

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Modesto, California

August 22, 2013 at 10:30 a.m.

1. [13-91102-D-7](#) DANIEL KREVITSKY ORDER TO SHOW CAUSE
 [13-9025](#) RHS-1 Pro Se 8-5-13 [[10](#)]
 KREVITSKY V. DEUTSCHE BANK
 NATIONAL TRUST COMPANY ET AL

Notice Provided: The Order to Show Cause was served by the Clerk of the Court through the Bankruptcy Noticing Center on Plaintiff, Defendant, and the Chapter 7 Trustee, on August 8, 2013. 14 days notice of the hearing was provided.

The court ordered Daniel Krevitsky, plaintiff-debtor in the above-captioned case, to appear to show cause as to why the court should not abstain from hearing the issues in this Adversary Proceeding pursuant to 28 U.S.C. § 1334(c) (1).

This Adversary Proceeding has been commenced by the Chapter 7 Debtor, Daniel R. Krevitsky. A survey of the Complaint indicates that the Debtor is asserting a variety of California state law claims though which he seeks a determination that a non-judicial foreclosure was invalid. The legal grounds asserted by the Debtor include:

- (1) California Civil Code § 2923.6,
- (2) California Civil Code § 17200,
- (3) breach of state law covenant of good faith and fair dealing arising under contract,
- (4) enjoining Defendants from exercising asserted rights under promissory note and deed of trust,
- (5) California Civil Code § 1752 (state law fraud),
- (6) declaration of state law rights under note and deed of trust,
- (7) California Civil Code §§ 2923.6, 2924, and 2932.5,
- (8) determination under state law the "holder of the note" secured by the deed of trust,
- (9) California Penal Code § 115, and
- (10) California Evidence Code § 669.

In addition, the Debtor has demanded a jury trial on all issues.

August 22, 2013 at 10:30 a.m.

Though filing the Adversary Proceeding on July 12, 2013, Schedule B filed by the Debtor on July 25, 2013, does not list any claims against Deutsche Bank National Trust Company, as Trustee, or any other of the Defendants named in the Complaint. No claims or rights of any such are listed on Schedule B or claimed as exempt on Schedule C. Dckt. 24. From the Complaint, it appears that these claims are asserted to have existed prior to the commencement of the case, thereby they would be property of the Chapter 7 bankruptcy estate. 11 U.S.C. § 541(a). As property of the estate, it is the Chapter 7 Trustee who has the sole right to prosecute such rights. 11 U.S.C. §§ 707(a), 323. Though a debtor bringing such an adversary proceeding is not immediately fatal on the issue of standing to commence such litigation (Fed. R. Civ. P. 17(a)(3), Fed. R. Bankr. P. 7017), the standing issue must promptly be addressed before the court can proceed with the litigation.

Even if the Debtor is the real party in interest, the Complaint raises serious issues of whether the bankruptcy court or district court should exercise the broad grant of jurisdiction and authority given by Congress under 28 U.S.C. §§ 1334 and 157.

The court ordered that any responses to this Order to Show Cause shall be in writing and filed with the court and served on the other parties having been served with the summons and complaint or appearing in this Adversary Proceeding, on or before August 15, 2013.

PLAINTIFFS' RESPONSE

The court has issued not only this Order to Show Cause, but an order to show cause in the Plaintiff's Chapter 7 bankruptcy case (13-91102) why it should vacate the order of dismissal. In the Chapter 7 case the Plaintiff filed a "Verified Response to Order to Show Cause Why Bankruptcy Case Should Not be Dismissed, Trial by Jury is Hereby Demanded." Bankr. E.D. Cal. No. 13-91102 Dckt. 49. The court construes this response to also be to the present Order to Show Cause why the court should not abstain and consider's the Plaintiff's position. FN.1.

FN.1. The order to show cause in the Plaintiff's bankruptcy case centers on whether he can show any likelihood of prevailing in that Chapter 7 case to support vacating the order dismissing that Chapter 7 case in light of the Plaintiff having recently completed and obtained a discharge in case number 10-92201, which was filed on June 9, 2010.

The Plaintiff sets forth the following in his Response to the Order to Show Cause with respect to this Adversary Proceeding:

- A. Pro Se complaints are held to less stringent standards than formal pleadings by lawyers.
- B. The bankruptcy case and Adversary Proceeding were commenced to seek protection from a fraudulent foreclosure by Defendant.

- C. The Plaintiff has been evicted from the property and is homeless.
- D. Plaintiff has provided the court with evidence that the Defendant could not be the holder in due course of the original note and deed of trust, and did not have standing to foreclose on the property.
- E. The fraudulent foreclosure and eviction have injured Plaintiff greatly.
- F. The "Supreme Law of the Land" prohibits taking of property without due process.
- G. Plaintiff seeks only time for a jury of his peers to hear evidence of the alleged fraud.
- H. Plaintiff believes that due process and property rights have been trampled on by fraud.
- I. Plaintiff asserts that anything less than this court allowing him to proceed to trial by jury would be a travesty of justice.

Response, *Id.*

DEFENDANTS' RESPONSE

Defendants Deutsche Bank National Trust Company and OneWest Bank, FSB filed a response asserting that this court should abstain from exercising jurisdiction over this proceeding because (1) only the Chapter 7 Trustee has the right to prosecute Plaintiff's claims because they existed before he filed his Chapter 7 and are thus property of the estate; and (2) even if Plaintiff were the real party in interest, this court should abstain from exercising its federal bankruptcy jurisdiction since the claims do not pertain to the underlying bankruptcy case or bankruptcy-law rights.

DISCUSSION

Jurisdiction was granted to the district courts and bankruptcy courts to the extent that issues arise under the Bankruptcy Code, in the bankruptcy case (such as administration of an asset), or relate to the (administration or outcome of a) bankruptcy case. 28 U.S.C. § 1334(a) and (b). However, recognizing this broad reach of federal court jurisdiction, Congress also provided that federal judges may, and in some situations are required to, abstain from hearing matters though federal court jurisdiction under § 1334 may exist. See 28 U.S.C. § 1334(c).

As provided in 28 U.S.C. § 1334(c) (1),

(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity

with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

A bankruptcy judge's exercise of the federal judicial power is considered in light of core and non-core (related to) jurisdiction created by Congress and limited by the United States Constitution. See *Stern v. Marshall*, 564 U.S. _____, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). This court has previously addressed the issue of when a bankruptcy court judge should utilize federal bankruptcy jurisdiction to adjudicate issues between parties which determination will have no bearing on the bankruptcy case and do not concern Bankruptcy Code issues. See *Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013). Such jurisdiction should be carefully used by the federal courts to the extent necessary and appropriate to effectuate the goals, policies, and rights relating to bankruptcy cases, and not as a device to usurp state courts of general jurisdiction or the district as the trial court for federal matter and diversity jurisdiction.

Here, the Plaintiff is asserting non-bankruptcy code claims, non-bankruptcy case claims, and claims which are not related to the bankruptcy case. Rather, the Plaintiff seeks to assert normal, state law claims in this specially created forum. The court cannot identify any issues or rights arising under the Bankruptcy Code or arising in the bankruptcy case, or any related to matters which effect the administration of the bankruptcy case or the bankruptcy law rights of the Debtor, for which the bankruptcy court should exercise jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157 in the place of the state court of general jurisdiction for these state law and non-bankruptcy law issued.

Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

Sec. 2, Cl 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

As stated by the Ninth Circuit Court of Appeals in *Southern Pacific Company v. McAdoo*, 82 F.2d 121, 121-122 (9th Cir. 1936),

Unless this proceeding was within the original jurisdiction of the District Court, it could not be brought within that jurisdiction by removal. *In re Winn*, 213 U.S. 458, 464, 29 S. Ct. 515, 53 L. Ed. 873. Unless it presents a "case" or "controversy," within the meaning of section 2, art. 3 of the Constitution, it is not within the jurisdiction of any federal court. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191; *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S. Ct. 507, 72 L. Ed. 880; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

The court cannot identify, and the Plaintiff has not shown, the basis for any claim or controversy as required by Article III, Section 2 of the United States Constitution. The Plaintiff argues that he is entitled to his day in court, and wants to have that day in this federal bankruptcy court. Congress did not create, and the United States Bankruptcy Courts do not exist, as a "go to" alternative judicial process when a party does not want to litigate in the state court of general jurisdiction or the United States District Court if proper grounds exist for that court to exercise federal court jurisdiction pursuant to Article III of the United States Constitution. While very broad in scope, the exercise of federal judicial power pursuant to 28 U.S.C. § 1334 is limited to the matters arising under the Bankruptcy Code, arising in the bankruptcy case, or related to the bankruptcy case (which raises it's own constitutional issues as addressed by the Supreme Court in *Stern*).

To the extent that federal court jurisdiction could be stretched to somehow may this a "related to" matter, abstention pursuant to 28 U.S.C. § 1334(c)(1) is appropriate. There is no reason shown for this federal bankruptcy court to wrestle away from the California Superior Court the determination of these non-federal law issues which have no impact on any bankruptcy case before the court. In the interests of comity with the State courts, and with due respect for State law, the court abstains from any further hearings or proceedings in this Adversary Proceeding.

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 hearing on the Order to Show Cause Why Court Should Not Abstain Pursuant to 28 U.S.C. § 1334(c)(1) having been conducted, the Plaintiff and Defendant having presented their respective Responses, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is sustained and the court abstains from hearing any further matters or proceedings in this Adversary Proceeding pursuant to 28 U.S.C. § 1334(c)(1).

August 22, 2013 at 10:30 a.m.

The Clerk of the Court shall close this Adversary Proceeding file.

2. 13-91102-E-7 **DANIEL KREVITSKY** **ORDER TO SHOW CAUSE**
 Pro Se **8-5-13 [45]**

Notice Provided: The Order to Show Cause was served by the Clerk of the Court through the Bankruptcy Noticing Center on Debtor, Chapter 7 Trustee, and Office of the U.S. Trustee, on August 8, 2013. 14 days notice of the hearing was provided.

Daniel B. Krevitsky, the Chapter 7 Debtor ("Debtor") filed an *ex parte* motion to vacate the prior order of this court dismissing the bankruptcy case but did not serve the motion on any other party in interest or set the matter for hearing or provide evidence in support of the Motion. The court vacated, as an interim order, the July 11, 2013 order dismissing the case (Dckt. 29). The court vacated the order on an interim basis to conduct a hearing on the Debtor's *ex parte* Motion.

The court ordered Daniel B. Krevitsky, debtor in the above-captioned case, to appear and show cause why this court should not dismiss this Chapter 7 case for cause, including,

- a. The Debtor having obtained a discharge in his Chapter 7 case No. 10-92201 filed June 9, 2010, and not being eligible for a Chapter 7 discharge in any case commenced which he commences before June 10, 2018. 11 U.S.C. § 727(a)(8).
- b. The Debtor not having shown any purpose under the Bankruptcy Code for the filing and prosecution of this Chapter 7 case.
- c. The Debtor failing to list on Schedule B (Dckt. 24) any claims against Deutsche Bank National Trust Company, as Trustee, and the other Defendants named in Adversary Proceeding No. 13-9025.
- d. Allowing the Interim Order to expire and enter a confirming order that the Chapter 7 case has been dismissed.

The Debtor was ordered to file any supplemental pleadings in support of the *ex parte* Motion to Vacate Order Dismissing the Chapter 7 case and in response to the Order to Show Cause on or before August 15, 2013.

Debtor failed to file a response on or before August 15, 2013. However, on August 19, 2013 a response was filed, which the court considers in light of the nature of these proceedings and the Debtor appearing in pro se.

The court has issued two orders to show cause, the one in the present bankruptcy case and on in the Debtor's Adversary Proceeding against Deutsche Bank National Trust Company, as Trustee, et al (Adv. No. 13-9025).

