UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

August 1, 2019 at 10:30 a.m.

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1. 19-90557-E-7 MRG-1 | **DENNIS/DEBRA HEGARTY** Michael Germain | **MOTION TO COMPEL ABANDONMENT** 7-16-19 [10]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 16, 2019. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

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

The Motion to Compel Abandonment is granted.

After notice and a hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or is of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b).

Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by the debtors, Dennis James Hegarty and Debra Lynn Hegarty ("Debtor") , requests the court to order the Chapter 7 Trustee, Gary Farrar ("Trustee") to abandon Debtor's business commonly known as Coyote Consignments(the "Business"), inclusive of the assets of the business. The Declaration of Debra Hegarty has been filed in support of the Motion. Dckt. 13.

Debtor provides testimony that the Business holds $6,000.00 worth of clothing inventory, of which roughly 60 percent is consigned (and therefore not owned by Debtor). *Id.* Debtor further testifies the value of other equipment of the Business is $1,800.00; that the Business does not have value from its name or good will; and that without Debtor's labor the Business is not profitable. *Id.*

Debtor listed the Business assets on Schedule B, and claimed exemptions on the Business assets in the amount of $7,800.00. Schedule C, Dckt. 1.

The Chapter 7 Trustee has not opposed the Motion.

Here, nearly all of the Business assets have been claimed exempt, and there is not likely significant value in the Business either through sale due to its reliance on Debtor's labor, or through liquidation. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compel Abandonment filed by Dennis James Hegarty and Debra Lynn Hegarty ("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 Debtor's business commonly known as Coyote Consignments and listed on Schedule A / B (the "Business") and all assets of the Business are abandoned by the Chapter 7 Trustee, Gary Farrar ("Trustee") to Debtor by this order, with no further act of the Trustee required.

2. 19-90373-E-7 ARANTXA SANTANA MOTION TO DISMISS CASE
UST-1 Pro Se 7-2-19 [20]

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

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

Below is the court's tentative ruling.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 2, 2019. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss is granted.

The US Trustee, Tracy Hope Davis ("US Trustee"), seeks dismissal of the case on the grounds that Arantxa Yamily Santana ("Debtor") has not completed credit counseling within 180 prior to filing, and therefore is not eligible to be a debtor. 11 U.S.C. § 109(h).

US Trustee has provided the Declaration of Robin Little to provide testimony that Debtor admitted at the Meeting of Creditors she had not obtained credit counseling. Declaration, Dckt. 22.

On July 24, 2019, Debtor filed a Certification About a Financial Management Course, but no certificate of completion is attached to it. Dckt. 26.

Based on the foregoing, and Debtor not being eligible to be a debtor, cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 7 case filed by The Chapter 7 Trustee, Tracy Hope Davis ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted, and the case is dismissed.

3.	**19-90382-E-7** **KDG-2**	**TRACY SMITH** **Pro Se**	**MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGEABILITY OF A DEBT AND/OR MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR** **7-11-19 [27]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, and Office of the United States Trustee on July 11, 2019. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend Deadline to File Complaint to Determine Dischargeability of Debt and to Object to Debtor's Discharge is granted.

Several creditors, including Jonathan Kaufman, Jonathan Kaufman IRA, Shinkin Equity, LLC, Rick Bradd, Benjamin Serebin, Teresa Atowwd, Mark Hendrickson, Global Capital Solutions, LLC, Brandy Ching-Arciga, Total Property Concetps and Chin-Arciga Solo 401k, Creditors, (collectively "Movant") have filed ths Motion seeking to moves to extend the deadline to file a complaint objecting to the debtor, Tracy Emery Smith's ("Debtor") discharge. Movant argues the extension is necessary as Movant is still seeking information from Debtor as to Debtor's business entities and the bank accounts, which information is necessary to determine whether an adversary proceeding should be filed against the Debtor.

The deadline for filing a complaint objecting to discharge is July 29, 2019. Dckt. 6. The Motion requests that the deadline to object to Debtor's discharge be extended to September 30, 2019.

MOTIONS FILED BY CHAPTER 7 TRUSTEE AND US TRUSTEE

In reviewing the docket, there were motions to extend deadline filed by Michael McGranahan, the Chapter 7 Trustee, and Tracy Hope Davis, the U.S. Trustee, on July 24 and 29, 2019, respectively. Dckts. 42, 47. Both motions request an extension to October 28, 2019, to allow additional time to investigate Debtor's financial affairs.

DISCUSSION

The court may, on motion and after a noticed hearing, extend the time for objecting to the entry of discharge for cause. FED. R. BANKR. P. 4004(b)(1). The court may extend that deadline where the request for the extension of time was filed prior to the expiration of time for objection. *Id.*

The instant Motion was filed on July 11, 2019, before the deadline to object to the discharge of Debtor.

The court finds that in the interest of Movant to complete investigation, namely continuing to gather all necessary financial information about Debtor's assets, there is sufficient cause to justify an extension of the deadline. Therefore, the Motion is granted, and the deadline for Movant to object to Debtor's discharge is extended to October 28, 2019.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend Deadline to File a Complaint Objecting to Discharge filed by several creditors, including Jonathan Kaufman, Jonathan Kaufman IRA, Shinkin Equity, LLC, Rick Bradd, Benjamin Serebin, Teresa Atowwd, Mark Hendrickson, Global Capital Solutions, LLC, Brandy Ching-Arciga, Total Property Concetps and Chin-Arciga Solo 401k (collectively, "Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the deadline to object to Tracy Emery Smith's ("Debtor") discharge for:
>
> Jonathan Kaufman,
> Jonathan Kaufman IRA,
> Shinkin Equity, LLC,
> Rick Bradd,
> Benjamin Serebin,
> Teresa Atowwd,

Mark Hendrickson,
Global Capital Solutions, LLC,
Brandy Ching-Arciga,
Total Property Concetps, and
Chin-Arciga Solo 401k

is extended to October 28, 2019 for each of the above named parties in interest.

4. **16-90157-E-7** **DARYL FITZGERALD** **MOTION BY RICHARD KWUN TO**
18-9011 **RK-1** **WITHDRAW AS ATTORNEY**
FITZGERALD V. TRELLIS COMPANY **6-13-19 [66]**

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

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

Below is the court's tentative ruling.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff on June 13, 2019. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

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

The Motion to Withdraw as Attorney is ~~granted~~.

Richard Kwun ("Movant"), counsel of record for the debtor, Daryl Fitzgerald ("Debtor"), filed a Motion to Withdraw as Attorney as Debtor's counsel in the bankruptcy case.

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

> Richard Kwun, counsel for plaintiff, after having substituted in at the plaintiff's request now hereby moves for withdrawal from representation based on the Memorandum of Points and Authorities in Support of Motion to Withdraw filed herewith.

Motion, Dckt. 66.

In reviewing the Memorandum of Points and Authorities in Support of Motion ("Memo"), the following basis for relief is asserted:

> A. The Motion is brought pursuant to Local Bankruptcy Rule 2017-1(e) and California Rule of Professional Conduct Rule 1.16 (b) (4). Memo ¶¶ 9-10, Dckt. 69.
>
> B. Debtor has not returned phone and email communications sent by Movant. *Id*., ¶¶ 5-7.
>
> C. Debtor has filed his own pleadings, *pro se,* without informing Movant. *Id*., ¶ 5.

Memorandum of Points and Authorities, Dckt. 69.

In his Declaration (Dckt. 68) Movant states that Debtor had ARAG legal services insurance which would fund the representation. Movant has undertaken the representation under such coverage.

DEBTOR'S MOTION TO SUBSTITUTE DEBTOR AS COUNSEL

On June 20, 2019, Debtor filed a motion entitled "Plaintiff return to pro se." Dckt. 73. That motion details the Debtor's view of difficulties in working with counsel, and expresses a desire to proceed in *pro se.*

Attached to the Debtor's motion is email correspondence regarding the scheduling of depositions, and an Eastern District of California Substitution of Attorney form with "terminated 2019" written , among several other interlineations.

DISCUSSION

Review of Minimum Pleading Requirements for a Motion

Federal Rule of Civil Procedure 7(b), incorporated into this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7007, requires that the motion itself state with particularity the grounds upon which the relief is requested. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Here, the Motion states the following:

> Richard Kwun, counsel for plaintiff, after having substituted in at the plaintiff's request now hereby moves for withdrawal from representation based on the Memorandum of Points and Authorities in Support of Motion to Withdraw filed herewith.

Motion, Dckt. 66. The above does not contain any of the factual or legal grounds for relief. The Motion is merely a direction by the Movant to the court to review other pleadings.

Failure to comply with the Federal, Bankruptcy, and Local rules is generally grounds for denial of the Motion.

