UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

August 10, 2016 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

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1. 16-23004-D-7 JENNIFER ISAAC — MOTION FOR RELIEF FROM AUTOMATIC STAY
JHW-1
AMERICREDIT FINANCIAL SERVICES, INC. VS.
7-8-16 [12]

Final ruling:

This matter is resolved without oral argument. This is Americredit Financial Services, Inc.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

2. 15-22006-D-7 RAE ANN TRAVIS
AP-1
WILMINGTON SAVINGS FUND SOCIETY, FSB VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
7-1-16 [35]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received her discharge on July 1, 2015 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

3. 16-22413-D-7 THOMAS FRYE
APN-1
SANTANDER CONSUMER USA INC. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
6-28-16 [17]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received his discharge on July 28, 2016 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

4. 14-27519-D-12 LOEK VAN WARMERDAM
WWB-18

MOTION FOR ENTRY OF DISCHARGE
7-12-16 [219]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for entry of Chapter 12 discharge under Bankruptcy Code § 1228(a) is supported by the record. As such the court will grant the motion for entry of Chapter 12 discharge under Bankruptcy Code § 1228 and the moving party is to submit an appropriate order. No appearance is necessary.

5. 12-34920-D-7 LRR-2 — ALVARO/MCKENZI RUIZ — MOTION TO AVOID LIEN OF DISCOVER BANK
7-6-16 [31]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

6. 12-34920-D-7 LRR-3 — ALVARO/MCKENZI RUIZ — MOTION TO AVOID LIEN OF DISCOVER BANK
7-6-16 [38]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

7. 16-22725-D-7 WWB-11 — PETER/CATHLEEN VERBOOM — MOTION FOR COMPENSATION BY THE LAW OFFICE OF WALTER WILHELM BAUER FOR RILEY C. WALTER, DEBTORS ATTORNEY(S)
7-15-16 [182]

Tentative ruling:

This is the application of the debtors' counsel for a first and final allowance of compensation. The court is not prepared to consider the application because the service date on the proofs of service is left blank. If corrected proofs of service have been filed prior to the time of the hearing, the court will consider the application. Otherwise, the court will continue the hearing to allow the moving party to file corrected proofs of service.

8. 16-22725-D-7 WWB-12 — PETER/CATHLEEN VERBOOM — MOTION FOR COMPENSATION FOR GENSKE, MULDER & COMPANY, LLP, ACCOUNTANT(S)
7-14-16 [173]

9. 10-50339-D-7 ELEFTHERIOS/PATRICIA EFSTRATIS MBK-3
15-2245
ATHENE ANNUITY AND LIFE COMPANY V. ACEITUNO ET AL

MOTION TO DISMISS ADVERSARY PROCEEDING
7-1-16 [87]

Tentative ruling:

This is the plaintiff's motion for an order dismissing it with prejudice from this action. The notice of hearing is confusing in that it does not state whether written opposition is or is not required, as required by LBR 9014-1(d)(4). The notice states, "You may wish to file a written opposition or answer explaining your position. Such response must be filed at [court's address]. You must also mail a copy to [plaintiff's counsel]. If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion and may enter an order granting that relief."

Because the notice of hearing did not clearly state that written opposition would be required and did not state a deadline for the filing of opposition, the court will hear the matter as a motion noticed under LBR 9014-1(f)(2) (no written opposition required). Thus, the court will entertain opposition, if any, at the hearing.

10. 10-26347-D-7 LESLIE BRACK
16-2037 CDH-1
BURKART V. BRACK

CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT
6-8-16 [13]

11. 14-25148-D-11 HENRY TOSTA
MF-35

MOTION TO EXTEND TIME
7-6-16 [610]

12. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2509
BURKART V. PAN PACIFIC PICTURES LIMITED ET AL

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT FOR AVOIDANCE AND RECOVERY OF FRAUDULENT TRANSFER
8-17-12 [1]

13. 15-27561-D-7 SIMONAE BARRY
15-2244 TJP-2
GATEWAY ONE LENDING & FINANCE V. BARRY

CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT AND/OR MOTION TO STRIKE
6-9-16 [21]

14. 16-22769-D-7 MICHAEL/DEBORAH SMITH
LBG-1

MOTION TO COMPEL ABANDONMENT
7-12-16 [11]

Tentative ruling:

