**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

**September 10, 2014 at 10:00 a.m.**

---

**INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS**

**1. Matters resolved without oral argument:**

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

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

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

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

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

---

| | | | |
|---|---|---|---|
| 1. | 13-27002-A-13<br>13-2338<br>ACEITUNO V. ROBERTS | RICHARD ROBERTS<br>TAA-3 | MOTION TO DISMISS ADVERSARY PROCEEDING<br>8-7-14 [31] |

**Final ruling:**

**This adversary proceeding has been transferred to Department A of this court. The hearing on this motion will be continued to September 15, 2014, at 10:00 a.m. in Department A, to be heard by the Hon. Michael S. McManus. No appearance is necessary on September 10, 2014.**

**The parties should note that the amended notice of hearing filed by the moving party on September 4, 2014 is incorrect for two reasons. First, the date selected for the continued hearing is for chapter 7 cases whereas this is a hearing in an adversary proceeding in a chapter 13 case, which is to be on a calendar for law and motion in adversary proceedings in all chapters. Second, the amended notice of hearing, on page 2, gives the original date as the date of the continued hearing.**

2. 14-23307-D-7 VINCENTE PORTER — CONTINUED MOTION TO DISMISS CASE
RTD-1 — 7-7-14 [24]

**Tentative ruling:**

**This is the motion of creditor Sacramento Credit Union (the "credit union") to dismiss this chapter 7 case pursuant to § 707(b)(1) of the Bankruptcy Code, based on an alleged presumption of abuse under § 707(b)(2). The debtor has filed opposition, the credit union has filed a reply, and the debtor has filed declarations. For the reasons discussed below, the court will grant the motion and dismiss the case or, with the debtor's consent, convert the case to chapter 13.**

**The analysis centers on the debtor's Form 22A.[1] Based on a household size of 4, and based on his other deductions, the debtor claims, on line 50 of Form 22A, that his monthly disposable income ("MDI") is $122.48. That figure, multiplied by 60, is $7,348.80. The debtor's general unsecured debts total $50,608, of which 25% is $12,652. Thus, on the face of the debtor's Form 22A, it appears the presumption of abuse does not arise. See § 707(b)(2)(A)(i).**

**The credit union contends adjustments totaling $2,214.80 must be made to the debtor's expenses listed on his Form 22A, including decreases in several categories of expenses. As a result of those adjustments, the credit union calculates that the debtor's MDI is actually $2,337.28, which, over 60 months, would amount to $140,236.80, much more than the amount necessary to trigger the presumption of abuse, and in fact, well over double the amount necessary to pay his unsecured debts in full.**

**For most of those adjustments, any single one would trigger the presumption of abuse. For example, if a household size of 3 is used, instead of 4, the debtor's expense deductions – those based on the national and local standards – would be reduced by $562. Adding chapter 13 administrative expenses at the multiplier the debtor listed on his Form 22C, 4.2%, or $24, the debtor's MDI would increase from $122 to $660 ($122 + $562 - $24) which, over 60 months, would equate to $39,600, enough to pay a 78% dividend to general unsecured creditors, and well over the amount necessary to trigger the presumption of abuse. As discussed below, the court concludes that the adjustment to the debtor's household size is appropriate, and thus, that the presumption of abuse arises.**

**The debtor claims his household consists of four persons: the debtor, his spouse, his nine-year old nephew, and his 19-year old stepdaughter (his spouse's daughter). The credit union contends neither the nephew nor the stepdaughter is properly included in the debtor's household size. However, because the calculations for a household of 3 are sufficient to trigger the presumption of abuse, the credit union did not make the calculations for a household of 2, and the court need not do so either. Because the court concludes that the inclusion of the debtor's nephew in the household size is not appropriate, the court will not focus on the issue of the debtor's stepdaughter except, as discussed below, as it relates to the debtor's overall credibility.**

**The debtor, in opposition to the motion, relies heavily on this language in Moore v. East Cleveland, 431 U.S. 494 (1977):**

**The tradition of uncles, aunts, cousins, and especially grandparents**

> sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition [as the nuclear family]. . . . Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. . . . Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State.

Moore, 431 U.S. at 504-05, 505-06. With this backdrop, the debtor charges the credit union with "interfering on the constitutional rights of the household family nucleus" and "desir[ing] to place itself in a better position than the City of Cleveland could achieve in Moore v. Cleveland." Debtor's Opp., filed Aug. 12, 2014 ("Opp."), at 3:3-5.

Moore involved the definition of a "family" in a city housing ordinance that limited the occupancy of a dwelling unit to members of a single family. It had nothing to do with bankruptcy law, and is of little use, if any, in evaluating the issue, particularly considering the overarching goal of BAPCPA "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensur[ing] that the system is fair for both debtors and creditors"[2] and the specific goal of the means test "to measure debtors' disposable income and, in that way, 'to ensure that [they] repay creditors the maximum they can afford.'"[3]

The debtor also cites In re Crow, 2012 Bankr. LEXIS 6149, at *12 (Bankr. E.D. Cal. 2012) (not for publication), in which another department of the court in this district allowed the debtor to include her unemployed boyfriend, who lived with her and whom she supported, in her household size on the means test. The Crow court analyzed the issue in light of the three general tests that have been developed in the case law since the passage of BAPCPA, as discussed in In re De Bruyn Kops, 2012 Bankr. LEXIS 775, at *2-5 (Bankr. D. Idaho 2012) (determining the debtor's household size to be 3, not 1.34, where his two children lived with him part-time under a joint custody arrangement). This court has considered the issue of the debtor's nephew under each of the three tests, and finds that the only one that would apply here is the "heads on beds" approach (see Kops, 2012 Bankr. LEXIS 775, at *8-12), which this court rejects (as did the Kops court, id.). It is also worth noting that the same judge who decided the Kops case more recently held that the debtor's stepson, whom the debtor had not adopted and was not legally responsible for, could not be counted in the debtor's household size. In re Ford, 509 B.R. 695, 700 (Bankr. D. Idaho April 17, 2014). The bottom line here is that the analysis is an intensely factual one, dependent on the particular circumstances of each case, as demonstrated by admissible evidence.

The facts regarding the debtor's nephew, as testified to by the debtor at the meeting of creditors, are set forth in the credit union's supporting declaration of Roxanne T. Daneri, who questioned the debtor at the meeting. The debtor's nephew has lived with the debtor and his wife on and off since last year. When asked if the debtor is receiving any support for the nephew, the debtor replied no, that his nephew is his godson. In opposition to this motion, the debtor submitted no evidence, instead relying on suggestion and hyperbole: "Taking care of the 9 year old nephew is a much better societal choice then [sic] placing him in a foster home." Opp. at 2:22-23.[4]

In its reply, the credit union observed that the debtor had submitted no

evidence to support his position, and in response to that, the debtor filed a late declaration, testifying as follows:

> My nephew is currently living with us, the majority of his time, due to family problems related to his parents and therefore under my care and support. These family problems are private matters related to a minor child. He is registered and attending the school by my home and due to my address and I provide his care and support as his parents are unable to do so. [¶] As a family, we have come together and provide for his care and support instead of placing him in foster care only to become a burden on the foster care system by getting assistance from government agencies to live. [¶] It is our belief that this is what families are supposed to do.

V. Porter Decl., filed Sept. 4, 2014, at 2:5-12. The debtor also filed a late declaration of his spouse, who added with regard to their nephew: "We provide his care and support, in that we feed him, provide him a place to live, buy him clothes and make sure he attends school, mentor and love him, as his parents are unable to do so." A. Porter Decl., at 2:9-11.

The court is inclined not to consider the declarations. They were filed only after the credit union pointed out in its reply that the debtor had submitted no evidence; thus, the declarations were filed after the evidentiary record had closed. See LBR 9014-1(f)(1)(C). Further, the court views the debtor's testimony with some skepticism, given inconsistencies elsewhere in the record. He originally listed his gross income on Schedule I as $7,665 and his expenses on Schedule J as $4,231. Three months later, after the credit union had obtained copies of the debtor's tax returns and pay advices, and after the meeting of creditors at which the debtor was questioned by the credit union's attorney, the debtor amended his Schedules I and J. This time, he scheduled his gross income as $8,357, and increased his expenses by $440, which offset the increased income almost exactly. He originally testified only that his nephew had lived with him and his spouse on and off for the past year, and is his godson, adding nothing about the circumstances he now claims compel him to provide for his nephew.

In addition, the debtor testifies in his declaration that his adult stepdaughter is unable to support herself without being a member of his household, and that he provides for her "instead of sending her out into the world only to become a burden on the welfare system by getting assistance from government agencies to live" (V. Porter Decl. at 2:1-3), whereas he testified at the meeting of creditors she works part-time and uses her income to pay off restitution. He did not include any of her income on his Form 22A, and has provided no information about the amount she earns or the amounts of her expenses. Further, the debtor now testifies he donates $200 per month in cash to his church, but he testified on his Statement of Financial Affairs – under oath – that he made no gifts or charitable contributions to any one recipient totaling $100 or more in the year preceding his bankruptcy filing. These contradictions and gaps in the evidence negatively impact the debtor's credibility with the court.

