UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

September 27, 2018 at 10:30 a.m.

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1. 15-90811-E-7 15-9062 — **ASSN., GOLD STRIKE HEIGHTS HOMEOWNERS NB-3** — **MOTION FOR PREVAILING PARTY FEES**
8-24-18 [142]

LEE V. GOLD STRIKE HEIGHTS ASSOCIATION ET AL

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff (*pro se*) on August 24, 2018. *See* FED. R. BANKR. P. 7004(b)(1). 34 days' notice was provided. 28 days' notice is required. LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Prevailing Party Fees is ~~granted~~.

Gary Farrar, the Chapter 7 Trustee ("Movant" or "Defendant-Trustee"), moves for prevailing party attorney's fees pursuant to *Fed. R. Ban P.* 7054 and Cal. Civ. Code § 5975. Specifically, Movant seeks an allowance of Fees and Expenses accrued in defending an appeal of the Bankruptcy Court's Order granting Defendant-Trustee's judgment on the pleadings (BAP Case No. 16-1169), which affirmed on appeal on July 17, 2018. Dckt. 120.

Fees are requested for the period August 23, 2016, through June 21, 2018. Movant requests fees in the amount of $9,540.25.

NOTICE DEFICIENCIES

Movant's Notice of Hearing on the Motion (Dckt. 143) provides conflicting information. The caption provides the correct hearing date of September 27, 2018. The body indicates a different hearing date, stating "NOTICE IS HEREBY GIVEN that on August _, 2018 at 10:30 a.m., or soon thereafter . . . " Dckt. 143 at 2:1. The Notice further indicates that 14 calendar days preceding the hearing is August 9, 2018 (suggesting an August 23 hearing). Dckt. 143 at 3:13-14.

The court notes that this Motion is brought for the second time, the first motion for prevailing party fees having been voluntarily dismissed without prejudice after failing to clearly distinguish fees sought for separate appeals. Dckt. 138. The current Motion is in substantially the same form, and it is likely a scrivener's error occurred in revising the Notice for this Motion.

The court finds that the Notice provided substantially complies with the Local Bankruptcy Rules and Federal Rules of Bankruptcy Procedure. Don Lee, the Plaintiff in *Pro Per*, has demonstrated in this Adversary Proceeding that he is a competent litigant, and will not have been prejudiced by the aforementioned Notice deficiencies. Therefore, the court will waive the defect, which would otherwise constitute cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

STATUTORY BASIS FOR ATTORNEY'S FEES

California Civil Code provides:

> In an action to enforce governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs.

(Cal. Civ. Code § 5975(c)), and:

> Governing documents means the declaration and any other documents, such as bylaws, operating rules, articles of incorporation, or articles of association, which govern the operation of the common interest development or association.

Cal. Civ. Code § 4150

The Federal Rules of Bankruptcy Procedure states:

> The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the Unites States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.

Fed. R. Bank P. 7054(b)(1)

As the court has previously determined, which has been affirmed on appeal, Defendant-Trustee has a statutory right to attorney's fees pursuant to California Civil Code § 5975. "The mandatory attorney's fees and costs award under Section [5975], applies when a plaintiff brings an action to enforce such governing documents, but is unsuccessful because he or she does not have standing to do so." *Martin v. Bridgeport Cmty. Assn's, Inc.* 173 Cal.App.4th 1024, 1039 (2009) (citing *Faber v. Bay View Terrace Homeowners Assn.* 141 Cal.App.4th 1007, 1014 (200). The law is clear that whether attorneys' fees may be allowed pursuant to the statute is not dependent on a determination of dispute concerning the Governing Documents but that it was put at issue in the action.

Computation of Prevailing Party Attorney's Fees

Unless authorized by statute or contractual provision, attorney's fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorney's fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), amended, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). An attorney's fee award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

Award of Attorney's Fees

The court having determined that the Defendant-Trustee is the prevailing party and that California Civil Code § 5975(c) provides that the prevailing party shall be awarded attorneys' fees, the court determines that the requested $9,540.25 in attorneys' fees is reasonable in this Adversary Proceeding for the additional services in defending the Judgment on Appeal.

Applying the normal lodestar analysis, the court begins with the billing rates for the attorneys for which the attorneys' fees are requested. The hourly rates for the work done by the attorney at $225, $240, $255, $340 an hour are reasonable. For an appellate attorney, they are very moderate when considering the regular billing rates in the community, as well as commensurate with the level of legal experience for the

issues on appeal from this Adversary Proceeding. The court notes that there are no costs requested, all of that having been included in the hourly rate for the attorney

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Interviews and Conferences: Movant spent 1.5 hours in this category. Movant formatted Appellee's brief and conferred regarding Appellee's brief arguments.

Obtaining & Reviewing Records: Movant spent 8.65 hours in this category. Movant reviewed the pleadings filed in the appeal; conferred regarding the appeal; reviewed the Bankruptcy Court's minute orders regarding the judgment on the pleadings; reviewed the record on appeal; reviewed and researched case law regarding declaratory relief.

Legal Research: Movant spent 4.1 hours in this category. Movant held conferred regarding the Court's memorandum decision on the motion for attorneys' fees; researched the Federal Rules of Appellate Procedure regarding briefs and standard of review issues in the case.

Preparing Briefs: Movant spent 24.8 hours in this category. Movant drafted, revised and edited Appellee's brief; conferred regarding the brief; finalized and filed Appellee's brief.