This is the debtors' motion to compel abandonment of real and personal property assets. The court is not prepared to consider the motion at this time because the moving parties served only the trustee and the United States Trustee, and did not serve any creditors. Fed. R. Bankr. P. 6007(a) requires the trustee or debtor-in-possession to "give notice of a proposed abandonment or disposition of property to the United States trustee [and] all creditors . . . ." On the other hand, Fed. R. Bankr. P. 6007(b) provides that "[a] party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate." Ostensibly, the latter subparagraph does not require that notice be given to all creditors, even though the former does. A motion under subparagraph (b), however, should generally be served on the same parties who would receive notice under subparagraph (a). See In re Jandous Elec. Constr. Corp., 96 B.R. 462, 465 (Bankr. S.D.N.Y. 1989) (citing Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 709-10 (9th Cir. 1986)). The court will continue the hearing 14 days or 28 days, depending on the amount of notice the moving parties wish to give. The debtors will be required to serve the motion and a notice of continued hearing on all creditors. The court will hear the matter.

15. 15-29890-D-7 FWP-10 — GRAIL SEMICONDUCTOR — MOTION FOR COMPENSATION BY THE LAW OFFICE OF FELDERSTEIN FITZGERALD WILLOUGHBY & PASCUZZI LLP FOR PAUL J. PASCUZZI, DEBTOR'S ATTORNEY(S) 7-13-16 [408]

This matter will not be called before 10:30 a.m.

Tentative ruling:

This is the motion of Felderstein Fitzgerald Willoughby & Pascuzzi LLP ("Counsel") for a first and final allowance of compensation as counsel for the former debtor-in-possession during the chapter 11 period of this case. No opposition has been filed except by creditor Ronald Hofer, who opposes only the payment aspect of the motion, not the allowance of fees and costs. The record establishes, and the court finds, that with one exception, the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion, insofar as it seeks allowance of compensation, except that fees for services that were secretarial in nature and not compensable will not be allowed. See Sousa v. Miguel, 32 F.3d 1370, 1374 (9th Cir. 1994).

Counsel billed a significant amount of time at $195 per hour for such services of Counsel's legal assistant as "drafting," "creating," and updating service lists; addressing problems with foreign addresses; "coordinating" and "directing" service of documents; drafting and e-filing proofs of service; preparing binders; "researching" superior court records and obtaining copy of complaint; downloading service list to check if additional parties were added and preparing additional service list; "drafting" amended creditor matrix to include new addresses; serving 341 notice; forwarding documents for signature and receiving documents for court filing; finalizing and coordinating efiling and service; "drafting" exhibit document and marking exhibits; bates labeling documents; and uploading documents to dropbox. For these services, the following charges will be disallowed:

Feb. 17, 2016 invoice:

12/30/2016	0.90 hrs.	$175.50	1/4/2016	0.20	39.00
1/4/2016	0.70	136.50	1/27/2016	0.90	175.50
1/5/2016	1.20	234.00	1/4/2016	0.40	78.00
1/19/2016	0.30	58.50	1/25/2016	0.70	136.50
1/4/2016	0.40	78.00			

March 4, 2016 invoice:

2/9/2016	0.40	78.00	2/2/2016	0.20	39.00
2/3/2016	1.60	312.00		0.40	78.00
2/18/2016	0.40	78.00	2/5/2016	0.70	136.50

April 20, 2016 invoice:

3/14/2016	1.00	195.00	4/6/2016	0.70	136.50
3/15/2016	0.80	156.00	4/6/2016	0.50	97.50

4/5/2016 4.90 955.50

For these services, which the court finds to be purely secretarial, the court will disallow a total of $3,373.50.

The court will entertain arguments and proposals concerning the payment aspect of the motion at the hearing.

16. 15-29890-D-7 GRAIL SEMICONDUCTOR
REO-2

MOTION FOR COMPENSATION BY THE LAW OFFICE OF WINTHROP COUCHOT PROFESSIONAL CORPORATION FOR ROBERT E. OPERA, CREDITOR COMM. ATY(S)
7-13-16 [415]

This matter will not be called before 10:30 a.m.

Tentative ruling:

This is the application of Winthrop Couchot Professional Corporation ("Counsel") for an award of compensation for its services as counsel for the Official Committee of Unsecured Creditors (the "Committee") in this case during the time the case was a chapter 11 case. The United States Trustee and several creditors have filed oppositions and Counsel has filed an omnibus reply. Because the Committee's application to approve the employment of Counsel, also on this calendar, will be denied, this application will also be denied. But for considerations of nunc pro tunc employment, discussed below, a professional whose employment is not approved by the court is not entitled to compensation. "Court approval of the employment of counsel . . . is sine qua non to counsel getting paid. Failure to receive court approval for the employment of a professional in accordance with § 327 and Rule 2014 precludes the payment of fees." In re Shirley, 134 B.R. 940, 943 (9th Cir. BAP 1992) (citations omitted; footnote omitted).

