UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 16, 2018 at 10:30 a.m.

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1. **18-21107-E-7** **LAURELS MEDICAL SERVICES** **STATUS CONFERENCE RE: VOLUNTARY PETITION**
Stephan Brown **2-28-18 [1]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, and creditors on April 24, 2018. By the court's calculation, 51 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen-days' notice for written opposition).

Status Conference has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The court having dismissed this bankruptcy case (Order, Dckt. 145), **the Status Conference is concluded and removed from the Calendar.**

This bankruptcy case was originally filed on February 27, 2018, as a Chapter 11 case by Laurels Medical Services ("Debtor"). Dckt. 1. The court has previously addressed several issues in this case in connection with the Motion to Employ Counsel for Debtor and Motion to Use Cash Collateral. Civil Minutes, Dckt. 30, 31, respectively. The court's concern centered on Debtor stating under penalty of perjury to having no assets of value and on the bankruptcy case being one in which the estate was merely a conduit through which monies were passed to a third-party and a shareholder of Debtor.

TRUSTEE'S MOTION TO CONVERT OR DISMISS

On April 24, 2018, Tracy Hope Davis, the United States Trustee (" US Trustee") filed a Motion for the Conversion or Dismissal of the Chapter 11 Case. Dckt. 60. US Trustee asserted Debtor's estate is diminished and there is no reasonable likelihood of Debtor's rehabilitation, the estate has been grossly mismanaged, and Debtor has used cash collateral that was not unauthorized to be used.

JUNE 14, 2018, HEARING AND ORDER CONVERTING TO CHAPTER 7 CASE

At the June 14, 2018, hearing on the U.S. Trustee's Motion for Conversion or Dismissal of Chapter 11 Case, the court announced the decision to convert this case from Chapter 11 to one under Chapter 7. Dckt. 107. As addressed in the Civil Minutes for that hearing (DCN:UST-1) the bankruptcy estate may have an operating business that may be able to generate some monthly positive cash flow for the bankruptcy estate, but that the substantial asset of the bankruptcy estate is an asserted $4,000,000.00 breach of contract claim relating to services provided for the Veterans Administration in Oregon. The Debtor in Possession also represented at the hearing it was working on obtaining addition service contracts to add to the one contract which is stated to be generating gross revenues of $109,000.00 a month. However, all of the materials and employees for staffing and performing such additional contracts would have to be subcontracted out, as it is now done for the one contract in the bankruptcy estate. See Monthly Operating Report, Dckt. 78. After paying the principal of the Debtor in Possession a monthly salary, there were no positive revenues generated for the estate (under a pending cash collateral stipulation, the creditor with a lien asserted against the contract, the IRS, is to be paid $3,000.00 a month).

In March 2018, the Debtor received a lump sum payment of $425,963.00, against which the IRS asserted it's pre-petition lien and that said monies were its cash collateral. In March 2018, the Debtor disbursed $297,099.00 to MYGORIDE, Inc., the subcontractor providing services for the bankruptcy estate's one active contract. It was stated at the June 14, 2018 hearing that MYGORIDE, Inc. demanded the payment to be applied to the current post-petition month of March (the first post-petition month in this case) and for April 2018. Additionally, the Debtor reports having paid $99,033.00 to MYGORIDE, Inc. for the pre-petition month of February 2018, for the asserted obligation for pre-petition services rendered on a contract that had not been assumed by the Debtor in Possession. No court authorization was obtained for the payment of any pre-petition debts.

The Debtor reported that in April 2018, MYGORIDE, Inc. terminated providing further services to the Debtor in Possession and bankruptcy estate (notwithstanding Debtor stating that it had pre-paid for services through April 2018), and a new, higher price, subcontractor had been obtained.

Finally, the Debtor reported that it was working on several new contracts, which the Debtor believed could generate revenues for the bankruptcy estate. No specifics were provided to the court.

Though the court converted the case to Chapter 7, it appears that there is a possibility that a trustee could operate the business and generate some revenue for the estate (if the principal of the Debtor was not being paid for services that would now duplicate the trustee). Further, if the Debtor is correct that other contracts could be obtained that would generate positive net revenues for the estate after paying for all subcontractors, it may be that such could be accomplished by the Trustee.

The court issued an order authorizing the Chapter 7 Trustee to operate the business of the bankruptcy estate through October 5, 2018. Since there may be an operating business, the court scheduled a Status Conference in this case for August 16, 2018. The court ordered the Chapter 7 Trustee to file a Status Report providing all parties in interest and the court with an update of the case, to include:

A. What businesses of the bankruptcy estate, if any, the Chapter 7 Trustee is operating;

B. The Status of the Chapter 7 Trustee obtaining counsel to prosecute the asserted $4,000,000.00 claim for breach of the Oregon Veterans Administration Contract (the Debtor reporting at the June 14, 2018, that the pre-petition counsel, for whom no authorization has been obtained to be employed post-petition, has stated that he is or has terminated such representation);

C. Steps being taken by the Chapter 7 Trustee concerning the $297,099.00 disbursed by the Debtor to MYGORIDE, Inc. purportedly as payment for the prepetition obligation for services rendered in February 2018 for a contract which has not been assumed by the Debtor, the monies purportedly paid in advance for services to be provided in March and April 2018, and the termination of the post-petition services to be provided for the post-petition pre-payment by MYGORIDE, Inc.

The court will consider at the Status Conference whether the authorization for the Chapter 7 Trustee to operate the business should be further extended.

CHAPTER 7 TRUSTEE'S STATUS REPORT

J. Michael Hopper, the Chapter 7 Trustee ("Trustee"), filed a Status Report on July 9, 2018. Dckt. 113. Trustee outlines his activities as follows:

A. Trustee has examined PACER records and discussed the case background with Allen Massey, staff attorney with the Office of the United States Trustee. The Trustee reviewed and analyzed available financial records of the Debtor including Debtor's current contract.

B. Trustee selected the firm of Meegan, Hanschu, & Kassenbrock ("Counsel") as the Estate's attorney, Counsel conducted a conflicts-check that indicated that there were no conflicts or material connection that would preclude employment. Trustee however does not anticipate Counsel to seek employment.

C. Trustee spoke with Mr. Shiraz Mir, director of Debtor, to obtain case background and an understanding of the business operations. Mr. Mir has

been responsive to Trustee and has provided information and documentation.

D. Trustee, directly and through counsel, spoke with attorney Joel Rapaport regarding the background and viability of Debtor's claim against the VA for breach of contract. Trustee has found the cause of action has been filed in the U.S. Civilian Board of Contract Appeals, and that Mr. Rapaport wishes to resign as counsel. Mr. Rapaport is experienced in cases like Debtor's and believes the case to be complex, and with a difficult-to-obtain result. Mr. Rapaport may take the case under a mixed hourly-contingency fee rate with ongoing payment, and believes other counsel will similarly not take the case purely based on contingency.

E. Trustee spoke with Debtor's attorney Stephen Brown to obtain case background information and documentation.

F. Trustee found Debtor has no insurance coverage. Trustee obtained evidence that he and the estate have been added to Debtor's contractor's policy as an additional insured.

G. Through proposed counsel, Jeffery Lodge, Trustee communicated with the IRS to discuss background information of the case and the IRS's position regarding the use of cash collateral and the prosecution of this case.

H. Trustee learned the IRS does not consent to the use of its cash collateral and prefers Trustee not administer any asset.

I. Trustee obtained a LEXIS business report on Debtor.

Trustee also provides specific updates ordered by the court as follows:

1. Trustee has determined that he is not going to operate the business of the Debtor for the following reasons: 1) concerns over ongoing insurance coverage, which is currently only provided through a third-party contractor, 2) lack of significant profitability in operating the business, and 3) the IRS disapproving of operation of the business and declining to consent to the use of its cash collateral and for the purpose of paying business expenses or administrative costs. Trustee also acknowledges continuing the business is brought into doubt by the government's ability to refuse to renew contracts due to uncertainty and risks created by a Chapter 7 case.

2. Trustee has learned the background and general status of Debtor's cause of action against the VA. Current counsel in that case desires to resign, and believes new counsel would require a mixed hourly-contingency fee with expenses paid on an ongoing basis. Trustee notes the IRS does not consent

to use of the cash collateral for any purpose. Additionally, Trustee notes the cause of action appears fact-intensive, making success unlikely without extensive discovery and witnesses. Therefore, Trustee concludes pursuit of this action will not be practicable or beneficial to pursue Debtor's claim.

3. Trustee has reviewed the circumstances surrounding the $297,099.00 apparently disbursed by Debtor post-petition to MYGoRide, Inc. Trustee asserts 99,033.00 of the debt appears to be pre-petition. However, Trustee notes the transfer would have been an unauthorized payment of IRS cash collateral to a transferee charged with constructive knowledge of the IRS lien which had been duly perfected. Because the IRS will not consent to use of their cash collateral and because the lien likely survived the transfer, Trustee does not believe it is feasible to pursue avoidance of the alleged transfer.

Because the amount of the IRS tax lien appears to exceed the value of the Debtor's assets, because the IRS opposes the use of its cash collateral and the continued operation of Debtor's business, and because of concerns regarding insurance coverage and potential liability, Trustee plans to seek dismissal of the Chapter 7 case or abandonment of all assets and rejection of all executory contracts.

2. **15-28108-E-11** **WILLARD BLANKENSHIP** **MOTION FOR COMPENSATION FOR**
RLC-15 **Stephen Reynolds** **STEPHEN M. REYNOLDS, DEBTOR'S ATTORNEY**
7-16-18 [243]

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on parties requesting special notice and Office of the United States Trustee on July 16, 2018. By the court's calculation, 31 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has not been properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Allowance of Professional Fees is denied without prejudice.

Stephen M. Reynolds, the Attorney ("Applicant") for Willard J. Blankenship, Debtor in Possession and Plan Administrator ("Client"), makes a Second and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 19, 2016, through May 12, 2018. The order of the court approving employment of Applicant was entered on April 21, 2016. Dckt. 94. Applicant requests fees in the amount of $40,670 and costs in the amount of $1,126.95.

INSUFFICIENT NOTICE OF MOTION

Applicant provided 31 days' notice of this Motion. Federal Rule of Bankruptcy Procedure 2002(a)(6) requires a minimum of twenty-one days' notice of the hearing, and Local Bankruptcy Rule 9014-1(f)(1)(B) requires an additional fourteen days for parties to file written opposition. Those time periods do not run concurrently. Those two minimums total thirty-five days. Applicant has provided 4 fewer days than the minimum. Therefore, the Motion is denied without prejudice.

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 Stephen M. Reynolds ("Applicant"), Attorney for Willard J. Blankenship, Debtor in Possession , ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF APPLICANT PROVIDES SUFFICIENT NOTICE

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). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at

1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant's services for the Estate include negotiating issues regarding the sale and transfer of property, preparation of motions for the sale of property and Apnea Analysis, interim distribution, confirmation of the Second Amended Plan, and close of the case. Applicant also prepared status conferences statements and attended status hearings. The court finds the services were beneficial to Client and the Estate and were reasonable.