Preparing for & Attending Oral Argument: Movant spent 2.3 hours in this category. Movant prepared the hearing binder; traveled to and from Sacramento to attend two oral argument hearings.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Cliff Stevens	1.00	$340.00	$340.00
Joshua Hunsucker	35.05	$225.00	$7,886.25
Joshua Hunsucker	2.50	$240.00	$600.00
Joshua Hunsucker	2.80	$255.00	$714.00
Total Fees for Period of Application			$9,540.25

FAILURE TO CLARIFY BILLING

A review of the Exhibits "A" filed in support of this Motion (Dckt. 145) and in support of Movant's other motion set to be heard the same day (Dckt. 151) shows potential double entry of billings. Both exhibits indicate in the header they are for "Case 15-09062" (the Adversary Proceeding case number) and were "Filed 07/26/18." Both Exhibits further clarify they are for "Farrar, Gary (Chapter 7 Trustee) / Gold Strike Heights HOA Bankruptcy (27473-40265)." The only Exhibit contents distinguishing the two Exhibits are various differences in billing entries and the docket numbers in the top-right header indicating their Docket Number when filed for the first, but not the present Motions.

Given the Exhibits indicate they are billing entries in the Adversary Proceeding, and are not specific to the appeals case, the court is not concerned where the billing entries are indistinguishable. The following entries appear identical on both Exhibits:

Date	Name	Hours	Amount	Rate	Narrative
08/25/2016	Hunsucker, Joshua P.	1.50	$337.50	225.00	Format appellee's brief; conference with C. Stevens regarding appellee's brief arguments
12/20/2016	Hunsucker, Joshua P.	2.65	$596.25	225.00	Review record on appeal; research issue regarding supplementing the record on appeal; conference with C. Stevens regarding the same; draft appellee's brief
06/20/2018	Hunsucker, Joshua P.	0.60	$153.00	255.00	Prepare hearing binder; review briefs; prepare for hearing; conference with C. Stevens regarding the same; review new 9th Circuit case.
06/21/2018	Hunsucker, Joshua P.	1.70	$433.50	255.00	Travel to and from Sacramento; prepare for hearing; appear at two oral argument hearings.

The court notes that the two appeals, BAP Case Nos. 16-1169 and 16-1283, were heard together, which likely resulted in the above overlap. While Movant may have merely divided the time for the above activities in two to reflect the two appeals, no such clarification has been made to the court.

With respect to entries on the Exhibits for draft of Movant's appellate brief and review of the record, given the two appeals were heard jointly, the court presumes Movant only billed for work relevant to each respective appeal. This is necessary, for example, where the Exhibits state generally "Draft Appellee's Brief" or "Draft appellee's responsive brief," where in fact there was likely only a single brief between the two appeals and therefore they could only have billed for drafting relevant portions of the brief.

At the hearing, Movant explained **XXXXXXXXXXXXXXXXXX**

PREVAILING PARTY FEES AND COSTS AWARDED

The court finds that the hourly rates, time expended, and services provided were reasonable and necessary for the Defendant-Trustee to defend his judgment on appeal, and the court awards the Defendant-Trustee $9,540.25 in prevailing party attorney's fees, which shall be enforced as part of the judgment in this Adversary Proceeding. No costs are awarded (nor were they requested).

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

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

The Motion for Allowance of Fees and Expenses filed by the Chapter 7 Trustee and Defendant, Gary Farrar ("Movant" or "Defendant-Trustee"), in this Adversary Proceeding and prevailing party on appeal having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.

IT IS ORDERED that Gary Farrar, the Defendant Chapter 7 Trustee is awarded prevailing party attorney's fees against Don Lee, the Plaintiff, in the additional amount of $9,540.25, and that such additional prevailing party attorney's fees shall be enforced as part of this judgment.

2. **15-90811-E-7** **ASSN., GOLD STRIKE** **MOTION FOR PREVAILING PARTY**
15-9062 **HEIGHTS HOMEOWNERS NB-4** **FEES**
8-24-18 [148]

LEE V. GOLD STRIKE HEIGHTS ASSOCIATION ET AL

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff (*pro se*) on August 24, 2018. *See* FED. R. BANKR. P. 7004(b)(1). 34 days' notice was provided. 28 days' notice is required. LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Prevailing Party Fees is ~~granted~~.

Gary Farrar, the Chapter 7 Trustee and Defendant in this Adversary Proceeding ("Movant" or "Defendant-Trustee"), moves for prevailing party attorney's fees pursuant to *Fed. R. Ban P.* 7054 and *Cal. Civ. Code* § 5975. Specifically, Movant seeks an allowance of Fees and Expenses accrued in defending an appeal of the Bankruptcy Court's Order granting attorney's fees (BAP Case No. 16-1283), which was heard and affirmed on July 17, 2018. Dckt. 120.

Fees are requested for the period August 23, 2016, through June 21, 2018. Movant requests fees in the amount of $6,507.75.

NOTICE DEFICIENCIES

Second, Movant's Notice of Hearing on the Motion (Dckt. 149) provides conflicting information. The caption provides the correct hearing date of September 27, 2018. The body indicates a different hearing

date, stating "NOTICE IS HEREBY GIVEN that on August _, 2018 at 10:30 a.m., or soon thereafter . . . " Dckt. 149 at 2:1. The Notice further indicates that 14 calendar days preceding the hearing is August 9, 2018 (suggesting an August 23 hearing date). Dckt. 149 at 3:16-17.

The court notes that this Motion is brought for the second time, the first motion for prevailing party fees having been voluntarily dismissed without prejudice after failing to clearly distinguish fees sought for separate appeals. Dckt. 138. The current Motion is in substantially the same form, and it is likely a scrivener's error occurred in revising the Notice for this Motion.

