

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

September 25, 2014 at 3:00 p.m.

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1. [12-30992](#)-E-11 MACHELLE HOLLOWAY CONTINUED STATUS CONFERENCE RE:  
Scott D. Schwartz VOLUNTARY PETITION  
6-8-12 [[1](#)]

Final Ruling: No appearance at the September 25, 2014 Status Conference is required.

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Debtor's Atty: Scott D. Schwartz

The court having ordered this case being administratively close after confirmation of the Chapter 11 Plan, **the Status Conference is removed from the calendar.**

Notes:

Continued from 6/19/14 to allow the filing of all necessary post-confirmation motions, including any motions to administratively close this case pending completion of the Chapter 11 Plan and the Debtor being entitled to a discharge.

Quarterly Operating Reports filed: 8/13/14 [ending June], 8/28/14 [ending September]

Stipulation Clarifying Plan Treatment as to Class 2.3 Creditor filed 8/15/14 [Dckt 358]; Order granting filed 8/19/14 [Dckt 359]

[RAS-14] Application for Entry of Final Decree filed 8/28/14 [Dckt 362], set for hearing 9/24/14 at 3:00 p.m.

[RAS-15] Amended First and Final Application of Rust, Armenis & Schwartz for Compensation filed 9/2/14 [Dckt 372], set for hearing 9/25/14 at 3:00 p.m.

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2. [12-30992-E-11](#) MACHELLE HOLLOWAY  
RAS-14 Scott D. Schwartz

MOTION FOR FINAL DECREE AND  
ORDER CLOSING CASE  
8-28-14 [[362](#)]

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and all creditors on August 28, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

**The court's decision is to grant the Motion for Final Decree and Order Closing Case, and deny without prejudice the request for the entry of a discharge at this time.**

Federal Rules of Bankruptcy Procedure Rule 3022 provides that, after an estate is fully administered in a Chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case. 11 U.S.C. § 350(a) additionally states that the court is required to close a case after an estate is "fully administered and the court has discharged the trustee." The fact that the estate has been fully administered merely means that all available property has been collected and all required payments made. *In re Menk*, 241 B.R. 896, 911 (9th Cir. B.A.P.

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1999).

To determine whether a Chapter 11 case has been "fully administered," the court considers whether:

- the plan confirmation order is final;
- deposits required by the plan have been distributed;
- property to be transferred under the plan has been transferred;
- the debtor (or the debtor's successor under the plan) has taken control of the business or of the property dealt with by the plan;
- plan payments have commenced; and
- all motions, contested matters and adversary proceedings have been finally resolved.

Federal Rule of Bankruptcy Procedure 3022, Adv. Comm. Note (1991). Additionally, unless the Chapter 11 plan or confirmation order provides otherwise, a Chapter 11 case should not remain open solely because plan payments have not been completed. See *id.*; *In re John G. Berg Assocs., Inc.*, 138 B.R. 782, 786 (Bankr. E.D. Pa. 1992).

Here, the Chapter 11 Plan was confirmed on May 5, 2014. The Plan provided that Debtor is responsible for operating its business and making distributions in accordance with the terms of the plan. Debtors state that all distributions to be made under the plan are current and that all the post-confirmation operating reports have been filed.

As indicated by the Advisory Committee Notes accompanying Fed. R. Bankr. P. 3022, entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Rather, the above-listed factors should be considered in determining whether the estate has been fully administered. As stated by Debtors, there are no outstanding deposits that require distribution under the plan and that all disputed claims have been resolved.

Upon confirmation of the Plan, the relevant property became fully vested in Debtors, who are currently managing the estate. Debtors appear to be current on all distribution under the plan and filed post-confirmation operating reports.

While the court does note that there is a Motion for Compensation (Dckt. 372) set for hearing on September 25, 2014 at 3:00 p.m., the court granted that motion, leaving no pending motions to be resolved.

Thus, the court finds that Debtors have satisfactorily met the above-listed factors, determining whether the Chapter 11 bankruptcy estate has been fully administered within the meaning of 11 U.S.C. § 350(a). The court will enter a final decree closing Debtors' case.