However, even if the court takes the declarations at face value, they do not change the court's findings or conclusions. There is no evidence the debtor is legally obligated to support his nephew. There is no evidence the nephew's own parents are not legally obligated to provide for him; presumably, they are, as the nephew lives with the debtor and his wife only on and off (or as the debtor now puts it, the majority of his time). There is no admissible evidence the nephew's own

parents are not financially able to provide for him. The testimony of both the debtor and his spouse is hearsay: it is based on what some third person or persons, presumably the child's parents, have told them. However, even if the testimony were admissible, it is too vague and conclusory to enable the court to find that the nephew is truly dependent on the debtor for his support.

There is no admissible evidence that the nephew's parents do not and are unable to contribute to his financial support in any way. The debtors do not claim him as a dependent on their tax returns. It is undisputed that the nephew lives with the debtor and his spouse only part-time; thus, some other adult or adults are able to and do care and provide for him the rest of the time. While it may be convenient, perhaps even beneficial, for the nephew to reside part-time with the debtor and his spouse, the court is not persuaded it is necessary. This appears to be an arranged situation where the debtor and his spouse have volunteered to take on the part-time care of their nephew, apparently because they believe they can provide him with a better living environment than his parents, and also, perhaps, so he can attend a school that is near their house. To construe the term "dependent," in § 707(b)(2)(A)(ii)(i), in such as way as to allow a debtor to voluntarily take on, at the expense of his creditors, a child for whom he has no legal obligation, simply because the debtor asserts there are problems in the child's parents' home, would simply open the door too wide – it would make it too easy for a debtor who is well above-median income (as is the debtor here, even for a household of 4) to construct a situation to avoid paying his creditors.

The court concludes that the debtor's nephew does not qualify as a dependent for purposes of the means test. Thus, the debtor has a household of, at most, 3; the presumption of abuse arises, as set forth above, and the court need not address at this time the remaining adjustments the credit union would make. The debtor has failed to rebut the presumption; instead, his sole argument is that the presumption does not arise. Accordingly, the court will grant the motion and dismiss the case unless the debtor consents to conversion to chapter 13.

Finally, in support of a vaguely presented argument that the debtor's financial situation is subject to virtually certain changes, and citing Hamilton v. Lanning, 560 U.S. 505 (2010), the debtor asks the court to take judicial notice of what he contends is the labor agreement between the City of Sacramento and the Sacramento Police Officers Association for the years 2014-2017, which provides for particular mandatory PERS contributions the debtor claims will increase his payroll deductions. The copy of the labor agreement the debtor has filed as exhibit appears to be a complete copy with one exception: at Article 5 - Salary Adjustments, only the headings of the three subsections appear; the text is missing. The debtor does not explain whether the copy was incomplete when he obtained it or whether those sections have been whited out. The credit union, in its reply, has located a complete copy of the agreement – the sections missing from the debtor's copy appear to provide for salary increases to offset in part the new mandatory PERS contributions.

The court agrees with the credit union that the incomplete copy of the labor agreement filed by the debtor, which is his only evidence on this issue, "does not constitute admissible evidence of a reasonably certain change in the net income of the Debtor." Reply, filed Aug. 30, 2014, at 6:22-23. Accordingly, the court rejects the debtor's conclusion that any chapter 13 plan he might propose would not be feasible.

The court will hear the matter.

**1 All references to the debtor's Form 22A are to the amended Form 22A filed April 9, 2014.**

**2 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, quoting H.R.Rep. No. 109-31, pt. 1, at 2 (2005).**

**3 Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 725 (2011), quoting H.R.Rep. No. 109-31, pt. 1, at 2 (2005).**

**4 The debtor's additional arguments are unpersuasive. First, he emphasizes that the United States Trustee (the "UST") and the chapter 7 trustee have not objected to his reported household size. This position diminishes the right of creditors to bring a § 707(b) motion independent of the UST's or chapter 7 trustee's decision whether or not to do so. Second, he cites the UST's apparent policy of departing from the IRS "dependent" test in cases justifying reasonable exceptions, such as a long-standing economic unit of unmarried persons and their children, an example that has no bearing here. Third, the debtor charges the credit union with attempting to "step into the living room of the debtor's home" to "dictate who may be a dependent of the debtor" (Opp. at 3:16-17), an argument that overlooks the fact that the means test analysis is of necessity fact-intensive, frequently requiring "stepping into" the debtor's household situation. The argument also wrongly ignores the policy considerations underlying the means test changes made by BAPCPA.**

| | | | |
|---|---|---|---|
| 3. | 14-26713-D-7<br>SMR-1<br>WILLIAM WONG VS. | ALFRED HILL | MOTION FOR RELIEF FROM AUTOMATIC STAY<br>8-12-14 [17] |

| | | | |
|---|---|---|---|
| 4. | 14-23125-D-7<br>PJR-3 | HAVEN/DAVID RITCHIE | OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS<br>8-8-14 [51] |

**Final ruling:**

**This is the objection of Tri Counties Bank to the debtors' amended claim of exemptions filed July 9, 2014. On August 27, 2014, the debtors filed a further amended claim of exemptions, which renders this objection moot. The objection will be overruled as moot by minute order. No appearance is necessary.**

5. 06-22532-D-7 RIO MORALES
SHS-1

MOTION FOR COMPENSATION FOR STEVEN H. SCHULTZ, SPECIAL COUNSEL(S)
8-5-14 [506]

**Tentative ruling:**

**This is the application of Steven H. Schultz ("Applicant") for an award of fees and costs incurred as special counsel for the debtors while this case was a chapter 11 case and the debtors were debtors-in-possession. The Applicant seeks $20,515 in fees and $29,626.54 in costs, for a total of $50,141.54. The chapter 7 trustee has filed a response; creditor Lichen, Inc. ("Lichen") has filed opposition, and the Applicant has filed a reply. For the following reasons, the motion will be denied.**

**This bankruptcy case has centered around construction defect claims involving the real property of the debtors, Rio and Dana Morales, in El Dorado Hills, California, and a deed of trust previously held by Lichen against that property. The construction defect claims were settled in 2006. Lichen asserted that its lien against the real property extended to the settlement proceeds, and the net proceeds were ordered blocked. By minute order dated June 5, 2007, Lichen and the debtors were granted relief from stay to proceed in state court for a determination of their respective rights to the settlement proceeds. By applications filed June 29, 2007, the debtors sought to employ the Applicant on an hourly basis to pursue fraud and usury claims against Lichen and Martell Strategic Funding, LLC, and fraud and legal malpractice claims against Robert Napolitano.**

**The United States Trustee opposed the applications, questioning, among other things, why the debtors were not employing counsel in New York when it appeared the litigation would take place there. The court had questions of its own, particularly in regards to potential conflicts of interest, in that entities related to the debtors were expected to be additional plaintiffs in the litigation. In response, the Applicant filed a declaration in which he stated, among other things, that the representation of the related entities would be handled by a separate attorney so as to avoid any conflict of interest. He did not address the United States Trustee's question as to why it was preferable for the debtors to employ counsel in California rather than New York. By minute orders dated September 6, 2007, the court authorized the debtors to employ the Applicant "to represent the debtors only and not any related entity."**

**At some point thereafter, apparently in the spring of 2008, a complaint was filed in state court in New York by Boss Accessories, Inc. ("Boss"), TCF Holdings, LLC ("TCF"), and the debtors.[1] The complaint was signed by attorney James Farinaro, of the Law Office of James Farinaro, as attorney for the plaintiffs. The first page of the complaint identified the attorneys for the plaintiffs as Mr. Farinaro, of San Leandro, California, and the Applicant, then of Demas and Rosenthal, LLP, in Sacramento, as co-counsel for the plaintiffs. On September 27, 2010, the plaintiffs filed an amended complaint in state court in New York; Lichen claims, without dispute, that after that date, the plaintiffs took no action to further prosecute the case.[2] On November 1, 2010, this court converted the debtors' chapter 11 case to chapter 7. On September 26, 2012, the chapter 7 trustee filed an adversary complaint against Lichen, and on February 14, 2014, this court issued a judgment determining that Lichen has no claim of lien against nor interest in the settlement proceeds. On March 4, 2014, a Stipulation of Discontinuance was filed in the New York action, by**

which all claims and cross-claims asserted in the action were dismissed with prejudice. The stipulation was signed by Thomas E. Scott, of Speyer & Perlberg in Melville, New York, for the plaintiffs, who were identified in the caption as Boss, TCF, and the debtors.