The court finds that the Notice provided substantially complies with the Local Bankruptcy Rules and Federal Rules of Bankruptcy Procedure. Don Lee, the Plaintiff in *Pro Per*, has demonstrated in this Adversary Proceeding that he is a competent litigant, and will not have been prejudiced by the aforementioned Notice deficiencies. Therefore, the court will waive the defect, which would otherwise constitute cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

STATUTORY BASIS FOR ATTORNEY'S FEES

California Civil Code provides:

> In an action to enforce governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs.

(Cal. Civ. Code § 5975(c)), and:

> Governing documents means the declaration and any other documents, such as bylaws,, operating rules, articles of incorporation, or articles of association, which govern the operation of the common interest development or association.

Cal. Civ. Code § 4150

The Federal Rules of Bankruptcy Procedure states:

> The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the Unites States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.

Fed. R. Bank P. 7054(b)(1)

As the court has previously determined, which has been affirmed on appeal, Defendant-Trustee has a statutory right to attorney's fees pursuant to California Civil Code § 5975. "The mandatory attorney's fees and costs award under Section [5975], applies when a plaintiff brings an action to enforce such governing documents, but is unsuccessful because he or she does not have standing to do so." *Martin v. Bridgeport Cmty. Assn's, Inc.* 173 Cal.App.4th 1024, 1039 (2009) (citing *Faber v. Bay View Terrace*

Homeowners Assn. 141 Cal.App.4th 1007, 1014 (200). The law is clear that whether attorneys' fees may be allowed pursuant to the statute is not dependent on a determination of dispute concerning the Governing Documents but that it was put at issue in the action.

Computation of Prevailing Party Attorney's Fees

Unless authorized by statute or contractual provision, attorney's fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorney's fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), amended, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). An attorney's fee award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

Award of Attorney's Fees

The court having determined that the Defendant-Trustee is the prevailing party and that California Civil Code § 5975(c) provides that the prevailing party shall be awarded attorneys' fees, the court determines that the requested $6,501.75 in attorneys' fees is reasonable in this Adversary Proceeding for the additional services in defending the Judgment on Appeal.

Applying the normal lodestar analysis, the court begins with the billing rates for the attorneys for which the attorneys' fees are requested. The hourly rates for the work done by the attorney at $225, $240, and $255 an hour are reasonable. For an appellate attorney, they are very moderate when considering the regular billing rates in the community, as well as commensurate with the level of legal experience for the issues on appeal from this Adversary Proceeding. The court notes that there are no costs requested, all of that having been included in the hourly rate for the attorney

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Interviews and Conferences: Movant spent 2 hours in this category. Movant formatted appellee's brief and conferred regarding Appellee's brief arguments.

Obtaining & Reviewing Records: Movant spent 2.95 hours in this category. Movant reviewed the record on appeal; researched the issue of supplementing the record on appeal and drafted appellee's brief.

Legal Research: Movant spent 1.1 hours in this category. Movant conferred regarding the Bankruptcy Appellant Panel's case regarding attorney's fees; reviewed attorney's fees cases.

Preparing Briefs: Movant spent 20.20 hours in this category. Movant drafted, revised and edited appellee's brief; researched issue application as it pertains to state law; consulted regarding the brief.

Preparing for & Attending Oral Argument: Movant spent 2.3 hours in this category. Movant prepared the hearing binder; traveled to and from Sacramento to attend two oral argument hearings.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Joshua Hunsucker	25.45	$225.00	$5,726.25
Joshua Hunsucker	.60	$240.00	$144.00
Joshua Hunsucker	2.50	$255.00	$637.50
Total Fees for Period of Application			$6,507.75

FAILURE TO CLARIFY BILLING

A review of the Exhibits "A" filed in support of this Motion (Dckt. 151) and in support of Movant's other motion set to be heard the same day (Dckt. 145) shows potential double-billing. Both exhibits indicate in the header they are for "Case 15-09062" (the Adversary Proceeding case number) and were "Filed 07/26/18." Both Exhibits further clarify they are for "Farrar, Gary (Chapter 7 Trustee) / Gold Strike Heights HOA Bankruptcy (27473-40265)." The only Exhibit contents distinguishing the two Exhibits

are various differences in billing entries and the docket numbers in the top-right header indicating their Docket Number when filed for the first, but not the present Motions.

Given the Exhibits indicate they are billing entries in the Adversary Proceeding, and are not specific to the appeals case, the court is not concerned where the billing entries are indistinguishable. The following entries appear identical on both Exhibits:

Date	Name	Hours	Amount	Rate	Narrative
08/25/2016	Hunsucker, Joshua P.	1.50	$337.50	225.00	Format appellee's brief; conference with C. Stevens regarding appellee's brief arguments
12/20/2016	Hunsucker, Joshua P.	2.65	$596.25	225.00	Review record on appeal; research issue regarding supplementing the record on appeal; conference with C. Stevens regarding the same; draft appellee's brief
06/20/2018	Hunsucker, Joshua P.	0.60	$153.00	255.00	Prepare hearing binder; review briefs; prepare for hearing; conference with C. Stevens regarding the same; review new 9th Circuit case.
06/21/2018	Hunsucker, Joshua P.	1.70	$433.50	255.00	Travel to and from Sacramento; prepare for hearing; appear at two oral argument hearings.

The court notes that the two appeals, BAP Case Nos. 16-1169 and 16-1283, were heard together, which likely resulted in the above overlap. While Movant may have merely divided the time for the above activities in two to reflect the two appeals, no such clarification has been made to the court.

