UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

August 27, 2020 at 10:30 a.m.

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1. **19-90400-E-7** **JUSTAN JOHNSON** **MOTION FOR COMPENSATION BY THE LAW OFFICE OF BAKKEN LAW FIRM FOR LORIS L. BAKKEN, TRUSTEES ATTORNEY(S)**
BLF-6 **Steve Altman** **7-28-20 [79]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 28, 2020. By the court's calculation, 30 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

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

The Motion for Allowance of Professional Fees is granted.

Loris L. Bakken, the Attorney ("Applicant") for Gary R. Farrar, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period June 22, 2020, through August 27, 2020. The order of the court approving employment of Applicant was entered on June 29, 2019. Dckt. 21. Applicant requests reduced fees in the amount of $6,390.00 and costs in the amount of $95.90.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney

must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include assisting and providing Trustee with general case administration; prepared an agreement and provided communication regarding administration of real property; reviewed and responded to debtor's motion to dismiss; prepared and filed motion to reserve asset; prepared settlement agreement, prepared and filed a motion to compromise. The Estate has $11,500.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 6.5 hours in this category. Applicant prepared Applicant's fee agreement and employment application; drafted stipulations to extend deadlines and to file complaint objecting to Debtor's discharge; and prepared Applicant's fee application.

Efforts to Assess and Recover Property of the Estate: Applicant spent 3.5 hours in this category. Applicant prepared an agreement with Debtor regarding the refinance or sale of real property inherited by Debtor after the bankruptcy was filed.

Debtor's Motion to Dismiss: Applicant spent 14.6 hours in this category. Applicant reviewed Debtor's Motion to Dismiss; drafted Reply; communicated with Debtor's attorney and counsel for the United States Trustee in attempt to reach solution on the real property and the bankruptcy case.

Motion to Reserve Asset and Settlement: Applicant spent 23.5 hours in this category. Applicant communicated with Debtor's attorney regarding an agreement which would allow closure of the case so that Debtor could secure financing on the inherited real property. Applicant prepared and filed a motion to

reserve the asset, and prepared a joint stipulation for withdrawal of the motion to reserve the asset after an alternative resolution was made. Applicant then prepared a settlement agreement, prepared and filed a motion to approve the compromise of the dispute, and appeared by telephone at the hearing in which the Court granted the motion.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Loris Bakken	48.1	$300.00	$14,430.00
	0	$0.00	$0.00
Total Fees for Period of Application			$14,430.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $95.90 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copying	$0.10	$45.30
Postage		$50.60
		$0.00
Total Costs Requested in Application		$95.90

FEES AND COSTS & EXPENSES ALLOWED

Fees

Reduced Rate

Applicant seeks to be paid a single sum of $6,390.00 for its fees incurred for Client. First and Final Fees and Costs in the amount of $6,485.90 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $95.90 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$6,390.00
Costs and Expenses	$95.90

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Loris L. Bakken ("Applicant"), Attorney for Gary R. Farrar, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Loris L. Bakken is allowed the following fees and expenses as a professional of the Estate:
>
> Loris L. Bakken, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $6,390.00
> Expenses in the amount of $95.90
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

2. **20-90205-E-11 DL-1** | **JSL LAND COMPANY, INC.** **David Johnston** | **MOTION FOR COMPENSATION FOR WALTER R. DAHL, CHAPTER 11 TRUSTEE(S)** **7-29-20 [70]**

DEBTOR DISMISSED: 07/26/2020

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the twenty (20) largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on July 29, 2020. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Allowance of Professional Fees is granted.

Walter R. Dahl, the Chapter 11 Subchapter V Trustee ("Applicant") for the estate of JSL Land Company, Inc. ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period March 17, 2020, through August 27, 2020. Trustee was appointed as the Subchapter V Trustee on March 17, 2020. Dckt. 7. Applicant requests fees in the amount of $5,055.50 and costs in the amount of $67.50.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the Trustee exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

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

A review of the application shows that Applicant's services for the Estate include general case administration, business operation, and drafting of fee and employment applications, and review of plan and disclosure statement. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 7 hours in this category. Applicant communicated with US Trustee and Debtor's counsel; reviewed petition, schedules, and statements; prepared for and attended debtor interview and meeting of the creditors; reviewed Chapter 11 status reports and attended status conferences; reviewed proofs of claims; prepared, filed, and served response to Debtor's status report and proposed case dismissal.

Business Operations: Applicant spent 0.60 hours in this category. Applicant communicated with Debtor's counsel regarding collateral as well as with Anderson Robert's Financial regarding case issues.

Fee Employment Application: Applicant spent 4 hours in this category. Applicant prepared, filed, and served motion and supporting pleadings for first and final compensation for Subchapter V Trustee fee application and attended hearing regarding fee application.

Plan and Disclosure Statement: Applicant spent 0.70 hours in this category. Applicant reviewed draft plan of reorganization and related communications; reviewed updated Chapter 11 status report.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**

Walter R. Dahl (trustee rate)	11.3	$435.00	$4,915.50
Walter R. Dahl (paralegal rate)	1	$140.00	$140.00
	0	$0.00	$0.00
Total Fees for Period of Application			$5,055.50

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $67.50 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Court Call	$22.50	$67.50
		$0.00
Total Costs Requested in Application		$67.50

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $5,055.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Costs & Expenses

First and Final Costs in the amount of $67.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available funds of the estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Fees $5,055.50
Costs and Expenses $67.50

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Walter R. Dahl ("Applicant"), Chapter 11 Subchapter V Trustee for the estate of JSL Land Company, Inc. ("Client"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Walter R. Dahl is allowed the following fees and expenses as a professional of the Estate:
>
> Walter R. Dahl, Chapter 11 Subchapter V Trustee for the estate of JSL Land Company, Inc.
>
> Fees in the amount of $5,055.50
> Expenses in the amount of $67.50,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 for the Chapter 11 Subchapter V Trustee.

3. 18-90029-E-11 JEFFERY ARAMBEL **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION**
3 thru 4 **1-17-18 [1]**

Debtor's Atty: Matthew J. Olson

Notes:
Continued from 6/18/20

Quarterly Report filed: 7/17/20

Notice of Plan Administrator's Post-Confirmation Monthly Compensation Report for Payment of Professional Fees for Services During the Month of July 2020 filed 8/14/20 [Dckt 1188]

The Status Conference is continued to ~~2:00 p.m. on December 3, 2020.~~

AUGUST 27, 2020 POST-CONFIRMATION STATUS CONFERENCE

The Reorganized Debtor and the Plan Administrator have filed their individual Status Reports (Dckts. 1195 and 1190, respectively). The Plan Administrator reports that the Reorganized Debtor continues in the marketing of the real property as provided in the plan. The sale 224.7 acres of the Business Part property has fallen out of contract, but the Reorganized Debtor remains in control for the sale of 107 acres of the Business Park property.

It is reported that post confirmation property taxes have been paid and the pre-petition property tax obligations are being paid in the 14 installments as provided in the Plan. Those payments are current and the Plan Administrator reports that the final payment will be due in December 2020.

It is requested that the Status Conference be continued to late November or early December 2020.

At the Status Conference, **xxxxxxxxxx**

4. **18-90029-E-11** **JEFFERY ARAMBEL** **CONTINUED MOTION TO FILE CLAIM**
NAR-5 **Matt Olson** **AFTER CLAIMS BAR DATE**
12-12-19 [1067]

Final Ruling: No appearance at the August 27, 2020 Hearing is required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on December 12, 2019. By the court's calculation, 56 days' notice was provided. 28 days' notice is required.

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

Pursuant to prior Order of this court (Dckt. 1194), the hearing on the Motion to File Claim After Claims Bar Date is continued to 10:30 a.m. on October 22, 2020.

AUGUST 20, 2020 SUPPLEMENTAL STATUS REPORT AND *EX PARTE* MOTION TO CONTINUE HEARING

On August 20, 2020, Jeffrey Edward Arambel, Reorganizing Debtor, filed a Status Report requesting the court continue the hearing 60 days, to an available date in the second half of October 2020, and further proposes to file a status report not later than seven (7) days before the continued hearing. Dckt. 1193. Reorganizing Debtor asserts that both Creditor and Plan Administrator have no objection to the continuance.

MAY 13, 2020 SUPPLEMENTAL STATUS REPORT

Jeffrey Edward Arambel, Reorganizing Debtor, filed a Status Report on March 5, 2020 Dckt.1154.

A. The parties have settled upon potential BDRP mediators but scheduling has been delayed due to COVID-19. Concurrent with this report, parties filed an order to appoint the BDRP mediators.

B. To allow time for the public health situation to improve and for mediation to occur, Reorganizing Debtor requests that the scheduled hearing on the Motion be continued about 75 days, to an available date in August 2020.

C. Counsel for the Reorganizing Debtor conferred with counsel for El Che and the Plan Administrator regarding the proposed continued hearing date and understands that there is no objection to the proposed continued hearing date.

D. The Reorganizing Debtor proposes to file a status report regarding the Motion not later than seven days before the continued hearing.

On May 14, 2020, the court signed the order submitted by the parties appointing J. Russell Cunningham as the Resolution Advocate (with George C. Hollister as an Alternate) and assigning the instant motion to the Bankruptcy Dispute Resolution Program. Dckt. 1156.

FEBRUARY 5, 2020 STATUS REPORT & EX-PARTE MOTION

Jeffrey Edward Arambel, Reorganizing Debtor, filed a Status Report on March 5, 2020 Dckt.1114.

A. Consistent with the court's directives, the parties met and conferred on March 2, 2020, to attempt to resolve both the Motion and allowance of the underlying claim in a sum certain. The parties were not able to reach an agreement at that meet and confer session, but agreed to further mediation and will request referral of the matter to the Court's Bankruptcy Dispute Resolution Program ("BDRP").

B. The parties are exchanging names of potential BDRP mediators and expect to submit a joint motion for referral of this matter to the BDRP mediator within the next 14 days.

C. To allow time for the mediation to occur, Reorganizing Debtor requests that the scheduled hearing on the Motion be continued about 60 days, to May 21, 2020. While May 14 is the regular Modesto day, counsel for the Reorganizing Debtor has a conflict that day and requests that court continued the hearing to May 21, 2020.

D Counsel for the Reorganizing Debtor conferred with counsel for El Che and the Plan Administrator regarding the proposed continued hearing date and understands that there is no objection to the proposed continued hearing date.

E. The Reorganizing Debtor proposes to file a status report regarding the Motion not later than seven days before the continued hearing.

El Che Corporation, Creditor of Jeffery Edward Arambel ("Creditor") requests that the court allow Creditor's late filed claim to be treated as timely filed. Creditor filed Proof of Claim Number 38 on December 10, 2019, substantially after the claims bar date expired in this case.

The Claim is asserted to be unsecured in the amount of $541,842.32. The deadline for filing proofs of claim in this case is May 16, 2018. Notice of Bankruptcy Filing and Deadlines, Dckt. 11.

REVIEW OF THE MOTION

Creditor asserts the following:

A. Creditor filed a lawsuit in the Stanislaus County Superior Court, case number 2021033, in July 2016 for the collection of money due to it from Jeffrey Arambel, and others, arising from services Creditor provided.

B. Creditor was represented in that litigation by the Law Offices of Brunn & Flynn, ("Brunn & Flynn / Prior Counsel").

C. The notice of this bankruptcy proceeding was apparently mailed, care of Brunn & Flynn as reflected on the Debtor's March 1, 2018 amended schedules.

D. However, Brunn & Flynn did not file a claim on behalf of Creditor.

E. Creditor never received any filings from this bankruptcy court, until Brunn & Flynn filed a notice of change of address with this court on May 31, 2018, after the claims bar date.

F. On August 1, 2018, Brunn & Flynn filed a motion to be relieved as counsel from the State Court.

G. When Creditor's new counsel communicated with Brunn and Flynn as to whether or not a claim was filed, Brunn and Flynn adopted the position that it did not represent Creditor in the bankruptcy case.

H. On July 19, 2019, the Debtor filed an Amended Proposed Plan of Reorganization.

I. The Order confirming Debtor's Plan of Reorganization was entered on September 15, 2019.

J. Creditor is informed that no other distributions have been made, and this motion as well as Creditor's Proof of Claim is filed in time to permit payment of such claim without prejudice to any other creditors, nor the Debtor.

K. Creditor employed approximately 80 to 120 employees who worked on Debtor's orchards.

L. Debtor paid Creditor with checks but the checks were returned due to insufficient funds to deposit the checks for the entire amount of $112,000, and Creditor's payroll checks bounced as a result, incurring a fee to Creditor of $2,000 for insufficient funds.

M. Creditor was forced to obtain a loan to meet its payroll obligations to compensate employees, incurring significant interest charges on such loan.

N. Debtor continued to fail to pay Creditor for its services, and Creditor was forced to retain Brunn & Flynn for the purpose of filing a civil complaint for breach of contract against Debtor.