The chapter 7 trustee's concern with the present application is two-fold: she contends it is not clear to what extent the Applicant's services benefitted the estate, and she questions the extent to which the Applicant was pursuing claims on behalf of the debtors' related entities. Lichen's opposition is more extensive. With regard to fees, Lichen claims the Applicant's services did not benefit the estate, and it does not appear they were reasonably intended to do so. With regard to the costs for which the Applicant seeks reimbursement, Lichen asserts (1) they are excessive; (2) they include fees and costs that are unsupported; (3) they claim a right to reimbursement for fees paid to other counsel, whose employment was not approved by this court; (4) they include fees of those other counsel, whose time is not accounted for; and (5) they exceed the scope of the Applicant's employment orders. The Applicant replies that (1) it is not a requirement for an attorney seeking compensation from a bankruptcy estate to prove he prevailed in the litigation; (2) his employment was not contingent on a successful outcome; (3) his services were provided in good faith and were meant to serve and did serve a purpose for the estate; (4) he successfully resisted Lichen's attempts to dismiss the state court action, and forced it to consider settlement; and (5) Lichen lacks standing to oppose this application.

In support of his standing argument, the Applicant cites this court's judgment in the adversary proceeding – the judgment determining that Lichen has no lien against or interest in the settlement proceeds. The Applicant claims that since those proceeds are the only remaining asset of the estate, Lichen has no standing to challenge their disposition. However, the judgment in the adversary proceeding was directed solely to Lichen's security interest (or lack thereof) in the proceeds, not to the validity of its claim against the estate. Lichen filed a proof of claim in this case. The effect of the judgment was to disallow that claim as a claim secured by the proceeds. No action has been taken to disallow the claim as a general unsecured claim. Thus, Lichen has standing to challenge this application.

Turning to the merits of the application, first, the Applicant is correct that compensation to counsel in a bankruptcy case is not dependent on his or her having achieved an actual benefit to the estate; the question is whether the services were reasonably likely to benefit the estate at the time they were performed. Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet), 251 B.R. 103, 108 (9th Cir. BAP 2000). It is also clear from the United States Trustee's opposition to the employment applications and the Applicant's further declaration in support of them that compensation was to be on a hourly, not a contingency, basis. Further, the court has no reason to second-guess, with the benefit of hindsight, the conclusion that the Applicant's services were intended to and were reasonably likely to benefit the estate at the time they were rendered.

In this regard, Lichen relies heavily on its claim that the purpose of the Applicant's employment was to invalidate Lichen's claim to the settlement proceeds, and therefore, that the scope of the services authorized by the employment orders was so limited, whereas the state court litigation sought an award of damages instead. Lichen correctly points out that Lichen and the debtors were granted relief from stay to proceed in state court to determine their rights to the proceeds. However, the debtors did not need relief from stay to pursue affirmative actions against Lichen (or anyone else), and it was clear from the Applicant's further

declaration supporting the employment applications that, while he would focus on freeing the El Dorado Hills property of Lichen's lien, he would also be seeking an award of damages. Thus, the court does not agree with Lichen that the services performed in the New York action were, in that sense, beyond the scope of the employment orders.

The court also disagrees with Lichen's contentions that the Applicant's delay in filing the action in New York and his failure to take any action after August of 2010 should affect the outcome of this application. A court evaluating a fee application must often consider the services performed from the outside; that is especially so here, where the action was litigated in a New York court. The court will not take the word of the Applicant's opponent in the litigation regarding when the Applicant should have commenced the action or how long he should have pursued it.

Having said all that, however, Lichen makes two points the court agrees with, points that are determinative of the outcome of this application. The first concerns the Applicant's request for reimbursement of costs. The Applicant has filed as his Exhibit B four pages on which his costs are itemized.[3] The large majority are listed by the name Speyer & Perlberg ("Speyer"), which is the law firm in New York whose attorney signed the Stipulation of Discontinuance as attorney for the plaintiffs. The Applicant paid Speyer $4,000 to begin with, which he characterized as a retainer, and he subsequently paid it additional sums apparently totaling approximately $30,000.[4]

Although the Applicant characterized those payments variously as mediation fees, consulting fees, and expert witness fees, there is no question but that Speyer was a professional whose employment was required to be approved by this court prior to the rendering of any services for which compensation was to be sought from the estate. Yet the Applicant, who must or should have known, from the debtors' applications to employ him, that such approval was required, did not seek to obtain it, either on his own or through the debtors' bankruptcy counsel. Accordingly, the Applicant's request for reimbursement of his payments to Speyer as costs will be denied. The request for reimbursement of "expert witness fees" paid to James Farinaro, Esq., will be denied for the same reason.

The court will also disallow the costs for the Applicant's travel expenses billed on November 2, 2009 (parking, meals, airfare, cab, hotel), as the Applicant's time records show no services performed in the last six months of 2009 aside from 0.2 hours reviewing a pro hac vice application. Lichen asserts, and the Applicant does not dispute, that he made no appearances in the New York action, having subcontracted out those services, apparently to Speyer, as discussed above. Thus, if the Applicant traveled to New York for a court hearing or otherwise, he has failed to meet his burden of demonstrating that the costs incurred were reasonable and necessary, and not duplicative of costs incurred or services provided by Speyer.

Similar considerations apply with regard to the Applicant's fees for his services, a total of $20,515. The court may not allow compensation for unnecessary duplication of services. § 330(a)(4)(A)(i). The Applicant has the burden of proof to demonstrate he is entitled to the fees requested,[5] including as to the issue of duplication.[6] Here, the court has no way of knowing whether, and if so to what extent, the Applicant's services were unnecessarily duplicative of those performed by Speyer or Farinaro.

Finally, as Lichen points out, this court's orders authorizing the Applicant's employment were very clear: the debtors were permitted to employ the Applicant "to represent the debtors only and not any related entity," whereas the New York lawsuit was commenced not by the debtors alone, but by Boss and TCF as their co-plaintiffs. There is no indication in the present application that the Applicant's services were performed for the debtors alone, and not for Boss and TCF as well, or that those entities were represented by a separate attorney, as the Applicant had stated in his further declaration supporting his employment applications would be the case.[7] The court concludes that the Applicant has not met his burden of demonstrating that his services were performed solely for the debtors, as authorized by this court, or if for the debtors and their co-plaintiffs, which portion is attributable to services for the debtors alone. The court reaches the same conclusion with respect to the Applicant's request for reimbursement of the costs not addressed above, the costs paid to Federal Express, Capital Process, and Hilton Investigations, a total of $1,463.42. The court simply cannot conclude from the evidence presented that those costs were incurred for the debtors alone, and not also for their co-plaintiffs.

For the reasons stated, the motion will be denied. The court will hear the matter.

_____

1 According to Lichen, the complaint was filed on May 29, 2008. The copy of the complaint Lichen cites was filed by Lichen as an exhibit in an adversary proceeding in this case, AP No. 12-2587. That exhibit is an unfiled copy of the complaint, such that the court cannot verify the date it was filed. It was signed on April 4, 2008.

2 According to the Applicant's time sheets, he performed no services after August 30, 2010.

3 In the application, the Applicant seeks reimbursement of costs totaling $29,626.54, whereas the cost records, Exhibit B, do not contain that figure, and so far as the court can determine, no combination of the figures or some of the figures on Exhibit B amounts to that total. The Applicant has not provided a breakdown as to how he arrived at the $29,626.54 figure.

4 Exhibit B is not sufficient to allow the court to determine the amount precisely. Pages 2 and 3 are a duplicate listing of almost, but not all, the payments on page 1; page 4 lists a single figure that does not appear on page 1 or pages 2 and 3.

5 Roderick v. Levy (In re Roderick Timber Co.), 185 B.R. 601, 606 (9th Cir. BAP 1995), citing In re Travel Headquarters, Inc., 140 B.R. 260, 261 (9th Cir. BAP 1992).

6 Bryce v. Lawrence (In re Bryce), 2013 Bankr. LEXIS 4347, at *15, 17 (Bankr. W.D. Wash. 2013).

7 The Applicant has not asserted that his services were performed for the debtors and Farinaro's and Speyer's for Boss and TCF, and such an argument would run counter to the Applicant's present attempt to obtain reimbursement of their fees from the debtors' estate.

| | | | |
|---|---|---|---|
| 6. | 12-38234-D-12<br>JPJ-1 | CAROL SHACKELFORD | OBJECTION TO CLAIM OF NATIONSTAR MORTGAGE LLC, CLAIM NUMBER 10<br>7-22-14 [46] |

**Final ruling:**

**The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection to the claim of Nationstar Mortgage, LLC has been filed and the objection is supported by the record. Accordingly, the court will sustain the trustee's objection to claim. The trustee is to submit an appropriate order. No appearance is necessary.**

| | | | |
|---|---|---|---|
| 7. | 14-27541-D-7 | JAMES TEETERS | MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE<br>7-24-14 [5] |

| | | | |
|---|---|---|---|
| 8. | 14-27144-D-7 | JOSE LUIS/MARIA JARAMILLO | MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE<br>7-10-14 [5] |

| | | | |
|---|---|---|---|
| 9. | 14-26254-D-7<br>ALP-1<br>BANK OF AMERICA, N.A. VS. | DARCI MCDERMOTT | MOTION FOR RELIEF FROM AUTOMATIC STAY<br>7-30-14 [13] |