With respect to entries on the Exhibits for draft of Movant's appellate brief and review of the record, given the two appeals were heard jointly, the court presumes Movant only billed for work relevant to each respective appeal. This is necessary, for example, where the Exhibits state generally "Draft Appellee's Brief" or "Draft appellee's responsive brief," where in fact there was likely only a single brief between the two appeals and therefore they could only have billed for drafting relevant portions of the brief.

At the hearing, Movant explained **XXXXXXXXXXXXXXXXXX**

PREVAILING PARTY FEES AND COSTS AWARDED

~~The court finds that the hourly rates, time expended, and services provided were reasonable and necessary for the Defendant-Trustee to defend his judgment on appeal, and the court awards the Defendant-Trustee $6,507.75 in prevailing party attorney's fees, which shall be enforced as part of the judgment in this Adversary Proceeding. No costs are awarded (nor were they requested).~~

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

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

~~The Motion for Allowance of Fees and Expenses filed by Gary Farrar ("Movant"), the Defendant Chapter 7 Trustee in this Adversary Proceeding and prevailing party on appeal having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.~~

~~**IT IS ORDERED** that Gary Farrar, the Defendant and Chapter 7 Trustee in this Adversary Proceeding ("Movant" or "Defendant-Trustee") is awarded prevailing party attorney's fees against Don Lee, the Plaintiff, in the additional amount of $6,507.75, and that such additional prevailing party attorney's fees shall be enforced as part of this judgment.~~

3. **18-90029-E-11** **JEFFERY ARAMBEL** **MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH SBN V AG I, LLC**
MF-31 **Matthew Olson** **8-29-18 [558]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney's, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on August 30, 2018. By the court's calculation, 28 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice).

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

The Motion for Approval of Compromise is denied.

Jeffery Edward Arambel, Debtor in Possession, requests that the court approve a compromise and settle competing claims and defenses with SBN V Ag I, LLC ("Summit"). The claims and disputes to be resolved by the proposed settlement are Summit's "expressed concerns at multiple hearings about the Debtor in Possession's ability to act as a fiduciary of all of the creditors of the Estate;" Summit's "concerns regarding the manner in which the Debtor in Possession has been marketing and selling his real property assets, including his reticence to employ real estate brokers in connection with proposed sales;" and Debtor in Possession's potential objection to Summit's pre-petition secured claim amount (asserted to be $41,678,551.68 inclusive of attorney's fees and costs).

Grounds Stated in Motion

Debtor in Possession and Summit have resolved these claims and disputes, which settlement terms are stated with particularity in the Motion as follows:

A. The Disputes between the Debtor in Possession and Summit are stated to be:

1. "Numerous disputes have arisen between the Debtor in Possession and Summit during the pendency of this Chapter 11 case."

Motion, p. 3:25-26; Dckt. 558. On this point, it appears that the "disputes" concern the prosecution of the Chapter 11 case, not the substantive rights of the parties..

2. "In the initial months of this case, Summit expressed concerns at multiple hearings about the Debtor in Possession's ability to act as a fiduciary of all of the creditors of the Estate."

Id., p. 3:26, 28. This is not a substantive rights and claims dispute, but merely whether the Debtor in Possession had the ability to prosecute the case, fulfill his duties as debtor in possession, and put forth a confirmable plan.

3. "Among Summit's concerns was the Debtor in Possession's proposal to pay 5% of the gross purchase price for each parcel of what the Debtor in Possession referrers to as the Arambel Business Park properties to Crestmont Development, LLC ("Crestmont") for "project-management commissions" that the Debtor alleged he previously had agreed to pay to Crestmont, which commission would constitute a payment of $1,231,212 from the Estate."

Id., p. 4:28, 5:1-4. Again, there is no dispute as to the rights and interests of the parties, competing claims and counter claims, disputed liability. But merely a "dispute" of how proceeds of a sale could properly disbursed when a sale was ordered by the court under the Bankruptcy Code.

4. "Debtor in Possession continues to pursue the [crop insurance] claims [subject to Summit's lien], but Summit is concerned that little real progress has been made to pursue the Crop Insurance Claims."

Id., p. 4:8-10.

5. "Summit also has expressed concerns regarding the manner in which the Debtor in Possession has been marketing and selling his real property assets, including his reticence to employ real estate brokers in connection with proposed sales. Debtor in Possession has now listed all nearly all real properties for sale."

Id., p. 11-14. This "dispute" is again a very ephemeral, non-rights and claims based matter. At the core of all of this is: "is the Debtor in Possession able to fulfill his obligations as debtor in possession." These types

of "disputes" are commonly the subject of a motion to convert or appointment of a trustee. They are not the types of "disputes" where creditors extract, and debtors in possession capitulate, releases, admissions of liability, waiver of defenses and rights, and give away rights and interests of the bankruptcy estate.

B. The term of the Stipulation, the rights and interests of the Debtor and Summit which are being transferred, released, assigned and waived, are stated with particularity in the Motion to be:

1. [Nothing is stated in the Motion]

At this juncture, the Parties having hidden the ball, the Motion may properly be denied. However, the court has reviewed the Settlement Agreement, the terms of which are not stated in the Motion. This "Settlement" raises serious concerns with respect to all of the Parties involved therein.

Review of Proposed Settlement Agreement

The proposed Settlement Agreement is filed as Exhibit A in support of the Motion. Dckt. 562. The first five pages are recitals. The "Agreement" portion of the document incorporates all of the Recitals, hook, line and sinker, into the "Agreement" text.