Though the comments in this Response appear to be more directed at the Adversary Proceeding, the court finds them relevant to consideration of the Debtor's filing and prosecution of this bankruptcy case. The Debtor's response states,

The Plaintiff sets forth the following in his Response to the Order to Show Cause with respect to this Adversary Proceeding:

- A. Pro Se complaints are held to less stringent standards than formal pleadings by lawyers.
- B. The bankruptcy case and Adversary Proceeding were commenced to seek protection from a fraudulent foreclosure by Defendant.
- C. The Plaintiff has been evicted from the property and is homeless.
- D. Plaintiff has provided the court with evidence that the Defendant could not be the holder in due course of the original note and deed of trust, and did not have standing to foreclose on the property.
- E. The fraudulent foreclosure and eviction have injured Plaintiff greatly.
- F. The "Supreme Law of the Land" prohibits taking of property without due process.
- G. Plaintiff seeks only time for a jury of his peers to hear evidence of the alleged fraud.
- H. Plaintiff believes that due process and property rights have been trampled on by fraud.
- I. Plaintiff asserts that anything less than this court allowing him to proceed to trial by jury would be a travesty of justice.

Response, Dckt. 49.

While the Debtor may want to choose the bankruptcy court as his "court of choice" to litigate with Deutsche Bank National Trust Company, Trustee, and the other defendants, that does not (1) establish a basis for federal court jurisdiction and (2) does not demonstrate a good faith, bona fide filing and prosecution of a bankruptcy case.

The court has addressed in connection with the Order to Show Cause in Adversary Proceeding 13-9025 the absence of federal court jurisdiction as required by Article III, Section 2 of the United States Constitution. Further, that to the extent any "related to" jurisdiction could be found (28 U.S.C. § 1334(a)) for the Adversary Proceeding, abstention pursuant to 28 U.S.C. § 1334(c)(1) is proper.

In issuing the Interim Order vacating the dismissal order and issuing this Order to Show Cause, the court addressed in detail the issues, and problems with, this present Chapter 7 case for the Debtor. Memorandum Opinion and Decision, Dckt. 43. First, the Debtor cannot obtain a discharge in this Chapter 7 case. The Debtor obtained a discharge in his prior Chapter 7 case, Bankr. E.D. Cal. 10-92201, filed on June 9, 2010, with a discharge entered on October 6, 2010. The Debtor having received his Chapter 7 discharge on October 6, 2010 (Chapter 7 case No. 10-92201 filed June 9, 2010), he cannot obtain a Chapter 7 discharge in any case commenced before June 10, 2018 (11 U.S.C. § 727(a)(8)) or in a Chapter 13 discharge in any case commenced before June 10, 2014 (11 U.S.C. § 1328(f)(1)).

Further, this is not the Debtor's second bankruptcy filing, but one in a long series of bankruptcy case filings.

Case Number Chapter	Filing Date Dismissal Date Discharge Date	Grounds Upon Which Dismissal Based
13-90494 Chapter 13	Date Filed: March 18, 2013 Date Dismissed: May 28, 2013 No Discharge	Motion to Dismiss based on (1) failure to make plan payments, (2) failure to set hearing on motion to confirm Chapter 13 Plan, (3) Chapter 13 Plan terms unclear, (4) failure to attend First Meeting of Creditors, (5) failure to provide copies of pay advices, (6) failure to provide copy of tax return, and (7) failure to provide Trustee with a Domestic Support Obligation Checklist. 13-90494 Dckt. 78. No Chapter 13 Plan confirmed.

<p>11-92475 Chapter 13</p>	<p>Date Filed: July 11, 2011 Date Dismissed: September 23, 2011 No Discharge</p>	<p>Motion to Dismiss based on (1) failure to file correct version of Chapter 13 Plan, (2) failure to provide Trustee with information for Class 1 Claim secured by Crystal Falls Property, (3) failure to provide Trustee information for a second Class 1 Claim secured by Crystal Falls Property, (4) failure to provide Trustee with information for a third Class 1 Claim secured by the Crystal Falls Property, and (5) failure to provide Trustee copy of tax return. 11-92475 Dckt. 23.</p> <p>No Chapter 13 Plan confirmed.</p>
<p>11-92033 Chapter 13</p>	<p>Date Filed: June 6, 2011 Date Dismissed: June 28, 2011 No Discharge</p>	<p>Notice of Incomplete Filing. Failure to file: (1) Chapter 13 Plan, (2) Means Test (Form 22C), (3) Schedules A-J, (4) Statement of Financial Affairs, (5) Statistical Summary, and (6) Summary of Schedules. 11-92033 Dckt. 3.</p> <p>Motion for extension of time to file documents denied based on the failure to show good cause. 11-92033 Dckt. 14.</p> <p>No Chapter 13 Plan confirmed.</p>
<p>11-91013 Chapter 13</p>	<p>Date Filed: March 22, 2011 Date Dismissed: April 21, 2011 No Discharge</p>	<p>Notice of Incomplete Filing. Failure to file: (1) Chapter 13 Plan, (2) Means Test (Form 22C), (3) Schedules A-J, (4) Statement of Financial Affairs, (5) Statistical Summary, and (6) Summary of Schedules. 11-91013 Dckt. 3.</p> <p>Motion for extension of time to file documents granted. 11-91013 Dckt. 13.</p> <p>No Chapter 13 Plan confirmed.</p>

10-92201 Chapter 7, Voluntary	Date Filed: June 9, 2010 Not Dismissed Discharge Date: October 6, 2010	
99-94575 Chapter 13	Date Filed: October 15, 1999 Not Dismissed Discharge Date: May 26, 2004	
99-91063 Chapter 13	Dated Filed: March 10, 1999 Date Dismissed: August 26, 1999	Motion to Dismiss based on default in Chapter 13 Plan payments.

Though the Debtor filed the Adversary Proceeding to assert a variety of State law claims against Deutsche Bank National Trust Company, Trustee, and the other defendants, he does not list any claims against Deutsche Bank National Trust Company, as Trustee, or any other of the Defendants named in the Complaint on his Schedules. No claims or rights of any such are listed on Schedule B or claimed as exempt on Schedule C. Dckt. 24. From the Complaint, it appears that these claims are asserted to have existed prior to the commencement of the case, thereby they would be property of the Chapter 7 bankruptcy estate. 11 U.S.C. § 541(a). As property of the estate, it is the Chapter 7 Trustee who has the sole right to prosecute such rights. 11 U.S.C. §§ 707(a), 323.

Proper Grounds To Vacate Dismissal

The Federal Rules of Civil Procedure provide for vacating an order or judgment in Rule 60, as incorporated into bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024, which incorporates minor modifications that do not apply here. Grounds for relief from a final judgment, order, or other proceeding are limited to:

- (1) Mistake, inadvertence, surprise, or excusable neglect;

- (2) Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) The judgment is void;
- (5) The judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying in prospectively is no longer equitable; or
- (6) Any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The court uses equitable principles when applying Rule 60(b) Fed. R. Civ. P. 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3rd ed. 1998). A precondition to the granting of such relief is that the movant show that he or she has a meritorious claim or defense. See 12-60 Moore's Federal Practice Civil § 60.24; *Brandt v. American Bankers Insurance Company of Florida*, 653 F.3d 1108, 111 (9th Cir. 2011); *Falk v. Allen*, 739 F.2d 461, 462 (9th Cir. 1984) ("We agree with the Third Circuit that three factors should be evaluated in considering a motion to reopen a default judgment under Rule 60(b): (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default. See *Gross v. Stereo Component Systems*, 700 F.2d 120, 122 (3d Cir. 1983) ("Gross"); see also *United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983) (adopting Third Circuit test).")

On the one hand, the Debtor did file substantially all of the missing documents. Unfortunately, though very experienced in bankruptcy filings, he argues that he sent one of the documents and filing fee to the Trustee instead of the court. This resulted in the court dismissing the case.

The Debtor makes no showing under Rule 60(b) as to why and how he can and will prosecute this Chapter 7 case. It appears that he cannot obtain a discharge. No assets of any value (other than possibly the unsecured claims asserted in the Adversary Proceeding) exist for the Trustee to administer and use to pay creditor claims. Schedules A and B, Dckt. 24. According to Schedule D, the Debtor asserts that he has no creditors having secured claims (whether such claims asserted are contingent, unliquidated, or disputed). Schedule D, *Id.* The Debtor lists no priority unsecured claims on Schedule E. *Id.* Other than a \$2,500.00 claim of the Internal Revenue Service, all of the other general unsecured claims on Schedule F are listed as "Unknown" and disputed. *Id.*

On Schedule I the Debtor lists having \$1,100.02 in gross income from wages, salary, and commissions. His occupation is listed as actor and his employer is Entertainment Partners. However, there are no deductions from his wages for payroll or Social Security Taxes. He also lists \$800.00 in monthly income from roommates for rent and \$400.00 from self employment.

Schedule I, *Id.* However, on Schedule J no provision is made for payment of any payroll taxes, self-employment taxes, or Social Security Taxes. The Debtor states that he has monthly food expenses of only \$200.00, nothing for medical or dental expenses, and only \$150.00 for transportation expenses. Schedule J, *Id.*

The Statement of Financial Affairs fails to provide the required income information for the current year and the two prior years. The only income shown in response to Question 1 of the Statement of Financial Affairs (Income from employment or operation of business for the current year and two years immediately preceding the current calendar year) is "\$400.....Personal message services." In response to Question 2 of the Statement of Financial Affairs for the same period of time (Income other than from employment or operation of business) the Debtor states "\$800.....Roommate rental 2 rooms income per month." *Id.*

In response to Question 4 (Suits and administrative proceedings), the Debtor lists an unlawful detainer action involving Deutsche Bank National Trust Company as an "open" proceeding. *Id.* In response to Question 5 (Repossession and foreclosures) the Debtor identifies a February 27, 2012 foreclosure having been conducted by Deutsche Bank National Trust Company. *Id.*

The Debtor has offered nothing to indicate that if the court were to vacate the dismissal, the Debtor could and would properly prosecute this Chapter 7 to some useful and proper (under the Bankruptcy Code) conclusion. FN.1. Though the court vacated the dismissal on an interim basis to allow the Trustee an opportunity to consider this unscheduled asset, the interim order vacating the dismissal expires on its own terms at 11:59 p.m. on August 23, 2013, unless otherwise ordered by the court.

FN.1. The court also notes that in addition to wasting time and monetary resources, a debtor who repeatedly files bankruptcy cases also squanders rights under the Bankruptcy Code. With the 2005 BAPCPA amendments, Congress statutorily addressed the perceived problem of repeat (non-productive) bankruptcy filers. As part of this, it created statutory terminations of certain rights and provisions precluding certain rights under the Bankruptcy Code from going into effect in the subsequent bankruptcy case(s).

The court not having been presented with a basis for permanently vacating the order dismissing the case, the interim order terminating on its own terms, and the court determining that the dismissal of this case was proper, the court orders that the bankruptcy case is dismissed. The interim order having been entered, the court shall enter this as a separate order dismissing the case for clarity of the record.

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.

of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Gary Farrar, Chapter 7 Trustee, moves for an order authorizing the Trustee to compromise his claims for (1) alleged fraudulent transfers pursuant to 11 U.S.C. § section 548 occurring during the two-year period prior to the filing of the bankruptcy petition by the Debtors and (2) tax refunds totaling \$17,774.54.

The Trustee states that during the two-year period prior to the filing of the chapter 7 petition by the Debtors, certain payments were made to trade schools and colleges for Debtors' children. The tuition payments for the Debtors' adult children, which the Trustee alleges were fraudulent transfers include the following payments: (1) University of Colorado in the amount of \$35,663.90; (2) DeVry University in the amount of \$19,812.00 plus approximately \$3,500.00 for other pre-petition months; and (3) San Francisco State tuition in the amount of \$2,260.50.

The Trustee also seeks recovery of 2012 tax refunds in the amount of \$7,925.50 representing pro-rated California Franchise Tax Board taxes as of the petition date (\$8,646.00) and pro-rated federal taxes of \$19,723.90). Debtors have claimed \$9,874.88 as exempt.

The Trustee states the terms of the proposed settlement agreement include the following:

1. Consideration: Debtors shall pay Trustee the sum of \$47,774.54 in exchange for the Trustee's release of the Tuition Fraudulent Transfer Claims and the Tax Refund claims against transferees;
2. As a condition of the Agreement, Debtors will pay the first installment of the settlement sum of \$47,774.54 to the Trustee in the amount of \$27,774.54 not later than ten calendar days after the execution of the Settlement Agreement. The second installment of \$10,000 will be due no later than thirty days after the first installment. The third and final payment in the amount of \$10,000 will be due sixty days after the first installment.
3. Mutual releases effective upon payment in full of the settlement amount are included in the settlement agreement.
4. Each party will bear its own costs and fees.
5. In the event of a default, the Trustee may enforce any and all rights, including commencing an adversary proceeding against the Debtor. Any payments made under the settlement will be administered as assets of the estate.