Counsel, however, asks the court to approve its compensation even if the employment application is denied. Citing In re THC Fin. Corp., 837 F.2d 389 (9th Cir. 1988); Mehdipour v. Marcus & Millichap (In re Mehdipour), 202 B.R. 474 (9th Cir. BAP 1996); and In re Johnson, 397 B.R. 486 (Bankr. E.D. Cal. 2008), Counsel argues "[a] bankruptcy court has discretion to award compensation to a professional, even if the professional has not been employed by the court." Counsel's App., DN 415, at 12:3-4. The statement is true as far as it goes. However, as Counsel acknowledges, all of those cases held that a professional whose employment has not been approved may be compensated only if he or she meets the "exceptional circumstances" test announced in THC Fin. As one of the two mandatory components of that test, the professional must show a satisfactory explanation for failing to obtain court approval before the services were performed. THC Fin., 837 F.2d at 392; Mehdipour, 202 B.R. at 479; Johnson, 397 B.R. at 492.

In this case, the court will not approve Counsel's employment as counsel for the Committee because Counsel failed to obtain informed written consent of its former client, the debtor, to the representation, as required by Rule 3-310(E) of the California Rules of Professional Conduct, and failed to satisfy the applicable test for employment in the absence of such consent. Those circumstances do not

constitute a satisfactory explanation for failing to obtain court approval of employment. For this reason, the application will be denied and the court need not reach the other issues raised by the parties. The court will hear the matter.

17.	15-29890-D-7 REO-3	GRAIL SEMICONDUCTOR	MOTION TO EMPLOY ROBERT E. OPERA AS ATTORNEY(S) 7-13-16 [421]

This matter will not be called before 10:30 a.m.

Tentative ruling:

This is the application purportedly of the Official Committee of Unsecured Creditors in this case to employ Winthrop Couchot Professional Corporation ("Counsel") as its counsel for the period February 22, 2016 through April 22, 2016.[1] David Rothschild, the United States Trustee (the "UST"), Niro Law, Ltd., and Donald Stern and Frank Bauder have filed oppositions, and Counsel has filed an omnibus reply. For the following reasons, the application will be denied.

The grounds raised by all the opposing parties are, for the most part, covered by the UST, and except as otherwise indicated, the court will address them as they have been presented by the UST. Some procedural background is in order. This case was commenced by the debtor, Grail Semiconductor, on December 30, 2015. On February 19, 2016, the UST appointed three creditors to the Committee, and on February 22, 2016, the Committee contacted Counsel about representing it. On March 22, 2016, the Committee filed an application to employ Counsel to represent it in the case. The debtor and the UST filed opposition. The court denied the application as moot because the court had granted the debtor's motion to convert the case to chapter 7. Counsel has now filed this second application to be employed, along with an application for a first and final allowance of compensation, also on this calendar. The UST, along with several creditors, oppose both applications.

The UST argues first that because the case has been converted to chapter 7, the Committee no longer exists and has no authority to seek approval of its employment of counsel. The UST cites several cases for the proposition that upon conversion to chapter 7, a chapter 11 creditors' committee ceases to exist. Here, however, it is clear the application was filed solely to enable Counsel to seek approval of compensation for its services performed prior to conversion. The court finds it reasonable to construe the employment application as having been filed by Counsel and the court will treat it as such. The court notes in this regard that the Committee filed its original employment application within 30 days of the date Counsel began rendering services to the Committee; that is, within the time the court generally allows as a "grace period" for professionals to seek approval of their employment. The conversion of the case is the only thing that stood in the way of the court ruling on that application, and the court thus finds it appropriate to rule on the merits of the present application.

For the same reason, the opposing parties' nunc pro tunc arguments are unpersuasive. As already indicated, the original employment application was timely filed and was denied without prejudice solely on account of the conversion of the case; that is, through no fault of the Committee or Counsel. Thus, the court finds

Counsel need not make a showing to support retroactive employment, as would otherwise be required under In re THC Fin. Corp., 837 F.2d 389, 392 (9th Cir. 1988). The court is not persuaded by the UST's position that the three-month delay in filing this second employment application after the first one was denied is significant for the simple reason that Counsel had ceased to represent the Committee when the case was converted. The court does not view anyone's rights as having been prejudiced by that post-conversion delay.