Setting the Recitals which are made part of the "Agreement" for a moment, the stated terms of the "Agreement:"

A. Promptly after signing the Settlement Agreement, the Parties shall diligently prosecute a Motion for a separate "DIP Agreement." Agreement ¶ 4.

B. The DIP Agreement is stated in Recital J to have the following basic terms:

1. "Summit has agreed to lend certain funds to the Estate, provided that the Debtor-in-Possession satisfies certain terms and conditions, including achieving certain milestones in the Chapter 11 Case regarding, among other things, sales of real properties and confirmation of a plan of reorganization."

This "Compromise" includes the providing of future funding, presumably for purposes of a Chapter 11 Plan.

2. "Further, the DIP Agreement requires that certain protections and safeguards be put and kept in place to the benefit of all of the stakeholders of the Estate."

General reference is made to terms, which appear to be ones that may be in the nature of binding plan terms.

3. "As to the Estate's non-insider unsecured creditors, up to $3,500,000 of Summit's cash collateral will be made available by Summit to allow for such creditors to receive cash payments upon confirmation of a plan of reorganization, provided that Summit receives, as adequate protection, junior

replacement liens securing the same amount dollar-for-dollar against certain of the Debtor's assets."

This appears to be a plan funding terms, since payment of unsecured claims must be done through a confirmed plan.

4. "As to the Estate's secured creditors, the Parties have agreed to a Real Estate Restructuring Agreement (as defined hereinafter) pursuant to which the Estate's secured creditors will be repaid within 12 months (the "Real Estate Restructuring Deadline")"

This appears to be a plan term for the treatment of Summit's secured claim.

5. "[e]ach secured creditor will have additional oversight regarding the Debtor's sale efforts, which will be further monitored and enforced by an independent third-party professional real estate advisor."

This appears to be the creation of a receivership or transfer of the fiduciary control of the bankruptcy estate to Summit and other creditors.

6. "Finally, a non-revolving line of credit facility in the aggregate amount of up to $2,000,000.00 will be made available by Summit to fund the Debtor-in-Possession's operating expenses during the pendency of the Chapter 11 Case pursuant to a budget acceptable to Summit."

This appears to pre-authorize post-petition borrowing for the Debtor in Possession.

Taken as a whole, this mere DIP Agreement appears to have resolved most confirmation issues and plan terms, without the necessity of a plan being presented and creditors having the need to vote.

C. The Agreement mandates that a "Real Estate Advisor" be engaged by the Debtor in Possession of the Debtor in Possession's fiduciary duties. Agreement ¶ 5. As shown below, these terms are not for a mere "advisor," but the equivalent of a "receiver" to supplant the fiduciary Debtor in Possession.

1. "Debtor-in-Possession shall file and diligently prosecute a motion seeking the an order of the Bankruptcy Court, in form and substance satisfactory to Lender ("Retention Order"), approving and authorizing the Estate's retention of George J. Demos of GlassRatner Advisory & Capital Group, LLC or any other person acceptable to Lender to serve as an independent third party professional real estate advisor to the Debtor-in-Possession ("Real Estate Advisor")."

This provision begins to expose the overreaching of Summit in this "Compromise." While stating that the "Real Estate Advisor" is to be "independent" and advising the Debtor in Possession, it can only be someone who Summit (reasonably or unreasonably) approves. There is no determination left for the court, but merely

the person determined acceptable to Summit. It is Summit who controls who gets appointed and to whom the "Real Estate Advisor" owes his or her appreciation for making money on "this deal."

2. "The Retention Order shall

a. confer upon the Real Estate Advisor certain duties, responsibilities, rights, and powers with respect to carrying out the Real Estate Restructuring Agreement, including, without limitation, the following:

(1) in the event of any dispute between the Debtor-in-Possession and any secured creditor(s) with liens on subject Real Properties (as defined hereinafter) under the Real Estate Restructuring Agreement, or

(2) if an event of default under the DIP Agreement has occurred and is continuing,

(3) or upon the failure of the Debtor-in-Possession to comply with the Real Estate Restructuring Agreement or complete the same by the Real Estate Restructuring Deadline,

b. "the Real Estate Advisor shall have standing and limited irrevocable power of attorney to, on behalf of the Estate,

(1) solely and exclusively

(a) market,

(b) negotiate, and

(c) enter into sale agreements providing for the sale of one or more of the Real Properties

i) without the prior consent of either the Debtor-in-Possession or the affected secured creditor(s);

(2) provided, however, that the Debtor-in-Possession and affected secured creditor(s) or other parties-in-interest shall retain the right to object to any motion seeking approval and authority to conduct any sale of any Real Properties."

In considering this provision, one is initially shocked in that it clearly turns over control of property of the bankruptcy estate to a third-party, not the mandated debtor in possession or trustee as required by Congress in the Bankruptcy Code. 11 U.S.C. § 1106, 1107. As discussed below, this provision is a thinly veiled attempt to violate the prohibitions of 11 U.S.C. § 105(b) precluding the appointment of a receiver in a bankruptcy case under Title 11.

This provision removes the Debtor in Possession from the process entirely, allowing the "Real Estate Advisor" to disregard opposition of the Debtor in Possession.

The provision goes further, relegating the fiduciary Debtor in Possession, who statutorily has unilateral control over all property of the bankruptcy estate, to a mere objecting party in interest to the administration of property of the estate by the "Real Estate Advisor."