O. After trial in the state court action commenced and the state court took the matter under submission, Creditor learned that Debtor was in bankruptcy.

P. Brunn & Flynn advised Creditor it could file a motion for relief from the automatic stay to continue with the litigation in the state court matter.

R. Brunn & Flynn demanded a significant retainer that Creditor was unable to afford in order to prepare and appear for the motion for relief.

S. Creditor was not advised that Brunn & Flynn was not filing a claim in the bankruptcy case, that a claims bar date had been set, or that Creditor was required to file a proof of claim in order to preserve its claim.

T. Creditor was eventually referred to its current counsel for the purpose of filing a Proof of Claim, and pursuing the matter in bankruptcy court.

U. In the present action, Debtor did not list Creditor's address, and failed to correctly identify Creditor in his Schedules D, E/F, G, and/or H, as required by F.R.B.P. 1007(a), as Creditor's address as reflected on the invoices mailed to Debtor was not listed.

V. The bankruptcy filings were mailed to Brunn & Flynn, who subsequently advised it did not represent Creditor in this bankruptcy matter, who stated they were not retained for such purposes, and who failed to advise Creditor that it needed to file a proof of claim or of a claims bar deadline.

W. No notice of this bankruptcy proceeding was mailed to Creditor at any time prior to the claims bar deadline, until after Brunn & Flynn filed a notice of change of address listing Creditor's address following the expiration of the deadline.

X. Thus, notice was insufficient throughout the present bankruptcy to give Creditor reasonable notice of the necessity of filing a claim, nor reasonable time to file a Proof of Claim.

Y. Moreover, Federal Rule of Bankruptcy Procedure 9006(b)(1) allows the claims bar date to be extended where the failure to timely act "was the result of excusable neglect."

Z. Creditor directs the court's attention to *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, (1993) 507 U.S. 380, explaining that a court's determination of whether the neglect is "excusable" should be an equitable one, whereby a court should "tak[e] account of all relevant circumstances surrounding the party's omission." Id. at 395.

AA. Adding that courts have found excusable neglect and determined that creditors have a right to file late claims where they have not received actual notice of the bankruptcy. See, e.g., *In re Anchor Glass Container Corp.*, (2005) 325 B.R. 892, 897.

BB. In the instant case there is no danger of prejudice to the Debtor or his bankruptcy estate in deeming the Creditor's claims as timely filed because no distributions have been made pursuant to the terms of the Chapter 11 Plan of Reorganization on file with this Court, with the exception of possible payments to professionals made pursuant to motion for compensation.

CC. Moreover, the Debtor had adequate notice of this claim, due to the extensive civil litigation in the State Court Action, and the fact that Debtor filed his bankruptcy after the commencement of the trial.

DD. The Debtor was well aware of the extent and nature of the claim well before the claim was filed.

EE. Finally, Creditor did not receive any bankruptcy filings until after Brunn & Flynn filed a notice of change of address with the bankruptcy court, at which time, Creditor was unaware that the Claims Bar Date had already passed, or that a claim needed to be filed, after it had already filed litigation in the State Court, which proceeded to trial.

FF. Creditor acted in good faith to seek bankruptcy counsel to file a Proof of Claim on his behalf once it learned of the bankruptcy case, that Brunn & Flynn did not timely file an claim and that the Claims Bar Date had passed.

In support of the Motion, Creditor filed the Declarations of Natali A. Ron and Jose Manuel Eguiluz and properly authenticated Exhibits A and B.

Declarations

Natali A. Ron is an attorney with the Law Offices of Hastings and Ron, current attorneys for Creditor. She testifies under penalty of perjury in her Declaration (identified by paragraph number of the Declaration) to the following:

> 2. Jose Manuel Eguiluz consulted with our firm in approximately July 2019, to discuss representation of his corporation with respect to the present bankruptcy case.
>
> 3. " I am informed and believe that the notice of this bankruptcy proceeding was mailed, care of the Law Offices of Brunn & Flynn, with respect to the creditor El Che Corporation . . . ."
>
> 4. "I am informed and believe, based on my review of court filings, that El Che Corporation filed a lawsuit in the Stanislaus County Superior Court, case number 2021033, in July 2016 for the collection of money due to it from Jeffrey Arambel, and others, arising from services El Che Corporation provided. . . ."
>
> 5. "I am informed and believe, based on my review of court filings, that Brunn & Flynn filed a motion to be relieved as counsel from the State Court."
>
> 6. "I am informed and believe that based on my review of the court docket filings, that on or about July 19, 2019, the Debtor filed an Amended Proposed Plan of Reorganization dated July 19, 2019 (hereinafter referred to as the "Proposed Plan")."
>
> 7. "I am informed and believe, based on the Court's docket in this matter, that since the date of plan confirmation, the Debtor has filed motions for compensation of certain professionals, and for payment of certain administrative expenses. I am informed and believe that no other distributions have been made."
>
> 8. Creditor retained Hastings and Ron to pursue this bankruptcy matter, and she filed a proof of claim on behalf of Creditor on December 10, 2019, while preparing this motion.

In reviewing this Declaration, in which counsel provides testimony under penalty of perjury, states by counsel cause the court significant concern. These statements under penalty of perjury and supposedly in compliance with Federal Rule of Evidence 601 and 602 (and subject to the certifications made pursuant to Fed. R. Bankr. P. 9011), counsel's testimony as to most of the above is based solely on "information and belief."

One of the fundamental principles of testifying under penalty of perjury is that the witness must testify based upon personal knowledge. Federal Rule of Evidence 602 states (emphasis added):

> A **witness may testify** to a matter **only if evidence is introduced** sufficient to **support a finding** that the **witness has personal knowledge of the matter**. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

The use of "information and belief" is not a device to testify under penalty of perjury. Here, counsel has no personal knowledge, but states that she has read and wants now to tell the court what the other documents say. In effect, counsel is wanting to tell the court what she "heard" the written words "say" when she read them. Being an attorney is not a license to provide her opinion of what she read and what she wants to tell the court she believes (especially when counsel is doing it to enhance the case she is seeking to advocate for as an officer of the court for her client). When reviewing Weinstein's Federal Evidence, § 602, the phrases "information and belief" and "informed and believe" are not used in addressing what is "personal knowledge" necessary for testifying under penalty of perjury.

Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 discuss how and when a person may use information and belief in a complaint. As discussed in 2 Moore's Federal Practice, Civil § 8.04(4):

> [4] Allegations Supporting Claims for Relief May Be Made on Information and Belief
>
> Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief (see § 8.06[5]). However, Rule 11 permits a pleader, after reasonable inquiry, to **set forth allegations** that "will **likely have evidentiary support** after a reasonable opportunity for further investigation or discovery" (see Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions). Courts have read the policy underlying Rule 8, together with Rule 11, to **permit claimants to aver facts that they believe to be true, but that lack evidentiary support** at the time of pleading. Generally, however, such averments are allowed only when the facts that would support the allegations are solely within the defendant's knowledge or control.

In stating that something is on "information and belief," one necessarily is stating that they don't know it to be true, but believe, if they can conduct discovery or investigate, they can come up with some evidence, in the future, to show that it is true. [FN. 1.]

FN. 1. To the extent that counsel is informed and believes based on documents filed with the court, other court's, or other documents, counsel could have them properly authenticated, presented them as the evidence, and then counsel structure the grounds in the motion or argument in the points and authorities using that evidence. But counsel cannot "create" evidence based on her information and belief and then assert that her information and belief is the evidence upon which she is informed and believes.

Jose Manuel Eguiluz is the principal for Creditor ("Principal"). He testifies under penalty of perjury to the following:

A. From approximately 2012 through 2016, Creditor provided harvesting and pruning services for Debtor.

B. In 2016, Debtor became delinquent on payments to Creditor.

C. Invoices with a past due amount of $21,163.16 were sent to Debtor referencing the work and outlining the amounts due and terms of payment. Each invoice included Creditor's address and/or post-office box address.

D. Debtor issued a partial payment by check but it bounced due to insufficient funds and Creditor was forced to obtain a loan (for $75,000 plus interest, for a total of $108,000.00) in order to pay his employees.

E. Creditor continued borrowing in order to pay back the loans and has incurred $100,000.00 in additional interest.

F. Creditor has also incurred $2,000.00 in insufficient funds bank fees.

G. Principal hired Brunn & Flynn to file a complaint against Debtor in state court to collect past-due payments and recover damages for incurred interest.

H. Close to the date for the state court trial, Principal learned that Debtor had filed for bankruptcy.

I. Principal incurred approximately $60,000.00 in attorneys' fees and $10,000 in costs to pay an interpreter to communicate with prior counsel.

J. Invoices mailed to debtor include a provision for attorneys' fees in the event of litigation is instituted to collect on any outstanding sum of money.

K. Prior Counsel apparently did not do anything in the bankruptcy court to preserve his claim.

L. Prior Counsel discussed filing a motion for relief from the automatic stay but requested a retainer to pursue the matter but principal could not afford it.

M. Principal was not advised that he needed to file a claim with the bankruptcy court in order to preserve said claim.

N. Principal is informed that prior counsel filed a change of address with the bankruptcy court removing the firm's address and substituting to Creditor's company address.

O. Eventually, but after the claim bar date, Principal began receiving mail from the bankruptcy court regarding Debtor's bankruptcy case.

P. In July 2019, Principal contacted Hastings and Ron for the purpose of pursuing the claim in bankruptcy court, who in turn filed a Proof of Claim on December 2019.

Summary of Exhibits

Exhibit A: Invoices

Exhibit A is 70 pages worth of past due invoices for 2016 (April and May 2016), Debtor's checks for payment, and bank records regarding the checks with insufficient funds.

Exhibit B: Proof of Claim Number 38

Exhibit B is Creditor's Proof of claim filed on December 10, 2020 attaching the same invoices and checks submitted as Exhibit A.

DEBTOR'S OPPOSITION

Jeffery Edward Arambel, the Reorganized Debtor under the Confirmed Chapter 11 Plan, ("Debtor") filed an Opposition on January 23, 2020. Dckt. 1087. Debtor requests that the court disallow Creditor's claim on the basis that:

A. Creditor received proper actual notice of the claims bar date and it did not act. Its failure to file a timely claim is its own fault, and it has not shown a basis for allowance of a late-filed claim under the Bankruptcy Rules 3002 and 3003.

B. In *Lompa v. Price* (*In re Price*), 871 F.2d 97 (9th Cir. 1989), the Ninth Circuit held that notice to an attorney representing a claimant in a state-court proceeding would apprise a creditor of a bankruptcy and related deadlines. The creditor was not directly notified by the bankruptcy court of the bar date for filing dischargeability complaints under 11 U.S.C. § 523(c) because he was not listed by the debtor, and creditor's motion for extension was not made before the time had expired under Bankr. R. 4007(c). *Id.* at 98. The Bankruptcy Appellate Panel held that notice to creditor's counsel constituted notice to appellant, and that it would apprise the creditor of the pendency of the dischargeability deadline date. *Id.* The Ninth Circuit affirmed. *Id.* at 99.

C. The Ninth Circuit's earlier decision in *Lawrence Tractor Co. v. Gregory* (*In re Gregory*), 705 F.2d 1118 (9th Cir. 1983) is in accord. In *Gregory*, a creditor argued that its claim in bankruptcy should not be discharged because it had received inadequate notice of the debtor's bankruptcy plan. *Id.* at 1120. The Ninth Circuit rejected the creditor's constitutional challenge, holding that "[w]hen the holder of a large, unsecured claim [in

bankruptcy] . . . receives any notice from the bankruptcy court that its debtor has initiated bankruptcy proceedings, it is under constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril." *Id.* at 1123. Adding that "[i]f [the creditor] had made any inquiry following receipt of the notice, it would have discovered that it needed to act to protect its interest." *Id.*

D. It is undisputed that as of the Petition Date, Brunn & Flynn represented Creditor in its claim in state court; that Creditor was actively litigating the claim with Debtor when the bankruptcy case was filed; that Creditor knew of the bankruptcy case by virtue of the notice of stay filed with the Superior Court, that Brunn & Flynn was served with a copy of the Notice of Bankruptcy Case and Deadlines as required by F.R.B.P. 2002(a)(7) that Brunn & Flynn did not withdraw from the representation until after the claim bar date had passed.

E. Thus, under *Price*, notice to Brunn & Flynn constituted notice to Creditor to timely file its claim. Further, Creditor (holder of one of the 20 largest unsecured claims) was in inquiry notice after he received dozens of notices, including the Plan disallowing its claim, regarding the bankruptcy after the change of address.

F. Creditor failed to show excusable neglect.

G. The existence of excusable neglect is determined by considering the totality of the circumstances, including these factors: (1) the reason for the delay; (2) the danger of prejudice to the debtor; (3) the length of delay and its impact on judicial proceedings; and (4) whether the claimant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Co.*, 507 U.S. 380, 395 (1993). The burden of presenting facts to establish excusable neglect is on the moving party. *Key Bar Invs., Inc. v. Cahn* (*In re Cahn*), 188 B.R. 627, 631 (B.A.P. 9th Cir. 1995); see also *In re Pac. Gas & Elec. Co.*, 311 B.R. 84, 89 (Bankr. N.D. Cal. 2004). Pioneer mandated a balancing test for determining excusable neglect, but did not assign the weight to be given to each of its nonexclusive factors in arriving at an equitable determination. *Pincay*, 389 F.3d at 860.