**Final ruling:**

**This matter is resolved without oral argument. This is Bank of America, N.A.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.**

10. 13-34956-D-7 BHS-2 — STUART/KATHRYN MOTT — MOTION FOR COMPENSATION FOR BARRY H. SPITZER, TRUSTEE'S ATTORNEY(S) 7-31-14 [30]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. With the exception noted below, the record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As this motion is being resolved without a hearing, the court will deny the request for up to $400 in additional fees and costs for the time spent in completing the motion, responding to possible opposition to the motion, and appearing at the hearing. As such, the court will grant the motion with that exception, and the moving party is to submit an order consistent with this ruling. No appearance is necessary.**

11. 14-27660-D-7 — JASMINE FARLEY MARTINEZ — MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE 7-28-14 [5]

12. 09-29162-D-11 SH-275 — SK FOODS, L.P. — OMNIBUS OBJECTION TO CLAIMS 7-16-14 [4971]

**Final ruling:**

**The hearing on this objection has been continued by order dated August 26, 2014 to October 8, 2014, at 10:00 a.m. No appearance is necessary on September 10, 2014.**

13. 09-29162-D-11 SH-276 — SK FOODS, L.P. — OMNIBUS OBJECTION TO CLAIMS 7-16-14 [4975]

**This matter will not be called before 10:45 a.m.**

**Tentative ruling:**

**This is the trustee's omnibus objection to certain claims filed by Boyd Special Commodities, Inc. ("Boyd"). The court intends to overrule the objection because the moving party failed to serve Boyd at the address on its filed proofs of claim, as required by LBR 3007-1(c). The moving party served Boyd at P.O. Box 1969, whereas the address on the proofs of claim is P.O. Box 1869. In the alternative, the court will continue the hearing to allow the moving party to file a notice of continued hearing and serve it, together with the objection and supporting declaration, on Boyd at the correct address.**

**The court will hear the matter.**

14. 09-29162-D-11 SK FOODS, L.P. OBJECTION TO CLAIM OF CGA PACKAGING, INC., CLAIM NUMBER 6
SH-277 7-17-14 [4986]

**Final ruling:**

**The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection to the claim of CGA Packing, Inc. has been filed and the trustee's objection to the priority status sought by the claimant is supported by the record. Accordingly, the court will sustain the objection as to priority status and allow the claim as general unsecured. The trustee is to submit an appropriate order. No appearance is necessary.**

15. 09-29162-D-11 SK FOODS, L.P. OBJECTION TO CLAIM OF GRANZELLAS, INC., CLAIM NUMBER 162
SH-278 7-17-14 [4990]

**Final ruling:**

**The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection to the claim of Granzellas, Inc. has been filed and the trustee's objection to the priority status sought by the claimant is supported by the record. Accordingly, the court will sustain the objection as to priority status and allow the claim as general unsecured. The trustee is to submit an appropriate order. No appearance is necessary.**

16. 09-29162-D-11 SK FOODS, L.P. OBJECTION TO CLAIM OF MECHEL S. PAGGI, CLAIM NUMBER 34
SH-279 7-18-14 [4994]

**Final ruling:**

**The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection to the claim of Mechel S. Paggi has been filed and the trustee's objection to the priority status sought by the claimant is supported by the record. Accordingly, the court will sustain the objection as to priority status and allow the claim as general unsecured. The trustee is to submit an appropriate order. No appearance is necessary.**

17. 09-29162-D-11 SK FOODS, L.P. OMNIBUS OBJECTION TO CLAIMS
SH-280 7-21-14 [4999]

**This matter will not be called before 10:45 a.m.**

**Tentative ruling:**

**This is the trustee's objection to two claims, Claim Nos. 19 and 317, filed by K2 Analytical, Inc. ("K2"). K2 has not filed a response. The trustee objects to Claim No. 19 as being duplicative of Claim No. 317, contending "K2 will not be prejudiced by having its Claim No. 19 expunged." Objection to Claim, DN 4999, at 5:7-8. The court agrees that the two claims are duplicative of one another.**

**However, it appears K2 could be prejudiced by having Claim No. 19 disallowed because the claim that would remain, Claim No. 317, was filed after the claims bar date. Because Claim No. 19 was timely filed, the court will disallow Claim No. 317 as the duplicative claim.[1]**

**As to Claim No. 19, the court agrees with the trustee that the claim on its face is not sufficient to show it is entitled to priority status; thus, the claim will be disallowed as a priority claim. As requested by the trustee, the claim will be allowed as a general unsecured claim.**

**The court will hear the matter.**

---

**1 The trustee also claims, "it appears that K2 sought to amend Claim No. 19 through the filing of Claim No. 317." Objection to Claims, DN 4999, at 5:6-7. There is a box on the proof of claim form for indicating that a particular claim amends a previously filed claim. K2 did not check that box on its Claim No. 317.**

18. 09-29162-D-11 SH-281 — SK FOODS, L.P. — OBJECTION TO CLAIM OF PACIFIC PALLET EXCHANGE, CLAIM NUMBER 3 7-21-14 [5003]

**Final ruling:**

**The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection to the claim of Pacific Pallet Exchange has been filed and the trustee's objection to the priority status sought by the claimant is supported by the record. Accordingly, the court will sustain the objection as to priority status and allow the claim as general unsecured. The trustee is to submit an appropriate order. No appearance is necessary.**

19. 09-29162-D-11 SH-282 — SK FOODS, L.P. — OMNIBUS OBJECTION TO CLAIMS 7-22-14 [5009]

**Final ruling:**

**The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection to the claim of CGA Packing, Inc. has been filed and the trustee's objection to the priority status sought by the claimant is supported by the record. Accordingly, the court will sustain the objection and disallow Claim No. 22 in its entirety, disallow Claim No. 121 as a priority, and allow Claim No. 121 as general unsecured. The trustee is to submit an appropriate order. No appearance is necessary.**

20. 09-29162-D-11 SH-283 — SK FOODS, L.P. — OBJECTION TO CLAIM OF MARK M. MCCORMICK, CLAIM NUMBER 333 7-22-14 [5017]

**Final ruling:**

**Objection to claim withdrawn by trustee/moving party. Matter removed from calendar.**

21. 09-29162-D-11 SK FOODS, L.P. OBJECTION TO CLAIM OF STOUGHTON
SH-284 DAVIDSON ACCOUNTANCY
CORPORATION, CLAIM NUMBER 123
7-22-14 [5021]

**This matter will not be called before 10:45 a.m.**

**Tentative ruling:**

**This is the trustee's objection to the claim of Stoughton Davidson Accountancy Corporation ("Stoughton"), Claim No. 123 on the court's claims register. The claim is for $64,342.64; the claim asserts priority status, for an unspecified amount, under § 507(a)(1) of the Bankruptcy Code. For the following reasons, the objection will be sustained in part.**

**The trustee asserts, first, that the claim should be disallowed in its entirety because Stoughton failed to attach any supporting documents to its proof of claim. However, the lack of supporting documentation affects the presumption of validity under Fed. R. Bankr. P. 3001(f); it does not, by itself, subject the claim to disallowance. Thus, the Ninth Circuit Bankruptcy Appellate Panel has held:**

> **When a creditor files a proof of claim, that claim is deemed allowed under Sections 501 and 502(a). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f) – it is not prima facie evidence of the validity and amount of the claim – but that by itself is not a basis to disallow the claim. Section 502(b) sets forth the exclusive grounds for disallowance of claims . . . .**

**Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 426 (9th Cir. BAP 2005) (emphasis added). "Noncompliance with Rule 3001(c) is not one of the statutory grounds for disallowance." Id. at 435.**

**Second, the trustee objects to the claim under § 502(d) of the Code, alleging Stoughton received avoidable transfers that it has failed to return to the estate. The trustee has entered into a tolling agreement with Stoughton regarding the avoidance claims, and has not yet filed an adversary complaint against Stoughton. However, this does not appear to be an impediment to the trustee's § 502(d) objection. See El Paso v. America West Airlines, Inc. (In re America West Airlines, Inc.), 217 F.3d 1161, 1167 (9th Cir. 2000); Committee of Unsecured Creditors v. Commodity Credit Corp. (In re KF Dairies, Inc.), 143 B.R. 734, 737 (9th Cir. BAP 1992). On the other hand, the trustee's declaration supporting this objection does not appear to touch on all the elements of § 547(b). The trustee testifies to the dates and total amount of the transfers, and concludes that the transfers were made to Stoughton in its capacity as a creditor, within the 90 days prior to the debtor's bankruptcy filing, and on account of antecedent debts owed by the debtor. The trustee does not, however, address the requirement of § 547(b)(5) – whether the transfers enabled Stoughton to receive more than it would have received in a hypothetical chapter 7 case if the transfers had not been made. Thus, the court is unable to conclude that the trustee has presented evidence sufficient to demonstrate he is entitled to disallowance of the claim under § 502(d).**