The Settlement Agreement is filed as Exhibit A, Dckt. 64.

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 Construction)*, 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 Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (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); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Here, the Trustee argues that the four factors have been met.

Probability of Success

The Trustee states that the success on the merits would be likely although recovery may be reduced by attorneys' fees incurred on behalf of the Trustee. As for the tax refunds, the Trustee states he is receiving 100% of the listed funds.

Difficulties in Collection

The Trustee argues that at least one of the Debtors is working at the present time and collection would be likely successful over time. However, the fact that the Debtors will pay the settlement amount in full within 60 days of the first installment is a strong motivation for the Trustee to accept this offer.

Expense, Inconvenience and Delay of Continued Litigation

The Trustee argues that litigation would result in significant costs, and would involve locating one or more witnesses to testify as to the accuracy of the accounting records. The Trustee states the recovery represented by this settlement will exceed the attorney's fees and costs in this matter.

Paramount Interest of Creditors

The Trustee argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Consideration of Additional Offers

At the hearing, the court shall announce the proposed settlement and request any other parties interested in making an offer to the Trustee for the claims or interests in the property to state their offers in open court.

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. 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 Compromise filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compromise Controversy against Debtors John and Gigi Laroco and Chapter 7 Trustee 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 on July 30, 2013(Docket Number 64).

4. [13-91008-E-7](#) **JOSEPH/APRIL GLOVER** **MOTION TO AVOID LIEN OF**
JAD-1 **Jessica A. Dorn** **CITIBANK, N.A.**
7-2-13 [[11](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on July 2, 2013. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

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

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

A judgment was entered against the Debtor in favor of Citibank, N.A. for the sum of \$8,788.78. The abstract of judgment was recorded with Stanislaus County on May 7, 2013. That lien attached to the Debtor's residential real property commonly known as 128 E. Roseburg Avenue, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$97,871.00 as of the date of the petition. The unavoidable consensual liens total \$152,628.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$5,000.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

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

IT IS ORDERED that the judgment lien of Citibank, N.A., Stanislaus County Superior Court Case No. 681064, Document No. 2013-0039114, recorded on May 7, 2013, with the Stanislaus County Recorder, against the real property commonly known as 128 E. Roseburg Avenue, Modesto, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

5. [11-94410-E-11](#) **SAWTANTRA/ARUNA CHOPRA** **MOTION TO APPROVE STIPULATION**
HSM-10 **Evan D. Smiley** **7-9-13 [563]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on July 9, 2013. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Stipulation is granted. No appearance required.

Chapter 11 Trustee, Gary Farrar, seeks an order approving the stipulation of the parties and extending the time to file objections to the Debtor's claims of exemptions.

Trustee states that the deadline to file objections to the Debtors' amended claims of exemption is presently set for July 10, 2013. The Debtors and the Trustee have entered into a stipulation to extend the deadline for the Trustee to object to the Debtors' amended claims of exemption until September 10, 2013.

Pursuant to Federal Rule of Bankruptcy Procedure 4003(b)(1), the court may, for cause, extend the time to file an objection, if before the time to object expires, a party in interest files a request for an extension.

Here, the Trustee has filed the request before the time to file objections to exemptions has expired. Further, the Trustee provides cause exists for requesting the extension, as the Trustee is continuing to evaluate the Debtors' recently amended schedules, including newly asserted claims of exemptions. The Trustee states he and the Debtors are engaged in negotiations concerning a potential agreement for the Debtors or their relatives to purchase and/or provide for other disposition of certain non-exempt assets. The Trustee has attached the stipulation agreeing to extend the time to file an objection to Debtors' exemptions.

Based on the foregoing, the court finds sufficient cause to grant the stipulation and extend the deadline to file objections to Debtors' amended claims of exemption to and including September 10, 2013.

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

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

The Motion to Approve Stipulation filed by the Chapter 11 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the deadline for the Trustee to file objections to Debtors' amended claims of exemption is extended to and including September 10, 2013.

6. [11-94410](#)-E-11 SAWTANTRA/ARUNA CHOPRA
HSM-11 Evan Smiley

MOTION FOR COMPENSATION FOR
GARY FARRAR, CHAPTER 11
TRUSTEE(S), FEES: \$15,302.11,
EXPENSES: \$0.00
7-18-13 [[571](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on July 18, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The First Interim Application for Fees is granted. No appearance at the August 22, 2013 hearing is required.

FEES REQUESTED

Gary Farrar, Chapter 11 Trustee, seeks an order granting his First Interim Application for Allowance of Compensation to the Chapter 11 Trustee in the amount of \$15,302.11. The period for which the fees are requested is for the period October 15, 2012 through July 16, 2013. The order of the court approving employment of the Trustee was entered on October 18, 2012.

Description of Services for Which Fees Are Requested

Case Administration: Trustee spent 16.20 hours in this category. Trustee communicated with the US Trustee concerning his appointment and other case initiation tasks; worked to gain control of the Debtor-in-Possession bank account, worked with the Debtors to obtain financial records, communicated with professionals and performed tasks in support of general case and asset administration matters, extensions of deadlines and administrative expense management. Trustee attending a number of Chapter 11

status conferences to update the court on the status of the administration of the estate.

Accounting/Auditing Matters: Trustee spent 7.35 hours in this category. Trustee communicated with professionals concerning ongoing tax and accounting analysis and compliance as well as preparing Monthly Operating Reports ("MOR"). The Trustee reviewed and served required MOR.

Asset Analysis and Recovery, Case Strategy: Trustee spent 63.45 hours in this category. Trustee inspected and investigated numerous real property assets in which the estate has an interest, including residential property, commercial buildings, and the Dale Road Project parcels, as well as tangible and intangible personal property. The Trustee met or participated in conference calls with the Debtors and their professionals on a number of occasions, reviewed documents and financial analysis regarding the Debtors' development of a plan of reorganization built primarily around development of the Dale Road Project. Trustee communicated with his professionals about legal issues and strategy related to the Debtors' proposals, participated in negotiations to conclude an interim asset buyback arrangement to support the estate's liquidity, and to receive payment from a medical corporation in which the estate holds an interest. The Trustee has made distributions to various creditors, including administrative and secured creditors.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the Trustee has successfully administered several real estate assets for the benefit of the Estate. The Trustee has collected approximately \$393,250.00 for the estate and has distributed \$241,042.21. The Trustee is currently holding \$152,207.79 in estate funds. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$300.00/hour for Trustee for 87 billed hours. However, the cap established by Section 326 limits the Trustee's compensation to \$15,302.11 during the application period based on disbursements of \$241,042.21 as follows,

A.	25% of the first \$5000	\$1,250
B.	10% of the next \$45,000	\$4,500
C.	<u>5% of the final \$191,042.21</u>	<u>\$9,552.11</u>
D.	Total: \$241,042.21	\$15,302.11

The court finds that the hourly rates reasonable and that Trustee effectively used appropriate skill and rates for the services provided. The total Trustee fees in the amount of \$15,302.11 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Trustee Fees	\$15,302.11
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The court shall issue a minute order substantially in the following form holding that:

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

The Motion for Allowance of Fees and Expenses filed by 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 Gary Farrar, Chapter 11 Trustee is allowed the following fees and expenses as a professional of the Estate:

Gary Farrar, Chapter 11 Trustee
Applicant's Fees Allowed in the amount of \$ 15,302.11

IT IS FURTHER ORDERED that this is the first interim allowance pursuant to 11 U.S.C. § 331 and subject to final review and approval of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

7. [13-91315-E-7](#) **APPLEGATE JOHNSTON, INC.** **MOTION TO EMPLOY WILKE FLEURY**
WFH-1 **George C. Hollister** **AS ATTORNEY(S)**
7-23-13 [[21](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 23, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted. No appearance required.

Chapter 7 Trustee, Michael D. McFranahan, seeks to employ counsel Wilke Fleury, Hoffelt, Gould & Birney, LLP ("Wilke Fleury") pursuant to Bankruptcy Code Section 327(a). Trustee seeks the employment of counsel to assist him to properly perform his duties as Trustee with respect to the following matters:

- A. To investigate the Debtor's financial affairs, assets and liabilities;
- B. To seek turnover of personal and real property if necessary;
- C. To assist the Trustee in the sale of real and personal property;
- D. To assist the Trustee with the employment of other professionals as needed to administer the Debtor's estate;
- E. To assist the Trustee with claim analysis and objections, if necessary;
- F. To assist the Trustee with preference, fraudulent transfer and avoidance actions, if necessary;

- G. To assist the Trustee with any other issues that arise during the administration of the estate.

The Trustee argues that he needs to employ counsel to advise him regarding his rights on these matters and to assist him in the administration of the estate. Trustee believes Wilke Fleury is well qualified to render the services described because the attorneys at the firm are experienced and practice in the areas of bankruptcy, debtor/creditor matters and general business litigation.

The Trustee states that to the best of his knowledge, other than as discussed and disclosed in the declaration of Steven Williamson, Wilke Fleury has not connection with the Trustee, the Debtor, creditors or any other party in interest, their respective attorneys and accountants or the US Trustee. The Trustee points out that although there are other connection disclosed in the Williamson Declaration, Wilke Fleury represents Montez Glass, Inc., a creditor listed on the mailing matrix, but only on matters unrelated to Applegate Johnston, Inc, Debtor. Wilke Fleury has discussed this connection with the Trustee and with Montez Glass and has obtained waivers from both parties, submitted as Exhibits A and B. Counsel for the Trustee states that should the Trustee pursue a claim objection or avoidance action against Montez Glass, special counsel will be employed for that purpose. Trustee believes that Wilke Fleury is disinterested as required by section 327(a).

No party in interest has filed an objection to the Motion to Employ.

DISCUSSION

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.

The court notes that Counsel disclosed various conflicts, stating that none of the matters in which Wilke Fleury has represented clients adverse to creditors or represented past clients which are creditors or counsel for creditors in this case is in any way related to the Debtor or matters upon which Trustee seeks to retain Wilke Fleury.

Wilke Fleury also obtained written consent from its client Montez Glass, Inc. and the Trustee to represent the Trustee and agreed to waive any conflicts that may exist. The relevant California rule on conflicts of

interest for attorneys is stated in Rule 3-310(E) of the California Rules of Professional Conduct, which provides:

A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Here, Counsel has obtained written consent from both his former client and the current client to waive any conflict of interest and to represent the Trustee in this case. Further, Counsel states that should the Trustee pursue a claim objection or avoidance action against Montez Glass, special counsel will be employed for that purpose.

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Wilke Fleury, Hoffelt, Gould & Birney, LLP as counsel for the Chapter 7 estate. The approval of fees is subject to the provisions of 11 U.S.C. § 328 and review of the fees at the time of final allowance of fees for the professional.

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 the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ Wilke Fleury, Hoffelt, Gould & Birney, LLP as counsel for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are

- (c) Any creditor or party in interest whose rights or interests are directly affected by a motion; and
- (d) Those creditors and equity security holders who file a written request that all notices be served upon them

for the following motions applications:

1. Applications for the employment of professionals;
2. Motions regarding the proposed use, sale or lease of property of the estate other than in the ordinary course of business, unless the court for cause directs another method of giving notice;
3. Notice of proposed use, sale or lease of property pursuant to Federal Rule of Bankruptcy Procedure 6004(a)
4. Motions regarding the approval of a compromise or settlement of a controversy other than approval of an agreement involving the lifting of the automatic stay; unless the court for cause shown directs that notice be sent; and
5. Motions on any entity's request for compensation or reimbursement of expenses.

Special notice procedures may be appropriate in bankruptcy case without raising due process concerns. See *In re Southland Supply, Inc.*, 657 F.2d 1076, 1081 (9th Cir. 1981) (holding that notice of a proposed sale, compromise, or settlement to an authorized creditors committee and to any creditors who file a request to receive all notices is adequate); see also *In re Siegler Bottling Co.*, 65 B.R. 117, 119 (Bankr. S.D. Ohio 1986) (recognizing that the bankruptcy rules contain provisions generally authorizing the court to limit the notices to be sent to certain claimants).

