UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 7, 2014 at 10:30 a.m.

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1. 11-48305-C-13 JOHN/DARLENE DOERR — CONTINUED MOTION TO CONFIRM PLAN
PGM-7 Peter G. Macaluso — 1-27-14 [183]

Tentative Ruling: The Motion to Confirm Plan 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 - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on January 24, 2014. By the court's calculation, 46 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The Trustee and Creditor having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is to deny the Motion to Confirm the Amended Plan.

AUGUST 7, 2014 HEARING

No resolution has been provided to the court to date. On July 3, 2014, Wells Fargo Bank, N.A. filed a Notice of Mortgage Payment Change which states that the new mortgage payment is $742.59. The loan document attached to the Notice is for an EquityLine Agreement dated February 6, 2007. This debt relates to Wells Fargo Bank, N.A. Proof of Claim No. 2. The deed of trust securing this claim was avoided by the Debtors in Adversary Proceeding

No. 12-2153, with that lien preserved for the benefit of the estate. 11 U.S.C. § 551; Judgment, Adv. 12-2151, Dckt. 118.

At the hearing, ----------

PRIOR HEARINGS

At the June 19, 2014 hearing Wells Fargo Bank, N.A., the Debtors, and the Trustee appeared and requested a continuance. It was reported that the Debtors and Wells Fargo Bank, N.A. believe they have worked out a resolution which would be acceptable to the Trustee, creditors and the court, which would allow a plan to be confirmed in this case. The court continued the hearing.

At the March 11, 2014 hearing, the Debtors requested additional time to brief and present their arguments as to what it means for the avoided transfer of the Wells Fargo, N.A. deed of trust to be preserved for the benefit of the estate.

At the May 20, 2014 hearing, the Debtors requested one final continuance in an effort to work with creditors, resolve the dispute with Wells Fargo Bank, N.A., and propose a plan which provides the value from the avoided lien for creditors with general unsecured claims. The court continued the hearing to this date to permit Debtors additional time to brief their arguments. Civil Minutes, Dckt. No. 230.

Nothing further on this matter has been filed on the court docket.

REVIEW OF MOTION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. In this instance, Creditor Wells Fargo Bank, N.A. ("Creditor") and the Chapter 13 Trustee have opposed confirmation of the plan.

CREDITOR'S OPPOSITION, filed 02/20/14 (Dckt. 197)

Creditor objects to Debtors' Motion to Confirm the Fifth Amended Plan on the following grounds:

On November 5, 2013, the Debtors prevailed in their adversary proceeding to avoid (11 U.S.C. § 544) the lien of Creditor in the amount of $222,593.65. Even though Debtors avoided Creditor's lien, Creditor still objects on the basis that the plan fails to satisfy the Chapter 7 liquidation analysis of 11 U.S.C. § 1325(a)(4), which requires that Debtors propose a plan that pays the unsecured claims of creditors at least the amount that they would be paid in a Chapter 7 liquidation. Specifically, Creditor asserts that based on Wells Fargo's appraisal, the Debtors' residence located at 815 Braddock Court, Davis, California, has a value of not less than $417,000.00, and is subject only to a lien secured by a first deed of trust in the amount of $221,320.62.

1. Based upon the appraised value of $417,000.00, and the fact that the Wells Fargo lien was avoided for the benefit of the Debtors' estate,

there is equity available to the unsecured creditors of the Debtors' estate of $195,679.381, which Debtor did not provide for in their plan. The appraisal and sworn declaration of the appraiser, Bruch Elisher, was filed in support of the objection. Creditor also objects to Debtors' valuation of their residence in any amount less than $417,00, which was Creditors' appraised value of the property as of December 6, 2011, since property values have increased since that time.

Creditor asserts that now that its lien has been avoided, the obligation of the Debtors is to pay more to unsecured creditors than they had proposed in their Fourth Amended Plan where they proposed to pay into the Plan $59,406. Currently, not only does the Debtors' Fifth Amended Plan not match what they had proposed before the avoidance of the Wells Fargo lien, but their Fifth Amended Plan proposes almost $10,000 less after avoiding the Wells Fargo lien of $222,593.65.

2. Creditor opposes Debtors' utilization of their homestead exemption and not accounting for the avoided lien. Creditor argues that 11 U.S.C. § 544 provides that any transfer avoided, is preserved for the benefit of the estate. Since the court avoided the Creditor's lien of $222,593.65, the lien is preserved for the benefit of the estate. Under the current plan, the Debtors' proposed Fifth Amended Plan proposes a distribution that is approximately $195,679.38 less than a current liquidation analysis in a Chapter 7 liquidation, therefore not meeting the best interests of creditors standard set forth in 11 U.S.C. § 1325(a)(4). FN.1.

FN.1. In addition to the statutory provisions of 11 U.S.C. § 551 for the automatic preservation of an avoided lien or transfer for the benefit of the estate, the judgment in the adversary proceeding expressly states, "IT IS ORDERED that judgement is for plaintiff and **the lien is avoided for the benefit of the estate**." (Emphasis added) 12-02153 Dckt. 118.

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3. Creditor further objects on the basis that once the value of the Creditor's avoided lien has been properly scheduled for repayment to holders of unsecured claims, Debtors cannot feasibly complete their Plan as proposed.

4. Creditor also contends that the proceeding was filed in bad faith.

TRUSTEE'S OPPOSITION

Trustee opposes confirmation of the Plan on three grounds: (1.) that the plan fails to pay unsecured creditors what they are entitled to in the event of a Chapter 7 under 11 U.S.C. § 1325(a)(4); (2.) Debtor has not proven that they will be able to make the payments called for by the plan under 11 U.S.C. § 1325(a)(6); and that (3.) the plan is not proposed in good faith under 11 U.S.C. § 1325(a)(3).

Chapter 7 Liquidation

Debtors maintain that the effective plan date is December 6, 2011. Page 2, Motion to Confirm, Dckt. No. 183. Debtor takes this position, even though their plan, Dckt. No. 186, sets forth that the Plan will be effective upon confirmation. Debtors ignore the court's ruling on a prior but similar plan, that ruled "The plan is effective upon confirmation." Civil Minutes, Dckt. No. 176. Trustee argues that Debtors are ignoring 9th Circuit case law holding that post-petition appreciation in the property of the estate is required to insure the benefit of the estate. *Gebhart v. Gaughan (In re Gebhart), 621 F.3d 1206, 1210 (9th Cir. 2010); Alsberg v. Robertson (In re Alsberg), 68 F.3d 312, 314-15 (9th Cir. 1995)*; *Hyman, 967 F.2d at 1321*; *Schwaber v. Reed (In re Reed), 940 F.2d 1317, 1323 (9th Cir. 1991)*; *In re Chappell* (B.A.P. 9th Cir. 2010), 373 B.R. 73, 79.); *Viet Vu v. Kendall (In re Viet Vu)*, 245 B.R. 644, 647-48 (9th Cir. BAP 2000).