**Finally, the trustee contends the claim should be disallowed as a priority claim. The court agrees. Stoughton checked the box on its proof of claim identifying § 507(a)(1) as the sole basis of its claim to priority. That subsection**

**provides for priority for claims for domestic support obligations owed to a spouse, former spouse, or child of the debtor, or for such claims that have been assigned to a governmental unit. Stoughton is not an individual or a governmental unit; thus, on its face, the claim is not entitled to priority under that subsection.**

**For the reasons stated, the objection will be sustained in part, and the claim will be disallowed as a priority claim and re-classified as a general unsecured claim in the amount of $64,342.64. Alternatively, the court will continue the hearing to allow the trustee to supplement the record as to his objection based on § 547(b)(5). The court will hear the matter.**

22. 09-29162-D-11 SK FOODS, L.P. OMNIBUS OBJECTION TO CLAIMS
SH-285 7-22-14 [5013]

**This matter will not be called before 10:45 a.m.**

**Tentative ruling:**

**This is the trustee's omnibus objection to certain claims filed by Jake Brazie ("Brazie"). The court intends to overrule the objection because the moving party failed to serve Brazie at the address on his filed proofs of claim, as required by LBR 3007-1(c). In the alternative, the court will continue the hearing to allow the moving party to file a notice of continued hearing and serve it, together with the objection and supporting declaration, on Brazie at that address.**

**In addition, the moving party will need to address the following issue. The trustee contends Brazie's claim, which is on account of contributions to an employee benefit claim that were not made, should be disallowed because Brazie has already received or will receive full payment of his allowed employee wage claim, and that the two types of claims are subject to a single "cap," or maximum, which has been or will be paid. The moving party cites § 507(a)(5)(B)(ii) of the Bankruptcy Code and In re Crafts Precision Indus., Inc., 244 B.R. 178, 183-84 (1st Cir. BAP 2000), for the proposition that "[t]he amount payable on account of employee benefit plans under section 507(a)(5) is reduced dollar-for-dollar by the amount of payments to covered employees under the fourth priority [§ 507(a)(4) – the priority for wages], and thus does not increase the overall priority granted to employment related claims." Obj., filed July 22, 2014, at 5:23-6:2. However, § 507(a)(5)(B)(ii) appears to refer to the maximum amount that can be claimed by a particular employee benefit plan, not necessarily by an individual claimant, and the claimant in the Crafts Precision case was an employee benefit plan, not an employee.**

**The Ninth Circuit Court of Appeals has stated that the single cap is an aggregate amount for covered employees as a whole, and not a limit for each individual employee. See Consol. Freightways Corp. v. Aetna, Inc. (In re Consol. Freightways Corp., 564 F.3d 1161, 1168 (9th Cir. 2009). The court contrasted the two subsections, § 507(a)(4) and (a)(5), and concluded that "[t]he result is, therefore, that an individual employee's claim under § 507(a)(5) will not be limited by the amount that the employee may have recovered under § 507(a)(4). No doubt the overall fund will be limited by the (a)(4) recovery, but individual claims to benefits will not be." Id.; see also In re Edgar B, Inc., 200 B.R. 119, 124 (M.D.N.C. 1996); In re New Eng. Cartage Corp., 220 B.R. 503, 504 (Bankr. D. Mass. 1998); In re C&S Cartage & Leasing Co., 204 B.R. 565, 566 (Bankr. D. Neb. 1996).**

**The court will hear the matter.**

23. 09-29162-D-11 SK FOODS, L.P. OBJECTION TO CLAIM OF FARELLA
SH-286 BRAUN + MARTEL, CLAIM NUMBER 380
7-22-14 [5025]

**This matter will not be called before 10:45 a.m.**

**The court intends to continue the hearing on this objection to December 17, 2014 at 10:00 a.m., to be heard with the creditors' committee's motion to disgorge. The court intends to use this hearing only as a status conference.**

24. 09-29162-D-11 SK FOODS, L.P. OMNIBUS OBJECTION TO CLAIMS
SH-287 7-23-14 [5029]

**This matter will not be called before 10:45 a.m.**

**Tentative ruling:**

**This is the trustee's omnibus objection to two claims filed by Fleur Du Lac Estates Association ("Fleur Du Lac"), Claim Nos. 255 and 315. For the following reasons, the objection will be overruled.**

**First, the trustee objects to Claim No. 255 as duplicative of and/or amended by Claim No. 315. In the trustee's view, "it appears that Fleur Du Lac sought to amend claim No. 255 through the filing of Claim No. 315." Obj., filed July 23, 2014 ("Obj."), at 5:28-6:1. He adds: "As a result, Fleur Du Lac will not be prejudiced by having its Claim No. 255 expunged." Id. at 6:1-2. In fact, Fleur Du Lac checked the box on its Claim No. 315 expressly indicating that Claim No. 315 was amending Claim No. 255. Had Fleur Du Lac not indicated on its Claim No. 315 that Claim No. 315 was amending Claim No. 255, the two claims would be arguably be duplicative of one another. However, the court is aware of no authority for the proposition that a claim is subject to disallowance simply because it has been amended.[1]**

**Similarly, the court is aware of no authority for disallowing a claim simply because it has been paid during the course of the bankruptcy case, which is the trustee's principal argument for disallowance of Claim No. 315. The proof of claim itemizes homeowners' association assessments, late charges, and finance charges totaling $35,467.70; the trustee earlier paid that exact amount pursuant to this court's order approving the sale of the real property against which the assessments were imposed. Under § 502(b) of the Bankruptcy Code, claims are determined as of the date of the petition. The post-petition payment of a claim or a portion of a claim constitutes a treatment of the claim, not a ground for objecting to the claim.**

**The balance of the claim, $3,048.01, appears to be for attorney's fees. (The proof of claim includes attachments itemizing statement dates, hours, fee amounts, expense amounts, and payment amounts.) All of the fees, according to the time details, were incurred post-petition.[2] The trustee complains that (1) "Fleur Du Lac has failed to establish that this portion of Claim No. 315 is entitled to an administrative expense priority" (Obj. at 6:24-25); and (2) "Fleur Du Lac has failed to provide any basis for recovery of attorneys' fees." Id. at 7:9. The trustee has failed to present any evidence to support a conclusion that Fleur Du Lac is not entitled to attorney's fees or that its claim for attorney's fees is not entitled to administrative expense priority. Thus, he has failed to "come forward with**

**sufficient evidence and 'show facts tending to defeat the claim by probative force equal to that of the allegations of the proof[] of claim [itself].'" Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000) (citation omitted). Thus, he has failed to shift the burden of proof back to Fleur Du Lac. Id. (citation omitted).**

**To the extent the objection is an objection to the absence of supporting documentation, the matter is covered by the Ninth Circuit Bankruptcy Appellate Panel's holding as follows:**

> **When a creditor files a proof of claim, that claim is deemed allowed under Sections 501 and 502(a). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f) – it is not prima facie evidence of the validity and amount of the claim – but that by itself is not a basis to disallow the claim. Section 502(b) sets forth the exclusive grounds for disallowance of claims . . . .**

**Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 426 (9th Cir. BAP 2005). "Noncompliance with Rule 3001(c) is not one of the statutory grounds for disallowance." Id. at 435.**

**For the reasons stated, the objection will be overruled. Alternatively, if the trustee wishes to supplement the record with additional evidence regarding his objection to Fleur Du Lac's claim for attorneys' fees, the court will continue the hearing for this limited purpose. The court will hear the matter.**

---

**1 The court notes also that Claim No. 255 was filed on the claims bar date; Claim No. 315 was filed three months later. Disallowance of Claim No. 255 would arguably leave Fleur Du Lac with nothing but a late-filed claim.**

**2 The proof of claim asserts administrative expense priority under § 507(a)(2) as to a $38,066.87 portion of the claim. The only portion of the claim for which such priority is not sought is $448.84, which, according to an invoice attached to the proof of claim, represented the late charge and finance charge on a homeowners' association assessment, both of which were due pre-petition. Thus, the proof of claim asserts administrative expense priority for the attorney's fees portion of the claim.**

| | | | |
|---|---|---|---|
| 25. | 09-29162-D-11<br>SH-288 | SK FOODS, L.P. | OBJECTION TO CLAIM OF NAGELEY MEREDITH & MILLER, INC., CLAIM NUMBER 373<br>7-23-14 [5034] |

**This matter will not be called before 10:45 a.m.**

**Tentative ruling:**

**This is the trustee's objection to the claim of Nageley, Meredith & Miller, Inc. ("NMM"), Claim No. 373, in the amount of $78,535.09. NMM has filed opposition, and the trustee has filed a reply.1 For the following reasons, the objection will be conditionally overruled.**

The trustee refers to an earlier "proposed" settlement among the parties – the trustee, the committee of unsecured creditors, and NMM, pursuant to which, among other things, NMM would have an allowed general unsecured claim for $78,535.09. The trustee testifies in support of this objection that "the proposed settlement was expressly subject to Court approval of NMM's Fee Application and of the settlement." B. Sharp Decl., filed July 23, 2014, at 3:17-19. He adds: "The Court later denied NMM's Fee Application, and as a result no Court approval was ever sought or obtained of the proposed settlement between NMM and the Estate." Id. at 3:19-20. As further support, the trustee refers to a joint statement of non-opposition filed January 29, 2014 by the trustee and the committee in response to NMM's fee application. In that statement of non-opposition, the trustee and the committee stated they had agreed, "subject to the Court's independent duty to review fee applications,"[2] that, among other things, "Nageley may have an allowed general unsecured claim against the consolidated Estate in the amount of $78,535.09 . . . ."[3] Based on his contention that the settlement was contingent on court approval of NMM's fee application, based on the court's denial of that application, and based on the court's remarks at the hearing on that application to the effect that it would not "approve fees" charged by professionals for services rendered to the entities that were later consolidated with the debtor, the trustee contends NMM's claim must be disallowed.