The Trustee argues that there are expected to be in excess of 339 or more persons and entities listed on the mailing list in this case for future motions, particularly special notice matters. Serving notice on all claimants and other parties-in-interest will be expensive and time-consuming due to the expected number of such motions and applications filed. Giving notice to entities or parties with no direct stake or financial interest does not accomplish due process goals.

DISCUSSION

While it may be appropriate to reasonably limit notices required to be sent by the Trustee, the current proposal is not "reasonable." It attempts to turn the Bankruptcy Rules on their head and place an affirmative obligation on creditors to seek out notice, rather than what is required in cases - the party seeking relief providing notice to effected parties. Providing notice, and having an open judicial process is essential to having a fair judicial process.

Taken on its face, other than providing the U.S. Trustee with copies of pleadings, nobody would receive notice unless they either (1) filed a proof of claim or requested special notice. Creditors have been notified by the court not to file claims. Notice of Chapter 7 Bankruptcy Case, Dckt. 5. This would appear to insure that the Trustee would have few creditors to provide notice of what he is doing in the case for such "minor" actions such as selling property of the estate, using property of the estate, compromising rights of the estate, and obtaining compensation for himself and his professionals. If the relief requested is granted, the Trustee would not even have to serve the Debtor or Debtor's counsel, unless they made requests for special notice.

There has been no showing by the Trustee that the requested limitation on notices is calculated to reasonably reduce the expenses for the estate while still providing sufficient notice to parties in interest that the credibility of the federal bankruptcy process is maintained. While the court does not believe that the Trustee and counsel intend to act in an improper manner, the not giving of any significant notice (in a case where creditors are told not to file claims) would create the appearance of an impropriety and the "old buddy bankruptcy club" operating to hand out monies to trustees and professionals.

On Schedule B the Debtor lists personal property assets totaling \$9,236,805.90. Dckt. 37 at 3-5. Schedule D lists \$1,389,203.00 in secured claim, subject to a number of "unknown" claim amounts, liens, or collateral. *Id.* at 6-8.

The court will grant the Motion on an interim basis while the Chapter 7 Trustee ascertains the extend of the work necessary for the administration of this case, on the following conditions:

- I. The court modifies the notice requirement for the following motions
 - A. Applications for the employment of professionals;
 - B. Motions regarding the proposed use, sale or lease of property of the estate other than in the ordinary course of business, unless the court for cause directs another method of giving notice;
 - C. Notice of proposed use, sale or lease of property pursuant to Federal Rule of Bankruptcy Procedure 6004(a)
 - D. Motions regarding the approval of a compromise or settlement of a controversy other than approval of an agreement involving the lifting of the automatic stay; unless the court for cause shown directs that notice be sent; and
 - E. Motions on any entity's request for compensation or reimbursement of expenses.
- II. Notice for the above motions shall be provided to:
 - A. The Office of the U.S. Trustee;

- B. Any creditor who filed a proof of claim;
 - C. Any creditor or party in interest whose rights or interests are directly affected by a motion;
 - D. Those creditors and equity security holders who file a written request that all notices be served upon them;
 - E. All creditors who are listed on Schedule D as having a secured claim;
 - F. The creditors holding the 20 largest general unsecured claims either filed with the court or listed on Schedule F.
- III. The modification of the notice requirements of Rule 2002, Federal Rules of Bankruptcy Procedure, does not modify or alter the service of process obligations of any party pursuant to Rule 9014 for any contested matter or as otherwise required under the Bankruptcy Rules of Procedure for other matters.
- IV. The Notice requirements are modified through and including May 31, 2013. The court shall conduct a further hearing on this Motion at 10:30 a.m. on March 30, 2013.

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

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

The Motion to Prescribe and Limit Notice 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 Limit Notice is granted.

IT IS FURTHER ORDERED that the Trustee, the Debtor, any statutorily appointed creditors' committee, and the Office of the United States Trustee are hereby authorized to limit notice on the following specified matters (collectively, the "Special Notice Matters") in this Case:

1. Applications for the employment of professionals;
2. Motions regarding the proposed use, sale or lease of property of the estate other than in the ordinary course of business, unless the court for cause directs another method of giving notice;
3. Notice of proposed use, sale or lease of property pursuant to Federal Rule of Bankruptcy Procedure 6004(a);

4. Motions regarding the approval of a compromise or settlement of a controversy other than approval of an agreement involving the lifting of the automatic stay; unless the court for cause shown directs that notice be sent; and
5. Motions on any entity's request for compensation or reimbursement of expenses.

IT IS FURTHER ORDERED that the persons to whom notices required to be sent pursuant to Rule 2002, Federal Rules of Bankruptcy Procedure, for any of the Special Notice Matters specified in this order is modified and only be required to be sent to the following persons:

- A. The Office of the U.S. Trustee;
- B. Any creditor who filed a proof of claim;
- C. Any creditor or party in interest whose rights or interests are directly affected by a motion;
- D. Those creditors and equity security holders who file a written request that all notices be served upon them;
- E. All creditors who are listed on Schedule D as having a secured claim;
- F. The creditors holding the 20 largest general unsecured claims either filed with the court or listed on Schedule F.

The modification of the notice requirements of Rule 2002, Federal Rules of Bankruptcy Procedure, does not modify or alter the service of process obligations of any party pursuant to Rule 9014 for any contested matter or as otherwise required under the Bankruptcy Rules of Procedure for other matters.

IT IS FURTHER ORDERED that the Notice requirements are modified pursuant to this order for these specified matter filed through and including May 31, 2014.

IT IS FURTHER ORDERED that a further hearing on this Motion shall be conducted at 10:30 a.m. on March 27, 2014. The Movant shall file, and serve on or before February 24, 2014, on the parties specified above in this Order, a supplemental pleading requesting an extension of this order and any modifications to this order. Any Responses to the Trustee's supplemental pleadings shall be filed and served on or before March 18, 2014.

IT IS FURTHER ORDERED that the Trustee, the Debtor, any statutorily appointed creditors' committee, or a party-in-interest, shall also give notice to any person or entity for a special Notice Matter as the Court may direct.

9. [13-90935](#)-E-12 ARTURO/RAMONA ROMERO
KDG-4 Hagop T. Bedoyan

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF KLEIN, DENATALE,
GOLDNER, COOPER, ROSENLIB &
KIMBALL, LLP FOR HAGOP T.
BEDOYAN, DEBTOR'S ATTORNEY(S),
FEES: \$10,225.00, EXPENSES:
\$239.36
7-10-13 [[31](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 10, 2013. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the First Interim Application for Fees. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball LLP, Counsel for the Debtors-in-Possession, makes a First Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period May 14, 2013 through June 19, 2013. The order of the court approving employment of counsel was entered on June 10, 2013.

Description of Services for Which Fees Are Requested

Case Administration: Counsel spent 17.6 hours in this category for total fees of \$3,486.50. Counsel conducted the reorganization without the appointment of a trustee or examiner, other than Mr. Johnson; provided legal advice concerning the administration of the case; provided information to Chapter 12 Trustee; and prepared files and schedules and statement of financial affairs.

Asset Disposition: Counsel spent 0.2 hours in this category for total fees of \$70.00. Counsel reviewed the court's order approving the motion to Approve Agreement.

Meetings/Communications with Creditors: Counsel spent 0.2 hours in this category for total fees of \$53.00. Counsel prepared for and attending the meeting of creditors.

Fee/Employment Applications: Counsel spent 10.10 hours in this category for total fees of \$1,752.50. Counsel prepared application for order authorizing employment of Counsel as attorneys for Debtors and supporting documents; prepared application for employment of accountants and supporting documents; reviewed order authorizing employment of Kathleen Klein as accountant.

Assumption/Rejection of Leases and Contracts: Counsel spent 7.7 hours in this category for total fees of \$1,706.50. Counsel communicated with Debtors and CSC regarding assumption of cherry packing agreement and additional draws to complete 2013 harvest; prepared Motion to Assume and supporting documents.

Non-Working Travel: Counsel spent 3.5 hours in this category for total fees of \$612.50. Counsel traveled to and from Sacramento for the Meeting of Creditors.

Financing/Cash Collateral Issues: Counsel spent 10.4 hours in this category for total fees of \$2,429.50. Counsel prepared Motion for Order Authorizing Use of Cash Collateral; prepared for and attending hearing on the Motion to Assume; prepared amendment to grower agreement; communicated with court personnel regarding need for entry of order; and conducted research on validity of deed of trust as perfection to lien against crop.

Tax Issues: Counsel spent 0.3 hours in this category for total fees of \$79.50. Counsel communicated with Debtors and accountant regarding preparation of tax returns.

Bankruptcy Litigation: Counsel spent 0.2 hours in this category for total fees of \$53.00. Counsel prepared and filed notice of stay proceedings in Waterford Irrigations v. Romero lawsuit.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

- (A) the time spent on such services;
- (B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that Counsel's services rendered a successful assumption of lease and other services for the benefit of the Estate. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$350.00/hour and \$175.00/hour for counsel Hagop Bedoyan for 12.90 hours; \$265.00/hour for counsel Jacob Eaton for 14.6 hours; \$265.00/hour for counsel Christian Jinkerson for .8 hours; \$150.00/hour for a law clerk for 1.0 hours; \$125.00/hour for paralegal work at 14.8 hours; and \$105.00 for paralegal work for 2.3 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided.

Total first interim professional fees for Counsel are allowed pursuant to 11 U.S.C. § 331, which are subject to final review pursuant to 11 U.S.C. § 330, in the amount of \$10,225.00. The court commonly authorizes the payment of 75% of the fees on an interim basis, which is \$7,668.75, from the available funds of the Estate in a manner consistent with the order of distribution in this Chapter 12 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$239.36 for travel (\$194.36), parking (\$8.00) and court teleconference (\$37.00). The court is unable to discern what "court teleconference" refers to, but this court does not generally allow the recovery of court call expenses on the theory that generally counsel use the Court Call service to make themselves more competitive in a larger geographic area. For those counsel, the Court Call service is akin to having phones in the office, legal resources, a desk and chair. This cost is therefore disallowed. The total costs in the amount of \$202.36 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 12 case.

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

Attorneys' Fees	\$10,225.00
Costs and Expenses	\$ 202.36

For a total interim allowance of \$10,427.36 in Attorneys' Fees and Costs in this case.

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

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

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

IT IS ORDERED that Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball LLP is allowed the following fees and expenses as a professional of the Estate:

Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball LLP,
Counsel for the Estate
Applicant's Fees Allowed in the amount of \$ 10,225.00
Applicants Expenses Allowed in the amount of \$ \$202.36 ,

IT IS FURTHER ORDERED that the Application is denied as to \$37.00 in expenses, with without prejudice.

IT IS FURTHER ORDERED that this is a interim allowance of fees and the Chapter 12 Trustee is authorized to pay \$7,668.75 of the allowed fees and \$202.36 of the allowed expenses from the available funds of the Estate in a manner consistent with the order of distribution in this Chapter 12 case.

IT IS FURTHER ORDERED that this is an interim award of fees pursuant to 11 U.S.C. § 331, which are subject to final review and allowance pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

10. [12-91442-E-11](#) ALEXANDRINO/DURVALINA
PD-1 VASCONCELOS
Thomas O. Gillis

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

CONT. FROM 8-1-13

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

Correct Notice Provided. The court continued the hearing for supplemental pleadings and notice to be provided to the Debtors in Possession and U.S. Trustee. Movant failed to file a Proof of Service with the Motion. The court is unable to determine if proper notice and service were provided to the proper parties.

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

The court's decision is to grant the Motion to Approve Stipulation. No appearance at the August 22, 2013 hearing is required.

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

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

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

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

DISCUSSION

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

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

(1) Motion; Service.

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

(i) an agreement to provide adequate protection;

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

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

(iv) an agreement to use cash collateral; or

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

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

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

(3) Disposition; Hearing. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than seven days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

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

De Facto Plan Terms

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

CONTINUANCE

The court continued the hearing on the Motion to Approve Stipulation to allow Movant to file and sever supplemental pleadings on or before August 15, 2013.

SUPPLEMENTAL PLEADINGS

Movant filed a supplemental motion for approval of the stipulation on August 15, 2013. Movant provides the sufficient information as required under Federal Rule of Bankruptcy Procedure 4001(d)(1)(A)(i) & (iii).

Movant also filed Exhibit A, "Stipulation Re: Treatment of Claim Under Debtors' Proposed Chapter 11 Plan of Reorganization."