The court is persuaded, however, by the UST's argument that Counsel's employment is precluded by its pre-petition representation of the debtor. The UST and others raise a number of legitimate concerns about the prior representation, including issues of actual and potential adverse positions and conflicts of interest. One of these issues is clearly dispositive; thus, the court need not reach the others. It is uncontroverted that in 2012, Counsel met with representatives of the debtor and advised and provided services to the debtor regarding the possible filing of a chapter 11 case. Between February and December of 2012, there were no less than 18.3 hours of billable time invoiced to the debtor, for which the debtor paid Counsel. It is undisputed that when the time came for the Committee to obtain counsel, the debtor refused Counsel's request that it provide written informed consent to Counsel's representation, as required by Rule 3-310(E) of the California Rules of Professional Conduct. The rule provides that "[a] member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." CAL. RULES OF PROF'L CONDUCT R. 3-310(E).

Counsel cites In re Perry, 194 B.R. 875, 880 (E.D. Cal. 1996), for the proposition that Rule 3-310(E) is trumped in bankruptcy cases by provisions of the Bankruptcy Code. Counsel has the Perry ruling the wrong way around. Contrary to Counsel's implication, the Perry court did not hold that bankruptcy counsel need not obtain informed written consent pursuant to Rule 3-310(E), but instead, that even such consent may not be enough to permit counsel to be employed in a bankruptcy case. The holding was that even with the written consent of both clients under Rule 3-310(E), counsel was not eligible to be employed where it had an unwaivable conflict under § 327(a) of the Bankruptcy Code. 194 B.R. at 880. "[S]ection 327(a) has a strict requirement of disinterestedness and absence of representation of an adverse interest which trumps the rules of professional conduct." Id. Thus, the court rejected counsel's argument that the signed waivers cured any conflict. Id. at 880-81.[2]

In short, Rule 3-310(E) does apply in this case. LBR 1001-1(c), incorporating Local District Court Rule 180(e); Tevis v. Wilke, Fleury, Hoffelt, Gould & Birney, LLP (In re Tevis), 347 B.R. 679, 688-89 (9th Cir. BAP 2006). Thus, "informed written consent is virtually essential to permitting representation in such circumstances." In re Kobra Props., 406 B.R. 396, 404 (Bankr. E.D. Cal. 2009). Where informed written consent is absent, as here, the court must determine (1) "[whether] the subject matter of the attorney's current representation is substantially related to the subject matter of the attorney's earlier representation of the former client" and (2) "[whether] the attorney's earlier representation of the former client was one in which confidential information would ordinarily be disclosed." In re Muscle Improvement, Inc., 437 B.R. 389, 395 (Bankr. C.D Cal. 2010), citing City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 847 (2006). If both these tests are met, there is "an irrebuttable presumption that the attorney possesses confidential information" and the attorney is disqualified from the subsequent representation. Muscle Improvement, Inc., 437 B.R.

at 395. In the present case, the court finds the answer to both of the applicable questions is a resounding yes.

Counsel attempts to differentiate the subject matter of its representation of the debtor in 2012 from that of its representation of the Committee in 2016 by, first, claiming its representation of the debtor was "very limited" in scope and in the amount of time spent and dollars billed. According to Robert Opera, the member of the firm who apparently primarily handled both representations, Counsel's files from the 2012 representation consist solely of a retainer agreement, a Nexus lien search, and "draft 'facesheet' Chapter 11 petition documents," along with a number of e-mails about which Mr. Opera states he has "no material recollection." Opera Decl., DN 423, at 5:23-24. He does recall that "[t]here was no comprehensive legal work performed by the Firm for the Debtor," adding that "[t]he Firm performed no meaningful or material analyses of the Debtor's business, the Debtor's financial affairs, the Debtor's assets or liabilities, or litigation concerning the Debtor." Id. at 6:2-5. Mr. Opera testifies that to the best of his recollection, "the Firm received no information of any confidential nature regarding the Debtor or the Debtor's business." Id. at 6:14-15. He also believes any information Counsel did receive in 2012 was no longer "relevant or meaningful" (id. at 7:1) by the time the debtor filed its petition over three years later.