Debtor refers to lay opinion and an appraisal with no docket reference to the appraisal, and the appraisal is not filed with the moving papers. Trustee objects to the consideration of this appraisal when Trustee cannot view the appraisal. Trustee also notes that the Debtor previously maintained that the value of the property was $180,000.00 (Declaration of Debtors in Support of the Motion to Value, Dckt. No. 22 at 1,) where they attempt to assert a value of $380,000 in this motion, so the lay opinion should not appear very convincing.

Debtors refer to an unopposed claim of exemption of $175,000.00 under California Code of Civil Procedure § 704.070, but does not explain what affect 11 U.S.C. § 551 has on the claim of exemption. Debtors do not address of the court's prior order that the lien is avoided for the benefit of the estate. Order, Bankr. E.D. Cal., Adv. No.: 12-02153, Dckt. 118, November 5, 2013.

Debtor has not proven that the plan pays unsecured creditors at least what they would receive in the event of a Chapter 7.

Ability to Make Payments

Trustee also asserts that Debtors have not proven that they will be able to make the payments called for by the plan under 11 U.S.C. § 1325(a)(6). Debtors' original plan, Dckt. No. 5, proposed $100,00 for 36 months and no less than 0% to holders of unsecured claims. The present plan proposes $150.00 for 9 months, $350.00 for 12 months, $754.00 for 39 months, and then a lump sum payment of $15,000 on or before the 60th month, with at least 14.5% to the holders of unsecured claims. Dckt. No. 186. Debtors do not give specific evidence of the ability to pay the lump sum, and instead, state,

> This lump sum will be from a combination of my husband's business as a private investigator, document server, which appears to be increasing this last few months, my regular cost of living increases at work, and/or a retirement loan, or a refinance of our real property. Page 2, Declaration of Debtors, Dckt. No. 185.

The court noted in its Civil Minutes in denying the last plan, on Dckt. No. 176, on page 3, that,

> The court is also skeptical of the plan relying on a lump sum payment to be drawn from a future refinance. Many unforseen factors and outside issues could impact the reliability of this projection. Debtors' reliance on refinance undermines the courts confidence in the feasibility of the plan.

Debtors have simply added additional factors, without specific evidence, to make it seem that Debtor will suddenly be able to make more than 15 extra monthly payments, as long as the court will let Debtors delay to the maximum time allowed by the law. Debtors have not provided sufficient evidence to show the ability to make the payments called for by the plan.

Plan Not Proposed in Good Faith

Debtors have proposed their 5th amended plan, and have ignored the rulings of the court as to the effective date of the plan, as to the preservation of an avoided transfer for the benefit of the estate, and as to the difficulty of proving the ability to pay a lump sum based on a refinance. Debtor continues to propose plans that do not comply with the court's prior rulings. Failure to propose a confirmable plan when Debtors are aware of the prior rulings appears to demonstrate bad faith under Factor #4 of In re Warren, 89 B.R. 87, 93 (9th Cir. 1987):

> (4) The accuracy of the plan's statements of the debts, expenses, and percentage of repayment of unsecured debt, and whether an inaccuracies are an attempt to mislead the court;

If Debtor is not going to propose a confirmable plan, and this Debtor has not demonstrated that they are willing to do so after five attempts, Trustee asks that the court consider denying confirmation without leave to amend.

DEBTORS' SUPPLEMENTAL REPLY TO WELLS FARGO BANK, N.A.'S OBJECTION

Debtor provides the following supplemental arguments in support of confirmation:

1. Debtors argue that their plan passes liquidation analysis. Debtors assert that they submitted "proper expert opinion" on the value of the subject real property at the time of filing being $380,000. (Exh. 1, Dckt.). According to Debtors, this leaves $127,007 in non-exempt equity that will be paid through the plan.

2. Debtors state they are seeking to value the security interest in the property located at 815 Braddock Court, Davis California. Debtors estimates a value of $127,007 will be assigned to that secured claim.

3. Debtors assert that their plan is not proposed in bad faith. The plan proposes to pay $7,812 from December 2013 through December 2013 ($754 x 30 months) plus a lump-sum payment of $92,051. Debtors concede that they must pay not less than

$127,007 to unsecured creditors.

4. Debtors contemplate being able to afford a $92,051 lump-sum payment because of a recent approval of a refinance of the first deed of trust on their residence. Debtors assert that the "naturally inclining value" and the exemption held by debtor allows for the equity necessary to make the $95,000 payment.

WELLS'S FARGO MEMORANDUM IN SUPPORT OF OBJECTION

In support of its objection to confirmation, Wells Fargo Bank, N.A. provides the following:

1. Wells Fargo objects to the valuation of Debtors' residence in any amount less than $417,000, as this is the appraised value of the property as of December 6, 2011, based on the appraisal conducted for Wells Fargo and filed with the court on other occasions. Using this figure, Wells Fargo asserts that unsecured creditors need to be paid $162,320 for Debtors' plan to pass the Chapter 7 liquidation analysis.

2. Wells Fargo asserts that Debtors' plan is not feasible as it relies upon their refinance of their residence almost three years from now. The uncertainty of this lump-sum does not meet the confirmation requirement that Debtors will be "able to make all payments under the Plan and to comply with the Plan." 11 U.S.C. § 1325(a)(6).

STIPULATION

On April 24, 2014, Debtors' Counsel, Creditor's Counsel, and the Chapter 13 Trustee agreed to continue the hearing on this matter from May 6 2014 to May 20, 2014 to allow time for the parties to negotiate an amicable resolution. As of May 17, 2014, no resolution has been presented to the court.

DECLARATION OF JOHN DOERR IN SUPPORT OF CONFIRMATION

Debtor John Doerr provides the following in support of confirmation:

1. John Doerr declares that his credit score is 580 and his wife's credit score is 626. He admits he needs to raise his score to be approved for a refinance.
2. John Doerr has started his credit repair and believes that within six months the qualification for refinance will be possible.

DISCUSSION

Debtors' Chapter 13 Plan continues to be deficient in a myriad of ways. The court notes that Debtors represented that their opinion of the fair market value of the property was $180,000.00 on the first Motion to Value the Secured Claim of Creditor, PGM-1. The adversary case between Debtors and Creditor was filed by Debtors to obtain a declaratory judgment

that Debtors are the owner of the fee simple interest in the subject property, and that Creditor has no secured interest in the property adverse to Debtors because Creditor did not properly record a lien on Debtors' property. Debtors alleged that Creditor did not record the deed of trust in the correct county, and thus the recording was not reflected in the chain of title for the property at issue. ¶ 31, Dckt. No. 1, Adv. No.: 12-02153. The court decided in favor of the Plaintiff and ordered that the lien of Creditor is avoided for the benefit of the estate. Order, Bankr. E.D. Cal., Adv. No.: 12-02153, Dckt. 118, November 5, 2013. Debtors now apparently assert that the value of the property is $380,000.