The trustee's declaration and the joint statement of non-opposition constitute evidence of "facts tending to defeat the claim by probative force equal to that of the allegations of the proof[] of claim [itself]." Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000) (citation omitted). Thus, the trustee's evidence is sufficient to shift the burden back to NMM to prove the validity of its claim by a preponderance of the evidence. Id. (citation omitted).

NMM contends its settlement with the trustee and the committee was not contingent on court approval of its fee application. NMM has submitted a declaration of James Keowen, who testifies that the only condition for the settlement was that it was subject to court approval; he states the settlement "was never conditioned on the Fee Application being approved by the Court." J. Keowen Decl., filed Aug. 26, 2014, at 2:26-27. NMM has also submitted copies of the letter and e-mails the parties exchanged regarding the settlement,[4] authenticated by Mr. Keowen. There is nothing in the letter or the e-mails to the effect that the settlement was contingent on court approval of NMM's fee application. The initial letter proposing the settlement, dated January 22, 2014, from the trustee's counsel to NMM, said nothing about court approval of NMM's fee application. The trustee's counsel sent an e-mail to NMM later the same day stating, "This will confirm our agreement to resolve your firm's fee application pursuant to the terms of the attached letter, with an additional term that your firm will be granted an allowed general unsecured claim of $78,535.09. The settlement is subject to Bankruptcy Court approval. I will prepare the necessary documentation." NMM's Ex. C. Again, there was nothing here to the effect that the settlement would be contingent on court approval of NMM's fee application.

The next day, January 23, 2014, the trustee's counsel sent another e-mail to NMM stating, "We need to be sensitive to the Court's independent duty to review and approve fee awards. I have little doubt that Judge Bardwil will embrace our agreement, but I want to avoid stepping on the Court's toes by simply submitting a stipulation. We have drafted the attached statement of non-opposition. . . . Barring any other unforeseen objections, I am confident Judge Bardwil will agree to the deal." NMM's Ex. D.

At the hearing on NMM's fee application and that of Farella Braun + Martel

("FBM"), the court clarified the orders it had issued earlier – following the district court's remand of the preliminary injunction. At that hearing, the court stated, "I am not going to approve fees. Whether upon review, I require disgorgement under Section 329 is another issue."[5] When counsel for FBM referred to the joint statement of non-opposition to NMM's fee application, suggesting that the court had approved NMM's fee application, the court was clear:

> I haven't. . . . I don't intend to approve fees. The structure that I set up was not that you file a fee application. . . . [T]he structure that was set up was similar to payment a debtor's counsel receives before a bankruptcy is filed. It's subject to review, the reasonableness standard. . . . [F]irst of all, a 2016 statement was to be filed and then parties can review it, and if . . . somebody thinks [the fees] were not reasonable, they are free to bring a motion to disgorge the fees . . . .[6]

The court also referred to the trustee's and the committee's settlement with NMM, suggesting a Rule 9019 motion would be appropriate, and emphasizing again it would not "approve fees"; the court also stated it was disinclined to determine sua sponte whether fees should be disgorged. The trustee's counsel responded that the trustee and counsel were "willing to work with the parties to try to work this out, as obviously, [they had] done with the Miller firm."[7] There was no suggestion at the hearing that the settlement with NMM was contingent on the court's approval of NMM's fee application.

As against all of this evidence – Mr. Keowen's testimony, the letter and e-mails memorializing the settlement, and counsel's remarks at the hearing on the fee application, the only evidence supporting the proposition that the settlement was "subject to Court approval of NMM's Fee Application" is the trustee's testimony in support of this objection.[8]

Based on the evidence presented, the court concludes that, although the trustee presented evidence sufficient to overcome the prima facie validity of the proof of claim, so as to shift the burden of proof back to NMM, NMM has demonstrated by a preponderance of the evidence the validity of its proof of claim based on the settlement among NMM, the trustee, and the committee. The court appreciates that the trustee's counsel's wished to be "sensitive to the court's independent duty to review and approve fee awards." However, under the circumstances of this case and the consolidation of the related entities, and where the fees are not sought as an administrative expense pursuant to § 327, et al., but rather sought as a general unsecured claim for services rendered by way of a proof of claim, as here, the court will not undertake sua sponte to review the proof of claim. See § 502(a) ["A claim . . . , proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects."]. Here, NMM's claim is based on a settlement that, although it has not been approved by the court because approval has not been sought, may yet be approved, depending on whether the applicable standards are met. If the settlement is approved, NMM's claim will be allowed as permitted by the terms of the settlement.

In reply to NMM's opposition, the trustee now claims not to have raised the question of NMM's entitlement to a general unsecured claim, only its entitlement to an administrative claim:

> The Trustee's objection raises the issue of whether NMM is entitled to an administrative claim, as requested. The Trustee has reserved its right

> to make other objections, such as whether Nageley is entitled to a claim as an unsecured creditor of the estate. The Court need not reach these other issues at this time, as they may never arise. The only issue the Court needs to reach is whether NMM is entitled to an administrative claim . . . .

Trustee's Reply, filed Sept. 3, 2014, at 1:16-2:2. Similarly:

> The Trustee has reserved its right to object to whether NMM is entitled to a general unsecured claim in the amount of $78,535.09. . . . If the Trustee does object on that basis, then the court can consider NMM's argument that the Trustee is bound by the unapproved settlement. But, whatever the outcome of that dispute – should it ever arise – it is clear that NMM is not entitled to the administrative claim asserted in Claim No. 373.

Id. at 3:17-22.

These statements do not accurately reflect the procedural posture of this matter. The trustee's objection was to the claim in its entirety, not just as an administrative claim.[9] Further, the objection squarely put in play the issue of the "proposed" settlement, as the trustee called it, among himself, the committee, and NMM. He testified in his declaration supporting his objection that "the proposed settlement was expressly subject to Court approval of NMM's Fee Application and of the settlement" and that "[t]he Court later denied NMM's Fee Application, and as a result no Court approval was ever sought or obtained of the proposed settlement between NMM and the Estate." Sharp Decl. at 3:17-20. NMM's opposition to the objection addressed that issue head-on, and is persuasive.

For the reasons stated, the court concludes that the settlement was not contingent on court approval of NMM's fee application, and for that reason, the objection will be overruled without prejudice. In the event the settlement is not approved, any party-in-interest may revisit the issue of the validity of the claim.

The court will hear the matter.

---

1 The trustee pointed out in his objection that the proof of claim asserts administrative expense priority under § 507(a)(2). NMM states in its opposition that the claim was "subsequently agreed to be non-priority." Opp., filed Aug. 26, 2014, at 2:21. The e-mails submitted by NMM as exhibits confirm that under the settlement discussed below, NMM's $78,535.09 claim was to be allowed as a general unsecured claim. Thus, NMM no longer contends its claim is entitled to administrative expense priority.

2 Trustee's and Creditor's Committee's Joint Statement of Non Opposition Upon Conditions, filed Jan. 29, 2014, DN 4660, at 3:8.