However, in light of the circumstances here, and Debtor having filed his own motion seeking substitution, the court shall consider the Motion.

Legal Authority For Withdrawal

District Court Rule 182(d) governs the withdrawal of counsel. LOCAL BANKR. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. CAL. LOCAL R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, No. 1:08cv01523 OWW GSA, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. June 23, 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554 (Cal. Ct. App. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 559.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. CAL. LOCAL R. 180(e).

Termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdraw from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. CAL. R. PROF'L CONDUCT 3- 700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probable cause and for the purpose of harassing or maliciously injuring any person and (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act. CAL. R. PROF'L CONDUCT 3-700(B).

Permissive withdrawal is limited to certain situations, including the two relevant for this Motion:

> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
>
> > (4) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.
> >
> > (6) The client knowingly and freely assents to termination of the employment.

CAL. R. PROF'L. CONDUCT 1.16(b).

Consideration of Withdrawal

In this Adversary Proceeding, the court has concerns about Debtor's ability to represent himself. However, in reviewing Movant and Debtor's pleadings filed, it is clear Debtor has made it unreasonably difficult for Movant to provide representation.

Email communications between Movant and Debtor show an unwillingness to proceed with depositions in this Proceeding. While Debtor appears to have some medical reasons for pushing the depositions off nearly half a year(from May to October), they are unexplained.

Without Movant's knowledge, Debtor filed his own objection to depositions. Dckt. 64. In the objection Debtor provides detailed information as to the number of medical visits he has had recently, but no actual detail is provided regarding any illness or condition.

~~In filing the "Plaintiff return to pro se," the court finds that Debtor has freely and knowingly assented to termination of employment of Movant. CAL. R. PROF'L. CONDUCT 1.16(b). Therefore, the Motion is granted.~~

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

> ~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~
>
> ~~The Motion to Withdraw as Attorney filed by Richard Kwun ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion to Withdraw as Attorney is granted, and Movant is permitted to withdraw as counsel for the debtor, Daryl Fitzgerald ("Debtor").~~

5. 12-92479-E-12 NFG-4 | **DAVID/ESPERANZA AGUILAR** Nelson Gomez | **MOTION TO ENFORCE TERMS OF CONFIRMED AMENDED CHAPTER 12 PLAN** 6-23-19 [117]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, and creditors on June 21, 2019. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Enforce Terms of Confirmed Amended Chapter 12 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Enforce Terms of Confirmed Amended Chapter 12 Plan is denied without prejudice.

The debtors, David Tafolla Aguilar and Ezperanza Aguilar ("Debtor"), filed this motion alleging that Creditor One West Bank ("Creditor"), through its servicer Loancare, LLC ("Servicer"), has pursued foreclosure proceedings in contravention of the Confirmed Amended Chapter 12 Plan ("Plan"). Debtor requests an order enforcing the terms of the confirmed Plan.

Debtor's counsel, Nelson F. Gomez, filed his own Declaration in support of the Motion. Declaration, Dckt. 119. The Declaration is a 64-page mega pleading, consisting of counsel's declaration and various exhibits. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court. Failure to comply with the Local Bankruptcy Rules is grounds for an appropriate sanction. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

In the Declaration, Gomez provides testimony as to the underlying facts of the Motion, including the following:

1. Gomez is counsel in this case.

2. Debtor filed this case September 17, 2012.

3. The Plan was confirmed after hearing on August 21, 2014.

4. Debtor obtained a discharge on February 22, 2018.

5. After making 36 payments to the Chapter 12 Trustee, Gomez inquired with Creditor's prior servicer whether Debtor should make the remaining 204 payments called for under the Plan.

6. On March 12, 2018, Servicer sent a letter to Gomez asserting arrearages on Creditor's claim in the amount of $18,121.97.

7. Gomez replied that the amount owing was actually $5,450.76, which amounted to six payments of $908.46.

8. Debtor sent payments in March through November 2018, which payments were not accepted due to the loan being in default.

9. On December 18, 2019, Servicer informed Debtor a foreclosure proceeding had commenced.

10. A Notice of Trustee's Sale was issued indicating a sale would occur June 24, 2019.

Declaration, Dckt. 119.

In the conclusion of the Declaration, as though it were the Motion in which grounds and requested relief must be stated with particularity, Gomez requests relief in the form of an order:

> that forces creditor OneWest Bank and its servicer, LOANCARE, LLC, to comply with the Court's Order and requires creditor OneWest Bank and its Servicer, LOANCARE, LLC to conduct any foreclosure of Debtors' Business Property based solely on the terms of the Confirmed Chapter 12 Plan. Furthermore, Debtors are asking that this Court issue a ruling that any Foreclosure conducted in contravention of the parameters of the Confirmed Chapter 12 Plan is null and void.

Id. at p. 5.

CHAPTER 12 PLAN

While the Motion asserts the Creditor is in violation of the Plan terms, very little is provided by Debtor as to what the actual terms are. As to Creditor's claim, the Plan stated the following:

> The holder of the claim in this class will receive $115,630.00, together with interest at the rate of 5% per annum, from September 1, 2014, in 240 fully amortized monthly payments of $779.17.
>
> Prior to confirmation of the Amended Plan, the Debtor will make adequate protection payments of $779.17 to the holder of the claim in this class commencing November 1, 2013. Debtor has made these payments from November 1, 2013 to July 10, 2014.
>
> The Trustee will make a total of 36 payments to the holder of the claim in this class from the funds paid to him, and the Debtors will make the remaining 204 payments. The holder of the claim in this class will retain its Deed of Trust against the Real Property.

Plan, Dckt. 71 at p. 3:14.5-23.5. As to default, the Plan states:

> After the Debtors have received a discharge, if they fail to make any of the payments required to be made to the holder of the claim in Class 3, **the holder of the claim will be required to give written notice of the default** by overnight delivery to the Debtors and their attorney as follows:
>
> David Tafolla Aguilar & Esperanza Aguilar
> P.O. Box 29
> Denair, California 95316
>
> Nelson F. Gomez, Esq.

Law Offices of Nelson F. Gomez
4043 Geer Road,
Hughson, California 95326

Thirty days after the notice is given, if the Debtors have not cured the default, the holder of the claim will be free to enforce its rights under its Deed of Trust, as modified by the Plan.

Id. at 5:1-9.5(emphasis added).

DISCUSSION

It is unclear from the Motion what basis Debtor is using to "enforce" the terms of the Plan. A proceeding to obtain injunctive relief must is an adversary proceeding. FED. R. BANKR. P. 7001(7). No adversary has been commenced here.

The Motion is required to state with particularity the grounds for relief, either through Federal Rule of Bankruptcy Procedure 9013, or through Federal Rule of Civil Procedure 7 as incorporated by Federal Rule of Bankruptcy Procedure 7007. Here, the Motion does not state what the Plan terms are which Creditor has allegedly violated–there is merely a conclusion that the pending foreclosure is a violation.

As discussed, *supra*, the Plan provided that in the event of default and after Debtor obtained a discharge, Creditor would be free to enforce its rights under the deed of trust after giving 30 days' notice.

The first written notice of default after discharge was entered was given March 12, 2018. Declaration ¶ 22, Dckt. 119. Nine months later, Servicer commenced foreclosure proceedings. *Id.*, ¶ 26. Debtor does not argue no notice was given, or that Debtor is not in default.

Debtor has also not explained why payments were not attempted to be commenced until March 2018. Debtor's counsel's letter to the Servicer (where payments were supposed to be sent) indicates confusion over where to send payments. Exhibit A, Dckt. 119 at p. 7. It is unclear why Debtor and Debtor's counsel chose to wait nearly half a year before following up.

Furthermore, once Debtor received notice of the transfer from the prior servicer to Servicer, Debtor received knowledge of where to send past payments and where to send new payments. Exhibit C, Dckt. 119 at p. 11. Despite this, Debtor did not attempt to send the October 2017 through February 2018 payments to the prior servicer.

Debtor purportedly attempted to send payments to Servicer in months March through November 2018, which payments were not accepted due to the loan being in default. Declaration ¶ 25, Dckt. 119. There is no testimony from Debtor that these payments were made.

Nature of Confirmed Plan

The Motion appears to seek the "enforcement" of the Chapter 12 Plan as if it was an order for injunctive relief. As provided in 11 U.S.C. § 1227, confirmation of the Chapter 12 Plan binds the parties

to the terms of the confirmed plan. The confirmation of a plan works to modify the pre-petition obligations of creditors and become the "amended obligation" that is owed.