The different figures cited by Debtors for the fair market value of their residence, coupled with an authenticated appraisal performed by a licensed appraiser (whose declaration is attached as Exhibit "B" in support of Creditor's opposition), which includes a Uniform Residential Appraisal Report that includes an analysis of comparable properties and adjustments for the current condition of the subject property, concluding that the value of the property is no less than $417,000.00 (Exhibit A, Dckt. No. 198), casts doubt over Debtors' less credible, less persuasive lay opinion that the value of the property is alternately $180,000 or $380,000.00.

As Creditor and Trustee pointed out, Debtors also claim an exemption of $175,000.00 on the property under California Code of Civil Procedure § 704.070, but still does not explain what affect 11 U.S.C. § 551 has on the claim of exemption. There is a prior court's order declaring that the Creditor's lien is avoided for the benefit of the estate. Order, Bankr. E.D. Cal., Adv. No.: 12-02153, Dckt. 118, November 5, 2013. 11 U.S.C. § 551 provides that any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate with respect to the property of the estate. 11 U.S.C. § 551. The avoided lien does not seem to have been preserved for the benefit of the bankruptcy estate by the Debtors, as the Plan still seems to proposes a distribution that is less than a distribution under a Chapter 7 liquidation test, therefore not meeting the best interests of creditors standard set forth in 11 U.S.C. § 1325(a)(4).

It is also remains unclear whether Debtors can make the payments called for by the plan under 11 U.S.C. § 1325(a)(6). Debtors propose paying a lump sum of $92,000 on or before the 60th month of the plan. Debtors acquisition of this amount of money depends on improving their credit score, increased property value, and final approval of a refinance. There is no set date in the future when this will occur. The court cannot determine whether plan payments are feasible with this level of uncertainty. It would be different if Debtors had a date marked in the future when the refinance will be approved and presented the court with credible evidence of the equity thereafter available. As it stands, the court lacks such reliable evidence. This is not sufficient evidence of Debtors' ability to make and afford the plan payments.

The court also recognizes that this is Debtors' 5th Amended Plan, and that many mistakes committed in Debtors' previous plans have been repeated, and have not been properly corrected. Debtors have not incorporated the court's rulings in the drafting of their plan. Trustee has even alleged bad faith on Debtors' part.

Good faith, under 11 U.S.C. § 1325(a)(3), is determined based on an examination of the totality of the circumstances. *In re Warren,* 89 B.R. 87, 92 (B.A.P. 9th Cir. 1988) (citing *In re Goeb*, 675 F.2d 1386, 1389-1390 (9th Cir. 1982)). Factors to consider include:

1) The amount of the proposed payments and the amounts of the debtor's surplus;

2) The debtor's employment history, ability to earn, and likelihood of future increases in income;

3) The probable or expected duration of the plan;

4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;

5) The extent of preferential treatment between classes of creditors;

6) The extent to which secured claims are modified;

7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;

8) The existence of special circumstances such as inordinate medical expenses;

9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and

11) The burden which the plan's administration would place upon the trustee.

Warren, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))). Additionally, when considering Chapter 13 dismissal due to bad faith in its filing, bankruptcy courts consider: whether the debtor misrepresented facts in the petition or unfairly manipulated the Code; the debtor's history of filings and dismissals; and whether the debtor intended to defeat state court litigation; and —whether egregious behavior is present. *In re Ellsworth*, 455 B.R. 904, 917 (B.A.P. 9th Cir. 2011).

Debtors have struggled with including accurate statements of debts in their Chapter 13 Plan, a marker of bad faith under Factor 4 of *In re Warren*. It is not difficult to understand why Debtors' creditors and the Trustee would assert that Debtors have unfairly manipulated the Bankruptcy Code, and that Debtors have been prosecuting their case in bad faith. Debtors have continually failed to cure the defects of their amended plans, and ignored court rulings in drafting new Chapter 13 Plans.

This case was filed in December 6, 2011. No Chapter 13 Plan has yet

been confirmed, after five attempts, over a span of over two years, to propose plans that have not complied with 11 U.S.C. §§ 1322 and 1325(a). Debtors have continually failed to cure the defects of their amended plans, and ignored court rulings in drafting new Chapter 13 Plans. Debtors have ignored court rulings on what needs to be addressed in order to achieve plan confirmation. This case is at serious risk of being dismissed for the Debtors' inability to effectuate a plan. A debtor's failure to timely file a Chapter 13 plan is cause for conversion or dismissal. 11 U.S.C. § 1307(c)(3)*; see In re Elkin*, 5 B.R. 21, 22 (Bankr. S.D. Cal. 1980). The Chapter 13 Trustee has filed previous Motions to Dismiss the Case for prejudicial delay to Debtor's creditors and now Debtors propose a plan based on a very contingent, large lump-sum payment of $92,000. The court is not confirming this plan as it does not meet confirmation requirements.

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 Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is denied and the proposed Chapter 13 Plan is not confirmed.

2. 11-48305-C-13 JOHN/DARLENE DOERR — CONTINUED MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
TSB-1 Peter G. Macaluso — 1-22-14 [179]

Tentative Ruling: The Motion to Dismiss Case 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 - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 22, 2014. 28 days' notice is required. That requirement was met.

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

The court's decision is to grant the Motion and convert the case to one under Chapter 7.

AUGUST 5, 2014 HEARING

At the hearing ----------

PRIOR HEARINGS

The Chapter 13 Trustee moved to Dismiss Debtors' Bankruptcy Case because Debtor's Motion to Confirm was heard and denied on December 10, 2013. Trustee initially requested the case be dismissed unless Debtors file and serve an amended plan and motion to confirm an amended plan no later than February 5, 2014, or Debtors file a response no later than February 5, 2014 explaining the reason for the delay and why it was reasonable.

At the February 19, 2014 hearing, Debtors responded and stated that they filed, set, and served a Motion to Confirm for March 11, 2014. Debtors are current pursuant to the proposed plan and are prosecuting their case. The court determined that Debtors had provided an adequate response to Trustee's concerns and were sufficiently prosecuting their case, as an amended plan was filed January 27, 2014 with a Motion to Confirm. The court determined that cause did not exist to dismiss Debtors' case and the Motion to Dismiss was continued.

At the March 11, 2014 hearing, it was unclear whether Debtors could achieve confirmation of a feasible plan that complies with the provisions of 11 U.S.C. § 1322 and 1325(a).