3 Id. at 3:12-13.

4 NMM's Exhibits C and D, DN 5160, pp. 31-38.

5 Transcript of Feb. 5, 2014 hearing, DN 4682, at 5:25-6:2.

6 Id. at 7:20-8:9.

**7 Id. at 12:10-11.**

**8 The joint statement of non-opposition proves very little. It stated only that the agreement was "subject to the Court's independent duty to review fee applications." Assuming the agreement included such a contingency, which has not been established, the words "subject to the court's independent duty to review fee applications" do not necessarily mean "subject to Court approval of NMM's Fee Application." The court would not expect NMM to have read it that way, and apparently, NMM did not.**

**9 Indeed, the "statutory predicate" for the relief sought was § 502 of the Code, not § 503. Obj. to Claim, filed July 23, 2014, at 2:12-13.**

| | | | |
|---|---|---|---|
| 26. | 13-35762-D-12<br>MF-12 | JOSE DASILVA | MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH JOSE DINIS DASILVA, ANDREW JOHN ROSSI, ROSSI FINANCE COMPANY, LLC AND JOHN ROSSI HAY COMPANY, INC.<br>8-7-14 [160] |

**Final ruling:**

**The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.**

| | | | |
|---|---|---|---|
| 27. | 09-47763-D-7<br>HCS-3 | LEA TINO | MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM\CRABTREE\SUNTAG FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S)<br>8-13-14 [40] |

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion and the moving party is to submit an appropriate order. No appearance is necessary.**

28. 13-35063-D-7 PETER/ALISON BIPPART — MOTION TO DISMISS CAUSE(S) OF ACTION FROM COMPLAINT
14-2070 SRL-2 — 7-31-14 [31]
COYNE, III V. BIPPART ET AL

29. 14-23964-D-7 LEE/MARLIS KING — MOTION TO AVOID LIEN OF GCFS, INC.
MTM-2 — 7-31-14 [26]

**Final ruling:**

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

30. 11-46172-D-12 VIRENDA/SUMAN MISHRA — OBJECTION TO CLAIM OF MAHARAJA MOTORS LLC, CLAIM NUMBER 20 AND/OR OBJECTION TO CLAIM OF MAHARAJA MOTORS LLC, CLAIM NUMBER 21
JPJ-1 — 7-22-14 [138]

**Final ruling:**

**The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection has been filed and the objection to the claims of Maharaja Motors, LLC (Claim Nos. 20 and 21) is supported by the record. Accordingly, the court will sustain the trustee's objection to claim. Moving party is to submit an appropriate order. No appearance is necessary.**

31. 13-22972-D-7 THOMAS SMITH — MOTION TO ABANDON
TAA-3 — 8-12-14 [80]

**Final ruling:**

**The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to abandon the real properties and the trustee has demonstrated the properties to be abandoned are of inconsequential value to the estate. Accordingly, the motion will be granted and the property that is the subject of the motion will be deemed abandoned by minute order. No appearance is necessary.**

32. 11-24177-D-7 SCOTT/ROBIN PAYTON — MOTION FOR AUTHORIZATION TO SELL PROPERTY AT PUBLIC AUCTION AND TO COMPENSATE AUCTIONEER
ICE-3 — 7-28-14 [126]

33. 12-39878-D-7 DAVID/RENEE SMITH — MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
TAA-1 — 7-14-14 [188]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to extend deadline to file a complaint objecting to discharge of the debtor is supported by the record. As such the court will grant the motion to extend deadline to file a complaint objecting to discharge of the debtor. Moving party is to submit an appropriate order. No appearance is necessary.**

34. 14-27978-D-7 KIMECHIA WILLIAMS — MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
ADR-1
CLAUDE RIDDLE VS. — 8-11-14 [15]

**Final ruling:**

**This is Claude Riddle's (the "Movant") motion for relief from stay. The Movant asserts, and it is not disputed, that he was the pre-petition lessor of the real property that is the subject of this motion. Movant further asserts that he obtained a judgment for possession pre-petition, and as such, the debtor has only have a possessory interest in the property. Accordingly, cause exists for relief from stay under Bankruptcy Code § 362(d)(1). There is no opposition to the motion.**

**As Movant has established it obtained a pre-petition judgment for possession and the debtor has only a possessory interest in the property, relief from stay will be granted for cause under Code § 362(d)(1). Further, as the debtor only has a possessory interest in the property, the court will waive FRBP 4001(a)(3). This relief will be provided by minute order.**

**The court will hear the matter.**

35. 14-27978-D-7 KIMECHIA WILLIAMS
VC-1
TOP FINANCE CO., INC. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-15-14 [21]

**Final ruling:**

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

36. 14-27381-D-7 BLAS REYNOSO
JLS-1
CAM VII TRUST VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
8-13-14 [11]

**Final ruling:**

**This matter is resolved without oral argument. This is CAM VII Trust's motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.**

37. 13-31283-D-7 ROBERT MESSNER AND KAREN LITTLE-MESSNER
ICE-1

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH LINDA MCDONALD
7-28-14 [31]

**Final ruling:**

**The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.**

38. 14-27587-D-7 KACIE SHACKELFORD
PP-1
ACM NORTHWEST V, LLC VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-13-14 [10]

**Final ruling:**

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

39. 14-22492-D-12 CHARLES CORNELL
PGM-1

CONTINUED MOTION TO CONFIRM CHAPTER 12 PLAN
4-29-14 [31]

40. 14-22492-D-12 CHARLES CORNELL
PGM-2

CONTINUED MOTION TO VALUE COLLATERAL OF OCWEN LOAN SERVICING, LLC
4-29-14 [35]

**Tentative ruling:**

**This is the debtor's motion to value the collateral securing the claim of Ocwen Loan Servicing, LLC ("Ocwen"); namely, a first position deed of trust against the debtor's family farm, at $160,000. Ocwen filed opposition, and the hearing was continued to allow the parties to file supplemental evidence. Ocwen timely filed supplemental evidence; the debtor, whose evidence was due July 11, 2014, filed nothing until September 5, 2014, when he filed a realtor's declaration and an exhibit. For the following reasons, the motion will be denied.**

**The court made the following findings and conclusions as of September 4, 2014, the day before the debtor filed his supplemental evidence. The debtor has not supported the motion with any admissible evidence, as required by LBR 9014-1(d)(6), and has failed to meet his burden of establishing the value of the property. The debtor testifies in his own declaration that the fair market value of the property is $160,000. He states he determined the value by reviewing zillow.com, reviewing comparable sales of homes in his neighborhood, and consulting with a realtor and/or**

broker.[1] His testimony is inadmissible. An owner of property may testify to his or her opinion of the value of that property, with limitations:

> If testifying under [Fed. R. Evid.] 701, the owner may merely give his opinion based on his personal familiarity [with] the property, often based to a great extent on what he paid for the property. On the other hand, if he is truly an expert qualified under the terms of Rule 702 "by knowledge, skill, experience, training or education . . .," then he may also rely on and testify as to facts "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . ." pursuant to Rule 703. For example, the average debtor-homeowner who testifies in opposition to a motion for relief from the § 362 automatic stay should be limited to giving his opinion as to the value of his home, but should not be allowed to testify concerning what others have told him concerning the value of his or comparable properties unless the debtor truly qualifies as an expert under Rule 702 such as being a real estate broker, etc.

2 Russell, Bankruptcy Evidence Manual § 701:2, pp. 784-85 (West 2012-2013 ed.).

Here, the debtor testified not to his opinion as an owner but to his opinion based on zillow.com, consultations with a realtor and/or broker, and the debtor's review of comparable sales. As to the first two of these, the debtor's testimony is hearsay. As to the latter, the debtor is purporting to testify as an expert in the field of property appraisal, but has not shown he has any qualifications to do so, and in particular, any qualifications to evaluate comparable sales. See In re Meeks, 349 B.R. 19, 22 (Bankr. E.D. Cal. 2006). Thus, the court gives no weight to the debtor's opinion. The court would add, however, that zillow.com gave the value of the property, as of May 29, 2014, as $189,009,[2] almost $30,000 higher than the debtor's valuation. The court takes judicial notice of that fact not for the purpose of proving the truth of the matter asserted; that is, the value of the property, but as demonstrating the unreliability of the debtor's testimony. In short, the debtor has failed to meet his burden of demonstrating, by admissible evidence, the value of the property.

For its part, the Bank has submitted the declaration of Jeff Bolton, a licensed real estate appraiser, together with a copy of his appraisal, as evidence that the value of the property as of May 27, 2014, two and one-half months after the petition date, was $260,000.

On September 5, 2014, the debtor filed a realtor's declaration and an exhibit consisting of the realtor's comparative market analysis. As early as June 11, 2014, the court issued a tentative ruling on this motion that was explicit concerning the insufficiencies in the debtor's own declaration. Despite that ruling, the debtor delayed until almost two months had passed from his deadline before filing his supplemental evidence. For that reason alone, the court should not consider the evidence. However, even taking the declaration and exhibit at their face value, they do not change the court's findings and conclusions. Absent some compelling reason to do otherwise (and the debtor has suggested none), the court gives greater weight to the opinion of a licensed real estate appraiser as to an issue of property valuation than to that of a realtor.