> The result of confirmation to a creditor is that the **debtor's obligation to the creditor after confirmation is adjusted in the manner set forth in the plan**. This adjustment is permanent and not just for the duration of the case, unless the case is dismissed or converted. Even after the case is closed and the debtor is no longer operating under court protection, the debt adjustment accomplished by the plan continues to be binding on the creditor. For example, if the plan provided for a secured creditor's claim to be reduced to the value of the collateral securing that claim, and for the reduced secured claim to be paid in installments over 20 years, then the debtor's secured obligation to the creditor will be limited to the reduced amount and the secured creditor's rights against the debtor limited to enforcement of the reamortized payment terms. The unsecured portion of the creditor's claim will be discharged along with other unsecured claims at the end of the plan period.

8 Collier on Bankruptcy, Sixteenth Edition, ¶ 1227.01 (2019)

The confirmed plan is the "amended contract" to be enforced by the parties. *See Claremont McKenna College v. Asbestos Settlement Trust (In re Celotex Corp.)*, 613 F.3d 1318, 1323 (11th Cir. 2010).

The present Motion seeks to assert and enforce the contractual rights between the Parties. These are the obligations and rights, as amended by the confirmed Chapter 12 Plan. In the Declaration, counsel for the Debtor also requests that the court issue prohibitory injunctive relief and order Creditor to do something. Finally, it also appears to request that the court issue a declaratory ruling of the respective rights of the parties under the contract as modified by the confirmed Chapter 12 Plan.

While this court has post-confirmation jurisdiction to address alleged violations of the Plan, such powers must be exercise in a manner consistent with the Federal Rules of Bankruptcy Procedure adopted by the U.S. Supreme Court or enacted by Congress. Federal Rule of Bankruptcy Procedure 7001 expressly provides that an adversary proceeding is required for:

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;
> . . .
> (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
> . . .
> (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; .
> . . .

This appears to cover the universe of the relief requested by the Debtor in the Motion.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. FED. R. EVID. 602. Here, it is unclear how Debtor's counsel would know payments were sent by Debtor. Likely, counsel heard his client, the Debtor, say that

the payments had been made. The Federal Rules of Evidence expressly address the reliability of hearsay evidence and the exceptions which exist when the Rules consider it credible for admission in evidence. *See* FED. R. EVID. 801, *et seq*. None of those exceptions include an attorney disclosing his or her own attorney-client communications in advancing claims of his or her client.

Even if the motion process were proper, the Motion and supporting pleadings and evidence have not clearly demonstrated any basis. The Motion does not clearly state grounds for relief. The court was left to sift through the pleadings filed in this case, including the Plan, to determine if there was any violation of Plan terms.

After finding a violation (because no authority is provided by Debtor), the court would be required to research if there is any legal authority for Debtor's counsel's proposition that acts taken in violation of the Plan are void. The court declines the opportunity to fill the gaps left by Debtor and Debtor's 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 Enforce Terms of Confirmed Amended Chapter 12 Plan filed by the debtors, David Tafolla Aguilar and Ezperanza Aguilar ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

6.	**19-90122-E-11** **MF-4**	**MIKE TAMANA FREIGHT** **Reno Fernandez**	**CONTINUED MOTION TO USE CASH LINES, LLCCOLLATERAL** **2-12-19 [21]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on February 12, 2019. By the court's calculation, 2 days' notice was provided. The court set the hearing for February 14, 2019. Dckt. 29.

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

The Motion for Authority to Use Cash Collateral is XXXXXXXXXXXX.

Debtor in Possession Mike Tamana Freight Lines, LLC filed this First Day Motion to use cash collateral to pay necessary expenses for the estate to continue to operate the transportation business that is included in the estate. The Debtor in Possession is continuing to operate on interim post-petition financing terms.

The Expenses to be paid with cash collateral are set forth in Exhibit C (Dckt. 23) filed in support of this Motion.

FEBRUARY 14, 2019 HEARING

At the February 14, 2019 hearing creditor Transportation Alliance Bank, Inc., holding the senior lien on the collateral, which was represented to be over encumbered, represented non-opposition to the Motion. Dckt. 43.

The court issued an Order granting the Motion, providing for replacement liens, and continuing the hearing on the Motion. Order, Dckt. 47.

CREDITOR WELLS FARGO'S OPPOSITION

Creditor Wells Fargo Equipment Finance, Inc. holding a secured claim ("Wells Fargo") filed a Limited Opposition on March 13, 2019. Dckt. 95. Wells Fargo asserts an interest certain equipment of the Debtor, including trucks and trailers, and their proceeds.

While Wells Fargo does not oppose the proposed $100,000.00 weekly adequate protection payment, Wells Fargo argues the Motion is silent as to which creditors are to be paid, the amount of payment, and when payment will be provided.

Wells Fargo asserts that as of the filing of its Limited Opposition no payment had been received.

TCF'S OPPOSITION

Creditor TCF Equipment Finance, a division of TCF National Bank or its assigns, holding a secured claim ("TCF")filed a Limited Opposition on March 14, 2019. Dckt. 98. TCF asserts it has an interest in multiple trucks and trailers used by Debtor in the operation of its business.

While not opposing the use of its cash collateral, TCF asserts Debtor's Motion and budget fail to identify which secured creditors will be paid or the amounts of such payments. TCF argues Debtor in Possession should be required, as a form of adequate protection, to specify to whom payments will be made, the amount of the payments, and the dates that the payments will be made.

TCF asserts it has received one adequate protection payment totaling $12,789.89.

DEBTOR IN POSSESSION'S REPLY

Debtor in Possession filed an Omnibus Reply on March 21, 2019. Dckt. 110. Debtor in Possession states Wells Fargo and TCF oppose the motion to the extent that the underlying agreement purports to prime their liens on certain equipment assets of the Debtor in Possession. Debtor in Possession states further it does not oppose limiting any replacement lien granted under the order approving the use of cash collateral.

MARCH 28, 2019 HEARING

At the March 28, 2019 hearing, counsel for the Debtor in Possession reported that cash collateral stipulations are being executed.

The court issued an Order on April 1, 2019, extending its Interim Order (Order, Dckt. 47) through and including April 19, 2019, and continuing the hearing on the Motion to April 4, 2019. Order, Dckt. 149.

APRIL 9, 2019 HEARING

At the April 9, 2019 hearing the court discussed the First Declaration of Amanjot Tamana, the Responsible Representative of the Debtor in Possession. Dckt. 155. Filed with the Declaration is Exhibit "D," which is identified to be the amended post-petition operating budget for the estate during the 13-week period starting on February 10, 2019. The Debtor in Possession projected the following financial consequences of operating under the cash collateral budget:

Total Revenue.....$6,805,000
Total Expenses.....($6,494,037)

Net Operating Income For the 13 Week Period.....$310,963

No opposition was presented at the hearing and financing alternatives still being explored, the court issued an Interim Order extending the prior Interim Order (Dckt. 47) and continuing the hearing to May 2, 2019. Dckt. 191.

MAY 2, 2019 HEARING

At the May 2, 2019 hearing the court granted the Motion and further continued the hearing to August 1, 2019. Dckt. 260.

THIRD SET OF SUPPLEMENTAL PLEADINGS

On July 18, 2019 Debtor in Possession filed its Third Set of Supplemental Exhibits and Declaration of Amanjot Tamana, the Responsible Representative of the Debtor in Possession. Dckts. 314, 315.

The Debtor in Possession projected the following financial consequences of operating under the cash collateral budget for the 13 week period starting August 11, 2019:

Total Revenue.....$5,265,000
Total Expenses.....($5,307,255)

Net Operating Income For the 13 Week Period.....($42,259)
Exhibit F, Dckt. 315.

WELLS FARGO'S STATEMENT OF POSITION

Well's Fargo filed a Statement of Position on August 1, 2019. Dckt. 319. The Statement asserts that Debtor in Possession is delinquent payments of $59,058.45 for both February and July 2019 as required under the Cash Collateral Stipulation. Wells Fargo asserts further that the proposes budget modifies the Stipulation by providing for 13 weekly payments, but also admits the prior cash collateral budgets were also done on a 13 week basis and states it does not oppose the weekly payments.

Wells Fargo also notes that the August 11, 2019 budget provides for "Cure Pmts," but that the cure amount is less than the $59,058.45 monthly adequate protection payment, leaving uncertain when Debtor in Possession plans to make the February, July, and August 2019 payments.

Wells Fargo requests the Motion be granted only on the following conditional language:

(i) when the July, 2019, adequate protection payment will be made,

(ii) when the February, 2019, adequate protection payment will be made,

(iii) when the adequate protection payments coming due in the first week of August, 2019 will be made,

(iv) what the "Cure Pmts" are for; and

(b) the granting of the Motion is not a finding that WFEFI is adequately protected.