The court finds this testimony to be self-serving wishful thinking and unconvincing. The court notes that this case is not overly complex from a business standpoint and has few moving parts. Specifically, at all times relevant the debtor was not operating a business, and the cornerstone of its attention was one piece of major litigation. That litigation resulted in various disputes among the debtor and its prior attorneys, however, many issues that would typically be involved in the reorganization of an on-going business were not present here. Before being appointed to the bench, the judge in this case was in practice for many years, advising parties in chapter 11 cases (very often debtors), and is keenly aware that in even a one or two-hour meeting with a potential chapter 11 debtor, a competent and experienced bankruptcy attorney will obtain a significant amount of information. The attorney will know where to poke and prod to get the information he or she needs to develop an informed opinion about the issues, problems and risks involved in a chapter 11 case which is essential in order to advise the client of the likelihood of success, as well as possible alternatives, which, after all, is the reason he or she is being consulted. Here there was over 18 hours of time billed to the debtor. The court is confident that given 18 hours of billable time, a competent and experienced bankruptcy counsel will obtain a large volume of information about those issues.

Further, according to Counsel, "the Firm was retained to be available to file a Chapter 11 petition for the Debtor if a filing were to prove necessary (and no filing proved to be necessary)." Opera Decl. at 5:26-28. An experienced bankruptcy attorney, particular given several months in which to gather information, will not want to be put in the position of filing an emergency petition without having enough information to reach an informed opinion as to whether the debtor has a reasonable prospect of success, who its adversaries are, what challenges it is likely to face, what claim objections and other litigation will likely be necessary, and so on. Further, the question is not, as Counsel would have it, whether Counsel "performed a meaningful or material analysis" of these matters or whether it performed "comprehensive" legal work. The question is simply whether the subject matter of the two representations was substantially related. Here, the subject matter of both was a Chapter 11 filing for the debtor which would entail a review of the debtor's financial background, history, assets and liabilities, litigation, dispute with

prior attorneys, relations among its directors, litigation, and the like. In short, the subject matter of both was virtually identical except as affected by the passage of time.

In this latter regard, Counsel highlights events that occurred between 2012, when Counsel represented the debtor, and the end of 2015, when the debtor finally filed its petition, such as the debtor's settlement with Mitsubishi, the debtor's disbursement of the settlement proceeds, potentially giving rise to avoidance causes of action, the disputes between Ronald Hofer and other members of the debtor's board of directors, and the debtor's purchase of stock in Nemaska Lithium, Inc. In Counsel's view, those events prove "[t]here was no connection . . . between the Firm's very limited representation of the Debtor in 2012 and the Debtor's bankruptcy case and the issues of relevance in the Debtor's bankruptcy case . . . ." Counsel's App., DN 421, at 10:8-11.

In response, the UST points out that a large number of the proofs of claim filed in this case reflect claims that purportedly arose in 2012 or earlier. For at least 50 of the 80 general unsecured debts scheduled by the debtor, including quite a few in very large amounts, the debtor listed as the dates incurred dates in or beginning in 2012 or earlier. Further, the judgment in the debtor's favor in its action against Mitsubishi – an action that, so far as the court is aware, was essentially the centerpiece of the debtor's existence during the eight and one-half years prior to the filing of this case, was rendered in May of 2012. A judgment was entered against the debtor in favor of one of the law firms that had represented the debtor in the Mitsubishi case, Mishcon De Reya New York LLP, also in May of 2012. Mishcon has filed a claim in this case for almost $2 million. And another such firm, Schwartz Rimberg & Morris, LLP, filed a notice of lien in the Mitsubishi case in 2010 based on services performed for the debtor between 2007 and 2010; Schwartz claims it is owed almost $2 million. Both Mishcon and Schwartz sought relief from stay in this case to pursue alleged lien rights against Mitsubishi.

Counsel's response to the UST's opposition on these points is untenable. First, it claims it "never performed any material review or analysis of claims asserted against Grail." Counsel's Reply, DN 472, at 15:28-16:1. As discussed above, Counsel's assertion that he did not seek to gather and did not obtain substantial information about the debtor's assets and liabilities is not convincing. Whether Counsel performed a review or analysis that Counsel would, after the fact, consider "material" is simply not relevant. The question is whether the subject matter of the two representations was substantially related. Second, Counsel contends "any such financial information provided in 2012 was outdated in 2016, and in any event was superseded by" (id. at 16:4-5) the debtor's schedules, the proofs of claim, and other documents of record in this case. Again, that the nature and extent of claims against the debtor were not precisely the same in 2012 as in 2016 is not relevant. The point here is that a substantial portion of the claims existing as of the date of filing, almost certainly more than half in amount, were also in existence in 2012, when Counsel represented the debtor. It is simply not credible that those claims, claims that would very likely be the subject of litigation in any bankruptcy, did not form a significant part of the subject matter of Counsel's representation.