ADDITIONAL FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a general summary for the services provided, which are described in the following main categories.

Case Administration: Applicant spent 37.8 hours in this category.

Asset Disposition: Applicant spent 60.4 hours in this category.
Claims: Applicant spent 0.6 hours in this category.

Fee Application: Applicant spent 4.6 hours in this category.

Financing: Applicant spent 5.1 hours in this category.

Litigation: Applicant spent 4.4 hours in this category.

Plan Statement: Applicant spent 3.3 hours in this category.

The fees requested 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**
Stephen M. Reynolds	116.2	$350.00	$40,670.00
Total Fees for Period of Application			$40,670.00

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

Application	**Interim Approved Fees**
First Interim	$43,340.00
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$43,340.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $1,126.95 pursuant to this application. Pursuant to prior interim applications, the court has allowed costs of $25.00.

The costs requested in this Application are,

Description of Cost	Cost
FedEx	$34.50
Yolo County Recorder - Fees for recording and certified copies	$55.70
FEMA	$943.00
Notary Fee	$45.00
Bookkeeping Services	$48.75
Total Costs Requested in Application	$1,126.95

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Second and Final Fees in the amount of $40,670.00 and prior Interim Fees in the amount of $43,340.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession and Plan Administrator from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Costs & Expenses

Attempting to Recover Inappropriate Costs

Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as online access to bankruptcy and state laws and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include "Bookkeeping Services." No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be charged in addition to the professional fees requested as compensation. Furthermore, Applicant requests fees of $943.00 for "FEMA," but provides no explanation of what this actually means or how it was applicable to the present case. The court disallows $991.75 of the requested costs.

Second and Final Costs in the amount of $135.20 and prior Interim Costs in the amount of $25.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in

Possession and Plan Administrator under the Plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

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

Fees	$43,340.00
Costs and Expenses	$135.20

pursuant to this Application and prior interim fees of $43,340.00 and interim costs of $25.00 as final fees 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 Stephen M. Reynolds ("Applicant"), Attorney for Willard J. Blankenship, Debtor in Possession and Plan Administrator, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Stephen M. Reynolds is allowed the following fees and expenses as a professional of the Estate:
>
> Stephen M. Reynolds, Professional employed by Debtor in Possession and Plan Administrator
>
> Fees in the amount of $43,340.00
> Expenses in the amount of $135.20,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor in Possession and Plan Administrator.
>
> **IT IS FURTHER ORDERED** that costs of $991.75 are not allowed by the court.
>
> The fees and costs pursuant to this Motion, and fees in the amount of $43,340.00 and costs of $25.00 approved pursuant to prior Interim Application, are approved as final fees and costs pursuant to 11 U.S.C. § 330.

3.	**17-25114-E-7** **FF-4**	**HSIN-SHAWN SHENG** **Gary Fraley**	**CONTINUED OBJECTION TO CLAIM OF CAPITAL ONE BANK (USA), N.A., CLAIM NUMBER 3** **6-5-18 [97]**

NOTICE TO PARTIES
THE COURT'S TENTATIVE HAS CHANGED FROM THE PRIOR HEARING
PLEASE REVIEW

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on June 5, 2018. By the court's calculation, 44 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 3-1 of Capital One Bank, N.A. is overruled.

REVIEW OF OBJECTION

Hsin-Shawn Sheng, Chapter 7 Debtor, ("Objector") requests that the court disallow the claim of Capital One Bank, N.A. ("Creditor"), Proof of Claim No. 3-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $7,533.70. Objector asserts that the Statute of Limitations on the collection of contract claims in California is four years from the date the balance was due under the contract or four years from the date the last payment was made under the contract.

Objector states that Creditor's proof of claim shows a "Last Payment Date" of February 7, 2014, but she asserts that has not "heard from them nor made any payments to them in eight to ten years." Objector's Declaration, Dckt. 99.

CREDITOR'S RESPONSE

Creditor filed a Response on July 3, 2018. Dckt. 110. Creditor argues that according to its attached payment history for the Claim, Objector made the last payment on February 7, 2014. Because that date is within four years of this case being filed, Creditor argues that it has filed a timely proof of claim.

Continuance of July 19, 2018 Hearing

At the hearing, the Parties agreed to continue the hearing to allow Debtor to conduct discovery concerning the payment which is asserted to have extended the running of the statute of limitations.

DISCUSSION

No further pleadings have been filed since the July 19, 2018, hearing.

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).

California Code of Civil Procedure § 337 states in relevant part:

> 2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

The Bankruptcy Code provides certain extensions of time for actions a creditor may take when a debtor files for bankruptcy. Specifically, 11 U.S.C. § 108© provides:

> Except as provided in section 524 of this title, if **applicable nonbankruptcy law**, an order entered in a nonbankruptcy proceeding, or an agreement **fixes a period for commencing or continuing a civil action** in a court other than a bankruptcy court **on a claim against the debtor**, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then **such period does not expire until the later of**–

> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> **(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.**

A review of Proof of Claim No. 3-1 lists the charge off date as November 12, 2010. Dckt. 100. The court takes judicial notice that a creditor does not "charge off" an account if payments are being made or further credit is being extended. (This basic fundamental point of credit transactions is commonly known by both creditors and consumers alike.)

Objector claims that no payment or other transaction occurred after the "charge-off date" of November 12, 2010. Dckt. 97. Thus, Objector alleges that the four-year statute of limitations expired on November 13, 2014. *Id*.

Conspicuously missing from Objector's Declaration is a statement that her testimony is made under penalty of perjury. Despite her assertion that she has not made payments in eight-to-ten years, Objector has chosen not to state to the court that her own statement is truthful and can be used as credible evidence from a competent witness. FED. R. EVID. 601, 602.

Creditor presented evidence in the form of a print-out of the payment history on Objector's account showing that a payment was made in February 2014, and Objector has not responded or presented any evidence that Creditor's records are inaccurate. The court takes Creditor's presentation as truthful that a payment was made in February 2014. Calculating from that date to the filing date, the court notes that the four-year statute of limitations did not elapse. Creditor filed a timely proof of claim in this case.

Computation of Statute of Limitations

Without citation to authority, Creditor states that the "last transaction" was on February 7, 2014, which was within four (4) years of the commencement of the bankruptcy case on August 2, 2017. Reply, ¶¶ 1, 4, 5; Dckt. 110.

The Declaration of Elana Ben-Meir has been filed as someone who otherwise has personal knowledge or has revised the records of Creditor as an employee of Capitol One Services, LLC, which is an agent and affiliate of Creditor. Declaration ¶¶ 1,2; Dckt. 114. Ms. Ben-Meir is not an employee of Creditor. Presumably this witness is to authenticate the business records of Creditor. The business records hearsay exception is found in Federal Rule of Evidence 803(6), which requires that a custodian or other qualified witness must provide the certification that the records meet the Rule 803(6) requirements.

In her Declaration, Ms. Ben-Meir states the conclusion that Creditor's records are made or kept in the ordinary course of business, at or near the time of the events, and that they are made with the knowledge or information provided by persons with knowledge of the business activity. Unfortunately, Ms. Ben-Meir, an employee of an agent of Creditor, has such intimate knowledge of Creditor's business operations.

With respect to the "business record" purporting to show a February 7, 2014 payment, most of the information on the page is redacted. A non-redacted item is for January 16, 2014, in which there is a charge for a "lien." Additionally, there is a November 30, 2013 charge for "service." These do not sound in the nature of a consumer credit relationship for which regular payments are being made by the consumer debtor.

As stated by Creditor in the Reply, California Code of Civil Procedure § 337(a) provides for a four year statute of limitations on an obligation based on a contract or instrument in writing, or a book account, account stated, or open current account.

> Cal. C.C.P. § 337
>
> Within four years:
>
> 1. An action upon **any contract**, obligation or liability founded upon an instrument **in writing**, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage.
>
> 2. An action to recover (1) upon a **book account** whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is **based upon an account of one item, the time shall begin to run from the date of said item**, and where an account stated is based upon an account of **more than one item, the time shall begin to run from the date of the last item**.

On its face, the statute does not state that for a written contract, the statute runs from the last day that a payment is applied to the contract. Even for a book account (not asserted here),

> "A book account does not remain open indefinitely so that any payment towards the debt necessarily becomes an "entry" for purposes of the applicable limitations period. Instead, a **book account like any open account becomes closed once the account creditor ceases to extend credit and there will be no further activity on the account other than the payments by a creditor towards the settled debt.** "While an 'open' book account has been defined as '"[a]n account with one or more items unsettled,"' it also includes '"an account with dealings still continuing."' (*Mercantile Trust Co. v. Doe* (1914) 26 Cal. App. 246, 253.) By contrast, a 'closed' account is, according to Black's Law Dictionary, one 'to which no further additions can be made on either side . . . .' Thus, it is clear that the 'open' or 'closed' nature of a book account turns not on the account balance *per se*, but on the parties' expectations of possible

future transactions between them [on that account]." (*Gross v. Recabaren* (1988) 206 Cal. App.3d 771, 778).

. . .

In the present case "the last pertinent entry" was the December 1980 entry showing a balance then due. When Skip Sports [debtor] failed to pay that amount, it defaulted on the account. When no further credit was extended, the "open" character of the account ended. What had been an open account was settled when RNC [creditor] demanded payment of the full amount then owed; i.e., in December 1980 -- or at most no later than March 1981 when RNC threatened to turn the debt over to a collection agency. Any payments made by Skip Sports on the settled account were nothing more than partial payments towards a fixed debt and, absent any indication that RNC intended to extend additional credit to Skip Sports on the same account, did not operate to reopen it.

. . .

Our conclusion is supported by the case of *Carter v. Canty* (1919) 181 Cal. 749, cited by the *Furlow* court as authority for the proposition that the relevant date for purposes of the statute of limitations is the date of the last item shown in the account. In Carter, as in many of the cases already discussed, one issue was whether the limitations period as to debts incurred as part of an open account began to run as of the date of each individual debt, or if they had to be considered together as part of one transaction so that the limitations period was measured from the end of the transaction as a whole. The court -- as did the courts in the other cases we have discussed -- found that the latter analysis was correct. (181 Cal. at p. 755.) Far from holding that the relevant date was the date of entry of the last item, however, the court found that on the facts before it the relevant date was the date of the creditor's death (ibid.); an event which necessarily cleared the account. It follows that the **relevant date is the date the debt becomes settled; i.e., the date the relationship between the parties has come to an end other than for purposes of paying amounts due or past due.** In *Carter* that date was the date of the creditor's death. In *Furlow* that **date was the date when the debtor declined to pay the full amount as it became due**. In **the present case the full amount was fixed, due and past due long before the February 1982 partial payments. The relevant date is December 10, 1980, when the debt became due and was not paid**. Even if it were assumed that the parties contemplated a continuing relationship such that Skip Sports could have obtained additional credit on its account notwithstanding that it failed to make the December payment as it became due, **the limitations period began to run no later than December 30, 1980, when RNC summed up the debt, or March 1981, when RNC demanded payment in full.** Under all possibilities, the partial payment in 1982 could do no more than toll the limitations period as to the principal, but as to the guarantors, the limitations period ran before the complaint was filed.