However, Movant also requests that the Debtor be granted her discharge. The Motion does not state with particularity grounds by which the granting of

a discharge is proper under 11 U.S.C. § 1141(d)(5). Rather, it merely "slides in" the request for a discharge. That portion of the Motion is denied without prejudice.

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

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

The Motion for Final Decree and Order Closing Case filed by the 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 is granted and Debtors' Chapter 11 Bankruptcy Case is closed pursuant to 11 U.S.C. § 350(a) and Federal Rule of Bankruptcy Procedure 3022, without limitation or restriction of this court's post-confirmation jurisdiction in this case.

All other relief requested in the Motion is denied without prejudice, including the request that the court grant the Debtor her discharge at this time.

3. [12-30992-E-11](#) MACHELLE HOLLOWAY  
RAS-15 Scott D. Schwartz

AMENDED MOTION FOR COMPENSATION  
BY THE LAW OFFICE OF RUST,  
ARMENIS AND SCHWARTZ FOR SCOTT  
D. SCHWARTZ, DEBTOR'S  
ATTORNEY(S)  
9-2-14 [[372](#)]

**COUNSEL FOR THE DEBTOR IN POSSESSION SHALL FILE.  
ON OR BEFORE NOON ON SEPTEMBER 29, 2014,  
A SUPPLEMENTAL DECLARATION PROVIDING THE  
PERSONAL KNOWLEDGE TESTIMONY AND PROPERLY AUTHENTICATING  
THE EXHIBITS FILED IN SUPPORT OF THE MOTION.**

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

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)(iii).**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on September 3, 2014. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

**The Motion for Allowance of Professional Fees is granted, with Counsel allowed \$10,000.00 in fees.**

Scott Schwartz, the Debtor's attorney, filed the instant Motion for Allowance of Professional Fees on September 2, 2014. The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the requested relief is based:

- A. This is the first and final application for fees by counsel for the Debtor in Possession. FN.1.

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FN.1. Though the Motion actually states that the professional fees pursuant to 11 U.S.C. § 330 are sought for legal services provided to the "Debtor," the court construes it as legal services provided to the Debtor in Possession, the fiduciary for the bankruptcy estate exercising the powers of a Chapter 11 bankruptcy trustee, including hiring professionals. 11 U.S.C. §§ 1107, 1106(a)(1) and 327(a). The "debtor" and "debtor in possession" have been statutorily defined by Congress [11 U.S.C. §§ 101(13), 1107] and are two distinct legally recognize persons.  
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- B. Attorneys' fees in the amount of \$22,575.00 are requested for the period of March 2012 through August 28, 2014.
- C. Counsel waives all fees in excess of the \$10,000.00.
- D. A Summary of the Work done is filed as Exhibit A.
- E. That the Debtor in Possession hired counsel (again, though the Motion says that it was the Debtor who hired counsel).
- F. Counsel Schwartz's hourly rate is \$300.00.
- G. No fees have been previously been approved for Counsel in this case.
- H. Counsel's law firm is not sharing fees with any other person.
- I. There are sufficient monies to pay the fees (Counsel having the \$10,000.00 retainer).
- J. Counsel has elected to waive \$12,575.00 in fees in excess of the \$10,000.00 retainer.
- K. The services provided are summarized as follows:
  - 1. Closing of case - 2.4 hours = \$720.00 in fees.
  - 2. Employment and compensation of professionals - 2.7 hours = \$810.00 in fees
  - 3. Monthly Operating Reports - 11.45 hours = \$3,435.00

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FN.1. Preparation of monthly operating reports is the responsibility of the Debtor in Possession (as it would be of the trustee) not Counsel for Debtor in Possession. While it is reasonable and necessary for Counsel to instruct the Debtor in Possession on her legal duties and conduct an appropriate legal

review the monthly operating reports before filing, the attorney for the debtor in possession or trustee is not the de facto bookkeeper or accountant. If Counsel were not reducing its fees, the court would be disallowing substantially all of these fees.