> c. "If the Real Estate Advisor determines that a proposed sale is in the best interests of the Estate, the Retention Order shall permit bankruptcy counsel for the Debtor-in-Possession, or counsel to the affected secured creditor(s), to file a motion for approval of the sale at the behest of the Real Estate Advisor on behalf of the Estate. The Real Estate Advisor shall be authorized to consult and work with the Real Estate Brokers (as defined hereinafter) in connection with carrying out its duties and responsibilities with respect to the Real Estate Restructuring Agreement."

With this provision, Summit elevates itself into the party controlling property of the bankruptcy estate, anointing itself with standing to bring motions to sell property of the Bankruptcy Estate. It also grants secondary authority to the Debtor in Possession, if the "Real Estate Advisor" does not exercise his or her powers (and presumably duty) to file a motion to sell property of the bankruptcy estate as granted in the "Settlement Agreement."

D. In Paragraph 7 of the "Settlement Agreement" the terms for the restructure in this case are specified.

> 1. "Notwithstanding the retention of the Real Estate Advisor, the Debtor-in-Possession shall use his commercially reasonable efforts to sell real property assets subject to liens in favor of Summit (including under the DIP Agreement) (collectively, the "Real Properties") in consultation with the real estate brokers whose retention has been approved by the Bankruptcy Court (the "Real Estate Brokers"), such that there shall be indefeasible repayment in full of the Pre-Petition Claim and any and all indebtedness under the DIP Agreement within twelve (12) months of the Effective Date of this Agreement, whether by virtue of sales of the Debtor-in-Possession's Real Properties, or by payment of cash through a refinancing or exit facility, that in either case repays the Pre-Petition Claim and any and all indebtedness under the DIP Agreement

in full in immediately available funds (the "Real Estate Restructuring Agreement")."

In this provision, Summit dictates/determines that the Plan term for paying its secured claim is the immediate, twelve month liquidation of its collateral. As opposed to an orderly business sale of property under a Chapter 11 Plan, this sounds in the nature of a rushed, Chapter 7 trustee liquidation for whatever can be gotten in the prompt liquidation of the bankruptcy estate. No voting on plan terms is required, the terms for treatment of Summit's claims having been stated in the "Settlement Agreement," the terms of the Chapter 11 plan are fixed – no voting required and no compliance with Chapter 11 required.

2. "Prior to executing any escrow or sale agreement with any person, the Debtor-in-Possession shall consult with the Notice Parties. In the event of any dispute between Summit or another affected secured creditor and the Debtor-in-Possession with respect to any offers, counter-offers, or proposed real estate sales, the Real Estate Advisor shall endeavor to resolve such disputes, and if the Real Estate Advisor determines in his or her fiduciary capacity that it would be in the best interests of the Estate, the Real Estate Advisor may exercise the Dispute Resolution Rights that he or she is permitted to take under the Retention Order."

In this provision Summit gives itself veto power over any sale that the fiduciary Debtor in Possession seeks to pursue, demonstrates that the Debtor in Possession has been stripped by the "Settlement Agreement" of his powers as the fiduciary of the bankruptcy estate, and unilateral control of property of the bankruptcy estate has been ceded to the "Real Estate Advisor" who has been employed only with the consent of Summit.

3. "If an event of default has occurred and is continuing under the DIP Agreement, upon the written instruction of Summit, the Real Estate Advisor shall exercise the Dispute Resolution Rights that he or she is permitted to take under the Retention Order. In the event the Debtor-in-Possession fails to comply with the Real Estate Restructuring Agreement or complete the same by the Real Estate Restructuring Deadline, the Real Estate Advisor shall exercise the Dispute Resolution Rights."

With this provision, if Summit asserts there is a default, then it may unilaterally give instructions for the "Real Estate Advisor" to act.

4. "In each case, the Real Estate Advisor may exercise the Dispute Resolution Rights in such manner as the Real Estate Advisor may determine in his or her commercially reasonable discretion, provided, however, that in the event the Debtor-in-Possession fails to complete the Real Estate Restructuring Agreement by the Real Estate Restructuring Deadline, Summit may instruct the Real Estate Advisor to conduct an auction or other disposition of some or all of the Real Properties, and the Real Estate Advisor shall follow such instructions."

Summit proceeds further, granting itself the power to direct and control the disposition of the property of the bankruptcy estate, stripping the "Real Estate Advisor" of any fictional "independence," mandating that "the Real Estate Advisor shall follow such instructions [as laid down by Summit]."

5. "The Debtor-in-Possession agrees that he will be enjoined and restrained from interfering with the Real Estate Advisor's exercise of any and all of the Dispute Resolution Rights. The Dispute Resolution Rights are in addition to and not in limitation of, and Summit reserves and preserves, all of the rights and remedies available to Summit under the ΔIP Agreement and the Loan Documents, at law, and in equity."

Summit's overreaching continues, imposing a prohibitory injunction from exercising the Debtor in Possession's fiduciary duties with regard to however Summit instructs the "Real Estate Advisor" to liquidate the property of the bankruptcy estate. Presumably, Summit would, if the Debtor in Possession sought to fulfill his fiduciary duties, then seek to have this court hold the Debtor in Possession in contempt, possibly seeking the imposition of monetary and incarceration sanctions.

E. Paragraph 8 of the "Settlement Agreement" allows Summit an Allowed Claim in the amount of $39,499,689.74 . It then has the Debtor in Possession waiving various rights, claims and interests, specifying:

1. "The Allowed Claim shall not be subject to

   a. objection,

   b. counterclaim,

   c. recoupment,

   d. offset,

   e. subordination

   f. or other reduction

2. by any person, including, without limitation, the Debtor, any creditors or parties-in-interest of the Estate, or subsequently appointed Chapter 7 or Chapter 11 trustees, or any other party acting on behalf of the Estate, and any trustee or other party appointed pursuant to an order confirming any Chapter 11 plan of reorganization for the Estate.

