYER  
Jessica Dorn

MOTION TO AVOID LIEN OF LOBEL  
FINANCIAL CORP.  
6-7-13 [[11](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on June 7, 2013. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

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

**The Motion to Avoid a Judicial Lien is granted.** No appearance required.

A judgment was entered against the Debtor in favor of Lobel Financial Corp for the sum of \$7,038.94. The abstract of judgment was recorded with Stanislaus County on November 28, 2012. That lien attached to the Debtor's residential real property commonly known as 2012 Bodega Lane, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$115,000.00 as of the date of the petition. The unavoidable consensual liens total \$117,392.94 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.014(b)(1) in the amount of \$4,646.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

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

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

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

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

**IT IS ORDERED** that the judgment lien of Lobel Financial Corporation, County Superior Court Case No. 311304, recorded on November 28, 2012, Document No. 2012-0106172-00, with the Stanislaus County Recorder, against the real property commonly known as 2012 Bodega Lane, Modesto, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

22. [13-90901](#)-E-12    **ANDREW NAPIER**  
EMS-1                    **Scott A. CoBen**

**CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY O.S.T.  
5-31-13 [45]**

**MESA LEASING, INC. VS.**

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 12 Trustee, and Office of the United States Trustee on May 30, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to grant the Motion for Relief from the Automatic Stay pursuant to 11 U.S.C. § 362(d)(1).** 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:

#### **JUNE 13, 2013 HEARING**

At the June 13, 2013 hearing the Debtor in Possession argued that he had insurance on the collateral. The Movant responded that in the past the Debtor has produced insurance for the collateral, and then shortly thereafter cancelled the insurance. The Movant also asserts that the Debtor received insurance proceeds for a portion of the collateral, and rather than paying the proceeds to Movant has retained the monies for other purposes. Movant states that it is now suing the insurance carrier. The Debtor in Possession shall file proof of insurance with the court and serve on counsel for Movant on or before Noon on June 14, 2013.

The court continued the hearing to allow the Movant to file amended motion and supporting pleadings on or before June 27, 2013, with opposition to be filed and served on or before July 11, 2013. The court required the Debtor in Possession to file with the court and serve electronically on counsel for Movant proof that insurance is in place for Movants collateral. If proof is not provided of proper insurance or if the insurance is subsequently cancelled, Movant may file an ex parte motion for the court to accelerate the hearing date to address the issue of the lack of insurance as grounds for immediate relief from the automatic stay.

#### **JULY 18, 2013 HEARING**

Though it was announced at the July 18, 2013 hearing that the motion was granted, no certificate of service to document any service of notice of the hearing being provided by Movant was filed. The court continued the hearing.

#### **SUPPLEMENTAL PLEADING**

Movant filed an Order Shortening Time to accelerate the hearing to address the issue of lack of insurance on their collateral as grounds for immediate relief from the automatic stay. Movant claims no proof of insurance was provided by June 14, 2013, as required by the courts order.

#### **DEBTOR'S RESPONSE**

Debtor responds, providing a copy of a proof of insurance, effective July 9, 2013. The Debtor states the insurance policy is an inland marine policy, which is a blanket policy for all of Debtor's property.

#### **DEBTOR'S SUPPLEMENTAL RESPONSE**

Debtor filed a Declaration asserting that he has filed a First Amended Plan which provides for Creditor in the amount of \$72,661 secured by multiple pieces of equipment to be paid in full as follows:

- (a) \$10,000 paid by August 1, 2013 directly by Debtor;

(b) \$10,000 paid by September 1, 2013 directly by Debtor and the balance of the claim paid with interest at a rate of 4.75 percent per annum, amortized over 3 years or \$1,659 per month.

Debtor asserts that he will be present at the hearing and will present the \$10,000 cashiers check to Creditor. Debtor states he has resolved all the objections from the prior plan. The Debtor requests that Creditor receiving \$20,000 within the next 38 days and favorable treatment in the proposed plan, the court deny the motion for relief.