H. Creditor does not meet its burden in its analysis of the *Pioneer* factors. Creditor's main argument is that, because it did not receive actual notice of the bankruptcy case, its failure to file a timely claim was excusable. Motion at 5:7–6:9.

I. However, as discussed, Creditor received actual notice through its counsel in the state court proceeding. Ordinarily, a lawyer is a client's agent and, consistent with agency law, clients "are considered to have notice of all facts known to their lawyer-agent." *Ringgold Corp. v. Worrall*, 880 F.2d 1138, 1141–42 (9th Cir.1989).

J. Creditor contends that no party will be prejudice but in reality all creditor holding unsecured claims will be prejudiced by the reduction in the interim Plan payments.

K. Even assuming that Creditor did not receive notice, Creditor knew of the Claims Bar Date by June 2019 yet did not file the present Motion for another six (6) months. Creditor has not behaved in good faith and by delaying to file his claim, Creditor has prejudiced other parties. This is not excusable neglect. Creditor fails to explain why it waited six months after the alleged discovery of the Claims Bar Date. This is inexcusable neglect and the Motion should be denied.

L. Creditor is bound by the Confirmed Plan and cannot collaterally attack the Confirmation Order.

M. Creditor ignores that the Plan confirmed controls and it is bound by the Plan, including the provision disallowing its claim as untimely. Creditor contends that the Plan provided it with notice of the Claims bar Date. Yet, did nothing to stop its confirmation on September 15, 2019.

N. Where a creditor has notice, a plan is *res judicata* to all issues that could have been raised at the time of confirmation. *Great Lakes Higher Educ. Corp. v. Pardee* (*In re Pardee*), 218 B.R. 916, 924, aff'd 193 F.3d 1083 (9th Cir.1999); see also *Lawrence Tractor Co. v. Gregory* (*In re Gregory*), 705 F.2d 1118, 1121 (9th Cir. 1983) (confirmation of an unopposed plan that provided for no payment to unsecured creditors and discharge of all debts could not be challenged post-confirmation).

O. It is undisputed that Creditor received notice of the Plan, of its disallowance of Creditor's claim and Creditor did not object to the Plan or the disallowance. Creditor failed to act and it now bound by the confirmed Plan.

P. Creditor's Proof of Claim should be disallowed in its entirety because it was not timely filed.

Q. Debtor submits his counter-motion under BLR9014-1(i) to disallow the claim filed by Creditor as untimely under 11 U.S.C. § 502(b)(9) and F.R.B.P. 3003(c)(3). Creditor's Proof of Claim was filed 573 days after the Claims Bar Date. Thus, as untimely, the claim should be disallowed in its entirety.

PLAN ADMINISTRATOR'S OPPOSITION

Focus Management Group USA, Inc., Plan Administrator, ("Plan Administrator") filed an Opposition on January 23, 2020. Dckt. 1091. Plan Administrator opposes on the basis that:

A. The Confirmed Plan expressly disallowed Creditor's claim.

B. Creditor received notice of the proposed plan that disallowed its claim in time to file a motion to allow a late-filed claim or otherwise object to disallowance of its claim prior to confirmation of the plan and did not do so.

C. Confirmation of the Plan precludes the relief requested by Creditor.

D. The Motion is an improper collateral attack on a confirmed Plan.

E. Under Ninth Circuit authority Creditor cannot relitigate the disallowance as the Plan has been confirmed. In *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995), the Ninth Circuit held that "Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect." Furthermore, "A final order confirming a Chapter 11 plan bars litigation of all issues that could have been raised in connection with confirmation. This res judicata effect extends to both claims that were actually litigated and claims that could have been raised in the confirmation proceedings." *In re Landmark West*, LLC, 2015 Bankr. LEXIS 4081 (Bankr. N.D. Cal. Dec. 2, 2015) (citations omitted).

F. Creditor acknowledges it contacted current counsel in July 2019. It did not object to the Plan, which expressly disallows it claim, prior to its confirmation on September 15, 2019.

G. Creditor now requests to have its claim deemed timely notwithstanding that Creditor was properly and timely served with the proposed Plan and disclosure statement, received proper and timely notice of the confirmation hearing, had sufficient time to oppose the plan and its disallowance of the claim, and did not object to the disallowance. The Motion should be denied because Creditor cannot relitigate the disallowed claim.

H. Even if confirmation of the Plan does not preclude the relief requested, Creditor has not shown excusable neglect.

I. Citing *Pioneer,* the Ninth Circuit stated that "[t]o determine whether a party's failure to meet a deadline constitutes 'excusable neglect,' courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Ahanchian c. Xenon Pictures, Inc.*, 624 D.3d 1253, 1261 (9th Cir. 2010)

J. The motion fails to show excusable neglect on the basis that Creditor states that current counsel was contacted in July 2019, yet nothing was done for five (5) months and allowing Creditor's claim would material impact other unsecured creditors under the Plan as it is approximately 9% of the current general unsecured claim pool.

CREDITOR'S REPLY

Creditor filed a Reply on January 30, 2020. Dckt. 1096. In its reply, Creditor addresses the delay in filing the proof of claim discussed by both Debtor and Plan Administrator in their oppositions. Creditor explains that after contacting current counsel he had to withdraw his retainer because one of his 12-year old twin daughters had been detained in Mexico. This meant that he had to send money to Mexico to support her and was forced to hire an immigration attorney. This went on for approximately 16 months, simultaneously with the present bankruptcy case. The daughter was allowed to return home with Creditor's family in August 2019, one month before the plan was confirmed.

Additionally, Creditor asserts in the Response that Creditor's Principal is unable to read or speak English. For both Declarations (Dckts. 1069 and 1097) certifications of translators are attached.

Creditor's prior counsel apparently received notice of the bankruptcy but not file a claim on its behalf nor did they advise Creditor that he needed to preserve its claim through the bankruptcy proceeding. At the same time, Creditor's company was going through financial difficulties, trying to pay his employees and his family suffering from the stress and devastation of the family separation with no definitive time frame or if his daughter would be allowed to return home.

Creditor contends that looking at the totality of the circumstances, mainly Mr. Eguiluz's personal and financial issues, there is excusable neglect and the court should allow the claim. Further arguing that there is no prejudice that warrant denial of th emotion because no interim distributions have been made and Creditor should be compensated for all the expenses Creditor has had to incur after Debtor; failed to pay for work Creditor's employees completed.

Creditor argues that the only possible prejudice would be that allowing the claim would result in Debtor's reduction of surplus dividend after the sale of sufficient property to pay the claims.

Creditor argues that his request to allow the claim is not bar by *res judicata* because under that doctrine the judgment must involve the same parties. Creditor was not represented in the bankruptcy until after the Plan was confirmed. Creditor did not participate and did not have reasonable opportunity to object. Moreover, Creditor is not challenging the Plan but requesting that its claim be allowed as timely filed so that it may be included under the general unsecured claims class.

Creditor further asserts that neither Debtor nor Plan Administrator cite any case in which a late claim should not be allowed to be filed where the confirmed plan provides for unsecured claims to be paid in full and there are millions of dollars in excess property to be distributed to the debtor as surplus.

Finally, Creditor argues that the interests of equity and justice require that the court allow the late claim based on since excusable neglect of the creditor, since there will be no prejudice to the other creditors.

APPLICABLE LAW

Rule 3003 provides for the Filings of Proofs of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases. Specifically, Rule 3003(c) states the following:

(c) Filing Proof of Claim.

> [. . .]
>
> (3) Time for Filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).

F.R.B.P. 3003.

As discussed in 9 Collier on Bankruptcy P 3003.03 (16th 2019), the Supreme Court has placed the Federal Rule of Bankruptcy Procedure 9006(b) excusable neglect standard as an overlay to the Rule 3003(c)(3) relief:

> Likewise, after the passage of the bar date, an extension may be granted upon a showing of cause. Although Rule 3003(c)(3) specifies that the time for filing a proof of claim may be extended for cause, the Supreme Court (in *Pioneer Inv. Servs.*] has adopted the excusable neglect standard without considering whether Rule 3003(c)(3) provides for a test different from Rule 9006(b). However, as interpreted by the Court, application of the excusable neglect standard includes consideration of factors, such as prejudice to the debtor, which some courts had previously determined to be beyond the scope of the Rule 9006(b) analysis.

9 Collier on Bankruptcy P 3003.03[b].

In *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489 (1993), affirming the Court of Appeals for the Sixth Circuit, the Supreme Court, in a five-to-four decision, ruled that a court may find that a creditor's failure to file a proof of claim by the bar date was due to excusable neglect when it has considered all of the relevant circumstances, including danger of prejudice to the debtor; the length of the delay; the reason for the delay and whether such delay was in the control of the party filing the late claim; the possible impact of the delay on the judicial proceedings; and whether the party filing the late claim acted in good faith.

DISCUSSION

The deadline for filing a proof of claim in this matter was May 16, 2018. Creditor's Proof of Claim was filed on December 10, 2019 - nineteen months later. A look at what happened between those two dates should provide some clarity.

Creditor confirms that it was aware of Debtor's bankruptcy sometime on or around March 2018, when it received notice of the bankruptcy's automatic stay on the eve of trial. *See* Eguiluz Declaration, ¶9 and Motion, ¶4. Moreover, Creditor's Principal testifies that Prior Counsel, Brunn and Flynn, informed him of the bankruptcy and that they should act by filing for relief from the automatic stay. *Id.* Creditor testifies that Brunn & Flynn requested a retainer but they did not hire them because Creditor could not afford it. *Id.* Nevertheless, this constitutes notice. Debtor was told that Debtor's bankruptcy and that actions needed to be taken.

What is not discussed is whether Prior Counsel Brunn and Flynn addressed with Creditor the simple filing of a proof of claim.

Thus, the evidence presented by Creditor is that it and its Prior Counsel had actual notice of the Bankruptcy Case. Further, that some action needed to be taken in light of the Bankruptcy Case being filed.

Then, Prior Counsel filed a change of address for Creditor in Debtor's bankruptcy case. Creditor directly received notices regarding Debtor's case following the May 31, 2018, change of address filed for Creditor by Prior Counsel. Dckt. 368. Creditor's Principal testifies that after this change of address he began to receive mail from the bankruptcy court regarding Debtor's case. Eguiluz Declaration, ¶10. Therefore, as early as May or June of 2018, Creditor had notice not only of this Bankruptcy Case, but service of motions, plans, and other pleadings. Creditor undisputedly had actual notice of this Bankruptcy Case. This constitutes actual notice of the bankruptcy case.

Looking at the post-May 31, 2018 pleadings filed and served on Creditor in this Bankruptcy Case, these pleadings include:

> Proposed Plan, Proposed Disclosure Statement and Notice of July 18, 2019 Hearing on approval of Disclosure Statement
>
> Certificate of Service filed on June 6, 2019; Dckts. 828, 829.

Notice of September 10, 2019 Hearing on Confirmation of Proposed Plan, Order Approving Disclosure Statement, Disclosure Statement, and Proposed Plan.

> Certificate of Serviced filed on July 30, 2019; Exhibit M, Dckt. 871.

The Disclosure Statement and Proposed Chapter 11 Plan served on Creditor specifically stated that the Plan disallowed Creditor's claim in its entirety for failure to timely file a claim. This Disclosure Statement and Chapter 11 Plan were received by Creditor first in June 2019, and then in August 2019 with the notice of the September 2019 confirmation hearing. Yet, Creditor did nothing for six months from first having notice of the Chapter 11 Plan and the terms disallowing its claim, and three months after the Chapter 11 Plan was confirmed.

Creditor argues that there was excusable neglect on their part. Creditor seems to shift the blame to Prior Counsel, stating that the Prior Counsel requested a retainer to represent Creditor in the Bankruptcy Case. Creditor's principal testifies that Prior Counsel "apparently did not do anything in the bankruptcy court to preserve my claim." Eguiluz Declaration, ¶9.

Creditor's Principal further testifies that Prior Counsel did not advise him that he needed to file a claim in the bankruptcy court in order to preserve his claim. *Id.* Principal also testifies that he did not know that there was a claim bar date. *Id.*

In *Pioneer*, the Court considered several factors, one of which is the reason for the delay and whether such delay was in the control of the party filing the late claim. Here, as explained above, Creditor had notice. Creditor took at the very least six months to assert its rights after receiving actual notice of Debtor's bankruptcy. Creditor had control over this delay as it knew of the bankruptcy, contacted current

counsel, but yet, the proof of claim was not failed until five months later. What the court sees is Creditor's inexcusable neglect at allowing time to pass without asserting its rights.