Finally, the passage of time argument is belied at least to some extent by Mr. Opera's testimony that in November and December of 2015; that is, immediately before the bankruptcy filing, he had "a limited number of communications with Ronald Hofer, an insider and claimant in this case, regarding the Debtor's financial difficulties and Chapter 11 issues." Opera Decl. at 7:25-27. He also acknowledges he had a

limited number of communications with Mr. Hofer even after the bankruptcy filing, also about the case. Although he states Counsel did not agree to represent and did not in fact represent Mr. Hofer, he does not indicate whether those communications were in connection with prospective employment of Counsel by Mr. Hofer individually or by the debtor. (By that time, Mr. Hofer was in an adversary relationship with the debtor's board of directors – the board had purported to revoke his authority to act as CEO of the debtor and Mr. Hofer had sued the debtor.) Either way, however, Mr. Opera himself acknowledges the discussions concerned the debtor's "financial difficulties and Chapter 11 issues."

For these reasons, the court views Counsel's contention that by the time the Committee retained Counsel, "there were a whole new set of factual circumstances and legal issues in this case" (Reply at 17:4-5), and that, therefore, there is "no material relationship" between the two representations as self-serving wishful thinking and contrary to reality. The court concludes instead that the subject matter of Counsel's representation of its former client, the debtor, was substantially and directly related to the subject matter of its later representation of the Committee. The court has no hesitation in also concluding that Counsel's representation of the debtor in 2012 was one in which confidential information would ordinarily be disclosed. Counsel's contention that it learned nothing of a confidential nature during those 18 hours is, first, unsubstantiated selective-non-recall – Mr. Opera testifies "ha[s] virtually no recollection of any substantive matters pertaining to the representation" (Opera Decl. at 6:24-25), and second, simply not tenable. In an email to the UST's office, in March of 2016, Mr. Opera described Counsel's role in 2012 as regards the debtor as this: "We were to stand ready if a filing were to become necessary." UST's Ex. 1. The court concludes the representation of the debtor was, almost by definition, one in which confidential information would ordinarily be disclosed.

As both components of the substantial relationship test are met here, it is "conclusively presume[d] that the attorney possesses confidential information adverse to the former client" (Tevis, 347 B.R. at 691), and Counsel is "automatically disqualified" from representing the Committee. Id.; see also Cobra Solutions, Inc., 38 Cal. 4th at 847; Muscle Improvement, Inc., 437 B.R. at 395. As a result, the court need not determine whether Counsel actually obtained confidential information from the debtor during the representation. "[T]he underlying concern is the possibility, or appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought. The test does not require the former client to show that actual confidences were disclosed." Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980).

This result may seem harsh from Counsel's perspective, but was entirely avoidable. At some point, presumably before undertaking to represent the Committee, Counsel asked the debtor to consent in writing to the representation and the debtor refused. The court can hardly imagine a more clear red flag to Counsel that its representation of the Committee was a risk. At that point, before rendering significant services, Counsel should have declined the representation or sought an order shortening time for an application to have its employment approved, but it did not. Instead, it undertook the representation, billing 69 hours and $45,220 in fees before it filed the original employment application. It is simply inconceivable that Counsel was unaware from the beginning of its representation of the Committee of the very significant risk its employment would not be approved.

For the reasons stated, the court will deny the application. The court will

hear the matter.

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1 The court uses the term "purportedly" because the application purports to be that of the Committee; it is signed by Robert J. Pearl, as Former Committee Chairperson. However, as discussed below, the case has been converted to chapter 7 and the Committee has been technically dissolved. As discussed below, the court will construe the application as having been filed by Counsel.

2 As another department of this court has phrased it, "informed written consent is a necessary, but not sufficient, precondition to a § 327(a) employment that entails concurrent or successive representation. By virtue of § 327(a), what is otherwise a matter between counsel and client becomes a collective public affair involving the entire body of interests in the case under title 11." In re Kobra Props., 406 B.R. 396, 405 (Bankr. E.D. Cal. 2009).