**DISCUSSION**

The court maintains the right to grant relief from stay for cause when the debtor has not adequately protected the interest in property, for example the inability to obtain insurance. 11 U.S.C. § 362(d)(1); *In re Pittman*, 7 B.R. 760, 763 (S.D.N.Y. 1980). The maintenance of insurance is critical so that the creditor may be protected from the various casualty risks attendant to property ownership. *In re Greives*, 81 B.R. 912, 970 (N.D. Ind. 1987). The court determines that cause exists for terminating the automatic stay since there is a lack of adequate protection of an interest in property of such party in interest. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Here, Debtor failed to provide proof of insurance on or before noon on June 14, 2013, as directed by the court. Dckt. 57. Furthermore, it appears Debtor obtained the insurance on July 9, 2013, over three weeks after the initial hearing on the Motion for Relief from Stay and the deadline to provide such proof of insurance to the movant.

Based on the evidence presented, the Debtor affirmatively misrepresented to this court that insurance existed. See Civil Minutes of June 13, 2013 hearing, Dckt. 57. Further, providing proof of insurance by the deadline ordered by the court. Compliance with the court's orders is not optional as convenient or only if advantageous for the Debtor.

As addressed in connection with another motion filed in this case, the Debtor has filed, and failed at, several prior bankruptcy cases. As stated in by the court in the Civil Minutes from the June 27, 2013 hearing on the NAEDA Financial Ltd motion for relief, Dckt. 87,

**Debtor's Prior Bankruptcy Cases and The Automatic Stay**

As addressed in the Motion, the present bankruptcy case is the Debtor's third Chapter 12 case in the past three years.

Case Number and Date Filed	Date Dismissed	

Bankr. E.D. Cal. 10-27953 Filed March 29, 2010	Order filed March 15, 2011, Dckt. 196	Dismissed because Debtor was \$43,057.84 delinquent in plan payments, with an additional \$19,236.92 coming due before hearing on Trustee's Motion to Dismiss. Civil Minutes, 10- 27953 Dckt. 185
Bankr. E.D. Cal. 11-21063 Filed January 14, 2011	Order filed May 20, 2013	Dismissed because Debtor was \$34,600 delinquent in plan payments. Trustee's Motion to Dismiss. Civil Minutes, 11- 21063 Dckt. 189

The present Chapter 12 case was filed on May 9, 2013, 11 days prior to the dismissal of Case No. 11-21063. Since March 29, 2010, the Debtor has received the protection under the Bankruptcy Code and has defaulted in \$96,893 in payments under confirmed plans.

Cause exists to terminate the automatic stay. The Movant's collateral has not been properly insured, and the Debtor affirmatively misrepresented to the court that such insurance existed. Such misconduct is consistent with the allegations and evidence that Debtor previously misrepresented the existence and maintenance of insurance on the collateral.

The court does not find credible Debtor's late plea of a successful Chapter 12 plan after a review of the history of the case.

The court shall issue a minute order terminating and vacating the automatic stay to allow Mesa Leasing, Inc., and its agents, representatives and successors, and all other creditors having lien rights against the asset, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

No other or additional relief is granted by the court.

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 Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Mesa Leasing, Inc., its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors under its security agreement, loan documents granting it a lien in the asset identified as a 12,000 Gallon Fuel Tank, a 1985 Freightliner Water Truck, VIN ending in 265129, a 1972 Cat Carryall Scraper, Model 623B, s/n 46P02014, a 2000 John Deere 8-Wheel Tractor, Model 9300, s/n S20020, a 2000 John Deere 8-Wheel Tractor, Model 9300, s/n 20582, an 18 Yard Marvin Carryall Ejector Scraper, Long Tongue, s/n 315-013, a 2001 Spectra Precision Geo Star GPS Survey System, s/n SH005, and a 4x4 Double Drum Sheepsfoot Compactor, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.

**IT IS FURTHER ORDERED** that the 14-day stay of enforcement of this order pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived.

No other or additional relief is granted.