Creditor further asserts that its more than $500,000 claim is of small consequence to this case as this will be a surplus case. $500,000 is not a "small consequence."

Consideration of Excusable Factors

In *Pioneer Inv. Servs. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), the Supreme Court discussed some general factors used in considering in allowing the late filing of claims. These include:

(1) whether granting the delay will prejudice the debtor;

On this factor, there is a confirmed Chapter 11 Plan in this case. The terms of the Plan, for which Creditor had notice, that the asserted claim of Creditor is disallowed as a matter of the Federal Rule of Bankruptcy Procedure, stating in Footnote 2 on page 19 of the sixty-three page Plan, to which an additional seventy-three pages of exhibits are attached:

> 2 The Claim of the El Che Corporation was scheduled as disputed, the El Che Corporation did not timely file a proof of Claim, and the El Che Corporation has not yet filed a proof of Claim. Hence, the Claim is disallowed. See Fed. R. Bankr. P. 3002(a), 3003(c)(2).

Chapter 11 Plan, Dckt. 860 at 19 (in the same 10 point font as used in the plan footnote).

Debtor scheduled Creditor's claim. Debtor disputed creditor's claim. Debtor had notice sent to Creditor through the attorneys representing Debtor in the state court action. Notices and information about the bankruptcy case continued to go to Creditor's counsel until a change of address was fled. After that, Debtor continued to receive notices, motions, and pleadings, including the proposed Plan and Disclosure Statement and the approved Disclosure Statement and Plan set for confirmation, all of which include the language that Creditor's claim was disallowed as provided in the Federal Rule of Bankruptcy Procedure.

Debtor sought, litigated, and confirmed the Chapter 11 Plan. Three months after confirmation is concluded and six months after unequivocally receiving notice of the Plan and that its claim was disallowed by operation of law, Creditor comes in to assert the right to be paid more than $500,000.

In the Opposition, the Debtor states that the prejudice consists of:

> 1. All creditors with unsecured claims will have their interim payments reduced if Creditor also receives interim payments.
>
> 2. Creditor has been dilatory in prosecuting its rights, therefore such is "to the prejudice of all other parties."

Opposition, p. 7:25-27, 8:3-5; Dckt. 1087.

In the Opposition filed by Focus Management Group, USA, Inc., the Plan Administrator, the prejudice to the Debtor, Plan or other creditors is not articulated.

As to this factor, it may tip slightly in favor of the Debtor in that the time, money, and expense has gone into a Plan. Creditors moved forward with voting based on there being no claim from Creditor, it appearing that Creditor was not challenging the scheduling of the claim as disputed.

If allowed, then monies will be diverted from the Plan distribution to the claim objection litigation (presuming that the Debtor still disputes the obligation) reducing the payments to creditors, as well as ultimate surplus to Debtor at the end of the day.

(2) the length of the delay and its impact on efficient court administration;

The evidence is undisputed that Creditor acknowledges having actual knowledge of the bankruptcy case as early as March 2018 when the filing of the bankruptcy case disrupted the state court litigation. This actual knowledge was not merely to the principal of the Creditor, but Creditor's Prior Counsel prosecuting the civil action against the Debtor. The bankruptcy case was expressly discussed and the need for Creditor to take action in the case advised by Creditor's Prior Counsel. Though evidence is presented that Prior Counsel addressed the issue of the relief from the automatic stay being necessary to continue in the state court action, no mention is made of the "simple task" of such counsel completing a proof of claim form and attaching a copy of the state court complaint to be filed within the deadline for filing claims.

Creditor's Principal acknowledges that he consciously did not take action in light of the demands for fees from his Prior Counsel. Creditor's Principal also discusses serious life events which strained his finances further from the strain he states from the asserted obligation owed by Debtor.

But this does not change that twenty-one months and the confirmation of the Chapter 11 Plan floated by before Creditor took any action. During this time not only the Debtor in Possession, prior to confirmation, and the Debtor, after confirmation, were moving forward and making decisions, but other creditors were making decisions on the Plan and there not being a $500,000+ claim being asserted by Creditor.

(3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;

Creditor argues that it did not have or did not want to pay the fees for counsel to represent it in the bankruptcy case. Though Creditor had actual knowledge to timely file its claim, it failed to act. It appears that Creditor did not seek out or ask its Prior Counsel to refer it to a bankruptcy attorney to see what needed to be done so its asserted right to $500,000+ did not get lost. Such was a very simple act, filing a proof of claim.

(4) whether the creditor acted in good faith;

From the evidence presented, it does not appear that Creditor acted with an evil, malevolent intent. Creditor's Principal was distracted by family events, but appears to have been able to keep the Creditor's business running. Creditor's failure to file the proof of claim was not merely inadvertent, but done consciously disregarding the Bankruptcy Case and its asserted right to be paid more than $500,000.

and

(5) whether clients should be penalized for their counsel's mistake or neglect

On this point, Creditor did not engage counsel to represent it in the Bankruptcy Case. Creditor did not want to pay the retainer (of some unstated amount). The Motion does not assert that there was a mistake or neglect by Creditor's counsel. Presumably, such would be the Prior Counsel who advised Creditor that relief from the stay would be needed.

Ruling on Motion to File Late Claim

The court has continued the hearing to allow the Parties the opportunity to engage in settlement negotiations.

Tentative Denial Without Prejudice of Countermotion

As for Debtor's "Countermotion" to disallow the claim section of his Opposition, the court first notes that a "countermotion" must be filed as a separate matter with its own docket control number. L.B.R. 9014-1(c)(4), (i). To the extent this is a Countermotion, it needs to be filed as a separate pleading and contested matter.

However, this requested relief, disallowance of a claim, does not sound in the nature of a countermotion, but an objection to claim. Objections to claim are governed by Federal Rule of Bankruptcy Procedure 3007 and Local Bankruptcy Rule 3007-1. If such relief is necessary, it can be sought by such an objection.

5. 20-90349-E-11 DCJ-3 | **R. MILLENNIUM TRANSPORT, INC.** **David Johnston** | **MOTION TO EXTEND TIME** **8-13-20 [77]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on August 13, 2020. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Extend Deadline for Filing Plan of Reorganization was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Extend Deadline for Filing Plan of Reorganization is granted.

R. Millennium Transport, Inc. ("Debtor") moves the Court for an order extending the deadline for filing a plan of reorganization to September 30, 2020 pursuant to 11 United States Code § 1189(b).

APPLICABLE LAW

11 United States Code § 1189 provides for who may file and the applicable deadline for a Chapter 11 Subchapter V plan:

> (a)Who May File a Plan.—
> Only the debtor may file a plan under this subchapter.
>
> (b)Deadline.—

> The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.

DISCUSSION

Debtor [FN.1] explains that although Debtor, Debtor's counsel, and the Subchapter V Trustee have been judiciously working towards a plan within that deadline of August 13, 2020, numerous circumstances have prevented them from filing said plan. Debtor explains the following circumstances:

1. Debtor's irregular beekeeping made it difficult to prepare the monthly operating reports.

2. The plan will rely in part to funds related to two "usurious" loans paid within the 90 day pre-petition period for which Debtor and Trustee have agreed to pursue recovery of these preferences, and special counsel has not yet fully reviewed.

3. Due to the unexpected loss of a family member of Debtor's counsel and subsequent funeral arrangements, counsel was unable to complete preparation of monthly operating reports and the plan for review by the Trustee.

FN.1. Debtor's attorney is fully aware of the distinction between a "debtor" and a "debtor in possession." Use of the term "debtor" in this motion is simply to be consistent with Section 1189 of the Bankruptcy Code.

Debtor argues that the language in 11 U.S.C. § 1189(b) is more flexible than the requirements under 11 U.S.C. 1121(3). Debtor further argues that the language in § 1189(b) is much more flexible than extensions of time for a trustee to assume a non-residential lease under 11 U.S.C. § 362(d)(4)(B) and extensions of the automatic stay in a second case filed within one year under § 362(c)(3)(B).

Debtor states that they have diligently worked with Trustee in successfully negotiating consensual treatment of many secured claims, have entered into adequate protection stipulations, and are close to agreeing on a plan to be presented to the court.

The instant Motion was filed on August 13, 2020, on the deadline to file the Chapter 11 Subchapter V plan.

Congress provides in 11 U.S.C. § 1189(b) that the court may extend the time for the filing of a Subchapter V plan "if the need for the extension is attributable to circumstances for whic h the debtor should not justly be held accountable." The Debtor, now serving as the fiduciary to the estate Debtor in Possession, explains that the pre-petition books and records have presented challenges in getting operating reports prepared and assembling the financial information to structure a plan. Counsel for the Debtor and Debtor in Possession also recounts non-bankruptcy life events involving its counsel that has raised further

challenges. Clearly, these situations have slowed the ability of the Debtor and Debtor in Possession from moving forward, and are events for which the Debtor and fiduciary Debtor in Possession should not be held accountable in the prosecution of this case.

The court finds that in the interest of Debtor to continue to gather all necessary financial information about Debtor's assets, engage special counsel and continue working with Trustee in presenting a consensual plan to the court, there is sufficient cause to justify an extension of the deadline. Therefore, the Motion is granted, and the deadline for Movant to object to Debtor's discharge is extended to September 30, 2020.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend Deadline for Filing Plan of Reorganization filed by R. Millennium Transport, Inc. ("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 granted, and the deadline for Debtor to file a plan of reorganization is extended to September 30, 2020.

6. 20-90151-E-7 RONALD HART MOTION TO SELL
BLF-2 James Knopf 7-21-20 [30]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on July 21, 2020. By the court's calculation, 37 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Michael D. McGranahan, the Chapter 7 Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the personal property identified as the non-exempt interest in a promissory note scheduled by Debtor as "Installment Note 7/20/18" with a principal balance of $53,668.94 ("Property").

The proposed purchaser of the Property is Nicole Lopez and Michael Losardo ("Buyer"), and a summary of terms of the sale are (the full terms of the Purchase are set forth in the Purchase Agreement filed as Exhibit D in support of the Motion, Dckt. 34):

A. Purchase price of $35,000.00.

B. Sale is on an as-is basis, without warranties or representations to Buyers, who are the makers of the promissory note.

C. Buyer to provide an Initial Deposit of $1,000. The remaining $34,000 to be paid within five (5) days of court's approval.

Proposed Overbidding Procedures

Trustee proposes the following overbidding procedures:

1. Any party overbidding must agree to purchase the estate's interest in the Property on the identical terms as set forth in the motion and the proposed Agreement (aside from increase price), and

2. The first overbid must be at least $36,000, and successive bids must be in increments of at least $500.00.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will provide a net to the estate of $8,303.37 ($35,000 less Debtor's exemption of $26,696.63) and the $330.00 July payment that Buyers submitted to Trustee prior to this purchase inquiry.

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 Sell Property filed by Michael D. McGranahan, [the Chapter 7 Trustee, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Michael D. McGranahan, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Nicole Lopez and Michael Losardo or nominee ("Buyer"), the personal property identified as the non-exempt interest in a promissory note scheduled by Debtor as "Installment Note 7/20/18" with a principal balance of $53,668.94 ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $35,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit D, Dckt. 34, and as further provided in this Order.

B. The sale proceeds shall first be applied to closing costs, other customary and contractual costs and expenses incurred to effectuate the sale.

C. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

7. 20-90265-E-7 ALLEN/KAREN BELL MOTION TO SELL
MDM-1 Thomas Hogan 7-16-20 [18]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 16, 2020. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Michael D. McGranahan, the Chapter 7 Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the personal property identified as the non-exempt equity in a 2015 Harley Davidson Dyna Motorcycle, CADL 22R1953, VIN ending in 4166 ("Property").

The proposed purchaser of the Property is Allen James Bell and Karen Rae Bell ("Debtor/Buyer"), and the terms of the sale are:

A. Purchase price of $4,000.00.

Overbidding Procedures

Trustee proposes the following overbidding procedures:

1. If any party wishes to pay more for the Property, they should contact the Trustee for instructions prior to the hearing date, as referenced in the Notice of Sale.

2. The next highest bid must be $4,000 plus overbid of $400, plus the exemption of $3,325, or a total overbid of $7,725, and be accompanied by a non-refundable deposit of $4,400.00.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale will avoid the costs incurred if Trustee were to sell Property at a public auction.

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 Sell Property filed by Michael D. McGranahan, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Michael D. McGranahan, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Allen James Bell and Karen Rae Bell or nominee ("Buyer"), the Property identified as the non-exempt equity in a 2015 Harley Davidson Dyna Motorcycle, CADL 22R1953, VIN ending in 4166 ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $4,000.00, on the terms and conditions set forth in the Motion, and as further provided in this Order.

B. The sale proceeds shall first be applied to closing costs, other customary and contractual costs and expenses incurred to effectuate the sale.

C. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

8. 06-90574-E-7 SSA-3 8 thru 9 | **DANIEL/ANGELA HAUSER** Randy Walton | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH DANIEL WELDON HAUSER AND ANGELA VICTORIA HAUSER** 8-3-20 [64]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2020. By the court's calculation, 24 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice).