At the May 20, 2014 hearing on this matter, the Debtors requested one final continuance in an effort to work with creditors, resolve the dispute with Wells Fargo Bank, N.A., and propose a plan which provides the value from the avoided lien for creditors with general unsecured claims. Dckt 232.

At the June 19, 2014 hearing Wells Fargo Bank, N.A., the Debtors, and the Trustee appeared and requested a continuance. It was reported that the Debtors and Wells Fargo Bank, N.A. believe they have worked out a resolution which would be acceptable to the Trustee, creditors and the court, which would allow a plan to be confirmed in this case.

Nothing further, however, has been filed on the court docket on this matter.

REVIEW OF THE MOTION

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. § 1307(c)(1).

After having reaped the benefits of Chapter 13 and all of its protections, just dismissing the is case at this juncture may not be proper or in the best interests of all creditors. While Wells Fargo Bank, N.A. may well be anxious to have the case dismissed so that it can correct its lien recording error that led to the lien being avoided, such may not be in the best interests of the estate and creditors. While the Debtors may now be anxious to have this case dismissed, having exhausted 27 months of bankruptcy protection, and start a new case, such may not be in the best interests of creditors and the estate.

Further, when considering dismissals, the court should consider whether a dismissal with prejudice is warranted. Such a motion has not been filed, and in connection with this motion that issue is not before the court. But in light of what has transpired in this case and the large non-exempt equity in the property for creditors holding general unsecured claims, any request to dismiss should inform the court, creditors, Debtors, and other parties in interest the calculation for such relief not being requested as part of the motion to dismiss.

The court set the motion for further hearing to address the issue whether dismissal or conversion to Chapter 7 is in the best interests of creditors and the estate. However, neither the Chapter 13 Trustee nor Debtor filed supplemental documents with the court.

The court finds sufficient cause to dismiss Debtors' case for unreasonable delay that is causing prejudice to creditors. 11 U.S.C. § 1307(c).

This case was filed in December 6, 2011. No Chapter 13 Plan has yet been confirmed, after five attempts, over a span of over two years, to propose plans that have not complied with 11 U.S.C. §§ 1322 and 1325(a). Debtors have continually failed to cure the defects of their amended plans, and ignored court rulings in drafting new Chapter 13 Plans. Debtors have ignored court rulings on what needs to be addressed in order to achieve plan confirmation.

This case is at serious risk of being dismissed for the Debtors' inability to effectuate a plan. A debtor's failure to timely file a Chapter 13 plan is cause for conversion or dismissal. 11 U.S.C. § 1307(c)(3)*; see In re Elkin*, 5 B.R. 21, 22 (Bankr. S.D. Cal. 1980). The Chapter 13 Trustee has filed previous Motions to Dismiss the Case for prejudicial delay to Debtor's creditors and now Debtors propose a plan based on a very contingent, large lump-sum payment of $92,000. The court is denying confirmation of the proposed fifth amended plan because it does not propose reliable terms of payment, which only compounds the continued prejudice facing creditors of Debtors.

Dismissal of this case is not in the best interests of the estate or creditors. The Debtor's successfully prosecuted an action to avoid the lien of Wells Fargo Bank, N.A. on real property pursuant to 11 U.S.C. § 544 (the Bank having recorded its deed of trust in the wrong county). Judgment, Adv. 12-2153 Dckt. 118. That lien, though avoided as to Wells Fargo Bank, N.A., is preserved for the benefit of the Bankruptcy Estate. 11 U.S.C. § 551.

If the court were to just dismiss the case, the creditor's right and ability to be paid from this preserved lien would be lost. As a fiduciary of the bankruptcy estate, the Debtors cannot just "throw away" that asset of the estate. On its face, this assets has a value of approximately $222,593.65 (plus additional accrual of interest) in the amount of the obligation secured by the avoided lien. See Civil Minutes from June 19, 2014 hearing on Motion to Confirm Plan, DCN: PGM-7, which are incorporated herein and made part of the ruling on this Motion.

The bankruptcy estate having a $222,593.65 asset which would be lost if the case were dismissed and creditors holding general unsecured claims thereby forfeiting the right to be paid pro rata from such monies if the case was dismissed, the Motion is granted and the case is converted to one under Chapter 7 of the Bankruptcy Code.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the case is converted to one under Chapter 7.

3. 13-24254-E-7 HSM-12 — RUSS TRANSMISSION INC — Gary F. Zilaff — MOTION TO SELL AND/OR MOTION TO PAY — 6-25-14 [133]

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on June 25, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion to Sell Property is granted.

Susan Didriksen, Chapter 7 Trustee ("Movant") seeks approval from the court for (I) the Trustee's entry of the Purchase Agreement and sale of the Property to the Current Tenant pursuant to the terms of the Purchase Agreement,(ii) payment of the commission to Agent consistent with the approved listing agreement, if the proposed sale is approved and consummated with the Current Tenant or any successful Qualified Overbidder, and (iii) payment of other customary expenses of closing associated with this sale.

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

> 6771 Elvas Ave, Sacramento, California, APN 008-391-015, including a residential unit and a cell tower.

Movant retained Bluett & Associates, a real estate services and brokerage firm, which was approved by the court on June 20, 2013, to market the property. Movant states she received a preliminary offer from a cell tower licencing company, Global Signal Acquisitions IV, LLC ("Crown Castle") to acquire the estate's leasehold interests in the existing cell tower lease for $210,000. However, the parties were unable to reach an agreement. Movant then marketed the entire property for sale, including the leasehold interest and Friedland Boctor Enterprises, LLC offered $225,000.00 for the Property. However, Crown Castle, upon hearing of the intent to sell,

advised Movant that the lease to the cell tower included a right of first refusal to purchase the property in the event the Trustee entered into an agreement to sell the property.

Movant then gave formal notice of the intent to sell the property on the terms of the Purchase Agreement and the need to exercise the right of first refusal under the existing lease. The original tenant on the Existing ATT Lease was identified as Sacramento Cellular Telephone Company (the "Original Tenant"). In response to requests from the Trustee regarding the proper party holding the right to exercise the right of first refusal, Crown Castle provided substantial documentation and explanation regarding how one of its entities, CCATT, LLC ("CCATT"), held a limited power of attorney for the current tenant, NCWPCS MPL 21-Year Sites Tower Holdings, LLC (the "Current Tenant"), and how the Current Tenant had assigned to Crown Castle all rights, as tenant under all of its existing cell tower leases, to exercise any rights of first refusal thereunder. In response to the Notice of Intent to Sell, the Trustee received a notice of exercise of the right of first refusal under the Existing ATT Lease, signed by CCATT, as Attorney-in-Fact for the Current Tenant.