Movant having sufficiently addressed the court's concerns from the prior hearing in the supplemental pleadings, the court grants the Motion to Approve Stipulation.

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

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

The Motion to Approve Stipulation filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and court approves the Stipulation, filed as Exhibit A, Dckt.160, between Debtors in Possession and Wells Fargo Bank, N.A.

11. [13-90643-E-12](#) GARY/CHRISTINE TAYLOR
ADJ-5 Anthony D. Johnston

CONTINUED MOTION FOR APPROVAL
OF ASSUMPTION OF UNEXPIRED
LEASE
7-17-13 [[59](#)]

CONT. FROM 8-1-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 17, 2013. By the court's calculation, 36 days' notice was provided. 21 days' notice is required.

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

The Motion for Approval of Assumption of Unexpired Lease is granted. No appearance required.

Debtors move the court for approval of the assumption of the unexpired agricultural ground lease. Debtors state that they and Gregory J. Milliken and Janice K. Milliken (Landlords) entered into a written agricultural ground lease agreement for approximately nineteen (19) acres on Landlord's real property commonly known as 12119 Doerksen Road, Denair, Stanislaus County, California. The term of the lease is from August 1, 2011 through December 31, 2031, with an option for Debtors to extend for five (5) years.

Pursuant to the lease, Debtors state that they have planted an almond orchard on the property at considerable expense. Debtors state that pursuant to section 7.a. of the lease, Landlords shall receive rent commencing with the 2016 crop year in the amount equal to 20% of the gross almond crop proceeds, including, if applicable, quality premiums or penalties, and profit sharing or retains, from the almond crops produced on the property. No rent shall be due or payable by Debtors to Landlords prior to the 2016 crop year.

Debtor filed a plan of reorganization on July 3, 2013, to continue farming operations, including farming on the real property. Debtors state

there have not been any defaults under the Lease and the future income which will be produced by the almonds grown on the property afford adequate assurance of future performance under the lease. Debtors filed a Agreement for Debtors' Assumption of Agricultural Ground Lease on July 24, 2013, Dckt. 73.

11 U.S.C. § 365(a) provides that the trustee, subject to court approval, may assume any unexpired lease of the debtor. The Debtors in this Chapter 12 case have the same rights and duties in which a trustee would have under Chapter 11, pursuant to 11 U.S.C. § 1203. Thus, the Debtors have authority to bring this motion.

The court uses the business judgment standard to determine whether to approve assumption of a unexpired lease. *G.I. Industries*, 204 F.3d 1276 (9th Cir. 2000). *In re Pomona Valley Medical Group*, adopted the nonbankruptcy form of the business judgment rule: In reviewing a rejection motion, the bankruptcy court should presume that the debtor in possession "acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate." 476 F.3d 665, 670 (9th Cir. 2007).

Based on a review of the contract, the proposed plan of reorganization, the agreement filed by the Landlords, and no opposition filed, the court grants the Motion and the assumption of the unexpired lease is approved

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 Approval of Unexpired Lease filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the assumption of the unexpired lease, as stated in Exhibit A, Dckt. 62, is approved.

12. [12-90756-E-7](#) LORENZO HERNANDEZ
ADJ-7 Raymond V. Sweeny

MOTION FOR COMPENSATION FOR
ATHERTON AND ASSOCIATES, LLP,
ACCOUNTANT(S), FEES: \$1,081.00,
EXPENSES: \$0.00
7-15-13 [[105](#)]

DISCHARGED 8-28-12

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 15, 2013. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

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

The [Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Michael D. McGranahan, Chapter 7 Trustee moves the court for allowance of compensation for accounting services rendered to the estate by Atherton & Associates, LLP, Certified Public Accountants ("Accountant"). The period for which the fees are requested is for the period April 23, 2013 through May 17, 2013. The order of the court approving employment of counsel was entered on May 13, 2013.

Description of Services for Which Fees Are Requested

Correspondence: Accountant spent 0.5 hours in this category. Accountant obtained information necessary for preparation of the federal and state fiduciary tax returns.

Tax Preparation: Accountant spent 3.7 hours in this category. Accountant prepared federal and state fiduciary tax returns for the bankruptcy estate.

Fee Application: Accountant spent 0.5 hours in this category. Accountant prepared a draft fee application, in which counsel used to prepare this fee applicaiton.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

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

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958

(9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Accountant was hired to file federal and state fiduciary tax returns because this was an asset case with the sale of personal property for the benefit of the Estate. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$230.00/hour for Accountant for 4.7 hours. The court finds that the hourly rates reasonable and that Accountant effectively used appropriate services and rates for the services provided. The total accountant fees in the amount of \$1,081.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Accountants' Fees	\$1,081.00
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The court shall issue a minute order substantially in the following form holding that:

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

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

Expenses in this case. The period for which the fees are requested is for the period May 14, 2012 through July 24, 2013. The order of the court approving employment of counsel was entered on May 31, 2012.

Description of Services for Which Fees Are Requested

Asset Analysis and Recovery: Counsel spent 13.4 hours in this category. Counsel filed a motion for turnover of bee boxes when Debtor refused to turn them over which resulted in a compromise agreement. The Debtor rendered his 2008 Ford F350, which was sold for \$12,365.00, and Debtor delivered to the Trustee \$2,000.00 for the benefit of the estate. Counsel evaluated whether Debtor's rental property had equity to benefit the estate.

Asset Disposition: Counsel spent 2.1 hours in this category. Counsel prepared the motion for authorization to sell the Ford and ancillary documents, and appeared at the hearing.

Case Administration: Counsel spent .2 hours in this category. Counsel reviewed the Debtor's amended schedules B and C.

Fee and Employment Applications: Counsel spent 7.4 hours in this category. Counsel prepared the necessary motion and supporting documents to obtain approval for the Trustee to employ him; prepared the motion for allowance of compensation for Trustee's CPA; and prepared this motion for allowance of compensation. Counsel will appear at the hearing on these motions.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that Counsel's services rendered a successful compromise agreement which included the sale of the Ford vehicle for the benefit of the Estate. The estate has \$14,365.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$250.00/hour for counsel for 23.1 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$5,775.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$240.74 for copies at \$.10 per page and postage. The total costs in the amount of \$240.74 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	\$ 5,775.00
Costs and Expenses	\$ 240.74

For a total final allowance of \$6,05.74 in Attorneys' Fees and Costs in this case.

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

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

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

IT IS ORDERED that Johnston & Johnston Law Corp. is allowed the following fees and expenses as a professional of the Estate:

Johnston & Johnston Law Corp., Counsel for the Estate
Applicant's Fees Allowed in the amount of \$ 5,775.00
Applicants Expenses Allowed in the amount of \$ 240.74,

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

14. [08-90957-E-7](#) **POWER GENERATION AND ENGINEERING, INC.** **MOTION FOR COMPENSATION BY THE LAW OFFICE OF NEUMILLER & BEARDSLEE FOR MICHAEL R. TENER, TRUSTEE'S ATTORNEY(S), FEES: \$11,0474.74, EXPENSES: \$0.00**
CWS-22 **David C. Johnston** **7-19-13 [433]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Second Interim and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Neumiller & Beardslee, A Professional Corporation, Counsel for the Trustee, makes a Second Interim and Final Request for the Allowance of Fees and Expenses in this case. Counsel previously submitted an interim application for compensation on June 14, 2013, which the court approved in the total amount of \$105,556.96 on June 18, 2013. The period for which the fees are requested is for the period June 13, 2012 to date. Counsel seeks additional fees and costs in the amount of \$4,917.84, for total compensation in the amount of \$110,474.74.

Description of Services for Which Fees Are Requested

Communications with the Trustee and Third Parties: Counsel spent .4 hours in this category for total fees of \$100. Counsel communicated with the Trustee and third parties concerning the case.

Stanislaus County Tax Claims: Counsel spent 7.6 hours in this category for total fees of \$1,937.50. Counsel assisted the Trustee in disputing and reaching a negotiated compromise over Claim Nos. 42, 118, and

120 filed by the Stanislaus County Tax Collector. The compromise reduced a \$37,021.74 priority claim to a \$19,905.54 claim, of which only \$10,820.36 will receive priority.

Fee Application: Counsel spent 8.0 hours in this category for total fees of \$2,037.50. Counsel prepared this fee application.

Miscellaneous: Counsel spent 1.4 hours in this category for total fees of \$350.00. Counsel assisted the Trustee with Miscellaneous matters.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

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

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

August 22, 2013 at 10:30 a.m.

- Page 50 of 84 -

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

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

Id. at 959.

Appearing that after this application for fees, upon distribution and successful recovery of assets of the estate for the benefit of the Estate, Counsel's representation was reasonable. As set forth in counsel's motion for fees, the Trustee has recovered \$660,718.39 for the estate, and so far has disbursed \$169,154.30. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$325.00/hour for counsel Clifford W. Stevens for 1.0 hours and \$250.00/hour for counsel Michael R. Tener for 250.00 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$4,425.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$492.84 for copies (\$252.80), mileage (\$42.72) and postage (\$197.32). The total costs in the amount of \$492.84 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	\$4,917.84
Costs and Expenses	\$ 492.84

The Trustee is authorized to pay, for a total final allowance of \$110,474.74 in fees and costs in the case, which includes the previously allowed amount of 105,556.96.

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

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

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

IT IS ORDERED that Neumiller & Beardslee, A Professional Corporation is allowed the following fees and expenses as a professional of the Estate:

Neumiller & Beardslee, A Professional Corporation, Counsel for the Estate
Applicant's Fees Allowed in the amount of \$ 4,917.84
Applicants Expenses Allowed in the amount of \$ 492.84,

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

15. [10-94457-E-7](#) MICHEL/KHANNA SARO
SSA-11 Steven S. Altman

MOTION TO EXTEND DEADLINE TO
FILE SCHEDULES OR PROVIDE
REQUIRED INFORMATION
8-5-13 [[154](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 5, 2013. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Extend Deadline to File Schedules was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Extend Deadline to File Schedules. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtors Michael and Khanna Saro move the court for an order extending the time within which to file the amended Means Test (Form 22A), pursuant to 11 U.S.C. § 521 and Federal Rule of Bankruptcy Procedure 1007. The Debtors converted their Chapter 13 to Chapter 7 on July 22, 2013. A meeting of creditors is scheduled for August 20, 2013. The last day by which to file an application to extend the time to file the amended means test is August 5, 2013.

Counsel for Debtor is currently out of the country and unable to prepare and submit to the court the amended means test and the Debtor requests the deadline be extended to August 22, 2013 to allow counsel time to prepare and file the necessary documents.

A review of the court docket shows that a Chapter 7 Statement of Current Monthly Income and Means Test Calculation was filed by the Debtor on August 12, 2013. Dckt. 159.

TRUSTEE'S OPPOSITION

Trustee Michael D. McGranahan, Chapter 7 Trustee vigorously opposes Debtor's attempt to covert the present case. Trustee argues that under 11 U.S.C. § 1307(c) (2) Debtor does not qualify for conversion because she has engaged in a pattern and practice of bad faith. Debtor's schedules also show an inability to confirm a viable Chapter 13 plan.

The Trustee states that for the better of the last four months, he has sought unsuccessfully the assistance of Debtor and her counsel to answer questions relative to the bankruptcy estate, including the real property at 1441 103rd Street, Oakland, California.

Here, the Debtors' case has not previously been converted and Debtors qualify for relief under Chapter 13. Notice was provided to the Chapter 7 Trustee, Office of the United States Trustee, and other interested parties. No opposition has been filed. Trustee contends that Debtor and her counsel's refusal to cooperate with the Trustee in his investigation of Debtor's affairs, the Trustee brought a Motion to Extend the Deadline to Object to Debtor's Discharge which was granted.

The Trustee argues that a debtor's right to convert a Chapter 7 case to Chapter 13 is not absolute within the meaning of 11 U.S.C. § 1307(c) and may be forfeited upon a finding of bad faith. The Trustee states bad faith should be determined by several factors as set forth in *In re Armstrong*, 409 B.R. 629, 634 (Bankr. E.D.N.Y. 2009). Trustee states that bankruptcy judges have broad discretion to determine whether the conduct rises to the level that would result in an abuse of process and warrant denial of the conversion.