Under the terms of the "Settlement Agreement" Summit's secured claim is not only determined, but any and all obligations of Summit are absolved. Even if the bankruptcy estate had a $10,000,000 offset right, that is thrown out the window.

F. Paragraph 10 grants Summit a general release by both the "Debtor in Possession" and the bankruptcy estate of any and all claims, rights, obligations, liabilities, and a laundry list of other things. It binds everyone and everything, including a Chapter 7 trustee who might subsequently be appointed and question the merits and legality of this "Settlement Agreement."

G. In Paragraph 11, having obtained the release, having put a third-party and itself in control of property of the estate, having removed the Debtor in Possession from exercising his statutory duties as the fiduciary of the bankruptcy estate, having specified the terms for any Chapter 13 Plan, having relegated the Debtor in Possession to an ancillary role with only the power to object, having enjoined the Debtor in Possession from objecting to the disposition of property of the bankruptcy estate as instructed by Summit, and having obtained a general release against the world and any Chapter 7 trustee, Summit agreed not to seek dismissal, conversion or appointment of a trustee (who cannot exercise any rights against Summit) so long as the Debtor in Possession complies with the "Settlement Agreement" and not interfere with Summit's administration of property of the bankruptcy estate.

H. Though these bankruptcy cases are pending in California, though all of the real property assets are in California, though the vast majority of creditors are in California, the "Settlement Agreement," Paragraph 12 dictates that New York substantive law will apply to the "Settlement Agreement." Since the "Settlement Agreement" dictates the terms of any plan, then New York substantive law would apply to the Plan.

It is curious that, in good faith, Summit and the Debtor in Possession would "agree" to New York substantive law applying to a uniquely California case. It is as if the parties recognized that something in the Settlement Agreement would be unenforceable if California substantive law were applied.

Thinking that Summit (SBN V Ag I LLC) might be a New York entity, the court checked the California Secretary's of State website for Summit's registration. No entity named SBN V Ag I LLC is authorized to do business in the State of California.

A LexisNexis Public Records search provided information that there is an SBN V AG I LLC registered in the State of Delaware. The information provided by LexisNexis is:

Business Information	
Filing Number	6013172
Company Name	SBN V AG I LLC
Mailing Address	1209 N ORANGE ST WILMINGTON, DE 19801-1120
Corporation Code:	Secretary of State
Secretary of State Code:	Limited Liability Company

Status:	New
Filing Date:	04/11/2016

https://advance.lexis.com/publicrecordshome/?pdmfid=1000200&crid=f9715939-daa6-415a-81c4-5c73f73a5ba1. The attachments to Summit's proof of claim indicate that it identifies itself as a Delaware limited liability company. Proof of Claim No. 23.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Debtor in Possession argues that the four factors have been met.

Probability of Success

Debtor in Possession's arguments for this factor are that Summit's "concerns" are slowing the reorganization in this Chapter 11 case and even though Debtor in Possession may have a "colorable" objection to claim, pursuit of the objection would be costly.

Debtor in Possession's arguments are not what this factor solicits. A statement that Summit's various "concerns" are slowing reorganization efforts does not explain the validity of the concerns (it is telling that Debtor in Possession sees Summit's concerns over the proper administration of the Chapter 11 case as a hindrance to reorganization).

As discussed above and below, this "Compromise" is merely a handing over of control of the Chapter 11 case to Summit. There are no disputes, there are no compromises. There is only the fast 12 month mandatory liquidation of the property by the third-party "Real Estate Advisor" that Summit must

approve. Further, if Summit determines that the Debtor in Possession's conduct is not proper, Summit will then direct the administration of property in the case, with the Debtor in Possession enjoined from raising a finger.

Difficulties in Collection

Debtor in Possession's argument for factor is that the factor is not relevant in this instance. Debtor in Possession notes, however, that the costs of pursuing claims or objecting to claims would be very expensive and would probably put the recoveries of unsecured creditors at risk.

Given that the Debtor in Possession cannot article any basis for objecting to the claim, this is a non-factor. Nothing is to be collected, but in reality, the "Settlement Agreement" provides for the Debtor in Possession giving away control of the case. Such could not otherwise be "collected" by Summit.

Expense, Inconvenience, and Delay of Continued Litigation

Debtor in Possession's argument for this factor is "As shown above, any litigation between Summit and the Debtor in Possession will be complex, will involve difficult jurisdictional and conflicts of law analysis, and will cause considerable expense, delay, and uncertainty in the administrative of this estate. The Debtor in Possession believes that the outcome of any litigation between the parties will likely be appealed, which will cause further delays, and which will continue to increase the administrative expenses of this estate, which can ill-afford such administrative expenses at this time. Moreover, the Debtor in Possession believes that ongoing litigation with Summit will also disrupt, distract and delay the real property sale process and likewise disrupt and delay plan confirmation." Dckt. 560.

Other than saying that the Debtor in Possession does not want to proceed with fulfilling his duties as Debtor in Possession, there is no expense, inconvenience, and delay – except for the "inconvenience" in complying with Chapter 11 in proposing, prosecuting, and confirming a Chapter 11 Plan. There is also the "inconvenience" of diligently prosecuting sales of property pending confirmation of a Plan.

While easier to have a *de facto* plan buried in a settlement and turning control of the case over to Summit, such does not support this factor.