The material terms of the Purchase Agreement are as follows:

a. The Purchase Price for the Property is $225,000.00 ("Purchase Price" or "Sales Proceeds");

b. The sum of $10,000.00 (the "Deposit") has been deposited by Current Tenant into escrow. The Deposit is creditable against the Purchase Price and is nonrefundable, subject to Seller obtaining Court approval of the Purchase Agreement. If Current Tenant fails to close the purchase due to default by Current Tenant, the Deposit shall be nonrefundable and shall be retained by the Trustee as liquidated damages for such breach;

c. The proposed sale of the Property and the Purchase Agreement are subject to Bankruptcy Court approval through the granting of this Motion;

d. Current Tenant has had the opportunity to inspect the Property and review the preliminary title thereto and has approved the condition of the Property and title to the Property by not timely objecting thereto in accordance with the terms of the Purchase Agreement;

e. Current Tenant will pay the Purchase Price and close escrow on or before seven (7) days after approval of this Motion by the Court (the "Closing Date");

f. The following closing costs will be allocated to the Estate and paid from the Sales Proceeds: (I) one-half the cost of the escrow fee; (ii) the premium for the standard coverage title insurance policy; (iii) the costs to prepare and record the grant deed and other costs related thereto, including the documentary

transfer tax; (iv) the prorated share of real property taxes and assessments secured against the Property. (including the costs to cure any delinquencies related thereto) and rents and utilities related to the Property; and (v) any amounts required to be withheld for state or federal taxes. The portion of the Sales Proceeds remaining after deduction of the foregoing costs allocable to the Estate as Seller, and after payment of the commission to the Agent as approved by the Court, shall be referred to herein as the "Net Sales Proceeds;"

g. Title to the Property shall be subject to all liens or encumbrances for real property taxes and/or assessments which are not delinquent as of the close of escrow;

h. The Trustee is not aware of any secured interests against the Property. If any monetary liens are discovered to exist against the Property, delivery of title free and clear from such other monetary liens may require the cooperation and consent of such lien holders. The Purchase Agreement allows that, if any other such secured creditor's consent cannot be obtained at least seven (7) days before the hearing date on this Motion, then the Trustee may request extension(s) of the hearing date for up to thirty (30) days and if the Trustee is still unable to obtain such consent, Current Tenant's sole recourse will be to either take the Property subject to the lien, without adjustment to the Purchase Price, or terminate the Purchase Agreement and receive the refund of the Current Tenant's deposit.

I. Current Tenant will acquire the Property in its "AS IS," "WHERE IS," "WITH ALL FAULTS" condition. Trustee is making no representations or warranties, directly or indirectly, with respect to the condition or history of the Property, or the status of the existing cell tower lease or rights to maintain the cell tower on the Property, or the legal compliance of the existing improvements and cell tower on the Property, and has no duty to inquire or investigate or provide any disclosures related to the Property. Current Tenant shall rely solely on its own investigation of the Property in the decision to acquire the Property;

j. With respect to the improvements and any fixtures located on the Property in which this bankruptcy Estate owns any interest therein, including the residential unit and cell tower located on the Property, this Motion seeks authority to sell and transfer to the Current Tenant the Estate's

interests, if any, in such assets as part of the Property; and

k. The proposed sale to Current Tenant is subject to overbidding at the hearing on this Motion. If no overbids for the Property are made at the hearing on this Motion, or if the Current Tenant is the highest bidder for the Property at the hearing on the Motion, the Deposit shall be applied to the Purchase Price or the highest price bid by Current Tenant at the hearing on the Motion, whichever is greater. If a Qualified Overbidder outbids Current Tenant, Current Tenant shall remain obligated to buy the Property at the Purchase Price or its highest bid, if the overbidder fails to close and Current Tenant is the next highest bidder on the Property. If a Qualified Overbidder outbids Current Tenant and closes its purchase of the Property, then the Purchase Agreement shall terminate and the Deposit shall be returned to Current Tenant.

REAL ESTATE AGENT FEES

Movant states she required the professional services of Agent to act as the Estate's agent to market and sell the Property. The Listing Agreement provides for the agent to receive a commission of six percent (6%) of the sales price of the Property. Trustee believes such a commission is within the range of customary and reasonable fees charged and paid in the area for professional brokerage services in connection with commercial real estate such as the Property. Trustee seeks authorization from the court to pay the commission to Agent upon closing the escrow from the Sales Proceeds.

Trustee is informed and believes that the Agent is disinterested within the meaning of the Bankruptcy Code for purposes of this engagement. As described in the Property Sale Agreement, the Broker represents both the Trustee and the Buyer in this transaction. Based on her experience, the Trustee is informed that such dual representation is common in the commercial real estate brokerage community. This dual representation was disclosed to the Trustee and the Buyer.

Because the Agent is acting as agent for both buyer and seller in this transaction, the entire six percent (6%) commission will be paid to the Broker, and will not be split with other parties. Trustee believes that the Agent has carried and continues to carry out its responsibilities under the Listing Agreement, and that the payment of the commission pursuant to the Listing Agreement is appropriate and reasonable.

WAIVER

The Trustee requests to waive the application of Federal Rule of Bankruptcy Procedure 6004(h) with respect to the approval of this Motion to Sell.

Federal Rule of Bankruptcy Procedure 6004(h) provides a fourteen (14) day stay of enforcement on orders authorizing the use, sale, or lease

of property other than cash collateral. The Trustee testifies that the Purchase Agreement provides for escrow to close within seven (7) days of the approval of this motion and due to this short period, a waiver of Rule 6004(h) is necessary and appropriate. The court determines that cause exists to waive the application of Federal Rule of Bankruptcy Procedure 6004(h) in this case.

CONCLUSION

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the Knights Landing Property.

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Susan Didriksen, the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Susan Didriksen, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to NCWPCS MPL 21-Year Sites Tower Holdings, LLC or nominee (“Buyer”), the Property commonly known as 6771 Elvas Ave, Sacramento, California (“Property”), on the following terms:
>
> 1. The Property shall be sold to Buyer for $225,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit G, Dckt. 138, and as further provided in this Order.
>
> 2. The Property will be sold on an “as is” “where is” “with all faults” basis, with no representations or warranties, express or implied, with respect to the property.
>
> 3. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount equal to six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to the Trustee's agent, Lori Bluett of Bluett & Associates.

5. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, other customary and contractual costs and expenses incurred in order to effectuate the sale. The reasonable and necessary costs and expenses of closing include the Estate's pro-rata share of real property taxes and assessments secured against the Property, and the amount of all delinquent taxes secured against the Property, upon the closing of the sale from the Sale Proceeds thereof.