Trustee argues that Debtor initially referenced the subject Oakland property to be jointly owned between herself and her mother. After the Trustee became interested in the property, she later amended her schedules to reflect she was only a 1/3 interest owner. Trustee also argues the Debtor's valuation of the subject property was misleading, as she referenced her interest was only worth \$54,996, while the Trustee states the property actually has a much higher value, at least \$150,000 if not more. Trustee states that he is in the process of engaging a real estate agent.

Trustee also argues that while Debtor states she has disposable income to propose a confirmable plan, Debtor's income after expenses is a negative \$15.00.

Trustee argues that Debtor's failure to cooperate with him in securing further information from Debtor as to her ownership interest, access to other family members to discuss the property, Debtor's refusal to respond to inquiries by the Trustee concerning her tax refund, Debtor's misstatements of both the characterization of the property in her schedules and the nature of her interest in the property and her statements about her ability to fund a plan to benefit unsecured creditors which is false and/or misleading, show a pattern and practice of bath faith to warrant a denial of Debtor's conversion motion before the court.

DISCUSSION

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). The Supreme Court held in *Marrama* that a ruling that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of prepetition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13. *Id.* at 374. The court stated that this individual, in other words, is not a member of the class of honest but unfortunate debtors that the bankruptcy laws were enacted to protect. *Id.*

Here, Trustee has shown sufficient bad faith on the part of Debtor when she failed to cooperate with him in regards to information regarding real property, tax refund and her misstatements in her schedules.

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

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

The Motion to Convert 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 Convert is denied without prejudice.

17. [11-90266-E-13](#) **JOHNNY/TAMARA MATTHEWS** **MOTION TO CONVERT CASE FROM**
DCJ-2 **David C. Johnston** **CHAPTER 11 TO CHAPTER 13**
7-26-13 [[249](#)]

Final Ruling: The case was previously converted to a Chapter 13 on the U.S. Trustee's Motion on August 8, 2013. Dckt. 256. This renders the present Motion to Convert moot. No appearance required at the August 22, 2013 hearing.

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

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

The Motion to Convert the Case to one under Chapter 13 filed by the Debtors having been presented to the court, the court having previously converted the case to one under Chapter 13 pursuant to a motion of the U.S. Trustee, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is moot, and the matter is removed from the calendar.

18. [10-94467-E-7](#) TINA BROWN CONTINUED MOTION FOR CONTEMPT
CWC-4 Michael R. Germain 7-11-13 [[63](#)]

DISCHARGED 2-22-11

CONT. FROM 8-8-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Tim Brown, Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for the Court to Issue an Order to Show Cause why Tim Brown should not be held in contempt or subject to other sanctions is xxxxxx.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

The Chapter 7 Trustee, Michael D. McGranahan, moves the court for an Order to Show Cause why Tim Brown should not be adjudged in civil contempt for failing and refusing to comply with the Judgment of the court. The Trustee states that the court entered judgment in Adversary Proceeding No. 12-09003 against Tim Brown determining that the following vehicles are property of the bankruptcy estate with a total value of \$42,915.00, which must be turned over by Mr. Brown to the Trustee on or before December 31, 2013:

(a) 1997 Harley Davidson Red Fat Boy Motorcycle, VIN ending in 32282;

(b) 2008 Harley Davidson Cross Bones Motorcycle, VIN ending in 40575; and

(c) 2007 Chevrolet Corvette Automobile, Licence No. 5XYR543, VIN ending in 33800.

The Trustee states that he has made repeated requests to Mr. Brown and his counsel seeking compliance with the Judgment for the turnover of the property, but Mr. Brown has failed and refused to turn over the vehicles.

Additionally, the Trustee states he has incurred attorney's fees in the amount of \$1,593.56 in fees and expenses incurred in employing his counsel to enforce the Judgment.

DISCUSSION

Bankruptcy Courts have the jurisdiction to impose sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-49 (9th Cir. 2004). The court also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see also 11 U.S.C. § 105(a).

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience to a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemtor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Lehtinen*, 564 F.3d at 1058. However, the court cannot issue punitive sanctions pursuant to its power to regulate the attorneys or parties appearing before it. *Id.* at 1059.

Here, the Trustee has shown that Time Brown has failed to comply with the court's Judgment order to turn over the personal property described above. Tim Brown has failed to respond to the Motion as required under Local Bankruptcy Rule 9013-1(f) (1).

CONTINUANCE

The court continued the hearing to issue an order requiring Tim Brown to appear in person at continued hearing on August 22, 2013. The Trustee provided notice of the continued hearing to the court's regular law and motion date for the Modesto Division Courthouse. Dckt. 74.

The court issued an order for Tim Brown to appear in person at the continued hearing, with no telephonic appearance permitted.

The court further ordered that if Time Brown fails to appear, the court shall issue corrective sanctions (in addition to such sanctions as warranted under the present Motion), which may include,

1. \$1,000.00 in corrective monetary sanctions,
2. Ordering the Tim Brown to appear at a further continued hearing, with the failure to do so the

basis for the court issuing further corrective sanctions in the amount of \$2,000.00, and

3. Issuing an order for the U.S. Marshal to take Tim Brown into custody, present him before the court, and hold him in custody until he delivers the items as ordered by the court to the Chapter 7 Trustee.

At the hearing, xxxx

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 Contempt filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is xxxx.

19. [12-91069-E-7](#) BALBIR BHATTI MOTION TO AVOID LIEN OF CAPITAL
GSR-2 Gurjeet S. Rai ONE BANK (U.S.A.), N.A.
7-16-13 [23]

DISCHARGED 7-30-12

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on July 16, 2013. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

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

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

A judgment was entered against the Debtor in favor of Capital One Bank (U.S.A.), N.A. for the sum of \$4,302.04. The abstract of judgment was recorded with Stanislaus County on January 30, 2012. That lien attached to the Debtor's residential real property commonly known as 3536 Dry Creek Drive, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$162,100.00 as of the date of the petition. The unavoidable consensual liens total \$232,859.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$1.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

the Debtor's residential real property commonly known as 3536 Dry Creek Drive, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$162,100.00 as of the date of the petition. The unavoidable consensual liens total \$232,859.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$1.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

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

IT IS ORDERED that the judgment lien of Capital One Bank (USA), N.A., Stanislaus County Superior Court Case No. 666574, Document No. 2012-0010279, recorded on January 5, 2012, with the Stanislaus County Recorder, against the real property commonly known as 3536 Dry Creek Drive, Modesto, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

21. [12-92570-E-12](#) COELHO DAIRY
TOG-11

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH BLACK ROCK
MILLING
7-22-13 [[171](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 22, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Compromise. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor moves the court to approve the mediated settlement of claim #24-1 filed by Black Rock Milling. Debtor asserts the settlement calls for a down payment of \$50,000 by May 10, 2013 and payments of \$3,400 per month for sixty months. The note is to be secured by a second mortgage on the real property located at 4500 Langworth Street, Oakdale, California. This settlement was negotiated with attorneys present at a scheduled mediation conducted by attorney John Harris. Debtor argues that the settlement is fair to all creditors and beneficial to the estate and resolves a active civil lawsuit brought by Black Rock Milling.

BLACK ROCK MILLING OPPOSITION

Creditor Black Rock Milling Co. ("Black Rock") opposes Debtor's Motion on the grounds that Debtors breached the settlement agreement and that it is no longer enforceable, which means Black Rock is now entitled to full repayment of the outstanding debt.

Black Rock asserts that its claim arises from a written contract for providing feed to Debtors in exchange for payment. Debtors failed to pay for the goods. Black Rock then filed a complaint in Stanislaus Superior Court for breach of contract seeking \$332,608.51 in damages. On March 22, 2013, Black Rock and Debtors went to mediation in an attempt to resolve the litigation prior to trial and an agreement was reached signed by all parties. The agreement called for Debtors to make a payment of \$50,000.00

to Black Rock by May 10, 2013, and Debtors were to begin to pay Black Rock \$3,400.00 a month for 60 months. Black Rock states that none of these payments were made despite being almost three months after the payment deadline.

Black Rock stated that it agreed to take a reduced amount based on Debtor's promise to pay a lump sum by May 10, 2013 and made plans to use the payment to satisfy outstanding debts with its own creditors. Black Rock states it now has been sued for its inability to pay its debts as a result of Debtors failure to make timely payments.

Black Rock asserts that Debtor's failure to make a payment was a condition precedent to the settlement agreement, which makes the agreement unenforceable.

BANK OF THE WEST'S OPPOSITION

Creditor Bank of the West ("BOTW") filed a limited opposition, stating that Debtor is already in breach of the settlement agreement by not remitting payment to Black Rock. BOTW asserts that if the settlement agreement is now approved, Black Rock will immediately have the right to a judgment against Debtor, which is not in the best interests of the Debtor or creditors other than Black Rock. The settlement agreement does not contain an agreement allowing Debtor to cure the default.

BOTW also argues that Debtor is unable to comply with the settlement agreement without the court's approval of post-petition financing. BOTW argues that the Motion for Post-Petition financing is fatally deficient as it does not include a copy of the credit agreement.

BOTW additionally argues that the settlement motion lacks the required information as the Motion provides no analysis of the litigation or why the proposed settlement is reasonable.

Lastly, BOTW states that the settlement motion is overdue, as the settlement was reached on March 22, 2013 and Debtor filed this motion over four months later.

DEBTOR'S REPLY

Debtor responds, stating that since the settlement agreement is not irreparably broken and can be repaired, the breach is not material. Debtor argues the delay in initiating settlement payments three months late does not rise to a material breach.

Debtor also argues that it has continually made a good faith effort to comply with the deadline imposed for the initiation of payments to Black Rock in furtherance of settlement. Debtor states the delay was caused by a lender extending assurances to the debtor that the loan was going to committee and that the likelihood of approval was high. Debtor states while he missed the deadline, he is now ready, willing and able to immediately perform, with payment of the entire down payment and the overdue installment payments.

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 Construction)*, 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 Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (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); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Here, the Debtor fails to provide sufficient information in the pleadings for the court to determine if the proposed settlement agreement is reasonable. Debtor has not provided any legal authority or discussion regarding the settlement agreement.

Furthermore, Debtor failed to state that it was already in material breach of the settlement agreement, by failing to make the initial \$50,000 payment by the May 10, 2013 deadline and three additional monthly payments of \$3,400.00. The court does not find this to be a non-material breach.

Based on the foregoing, 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 Compromise filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 22, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Incur Debt. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor seeks an order to obtain a post-petition financing loan to use to pay Black Rock Milling, Co. to settle a pending lawsuit. Debtor asserts the following loan provisions:

- A. Borrowers: Frank & Bernadette Coelho
- B. Lenders: Manuel Martins Dairy, LP
- C. Commitment: \$50,000
- D. No prepayment penalty
- E. Interest: 0
- F. Availability: Debtor has no other source for funding other than a hard money loan at high interest
- G. Maturity Date: 6 months from date of loan
- H. Priority: Deed of Trust first position on Frank Coelho's real property of 32.89 acres located on Claribel Road, Oakdale, California (not part of the assets of the estate)
- I. Payments: No monthly payments. The entire balance will be due and payable 2 years from close of escrow.
- J. Disclosure: the lender's owner is a relative of the Debtor

BANK OF THE WEST'S OPPOSITION

Creditor Bank of the West ("BOTW") opposes the motion for post-petition financing on the grounds that Debtor did not attach the credit agreement to the financing motion as required by Federal Rule of Bankruptcy Procedure 4001(c) (1) (A).

BOTW also argues that the alleged terms of the credit agreement are contradictory and are contradicted by a Declaration submitted by the Debtor in support of the Motion to Approve Settlement Agreement. BOTW states that the financing motion lists the maturity date of the loan as 6 months from the date of the loan, but also states that the entire balance will be due and payable 2 years from the close of escrow. Further, BOTW states that the Debtor provides that the loan provides for no interest but the declaration provided by Frank Coelho in support of the Motion to Approve Settlement states that he is capable of making interest payments on the proposed loan.

Lastly, BOTW states that the Debtor settlement has not been approved, and if it is not approved, then there is no purpose for Debtor's financing motion.

DISCUSSION

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c) (1) (B). Moreover, a copy of the agreement must be provided to the court. *Id.* at 4001(c) (1) (A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

Here, Debtor has not provided a copy of the agreement to the court as Federal Rule of Bankruptcy Procedure 4001(c) requires. Additionally, it does not appear that Debtor is the entity seeking to enter into the loan, as Debtor states it is Frank & Bernadette Coelho who are borrowers on the loan, rather than Coelho Dairy, the Debtor in this case.