Dckt. 319.

DISCUSSION

At the hearing, xxxxxxxxxxxxxx.

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

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

~~The Motion for Authority to Use Cash Collateral filed by Mike Tamana Freight Lines, LLC ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that hearing on the Motion to Use Cash Collateral is continued to 10:30 a.m. on xxxxxxxx. Supplemental pleadings reques6ting further use filed on or before xxxxxxxx.~~

~~**IT IS FURTHER ORDERED** that the further authorization to use cash collateral as set forth in the budget filed as Exhibit F for the period August 11, 2019 through August 10, 2019, (Dckt. 315) sought by the present Motion is authorized through and including November 3, 2019.~~

7. 19-90151-E-11 UST-2 — Y&M RENTAL PROPERTY MANAGEMENT, LLC, David Johnston — MOTION FOR REVIEW OF FEES 7-11-19 [21]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, and creditors, on July 11, 2019. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6).

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

The Motion for Review of Fees is ~~granted.~~

The US Trustee, Tracy Hope Davis ("Movant") filed this Motion seeking review and disgorgement of fees paid prepetition by debtor in possession, Y&M Rental Property Management, LLC's ("ΔIP ") to counsel, David C. Johnston ("Counsel").

Movant provides the following factual background in the Motion:

1. Mr. Johnston filed a voluntary petition under Chapter 11 on behalf of the Debtor on February 21, 2019.

2. Mr. Johnston has not sought to be employed as counsel in this case.

3. Mr. Johnston has not filed an application for compensation in this case.

4. The Debtor discloses the following under Part 6 of its Statement of Financial Affairs:

> $2,983 paid for attorney's fees and $1,717 for clerk's filing fee for prior Chapter 11 case. $2,983 paid for as compromise for additional fees in prior case. $1,717 for clerk's filing fee for present case.

5. Mr. Johnston filed a "Disclosure of Compensation of Attorney For Debtor(s)" indicating that he has agreed to accept "Reasonable value of services" for his legal services, and that he received nothing for the present case except the filing fee. He further discloses that the balance due is "Reasonable value of services[.]"

6. Mr. Johnston filed a prior Chapter 11 case on behalf of the Debtor on May 22, 2018.

7. In the Prior Case, on Part 6 of its Statement of Financial Affairs, the Debtor disclosed payment of $2,983 for attorney's fees and $1,717 for the clerk's filing fee.

8. In the Prior Case, Mr. Johnston filed a "Disclosure of Compensation of Attorney for Debtor(s)" agreeing to accept "Reasonable value of services as allowed by Court" for legal services, $2,983 received prior to filing, and a balance due of "Reasonable value of services as allowed by Court."

9. The Debtor's Prior Case was dismissed on December 6, 2018, on the U.S. Trustee's motion, which alleged cause for dismissal for failure to file four monthly operating reports.

10. Mr. Johnston never filed an application for compensation in the Prior Case.

Motion, Dckt. 21.

Movant argues Counsel should be required to disclose all fees received in this case and the ΔIP's prior case, No. 18-90375, what these fees were for, and what fees Counsel argues have been earned but not yet paid. Movant argues this is necessary because Counsel has not filed any fee applications or sought to be employed in either of ΔIP's cases.

Without any explanation provided, Movant concludes that full disgorgement is warranted given ΔIP's failure to prosecute this and ΔIP's prior case.

DISCUSSION

Required Authorization to be Employed

The Debtor in Possession is permitted to employ counsel, but as with a trustee, said employment must be authorized pursuant to 11 U.S.C. § 327. As is well established law, a professional [employed by a trustee or other person exercising the power of a trustee] who fails to obtain authorization to be employed pursuant to 11 U.S.C. § 327 is not entitled to any compensation. *See Interwest Business Equip. v. United*

States Trustee (In re Interwest Business Equip.), 23 F.3d 311, 318 (10th Cir. 1994)(emphasis added), holding:

> "Thus, there can be no question of the court either permitting or prohibiting unapproved representation. Instead**, any professional not obtaining approval is simply considered a volunteer if it seeks payment from the estate**. 11 U.S.C.A. 330 (court may allow fees to a professional 'employed under section 327'); 2 Collier on Bankruptcy P 327.02 at 327-10 (15th ed. 1993)."

The Ninth Circuit Court of Appeal has long applied this basic requirement, dating back to the Bankruptcy Act. As discussed in *Atkins v. Wain (In re Atkins)*, 69 F.3d 970, 973-974 (9th Cir. 1995) (emphasis added):

> In bankruptcy proceedings, **professionals** who perform services for a debtor in possession **cannot recover fees for services rendered to the estate unless those services have been previously authorized by a court order**. See 11 U.S.C. § 327(a); Fed. R. Bank. P. 2014(a); *see*, e.g., *McCutchen, Doyle, Brown & Enersen v. Official Comm. of Unsecured Creditors (In re Weibel, Inc.)*, 176 Bankr. 209, 211 (Bankr. 9th Cir. 1994) (citation omitted). The bankruptcy courts in this circuit possess the equitable power to approve retroactively a professional's valuable but unauthorized services. *See Halperin v. Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.)*, 40 F.3d 1059, 1062 (9th Cir. 1994); *In re THC Fin. Corp*., 837 F.2d at 392. We have held that such **retroactive approval should be limited to situations in which "exceptional circumstances**" exist. *In re Occidental Fin. Group, Inc.*, 40 F.3d at 1062; *In re THC Fin. Corp.*, 837 F.2d at 392.
>
> To establish the presence of exceptional circumstances, professionals seeking retroactive approval must satisfy two requirements: they must (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankrupt estate in a significant manner. *In re Occidental Fin. Group, Inc.*, 40 F.3d at 1062 (finding retroactive approval inappropriate where these two conditions were not met); *In re THC Fin. Corp.*, 837 F.2d at 392 (affirming denial of retroactive approval where these two conditions were not satisfied) (citations omitted). Whether additional factors should or must be considered is contested in this appeal.

There being no order authorizing the employment of counsel for the Debtor in Possession in either the prior case or the current case, counsel cannot be paid for services rendered. (As discussed in *Atkins*, upon a proper showing, retroactive authorization may be granted.")

Disgorgement of Fees

Federal Rule of Bankruptcy Procedure 2017(a) provides a procedure for the review of compensation for prefiling services, stated as follows:

> On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the

> filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

The review performed by the court pursuant to Rule 2017 in determining the value of services rendered will apply the same tests that would be applied in review of an application for compensation pursuant to Rule 2016 and section 330 of the Code. 9 COLLIER ON BANKRUPTCY P 2017.05 (16th 2019).

Once a question has been raised about the reasonableness of an attorney's fee under section 329, the attorney bears the burden of establishing that the fee is reasonable." 3 COLLIER ON BANKRUPTCY P 329.01 (16th 2019). Section 329(b) provides that if "such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to … the entity that made such payment." 11 U.S.C. 329(b).

On the subject of disgorgement, Collier states:

> The bankruptcy court has the authority and responsibility to look for ethical breaches when examining fee transactions. Compensation may be denied, particularly when an attorney intentionally misrepresents facts or deceives the court. The bankruptcy court may order disgorgement of fees, award costs, or impose other penalties when an attorney is found to have committed a fraud on the court or when an attorney has a conflict of interest. A bankruptcy court does not have to calculate how much the unethical conduct depleted the value of the attorney's service, but may, in its discretion, deny compensation in whole or in part. It may also order disgorgement of all fees already paid.

3 COLLIER ON BANKRUPTCY P 329.04 (16th 2019).

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

DISCUSSION

On July 18, 2019, Monthly Operating Reports were filed for the period of March through June 2019. However, the filing appears to have been made for the sole purpose of preventing dismissal, and not in the normal, good faith course of prosecuting this Chapter 11 case.

In ΔIP's most recent case, No. 18-90375, the court dismissed the case for failure to file any Monthly Operating Reports until the last minute. 18-90375, Civil Minutes, Dckt. 39.

Based on the evidence presented, it appears compensation for services provided in the prior case and the present case are not permitted - the ΔIP not having been authorized as required by 11 U.S.C. § 327 to employ counsel. Additionally, there exists a question as to wether the almost $6,000 in fees for the prior case would be reasonable.

At the time of filing this current case, ΔIP had already been through a Chapter 11 case and was well versed on the importance of timely filing Monthly Operating Reports and prosecuting the case. Based on the failure to prosecute, the court found the present case was filed in bad faith. Therefore, the services performed were in this case also appear to be unreasonable.

The Statement of Financial Affairs states the following as to what has been paid:

> $2,983 paid for attorney's fees and $1,717 for clerk's filing fee for prior Chapter 11 case. $2,983 paid for as compromise for additional fees in prior case. $1,717 for clerk's filing fee for present case.