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

The Motion for Approval of Compromise is granted.

Irma Edmonds, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Angela Victoria Hauser ("Debtor"). The claims and disputes to be resolved by the proposed settlement are the bankruptcy estate's interest in a product liability claim.

Movant and Debtor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 68):

A. The bankruptcy estate shall receive the gross sum of $100,000 as an initial settlement award for the litigation. Court ordered deductions, attorney's

fees, and a deduction for a medical lien leaves the bankruptcy estate with $46,905.13.

In the Motion Movant makes reference to the bankruptcy estate as receiving $100,000 as "an initial settlement" for the claim. It is not clear if there is more money to be paid, either to the estate or the Debtor. At the hearing, counsel for Movant explained **xxxxxxxxxx**

B. The foregoing settlement, if approved by this Court, shall result in the complete and general release of all party defendants of any and all claims related to the personal injury/products liability involving Debtor Angela Victoria Hauser.

C. The underlying settled litigation and claims will ultimately result in the dismissal of the subject lawsuit currently pending.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the three factors have been met.

Probability of Success

Trustee argues that while special counsel was fairly confident that there was a high likelihood of success, the actual work related to the litigation and costs could consume hundred of thousands of dollars. Thus, the proposed settlement together with the award of $100,000 weigh in favor of supporting the settlement.

Difficulties in Collection

The settlement is a sufficient sum for Debtor and the estate and eliminates potential costs and continued litigation.

Expense, Inconvenience, and Delay of Continued Litigation

Without the settlement, there would be additional legal fees by continuing to litigate this contentious matter involving a defective product. Moreover, Trustee asserts that the Special Master and health care officials engaged in this case took into account the nature and extend of Debtor's damages and claims in reaching the proposed settlement amount.

Paramount Interest of Creditors

Trustee asserts that the settlement of Debtor's claims will be economically advantageous for the bankruptcy estate and creditors.

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because of the probability of success and the expense, inconvenience, and delay of continued litigation. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Irma Edmonds, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Angela Victoria Hauser ("Debtor") 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 1 in support of the Motion (Dckt. 68).

9. 06-90574-E-7 SSA-4 | **DANIEL/ANGELA HAUSER** | **MOTION FOR ADMINISTRATIVE EXPENSES**
Randy Walton | **8-5-20 [71]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 4, 2020. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Mostyn Law Firm and Arnold & Itkin, the Attorneys ("Applicants") for Irma Edmonds, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested in connection with litigation of a personal injury/product liability suit. The order of the court approving employment of Applicants was entered on June 8, 2020. Dckt. 62. Applicant requests fees in the amount of $38,000.00 and costs in the amount of $689.06.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

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

A review of the application shows that Applicant's services for the Estate include prosecution of Debtor's products liability/personal injury matter. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Contingency Fee: Litigation

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in litigation to prosecute Debtor's products liability/personal injury case, for which Client agreed to a contingent fee of 40% of the net after payment of expenses. In approving the employment of applicant, the court approved the contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). $95,000 of net monies was recovered for Client.

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Contingency Fee**
Mostyn Law Firm	N/A	N/A	$19,000.00
Arnold & Itkin	N/A	N/A	$19,000.00
			$0.00
Total Fees for Period of Application			$38,000.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $689.06 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copying		$10.52

Court Costs		$400.00
Experts and Legal Research		$148.79
Delivery Services and Postage		$14.22
Records		$104.75
A&I Interest		$10.78
		$0.00
Total Costs Requested in Application		$689.06

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the fees computed on a percentage basis recovery for Client are reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees of $38,000.00 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant. The Chapter 7 Trustee is authorized to pay from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $689.06 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$38,000.00
Costs and Expenses	$689.06

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Mostyn Law Firm and Arnold & Itkin ("Applicants"), Attorneys for Irma Edmunds, the Chapter 7

Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Mostyn Law Firm are allowed the following fees and expenses as a professional of the Estate:

Mostyn Law Firm, Attorneys employed by the Chapter 7 Trustee

Fees in the amount of $19,000.00
Expenses in the amount of $689.06,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that Arnold & Itkin are allowed the following fees and expenses as a professional of the Estate:

Arnold & Itkin, Attorneys employed by the Chapter 7 Trustee

Fees in the amount of $19,000.00
Expenses in the amount of $0.00,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

10. 19-90891-E-7 KIM JORDAN
MF-2 Steve Altman

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH KIM D. JORDAN AND RYDELL JORDAN
7-17-20 [25]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Trustee's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on July 17, 2020. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Approval of Compromise is granted.

Michael D. McGranahan, the Chapter 7 Trustee, ("Movant/Trustee") requests that the court approve a compromise and settle competing claims and defenses with Kim D. Jordan (the Debtor) and Rydell Jordan ("Settlor/Debtor's Spouse"). The claims and disputes to be resolved by the proposed settlement are the bankruptcy estate's interest in the March of 2017 transfer of Debtor's undivided 50% ownership interest to the Settlor in real property commonly known as 2300 Thomas Street, Ceres, California.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 28):

A. Trustee accepted the sum of $15,000.00 in full satisfaction of any claims against Debtor and Debtor's Spouse prior to the execution of this Agreement.

B. Agreement is continued upon approval of the bankruptcy court.

C. Time is expressly declared to be of the essence in this Agreement.

D. In the event of a breach of this Agreement by another Party to this Agreement, the breaching Party will pay reasonable attorneys' fees and costs of the non-breaching party incurred by reason of said breach.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met.

Under the settlement, Movant shall recover $15,000.00 in satisfaction of the Estate's claim for recovery of the property, with an asserted value of $30,000.00, from Settlor. Movant asserts that the property can be recovered for the Estate for the claim it has against Settlor. This proposed settlement allows Movant to recover for the Estate $15,000.00 without further cost or expense and is 50.00 % of the maximum amount of the claim identified by Movant.

Probability of Success

Although the Trustee believes that there is a high probability of success, but there are risks of expenses related to litigation that would affect the estate. Thus, the Agreement avoids these expenses.

Difficulties in Collection

Trustee argues that this factor weighs heavily in support of the Settlement. Trustee asserts that there would be difficulties in collection because Trustee would need to sell the Property which will be timely and costly. Therefore, until Trustee sells the property, he will not be able to collect anything.

Expense, Inconvenience, and Delay of Continued Litigation

Without the settlement, the bankruptcy estate would be incurring additional legal fees by pursuing litigation. Trustee contends the settlement avoids expense, inconvenience, uncertainty, and delay.

Paramount Interest of Creditors

Trustee argues that certainty, security, and immediacy would be preferable for creditors to recover under the settlement agreement as the amount agreed upon is an estimated amount to pay all unsecured claims in this case in full.

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because of anticipated delay and difficulties in collection. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Michael D. McGranahan, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Kim D. Jordan and Rydell Jordan ("Settlor") 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 1 in support of the Motion (Dckt. 28).

11. 20-90327-E-7 SSA-2 | **PHILIP/DALLIA ENGLE** | **OBJECTION TO DEBTOR'S CLAIM EXEMPTIONS**
Gurjeet Rai | **6-26-20 [17]**

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

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

Sufficient Notice Provided. No Proof of Service was filed with the instant motion. Thus, the court is unable to determine whether the proper parties received notice. However, the Debtor has responded, filed an opposition, and demonstrated that Debtor has been served.

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

The Objection to Claimed Exemptions is xxxxxxxxxx.

The Chapter 7 Trustee, Michael D. McGranahan ("Trustee") objects to Philip Scott Engle and Dallia Desamito Engle's ("Debtors") claimed exemptions under California law because Debtors' claimed exemption under California Code of Civil Procedure § 704.730 is subordinate to the Trustee's rights and remedies pursuant to 11 U.S.C. § 724(b).

California Code of Civil Procedure § 704.730 allows a debtor to claim an exemption higher than the $100,000 under the statute under the following conditions:

(A) debtor is a person 65 years of age or older;

(B) a person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment;

(C) debtor is a person 55 years of age or older with a gross annual income of not more than not more than twenty-five thousand dollars ($25,000) or, if debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than thirty-five thousand dollars ($35,000) and the sale is an involuntary sale.

In this case, Debtors have claimed $108,918.77 pursuant to C.C.P. § 704.730.

A claimed exemption is presumptively valid. *In re Carter,* 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, "the objecting party has the burden of proving that the exemptions are not properly claimed." FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005). If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to produce unequivocal evidence to demonstrate the exemption is proper. *In re Elliott*, 523 B.R. 188, 192 (9th Cir. B.A.P. 2014). The burden of persuasion, however, always remains with the objecting party. *Id.*

DISCUSSION

The Trustee argues that Debtors' homestead exemption should be disallowed in its entirety for three reasons.

First, the Trustee asserts that Debtors' exemption is subordinate to the federal and state tax liens in this case. Under 11 U.S.C. § 522(c)(2)(B), exempt property remains liable for a properly noticed tax lien. The Trustee contends that Debtors' claimed exemption is ineffective as there are two tax liens at play: the Franchise Tax Board filed Proof of Claim 5-1 for $23,608.06, secured by Debtors' residence. The Internal Revenue Service filed Proof of Claim 7-1 for $174,078.44, of which $163,117.73 is asserted to be secured, and $10,960.71 as unsecured.

Second, the Trustee argues that pursuant to § 724(b) the Trustee has the power to subordinate any homestead claim and interest of the taxing authorities for the benefit of the bankruptcy estate, including to pay administrative expenses.

The Trustee testifies that based on the interplay between § 724(b) and 726(a)(4), he will be able to subordinate the tax lien present in this case to the benefit of the estate. Declaration, Dckt. 19, ¶ 7. The Trustee believes that a further claim by the IRS will be filed that would further expand the Trustee's ability to subordinate the taxing authority claims for the benefit of the bankruptcy estate.

Third, the Trustee argues that Debtors have failed to show that they are entitled to a higher exemption than the $100,000 allowed under C.C.P. § 704.730. Debtors' petition schedules do not show them to meet the criteria as enumerated by the statute to exempt in excess of $100,000.

Debtor Opposition

Debtors filed an Opposition on August 13, 2020. Dckt. 26. They also filed a Declaration asserting that both Debtors are over 65 years of age and thus entitled to a homestead exemption of $175,000.00. Opposition, Dckt. 27, ¶ 2. Debtors provide a copy of their California Driver License showing that Debtor Phillip was born February 10, 1955 and Debtor Dallia was born December 27, 1954. As this case was filed on May 5, 2020, both Debtors were over the age of 65 at the time of filing.

The Trustee notes that as the case is still in its early stages and the deadlines to file claims have not yet passed, the Trustee requires additional time to explore potential agreements with the taxing authorities and evaluate Debtors' valuation of the residential property. The Trustee testifies that in the past he has been successful at securing "carve out" agreement with taxing authorities which have been beneficial

to creditors of an estate. Declaration, ¶ 8. Further, after a preliminary investigation, the Trustee testifies that he believes Debtors significantly undervalued the property. Thus, the Trustee needs additional time to employ an appraiser, broker, or realtor to conduct an inspection and provide him with a valuation analysis of the property. *Id*., ¶ 9. The Trustee requests sixty (60) to ninety (90) days to complete these tasks.

In their Opposition, Debtors assert that the property is valued at no more than $295,000 based on the condition of the property and after being previously unable to refinance at $250,000. Opposition, Dckt. 26, ¶ 4.

Debtors argue that pursuant to an agreement made prior to filing of this case, Debtors were making monthly payments to the IRS in the amount $1,500.00 and $350.00 to FTB per month, and that they filed bankruptcy with the understanding that the tax liens would survive following bankruptcy. Declaration, Dckt. 27, ¶ 5.

Finally, Debtors request that an order indicating that the homestead exemption applies regardless of the tax liens on the basis that it would be improper to deny Debtors their homestead exemption beyond the established liens of $197,686.50. Opposition, Dckt. 26, ¶ 8.

Homestead Exemption and Application of 11 U.S.C. §§ 724(b) and 726(a)(4)

The Trustee makes it clear that he is not stating that Debtor cannot claim a homestead exemption, but that such exemption is subject to the provisions of federal Bankruptcy Law. The Trustee also raises evidentiary objections to unauthenticated documents that were filed with the opposition.

Debtor asserts that both debtors were over the age of 65 when the case was filed and can claim a homestead exemption of $175,000. Opposition, p. 1:22-24; Dckt. 26. Such is factual information for application of California law, and should not present any significant issue for the Trustee and Debtor.

Debtor acknowledges that there are tax liens and the tax obligations are substantial, just short of ($200,000).