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- 4. Objection to Claims - .30 hours = \$150.00.
- 5. Motions to Value Secured Claims - 20.55 hours = \$6,165.00
- 6. Motions to Provide Adequate Protection - 12 hours = \$3,000.00.
- 7. Communications with Debtor in Possession, Communications with Creditors - 11.7 hours = \$3,510.00.
- 8. Plan and Disclosure Statement - 10.9 hours = \$3,270.00.
- 9. Balloting and Communications Concerning Confirmation of Plan, Stipulations - 3 hours = \$900.00

**Defective Notice of Hearing**

"The notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition. If written opposition is required, the notice of hearing shall advise potential respondents that the failure to file timely written opposition may result in the motion being resolved without oral argument and the striking of untimely written opposition." Local Bankr. R. 9014-1 (d).

The notice of hearing does not contain the requirements of Local Bankr. R. 9014-1 (d). In fact, Scott Schwartz, the Debtor's attorney, provides absolutely no information on the deadlines for opposition or whether a hearing is required.

**Lack of Authentication, Evidence.**

Scott Schwartz, the Debtor's attorney, does not provide any declaration authenticating the task billing exhibits. Mr. Schwartz does not authenticate whether the task billing was done contemporaneously with the services rendered nor does he describe the means in which the billing is done.

Even for "simple" motion, evidence sufficient for the court to make the necessary findings of fact and conclusions of law are required. L.B.R. 9014-1(d)(6). Though there are a series of exhibits filed, they are not authenticated. Fed. R. Evid. 901 et seq.

Based on the specific facts and circumstances of this case, the efforts of Counsel in working with creditors to resolve the objections to confirmation, and the plan having been confirmed, *for this Motion only*, the court waives the defective notice. All parties in interest were provided notice of the relief requested in a sufficient manner to state an opposition, if any.

## **Supplemental Presentation of Evidence**

It is obvious in this case that Counsel has effectively represented the Debtor in Possession, successfully confirming the Chapter 11 Plan. In light of the economic realities of this case, Counsel has reduced its fees to \$10,000.00, which will be paid from the \$10,000.00 retainer. The Debtor, as Plan Administrator, and the creditors to be paid through the plan will not be burdened with the payment of any amounts for an administrative expense for Counsel's fees.

The court is confident that Counsel can, and will, provide a supplemental declaration (1) authenticating all of the exhibits (other than those which are copies of pleadings already filed in this case) and (2) providing the personal knowledge testimony (Fed. R. Evid. 601, 602) for the court to make these necessary findings of fact and conclusions of law.

## **Allowance of Fees**

The court finds reasonable \$10,000.00 in total attorneys' fees for the services provided in this case by Rust, Armenis & Schwartz, Scott D. Schwartz as counsel of record. All fees and costs in excess of that amount are not allowed, pursuant to the waiver by Counsel. (Though the court would disallow a portion of the requested fees as they related to the Monthly Operating Reports, clearly Counsel's legal services are significantly in excess of \$10,000.00).

The court allows Rust, Armenis & Schwartz, Scott D. Schwartz as counsel of record, \$10,000.00 in fees (inclusive of all costs relating thereto).

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

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

The Motion for Allowance of Professional Fees filed by Scott Schwartz 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 Allowance of Professional Fees is granted, and Rust, Armenis & Schwartz, Scott D. Schwartz as counsel of record, is allowed \$10,000.00 in fees (inclusive of all costs relating thereto) for representation of the Debtor in Possession in this bankruptcy case. All additional fees and costs in excess of the \$10,000.00 set forth in this Order are disallowed. This is a final allowance of fees pursuant to 11 U.S.C. § 330.

**IT IS FURTHER ORDERED** that Rust, Armenis & Schwartz ("Counsel") is authorized to apply the \$10,000.00 retainer is holding for this case to the fees, paying the allowed fees in full. The Plan Administrator, nor any other person, is authorized to pay any amounts to Counsel for any fees or costs for or relating to representation of the Debtor in Possession



in this case.