R.N.C., Inc. v. Tsegeletos, 231 Cal. App. 3d 967, 972-975 (1991). See also *Professional Collection Consultants v. Lauron*, 8 Cal. App. 5th 958, 966 (2017) ("To the extent PCC's action is construed as one for breach of contract, it accrued when Lauron failed to pay for transactions made on her account by the date and time set forth on her billing statement.).

The court is also curious as the February 2014 "payment" appears to be an isolated event occurring after there is a "lien." The February 7, 2014 "payment" is stated to be "Agy Pmt (Electronic)." Ms. Ben-Meir offers no explanation as to who "Agy" is and why "Agy" made a payment.

As Exhibit B Creditor provides a partial copy of Proof Claim No. 3 it filed in this case. Dckt. 115. On Proof of Claim No. 3 Creditor states that this obligation is based on a credit card. Proof of Claim No. 3, Section 8. The Attachment to Proof of Claim No. 3 discloses:

1. The credit card account was opened on May 5, 2002, and

2. Creditor "charged off" the debt on November 12, 2010.

While the "Charge-Off" of the debt is not a release or novation, it does reflect that the bilateral contractual relationship (to the extent this was a book account) had ceased, with Creditor no longer providing any new credit. Creditor offers no evidence of what this term means. In looking at possible definitions, the court notes the following:

> "The term "charge off" means that the original **creditor has given up on being repaid according to the original terms of the loan**. It considers the remaining **balance to be bad debt**, but that doesn't mean you no longer owe the amount that has not been repaid.
>
> After an account is charged off by the original lender it is usually sent to a collection agency. The collection agency will then attempt to recover the remaining amount and potentially additional interest and fees."

Experian Consumer Reporting Agency Website,
https://www.experian.com/blogs/ask-experian/charged-off-debt-must-still-be-repaid/.

> "to treat as a loss or expense."

Merriam-Webster Electronic Dictionary,
https://www.merriam-webster.com/dictionary/charge%20off

> "c. "Charged-Off" and "Charge-Off' refer to Accounts treated by Respondents as a loss or expense because Respondents have determined that, under the Federal Financial Institutions Examination Council's Final Notice of Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36903 (June 12, 2000), or other relevant guidelines, repayment of the Debt is unlikely."

Consent Order, *In the Matter of Chase Bank, USA N.A. and Chase Bankcard Services, Inc.*, U.S. Consumer Financial Protection Bureau, Administrative Proceeding File No. 2015-CFPB-0013.

> "What does credit card charge-off mean?

> When a credit card account goes 180 days (a full 6 months) past due, the credit card company must close and charge off the account. This means the account is permanently closed and written off as a loss to the company, although the debt is still owed."

Capital One Bank, N.A. (USA) website,
https://www.capitalone.com/credit-cards/blog/credit-card-charge-off/.

Based on the above, including the meaning that the court found on the Capital One Bank, N.A. (USA) website, this account was permanently closed, the bilateral relationship terminated November 12, 2010.

Thus, Calculating from that November 12, 2010 date to the filing date of August 2, 2017, the court notes that the four-year statute of limitations appears to have long lapsed.

First, based on the evidence presented by Creditor, the court cannot find that either the contract obligation or book account obligation (if advanced by Creditor) had not expired as of the commencement of this case. Creditor's Proof of Claim No. 3 clearly states that this debt was charged off in 2010. The evidence, presented by an employee of an agent of the Creditor, is that records of Creditor show that in 2014 there was an "Agy Pmt (Electronic)" as some form of credit. This is after there are charges for a "lien" shown on the highly redacted statement.

Creditor, having stated that the debt was "charged off" in 2010, offers no evidence of there being any ongoing transactions between the Debtor and Creditor. At best, Creditor's evidence shows that there was an unpaid debt, a "bad debt," an account that Creditor closed, and there was an outstanding unpaid debt to be collected.

Creditor's records are not inconsistent with the statements (not made under penalty of perjury) of Debtor in which she states that she has not made any payments to Creditor in the prior 8 to 10 years. Declaration ¶ 3, Dckt. 99. Creditor's records show that there was an "Agy Pmt (Electronic)" credit in 2014, offering no evidence of what an "Agy Pmt" is, asserting that the payment was made by the Debtor, or that "the date the relationship between the parties has come to an end other than for purposes of paying amounts due or past due" had come and gone years before.

Standing of Debtor

Though Debtor may file an objection, there is the issue in a Chapter 7 case whether a debtor has standing—Is there an actual case or controversy? There must be a real economic consequence for Debtor, not merely the desire to fight with the creditor.

For this case, it is projected that this will be a surplus case, with there being substantial assets to be disbursed to the Debtor after payment of all claims and the administrative expenses. Debtor has standing to prosecute this objection.

The Objection is sustained and the claim disallowed in its entirety.

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 Capital One Bank, N.A.("Creditor") filed in this case by Hsin-Shawn Sheng, Chapter 7 Debtor, ("Objector") 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 No. 3 of Capital One Bank, N.A. (USA) is sustained and said claim is disallowed in its entirety.

4. **16-25321-E-7** **JAY COHEN** **MOTION TO RECONVERT CASE TO CHAPTER 13**
SLE-4 **Steele Lanphier**
7-24-18 [196]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served onChapter 7 Trustee, and Office of the United States Trustee on July 24, 2018. By the court's calculation, 23 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice).

The Motion to Reconvert Case to Chapter 13 was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to reconvert case to chapter 13 is denied without prejudice.

Jay Cohen ("Debtor") seeks to convert this case, initially filed under Chapter 13 and subsequently converted to Chapter 7, back to a case under Chapter 13. The Bankruptcy Code authorizes a one-time, near-absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007). However, the availability of this one-time, near-absolute right of conversion requires that "the case has not been converted under section 1112, 1208, or 1307 of this title." 11 U.S.C. § 706(a).

Debtor asserts in the Motion that the case should be converted because his "financial and/or legal situation has unexpectedly changed." Dckt. 196 at 1:21–22. Debtor concludes further that he is "eligible and qualified to be a Debtor under the provisions of Chapter 13." *Id.* at 23. The Declaration of Jay Cohen explains that Debtor sought conversion to a Chapter 7 case after a determination there were no arrears on his mortgage, and that reconversion to Chapter 13 became necessary after learning the Chapter 7 trustee

intended to sell Debtor's property despite that determination. Dckt. 198. Debtor supplements the Motion with a proposed Chapter 13 plan attached as "Exhibit A." Dckt. 196.

PREVIOUS CONVERSION TO CHAPTER 7 BY DEBTOR

Debtor initially filed this case under Chapter 13 on August 12, 2016, Dckt. 1. A plan was confirmed on March 28, 2017, and was later modified on January 24, 2018. Dckt. 82, 118. Neither of those plans required Debtor to sell his Property. Dckt. 71, 98.

On January 27, 2018, Debtor filed a Notice of Voluntary Conversion to Chapter 7. Dckt. 120. His attached declaration asserts that Chapter 7 is more reasonable for him because there are no arrears on his home mortgage. Dckt. 121.

PRIOR MOTION TO RECONVERT CASE AT JULY 17, 2018 HEARING

When the Chapter 7 Trustee gave notice that there were assets to administer in this case (May 30, 2018 Trustee Docket Entry Report), Debtor filed a Motion to Reconvert to Chapter 13. Motion, Dckt. 170. The Chapter 7 Trustee responded with a Motion for the Debtor to turnover the property that the Chapter 7 Trustee sought to administer for the benefit of the bankruptcy estate. Turnover Motion, Dckt. 174.

In denying without prejudice the prior Motion to Reconvert, the court noted the division on the question if a debtor could properly seek to reconvert a case. The court also noted its prior ruling in another case concluding that the court has the discretion to reconvert a case to one under Chapter 13 when the debtor shows a colorable, good faith plan to prosecute. Civil Minutes, Dckt. 192 at 3.

In denying without prejudice the prior Motion, the court provided the Debtor with a clear summary of the shortcomings in the request and evidence presented:

> "Debtor offers no information as to how he would now successfully prosecute a Chapter 13 case or what plan he would be proposing. Debtor provides no information as to what his projected disposable income would be, how much he will fund the plan, and what creditors will be paid. This case now being two years old, Debtor does not address the legal and equitable issues concerning two years being "wasted" and any plan being artificially truncated by Debtor's desire not to have a plan of reorganization or to restructure, but instead choosing to convert this case to one under Chapter 7.
>
> Debtor does not address his failure to claim an exemption, therefore forcing the Chapter 7 Trustee into having to incur the cost and expense of administering the Property as part of fulfilling his fiduciary duties to the bankruptcy estate.
>
> Debtor has not shown grounds, legal and equitable, for reconverting this case to one under Chapter 13. Debtor does not address how he will compensate the bankruptcy estate for the expenses incurred in trying to administer an asset in which Debtor did not claim an exemption.

Debtor's request seems to be a near panic-induced filing to interfere with the Chapter 7 Trustee liquidating property of the Estate. The Motion is denied without prejudice."

The above Civil Minutes from the July 17, 2018 hearing were filed on July 17, 2018.

DEBTOR'S CURRENT MOTION TO RECONVERT

On July 24, 2018, having the benefit of the prior Decision, Debtor filed the current Motion to Convert the Case. The current Motion to Convert states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the relief is based:

A. "2. After the filing of the petition, the Debtor's financial and/or legal situation has unexpectedly changed and the Debtor now desires to convert to Chapter 13." Motion ¶ 2, Dckt. 196.

B. "5. Per the court's suggestion please find as "Exhibit A" a copy of the proposed Chapter 13 plan." *Id.* ¶ 5 (the fifth and final paragraph of the Motion).

Debtor then improperly attached an exhibit to the Motion, in contravention of Local Bankruptcy Rule 9004-1 and 9004-2(d), requiring exhibits to be filed in a separate exhibit document that is docketed in the case.

Debtor's Declaration is provided in support of the request for the court to exercise its powers to determine that reconversion of this case is proper. The Debtor provides the following testimony under penalty of perjury:

a. "2. My financial and/or legal situation has unexpectedly changed and I requested my attorney to convert my Chapter 13 to a Chapter 7. My primary reason for that request was the court's determination that I had NO arrears on my mortgage (see docket # 111). When the court determined that there were NO arrears it made sense to me to convert the case to a Chapter 7 and thereby eliminate all of my unsecured debts." Declaration ¶ 2, Dckt. 198.

b. "4. When I converted my Chapter 13 to a 7 I found that the Chapter 7 trustee and my mortgage holder earnestly wanted to sell my home disregarding the court's ruling concerning the arrears." *Id.* ¶ 4.

c. "5. Because of an error my modified chapter 7 indicated that I was claiming $1.00 exemption on my home. The truth was that it should have been listed as $100,000.00. I was surprised that the Chapter 7 trustee and his attorney, people whom I was led to believe had years of experience could believe that I was only claiming $1 .00 when I was eligible for the $100,000.00." *Id.* ¶ 5.

d. "6. Based on the trustee's actions and those of my home creditor and their clear desire to sell my property I requested that my attorney re-convert the current Chapter 7 to Chapter 13." *Id.* ¶ 6.

e. "7. Currently I am employed as development director for the California State Railroad Museum Foundation and can afford the plan payments my attorney has proposed in the current plan." *Id.* ¶ 7.

f. "9. Considering my stable income at a financially sound, old and reputable nonprofit Foundation, coupled with my fear that Judge Sargis', ruling that arrears are not enforceable, might not hold anymore in a chapter 7 I believe that the Chapter 13 is my only viable alternative." *Id.* ¶ 9.