However, the Trustee brings into play federal law enacted as part of the Bankruptcy Code by Congress. In 11 U.S.C. § 724 Congress provides that a Chapter 7 trustee has special avoiding powers of liens, which include the following relevant to the matter before the court:

> § 724. Treatment of certain liens
>
> (a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.
>
> (b) **Property** in which the estate has an interest and that is subject to a lien that is not avoidable under this title (other than to the extent that there is a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate) and **that secures an allowed claim for a tax**, or **proceeds of such property**, **shall be distributed**—

> (1) **first, to any holder of an allowed claim secured by a lien** on such property **that is not avoidable** under this title and **that is senior to such tax lien**;
>
> (2) **second, to any holder of a claim of a kind specified in section 507(a)(1)(C) or 507(a)(2) . . ., 507(a)(1)(A), 507(a)(1)(B), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7)** of this title, **to the extent of the amount of such allowed tax claim that is secured by such tax lien**;

[The claims referenced above for 11 U.S.C. § 507(a) are for claims and administrative expenses entitled to priority in payment in a Chapter 7 case.]

> (3) **third, to the holder of such tax lien**, **to any extent** that such holder's allowed tax claim that is secured by such tax lien **exceeds any amount distributed under paragraph (2) of this subsection**;
>
> (4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;
>
> (5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and
>
> (6) **sixth, to the estate**.
> . . .
>
> (e) **Before subordinating a tax lien** on real or personal property of the estate, the trustee shall—
>
> (1) exhaust the unencumbered assets of the estate; and
>
> (2) in a manner consistent with section 506(c), recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of such property.
> . . . .

As explained in 6 Collier on Bankruptcy ¶ 724.03, Congress effectively has provided that a Chapter 7 trustee can take a portion of the money due on secured tax claims and divert it to pay the specified 11 U.S.C. § 507(a) priority claims and expenses:

> ¶ 724.03 Subordination of Tax Claims; § 724(b)
>
> Section 724(b) provides a mechanism for subordinating certain tax liens to the payment of certain priority claims. It provides that **proceeds of property in which the estate has an interest and that are subject to a lien** securing an allowed claim **for taxes**, other than a lien for ad valorem taxes, **will be distributed in accordance with the priority schedule contained in section 724(b)**. The priority schedule is

complicated and is discussed in detail below. Section 724 applies only in chapter 7. There are no comparable provisions in chapter 11, 12 or 13.

The impact of sections 724(e) and 724(f) should not be overlooked. Section 724(e) **limits subordination under section 724(b) to circumstances where the trustee has exhausted the unencumbered assets of the estate** and obtained any recovery to which the trustee is entitled under section 506(c). Section 724(f) provides a limited exception to the exclusion of ad valorem taxes from the scope of section 724(b).

. . .

[6] The Trustee Should Not Sell Estate Property and Invoke Section 724(b) If the Only Priority Claims to Be Paid Would Be Those Incurred in the Sale

A trustee should not be allowed to sell encumbered estate property and subordinate tax liens to pay priority claims, if the only claims to be paid would be those generated by the sale. For example, if an estate has overencumbered property with a $2,500 first tax lien, but it would cost $2,500 or more in trustee fees and real estate commissions to sell the property, the sale should not be approved.

[7] When Section 724(b) Can Be Used to Create Value for an Estate in Overencumbered Property

Section 724(b) can create value for an estate in overencumbered property. If a tax lien subject to section 724(b) subordination exceeds the administrative costs of disposing of the property, the property could have value to the estate, and the trustee may be justified in selling the property and subordinating the tax lien. Section 724(b) has also been held relevant in a preference action against the Internal Revenue Service for having levied on property prior to a bankruptcy case. One case used section 724(b) as justification for a trustee to recover from a junior lienholder who, after obtaining relief from the automatic stay but prior to foreclosing, used its own funds to pay off senior real estate taxes. A later and better reasoned case reached the contrary result, ruling that section 724(b) applies only when a trustee sells estate property, and does not create an independent right to collect tax payments.

Congress further provides in 11 U.S.C. § 726(a)(4) that an allowed claim for any fine, penalty, forfeiture, or punitive damages, to the extent that they do not represent actual pecuniary loss for the creditor, will be subordinate to the payment of all other claims (including tardy claims).

Debtor has and is claiming a homestead exemption for any value in excess of the liens encumbering the property. The Trustee does not dispute that, but is asserting the right to administer property subject to a tax lien and then disburse the proceeds thereof as provided by Congress in 11 U.S.C. § 724(b).

The Ninth Circuit Court of Appeals discussed the purpose of 11 U.S.C. § 724(b) and it moving assets in a Chapter 7 case away from a taxing agency (which might have a nondischargeable claim) and to other, average creditors [emphasis added]:

D. Policy

> As both parties properly concede, **an important purpose of § 724(b) is to offer some protection to certain priority claimants - such as spouses, dependent children, farmers, fishers, consumers, and employees - from tax claims that otherwise would consume most or all of the bankruptcy** estate. *See Gouveia v. IRS (In re Quality Health Care)*, 215 B.R. 543, 557 (Bankr. N.D. Ind. 1997); see also *N. Slope Borough v. Barstow*, 308 F.3d 1057, 2002 U.S. App. LEXIS 21918(op. at 19), No. 01-35892, (decided this date)(holding that the language of **§ 724(b) unambiguously establishes partial subordination of tax liens to the interests of priority unsecured creditors)**. If the purpose of the statute is truly to protect priority claimants and to ensure that they are paid before the taxing authorities are, it seems implausible that Congress intended to distinguish among different types of liens.
>
> On the other hand, when viewed from another perspective, the IRS's construction of the statute is entirely reasonable. Congress enacted § 67c of the Chandler Act in response to similar concerns about protection of administrative and wage claimants yet, as discussed above, Congress clearly chose to limit the application of subordination to only statutory claims. In balancing the competing interests of tax lienholders and priority unsecured claimants, Congress easily could have concluded that the fairest course of action was to subordinate some, but not all, liens securing claims for tax.

Barstow v. IRS (In re Markair, Inc.), 308 F.3d 1038, 1045-1046 (9th Cir. 2002), concluding that the 11 U.S.C. § 724(b) subordination applied only to statutory tax liens and not judicial liens.

In the related appellate decision *N. Slope Borough v. Barstow (in Re Bankr. Estate of Markair, Inc.)*, 308 F.3d 1057, 1064-1065, (9th Cir. 2002), Ninth Circuit Court of Appeals states [emphasis added]:

> D. Conclusion
>
> In sum, we agree with the Creditors: The express text of **§ 724(b) subordinates the interests of tax lienholders to that of priority unsecured creditors, but only up to the total amount of the tax lien.** Any **remaining proceeds are to be distributed first to junior lien claimants, next to the tax lienholders** and, finally, to the debtor's estate. . . .

While the Ninth Circuit's decisions on the statute clearly provides for subordination of the right to payment from the proceeds encumbered by the lien, they do not address the interplay when the property subject to the lien is one in which a debtor may claim a homestead exemption.

11 U.S.C. § 724(b) begins with a limitation, stating that it applies to "Property in which the estate has an interest." Clearly, merely because property is subject to an exemption does not remove it from the bankruptcy estate. A debtor may claim an exemption in an asset. The vast majority of exemptions under California Law (the applicable bankruptcy exemptions in California, Cal. Civ. Pro. § 703.140) are for monetary amounts in assets of the estate. Such assets continue to remain property of the estate until used, sold, or abandoned from the estate. *Schwab v. Reilly*, 560 U.S. 770, 792-793 (2010); *Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206, 1210 (9th Cir. 2010).

However, once the Trustee reduces the asset from land to dollars, the issue arises as to what portion of those dollars are property in which the bankruptcy estate has an interest. As discussed by the Supreme Court in *Schwab*:

> As we emphasized in *Rousey*, "[t]o help the debtor obtain a fresh start, the **Bankruptcy Code permits him to withdraw from the estate** certain interests in property, such as his car or home, up to certain values." 544 U.S., at 325, 125 S. Ct. 1561, 161 L. Ed. 2d 563 (emphasis added). The Code limits exemptions in this fashion because every asset the **Code permits a debtor to withdraw from the estate is an asset that is not available to his creditors**. See § 522(b)(1). Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors, and it is not for us to alter this balance by requiring trustees to object to claimed exemptions based on form entries beyond those that govern an exemption's validity under the Code. *See Lamie*, 540 U.S., at 534, 538, 124 S. Ct. 1023, 157 L. Ed. 2d 1024; *Hartford*, 530 U.S., at 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1; *United States v. Locke*, 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985).

Schwab v. Reilly, 560 U.S. at 791-792.

Thus, in applying 11 U.S.C. § 724(b) subordination, the Trustee may first receive and disburse the proceeds subject to the tax lien up to the amount of the tax lien, which amounts are not subject to the homestead exemption. Next, the Trustee disburses the monies to the holders of junior liens which are not subject to the homestead exemption.

At that point, the Trustee is holding unencumbered monies of the estate, in which the Debtor is asserting an exemption and the Debtor by that exemption removes them from the bankruptcy estate. So removed, they are not property in which the estate has an interest, but property of the Debtor. In 11 U.S.C. § 724 Congress does not abrogate a debtor's exemption, but only reallocates the portion of the value of the property to which the exemption does not apply.

Using the economic model for the property and tax liens at issue stated in the Opposition (Dckt. 26), one analysis of the property and proceeds in which the Debtor has claimed an exemption is as follows:

Value of the Property	$295,000
Secured Tax Claims Subject to § 724(b) Subordination	($186,729) [FN. 1]
Value Remaining After Tax Lien In Which Exemption May be Claimed	$ 108,271

FN. 1. On Schedule D, Debtor does not list any other creditors having claims that are secured by the Property subject to the tax liens.

So, with the above model, the Trustee liquidates the Property for $290,000, and from that, the Trustee then pays the administrative expenses (including the costs of sale of the Property) and pays the priority claims and expenses from the $184,729 subject to subordination, and then from what remains of the $184,729 after the priority claims and expenses, disburses that to the taxing agencies.

If the Debtor's valuation is correct, the asserted $100,000 exemption would effectively exhaust all of the proceeds after the subordination. If Debtor is correct and can show that Debtor is over 65 years of age, then the $175,000 homestead exemption would be well in excess of the projected proceeds.

Included in the Reply materials is the Declaration of the Trustee real estate broker. Dckt. 31. It appears that the value of the property may be higher than the $290,000 stated by Debtor, with the Trustee's broker stating it might be $25,000 +/- higher. If the broker is correct, but the Debtor has the more than 65 year old exemption, the $175,000 homestead exemption would soak up the increase in value. If the lower exemption applies, then there could be an "extra" $20K for the estate.

Priority Claims and Expenses to be Paid

On Schedule E/F Debtor listed no priority unsecured claims. Dckt 1 at 22. The only proof of claim filed asserting an unsecured priority claim is that of the Internal Revenue Service in the amount of $101,960.71, which is the amount that the Internal Revenue Service asserts is not part of its secured claim.

A review of Debtor's Schedules shows that they list a limited number of assets. Schedule A/B, Dckt. 1 at 9-16.

The court does not have in front of it a motion by the Trustee to sell the Property and assert the 11 U.S.C. § 724(b) subordination. In the Objection, the Trustee references 11 U.S.C. § 724(b) as something that the Trustee might exercise for the benefit of the bankruptcy estate. Objection, p. 3:5-7; Dckt. 17. But as the Ninth Circuit has discussed, the provisions of 11 U.S.C. § 724(b) were not enacted to benefit the bankruptcy estate (as were 11 U.S.C. §§ 544, 547, and 549 for example), but to benefit holders of certain priority claims and necessary administrative expenses at the cost of taxing agencies by subordinating the tax lien position to keep the taxing agency from soaking up all of the value in the estate by virtue of the expansive statutory tax liens.

It does not appear that there are any priority claims or necessary administrative expenses identified, at this time, for the Trustee to subordinate the secured tax claims. But that would be an issue for another day. The Trustee is not seeking, and the court is not authorizing, by this Objection the exercise of the subordination of a secured tax claim and the sale of property of the estate.

RATIONAL RESOLUTION OF OBJECTION

The Trustee's Objection asserts that Debtor has not established that they can claim an exemption of more than $100,000 in the Property. Thus, it appears that the Trustee acknowledges that the Debtor's exemption is at least $100,000, and all that is at issue is $8,918.77 claimed as exempt in excess of the $100,000. [FN. 1]

FN. 1. The court has always found it curious when debtors and their counsel do not claim the full amount of an exemption on Schedule C, but only what they compute the net amount to be based on the least

sophisticated consumer debtor's opinion (using the "least sophisticated consumer" reference to a debtor as applied under the statutory consumer protection schemes such as the Fair Debt Collection Practices Act and the Fair Credit Report Act), and electing to waive any greater amount in the event that a knowledgeable, sophisticated trustee effectively and efficiently administers the asset and sells it for significantly more than the least sophisticated consumer thought it was worth.

It would appear that the Trustee and Debtor could come to a reasonable, rational joint determination of the correct amount of the homestead exemption.