Reply Pleading Filed By Debtor

On August 15, 2013, the Debtors filed a Reply Pleading and a copy of a proposed note and deed of trust. Exhibit C, Dckt. 213. The basic terms of the Note are:

- A. \$50,000.00 loan.
- B. Principal payment due February 1, 2014 (five month term of Note).
- C. If not paid by February 1, 2014, interest will accrue at the rate of 5% per annum on the unpaid balance.

- D. The Note is executed by Frank R. Coelho, Jr. And Bernadette M. Coelho.
- E. The Note is secured by a deed of trust against 32.89 acres of property on Claribel Road, Oakdale, California (APN 014-049-005). The Deed of Trust is provided by Frank R. Coelho, Jr. And Bernadette M. Coelho.

The court is unsure why it is being asked to approve a loan being obtained by Frank Coelho and Bernadette Coelho. Coelho Dairy, the Debtor in Possession is not borrowing the money. Coelho Dairy is a partnership, for which Frank and Bernadette Coelho, Mary Coelho, and Mary Coelho, Trustee of the Frank R. Coelho Living Trust are partners. Statement of Financial Affairs, Answer to Question 21. Dckt. 12 at 37.

Furthermore, the Debtor in Possession does not address the reasonableness of incurring debt. As the court denied the Motion to Approve Settlement Agreement, the loan does not appear necessary at this time.

Based on the foregoing, 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 Incur Debt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

23. [12-92479-E-12](#) DAVID/ESPERANZA AGUILAR MOTION TO VALUE COLLATERAL OF
NFG-1 Nelson F. Gomez ONEWEST BANK, FSB
7-11-13 [[38](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 12 Trustee, respondent creditor, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to continue the hearing on the Motion to Value to 10:30 a.m. on September 26, 2013. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor seeks to value the collateral securing Debtor's indebtedness to OneWest Bank, FSB on Debtor's first mortgage and deed of trust on the business real property commonly known as 5001 W. Monte Vista Avenue, Denair, California. The motion is accompanied by the Debtor's declaration. The Debtor seeks to value the property at a fair market value of \$81,260.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. See Fed. R. Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor also offers the Declaration of Jose L. Valencia, a licensed real estate broker, who opines that the value of the property is \$81,260.00.

CREDITOR'S OPPOSITION

Creditor Deutsche Bank National Trust Company, as Trustee of Indymac Loan Trust Mortgage Backed Certificates Series 2004-11 Under the Pooling and Servicing Agreement Dated June 1, 2004, as serviced by OneWest Bank, FSB opposes the Debtor's Motion to Value. Creditor filed Proof of Claim No. 1 in the amount of \$179,923.80, including an arrearage.

Creditor believes that the value of the property is \$150,000.00. Creditor offers the Declaration of David Tafolla Aguilar, a licensed real estate agent with 14 years' experience, who opines that the value of the property is \$150,000.00.

Creditor seeks a continuance to procure an appraisal or other expert evaluation of the property.

The hearing on the Motion to Value is continued to 10:30 a.m. on September 26, 2013 to allow the parties to obtain appraisals on the subject real property.

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

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

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

IT IS ORDERED that the hearing on the Motion to Value is continued to 10:30 a.m. on September 26, 2013.

24. [13-90683-E-7](#) DONALD/REBECCA PRICE MOTION TO AVOID LIEN OF
RLF-1 Shane Reich CITIBANK, N.A.
7-11-13 [[14](#)]

DISCHARGED 7-23-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee and respondent creditors on July 11, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

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

A judgment was entered against the Debtor in favor of Citibank, N.A. for the sum of \$4,234.66. The abstract of judgment was recorded with Calaveras County on March 22, 2012. That lien attached to the Debtor's residential real property commonly known as 3082 Bow Drive, Copperopolis, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$55,000.00 as of the date of the petition. The unavoidable consensual liens total \$71,319.35 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of \$8,000.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

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

IT IS ORDERED that the judgment lien of Citibank, N.A., Calaveras County Superior Court Case No. 11CF10230, Document No. 2012 3568, recorded on March 22, 2012, with the Calaveras County Recorder, against the real property commonly known as 3082 Bow Drive, Copperopolis, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

25. [13-91086-E-7](#) VICENTE RAMIREZ CASAS AND MOTION TO COMPEL ABANDONMENT
JDP-1 MARIA RAMIREZ 7-22-13 [[13](#)]
James Pitner

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, all creditors and Office of the United States Trustee on July 22, 2013. By the court's calculation, 31 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Abandon Real Property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

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

Here, the property is a small janitorial franchise named "Coverall Health-Based Cleaning System." Debtor states this business has no marketable value outside of Debtors' own efforts. This business is Debtors' main occupation at the present time and Debtors state they have invested substantial resources, time and energy into the business and wish to keep operating at the present time.

Debtors ask that the following assets be abandoned:

A. The business name "Coverall Health-Based Cleaning System;"

- B. The checking and savings accounts with Wells Fargo Bank with account ending in 4031, which has approximate balance of \$400.00;
- C. Accounts receivable owed to the business in the amount of \$300;
- D. And cleaning supplies and mops worth about \$100.

Debtor asserts the janitorial franchise operated by Debtors has a liquidation value of approximately \$20,257.00, which is fully exempt under various sections of the California Code of Civil Procedure. Debtors argue as the property is exempted, it is of inconsequential value to the bankruptcy estate and there is nothing for the Trustee to administer.

Since the value of the property is fully exempted, and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

A minute order substantially in the following form shall be prepared and issued by the court:

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

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

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the personal identified as:

- A. The business name "Coverall Health-Based Cleaning System;"
- B. The checking and savings accounts with Wells Fargo Bank with account ending in 4031, which has approximate balance of \$400.00;
- C. Accounts receivable owed to the business in the amount of \$300;
- D. And cleaning supplies and mops worth about \$100.

on Schedule B by the Debtors are abandoned to Vicente Ramirez Casas and Maria Yesenia Ramirez, the Debtors by this order, with no further act of the Trustee required.

26. [13-91189-E-11](#) MICHAEL/JUDY HOUSE
RMY-2 Robert M. Yaspan

DEBTORS' MOTION FOR ENTRY OF
INTERIM AND FINAL ORDERS (A)
AUTHORIZING THE USE OF CASH
COLLATERAL; (B) GRANTING
ADEQUATE PROTECTION SECURED
PARTIES; AND (C) SCHEDULING A
FINAL HEARING
7-23-13 [[23](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on July 23, 2013. By the court's calculation, 30 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Entry of Interim and Final Orders was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Entry of Interim Order for Debtors-in-Possession to Use Cash Collateral and set the final hearing on xxxx. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtors-in-Possession move the court for entry of an interim order and final order (a) authorizing Debtors-in-Possession to use cash collateral, (b) granting adequate protection to certain prepetition secured parties for the use of their cash collateral and (c) prescribing the form and manner of notice and setting the time for the final hearing on the Motion.

Debtors state they have pledged the rental income as collateral on the farm-rental properties located at 6231 Smith Road, Oakdale, California and 2107 South Stearns Road, Oakdale, California. Debtors assert they will be setting up cash collateral accounts for each of the properties and the income for each property will be allocated to the cash collateral account. Debtors state they anticipate all secured parties will consent to the use of cash collateral subject to Debtors continuing to pay all of the contractually due payments and subject to the following budget (with a 20% line by line potential variance):

Income	Expense	Amount
Rental Income from Smith and Triumph Properties		\$26,210.00
Other Income (Not Subject to Cash Collateral), including, but not limited to real estate commissions, Valk Care, pasture rent, Disney Store income and School Board stipend		\$4,300.00
	Payment to Petaluma	(\$6,275.72)
	Payment to AG Credit	(\$4,223.98)

	Payment to Oak Valley Community Bank	(\$1,692.88)
	Payment to Arthur and Karen House Trust (Triumph Ranch)	(\$5,516.74)
	Payment to Arthur and Karen House Trust (Smith Ranch)	(\$1,200.00)
	Expenses for Ranches	(\$1,370.00)
	Rent	(\$1,500.00)
	Utilities	(\$500.00)
	Home Maintenance	(\$25.00)
	Food	(\$500.00)
	Clothing	(\$100.00)
	Medical and Dental Expenses	(\$50.00)
	Transportation	(\$ 250.00)
	Recreation	(\$ 50.00)
	Charitable Contributions	(\$30.00)
	Life Insurance	(\$920.00)
	Health Insurance	(\$1,100.00)
	Insurance for Ranch, Auto and House	(\$2,500.00)
	Income Tax	(\$ 500.00)
	Photography Expenses	(\$ 200.00)
	Trustee Fees - Estimated	(\$ 325.00)
	Payments for Additional Dependents not Living at Home	(\$ 200.00)
	Attorneys' Fees Carve Out (Fees to be Paid Only After Court Approval)	(\$1,000.00)

The Debtors-in-Possession seek authorization to use cash collateral to pay personal expenses post-petition taxes, utilities, insurance and maintenance on the rental property pursuant to the above-referenced budget.

Debtors-in-Possession argue that the lender is adequately protected by the continued operations of the Debtors-in-Possession businesses and also protected by a replacement lien against the Debtors-in-Possession's assets.

DISCUSSION

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtor in Possession has the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. See *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

The court authorizes the use of cash collateral through XXXX, including the adequate protection payments. Only expenses relating to the property from which the cash collateral is generated may be paid with cash collateral for that property. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by the Debtor in Possession. All surplus Cash Collateral from each property shall be held in a cash collateral account and separately accounted for by the Debtor in Possession.

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 Authorize Use of Cash Collateral filed by Debtors-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 Use Cash Collateral for the payment of expenses is granted and the cash collateral may be used monthly, through and including xxxx, to pay the following monthly expenses for each specific identified property:

Income	Expense	Amount
Rental Income from Smith and Triumph Properties		\$26,210.00
Other Income (Not Subject to Cash Collateral), including, but not limited to real estate commissions, Valk Care, pasture rent, Diancy Store income and School Board stipend		\$4,300.00
	Payment to Petaluma	(\$6,275.72)
	Payment to AG Credit	(\$4,223.98)

	Payment to Oak Valley Community Bank	(\$1,692.88)
	Payment to Arthur and Karen House Trust (Triumph Ranch)	(\$5,516.74)
	Payment to Arthur and Karen House Trust (Smith Ranch)	(\$1,200.00)
	Expenses for Ranches	(\$1,370.00)
	Rent	(\$1,500.00)
	Utilities	(\$500.00)
	Home Maintenance	(\$25.00)
	Food	(\$500.00)
	Clothing	(\$100.00)
	Medical and Dental Expenses	(\$50.00)
	Transportation	(\$ 250.00)
	Recreation	(\$ 50.00)
	Charitable Contributions	(\$30.00)
	Life Insurance	(\$920.00)
	Health Insurance	(\$1,100.00)
	Insurance for Ranch, Auto and House	(\$2,500.00)
	Income Tax	(\$ 500.00)
	Photography Expenses	(\$ 200.00)
	Trustee Fees - Estimated	(\$ 325.00)
	Payments for Additional Dependents not Living at Home	(\$ 200.00)
	Attorneys' Fees Carve Out (Fees to be Paid Only After Court Approval)	(\$1,000.00)

IT IS FURTHER ORDERED that only expenses relating to the property from which the cash collateral is generated may be paid with cash collateral for that property. No use of cash collateral is authorize for any other purposes, including plan payments or use of any "profit" by the Debtor in Possession. All surplus Cash Collateral from each property shall be held in a cash collateral account and separately accounted for by the Debtor in Possession.

IT IS FURTHER ORDERED that a final hearing on the Motion for Use of Cash Collateral shall be set for xxxx.

27. [12-90696-E-7](#) CLEO PAUGH MOTION TO APPROVE PURCHASE OF
SSA-8 Brian S. Haddix BOND TO RESOLVE REMAINING
PURPORTED SECURED LIEN
CONTROVERSY FOLLOWING SALE OF
REAL PROPERTY
7-17-13 [[107](#)]

DISCHARGED 7-2-12

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors and Office of the United States Trustee on July 17, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion Approve Purchase of Bond to Resolve Remaining Purported Secured Lien Controversy. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the

matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Irma Edmonds, Trustee in this case asserts that the real property commonly known as 2100 Edsel Lane, which was subject of a Trustee's motion to Sell that occurred before this court on June 6, 2013, realized the bankruptcy estate the gross sales price of \$310,000.00. Trustee states the Starineri Family Trust was paid the full principal owed on its underlying note (\$150,000) and partial interest (\$12,000).