CHAPTER 7 TRUSTEE'S OPPOSITION

J. Michael Hopper ("the Chapter 7 Trustee") filed an Opposition on June 26, 2018. Dckt. 180. The Chapter 7 Trustee argued that because Debtor has claimed an exemption of $0.00 in his real property commonly known as 9029 Boise Court, Sacramento, California ("Property"), then there is additional equity of $60,000.00 that can be paid to unsecured claims upon sale of the Property.

The Chapter 7 Trustee argues that Debtor is incorrect to argue that unsecured claims would not receive anything from the sale of the Property. He notes that liquidation under Chapter 7 would provide full payment of the secured claim against the Property in a quick manner while also providing substantial proceeds for unsecured claims.

DISPOSITION

Grounds Stated with Particularity
For Relief Requested

The court first considers Debtor's Motion and the grounds stated with particularity. The only "grounds" are that "Debtor's financial and/or legal situation has unexpectedly changed." Motion ¶ 2, Dckt. 196. This single conclusion provides the court with no grounds. Debtor states (subject to the certifications of Fed. R. Bank. P. 9011) that he cannot allege whether his financial situation or legal situation has changed. Debtor cannot state what financial grounds have changed. Debtor cannot state what legal grounds have changed.

The Motion as presented by Debtor alleges no "grounds" but merely states Debtor's edict - "You Shall Reconvert My Case."

Debtor's Declaration (Dckt. 172) provides little if any factual testimony. He states his personal factual determination that "My financial and/or legal situation has unexpectedly changed . . . " Declaration ¶ 2, Dckt. 198. He does not know which "situation," financial or legal, has changed, but he states it as a

finding of fact. Debtor does not attempt to provide the court with any "facts" for the court to make such findings or conclusions.

He further testifies that when he converted the case, his lender was trying to foreclose. *Id.* ¶ 4. He says that it was an error when he signed Schedule C under penalty of perjury stating he was claiming only a $1.00 exemption in the real property that the Chapter 7 Trustee now seeks to administer. *Id.* ¶ 5. Debtor offers no testimony as to how, after he carefully reviewed the Schedules before signing them under penalty of perjury that he could have made an error of such magnitude.

Debtor then proceeds to dictate to the court Debtor's factual determination he "can afford the plan payments my attorney has proposed in the current plan." *Id.* ¶ 7. (The "current plan" reference is to the Chapter 13 Plan provided as an exhibit to show the court and Chapter 7 Trustee what Debtor intends to pursue on a good faith prosecution of the a Chapter 13 case.) Debtor offers no testimony as to his income and expenses for the court to determine whether it appears to be a colorable ability to perform a plan. The Debtor again only dictates to the court Debtor's finding to be adopted without question by the court.

Debtor concludes testifying that he does not want his home (the property the Trustee is attempting to administer) to be foreclosed. *Id.* ¶ 10.

The above "testimony" provides the court with little in the way of personal knowledge factual testimony for the court to make the necessary findings and conclusions.

Review of Intended Chapter 13 Plan

The draft Chapter 13 Plan attached as an Exhibit to the Motion (Dckt. 196 at 4-10) provides for Debtor to make monthly plan payments of $2,498.33 for a period of sixty months. Plan ¶¶ 2.01, 2.03, Dckt. 196. From the $2,498.33, the Trustee is to distribute:

1. $2,000 to Debtor's Counsel.....$ 33.33 a month/60 months
2. Chapter 13 Fees.....$ 200.00 a month (Est. at 8%)
3. Class 1 $10,000 Arrearage.....$ 166.67 a month (Over 60 months)
4. Class 1 Current Payment.....$1,860.00 a month
5. Class7 Unsecured $106,737.45 Claims..... 0.00% Dividend

Id. These payments total $2,260.00 leaving some amount which could exist for an unsecured dividend of $238 a month x 60 months = $14,299.80 (13.3%). Though by Debtor's statements in the Plan there would be a dividend, Debtor refuses to commit and provide in good faith for some minimum dividend for the Class 7 creditors.

The court notes that there appear to be significant Chapter 7 Trustee and professional fees that have been incurred and will have to be paid. These were caused by Debtor's voluntary election to convert the case and claiming a *de minimis* exemption in the real property the Chapter 7 Trustee is attempting to administer.

Debtor's Financial Information

When Debtor filed this case on August 12, 2016, he stated under penalty of perjury that he had net self-employment income of $4,163.00. Schedule I, Dckt. 1 at 34-35. On Schedule J he listed reasonable and necessary expenses of only ($1,607). Schedule J, *Id.* at 36-37. Debtor computed having $2,556 in net month income.

The ($1,607) in expenses are for a family unit of two persons - Debtor and his ten (10) year old daughter. Though stating under penalty of perjury on Schedule I that he has more than $4,000 a month in self-employment income, on Schedule J Debtor states under penalty of perjury that he does not pay any self-employment taxes, federal income taxes, or state income taxes (no provision made for payment of any such taxes). Debtor further stated under penalty of perjury that there were monthly expenses of only : (1) $15 for home maintenance and repair; (2) $350 for food and house keeping supplies for two persons (after allowing $50 for housekeeping supplies, leaves only $1.66 per meal per person in a thirty-day month); (3) $15 for clothing and laundry for an adult and a child; and (4) $40 for medical and dental expenses. These amounts do not appear to based in reality for an adult and growing child.

On original Schedule C Debtor did not claim an exemption in the real property. Dckt. 1 at 17-18. This may well have been because Debtor stated under penalty of perjury that the real property had a value of only $210,000 and was subject to a secured claim of ($263,954). Schedule D, Dckt. 1 at 19.

Debtor then filed Amended Schedules I and J on October 10, 2016. Dckt. 30. On Schedule I Debtor stated that his self-employment income was $4,163 (no change from original Schedule I) and that the reasonable and necessary expenses for an adult and ten-year old child had decreased to ($1,510). On Amended Schedules I and J Debtor made no provision for payment of self-employment taxes, federal income taxes, or state income taxes.

On November 10, 2016, Debtor filed Second Amended Schedule I. Dckt. 54. Debtor's self-employment net income was still stated to be $4,136 a month. The Second Amended includes the required information of how Debtor computes the net monthly self-employment income.

On November 30, 2016, the court denied confirmation of Debtor's proposed amended plan. The denial focused on Debtor's inability to provide clear accurate financial information, with the court concluding:

> "Trustee objects on a basis that Debtors various documents filed in this case are not consistent and clear as to what amount has been paid to Debtors Attorney as compensation and as to what is Debtors legal middle name. The Trustee is unsure how much, if any, remains to be paid in attorneys fees, and the Trustee has noted that Debtor has used two different middle names already in this case. Accordingly, the Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Without an accurate picture of the Debtors financial reality and identity, the court cannot determine whether the Plan is confirmable.

> Additionally, the Debtor has failed to provide the Trustee with a Business Budget that details the business income and expenses. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). That document is required seven days before the date set for the first meeting, 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting the Business Budget, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325. Therefore, the Motion is denied without prejudice, and the Plan is not confirmed."

Civil Minutes, Dckt. 57.

The court then confirmed Debtor's Plan on April 12, 2017. Order, Dckt. 86. On October 4, 2017 (five months later), the Chapter 13 Trustee filed a Motion to Dismiss the Chapter 13 case because of Debtor's monetary default in plan payments. As of October 2017 the default was $6,812.00, which represented almost three payments of $2,653.00 each. Motion, Dckt. 89.

Debtor did not dispute the defaults, and sought to confirm a modified plan. Response, Dckt. 93. In the Response, it is stated that "Debtor" had obtained a "normal" salaried job and would no longer be self employed. Debtor was to make an additional $1,000 a month payment to cure the arrearage. *Id.*

An issue arose in the case in which Debtor was providing in the plan to pay a substantial arrearage on the claim secured by the real property, but the creditor stated in Proof of Claim No. 13 that there was no pre-petition arrearage. When the Debtor had not resolved this inconsistency, the court issued an Order to Show Cause to address the matter. Order to Show Cause, Dckt. 111. After the noticed hearing on the Order to Show Cause, the court determined that there was no pre-petition arrearage to be paid the creditor (U.S. Bank, N.A., as Trustee) on the claim secured by the real property. Order, Dckt. 119.

The court then granted Debtor's Motion to Confirm the Modified Plan. Order, Dckt. 118.

Though Debtor purported to have the substantial financial ability to perform a Plan, the Debtor elected to convert the case to one under Chapter 7 rather than perform a plan and provide for payments to creditors from what he represented to be his substantial financial ability at that time. Debtor Election to Convert, Dckt. 120. In his Declaration, Debtor states that since the court has determined that there is no arrearage on the obligation secured by the real property, "a Chapter 7 is a more reasonable solution to my financial condition." Declaration ¶ 2, Dckt. 121.

When the Trustee acted to administer the real property and sell it for the benefit of the bankruptcy estate, on May 7, 2018, Debtor filed an Amended Schedule C, stating under penalty of perjury that he claimed an exemption of $0.00 in the real property. Dckt. 164 at 3. Debtor continued to state that the real property had a value of only $210,000. *Id.* Debtor repeated this claim of a $0.00 exemption in a second filing of Amended Schedule C on May 7, 2018. Dckt. 166.

On June 6, 2018, Debtor filed a Third Amended Schedule C, in which he again, under penalty of perjury, claimed an exemption of $0.00 in the real property. Dckt. 178 at 1. He again stated that the real property had a value of only $210,000. *Id.*

On July 2, 2018, Debtor filed an Amended Schedule A/B in which he then stated under penalty of perjury that the real property had a value of $350,000. Dckt. 185 at 3.

Debtor also filed on July 2, 2018, a Fourth Amended Schedule C, now claiming an exemption of $86,046.00 in the real property. *Id.* at 9. On the Fourth Amended Schedule C Debtor listed the real property as having a value of $350,000. *Id.*

Debtor's Current Income

Debtor has not filed any Supplemental Schedules I and J stating under penalty of perjury Debtor's current income and current expenses.

In 2017, Debtor filed a Supplemental Schedule I stating that he had monthly gross income of $7,500 from his salaried income as an employee of "Lifesteps." After withholding for taxes, Debtor reporting having $5,000 in monthly income. Dckt. 99 at 1-2. On Supplemental Schedule J, Debtor stated that the then current expenses were ($2,047), leaving $2,953 in monthly net income. This $2,953 was the exact number Debtor needed to fund the amended plan he was seeking to confirm. Plan, Dckt. 98. The proposed plan provided for a 0.00% dividend to creditors holding general unsecured. Claims.