6. All proceeds of the sale, after payment of the amounts authorized above, shall be disbursed directly to the Trustee.

7. The fourteen (14) day stay of enforcement provided in Rule 6004(h), Federal Rules of Bankruptcy Procedure, is waived.

4. 13-24254-E-7 HSM-13 | **RUSS TRANSMISSION INC** | **Gary F. Zilaff** | **MOTION FOR COMPENSATION FOR HEFNER, STAR AND MAROIS, LLP, TRUSTEE'S ATTORNEY(S) 6-25-14 [145]**

Final Ruling: No appearance at the August 5, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on June 25, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Hefner, Stark & Marois, LLP, the Attorney ("Applicant") for Susan Didriksen the Chapter 7 Trustee ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 1, 2013 through May 31, 2014. The order of the court approving employment of Applicant was entered on May 16, 2013.

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

Asset Disposition: Applicant spent 216.30 hours in this category. Applicant assisted Client with legal issues and strategy related to administration of multiple, complex real property assets; draft and prosecute motions authorizing the sale of multiple real properties; advise Trustee in connection with complications initially preventing consummation of real property asset sales; Advise Trustee and communicate with creditor's counsel concerning cash collateral issues; Advise and represent Trustee in connection with motion for relief, abandonment, and lease assumption/rejection issues; and, Advise Trustee in connection with cellular tower sale issues.

Dos Rios Property Insurance and Claims Issues: Applicant spent 28.05 hours in this category. Applicant advised and represented the Trustee in connection with discovery and investigation related to insurance proceeds from pre-petition fire at real property owned by Debtor; conducted research regarding bankruptcy claims issues related to the property and fire/insurance proceeds; communicated with various creditors' attorneys, and the Trustee, regarding the same.

General Claims Analysis: Applicant spent .5 hours in this category. Applicant advised Trustee in connection with initial legal analysis of proofs of claims filed in case.

General Administrative Advisory Services: Applicant spent 32.5 hours in this category. Applicant advised and represented Trustee in connection with limited general matters, as appropriate; advised Trustee in connection with operational issues related to estate's real property assets; drafted employment applications for Counsel and for Trustee's broker/real property manager; and initial work on Counsel's First Interim Compensation Application.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering

the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including advising and representing the Trustee regarding lease assumption/rejection issues and the sale of the cellular tower. The estate has over $305,000.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS ALLOWED

The fees request are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The hourly rates for the fees billed in this case are $390.00/hour for senior counsel and $300.00/hour for counsel. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided.

First Interim Fees in the amount of $94,414.00 are allowed pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330. The court authorizes the payment of the fees on an interim basis by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $871.07 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopies		$750.75
Document Requests		$39.00
Postage		$81.32

Total Costs Requested in Application		$871.07

The First Interim Costs in the amount of $871.07 are approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is allowed the following amounts as compensation to this professional in this case:

Fees $94,414.00
Costs and Expenses $ 871.07

pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331 in this case and the Trustee is authorized to pay the fees and costs from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Hefner, Stark & Marois, LLP ("Applicant"), Attorney for the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Hefner, Stark & Marois, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Hefner, Stark & Marois, LLP, Professional Employed by Trustee
>
> Fees in the amount of $ 94,414.00
> Expenses in the amount of $ 871.07,
>
> The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the interim fees of $94,414.00 and expenses of $871.07 from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

5. 13-24254-E-7 RUSS TRANSMISSION INC MOTION FOR COMPENSATION FOR

SMD-2 **Gary F. Zilaff** **GABRIELSON & COMPANY, ACCOUNTANT(S)**
6-25-14 [140]

Final Ruling: No appearance at the August 7, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on June 25, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Gabrielson & Company, the Accountant ("Applicant") for Susan Didriksen the Chapter 7 Trustee ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 9, 2013 through June 22, 2014. The order of the court approving employment of Applicant was entered on April 22, 2014.

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

Reconstruction of Financial Statement to Prepare Required Corporation Tax Returns: Applicant spent 30.9 hours in this category. Applicant reconstructed financial statements from banking, bankruptcy and other accounting records for the fiscal years June 30, 2007 through June 30,2012, including communication with the Internal Revenue Service regarding an ongoing tax audit, and the debtor and prior chapter eleven trustee to obtain needed information.

Preparation of 2007 through 2014 Federal and State Corporation Income Tax Returns: Applicant spent 30.8 hours in this category. Applicant

prepared eight years of debtor federal and California corporation income tax returns and related attachment schedules for fiscal years ended June 30, 2007 through June 30,2013 and began preparation of June 30,2014 tax returns, including analysis of tax attribute carry forwards from last chapter eleven tax period and tax basis of various real property assets sold by estate.

Provided Required Accounting and Tax Information per IRS Tax Audit: Applicant spent 8.4 hours in this category. Applicant provided 2007 through 2013 accounting financials and tax returns to the Internal Revenue Service related to ongoing federal tax audit.

Administrative Functions: Applicant spent 3.3 hours in this category. Applicant prepared accountant declaration and related employment documents for trustee review, prepared first interim fee application, including detailed description of tax services.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing corporate federal and state tax returns. The estate has over $305,000.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Michael Gabrielson	67.2	$325.00	$21,840.00
Michael Gabrielson	6.2	$345.00	$2,139.00

Total Fees For Period of Application	$23,979.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of $23,979.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $193.25 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying Charges		$149.40
Telephonic Appearance		$30.00
Postage		$13.85
Total Costs Requested in Application		$193.25

This court does not generally allow the recovery of court call expenses on the theory that generally professionals use the Court Call service to make themselves more competitive in a larger geographic area. For those professionals, the Court Call service is akin to having phones in the office, legal resources, a desk and chair.

The First Interim Costs in the amount of $163.25 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Applicant is allowed the following amounts as compensation to this professional in this case:

Fees $23,979.00
Costs and Expenses $ 163.25

pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331 in this case and the Trustee is authorized to pay the $23,979.00 in fees and $163.25 in costs from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

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

The Motion for Allowance of Fees and Expenses filed by Gabrielson & Company ("Applicant"), Accountant for the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Gabrielson & Company is allowed the following fees and expenses as a professional of the Estate:

Gabrielson & Company, Professional Employed by Trustee

Fees in the amount of $ 23,979.00
Expenses in the amount of $ 163.25,

IT IS FURTHER ORDERED that the costs of $30.00 are not allowed by the court.

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

IT IS FURTHER ORDERED that the Trustee is authorized to pay the 23,979.00 of the allowed interim fees and $163.25 of the allowed expenses from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

6. 11-36557-E-7 CAH-3 — MARTHA RAMIREZ — C. Anthony Hughes — OBJECTION TO CLAIM OF CELERINO BENITEZ, CLAIM NUMBER 8 — 6-9-14 [242]

Tentative Ruling: The Objection to Claim 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 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Chapter 7 Trustee, parties requesting special notice, and Office of the United

States Trustee on June 9, 2014. By the court's calculation, 59 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The Objection to Claim of Celerino Benitez is overruled.