Dckt. 14.

~~The Motion is granted, and ΔIP's counsel shall pay $5,966.00 in attorney's fees to the Chapter 11 trustee appointed in this case. The court does not order the disgorgement of fees advanced that were paid to the court by counsel.~~

~~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 Review of Fees filed by the US Trustee, Tracy Hope Davis ("Movant"), in this matter having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.~~

~~**IT IS ORDERED** that Motion is granted, and the debtor in possession, Y&M Rental Property Management, LLC 's ("ΔIP ") counsel, David C. Johnston ("Counsel"), shall pay $5,966.00 to the Chapter 11 trustee appointed in this case.~~

8. 19-90151-E-11 UST-1 | **Y&M RENTAL PROPERTY MANAGEMENT, LLC** **David Johnston** | **MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7** **7-11-19 [18]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, and creditors on July 11, 2019. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion is granted and the appointment of a Chapter 11 trustee is ordered.

The US Trustee, Tracy Hope Davis, ("US Trustee") filed this Motion seeking dismissal of the Chapter 11 case of debtor in possession, Y&M Rental Property Management, LLC ("ΔIP"), pursuant to 11 U.S.C. §1112(b)(1) with a 180 day bar on refiling, or in the alternative, conversion to Chapter 7.

The Motion provides the following case history:

1. The case was filed on February 21, 2019.

2. The Debtor discloses real property valued at $1,075,000 and other property valued at $58,021.

3. The Debtor discloses one secured claim (Wells Fargo Bank) totaling $135,000, and no priority or general unsecured creditors.

4. No Official Committee of Unsecured Creditors has been appointed by the U.S. Trustee, and no Chapter 11 trustee has been appointed in this case.

5. The Section 341(a) First Meeting of Creditors was concluded on March 26, 2019.

6. Despite this case being over four months old, the Debtor has not filed a single Monthly Operating Report in this case.

7. The attorney of record for the Debtor is David Johnston.

8. The Debtor has not sought to employ Mr. Johnston in this case.

9. The Debtor filed a prior Chapter 11 case on May 22, 2018.

10. On December 6, 2018, the Debtor's Prior Case was dismissed on the U.S. Trustee's motion to dismiss, which alleged cause for dismissal for failure to file four monthly operating reports.

Motion, Dckt. 18.

The US Trustee argues there is cause for dismissal because (1) the Debtor has not filed any monthly operating reports in this case; (2) the Debtor has failed to expeditiously prosecute its case; and (3) the case was filed in bad faith. US Trustee also argues a 180 day bar is appropriate here because this is ΔIP's second case which ΔIP failed to prosecute.

US Trustee asserts that no monthly operating reports have been filed in this case, which reports are due the 14th day of the month following the reporting month. US Trustee argues that ΔIP has maintained the "status quo" since the filing of the case and thereby caused unreasonable delay.

US Trustee also argues the case was filed in bad faith because there is nothing to reorganize, there being a single creditor with a fully secured claim.

MONTHLY OPERATING REPORTS

On July 18, 2019, ΔIP filed Monthly Operating Reports for March through June 2019. Dckts. 24, 26, 28, and 30.

Looking at the Monthly Operating Report for June 2019, the fourth report in this case (Dckt. 30), only income and expense information for June 2019 is provided– there are no cumulative income or expense numbers. However, the Monthly Operating Report for May 2019 (misidentified as 2018) shows more income in May 2019, and that the cumulative total is equal to the amount for May 2019. Dckt. 29. The April 2019 Report states additional income and expenses for that month, but no cumulative totals. Dckt 26.

The Monthly Operating Reports are not sufficient completed to provide the required information.

DISCUSSION

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) (emphasis added).

Here Trustee asserts there is cause for dismissal because Debtor has failed to file monthly operating reports, has not prosecuted the case, and because the case was filed in bad faith since there are no debts to reorganize.

ΔIP did not file an opposition or response to this Motion. Monthly Operating Reports have now been filed, but it appears that they were only filed in response to the Motion, providing the bare minimum of what is required in this Chapter 11 case. Such a last minute filing to prevent dismissal of the case is not indicative of ΔIP fulfilling its fiduciary duties, or with the case having been filed and prosecuted in good faith.

In ΔIP's most recent prior case, No. 18-90375, the court dismissed the case for failure to file any Monthly Operating Reports until the last minute. 18-90375, Civil Minutes, Dckt. 39.

Again in this case, the Monthly Operating Reports were not filed timely. Unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter constitutes "cause." 11 U.S.C. § 1112(b)(4)(F).

On Schedules D and E/F, ΔIP lists only the secured claim of Wells Fargo Bank, N.A. Dckt. 14. Taken at face value, the bankruptcy estate has several real property assets. Though having now been in Chapter 11 bankruptcy since May 2018, spread over two different bankruptcy cases, the ΔIP has now demonstrated that with more than a year in bankruptcy, there is no plan, there is no reorganization, there is no headway that the ΔIP can make in Chapter 11.

On Schedule A/B Debtor's managing member states under penalty of perjury that the Debtor owed seven different real properties, which are now property of the Bankruptcy Estate in this case (11 U.S.C. § 541(a)), worth almost $1,100,000. Dckt. 14 at 6. Of this, the only debt of the Debtor (at least the only debt disclosed by the managing member when stating the creditors under penalty of perjury on Schedule D) is the ($135,000)claim of Wells Fargo Bank, N.A., secured by real property worth more than twice that amount. Dckt. 14 at 9.

Merely dismissing this second non-productive Chapter 11 case will not be a proper use of the bankruptcy laws. Debtor filing yet a third nonproductive bankruptcy case is not proper. Allowing the ΔIP to continue nonproductively using bankruptcy and not prosecute the case will not be a proper use of the bankruptcy laws.

Rather, given that it appears that the Bankruptcy Estate has significant assets that the ΔIP cannot act to protect, the best interests of the Bankruptcy Estate and Creditors, as well as the Debtor, it is necessary and proper for this court to order the appointment of a Chapter 11 trustee. There are assets for a trustee to administer and there are funds to pay for the necessary services.

Dismissing the case is clearly in the best interests of the Bankruptcy Estate, as the Debtor, both outside of bankruptcy and in exercising the fiduciary duties and powers of a trustee as the ΔIP has demonstrated that it cannot handle the finances and operation of these properties. It is not in the best interests of creditors to go unpaid and have the Debtor yo-yo the properties and creditors in and out of multiple bankruptcy cases.

The Motion is granted, and the court orders that a Chapter 11 trustee be appointed in this case.

Request For Injunctive Relief

US Trustee requests the additional relief that the court impose a 180 day bar on filing of a subsequent bankruptcy case by ΔIP.

Federal Rule of Bankruptcy Procedure states the following:

> An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:
>
> . . .
>
> (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

The present Motion was not brought as an Adversary Proceeding.

Additionally, the court having determined that the appointment of a trustee is necessary, the case is not being dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion To Dismiss filed by the US Trustee, Tracy Hope Davis ("US Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the U.S. Trustee shall select and present to the court a Chapter 11 trustee to be appointed in this case.
>
> No other or Further relief is granted.

9.	**19-90159-E-11** **UST-1**	**BARRENO ENTERPRISES, LLC** **David Johnston**	**MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7, MOTION TO DISMISS CASE** **7-11-19 [20]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on July 11, 2019. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion is granted and the appointment of a Chapter 11 trustee is ordered.

The US Trustee, Tracy Hope Davis, ("US Trustee") filed this Motion seeking dismissal of the Chapter 11 case of debtor in possession, Barreno Enterprises, LLC ("ΔIP"), pursuant to 11 U.S.C. §1112(b)(1) with a 180 day bar on refiling, or in the alternative, conversion to Chapter 7.

The Motion provides the following case history:

1. The case was filed on February 25, 2019.

2. The Debtor discloses secured claims totaling $36,700, priority claims totaling $96,289, and general unsecured creditors totaling $1,559,361.

3. The Debtor discloses the following unencumbered assets:

a) Cash and cash equivalents valued at $4,044;
b) Inventory valued at $4,500;
c) Leasehold interests of an unknown value;
d) Licenses, franchises, and royalties valued at $75,000; and
e) Lawsuit of an unknown value (Debtor has requested $140,000).

4. No Official Committee of Unsecured Creditors has been appointed by the U.S. Trustee, and no Chapter 11 trustee has been appointed in this case.

5. The Section 341(a) First Meeting of Creditors was concluded on April 2, 2019.

6. Despite this case being over four months old, the Debtor has not filed a single Monthly Operating Report in this case.