18.	16-24498-D-7	PAIGE MORGAN	MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE 7-11-16 [5]

19.	15-27999-D-7 LRR-2	GILBERT/DOLORES GRANADOS	MOTION TO AVOID LIEN OF THE BEST SERVICE CO., INC. 7-1-16 [29]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

20.	15-27999-D-7 LRR-3	GILBERT/DOLORES GRANADOS	MOTION TO AVOID LIEN OF INVESTMENT RETRIEVERS, INC. 7-1-16 [34]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

21.	16-24099-D-7	STRAUDJAH TURNER	MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE 6-24-16 [5]
22.	15-22006-D-7 PA-2	RAE ANN TRAVIS	COUNTER MOTION TO ABANDON REAL PROPERTY 7-27-16 [42]
23.	16-24611-D-7 DBL-1	RANDAL MORTON	MOTION TO DISMISS CASE 7-27-16 [9]

24.	16-22919-D-7	HANNAH PINEDA	CONTINUED TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS 6-29-16 [12]
25.	16-21920-D-7 FF-1	DAYNE/WHITNEY DELANO	CONTINUED MOTION TO COMPEL ABANDONMENT 4-27-16 [11]
26.	16-21920-D-7 DMW-2	DAYNE/WHITNEY DELANO	MOTION TO SELL 7-27-16 [45]
27.	16-21920-D-7 DMW-1	DAYNE/WHITNEY DELANO	CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH DAYNE ELLIOT DELANO AND WHITNEY NICOLE DELANO 6-23-16 [33]

28. 16-22725-D-7 PETER/CATHLEEN VERBOOM — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
7-20-16 [189]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

29. 16-24643-D-7 GGM-1 GAVIN MEHL — MOTION TO EXTEND AUTOMATIC STAY
7-22-16 [11]

30. 14-25148-D-11 MF-36 HENRY TOSTA — MOTION TO APPROVE EXIT FINANCING
7-20-16 [614]

31. 09-29162-D-11 NH-1 SK FOODS, L.P. — MOTION TO SUBSTITUTE ATTORNEY
7-20-16 [5751]

32. 15-26465-D-7 GJH-2 — SCOTT POMEROY — MOTION FOR STAY OF ORDER OVERRULING OBJECTION TO DEBTOR'S CLAIM OF EXEMPTION 7-27-16 [79]

Tentative ruling:

This is the trustee's motion to approve a stipulation with the debtor concerning assets that are the subject of a pending appeal from the court's order overruling the trustee's objection to the debtor's claim of exemption. The motion was noticed pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

The stipulation provides that, with one exception, the debtor will maintain the assets "as if they are property of the Estate" (Trustee's Mot., filed July 27, 2016, at 2:3), and not spend or transfer them until the appeal is concluded. The exception is that the debtor may use up to $40,000 of the funds in a Wells Fargo Bank account for any purpose provided that he pay any taxes or penalties for their withdrawal and that the debtor will be "accountable" for all non-exempt assets, including those spent by him in reliance on the stipulation and order approving it; that is, accountable for any portion of the $40,000 the debtor withdraws and spends before the appeal is concluded. The stipulation does not sufficiently define what "accountable" means in this context. Will the debtor need to explain how the funds were used? Will he be required to repay the estate for the funds he spent? When? By a particular date or over a period of time? What will be the repercussions if the debtor does not repay the estate?

In the court's view, it would be asking for trouble down the road to approve the stipulation in its present form without addressing these questions. The court will hear the matter.

33. 15-26465-D-7 GJH-3 — SCOTT POMEROY — MOTION TO EMPLOY GREGORY J. HUGHES AS ATTORNEY(S) 7-27-16 [82]

Tentative ruling:

This is the trustee's application to employ Hughes Law Corporation ("Counsel") to represent him in his appeal from this court's order overruling his objection to certain of the debtor's exemption claims. The application has been brought pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

The application states Counsel will be paid "hourly fees on a contingent basis" (Trustee's App., filed July 27, 2016 ("7/27/16 App."), at 2:7); that is, Counsel will be paid fees incurred on an hourly basis but only if the estate recovers assets the debtor has claimed as exempt. "In other words, payment of any fees will be contingent on a successful outcome for the appeal." Id. at 2:11-12. If the appeal is successful, however, Counsel will be paid on an hourly basis, not a percentage of the recovery.