Martha Ramirez, the Chapter 7 Debtor ("Objector") requests that the court disallow the claim of Celerino Benitez ("Creditor"), Proof of Claim No. 8-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $38,960.00. Objector asserts that the claim attempts to collect on a debt that was paid in full pre-petition.

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

However, in a chapter 7 case the debtor usually has no pecuniary interest that would justify objecting to a claim unless there could be a surplus after all claims are paid. 4 COLLIER ON BANKRUPTCY ¶ 502.02 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.); see also *Caserta v. Tobin*, 175 B.R. 773 (S.D. Fla. 1994) (chapter 7 debtor, in case where there is no surplus, lacks standing to object); *In re Weeks, Thomas & Lysaught, Chartered*, 97 B.R. 46 (D. Kan. 1988) (after trustee appointed, debtor no longer had standing to object).

Here, Debtor has not shown that she has proper standing to object to the claims, as this is a Chapter 7 case and no assertions have been made that this is a surplus estate. Therefore, the court cannot determine if Debtor has standing for the present motion.

If the allegations set forth by the Debtor are in fact true, the Chapter 7 Trustee should be the party in interest objecting to the claim. Additionally, the Chapter 7 Trustee and the U.S. Trustee may well determine that further investigation concerning this Proof of Claim is warranted.

The Trustee was properly served at his designated electronic address but has not filed a response to date. The court will leave it to the parties in interest to object to this claim or determine the claim is false and should be referred to the US Attorney.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Celerino Benitez, Creditor filed in this case by Martha Ramirez, 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 objection to Proof of Claim Number 8-1 of Celerino Benitez is overruled.

7. 10-23577-E-11 GLORIA FREEMAN — CONTINUED MOTION FOR COMPENSATION FOR DAVID D. FLEMMER, CHAPTER 11 TRUSTEE
WFH-42 Pro Se — 4-9-14 [1398]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on April 9, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

David D. Flemmer, the Chapter 11 Trustee ("Applicant"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period February 10, 2011 through October 1, 2013. The order of the court approving employment of Applicant was entered on January 7, 2011.

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

Asset Sales/Motions: Applicant spent 92.65 hours in this category. Applicant coordinated the repair of damages to the Debtor's residence located at 5135 Moss Lane, Granite Bay, California, including coordination of an insurance claim on the property; listed and marketed the property before the estate's interest in the property was sold to Laurence Freeman.

Bankruptcy Litigation: Applicant spent 34.75 hours in this category. Applicant supervised and directed litigation with the Debtor and others, including Landmark Community Church and Laurence Freeman: settlements were reached with Laurence Freeman terminating two adversary proceedings.

Bankruptcy Tax Preparation and IRS Correspondence: Applicant spent 2.0 hours in this category. Applicant consulted with the Internal Revenue Service and Franchise Tax Board regarding claims and refunds.

Bank Setup and Account Problems: Applicant spent 25.0 hours in this category. Applicant set up new bank accounts and did work tracking the transfer of funds from Debtor's accounts to the Trustee accounts.

Case Accounting and Monthly Operating Reports: Applicant spent 75.95 hours in this category. Applicant prepared monthly operating reports and prepared accounting and bank reconciliations for the estate.

Case Administration: Applicant spent 94.25 hours in this category. Applicant engaged in general case administration, including consultations with counsel, e-mail discussions with the Debtor, meetings with Laurence Freeman, analysis of issues with Staff USA, Inc., conferences with opposing counsel, assistance in preparing a plan of reorganization, and general trustee duties.

Claims Administration and Objections: Applicant spent 11.2 hours in this category. Applicant met with counsel and a major creditor, and ultimately negotiated a complex, multiparty settlement involving ownership of, and claims arising from, Fortune West Enterprises, Inc. The settlement resulted in the elimination of over $1,000,000 of claims against the estate.

Court Appearances: Applicant spent 60.6 hours in this category. Applicant made numerous court appearances at hearings and status conferences in this case.

Miscellaneous Matters: Applicant spent 17.0 hours in this category. Applicant performed additional services, including conferring with brokers

and counsel, and preparing for and attending a Rule 2004 examination of the Debtor.

In sum, Applicant spent 414.15 hours, at a fee of $155,306.25, in providing services to the estate. However, Applicant acknowledges that his fees are limited by Section 326 of the Bankruptcy Code in the amount of $62,027.67.

DEBTOR'S OPPOSITION

Debtor Gloria Freeman filed opposition stating that Applicant failed to disclose his conflicts of interest with Flemmer and Associates, which was not a disinterested party due to its conflicts with Parasec/Para corp/MCLEZ, a competitor of Ulrich, Nash and Gump. Debtor objects to payment of Trustee fees due to Applicant's lack of disinterestedness because of this conflict.

However, the court addressed the Trustee's disinterestedness in a detailed ruling on Debtor's Motion to Remove David Flemmer Trustee and Disgorge His Fees for the Estate of Gloria Freeman and Other Entities in the Eastern District of California. See Motion, Dckt. 695; Civil Minutes, Dckt. 841. This court held that the Trustee did not have an impermissible interest and that the Trustee did not hold an adverse interest to the estate:

> Debtor has not shown that the Trustee is not a disinterested person or has an adverse interest to the estate. A disinterested person is one that does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason. 11 U.S.C. § 101(14)(C). An adverse interest is the (1) possession or assertion of an economic interest that would tend to lessen the value of the bankruptcy estate; or (2) possession or assertion of an economic interest that would create either an actual or potential dispute in which the estate is a rival claimant; or (3) possession of a predisposition under circumstances that create a bias against the estate. In re AFI Holding, Inc., 530 F.3d at 845. Whether an interest is materially adverse necessarily requires an objective and fact-driven inquiry. *Rus, Miliband & Smith, APC v. Yoo (In re Dick Cepek, Inc.)*, 339 B.R. 730, 73940 & n. 10 (9th Cir. BAP 2006).
>
> Here, Debtor does not meet her burden to show specific facts supporting cause under section 324. Debtor alleges that cause exists since Trustee did not disclose that Trustee (allegedly) has an interest in a legal education business similar to the Debtor's legal education business, UNG. Debtor alleges that Trustee's adverse interest was detrimental to the UNG business and caused hundreds of thousands of dollars in losses. However, Debtor has not explained how Trustee's alleged interest in a business similar to that of Debtor's creates a conflict or results in the Trustee's interest being adverse to the

estate. More importantly, Debtor has not provided sufficient evidence to establish any of the alleged misconduct by the Trustee or of the alleged loss or injury sustained.