7. The attorney of record for the Debtor is David Johnston.

8. The Debtor has not sought to employ Mr. Johnston in this case.

9. The Debtor filed a prior Chapter 11 case on March 26, 2018.

10. On December 6, 2018, the Debtor's Prior Case was dismissed on the U.S. Trustee's motion to dismiss, which alleged cause for dismissal for failure to file four monthly operating reports.

Motion, Dckt. 18.

The US Trustee argues there is cause for dismissal because (1) the Debtor has not filed any monthly operating reports in this case; (2) the Debtor has failed to expeditiously prosecute its case; and (3) the case was filed in bad faith. US Trustee also argues a 180 day bar is appropriate here because this is ΔIP's second case which ΔIP failed to prosecute.

US Trustee asserts that no monthly operating reports have been filed in this case, which reports are due the 14th day of the month following the reporting month. US Trustee argues that ΔIP has maintained the "status quo" since the filing of the case and thereby caused unreasonable delay.

US Trustee also argues the case was filed in bad faith because there is no ongoing business to reorganize and this is ΔIP's second case ΔIP has not prosecuted.

MONTHLY OPERATING REPORTS

On July 17, 2019, ΔIP filed Monthly Operating Reports for March through June 2019. Dckts. 27, 29, 31, and 33.

DISCUSSION

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) [emphasis added].

Here, US Trustee asserts there is cause for dismissal because Debtor has failed to file monthly operating reports, has not prosecuted the case, and because the case was filed in bad faith.

On July 17, 2019, Monthly Operating Reports were filed for the period of March through June 2019. Dckts. 27, 29, 31, 33. However, the filing appears to have been made for the sole purpose of creating the mere appearance of the ΔIP prosecuting this Chapter 11 case.

Looking at the latest Monthly Operating Report, that being for June 2019, the Responsible Individual for the ΔIP in fulfilling the fiduciary duties of the ΔIP in exercising the rights and powers of a trustee, states under penalty of perjury that there is $0 in cumulative income and ($0) in cumulative expenses in the first four months of this case. The Responsible Individual states under penalty of perjury that all income and expenses in this Chapter 11 case were only incurred in June 2019. Dckt. 33 at 4.

However, such statement under penalty of perjury is inconsistent with the Monthly Operating Reports for March, April and May, 2019, that show substantial income and expenses for the bankruptcy estate in each of those months. Dckts. 27, 29, 31. The aggreate income for the first three months of the case total $121,825 (as stated under penalty of perjury by the Responsible Individual) and the aggregate expenses for the first three months total ($120,139). Dckt. 27 at 5, Dckt. 29 at 4, Dckt. 31 at 4.

The court issued a separate Order to Show Cause why the case should not be converted, dismissed or a Chapter 11 trustee appointed, for which responses were required to be filed on or before July 18, 2019. Order, Dckt. 19. No response was filed by the ΔIP.

From the belatedly filed, inconsistent, Monthly Operating Reports, there is a business operation going on in the Bankruptcy Estate for which significant dollars have been passing through the ΔIP's fingers. The Debtor and the ΔIP have demonstrated that they cannot manage, preserve, and protect the property of the Bankruptcy Estate. Other than merely "existing" in non-productive Chapter 11 cases, the ΔIP and Debtor have done little, if anything, other than commencing multiple Chapter 11 cases to protect the property of the Bankruptcy Estate and provide for payment of the claims of creditors.

The court determines that the appointment of a Chapter 11 trustee is proper and necessary, and is in the best interests of the Bankruptcy Estate and creditors. Merely dismissing this case is not proper, Debtor having demonstrated that it cannot manage these assets. Converting it to Chapter 7 and having the business liquidated cannot be determined until after an independent Chapter 11 trustee can review the business, value the operation, and determine whether a reorganization or liquidation is in the best interests of the estate and creditors.

The Motion is granted and the appointment of a Chapter 11 trustee is ordered.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Convert the Chapter 11 case filed by Tracy Hope Davis ("the U.S. Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the U.S. Trustee shall select and present to the court a Chapter 11 trustee to be appointed in this case.
>
> No other or Further relief is granted.

10. 19-90159-E-11 UST-2 | BARRENO ENTERPRISES, LLC David Johnston | MOTION FOR REVIEW OF FEES AND/OR MOTION TO DISGORGE FEES 7-11-19 [23]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on July 11, 2019. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion for Review and Disgorgement of Fees is xxxxx.

The US Trustee, Tracy Hope Davis ("Movant") filed this Motion seeking review and disgorgement of fees paid prepetition by debtor in possession, Barreno Enterprises, LLC's ("ΔIP ") to counsel, David C. Johnston ("Counsel").

Movant provides the following factual background in the Motion:

1. Mr. Johnston filed a voluntary petition under Chapter 11 on behalf of the Debtor on February 25, 2019.

2. Mr. Johnston has not sought to be employed as counsel in this case.

3. Mr. Johnston has not filed an application for compensation in this case.

4. The Debtor discloses the following under Part 6 of its Statement of Financial Affairs:

$4,000 compromise for pre-petition services and
$1,717 for clerk's filing fee.

5. Mr. Johnston filed a "Disclosure of Compensation of Attorney For Debtor(s)" indicating that he has agreed to accept "Reasonable value of services" for his legal services, and that he received nothing for the present case except the filing fee. He further discloses that the balance due is "Reasonable value of services[.]"

6. Mr. Johnston filed a prior Chapter 11 case on behalf of the Debtor on May 22, 2018.

7. In the Prior Case, on Part 6 of its Statement of Financial Affairs, the Debtor disclosed payment of $5,000.00 for attorney's fees and $1,717 for the clerk's filing fee.

8. In the Prior Case, Mr. Johnston filed a "Disclosure of Compensation of Attorney for Debtor(s)" agreeing to accept "Reasonable value of services as allowed by Court" for legal services, $2,983 received prior to filing, and a balance due of "Reasonable value of services as allowed by Court."

9. The Debtor's Prior Case was dismissed on December 6, 2018 for failure to file four monthly operating reports.

10. Mr. Johnston never filed an application for compensation in the Prior Case.

Motion, Dckt. 23.

Movant argues Counsel should be required to disclose all fees received in this case and the ΔIP's prior case, No. 18-90196, what these fees were for, and what fees Counsel argues have been earned but not yet paid. Movant argues this is necessary because Counsel has not filed any fee applications or sought to be employed in either of ΔIP's cases.

Without any explanation provided, Movant argues full disgorgement is warranted given ΔIP's failure to prosecute this and ΔIP's prior case.

DISCUSSION

Required Authorization to be Employed

The Debtor in Possession is permitted to employ counsel, but as with a trustee, said employment must be authorized pursuant to 11 U.S.C. § 327. As is well established law, a professional [employed by a trustee or other person exercising the power of a trustee] who fails to obtain authorization to be employed pursuant to 11 U.S.C. § 327 is not entitled to any compensation. *See Interwest Business Equip. v. United States Trustee (In re Interwest Business Equip.)*, 23 F.3d 311, 318 (10th Cir. 1994)(emphasis added), holding:

> "Thus, there can be no question of the court either permitting or prohibiting unapproved representation. Instead**, any professional not obtaining approval is simply considered a volunteer if it seeks payment from the estate**. 11 U.S.C.A. 330 (court may allow fees to a professional 'employed under section 327'); 2 Collier on Bankruptcy P 327.02 at 327-10 (15th ed. 1993)."

The Ninth Circuit Court of Appeal has long applied this basic requirement, dating back to the Bankruptcy Act. As discussed in *Atkins v. Wain (In re Atkins)*, 69 F.3d 970, 973-974 (9th Cir. 1995) (emphasis added):

> In bankruptcy proceedings, **professionals** who perform services for a debtor in possession **cannot recover fees for services rendered to the estate unless those services have been previously authorized by a court order**. See 11 U.S.C. § 327(a); Fed. R. Bank. P. 2014(a); *see*, e.g., *McCutchen, Doyle, Brown & Enersen v. Official Comm. of Unsecured Creditors (In re Weibel, Inc.)*, 176 Bankr. 209, 211 (Bankr. 9th Cir. 1994) (citation omitted). The bankruptcy courts in this circuit possess the equitable power to approve retroactively a professional's valuable but unauthorized services. *See Halperin v. Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.)*, 40 F.3d 1059, 1062 (9th Cir. 1994); *In re THC Fin. Corp*., 837 F.2d at 392. We have held that such **retroactive approval should be limited to situations in which "exceptional circumstances"** exist. *In re Occidental Fin. Group, Inc.*, 40 F.3d at 1062; *In re THC Fin. Corp.*, 837 F.2d at 392.
>
> To establish the presence of exceptional circumstances, professionals seeking retroactive approval must satisfy two requirements: they must (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankrupt estate in a significant manner. *In re Occidental Fin. Group, Inc.*, 40 F.3d at 1062 (finding retroactive approval inappropriate where these two conditions were not met); *In re THC Fin. Corp.*, 837 F.2d at 392 (affirming denial of retroactive approval where these two conditions were not satisfied) (citations omitted). Whether additional factors should or must be considered is contested in this appeal.