The trustee initially applied for and was granted approval to employ Counsel as both general and special counsel to, among other things, file and prosecute the objection to exemptions that is the subject of the pending appeal. The initial employment application specifically identified the nature of the services to be performed by Counsel as general counsel and those to be performed as special counsel, and proposed a hybrid compensation scheme for the two categories. For its services as general counsel, Counsel would be paid on an hourly basis and for its services as special counsel, it would be paid 33.3% of the value of any cash and property received by the estate as a result of Counsel's efforts. There was a single exception to that compensation structure:

> **If litigation being handled on a special counsel basis is resolved because of the Debtor's amendment of his schedules, so that the Estate does not recover amounts to which it would otherwise be entitled, HLC will be entitled to seek compensation for actual time spent on the case, on an hourly basis, subject to Court approval.**

Trustee's App., filed Oct. 2, 2015 ("10/2/15 App."), at 3:6-9. The application did not make an exception for appellate services, did not include a tiered structure, as is common in contingency fee matters, such as 25% if the case settles before a settlement conference, 33% if it goes to trial, 40% if there is an appeal, or the like, and importantly, did not indicate that compensation for appellate services would be the subject of additional compensation to be disclosed later. The court approved the initial application on the specific terms proposed by the trustee and Counsel.

The trustee now seeks to employ Counsel on an hourly basis for its time spent prosecuting the appeal from the order overruling the objection to exemptions. The court is not persuaded Counsel's services in the appeal are not covered by the order approving Counsel's employment in the first instance. Simply put, it was the trustee and Counsel who proposed the hybrid arrangement for services performed as general counsel and as special counsel and who agreed to the 33.3% contingency fee for the special counsel services, without making an exception for an appeal and without proposing a tiered structure or other terms to cover the possibility of an appeal.[1]

Further, the initial application, although it did not refer specifically to an appeal (just as it did not refer specifically to discovery, for example), implied appellate work was included. The application stated,

> **Trustee . . . believes that he requires special counsel <u>to pursue recovery of assets</u> or avoidable transfers which may have been made by the Debtor. Trustee believes he requires counsel to file and prosecute <u>such litigation</u> against such persons, including the Debtor, <u>as may be necessary to recover any assets which may be property of the Estate</u>, or to avoid and recover transfers which may be avoidable.**

10/2/15 App. at 2:3-7 (emphasis added). In the court's view, the most reasonable reading of this language is that "such litigation as may be necessary to recover" estate property includes all aspects of the litigation.

In reviewing a trustee's application to employ counsel, the court expects the applicant to present the nature of the work that needs to be done and that will be covered by the order, together with the terms of compensation that will apply, whether hourly or a contingency fee, tiered or not, or a hybrid of the two.

Attorneys for bankruptcy trustees regularly handle appeals and it is this court's expectation that services in the appeal are covered by the original fee agreement and order approving employment unless otherwise stated. The possibility of an appeal is clearly foreseeable and if it is not to be covered in the original application, it should be so stated in the original application. The applicant and proposed counsel are expected to disclose the proposed compensation terms for all services that can reasonably be anticipated, so the court and parties-in-interest can evaluate the expected compensation as a whole at the outset of the employment. In the alternative, the applicant and counsel are at a minimum expected to indicate that the compensation for particular services, such as appellate work, and not included, and will be the subject of future negotiation and approval.

The court concludes that representation in an appeal – particularly an appeal concerning the subject of Counsel's special counsel services delineated in the application – should have been included in the original application and the terms of compensation for those services should have been spelled out if they were not to be covered by the contingency fee proposed in the application. Because they were not included, and because the language of the original application, prepared by Counsel and signed by the trustee, supports the conclusion that all aspects of the litigation necessary to a recovery were included in the contingency fee set forth in the application, the court finds that the appellate work is covered by the order granting the original application, and thus, by the 33.3% contingency fee. Accordingly, the application will be denied.

The court will hear the matter.

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1 In fact, the present application does not expressly state that appellate services were not covered by the original application. It states only that "HLC represented the Estate in connection with the underlying objection to the Debtor's claim of exemption and its employment for that purpose has previously been approved by this court." 7/27/16 App. at 2:19-21. And Counsel and the trustee have not provided a copy of their underlying fee agreement to show what they initially agreed to.

34.	14-31685-D-7 DNL-16	CATHERINE PALPAL-LATOC	MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH & CUNNINGHAM FOR J. LUKE HENDRIX, TRUSTEES ATTORNEY(S) 7-18-16 [203]

35.	15-29099-D-7 FF-5	RAJINDER/MEENA WALIA	MOTION TO COMPEL ABANDONMENT 7-25-16 [67]