Debtor offers no testimony as to his current income and expenses in August 2018. In his current Declaration Debtor merely states that he is employed at a "financially sound, old and reputable nonprofit foundation." Declaration ¶ 9, Dckt. 198. He does not identify that foundation.

Using the California Secretary's of State Official Webpage for information concerning corporations, limited liability companies, and limited partnerships, when inquiring about an entity named "Lifesteps," the Secretary of State reports: [FN.1.]

1. There is one active corporation named Lifesteps Financial, Inc. which registered with the State in July 2009.

2. There are no active limited liability companies or limited partnerships with the word "Lifesteps" in its name.

FN.1. California Secretary of State Business Search Website https://businesssearch.sos.ca.gov/CBS/Index2?SearchType=LPLLC&SearchCriteria=lifesteps&SearchSubType=Keyword.

The court identified a Webpage for LifeSTEPS, which identifies have a Fair Oaks location.[FN.2.] This may be the same entity as listed on Debtor's 2017 Supplemental Schedule J. This entity states that it has been providing its services since 1996.

FN.2. http://www.lifestepsusa.org/locations/#sacramento.

Debtor provides no current, accurate evidence of his income and expenses.

Draft Chapter 13 Plan

If Debtor is currently generating $7,500 a month in gross income, then his annual income for a family of two persons is $90,000. [FN.3.] The means testing information for annual median income in California (using the current higher 2018 figures) for a family of two persons is $73,162. This information causes one to pause, and consider what good faith belief and purpose ("good faith" being the focus of the consideration) Debtor and Debtor's counsel had when deciding to convert the case of a $90,000 annual income debtor after having just succeed in confirming a Chapter 13 Plan.

FN.3. https://www.justice.gov/ust/means-testing/20180501.

The court moves to the Draft Plan attached as an exhibit to the Motion. It requires that there be $2,498.33 in payments to be made for sixty months. The Debtor is currently in month twenty-four of the Plan. No provision is made for the payments actually made up to the time Debtor elected to eject the plan he confirmed and opt in January 2018 to convert the case to Chapter 13 and picking up the case sometime in late 2018.

Though the court has determined that there is no arrearage on the claim secured by the real property, Debtor's draft Plan proposed to cure a $30,493.00 arrearage. This is EXACTLY the same amount of post-petition arrearage stated by Debtor in the original Plan filed in this case. Plan, Dckt. 7. Having such incorrect information does not add to the credibility of Debtor or Debtor's counsel in trying to convince the court that a discretionary reconversion of this case is proper.

The court is not presented with a colorable plan to be presented for confirmation. The Debtor has withheld his current financial information of income and expenses to determine whether the draft plan presents a colorable plan the Debtor can perform to properly pay creditors as required under the Bankruptcy Code.

APPLICABLE LAW

Here, Debtor's case has been converted previously, pursuant to 11 U.S.C. § 1307©. That extinguishes Debtor's near-absolute right under 11 U.S.C. § 706(a) to convert a Chapter 7 case "at any time." *Gualtieri v. Goux (In re Goux)*, 65 B.R. 121 (Bankr. E.D.N.Y. 1986); *see* H.R. REP. NO. 595 (1997) ("If the case has already once been converted from chapter 11 or 13 to [C]hapter 7, then the debtor does not have that right [of conversion].")

While there is a sharp divide whether this permits debtors to request reconversion at all, a slight majority of courts have held that debtors may still make such a motion. *Compare In re Johnson*, 116 B.R. 224 (Bankr. D. Idaho 1990) (acknowledging the court's authority to allow reconversion while denying due to failure of debtors to demonstrate facts that would persuade the court to exercise its discretion), *with In re Banks*, 252 B.R. 399, 399 (Bankr. E.D. Mich. 2000) (interpreting 11 U.S.C. § 706(a) as placing a bar on

any reconversion). While there is no binding precedent on this matter in this Circuit, previous decisions of this court, as well as of the Bankruptcy Appellate Panel for the Ninth Circuit, show a trend toward adoption of the majority rule: allowing reconversion on a discretionary basis. *In re De La Salle*, No. 10-29678-E-7, 2011 Bankr. LEXIS 5621, at *26 (Bankr. E.D. Cal. Sept. 6, 2011) ("If [debtors] wish to propose a confirmable plan, they may seek to re-convert this case to one under Chapter 13. . ."); *see Gallagher v. Dockery (In re Gallagher)*, No. CC-13-1368-TaKuPa, 2014 Bankr. LEXIS 1037 (B.A.P. 9th Cir. Mar. 17, 2014) (assessing whether a tax refund was rightfully the property of the Chapter 13 or Chapter 7 estate in a case converted to Chapter 7 then subsequently reconverted to Chapter 13).

It remains within the court's discretion, therefore, whether to grant such a reconversion. Generally, a court will grant such a motion absent abuse of bankruptcy law and if the confirmed plan is in accordance with the requirements of 11 U.S.C. § 1325, in particular whether a plan is feasible under 11 U.S.C. § 1325(a)(6). Of great weight in such considerations is any change in circumstance from the initial failed plan that would suggest more likelihood of success now. *In re Johnson*, 116 B.R. at 227.

DECISION

Notably, the present Motion provides less detail than Debtor's First Motion. *Compare*, Dckt. 196, *with* Dckt. 171. As with Debtor's First Motion, the first inquiry is the grounds stated with particularity (Federal Rule of Bankruptcy Procedure 9013) upon which this relief is request. Paragraphs 1, 2, and 3 of the present Motion are identical to paragraphs 1, 2, and 4 of Debtor's First Motion, respectively. *See*, Dckt. 170, 196. However, the present Motion omits sections where Debtor previously explained that his circumstances have changed since converting to a Chapter 7 case, and that he obtained a more lucrative job which supported a coversion back to Chapter 13. *Id*. The only addition to the Motion is the attachment of a proposed Chapter 13 plan as "Exhibit A." Dckt. 196 at 2:1.

Debtor again supplements his Motion with a declaration. Dckt. 198. Debtor states he previously claimed only an exemption in his home of $1.00, where "the truth was that it should have been listed as $100,000.00." Dckt. 198 at 2:5–9. Debtor indicates further that he was surprised the Chapter 7 Trustee did not 'see' and respond to this clear error, and that reconversion became necessary due to the Trustee proceeding with the sale of Debtor's property. *Id.* at 2:6–11. Debtor believes he has proven for 18 months that he can and will make trustee payments under a Chapter 13 plan. Dckt. 198 at 2:15.

DISCUSSION

Trustee asserts (with no evidence provided) that Debtor's election to convert this case to Chapter 7, not properly claim exemptions, and attempts to bounce back to Chapter 13 when the Chapter 7 Trustee has caused there to be incurred $12,000 of Chapter 7 Trustee and Trustee's counsel fees in fulfilling their respective obligations to the bankruptcy estate. It appears that these fees and costs not only directly flow from the decision of Debtor and Debtor's counsel to convert this case, but the inaccurate Schedules, including multiple Amended Schedules C, and cryptic and incomplete attempts to reconvert this case and escape the Chapter 7 Trustee fulfilling his obligations to administer the Chapter 7 estate.

Debtor and Debtor's counsel continue in their cryptic, hiding of any actual information, in the present Motion. Debtor refuses to provide any testimony about his current income and expenses. Debtor fails to provide any facts showing how this $90,000 a year income Debtor can muster only a 0.00% dividend to creditors holding general unsecured claims.

Though asserting at a previous hearing that it was not a reasonable good faith argument to contend that the Chapter 7 Trustee should not act to fulfill his obligations in light of the claiming of a $0.00 exemption because the Debtor could assert other rights, it is equally wrong to tell the court that it should ignore Debtor's attempt to show good faith in what a plan would be when that draft Plan erroneously shows a non-existent pre-petition arrearage to be paid.

Based on the evidence presented, the Debtor has demonstrated that he and counsel are incapable of prosecuting a Chapter 13 case. They cannot present the court with credible evidence and testimony (Fed. R. Evid. 601, 602), nor can they state grounds upon which the requested relief is to be based. They continue in their practice of just demanding the ultimate relief and the court do their bidding.

The Motion is denied.

The court reserves for separate motion under Federal Rule of Bankruptcy Procedure 9011 the recovery by the Chapter 7 estate the costs and expenses caused by the conduct of Debtor and Debtor's counsel or Order to Show Cause the imposition of Civil Sanctions for such conduct, or both.

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 Reconvert filed by Jay Cohen ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Reconvert is denied.

5. **16-25321-E-7** **JAY COHEN** **CONTINUED MOTION FOR RELIEF**
CJO-1 **Steele Lanphier** **FROM AUTOMATIC STAY**
3-19-18 [133]

U.S. BANK TRUST, N.A. VS.

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

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

Below is the court's tentative ruling.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on March 19, 2018. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is denied without prejudice.

U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust by Caliber Home Loans, Inc., as attorney in fact ("Movant") seeks relief from the automatic stay with respect to Jay Cohen's ("Debtor") real property commonly known as 9029 Boise Court, Sacramento, California ("Property"). Movant has provided the Declaration of Melba Arredondo to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Arredondo Declaration states that there are eighteen post-petition defaults in the payments on the obligation secured by the Property, with a total of $33,239.16 in post-petition payments past due. The Declaration also provides evidence that there are five pre-petition payments in default, with a pre-petition arrearage of $9,233.10.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $289,671.03 secured by Movant's first deed of trust, as stated in the Arredondo Declaration and Schedule D. The value of the Property is determined to be $350,000.00, as stated in Amended Schedule A. Dckt. 185. When the Motion was filed, Movant relied upon the current assertion of value, which was $210,000.00. Dckt. 1.

ORDER CONTINUING HEARING

Pursuant to a joint *ex parte* stipulation between the parties, the court entered an order on April 2, 2018, continuing the hearing to 3:00 p.m. on July 17, 2018. Dckt. 149.

CONTINUANCE OF JULY 17, 2018 HEARING

In related Contested Matters in this case, the court addressed the Debtor's desire to reconvert the case to Chapter 13 based on changed circumstances. The court also addressed the potential equity in the Property, which Debtor has finally claimed an exemption in and the Chapter 7 Trustee's apparent inaction based on Debtor seeking to reconvert this case to one under Chapter 13.

In light of the "challenges" manifested by Debtor in claiming exemptions and moving to reconvert this case to one under Chapter 13 and the Trustee's apparent "confusion" over acting with respect to the equity in the property (in part by Debtor's delay in claiming the exemption), the court further continued this hearing to avoid all of the parties the potential cost and expense of addressing a Rule 60(b) motion if the relief is granted, the case reconverted, and the Debtor pursuing a Chapter 13 Plan with his increased income.

TRUSTEE'S OPPOSITION

Chapter 7 Trustee, J. Michael Hopper, filed an Opposition to the Motion on July 19, 2018. Dckt. 189. Trustee's Opposition is supported by the Declaration of Gina Crane, licensed real estate agent and agent for Coldwell Banker Real Estate. Dckt. 190. Trustee asserts the value of the Property is approximately $360,000.00, therefore having equity which could satisfy other claims on top of Movant's full secured claim. The Trustee notes that Movant previously admitted there was no pre-petition arrearage on the debt shown by U.S. Bank Trust's Proof of Claim No. 13–1 is based. Dckt. 119.