There being no order authorizing the employment of counsel for the Debtor in Possession in either the prior case or the current case, counsel cannot be paid for services rendered. (As discussed in *Atkins*, upon a proper showing, retroactive authorization may be granted.")

Disgorgement of Fees

Federal Rule of Bankruptcy Procedure 2017(a) provides a procedure for the review of compensation for prefiling services, stated as follows:

> On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

The review performed by the court pursuant to Rule 2017 in determining the value of services rendered will apply the same tests that would be applied in review of an application for compensation pursuant to Rule 2016 and section 330 of the Code. 9 COLLIER ON BANKRUPTCY P 2017.05 (16th 2019).

Once a question has been raised about the reasonableness of an attorney's fee under section 329, the attorney bears the burden of establishing that the fee is reasonable." 3 COLLIER ON BANKRUPTCY P 329.01 (16th 2019). Section 329(b) provides that if "such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to … the entity that made such payment." 11 U.S.C. 329(b).

On the subject of disgorgement, Collier states:

> The bankruptcy court has the authority and responsibility to look for ethical breaches when examining fee transactions. Compensation may be denied, particularly when an attorney intentionally misrepresents facts or deceives the court. The bankruptcy court may order disgorgement of fees, award costs, or impose other penalties when an attorney is found to have committed a fraud on the court or when an attorney has a conflict of interest. A bankruptcy court does not have to calculate how much the unethical conduct depleted the value of the attorney's service, but may, in its discretion, deny compensation in whole or in part. It may also order disgorgement of all fees already paid.

3 COLLIER ON BANKRUPTCY P 329.04 (16th 2019).

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

DISCUSSION

ΔIP and Counsel have not responded to the Motion.

On July 17, 2019, Monthly Operating Reports were filed for the period of March through June 2019. Dckts. 27, 29, 31, 33. However, the filing appears to have been made for the sole purpose of preventing dismissal, and not in the normal, good faith course of prosecuting this Chapter 11 case.

In reviewing the docket, the court has granted a motion to dismiss the case based on failure to file the Monthly Operating Reports, failure to prosecute the case, and because the case was filed in bad faith.

In ΔIP's most recent case, No. 18-90196, the court dismissed the case for failure to file any Monthly Operating Reports until the last minute. 18-90196, Civil Minutes, Dckt. 39.

In filing this second case, the ΔIP paid $4,000.00 in attorney's fees and $1,717.00 in costs for filing. Dckt. 14.

Based on the evidence presented, and no opposition presented, it appears compensation for much of the services provided was not reasonable. At the time of filing this case, ΔIP had already been through a Chapter 11 case and was well versed on the importance of timely filing Monthly Operating Reports and prosecuting the case. Based on the failure to prosecute, the court found the present case was filed in bad faith. Therefore, the services performed were not reasonable.

~~The Motion is granted, and ΔIP's counsel shall pay $4,000.00 in attorney's fees to the Chapter 11 trustee appointed in this case. The court does not order the disgorgement of the fees that were paid by counsel to 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 Review of Fees filed by the US Trustee, Tracy Hope Davis ("Movant"), in this matter having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.~~

~~**IT IS ORDERED** that Motion is granted, and the debtor in possession, Barreno Enterprises, LLC's ("ΔIP ") counsel, David C. Johnston ("Counsel"), shall pay $4,000.00 to the Chapter 11 trustee appointed in this case~~.

11. 19-90159-E-11 RHS-1 — BARRENO ENTERPRISES, LLC — David Johnston — ORDER TO SHOW CAUSE — 7-8-19 [19]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor and Chapter 13 Trustee as stated on the Certificate of Service on July 8, 2019. The court computes that 22 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to expeditiously prosecute this bankruptcy case.

The Order to Show Cause is XXXXXXXXXXX.

ORDER TO SHOW CAUSE

On July 8, 2019, the court issued an Order To Show Cause why this a Chapter 11 trustee should not be appointed or this bankruptcy case dismissed due to the Debtor in Possession's (" ΔIP") failure to prosecute this case. The Order, Dckt. 19, states:

> This Chapter 11 Case was filed by the Debtor on February 25, 2019. A review of the file reflects that nothing has been filed in this case by the Debtor in Possession ("ΔIP") since its March 16, 2019 Status Report. At the March 28, 2019 Status Conference it was stated that the Debtor or the ΔIP would file a Chapter 11 plan and disclosure statement by June 25, 2019. Neither has been filed by that date.
>
> There are five proofs of claims that have been filed. The largest is for unpaid sales taxes to the State of California.
>
> The ΔIP has not filed monthly operating reports for:
>
> March 2019,
> April 2019,
> May 2019, and
> June 2019.
>
> This is not the Debtor's only recent Chapter 11 case, nor the opportunity afforded the Debtor to serve as the debtor in possession in the place of a trustee. Debtor's prior Chapter 11 case was filed on March 26, 2018, and dismissed on December 6, 2018. During eights months of that case, seven monthly operating

reports were to be filed by the ΔIP in that case (which is also serving as the ΔIP in this case). No monthly operating reports were filed in the prior Chapter 11 case.

The ΔIP in this case and in the prior Chapter 11 case have been represented by experienced Chapter 11 counsel. There can be no doubt that the ΔIP is aware of its obligation to file monthly operating reports.

In the prior case, the ΔIP sought to blame the Chapter 11 counsel for the failure to file monthly operating reports,

Debtor in Possession filed a Response in Opposition on November 29, 2018. Dckt.56. Debtor in Possession's counsel states that Debtor in Possession has relied on counsel to convert franchise-dictated monthly operated reports for Debtor in Possession's Dickey's Barbeque Pit businesses to the format of monthly operating reports required by the court. Debtor in Possession's counsel states further that he has been prevented from producing the monthly operating reports due to several unexpected hardships, including health issues and injuries of numerous family members.

Debtor in Possession argues 11 U.S.C. § 1112(b)(2) applies to this situation because the defect can be cured within a short period of time, the Debtor in Possession was diligent in providing franchise-dictated monthly operated reports to its attorney, and there are reasons the attorney was unable to prepare the monthly operating reports.

18-90196; Civil Minutes, Dckt. 60.

Where an attorney seeks to "fall on his sword" as the excuse for a client failing to fulfill their obligations in a bankruptcy case is a very slippery slope. In substance, such "excuse" can be viewed as admission by the attorney who has a fiduciary duty to the bankruptcy estate.

The court gave the Debtor and counsel for the ΔIP in the prior case the benefit of the doubt and elected to dismiss the prior case rather than convert it to one under Chapter 7 or appoint a Chapter 11 trustee. *Id.*; at 3.

Unfortunately, though given the benefit of the doubt and a second chance by the court, the IP is demonstrating that it has no intention of fulfilling its obligations under the Bankruptcy Code.

The failure to file monthly operating reports is a basis for the appointment of a Chapter 11 trustee or conversion of this case to one under Chapter 7.

At the Status Conference, the ΔIP did not offer any reason for being unable to file Monthly Operating Reports.

Counsel for the ΔIP reported that there was a disagreement among the owners over whether the case should be dismiss or a plan be prosecuted.

The businesses of the Debtor that have been property of the bankruptcy estate in this and the prior case are restaurant operations. For seven months in the prior Chapter 11 case and now five months in this case, the ΔIP and its principals have operated in financial secrecy, spending monies of the bankruptcy estates however they privately desire, without regard to their legal and fiduciary duties.

On the Statement of Financial Affairs, the Debtor states that for the period from January 1, 2019 to the filing of this case (which may only be one month depending on the Debtor's and ΔIP's undisclosed bookkeeping practices), the Debtor had revenues of $63,000.00. For 2018 the revenues were stated to be $905,812.00 and for 2017 $1,656,481.00. Statement of Financial Affairs Question 1; Dckt. 14 at 22.

In response to Question 25.1, the Debtor states that it has closed all of its stores except the one restaurant in Merced, California. *Id.* at 28.

It is further disclosed that Albert Barreno, now the sole member of the LLC Debtor, is paid a salary of $50,000.00 a year and Evelyn Barreno, who is identified as married to the managing member, is paid a salary of $42,000.00 a year. What they have actually been paid during the prior case and this case is unknown as no Monthly Operating Reports have been filed and the ΔIP and its principal are keeping all of the estate finances secret.