At the hearing, **XXXXXXXXXX**

REQUEST FOR ADDITIONAL TIME TO NEGOTIATE A CARVE OUT

As part of the Objection, the Trustee states that he is contemplating negotiating a carve out agreement with the taxing agencies. Such agreements are not uncommon, in which creditor's recognize the value of a trustee (or even a debtor) to market and sell property, maximize the recovery, and make a deal where a portion of the secured claim is assigned to the bankruptcy estate for the benefit of creditors holding unsecured claims, as well as for paying necessary administrative expenses.

However, the Trustee does not explain how the Debtor having a valid, *bona fide*, legal homestead exemption is in conflict with the rights of a trustee to administer property of the estate (here, the power to sell the Property, which is subject to a homestead exemption.). There is no assertion that the Trustee and taxing agencies can invalidate an otherwise *bona fide*, legal, valid, enforceable homestead exemption in the bankruptcy case.

The court concludes that there is no basis to continue the Objection and have this Sword of Damocles remain hanging over the Debtor's head.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claimed Exemptions filed by the Chapter 7 Trustee, Michael D. McGranahan ("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 Objection is **XXXXXXXXXX**.

FINAL RULINGS

12. 18-90237-E-7 HSM-12 | **JOANN MERENDA** Pro Se | **MOTION FOR COMPENSATION FOR RYAN, CHRISTIE, QUINN & HORN, ACCOUNTANT(S) 7-23-20 [142]**

Final Ruling: No appearance at the August 27, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 23, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Ryan, Christie, Quinn & Horn, the Accountant ("Applicant") for Gary Farrar, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 20, 2019, through August 6, 2020. The order of the court approving employment of Applicant was entered on August 21, 2019. Dckt. 102. Applicant requests fees in the amount of $1,950 and costs in the amount of $0.00.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

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

A review of the application shows that Applicant's services for the Estate include general case administration and tax resolution issues. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 2 hours in this category. Applicant reviewed the case, prepared Applicant's employment application, and assisted in preparing the instant compensation application.

Tax Resolution Issues: Applicant spent 5.8 hours in this category. Applicant prepared tax returns; reviewed settlement agreement and prepared a tax related memo; prepared the bankruptcy estate trust tax returns; and drafted letters to respective tax authorities.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Ryan, Christie, Quinn & Horn	7.8	$250.00	$1,950.00
	0	$0.00	$0.00
Total Fees for Period of Application			$1,950.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $1,950.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $1,950.00,

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Ryan, Christie, Quinn & Horn ("Applicant"), Accountant for Gary Farrar, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Ryan, Christie, Quinn & Horn is allowed the following fees and expenses as a professional of the Estate:
>
> Ryan, Christie, Quinn & Horn, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $1,950.00,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

13. 18-90237-E-7 HSM-13 | **JOANN MERENDA, Pro Se** | **MOTION FOR COMPENSATION FOR GARY FARRAR, CHAPTER 7 TRUSTEE(S), 7-23-20 [148]**

Final Ruling: No appearance at the August 27, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 23, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Gary Farrar, the Chapter 7 Trustee, ("Applicant") for the Estate of Joann E. Merenda ("Client"), makes a Request for the Allowance of Fees and Expenses in this case. Fees are requested for this case.

STATUTORY BASIS FOR FEES

11 U.S.C. § 330(a)

> (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 —

> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.

In considering the allowance of fees for a professional employed by a trustee, the professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)).

In considering the compensation awarded to a bankruptcy trustee, the Bankruptcy Code further provides:

> (7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

11 U.S.C. § 330(a)(7). The fee percentages set in 11 U.S.C. § 326 expressly states that the percentages are the maximum fees that a trustee may received, and whatever compensation is allowed must be reasonable. 11 U.S.C. § 326(a).

Benefit to the Estate

Even if the court finds that the services billed by a trustee are "actual," meaning that the fee application reflects time entries properly charged for services, the trustee must demonstrate still that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A trustee must exercise good billing judgment with regard to the services provided because the court's authorization to employ a trustee to work in a bankruptcy case does not give that trustee "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include general administration of the case, overseeing the negotiation and agreement over a real property dispute, and

overseeing accounting and tax issues. The Estate has $145,925.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES REQUESTED

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

General Case Administration: Applicant spent 51.7 hours in this category. Applicant investigated, analyzed, and resolved disputes relating to real property; oversaw the negotiation and finalization of an agreement between parties in dispute over real property; reviewed motion seeking approval of the agreement to sell the estate's interest in the disputed real property; facilitated the sale of personal property from the estate.

Accounting and Tax Issues: Applicant spent 5.6 hours in this category. Applicant consulted with a tax professional concerning bankruptcy estate tax reporting matters and analysis of tax ramifications from the real property agreement.

Applicant requests the following fees:

25% of the first $5,000.00	$1,250.00
10% of the next $45,000.00	$4,500.00
5% of the next $950,000.00	$4,398.22
3% of the balance of $0.00	$0.00
Calculated Total Compensation	**$10,148.22**
Plus Adjustment	$0.00
Total Maximum Allowable Compensation	$10,148.22
Less Previously Paid	$0.00
Total First and Final Fees Requested	$10,148.22

FEES ALLOWED

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. § 326(a) and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $10,148.22 are approved pursuant to 11 U.S.C. § 330 are authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

In this case, the Chapter 7 Trustee currently has $137,964.44 of unencumbered monies to be administered. The Chapter 7 Trustee general administration of the case, overseeing the negotiation and agreement over a real property dispute, and overseeing accounting and tax issues. Applicant's efforts have resulted in a realized gross of $145,925.00 recovered for the estate. Dckt. 152.

This case required significant work by the Chapter 7 Trustee, with full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowable as a commission to the Chapter 7 Trustee.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$10,148.22
Costs and Expenses	$211.00

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Gary Farrar, the Chapter 7 Trustee, ("Applicant") 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 is allowed the following fees and expenses as trustee of the Estate:
>
> Gary Farrar, the Chapter 7 Trustee
>
> Fees in the amount of $10,148.22
> Expenses in the amount of $211.00
>
> **IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

14. 18-90237-E-7 HSM-14

JOANN MERENDA
Pro Se

MOTION FOR COMPENSATION BY THE LAW OFFICE OF HEFNER, STARK & MAROIS, LLP FOR AARON A. AVERY, TRUSTEES ATTORNEY(S)
7-23-20 [153]

Final Ruling: No appearance at the August 27, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 23, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Hefner, Stark & Marois, LLP, the Attorney ("Applicant") for Gary Farrar, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period February 14, 2019, through August 27, 2020. The order of the court approving employment of Applicant was entered on March 22, 2019. Dckt. 85. Applicant requests fees in the amount of $35,000.00 and costs in the amount of $130.80.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

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

A review of the application shows that Applicant's services for the Estate include

The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 35.20 hours in this category. Applicant drafted employment application for counsel; performed case analysis; advised Trustee in negotiations, discharge issues, and exemptions issues; reviewed motion to withdraw; drafted and prosecuted compensation applications for the Trustee and his professionals .

Asset Investigation: Applicant spent 13.60 hours in this category. Applicant advised Trustee in administration of estate assets and deed restriction issues; reviewed documents and communicated with former spouse in relation to dissolution issues; reviewed documents and provided analysis regarding disputed interest in real property.

Asset Disposition: Applicant spent 56.80 hours in this category. Applicant advised and represented Trustee in administration of estate's assets; drafted multiparty agreement regarding disposition of assets and dissolution action; drafted agreement revisions; reviewed tax analysis of agreement; drafted and prosecuted sale/compromise motion; advised Trustee with performance of agreement.

Litigation and Claims: Applicant spent 14.70 hours in this category. Applicant researched and advised Trustee regarding legal and procedural issues; drafted complaint for declaratory relief against Debtor's former spouse; reviewed amended proof of claim and communicated with Trustee.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Aaron A. Avery	101.40	$340 - $380	$33,074.00
Howard S. Nevins	7.7	$420 - $440	$3,274.00
	0	$0.00	$0.00
Total Fees for Period of Application			$36,348.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $130.80 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying	$0.10 per page	$116.30
Certified Copy Fee		$14.50
		$0.00
Total Costs Requested in Application		$130.80

FEES AND COSTS & EXPENSES ALLOWED

Fees

Reduced Rate

Applicant seeks to be paid a single sum of $35,130.80 for its fees and costs incurred for Client. First and Final Fees and Costs in the amount of $35,130.80 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Costs & Expenses

First and Final Costs in the amount of $130.80 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$35,000.00
Costs and Expenses	$130.80

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Aaron Avery Esq., of Hefner, Stark & Marois, LLP, ("Applicant"), Attorney for Gary Farrar, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Aaron Avery Esq., of Hefner, Stark & Marois, LLP, is allowed the following fees and expenses as a professional of the Estate:
>
> Aaron Avery, Esq., of Hefner, Stark & Marois, LLP, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $35,000.00
> Expenses in the amount of $130.80,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

15. 12-92479-E-12 NFG-6 | **DAVID/ESPERANZA AGUILAR** **Nelson Gomez** | **CONTINUED MOTION TO ENFORCE TERMS OF CONFIRMED AMENDED CHAPTER 12 PLAN AND FOR ADDITIONAL RELIEF** **6-1-20 [150]**

Final Ruling: No appearance at the August 27, 2020 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's, Chapter 12 Trustee, Creditor, and Office of the United States Trustee on June 1, 2020. By the court's calculation, 66 days' notice was provided. 28 days' notice is required.

The Motion to Enforce Terms of Confirmed Amended Chapter 12 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion to Enforce Terms of Confirmed Amended Chapter 12 plan is continued to 10:30 a.m. on September 10, 2020.

The present Motion to Enforce Terms of the Confirmed Amended Chapter 12 Plan was filed by the debtors, David Tafolla Aguilar and Esperanza Aguilar ("Debtors"), against creditor OneWest Bank ("Creditor"), asserting that Creditor has violated the terms of the Confirmed Amended Chapter 12 Plan ("Plan") by, through its current service, proceeding with a pending foreclosure of Debtors' business property.

REVIEW OF JOINT STATUS REPORT (Dckt. 158)

The Parties have provided the court with a Joint Status Report in advance of the continued hearing. The Parties report that they are continuing in their good faith settlement discussions and request that the court continue the hearing to September 10, 2020 to afford them additional time in their efforts.

The court so continues the hearing.

REVIEW OF THE MOTION

In asserting these claims, Debtors state with particularity (Federal Rule of Bankruptcy Procedure 9013) the following grounds for relief:

A. The August 21, 2014 confirmed Amended Plan called for monthly payments of $994.00.

B. The Amended Plan provided for Debtors to make payments on their Business Property, located at 5001 E. Monte Vista Avenue, Denair, California, through the Plan.

C. Creditor did not object to the confirmation of the Plan.

D. Creditor through its current servicer, LoanCare, LLC ("LoanCare"), has continued to ignore and disregard the order of this court regarding the confirmation of the Amended Plan, to the detriment of Debtor, including the pending foreclosure on Debtors' Business Property by Creditor.

Motion, Dckt. 150.

Prayer for Relief

Debtor requests the following relief:

1. For an evidentiary hearing to determine the amount owed by Debtors under terms of the confirmed Amended Chapter 12 Plan;

2. For an order dismissing the amounts claimed by LoanCare as owing which were part of the unsecured portion of Debtors' Amended Chapter 12 Plan;

3. For damages for emotional distress incurred by Debtors as a result of LoanCare's unlawful foreclosure action, according to proof;

4. For attorney's fees incurred by Debtors in defending them against LoanCare's unlawful foreclosure action, according to proof; and

5. For any additional relief which the court may deem appropriate.

Review of Evidence

Debtors have provided the Declaration of Nelson F. Gomez in support of the Motion. Dckt. 152. Declarant is Debtors' Counsel who testifies to the following:

A. No opposition to the entry of discharge was filed and an order granting Debtors' discharge was entered on February 22, 2018.

B. Once the thirty six payments were made to the Chapter 12 Trustee, Counsel communicated with the servicer of the loan, CIT Bank, to inquire as to where Debtors should make the remaining 204 payments called for by the Amended Chapter 12 Plan. He was informed that the Bankruptcy Department of CIT Bank would provide a response. See Exhibit A.

C. Counsel's attempt to communicate with Creditor was unsuccessful and the communication was returned as undeliverable. See Exhibit B.

D. CIT Bank informed Counsel that the servicing of the loan was being transferred to LoanCare. See Exhibit C.

E. On March 12, 2018, Counsel received a Debt Validation Letter ("Debt Letter") from LoanCare, which stated that the loan was in delinquency and that the arrears amount for Principal and Interest was $18,121.97. See Exhibit D.

F. On March 26, 2018, Counsel responded to the Debt Letter, challenging it as inaccurate on the grounds that the amount owed by Debtors was $5,450.76, which amounted to six payments of $908.46. Counsel never received a response to his letter.

G. On May 31, 2018, Counsel forwarded to LoanCare all the relevant documents from the Bankruptcy showing that this borrower only owed payments from October, 2017 to May, 2018. See Exhibit F.