DISCUSSION

The Trustee's arguments are well-taken. Even using Debtor's lesser valuation of $350,000.00, selling the Property would satisfy Movant's claims and possibly result in equity to satisfy other claims. Furthermore, the court has already appointed a broker who has taken steps towards the sale of the Property.

Dckt. 160. Movant has not presented argument why the Trustee, already in the process of selling the Property, is not in the best position to continue to do so.

Movant has not established that the Property lacks equity. 11 U.S.C. § 362(d)(2). Movant has also not demonstrated good cause, given the Property's apparent equity cushion. 11 U.S.C. § 362(d)(1). Therefore the Motion for Relief from Automatic Stay is denied without prejudice.

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 Relief from the Automatic Stay filed by U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust by Caliber Home Loans, Inc., as attorney in fact ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Relief from Automatic Stay is denied without prejudice.

6.	**17-21838-E-7** **UST-1**	**WILLIAM/MELISA MUELLER** **Mohammad Mokarram**	**MOTION FOR DENIAL OF DISCHARGE OF JOINT DEBTOR UNDER 11 U.S.C. SECTION 727(A)** **7-16-18 [47]**

Final Ruling: No appearance at the August 16, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor), Debtor's Attorney, and Chapter 7 Trustee on July 16, 2018. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion for Denial of Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Denial of Discharge is granted.

Tracy Hope Davis, the United States Trustee, ("Objector") filed the instant Motion for Denial of Debtor's Discharge on July 16, 2018. Dckt. 47.

Objector argues that Melissa Jean Mueller ("Co-Debtor") is not entitled to a discharge in the instant bankruptcy case because Co-Debtor previously received a discharge in a Chapter 7 case.

Co-Debtor filed a Chapter 7 bankruptcy case on March 19, 2010. Case No. 10-26944. Debtor received a discharge on June 21, 2010. Case No. 10-26944, Dckt. 32.

The instant case was filed under Chapter 7 on March 21, 2017.

11 U.S.C. § 727(a)(8) provides that a court shall not grant a discharge if a debtor has received a discharge in a case filed under chapter 7 or 11 within eight years before the filing date of the instant case. 11 U.S.C. § 727(a)(8).

Here, Debtor received a discharge under 11 U.S.C. § 727 on June 21, 2010 , which is less than eight years preceding the date of the filing of the instant case. Case No. 10-26944, Dckt. 32. Therefore, pursuant to 11 U.S.C. § 727(a)(8), Debtor is not eligible for a discharge in the instant case.

Therefore, the Motion is denied. Upon successful completion of the instant case (Case No. 17-21838), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Denial of Discharge filed by Tracy Hope Davis, the United States 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 Motion for Denial of Discharge is granted, and upon successful completion of the instant case, Case No. 17-21838, the case shall be closed without the entry of a discharge.

7. **17-90346-E-7** **ENRIQUEZ/LISA SANCHEZ** **MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH MARIA SANCHEZ, INLAND PROPERTY GROUP, LLC, SHIRLEY BONUCCELLI, ET AL., AND/OR MOTION TO SELL**
HSM-19 **Thomas Hogan** **7-20-18 [100]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 20, 2018. By the court's calculation, 27 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice).

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

The Motion for Approval of Compromise is granted.

Gary Farrar, the Chapter 7 Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses of Inland Property Group LLC, a California limited liability company ("Inland"); Shirley Bonucceli, Trustee of the Bonucelli Family Trust dated August 18, 1996 ("Family Trustee"); Rose Johnson ("Johnson"); Movant; Enrique and Lisa Mona Sanchez ("Debtors"); and Maria Sanchez ("Maria")(collectively the "Parties"). The claims and disputes to be resolved by the proposed settlement are:

1. This case.

2. An adversary proceeding filed by Movant against Inland for an injunction (Adv. No. 17–9010–E) and the avoidance of a fraudulent transfer from Co-Debtor Enrique Sanchez to Inland of 4605 Strawflower Lane, Salida, CA (APN# 135-032-033) (the "Strawflower Property").

3. An adversary proceeding concerning property located at 5421 Port Alice Way, Salida, CA (the "Port Alice Property").

4. A discharge adversary proceeding filed by Maria against Debtors in this case (Adv. No. 17–09011–E) seeking a determination of non-dischargeability of a debt.

5. A state court action filed by Maria in the Superior Court of the State of Californian for the County of Stanislaus,(Case No. 2013441) claiming an interest in the Strawflower Property and seeking to quiet title free and clear of competing interests of Debtors and Inland (the "State Court Action").

6. Cross-Complaints filed by Debtors and Inland in the State Court Action.

7. Claims against Joe Bonucelli, Shirley Bonucelli, Johnson, and the Family Trust in the State Court Action.

8. Proof of Claim No. 2–1 filed by the Family Trust and Johnson, totaling over $140,000.00 after $124,499.99 in secured debt and post-petition interest (the "Family Trust Loan").

9. Proof of Claim No. 6–2 filed by Maria, originally valued at $136,000.00 and later amended to $245,441.25. This claim, in connection with the State Court Action, is alleged to have been for a loan to purchase the Strawflower Property.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 106):

A. Maria will amend the value of her Proof of Claim No. 6–2 to an agreed unsecured amount of $176,000.00. The Estate will sell its interest in the Strawflower Property to Maria for the original purchase price of $136,000.00, leaving a remaining amount of $40,000.00 of Maria's claim to be accounted for through other treatment.

The sale of the Estate's interest in the Strawflower Property to Maria will be "as-is," conveyed by grant deed and delivered to Maria through escrow within 5 business days after dismissal with prejudice of the state court

action. Maria is responsible for effecting the state court dismissal; Debtors and Inland agree to sign the dismissal.

Sale of the Estate's interest shall be subject to the Family Trust Loan, and conditioned on 1) Maria obtaining sufficient financing to fully satisfy the Family Trust Loan, including additional interest fees capped at $135,000.00; 2) Maria, concurrently, fully satisfying the amounts of the Family Trust Loan and obtaining reconveyance through escrow; 3) payment of all other claims secured by the Strawflower Property; 4) and costs of the sale. Because a shortfall is anticipated based on Maria's borrowing capacity, Trustee intends but is not required to seek Bankruptcy Court approval to contribute remaining funds necessary to pay the Family Trust Loan or other shortfalls during escrow.

The Estate will pay any capital gains taxes resulting from sale. If the escrow does not close in connection with the sale of the Strawflower Property, the agreement is void.

B. After sale of the Strawflower Property, escrow, and reconveyance, the Family Trust Loan shall be deemed satisfied in full and no other claims will be filed by the Family Trust, its trustees, Johnson.

C. If, after paying costs associated with the sale of the Strawflower Property and meeting a reserve of $10,000.00, the Estate holds insufficient funds to pay all remaining allowed unsecured claims in full, the Debtors will contribute additional funds to the Estate through 1) sale of the scheduled motorcycle asset, 2) sale of the scheduled educational financial accounts, and 3) monthly payments of $445 until all financial obligations, in the Trustee's discretion, are satisfied.

D. Upon Debtors' completion of obligations under the Agreement, Trustee will 1) refrain from selling the Port Alice Property, 2) will not object to Debtors' claimed homestead exemption, and 3) will dismiss with prejudice Trustee's remaining adversary proceeding against Inland (Adv. No. 17–9009–E) for prepetition transfer avoidance and the recovery of the Port Alice Property. Trustee's right to object to Debtors' homestead exemption will extend pending Debtors' completion of obligations.

E. The Agreement shall be treated as a sale of claims, subject to overbidding. The Agreement is contingent on and becomes effective after Bankruptcy Court approval and "non-appealable" final order. The Parties agree to cooperate and support approval.

F. Upon full performance under the Agreement, Maria and Movant agree to mutually waive all claims and liability against each other relating to the Strawflower Property, the State Court Action, and this case.

G. Upon full performance under the Agreement, Debtors, Movant, and Inland agree to mutually waive all claims and liability against each other relating to the Strawflower Property, the State Court Action, the Port Alice Property, and this case.

H. Upon full performance under the Agreement, Maria and, together, the Debtors and Inland agree to mutually waive all claims and liability against each other relating to the Strawflower Property, the State Court Action, and the discharge adversary proceeding.

I. Upon full performance under the Agreement, Movant and, together, the Family Trust and Johnson agree to mutually waive all claims and liability against each other relating to the Strawflower Property and the State Court Action.

J. Upon full performance under the Agreement, Maria and, together, the Family Trust and Johnson agree to mutually waive all claims and liability against each other relating to the Strawflower Property, the State Court Action, and the discharge adversary proceeding.

K. Upon full performance under the Agreement, Debtors and, together, the Family Trust and Johnson agree to mutually waive all claims and liability against each other relating to the Strawflower Property, the State Court Action, and the discharge adversary proceeding.

L. The Parties warrant, severally, that they have not assigned, conveyed, granted, transferred, or otherwise disposed of any of the claims released pursuant to the Agreement.

M. The Parties covenant and agree, severally, that they will not pursue claims against any member of the Parties for damages or losses released pursuant to the Agreement. The parties agree the aforementioned stands even where different or additional facts are discovered, waiving potential protection under Civil Code section 1542.

N. The Parties agree to execute documents necessary and appropriate for the Agreement.

O. The Parties agree the Agreement is for settlement purposes and does not constitute evidence or an admission by any member of the Parties.

P. The Parties agree the Agreement is binding on the Parties, as well as their representatives, successors, and assigns.

Q. The Parties agree the Agreement may be executed in counterparts.

R. The Parties represent that all representations, warranties, and promises relied on in executing the Agreement are those explicitly stated within the Agreement. Additionally, the Parties relied on their own investigation and understanding of the facts underlying the Agreement.

T. The Parties agree the Agreement is fully integrated and supercedes all prior representations and agreements Subsequent modifications to the Agreement must be in a writing referencing the Agreement and signed by the Parties.

U. The Parties agree that they, severally, should bear their own litigation costs. Related to this case and the negotiation, drafting, or performance of the Agreement.

V. The Parties agree the prevailing party in an action between members of the Parties to enforce the Agreement is entitled to recover Attorneys' fees and costs.

W. The Parties agree the Agreement shall be governed by the laws of the State of California and applicable federal bankruptcy law, and that proper venue for any dispute shall be the Bankruptcy Court.

X. The Parties represent that they have each, severally, relied solely on their own legal counsel, tax advisers, professionals, and lenders with respect to executing the Agreement. The Parties represent further they have each, severally, relied upon their own investigation and understanding of the facts underlying the Agreement.

Y. The Parties represent that they have each, severally, relied solely on their own legal counsel with respect to the negotiation, preparation, and execution of the Agreement.

Z. The Parties agree the Trustee is not personally liable for performance or non-performance of obligations under the Agreement.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is

appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met. Movant supports the Motion with the Declaration of Gary Farrar. Dckt. 104.