The Order set a hearing for August 1, 2019, and required the following to be done by the ΔIP and its principals:

1. that Albert Barreno, identified as a managing member of the Debtor; and Evelyn Barreno, who is identified as a "former member," who is married to Albert Barreno, and regularly salaried insider; and David Johnston, Esq., counsel for the IP in this case and for the debtor in possession in the prior case; and each of them, shall appear in person at the above hearing on this Order to Show Cause.

2. that Barreno Enterprises, LLC as the ΔIP in this case, and Albert Barreno, the responsible representative of the ΔIP, and Evelyn Barreno who is identified as a former member of the Debtor, spouse of Albert Barreno, and the recipient of payments from the debtors in possession in the bankruptcy cases, and each of them shall show cause why:

    a. The court does not appoint a Chapter 11 Trustee in this case or convert it to Chapter 7; and

    b. The court does not order that Albert Barreno and Evelyn Barreno, and each of them, reimburse the bankruptcy estate for all costs and expenses of the trustee and professionals hired by said trustee to investigate and determine the operation of the business of the bankruptcy estates, dispositions of monies, and fiances of the

bankruptcy estates in this and the prior bankruptcy cases filed by Debtor in which the Debtor served as the debtors in possession.

3. that Responses to the Order to Show Cause shall be filed and served on or before July 18, 2019, and Replies, if any, on or before July 29, 2019

DISCUSSION

No Response to the Order was filed, the ΔIP and its principals appearing to capitulate to the conversion, dismissal, or appointment of a Chapter 11 trustee.

On July 17, 2019, Monthly Operating Reports were filed for the period of March through June 2019. Dckts. 27, 29, 31, 33. However, the filing appears to have been made for the sole purpose of creating the mere appearance of the ΔIP prosecuting this Chapter 11 case.

Looking at the latest Monthly Operating Report, that being for June 2019, the Responsible Individual for the ΔIP in fulfilling the fiduciary duties of the ΔIP in exercising the rights and powers of a trustee, states under penalty of perjury that there is $0 in cumulative income and ($0) in cumulative expenses in the first four months of this case. The Responsible Individual states under penalty of perjury that all income and expenses in this Chapter 11 case were only incurred in June 2019. Dckt. 33 at 4.

However, such statement under penalty of perjury is inconsistent with the Monthly Operating Reports for March, April and May, 2019, that show substantial income and expenses for the bankruptcy estate in each of those months. Dckts. 27, 29, 31. The aggregate income for the first three months of the case total $121,825 (as stated under penalty of perjury by the Responsible Individual) and the aggregate expenses for the first three months total ($120,139). Dckt. 27 at 5, Dckt. 29 at 4, Dckt. 31 at 4.

Since the court issued this Order, Tracy Hope Davis, the U.S. Trustee ("US Trustee"), filed a Motion To Dismiss the case, and a Motion For Disgorgement of Fees. Dckts. 20, 23.

As addressed in connection with the U.S. Trustee' s Motion, the court has determined that the appointment of a Chapter 11 Trustee is appropriate.

This resolves the matter in the Order to Show Cause, which may be discharged.

At the hearing, xxxxxxxxxxxxxx.

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

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

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

IT IS ORDERED that the Order to Show Cause is **XXXXXXXXXX**.

12. 19-90159-E-11 **BARRENO ENTERPRISES, LLC** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION**
David Johnston **2-25-19 [1]**

Debtor's Atty: David C. Johnston

Notes:
Continued from 6/27/19 to be heard in conjunction with the Order to Show Cause as to why this case should not be converted to one under Chapter 7.

Operating Reports filed: 7/17/19 [Mar, Apr, May, Jun]

[UST-1] United States Trustee's Motion to Convert Case to Chapter 7 or Dismiss Case With 180-Day Bar to Re-Filing filed 7/11/19 [Dckt 20], set for hearing 8/1/19 at 10:30 a.m.

[UST-2] United States Trustee's Motion for Review and Disgorgement of Fees of David C. Johnston filed 7/11/19 [Dckt 23], set for hearing 8/1/19 at 10:30 a.m.

The Status Conference is xxxxxxxxxxxxxxx

AUGUST 1, 2019 STATUS CONFERENCE

At the Status Conference xxxxxxxxxxxxxxxxx

JUNE 27, 2019 STATUS CONFERENCE

A review of the file reflects that no pleadings have been filed in this case by the ΔIP since its March 16, 2018 Status Report. At the March 28, 2019 Status Conference it was stated that the Debtor or the ΔIP would file a Chapter 11 plan and disclosure statement by June 25, 2019. Neither has been filed by that date.

There are five proofs of claims that have been filed. The largest is for unpaid sales taxes to the State of California.

The ΔIP has not filed monthly operating reports for:

March 2019,
April 2019,

May 2019, and
June 2019.

Debtor's prior Chapter 11 case was filed on March 26, 2018, and dismissed on December 6, 2018. During eights months of that case, seven monthly operating reports were to be filed by the ΔIP in that case (which is also serving as the ΔIP in this case). No monthly operating reports were filed in the prior Chapter 11 case.

The ΔIP in this case and in the prior Chapter 11 case have been represented by experienced Chapter 11 counsel. There can be no doubt that the ΔIP is aware of its obligation to file monthly operating reports.

In the prior case, the ΔIP sought to blame the Chapter 11 counsel for the failure to file monthly operating reports,

> Debtor in Possession filed a Response in Opposition on November 29, 2018. Dckt.56. Debtor in Possession's counsel states that Debtor in Possession has relied on counsel to convert franchise-dictated monthly operated reports for Debtor in Possession's Dickey's Barbeque Pit businesses to the format of monthly operating reports required by the court. Debtor in Possession's counsel states further that he has been prevented from producing the monthly operating reports due to several unexpected hardships, including health issues and injuries of numerous family members.
>
> Debtor in Possession argues 11 U.S.C. § 1112(b)(2) applies to this situation because the defect can be cured within a short period of time, the Debtor in Possession was diligent in providing franchise-dictated monthly operated reports to its attorney, and there are reasons the attorney was unable to prepare the monthly operating reports.

18-90196; Civil Minutes, Dckt. 60.

Where an attorney seeks to "fall on his sword" as the excuse for a client failing to fulfill their obligations in a bankruptcy case is a very slippery slope. In substance, such "excuse" can be viewed as admission by the attorney who has a fiduciary duty to the bankruptcy estate.

The court gave the Debtor and counsel for the ΔIP in the prior case the benefit of the doubt and elected to dismiss the prior case rather than convert it to one under Chapter 7 or appoint a Chapter 11 trustee. *Id.*; at 3.

Unfortunately, though given the benefit of the doubt and a second chance by the court, the ΔIP is demonstrating that it has no intention of fulfilling its obligations under the Bankruptcy Code.

The failure to file monthly operating reports is a basis for the appointment of a Chapter 11 trustee or conversion of this case to one under Chapter 7.

At the Status Conference, the Debtor in Possession did not offer any reason for being unable to file Monthly Operating Reports.

Counsel for the Debtor in Possession reported that there was a disagreement among the owners over whether the case should be dismiss or a plan be prosecuted.

In light of the failure of the Debtor in Possession to fulfill its obligations, the court shall issue an order to show cause why the case should not be converted to one under Chapter 7.

MARCH 28, 2019 STATUS CONFERENCE

This voluntary Chapter 11 bankruptcy case was filed by Barreno Enterprises, LLC on February 25, 2019. Debtor's prior voluntary Chapter 11 case was filed on March 26, 2018, and dismissed on December 6, 2018. 18-90196.

In this case Barreno Enterprises, LLC, the Debtor, and not the debtor in possession, filed a Status Report. Dckt. 15. Debtor reports operating one Dickey's Barbeque Pit franchise, having closed five other locations.

Debtor states that it, and not the debtor in possession, intends to file a Chapter 11 plan by June 25, 2019. The Debtor notes that as of the March 16, 2019 filing of the Status Report only one proof of claim had been filed, that for $325.00 by the U.S. Trustee.

On Schedule A/B Debtor lists having significant assets consisting of: (1) $4,000 in cash and banking deposits; (2) $4,500 in food and inventory; (3) $16,000 in machinery and equipment; and (4) a franchise worth $75,000. Dckt. 14.

On Schedule D Debtor lists creditors having secured claims which total ($36,000). *Id.* at 11-12. On Schedule E/F Debtor lists $96,000 in priority claims and $1,559,000 in general unsecured claims. *Id.* at 13-18.

At the Status Conference counsel for the Debtor in Possession reported that the Schedules have been filed. At the one remaining location the revenues are up approximately twenty percent.