H. Debtors sent payments to LoanCare beginning in March of 2018, until November of 2018. The payments were not accepted by the servicer, but later claimed that they did not receive them. Debtors have since received the funds from Bank of America. See Exhibit G.

I. On December 17, 2018, LoanCare informed Debtors that the loan was in default and that a foreclosure proceeding had commenced. The Notice of Default included sums which were part of the unsecured claim of Creditor, which had been dismissed when the Discharge of Debtors was entered. See Exhibit H.

J. Multiple attempts to communicate with LoanCare's individual in charge were unsuccessful. The foreclosure action resulted in a Notice of Trustee Sale issued by Trustee Corps, the company hired by LoanCare to conduct the foreclosure on June 24, 2019. See Exhibit I.

K. On May 22, 2019, after Creditor and LoanCare failed to respond to Debtor, through their attorney, Counsel asked this court to reopen the Bankruptcy Case for the purpose of filing the instant Motion.

L. Since the reopening of the case, LoanCare has continued to maintain the Trustee Sale of Debtors' property, only postponing it for terms of 30 days.

M. Counsel adds that Creditor and LoanCare are attempting to recover an unsecured component through the foreclosure action against the terms of the confirmed Plan, and Debtor requests the court to enforce the terms of the plan by issuing a ruling for Creditor and LoanCare to comply with the order

so the foreclosure action is based solely on the amount legally owed by Debtor as outline in the Plan.

The following Exhibits are provided as part of the Declaration:

- Exhibit A: copy of October 9, 2017 Debtor's Counsel Letter to CIT Bank, NA and a copy of undeliverable envelope as Exhibit B.

- Exhibit C: copy of Notice of Servicing Transfer dated February 8, 2018

- Exhibit D: copy of March 6, 2018 LoanCare Debt Validation Letter

- Exhibit E: copy of March 26, 2018 Debtor's Counsel Letter to LoanCare

- Exhibit F: copy of Fax Transmission Cover Sheet and May 30, 2018 Letter to LoanCare with accompanying bankruptcy related documents

- Exhibit G: copies of nine (9) Bank of America Cashier's Checks in the amount of $908.46 dated March 2018 through November 2018.

- Exhibit H: copy of December 17, 2018 LoanCare Letter to Debtor regarding default and foreclosure proceedings

- Exhibit I: copy of Notice of Trustee's Sale

Dckt. 152.

RESPONDENT'S OPPOSITION

Respondent filed an Opposition on July 23, 2020. Dckt. 154. Respondent opposes the Motion on the following grounds:

A. Debtors do not allege that their loan is current and fail to explain how, specifically, the March 2018 Debt letter is inaccurate.

B. Debtors have not, and are unable to, produce proof of payments from October 2017 until now. LoanCare has no record of receiving the cashier's checks in question that Debtors contend were sent between March 2018 and November 2018 prior to the commencement of the foreclosure.

C. Debtors have failed to asserts how LoanCare violated the terms of the confirmed plan on the basis that the delinquent amount stated in the Debt Letter in the amount of $18,413.79 is not a portion of the unsecured claim that was to be wiped out upon discharge.

D. Instead, the delinquent amount included in the Debt Letter contains payments that were to be paid subject to the Amended Stipulation Resolving Debtors' Motion to Value Collateral on Subject Business

Property and Setting Forth Chapter 12 Plan Treatment, but were, instead, paid at the lower amount of $779.19 (instead of the stipulated monthly plan payment of $908.46) coupled with the Debtors' lack of payments between October 2017 and March 2018 after the closing of the case.

E. Debtors failed to show that LoanCare violated the terms of the Plan and that they suffered any emotional distress damages.

F. The Motion fails to provide evidence or a calculation of the alleged attorney's fees and costs associated with the alleged violation of plan terms, hourly rate paid, or any other details that would allow a court to award fees and costs. Thus, Debtors are not entitled to an award of attorney's fees and costs.

DISCUSSION

The court begins with the Confirmed Amended Chapter 12 Plan, the modified contract between the parties. With respect to the secured claim at issue, the Confirmed Amended Plan provides:

> Class 3: Secured claim of One West Bank.
>
> This class consists of the claim of One West Bank which is secured by a Deed of Trust on the Real Property located at 5001 E. Monte Vista Avenue, Denair, California.
>
> (The Bank filed a claim in the sum of $179,923.80. The Debtors and the Bank reached a Stipulation regarding the secured and unsecured portions of The Bank's claim, and the Court accepted this Stipulation.)

Confirmed Amended Plan, p. 2:22-25, 3:1-3, attached to Confirmation Order; Dckt. 79.

> Class 3: Secured claim of One West Bank.
>
> The holder of the claim in this class will receive $115,630.00, together with interest at the rate of 5% per annum, from September 1, 2014, in 240 fully amortized monthly payments of $779.17.
>
> Prior to confirmation of the Amended Plan, the Debtor will make adequate protection payments of $779.17 to the holder of the claim in this class commencing November 1, 2013. Debtor has made these payments from November 1, 2013 to July 10, 2014.
>
> The Trustee will make a total of 36 payments to the holder of the claim in this class from the funds paid to him, and the Debtors will make the remaining 204 payments. The holder of the claim in this class will retain its Deed of Trust against the Real Property.

Id., p. 3:13-24.

Thus, the confirmed plan provides that Creditor's secured claim is $115,630.00, with fully amortized payments of $779.17 a month until paid in full at the end of 20 years.

There does not appear that there can be many complex issues over whether the required payments under the Note, as modified by the confirmed Amended Plan, have been made - $779.17 per month commencing September 1, 2014.

The court notes that the Stipulation filed on August 20, 2014, a month before the Amended Plan is confirmed. The Stipulation provides for a 5.25% interest rate and for the pre-confirmation adequate protection payments to be $908.46, of which $129.29 to be applied to "escrow."

Using the Microsoft Excel Loan Calculator Program, the court computes the monthly payment for a fully amortized repayment of $115,630.00 over 240 months at 5.25% interest to be $779.17. So, while it appears that the interest rate stated in the plan, 5%, the monthly payment amount was computed consistent with the Stipulation at $779.17. No reference is made in the Plan to amounts for "escrow" (but presumably the portion of the loan documents not modified provide for such amounts if that is the asserted default).

At the hearing, the court addressed with the Parties identifying the real financial issues that exist and how to clearly and accurately identify the payments required and the payments made.

At the hearing, Counsel for the Debtors reported that Creditor now agrees that the payments from the Debtor began the month after the hearing.

The Parties requested a continuance to 10:30 a.m. August 27, 2020, to further address resolution of this matter.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Enforce Terms of Confirmed Amended Chapter 12 Plan filed by David and Esperanza Aguilar, the Debtor/Plan Administrator 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 Enforce Terms of Confirmed Amended Chapter 12 plan is continued to 10:30 a.m. on September 10, 2020.

16. 20-90210-E-11 AF-5 16 thru 17

JOHN YAP AND IRENE LOKE
Arasto Farsad

MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON AND/OR MOTION TO VALUE COLLATERAL OF COLLATERAL FINANCING GROUP, LLC
5-15-20 [62]

Final Ruling: No appearance at the August 27, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on June 26, 2020. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion to Value the Secured Claim of Bank of New York Mellon is granted, the secured claim of Bank of New York Mellon is determined to have a value of $301,324.00

The Motion to Value the Secured Claim of Collateral Financing Group, LLC is granted, and the secured claim of Collateral Financing Group, LLC is determined to have a value of $0.00.

Joinder of Multiple Parties One Contested Matter

The present Motion (a Contested Matter as provided in Federal Rule of Bankruptcy Procedure 9014) seeks relief pursuant to 11 U.S.C. § 506(a) against two different persons concerning two different claims. While in an adversary proceeding Federal Rule of Civil Procedure 20, as incorporated into Federal

Rule of Bankruptcy Procedure 7020) permits the joinder of multiple parties in one adversary proceeding if there is a common question of law or fact to all defendants. Federal Rule of Bankruptcy Procedure 7020 is not automatically incorporated into contested matter practice. Fed. R. Bankr. P. 9014(c).

However, the court may, and does in this Contested Matter, make Federal Rule of Bankruptcy Procedure 7020 and thereby Federal Rule of Civil Procedure 20 applicable to allow for the permissive joinder of The Bank of New York Mellon and Collateral Financing Group, LLC as respondent parties herein.

REVIEW OF THE MOTION

The Motion to Value filed by John Hst Yap and Irene Laiwah Loke ("Debtors in Possession") to value two claims secured by real property commonly known as 2412 6th Street, Hughson, California ("Property"). Debtor seeks to value the Property at a fair market value of $301,324.00 as of the petition filing date. As the owner, 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).

The valuation of property that secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2 (case or controversy requirement for the parties seeking relief from a federal court).

IDENTITY OF CREDITORS TO HAVE SECURED CLAIMS VALUED

The Motion states that there are two mortgages/deeds of trust recorded against the Property and a judgment lien. These encumbrances are identified by the Debtor in Possession as follows.

Senior Deed of Trust

The First Deed of Trust is stated to have originated with First Home Loan Corporation, in the amount of ($299,000). A copy of the First Home Deed of Trust is provided as Exhibit 1. Dckt. 66. The

Motion then states that this note and deed of trust were assigned to Bank of New York Mellon f/k/a the Bank of New York, as Trustee for the holders of the Certificates, First Horizon Mortgage Pass-Through Certificates (FHAMS 2006-AA7), and that Nationstar Mortgage, dba Mr. Cooper, is the loan servicer for The Bank of New York Mellon, as trustee.

Proof of Claim No. 5-1 has been filed by The Bank of New York Mellon, as trustee, for this claim, which is stated in Proof of Claim 5-1 to be a ($405,421.01) secured claim for which the Property is identified as collateral.

Second Deed of Trust

The Motion then identifies a second deed of trust securing an obligation originally owed to Collateral Financing Group, LLC in the original amount of ($94,421.00). The Debtor in Possession asserts that this claim is at least ($94,421.00). Debtors do not recall making any payments on this Second Deed of Trust post origination and assert not having received any notices or statements from Collateral Financing Group, LLC (or any other creditor for that matter with regard to this Second Deed of Trust) since it was originated.

No proof of claim has been filed for this debt.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $405,421.01. Proof of Claim 5-1. Creditor's second deed of trust secures a claim with a balance of approximately $94,421.00. Declaration, Dckt. 64.

The Motion states that Debtor in Possession requested that a local Realtor provide a verbal price opinion as to value of the Property. In her Declaration, the Realtor, Regina Zabarte, states that the property has a value of $301,324.00 in its as-is condition. Dckt. 65. Realtor adds that this value is a "little high" and "would likely suggest a list of price at $275,000 to hopefully obtain $300,000 or a little more." *Id.* The Debtor in Possession believes that Ms. Zabarte's opinion is accurate. The Debtor in Possession testifies that they conducted additional research from other third parties identified as Zillow.com and Redfin.com.

The claims of both the First and Second Deeds of Trust are not protected by the anti-modification clause of Title 11 U.S.C. Section 1322(b)(2) because the subject Property is not the Debtors' primary residence.

The Property has a value of $301,324.00. Thus, The First Deed of Trust securing The Bank of New York Mellon claim with a balance of $405,421.01 is partially under-collateralized. The Bank of New York Mellon has a secured claim in the amount of $301,324.00 and a general unsecured claim in the amount of $104,491.00.

Creditor Collateral Financing Group, LLC's claim secured by a junior deed of trust is completely under-collateralized. Creditor Collateral Financing Group, LLC's secured claim is determined to be in the amount of $0.00, the value of the collateral, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir.

1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) 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 Value Collateral and Secured Claim filed by John Hst Yap and Irene Laiwah Loke ("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 pursuant to 11 U.S.C. § 506(a) is granted, and the claim of The Bank of New York Mellon f/k/a the Bank of New York, as Trustee for the holders of the Certificates, First Horizon Mortgage Pass-Through Certificates (FHAMS 2006-AA7) ("Creditor") secured by a first in priority deed of trust recorded against the real property commonly known as 2412 6th Street, Hughson, California, is determined to be a secured claim in the amount of $301,324.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan.
>
> **IT IS FURTHER ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Collateral Financing Group, LLC ("Creditor") secured by a second in priority deed of trust recorded against the real property commonly known as 2412 6th Street, Hughson, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $301,324.00 and is encumbered by a senior lien securing a claim in the amount of $405,421.01, which exceeds the value of the Property that is subject to Creditor's lien.

17. 20-90210-E-11 AF-7

JOHN YAP AND IRENE LOKE
Arasto Farsad

MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON AND/OR MOTION TO VALUE COLLATERAL OF FIRST HORIZON HOME LOAN CORPORATION
7-17-20 [104]

Final Ruling: No appearance at the August 27, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on July 17, 2020. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Value Collateral and Secured Claim of The Bank of New York Mellon ("Creditor") has been continued to 10:30 a.m. on October 1, 2020, by prior Order (Dckt. 125) of the court.