Furthermore, it appears that the Trustee does not own Parasec. Rather, Parasec owns a minority share of Flemmer Associates, LP, the Trustees accounting firm. Additionally, the Trustee explains that Paracorp, Incorporated, dba Parasec is not a legal education business but provides legal support services in the form of document filing and retrieval for attorneys and business entities. Declaration of Lynn Conner. The Trustee states that the company did enter into an agreement with MCLEZ, an unrelated company providing continuing legal education products, to market to Parasec's customers through a link on their website. It appears Parasec did not prepare or own MCLEZs products and only generated $1,112.97 over two and a half-years. These facts to not raise to any of the standards of adverse interest as set forth in *In re AFI Holding, Inc.* by the Ninth Circuit Court of Appeals. First, Debtor has not shown that the Trustees connection with Parasec has lessened the value of the bankruptcy estate. Further, no evidence has been shown that the connection creates an actual or potential dispute with the bankruptcy estate as the Trustee does not own the company nor does the company engage in similar services as the estate. Lastly, the Debtor has not shown a predisposition that creates a bias against the estate in the Trustees connection with Parasec.

Civil Minutes, Dckt. 841.

Debtor has not presented new arguments in her opposition to this motion and the court will not re-litigate the same issues that were contested in that motion.

DISCUSSION

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

Id. at 959.

While there have been significant legal fees in this case, this has

occurred a number of reasons. First, there has been significant litigation in this case and the related Adversary Proceedings. That litigation centers around the pre- and post-petition conduct of the Debtor, counsel for her as Debtor in Possession, and Lawrence Freeman. This has also been caused because of the many related entities and disputes which arose in connection with those case. These disputes include the interests of the Debtor's brother and sister in law and the claims of the Trustee in the Staff USA, Inc. case that monies from that business were paid to bankruptcy counsel and family law counsel of the Debtor in Possession.

In reviewing all of the litigation, contentions made by Lawrence Freeman, positions advanced by the Debtor and counsel while as Debtor in Possession and now as Debtor, the asserted conflicts of interest by the Debtor against her attorney, and the attorney who represented the estate while the Debtor served as Debtor in Possession attempted to represent Lawrence Freeman against the estate, the court is convinced that a significant amount of these legal expenses are the Debtor's own doing. These have arisen not because of mistake or inadvertence, but the intentional conduct and strategy of the Debtor and her attorney representing the estate when she was Debtor in Possession.

The court notes the difficulty the Chapter 11 Trustee in this case in interacting with Gloria Freeman, prior counsel W. Austin Cooper and Laurence Freeman. Gloria Freeman has displayed litigation tactics that necessitated the Trustee to file several motions, responses and replies. Further, the Trustee has had to respond to and consider the ethical concerns raised by the conduct of W. Austin Cooper and his representation of this estate, the estate of Debtor Gloria Freeman, and the interests of Mr. Laurence Freeman in a related adversary proceeding.

The requested capped fees of $62,027.67 is not shocking. The liquidating trust created under the plan currently holds the sum of $413,093.96 as of the filing of this application. A review of the case file and prior rulings has made it clear that the recovery of these monies has not been easy. The court finds Applicant's services were beneficial to the bankruptcy estate and reasonable.

FEES ALLOWED

This bankruptcy case has been anything but "routine." Much of the complexity, and cost, has been caused by the Debtor herself and her litigation strategy implemented with the assistance of her counsel. This court has addressed in other rulings the conflicts of interests, misdealing, and duplicity of the Debtor and her counsel with respect to the property of this estate, related bankruptcy estates, and her ("ex-" at times) husband, Laurence Freeman. This court was required to hold a legal competency hearing concerning Laurence Freeman to determine whether a personal representative was necessary pursuant to Federal Rule of Civil Procedure 25(b), and Federal Rules of Bankruptcy Procedure 9014 and 7025. After Laurence Freeman's second counsel died (his prior counsel having been "fired" under suspicious circumstances), Laurence Freeman began filing pleadings and declarations under penalty of perjury that he was not "legally competent." "He," jointly with the Debtor, sought to set aside his settlement with the Trustee determining that certain property was his separate property and not subject to the community property claims of the

Debtor should be vacated. As was disclosed at the evidentiary hearing to determine the legal competency of Laurence Freeman that it was the Debtor and her counsel who were behind Laurence Freeman asserting that he was not legally competent and to make his separate property again subject to alleged community property claims of the Debtor. FN.1.

FN.1. The court's various rulings on these issues include the filings and conclusions in the following Civil Minutes: (1) Motion to Dismiss or Convert, Dckt. 66; (2) Motion for Compensation for Trustee's Counsel, Dckt. 474; (3) Debtor's Motion to Convert Case to Chapter 7, Dckt. 741; (4) Motion for Compensation of Counsel for Trustee, Dckt. 823; (5) Debtor's Motion to Remove Trustee, Dckt. 841; (6) Debtor's Motion to Remove Trustee's Counsel, Dckt. 880; (7) Debtor's Motion for Stay Pending Appeal, Dckt. 1018; (8) Motion for Special Counsel to Debtor in Possession Attorneys' Fees, Dckt. 1167; (9) Motion for Fourth Interim Fees for Trustee's Counsel, Dckt. 1246; and (10) Debtor's Counter Motion for Administrative Expense, Dckt. 1433.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
David D. Flemmer	414.5	$375.00	$155,437.50
			$
Total Fees For Period of Application			$155,437.50

STATUTORY MAXIMUM FOR TRUSTEE FEES

Trustee's fees are capped by a formula provided by 11 U.S.C. § 326, providing the trustee may not exceed 25% on the first $5,000 or less, 10% on any amount in excess of $5,000 but not in excess of $50,000, 5% on any amount in excess of $50,000 but not in excess of $1,000,000. Trustee states that Disbursements to Creditors and others totals $690,993.40 and Cash Disbursements to the Liquidating Trust totals $484,559.94, for a total disbursement amount of $1,175,553.34. Trustee calculates the following for his maximum fees pursuant to 11 U.S.C. § 326:

$ 5,000 x 25%.....$ 1,250.00
$45,000 x 10%.....$ 4,500.00
$1,125,553.34 x 5%.....$56,277.67

Maximum Fees.....$62,027.67

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Final Fees in the amount of $62,027.67 are approved pursuant to 11 U.S.C. § 330 and

authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

COSTS ALLOWED

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $2,801.27 for parking, mileage at $.54 per mile, costs of asset searches and an advance for insurance on Debtor's real property.

Costs in the amount of $2,801.27 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

CONCLUSION

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

Fees	$62,027.67
Costs and Expenses	$ 2,801.27

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by David D. Flemmer ("Applicant"), Chapter 11 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 David D. Flemmer is allowed the following fees and expenses as a professional of the Estate:
>
> David D. Flemmer, Chapter 11 Trustee
>
> Fees in the amount of $ 62,027.67
> Expenses in the amount of $ 2,801.27,
>
> The Fees and Costs pursuant to this Applicant are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Plan Administrator under the confirmed plan is authorized to pay the fees allowed by this Order from the available Plan Funds in a

manner consistent with the order of distribution under the confirmed Plan.