Based on the evidence presented, the court finds the value of the collateral securing the Bank's claim to be $260,000. As the amount due the Bank as of the petition date was $255,955.45, the Bank's claim is fully secured. Accordingly, the

**motion will be denied.**

**The court will hear the matter.**

---

**1 This is boilerplate language used by debtors in cases filed by the debtor's counsel. Given the frequency with which it is used and the fact that it is always used without any supporting detail, the court questions whether the statement is even true in any respect.**

**2 See http://www.zillow.com/homes/5314-marigold-mine-way,-garden-valley,-ca_rb/ (last visited May 29, 2014).**

41. 14-25094-D-7 RNM-1 — BRIAN PORTER — MOTION TO DEEM JUDGMENT NON-DISCHARGEABLE 8-7-14 [30]

**Final ruling:**

**This is a motion to deem a state court judgment non-dischargeable in this chapter 7 case pursuant to § 523(a)(2)(A) of the Bankruptcy Code. 1 The motion will be denied for the following reasons. First, the motion and notice of motion are a single document, contrary to LBR 9014-1(d)(2). Second, the notice does not advise potential respondents whether and when written opposition must be filed, as required by LBR 9014-1(d)(3), does not contain the additional information required in the event the moving party intended to require the filing of written opposition, and does not contain the cautionary language required by the same rule. Third, the type of relief requested must be sought by way of an adversary proceeding. Fed. R. Bankr. P. 7001(6).**

**As a result of these procedural defects, the motion will be denied by minute order. No appearance is necessary.**

---

**1 By notice filed September 3, 2014, the moving party purported to withdraw this motion. However, because opposition had been filed, the moving party did not have the right to unilaterally withdraw the motion. Fed. R. Civ. P. 41(a)(1)(A), incorporated herein by Fed. R. Bankr. P. 7041 and 9014(c).**

42. 14-27506-D-7 AVV-1 — PETER/ROZA RUDEYCHUK — MOTION TO COMPEL ABANDONMENT 8-26-14 [13]

| | | | |
|---|---|---|---|
| 43. | 14-26408-D-7<br>PA-1 | MARK GILROY | CONTINUED COUNTER MOTION TO ABANDON REAL PROPERTY<br>8-13-14 [19] |

| | | | |
|---|---|---|---|
| 44. | 14-25816-D-11<br>DNL-3 | DEEPAL WANNAKUWATTE | CONTINUED MOTION TO APPROVE FORM AND MANNER OF NOTICE BY PUBLICATION OF CLAIMS BAR DATE<br>7-16-14 [81] |

**This matter will not be called before 11:00 a.m.**

| | | | |
|---|---|---|---|
| 45. | 14-25820-D-11<br>FWP-8 | INTERNATIONAL MANUFACTURING GROUP, INC. | CONTINUED MOTION FOR ORDER AUTHORIZING FORM AND MANNER OF PUBLICATION NOTICE OF BAR DATE<br>7-16-14 [114] |

**This matter will not be called before 11:00 a.m.**

| | | | |
|---|---|---|---|
| 46. | 14-25820-D-11<br>FWP-11 | INTERNATIONAL MANUFACTURING GROUP, INC. | MOTION TO EMPLOY JEFFREY S. BOSLEY AS SPECIAL COUNSEL<br>8-27-14 [211] |

**This matter will not be called before 11:00 a.m.**

**Tentative ruling:**

**This is the trustee's motion to employ Davis Wright Tremaine LLP ("Davis Wright") as special labor and employment law counsel. The motion was brought pursuant to LBR 9014-1(f)(2); thus, the court would ordinarily entertain opposition, if any, at the hearing. However, for the following reasons, the court is not prepared to consider the motion at this time.**

**First, the moving party served some but not all the parties who had, well before the motion was served, requested notice in this case. The court has identified at least five such parties – those filing requests at DN 9, 119, 158, 176, and 191 – and there may be more. The court intends to continue the hearing to allow the moving party to file a notice of continued hearing and serve it on parties who have requested notice in the case but who were not previously served.**

**Second, the declaration supporting the motion is insufficient to demonstrate the extent of connections between Davis Wright, on the one hand, and the persons and entities listed in Fed. R. Bankr. P. 2014(a), on the other. Jeffrey S. Bosley testifies he has reviewed the debtor's list of 20 largest unsecured creditors and DBA's; he has made reasonable inquiries of Davis Wright's lawyers and staff to determine the nature of the connections described in the declaration; he has reviewed Davis Wright's client list; and Davis Wright's staff has performed a computerized conflict check of the 20 largest creditors, DBA's, and parties-in-interest in this case and the related case of Deepal Wannakuwatte. To the best of Mr. Bosley's knowledge, he does not believe any of Davis Wright's current or former representations poses an adverse interest in connection with the case, or disqualifies Davis Wright from the proposed representation. That conclusion is the court's to draw, not Mr. Bosley's.**

**The language of the declaration, while broad, is not sufficient to demonstrate that the lawyers and employees of Davis Wright have no connections with <u>any</u> of the creditors (not just the 20 largest unsecured creditors), shareholders, or business entities related to the debtor, or their respective attorneys and accountants, except the single connection disclosed by Mr. Bosley – that Davis Wright has represented and represents General Electric Capital Corporation in matters unrelated to the debtor or the case. Further, the declaration describes Mr. Bosley's extensive work with the trustee in other matters; it does not indicate whether other attorneys or employees of Davis Wright have any connections with the trustee, or her attorneys or accountants.**

**Finally, Mr. Bosley concludes, based solely on his review of the computerized conflict check that neither he nor any of the other attorneys or employees of Davis Wright has any business or social connection with the debtor, its creditors, equity security holders, or with the Office of the United States Trustee or the employees of that office except the connection with General Electric Capital Corporation. The court is not persuaded Mr. Bosley's review of the computerized conflict check, a check evaluating, apparently, only the 20 largest unsecured creditors, DBA's, and other unidentified "parties in interest," is sufficient for the purpose of determining the existence of all connections between the relevant parties, on the one hand, and all the attorneys and employees of Davis Wright, not just Mr. Bosley, on the other hand. As a result, the court intends to continue the hearing to allow the moving party to address the notice and disclosure defects outlined above.**

**The court will hear the matter.**

47. 13-29030-D-7 WILLIAM/JANET CHENG
KSR-1
MONTROSE TRUST #118 VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-19-14 [563]

48. 14-27534-D-7 JENNY CASTILLO
CAH-1

MOTION TO APPOINT VINCENT CASTILLO TO HANDLE BANKRUPTCY MATTERS ON BEHALF OF DEBTOR
8-22-14 [11]

49. 14-28239-D-7 DARSHAN SINGH
FF-1

MOTION TO EXTEND AUTOMATIC STAY
8-15-14 [7]

50. 14-28239-D-7 DARSHAN SINGH
FF-2

MOTION TO COMPEL ABANDONMENT
8-15-14 [12]

51. 10-44961-D-13 MARTHA POORNASIR — CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT
14-2153 RCB-1 — 7-15-14 [9]
POORNASIR V. BANK OF THE WEST, N.A.

**Tentative ruling:**

**This is the motion of the plaintiff, Martha Poornasir, who is also the debtor in the chapter 13 case in which this adversary proceeding is pending (the "debtor"), for entry of a default judgment against defendant Bank of the West, N.A. (the "Bank"). The hearing was continued to permit the debtor to obtain entry of the Bank's default, which the debtor has now done. For the following reasons, the motion will be granted in part.**

**By this motion, the debtor seeks a judgment determining that the Bank's deed of trust against the debtor's real property commonly known as 773 Ellerbrook Street, Mountain House, California, a deed of trust that was determined in the debtor's chapter 13 case to have a value of $0, is void and unenforceable.[1] (The debtor has completed her plan payments and received a chapter 13 discharge, but the Bank has, apparently, not recorded a deed of reconveyance of the deed of trust.) The debtor also requests "a judgment determining th[e] lien to be valued at zero and stripped from" the property.**

**A different department of this court has recently issued a Memorandum Opinion and Decision supporting entry of a default judgment in a different case that is factually very similar to this one. That case is Luchini v. JPMorgan Chase Bank, N.A. (In re Luchini), AP No. 13-2321, 2014 Bankr. LEXIS 2510 (Bankr. E.D. Cal. June 4, 2014). As to the findings and conclusions set forth in that Memorandum Opinion and Decision regarding the third claim for relief in that case, this department agrees with that decision, and adopts the court's findings and conclusions as supporting entry of a default judgment in this case on the debtor's request for an order determining the deed of trust to be void and unforceable, and of no further force and effect.**

**As to the debtor's additional request – for "a judgment determining th[e] lien to be valued at zero and stripped from" the property, that relief will be denied as unnecessary. The court determined in the debtor's parent case, on the debtor's motion to value collateral, that the Bank's secured claim had a value of $0. As the Luchini court observed concerning the Luchini plaintiff's request to "ratify" the value of the residence as $0, "[t]hat prior order and findings of fact thereunder are not subject to attack or dispute." Mem. Op., filed June 4, 2014, in AP No. 13-2321, at 8:14-15. "The findings and that final order stand, are enforceable, and are binding on the parties. No 'reaffirming' is required." Id. at 8:15-17.**

**For the reasons stated, the motion will be granted in part, and the court will issue a judgment determining that the Bank's deed of trust is void, unenforceable, and of no force and effect. The moving party is to submit a proposed judgment.**

**The court will hear the matter.**

---

**1 That is the language of the prayer to the motion. The opening paragraph of the motion words the relief requested slightly differently: the debtor seeks a judgment that the deed of trust "has no further force or effect as a secured lien" against the property. The court has no problem with either proposed wording.**