The Debtor and the Trustee, on behalf of the bankruptcy estate, have a continuing dispute with the Starineri Trust regarding its asserted residual lien, encumbrance or interest. The court allowed the sale to close with the net residual proceeds to be placed in a segregated account, with the Trust's claim to be adjudicated thereafter. Following the closing of sale escrow, counsel for the Trustee engaged in substantive settlement discussions. The only remaining residual lien against the sale proceeds and the remaining two residual property interest is an \$8,000 recorded deed of trust in book 9, page 32 of Stanislaus County Recorders Office in favor of Nick G. Karras and Marion Toti.

The Trustee has been working with Paula Sivla, of Paula Sliva Insurance to secure a bond, to be in operation for five years, to bond around any purported Deed of Trust claim by Nick G. Karras, Marion Toti, if a dispute should arise over the original promissory note and deed of trust against the property. The foregoing would be financed by estate money; however, the initial payment of the bond application, estimated to be under \$900, would be signed by both the Debtor and her daughter. Trustee states this would obviate the need to commence an adversary proceeding concerning the subject line or claim, which would be costly and require significant time to litigate.

The Trustee argues with the bond in place, the Trustee could move to review any residual claims, pay administrative expenses and prepare the Final Trustee's Report. The Debtor and her siblings have indicated acceptance of this proposal and course of action.

DISCUSSION

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b). Here, the Trustee is using residual funds from the sale of property for the procurement of a bond which will enable the current estate to close. The bond is to do the following:

(1) Bond around the purported \$8,000.00 claim of Nick G. Karras, Marion Toti;

(2) Be for a period of five (5) years;

(3) the cost of the bond is under \$700 and resolves the prospect of lengthy and costly litigation if not otherwise resolved by bond purchase;

(4) if the Trustee is otherwise unable to resolve this matter, -----

Based on the foregoing, the court grants the motion and authorizes the Trustee and Debtor to procure the bond.

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 Purchase of Bond to Resolve Remaining Purported Secured Lien Controversy filed by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the Trustee is authorized to pay the sum of \$900.00 to Ms. Silva to procure the bond.

IT IS FURTHER ORDERED that the Trustee and/or the Debtor and her daughter are authorized to execute any other documents necessary to consummate this transaction.

IT IS FURTHER ORDERED that this Court will retain jurisdiction to enforce the terms and conditions of the bond application and its implementation.

Nora Torres Farm Service, Inc. ("Nora Torres") has filed the present Motion for Order to Force the Sale of Property. Dckt. 728. The Motion seeks to have the court "force" James Saras and Lori Sara, the Debtors and Plan Administrators under the confirmed Chapter 11 Plan ("Debtors"), to sell the real property commonly known as 1969 Costner Road, Modesto, California ("Costner Property").

CHAPTER 11 PLAN

The Debtors' Chapter 11 Plan was confirmed on November 16, 2012 (the "Chapter 11 Plan"). The terms of the Chapter 11 Plan state that the Debtors shall sell the Costner Property and 6061 Carver Road, Modesto, California (the "Carver Property"), within 120 days after the effective date of the Chapter 11 Plan. Chapter 11 Plan Article IV, Section 1.A., Treatment of Administrative Expenses, attached to Order Confirming Chapter 11 Plan, Dckt. 665. The specific language in the Chapter 11 Plan is, "The sale [of the Costner Property and the Carver Property] is expected to occur within 120 days after the effective date of the Plan." The effective date of the Plan is defined to be the fifteenth day after the entry of the order confirming the Chapter 11 Plan, if no appeal is taken thereof. No appeal having been taken, the effective date of the Chapter 11 Plan was December 1, 2012.

While stating that the sale of these two properties was "expected" within 120 days, other terms of the Chapter 11 Plan require that the property be sold so that payments of specified claims would be made within 120 days of the effective date. These payments include, Franchise Tax Board Priority Unsecured Claim, Internal Revenue Service Priority Unsecured Tax Claim, California Employment Development Department Priority Unsecured Claim, Eva L. Saras Trust Secured Claim (to be paid by January 20, 2013), Toyota Motor Credit Secured Claim, Stanislaus County Secured Tax Claim, Ranching Crew Workers Priority Unsecured Claim, and all General Unsecured Claims. Article IV, Sections 1.B., 2.A., 2.B., and 2.C. of Chapter 11 Plan. All provisions state that the respective claims "shall" be paid within 120 days of the Effective Date of the Chapter 11 Plan.

The Chapter 11 Plan also defines what constitutes a "Material Default" under the Plan. If the Debtors fail to make two consecutive payments under the Chapter 11 Plan or perform any other obligation required under the Plan for more than 30 days after the date required under the Chapter 11 Plan, then the affected creditor may serve a written notice of default on the Debtors and Debtors' attorney. The Debtors then have 21 days to cure the default. If the default is not cured, then the Debtors are in Material Default. Chapter 11 Plan, Article IIX, ¶ 8.07.

The order confirming the Chapter 11 Plan does not alter these provisions for the sale of the Costner Property and Carver Property, and the payment of claims.

STIPULATION BETWEEN DEBTORS AND NORA TORRES

A dispute as to the amount of the Nora Torres administrative expense was resolved by stipulation after confirmation of the Chapter 11 Plan. Nora Torres and the Debtors entered into a written stipulation resolving this dispute (the "Stipulation") which was approved by the court upon *ex parte* motion. June 17, 2013 Order, Dckt. 726; Stipulation attached to Order. Under the terms of the Stipulation, Nora Torres and the Debtors agreed: (1) the Nora Torres administrative expense was fixed in the amount of \$105,000.00, (2) Nora Torres shall be paid \$20,000.00 to be applied to this administrative expense, (3) Nora Torres shall be paid \$85,000.00 from the proceeds of the Costner Property, and (4) Nora Torres may "seek an order from the Court that requires the sale of the [Costner Property] if [the Costner Property] has not already been sold or refinanced within 45 days of this Stipulation." Stipulation ¶ (1), (2), (4), and (5). The Stipulation was approved by the court on June 17, 2013. Using that as the "date of the Stipulation," the 45 days expired on August 1, 2013.

"FORCING A SALE" OR APPOINTING COURT OFFICER TO CONSUMMATE SALE

The Motion filed by Nora Torres to force the sale of the Costner Property asserts that grounds exist under the confirmed Chapter 11 Plan and Stipulation between the Debtors and Nora Torres. Motion, Dckt. 728. The Motion does not state what is meant by to "force" the sale, other than it appears that Nora Torres wants the court to conduct an auction in open court and see who shows up. Nothing is stated in the Motion as to who is responsible for seeing that the property of the Debtors is properly marketed, who is responsible for presenting an offer to the court and opine as to which offer is the best for the Debtors and creditors under the confirmed Chapter 11 Plan, and who is responsible for fulfilling the obligations of the Debtors as sellers of the Costner Property as provided for under the Chapter 11 Plan. The court is not the Plan Administrator.

The Plan requires the Debtors, as Plan Administrators, to file a motion to obtain bankruptcy court approval for the sale of the Costner Property.

MATERIAL DEFAULT UNDER CHAPTER 11 PLAN

The Chapter 11 Plan does not provide an express mechanism for substituting someone for the Debtors (as Plan Administrators) if the Debtors fail or refuse to perform the duties of the plan administrator. The Chapter 11 Plan does provide that the Debtors will be in material default under the Plan if, within 21 days of receiving notice of a default, they fail to cure the default. Here, Nora Torres has provided a notice of default, as evidenced by the Motion to Force Sale of Property, of the failure to timely sell the Costner Property. The Motion having been filed and served on August 15, 2013, the 21-day notice expires on September 5, 2013 (assuming that no evidence of an earlier notice of default is not presented to the court or that the requested 30-day default period expired prior to giving the notice).

Upon there being a material default, one of the possible outcomes is that the case may be converted to one under Chapter 7 or dismissed. 11 U.S.C. § 1112(b)(4)(N). If the court were to convert the case to one under Chapter 7, it would be the Chapter 7 Trustee who would be the real party in interest who would be responsible for the marketing and sale of the Costner Property.

Another alternative would be for the court to appoint a receiver for the limited purpose of performing the contractual obligations of the Debtors (as Plan Administrators) to sell the Costner Property as required by the confirmed Chapter 11 Plan. The Debtors have stipulated, as approved by the court, that the court may "require" that the Costner Property is sold as required under the Chapter 11 Plan.

In enacting the Bankruptcy Code, Congress restricted the appointment of receivers by the federal courts in bankruptcy cases. In 11 U.S.C. § 105(b), Congress provided, "(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title." However, this restriction has been interpreted to limit the federal court's power to use a receiver in lieu of appointing a trustee or examiner, and does not limit the appointment of a receiver as permitted by applicable law. Cases which are instructive on the proper exercise of the equitable powers by a federal judge to appoint a receiver include the following.

In re Memorial Estates, Inc., 797 F.2d 516 (7th Cir. 1986), (The appointment of a receiver for the mortgaged property -- not for the bankrupt's estate as such -- is the appointment of a regular equity receiver and is therefore subject to section 1292(a)(2). Compare our discussion of the possible applicability of section 1292(b) to bankruptcy cases in *In re Riggsby*, supra, 745 F.2d at 1156-57...

The power cut off by section 105(b) of the Bankruptcy Code is the power to appoint a receiver for the bankrupt estate, that is, a receiver in lieu of a trustee. Thus in *In re Cash Currency Exchange*, supra, where we held that U.S.C. § 1292(a)(2) is limited to equity receivers, the order sought to be appealed was the order appointing the trustee in bankruptcy, and the appellant wanted us to deem the trustee a receiver for purposes of that section. Section 105(b) is not addressed to the power of the bankruptcy court to appoint a receiver in a separate controversy between a creditor and the debtor or another creditor.

Craig v. McCarty Ranch Trust (In re Cassidy Land and Cattle), 836 F.2d 1130, 1133 (8th Cir. 1988), cert. denied 486 U.S. 1033 (1988). The power of the bankruptcy judge precluded by section 105(b) of the Bankruptcy Code is the power to appoint a receiver for the estate in lieu of a trustee. *In re Memorial Estates, Inc.*, 797 F.2d 516, 520 (7th Cir. 1986). Section 105(b) is not addressed to the power of the bankruptcy court to appoint a receiver at the request of the trustee [exercising lien rights of the estate] for the limited purpose of administering the mortgaged property pending disposition of the foreclosure proceeding.

Balakian v. Balakian, 2008 U.S. Dist. LEXIS 121067, at *49, (E.D. Cal. 2008). ("Although 11 U.S.C. § 105(b) precludes appointment of a receiver 'in a case under this title,' Section 105(b) does not preclude appointment of a

receiver in an adversary proceeding to foreclose a lien, see *In re Cassidy Land and Cattle Co., Inc.*, 836 F.2d 1130, 1133 (8th Cir.1998).")

The appointment of a receiver to take possession of and complete a required transaction under the confirmed Chapter 11 Plan, would not appear to run afoul of 11 U.S.C. § 105(b). This is not being done in lieu of the appointment of a trustee to take control of all the property of the estate, but merely to enforce the contractual terms (Chapter 11 Plan) for the marketing and sale of the Costner Property. The Debtors have agreed, as set forth in the Stipulation, that the court shall "require" that the Costner Property be sold. The Debtors and Nora Torres have left it to this court to determine how the court will enforce the plan and have the sale be completed as required in the Chapter 11 Plan and Stipulation. While the court cannot, and will not, serve as the plan administrator, a receiver may fulfill those fiduciary duties under the Chapter 11 Plan.

STATUS AND SCHEDULING CONFERENCE

The court ordered a Status Conference and for James Saras, Lori Saras, Mikalah Liviakis (the Debtors' attorney), a senior officer or manager (with authority to make decisions concerning the Motion to Force the Sale of Property) of Nora Torres Farm Services, Inc., and James Mayol (attorney for Nora Torres Farm Services, Inc. in this bankruptcy case) to appear in person.