The proposed settlement has a few main points. Most centrally, the Strawflower Property will be sold to Maria. Debtors borrowed $136,000.00 from Maria to initially purchase the Strawflower Property –whether this was simply a loan or part of some broader agreement is disputed in the State Court Action. The Strawflower Property is also encumbered by the Family Trust Loan and a tax lien of $17,000.00. Dckt. 104 at 4:20–23. Debtors' Amended Schedule A values the Strawflower Property at $250,000.00. Dckt. 41. However, Movant intends to sell the Strawflower Property for approximately $340,000.00. Dckt. 104 at 4:23–26. The Strawflower Property will be used to satisfy Maria's claims and the costs of sale, and ideally the Family Trust Loan, tax lien, and any allowed unsecured claims as well. Additionally, Movant estimates selling the Strawflower Property will reduce capital gains taxes owed the Estate owes by approximately $13,669.65.

Sale of the Strawflower Property will resolve the various adversary proceedings related to the Strawflower Property, as well as all claims and counter-claims in the State Court Action. The Debtors will be allowed to keep the Port Alice Property, and those related adversary proceeding will be resolved.

In the alternative–if Maria cannot acquire sufficient funds to pay costs of sale, the Family Trust Loan, the tax lien, or remaining allowed unsecured claims–Debtors will liquidate their motorcycle asset and educational financial accounts (currently exempt) for an estimated value over $10,000.00 to put towards costs of sale and remaining debts. Dckt. 104 at 5:21–6:7. If necessary, Debtors will make monthly payments of $445 until all financial obligations, in the Trustee's discretion, are satisfied. Based on Maria's reasonable borrowing capacity, Movant anticipates a shortfall in the closing for the Strawflower Property in the range of $17,000-$20,000. Dckt. 104 at 5:6–10. Therefore, this alternative plan is likely.

Under the terms of the settlement, all claims against the Estate, including any pre-petition claims of Debtors, are fully and completely settled, with full payment to creditors with secured and allowed unsecured debts.

Probability of Success

Movant states he is "Confident in the Estate's position with respect to the claims to be released by the Estate." Movant indicates "the same is true" regarding other litigation in this case. Despite this, Movant notes there is risk inherent to all litigation, then pointing out that the Agreement provides a mechanism for 100% distribution to creditors with unsecured claims. Movant notes further that there is no dispute over Maria's loaning funds for the Purchase of the Strawflower Property, even though the intent behind the loan is contested.

Movant seems to misunderstand what this factor solicits. Movant indicates he is confident in litigation; the risk inherent in all litigation and the fact a 100% distribution to creditors can be made through the Agreement are not relevant. Therefore, this factor is against approval.

Difficulties in Collection

Movant argues that litigation over the Strawflower Property will reduce recovery for the Estate. Movant notes the Agreement administrates the Strawflower Property, settling all related claims and satisfying the Family Trust Loan. Movant also believes collection risks exists because Maria "is of limited means."

Movant also misunderstands this factor. The likelihood of success and expense of litigation are simply not relevant here, nor is the fact the Agreement settles the litigation. Furthermore, Movant's assertion Maria being indigent causes collection difficulty is simply not supported. This would be relevant if the Estate were awarded significant damages in the State Court Action, but it seems to ignore Maria also holds a claim for her loan of $136,000.00. On its face, there do not appear to be any significant difficulties in collection here. Assuming the Estate prevails in litigation, it could then liquidate the Strawflower Property, which is essentially the heart of the Agreement. Therefore, this factor is against approval.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues there are numerous issues to litigate, which would result in significant time and expense. Movant anticipates that the fact-intensive nature of the issues would require discovery. Movant notes administrative costs would be increased during this period. Movant also adds that settlement would mitigate time spent and costs.

Movant's arguments here are well-taken. This case has several adversary proceedings and a state court action. If the Parties were required to engage in discovery, the costs would be considerable. Furthermore, the litigation would likely drag on over a long period. The numerosity of issues in this case overwhelmingly favor approval of compromise.

Paramount Interest of Creditors

Movant argues the interest of creditors is best served by settlement because the Strawflower Property will be administered fairly and equitably, all claims and competing claims will be resolved, and a path to payment in full to secured and unsecured creditors will be established.

Movant's arguments here are well-taken. All creditors are provided for in full under the Agreement, whereas significant expenses of litigation could diminish any recovery even if the Estate prevails. The time-value of being able to recover before protracted litigation is also great. Therefore, this factor also supports approval.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it reduces the significant monetary and time cost of litigation, and serves the best interest of the creditors whom will receive payment in full. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Gary Farrar, the Chapter 7 Trustee ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Inland Property Group LLC, a California limited liability company ("Inland"); Shirley Bonucceli, Trustee of the Bonucelli Family Trust dated August 18, 1996 ("Family Trustee"); Rose Johnson ("Johnson"); Movant; Enrique and Lisa Mona Sanchez ("Debtor"); and Maria Sanchez ("Maria")(collectively the "Parties") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 106).

8. **17-22347-E-11 JJG-9** **UNITED CHARTER LLC** **Jeffrey Goodrich** **MOTION TO EMPLOY MICHAEL BLUTO AS SPECIAL COUNSEL 8-2-18 [260]**

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

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

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

Sufficient Notice Not Provided. No Proof of Service filed with the Motion.

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

The Motion to Employ is denied.

United Charter LLC ("Debtor in Possession" or "Movant") seeks to employ the law firm of CJ & Associates ("Counsel") as counsel pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Movant seeks the employment of Counsel to represent the estate in lease negotiations and litigation arising from the operation of its primary asset, an industrial warehouse facility in Stockton, California.

Movant argues that Counsel's appointment and retention is necessary to pursue appropriate action against two tenants whom are in default under the terms of their lease agreements. Movant and Counsel have entered agreements for legal representation in a causes of action against H & K Express, Inc. and JAS Trucking, Manuel Melazquezor, and Manraj Bains' breaches of lease agreements. Dckt. 263, Exhibit B. In both actions, Counsel agrees to provide services through trial at its normal hourly rate with all costs borne by Movant.

The Motion is supported by the Declaration of Michael Bluto, an attorney employed by Counsel and specializing in landlord-tenant law. Dckt. 262. Declarant testifies that he has personal knowledge of the issues in this case, and the agreement retaining Counsel on behalf of the Debtor in Possession. Declarant

represents that he has extensive experience representing both landlords and tenants in California actions, and has represented United Charter LLC (addressed as "Raymond and Cindy Zhang") in matters both related and unrelated to this case, including unlawful detainer actions.

Declarant testifies he and the firm do not represent or hold any interest adverse to Debtor in Possession or to the Estate as to the two lease agreement causes of action. Dckt. 262 at 2:23–3:3. Declarant concedes that there would be a conflict in pursuing action against United Cabinet Building Supplies, Inc., (owned by Raymond and Cindy Zhang) but asserts that Counsel will not be retained for that matter. *Id.*

Local Bankruptcy Rule 9004-2(e)(1) requires a proof of service be filed separately from any motion and notice of motion. Movant has not provided any proof of service, failing to meet this notice requirement. Therefore, the Motion is denied without prejudice.

CONSIDERATION OF MOTION

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

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

OPPOSITION OF U.S. TRUSTEE

The U.S. Trustee raises several points in opposition to the present Motion. First, the Motion does not address whether employment is sought pursuant to 11 U.S.C. § 327(a) [disinterested person] or § 327(e) [representation of counsel who has represented Debtor if no conflict exists].

In the Motion, the Debtor in Possession affirmatively states:

> 5. Movant has made diligent inquiry into the connections of said proposed special counsel with Movant, and to the best of its knowledge, said proposed special counsel has no connection with the Movant, its creditors or with anyone employed by the Office of the United States Trustee, other than as disclosed in the supporting Declaration of Michael Bluto.

Motion ¶ 5, Dckt. 260. This passive-aggressive pleading appears to be one in which the Debtor in Possession appears to seek to absolve itself of fulfilling its duties to affirmatively state the possible conflicts the Debtor in Possession is aware of, but just say "limited to whatever the applicant chooses to disclose, I don't think there is a conflict."

The U.S. Trustee further states that the Motion fails to disclose the scope of employment that is sought.

The Trustee directs the court to the Declaration of Michael Bluto, an attorney employed by the Firm. Declaration, Dckt. 262. In the Declaration he states that prior to the filing of this Chapter 11 case:

1. Mr. Bluto represented United Charter, LLC in an unlawful detainer action.

2. The Firm has and continues to represent:

a. Raymond Zhang, principal of the Debtor; and

b. Cindy Zhang, Principal of the Debtor

in unspecified matters both related and unrelated to this case. Declaration ¶ 3, Dckt. 262.

Though not stated in the Motion, Mr. Bluto testifies that the employment is to be in two matters:

1. Non-specified matter involving H&K Express, Inc. and Harminder Kauer, guarantor; and

2. Breach of lease claims against Manuel Melazquez and Manraj Bains, dba JAS Trucking, a former tenant.

Declaration ¶ 4, Dckt. 262.

The written Attorney-Client Agreements are provided as Exhibit B. Dckt. 263.

A look at the proposed Attorney-Client Agreements contain information demonstrating that employment is not proper, but also re-raising for the court when counsel for the Debtor in Possession is able to, and should be allowed, to continue as counsel for the Debtor in Possession

The proposed Attorney-Client Agreements are between the Firm and "United Charter, LLC." Exhibit B. The Agreements expressly state that "United Charter, LLC" is the "client." The signature block is merely for "client," which is identified as "United Charter, LLC." The signature line is merely for "client" and contains an illegible scrawl.

The proposed Attorney-Client Agreements as prepared by the Firm and now presented by the court by the Debtor in Possession and counsel for the Debtor in Possession are not for the employment of counsel by the fiduciary Debtor in Possession. Rather, they are drafted to merely have the Debtor limited liability company, in its non-debtor in possession capacity, engage the services of the firm to enforce rights of the bankruptcy estate.

One might believe that such ignoring of the fiduciary Debtor in Possession, not having the Agreements between the Firm and "United Charter, LLC, Debtor in Possession," and not having the

signature block set up to clearly identify that it was the Debtor in Possession signing the Agreements and that Raymond Zhang signing it as the representative of the Debtor in Possession were mere oversights by attorney and Mr. Zhang who are not really knowledgeable about bankruptcy and the fiduciary duties of the Debtor in Possession.

Unfortunately, Mr. Zhang, the Debtor in Possession, and counsel for the Debtor in Possession have repeatedly ignored the existence of the Debtor in Possession and tried to just have the "Debtor" exercise control the bankruptcy estate. Examples of this include:

1. Status Conference Statement, Dckt. 17, lumping the Debtor and Debtor in Possession into one joint entity collectively defined as "Debtor" (in contravention of the statutory definition of debtor in 11 U.S.C. § 101(13) and Debtor in Possession 11 U.S.C. § 1107).

2. Motion to Employ Counsel for the Debtor and Debtor in Possession pursuant to 11 U.S.C. § 327. Dckt. 23.

3. Motion to Use Cash Collateral filed by the joint entities Debtor and Debtor in Possession, collectively defined as "Debtor." Dckt. 32.

4. August 15, 2017 Civil Minutes discussing the misidentification of "Debtor" in the place of "Debtor in Possession" and referencing the court addressing the point at the May 31, 2017 Status Conference. Dckt. 42 at 8.

5. Civil Minutes for May 31, 2017 Status Conference, Footnote 1, Dckt. 25, which states:

> "FN.1. The Debtor in Possession, fiduciary of the bankruptcy estate, uses the confusing defined term "Debtor" to describe it in its fiduciary position. "Debtor" is a statutory term which is the entity which filed the bankruptcy. The Debtor in this case may also serve as the "Debtor in Possession," accepting all of the fiduciary duties and responsibilities that go with that position, or elect to allow to have a Chapter 11 trustee appointed if the Debtor is unwilling or unable to take on such fiduciary duties. The "debtor" and the "debtor in possession" are not the same legal entity, the same as an individual person and that person serving as the trustee of a trust are not merely the same "person." As a trustee, that person owes fiduciary duties to the trust estate and beneficiaries, well beyond that of the individual."

6. Motion for Employment of Auctioneer by Debtor and Debtor in Possession (jointly identified by the defined term "Debtor"). Dckt. 66.

7. Civil Minutes for August 31, 2017 hearing on Motion to Use Cash Collateral referencing the misidentification as the Debtor. Dckt. 59 at 4.

8. Motion to Employ Accountant by Debtor and Debtor in Possession (jointly identified as "Applicant"). Dckt. 176.

9. Motion to Pay Broker filed by Debtor and Debtor in Possession (jointly identified as "DIP"). Dckt. 169.

10. Civil Minutes for March 22, 2018, hearing on Motion to Pay Broker, with the court stating:

> "The Lease Agreement itself purports to be between H & K Express, Inc., and United Charter, LLC, Raymond Zhang, its Manager. Exhibit A, Dckt. 171. Again, **Mr. Zhang appears to ignore the fact that United Charter, LLC, the debtor, does not have the right and power to be leasing property of the Bankruptcy Estate**. On its face, **the fiduciary Debtor in Possession does not appear to be the lessor.** The Lease Agreement continues with this failure to have Debtor in Possession be a party to or to exercise its rights, and only its rights, to lease the property.
>
> Debtor in Possession, **Counsel for Debtor in Possession, and the Leasing Agent appear to have created a serious legal issue** for the Bankruptcy Estate concerning whether there is any lease that can be enforced by the Bankruptcy Estate.
>
> [Emphasis Added]
>
> Before the court approves compensation for services **Provided to the Bankruptcy Estate** by a **Professional Hired By Debtor in Possession**, the court needs to believe that the
> services were provided **for Debtor in Possession and the Bankruptcy Estate**, as well as there
> being any **enforceable rights for the Bankruptcy Estate**.
>
> [Emphasis in Original]"

Dckt. 203.

11. *Ex Parte* Motion to Continue Hearing on Disclosure statement by Debtor and Debtor in Possession (jointly defined to be "Applicant"). Dckt. 252.

The Motion is denied. Again, counsel for the Debtor in Possession files a motion in which the Debtor is inserted in a position to control rights of the estate and exercise powers outside of the fiduciary position as Debtor in Possession. The Motion continues in the repeated (and clearly intentional) practice of conflating the Debtor and Debtor into one jointly defined entity stated to be "Debtor," which as defined by Congress in the Bankruptcy Code.

Mr. Bluto and his law firm CJ & Associate, P.C. join in with counsel for the Debtor in Possession and seek to have this court (improperly) authorize employment by the Debtor pursuant to 11 U.S.C. § 327. To the extent that CJ & Associates, P.C. asserts that it and its attorneys don't know about bankruptcy law,

don't know about representing debtors in possession, don't know about representing bankruptcy trustees, and don't understand the difference between a fiduciary debtor in possession and the mere debtor, it demonstrates an inability to represent a fiduciary debtor in possession.

For counsel for Debtor in Possession and Mr. Zhang as the responsible representative for the Debtor in Possession to repeatedly come in to try and get the court to sign orders allowing "Debtor" to exercise powers, assert rights, and engage in activities that relate to property of the estate and the Debtor in Possession, such attempts have clearly moved from the inadvertent to the intentional. The court has repeatedly addressed these issues not only for counsel, but Mr. Zhang who has attended the hearings.

The Motion is Denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by United Charter LLC ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Michael Bluto and his law firm of CJ & Associates is Denied.

9. **16-27854-E-11** **GARY STEINGROOT** **CONTINUED MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7, MOTION TO DISMISS CASE**
UST-1 **Stephan Brown** **6-1-18 [178]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, and parties requesting special notice on June 1, 2018. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen-days' notice for written opposition).

The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion to Dismiss is continued to 10:30 a.m. on xxxxxx, 2018, to allow for the Debtor in Possession to diligently prosecute the necessary motions for the administration of the estate prior to dismissal.

This Motion to Dismiss or Convert the Chapter 11 bankruptcy case of Gary Steingroot ("Debtor in Possession") has been filed by the United States Trustee ("Movant"). Movant asserts that the case should be dismissed or converted because Debtor in Possession is time-barred under 11 U.S.C. § 1129(e) from confirming the pending amended plan and because the automatic stay has been lifted as to Debtor in Possession's real property.

Movant argues that September 25, 2017, was the three-hundredth day post-petition and was the last day that Debtor in Possession could file a plan and comply with 11 U.S.C. § 1121(e)(2). An Amended Plan was filed on September 14, 2017, and Movant concurs that the 300-day deadline was satisfied.

Movant argues, however, that October 30, 2017, was the forty-sixth day following filing of the Amended Plan and was the last day that Debtor in Possession could confirm the plan and comply with 11 U.S.C. § 1129(e) without obtaining an extension of the deadline.

The court entered an order on October 26, 2017, setting a confirmation hearing on December 19, 2017. Dckt. 119. Then, on December 21, 2017, the court entered an order continuing the hearing to 11:30 a.m. on January 17, 2018, which was amended by an order on December 27, 2017, setting the matter for hearing at 2:00 p.m. on January 17, 2018. Dckt. 163, 164.

Where Movant places the brunt of its argument is at what happened next in the case. Movant argues that after the January 17, 2018 hearing there is no conceivable order extending the confirmation deadline, merely civil minutes indicating a continued hearing. *See* Dckt. 167. Because of there being no order, Movant argues that Debtor in Possession cannot confirm a plan in line with 11 U.S.C. § 1129(e).

Additionally, Movant argues that cause exists to dismiss or convert this case because the court's order entered on December 11, 2017, stated that the automatic stay would be lifted for Citizens Bank, N.A. FKA RBS Citizens, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed recorded against Debtor in Possession's property effective July 1, 2018. *See*, Dckt. 147.

In the Memorandum of Points and Authorities filed with the Motion, Movant indicates that conversion may be better for creditors in this case because there is over $50,000.00 in cash to be distributed. Dckt. 180 at 5.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on July 5, 2018. Dckt. 199. Debtor in Possession argues that grounds have not been shown that favor converting or dismissing this case. Debtor in Possession stresses that Movant did not oppose the prior continuances of the confirmation hearing (in fact, did not even appear at the hearings).

Debtor in Possession also notes that the main and only piece of real property was authorized by the court to be sold on June 28, 2018, and the property was sold on June 29, 2018, with escrow closed. *Id.* at 2.

Debtor in Possession focuses on the lack of a written order continuing the confirmation hearing in January 2018 and argues that "entry of an order is not always necessary to effectuate it, particularly when the parties had notice of the oral order." *Id.* at 3–4 (quoting *Rodarte v. Estates at Monarch Cmty. Assoc. (In re Rodarte)*, No. CC-12-1276-HKiD, 2012 WL 6052046 (B.A.P. 9th Cir. Dec. 6, 2012) (citing *Noli v. Comm'r of Internal Revenue*, 860 F.2d 1521, 1525 (9th Cir. 1988); *Am.'s Servicing Co. v. Schwartz-Tallard*, 438 B.R. 313, 318 (D. Nev. 2010))). Debtor in Possession argues that the court's implicit oral order arising from the January 17, 2018 civil minutes is that the confirmation deadlines were extended.

Debtor in Possession argues that there is a reasonable likelihood of rehabilitation in this case because the court approved the sale of Debtor in Possession's real property, and that sale has closed, preventing any diminution in value from the automatic stay being lifted. Debtor in Possession believes that the proposed amended plan can be confirmed on July 11, 2018.

JULY 19, 2018, HEARING

At the hearing, the court continued the hearing to August 16, 2018. Dckt. 208.

DEBTOR IN POSSESSION'S SUPPLEMENTAL OPPOSITION

Debtor in Possession submitted a supplemental opposition on August 2, 2018. Dckt. 213. Debtor in Possession consents to the dismissal of this case so long as the Movant defers filing the order until the case is fully administered. Debtor in Possession indicates the remaining actions to be taken in the case are: Cach, LLC being paid in full, submission of a motion for compensation for Debtor in Possession's counsel, and filing of a final report and account for the case.

Debtor in Possession pleads in the alternative that conversion should not be granted because the Debtor in Possession is in a position to fully administer the case.

APPLICABLE LAW

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

The Bankruptcy Code Provides:

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

11 U.S.C. § 1112(b)(1).

DISCUSSION

The plain language of 11 U.S.C. § 1129(e) indicates that neither dismissal nor conversion is mandatory once the deadline has passed. *See In re Simbaki, Ltd.*, 522 B.R. 917 (Bankr. S.D. Tex. 2014). In this instance, it appears that Movant is asserting to the court that as soon as the deadline and as soon as there is no written order continuing a confirmation hearing then the court *must* dismiss or convert the case.

As just one quick example that the court found about the effect of oral orders, the court points to a Fifth Circuit decision affirming that criminal contempt sanctions could be issued for violating a bankruptcy court's oral order. *Ingalls v. Thompson (In re Bradley)*, 588 F.3d 254, 264 (5th Cir. 2009). The Fifth Circuit found support in its prior rulings and from the Sixth Circuit and was not moved by arguments

that a later-issued written order used different (more specific) language. *Id.* The Fifth Circuit declared that an oral order was clear enough to provide notice to the parties. *Id.*

However, Debtor in Possession now consents to the dismissal of this case, with the caveat that the dismissal be delayed so that all administrative matters (including fees of counsel for the Debtor in Possession be allowed) prior to dismissal. Though the court clearly retains post-dismissal jurisdiction to determine all such necessary matters, it is a "cleaner" dismissal in the Chapter 11 setting if the matters are clearly resolved prior to dismissal.

Given that the sale of the property having been consummated and secured claims now paid through escrow, and it not appearing that a delayed dismissal is being used as a device or artifice to maintain the automatic stay in less than good faith by the Debtor in Possession, the court continues the hearing further.

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 or Convert the Chapter 11 case filed by the United States Trustee ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Dismiss or Convert is continued one final time to 10:30 a.m. on xxxxxx, 2018, to allow for the Debtor in Possession to diligently prosecute the necessary motions for administration of the bankruptcy estate prior to dismissal.