Paramount Interest of Creditors

Debtor in Possession's argument for this factor is that the settlement addresses Summit's concerns, results in the hiring of a "Real Estate Advisor," ensures real property of the Estate is sold in a manner consistent with the best interests of this estate's creditors, and benefits the Estate's creditors with unsecured claims.

But the "Real Estate Advisor" is merely a prohibited receiver who will exercise all power of the fiduciary Debtor in Possession. Further, the Debtor in Possession is moved to non-participant status, being enjoined from questioning or challenging Summit's instructions to the "Real Estate Advisor" to liquidate property of the bankruptcy estate.

It has not been shown how removing the Debtor in Possession and having a "Real Estate Advisor" operating under the instructions of Summit is: (1) in the best interests of other creditors, (2) consistent with what is permitted under the Bankruptcy Code, (3) is a basis for predetermining the terms of a Chapter 11 plan, and (4) is a basis for terminating the voting rights of the other creditors.

RULING

In this case's long history (though being only nine months in existence, the parties have repeatedly been before this court), the Debtor in Possession has manifested a lack of business sense and some of the creditors have demonstrated such ill-will or desire to divert property of the bankruptcy estate well in excess of their secured claim into their own pockets.

Here, the Debtor in Possession and Summit purport to have a compromise that is permissible under the Bankruptcy Code. The main "agreement" by the fiduciary Debtor in Possession appears to run afoul of a fundamental prohibition under the Bankruptcy Code.

While often cited as the font of unlimited power for a bankruptcy judge to do "whatever," [FN.1] the provisions of 11 U.S.C. § 105(a) states:

> § 105. Power of court
>
> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
>
> (b) Notwithstanding subsection (a) of this section, **a court may not appoint a receiver in a case under this title**.

11 U.S.C. § 105(a), (b) [emphasis added].

FN.1. Consistent with well established prior rulings of the Ninth Circuit Court of Appeal, the United States Supreme Court has clearly stated that the power granted by Congress under 11 U.S.C. § 105(a) is limited to effectuate other provisions of the Bankruptcy Code and not a roving commission for a bankruptcy judge to whatever he or she thinks is "a good idea" when asked by a party in a bankruptcy case. *Stern v. Marshall*, 564 U.S.462(2011).

The legislative history for 11 U.S.C. § 105(a) articulates the firm foundation underlying this prohibition and the substance of the request for a receiver, including:

> Section 105 is derived from section 2a (15) of present law [section 11(a)(15) of former title 11], with two changes. First, the limitation on the power of a

> bankruptcy judge (the power to enjoin a court being reserved to the district judge) is removed as inconsistent with the increased powers and jurisdiction of the new bankruptcy court. Second, **the bankruptcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances**. The **bankruptcy code** has ample **provision for the appointment of a trustee when needed**. Appointment of a receiver would simply circumvent the established procedures.

Senate Report No. 95-989. See also 2 COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 105.06.

Under California law, the powers and scope of duties has been crafted by the California Legislature to be stated in California Code of Civil Procedure § 568 (emphasis added) to be:

> § 568. Powers of receivers
>
> **The receiver has**, under the control of the court, **power to** bring and defend actions in his own name, as receiver; to **take and keep possession of the property**, to receive rents, collect debts, to compound for and compromise the same, **to make transfers**, and generally to do such acts **respecting the property** as the court may authorize.

The "Compromise" is to appoint a "Real Estate Advisor," who must be pre-approved by Summit, who will take instructions from Summit, and who will follow Summit's instructions for the liquidation of the property of the estate – all of which sounds in the nature of the statutory duties of state court receiver, with one major exception. A state court receiver is an officer of the court and does not follow, act on, or owe a duty to the creditor.

The cornerstone of "compromise" and "settlement" between the Debtor in Possession and Summit is for the Debtor in Possess to cede his fiduciary duties and powers of a trustee (11 U.S.C. §§1106, 1107) to possess, control, and administer property of the bankruptcy estate to Summit.

The actual "compromise" is pre-determine the terms of the Chapter 11 plan in this case, turn control of property of the bankruptcy estate over to Summit, and do away with the requirements under Chapter 11 to confirm a plan. It also "compromises" away the voting rights of creditors, enjoins the Debtor in Possession from exercising his fiduciary duties of the Debtor in Possession, and relegates the court to rubber stamping the plan that is subsequently filed.

The Motion is Denied.

Admissions by Debtor in Possession

Based on the present "Settlement" and "Compromise" the Debtor in Possession appears to admit that he cannot administer the property of the bankruptcy estate, cannot prosecute a Chapter 11 plan, cannot work with creditors, cannot defend the rights and interests of the estate, and needs to have an independent fiduciary appointed for the bankruptcy estate. Essentially the Debtor in Possession is admitting that he needs a Chapter 11 Trustee appointed to take over this case.

Such admission is not a sign of weakness, but a possible recognition of an lack of business and organizational ability to fulfill the fiduciary obligation of a debtor in possession. Real estate cases of this size are not quick twelve month liquidations, but orderly sales of real estate.

The court shall address such issue pursuant to separate motion or order to show cause, affording all parties in interest, including the Debtor in Possession, adequate time to respond.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Jeffery Edward Arambel, the Debtor in Possession, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise is denied.

4. **18-90029-E-11** **JEFFERY ARAMBEL** **MOTION FOR AUTHORIZING POST PETITION JUNIOR SECURED DEBTOR IN POSSESS FINANCING AND/OR MOTION TO USE CASH COLLATERAL**
MF-32 **Matthew Olson** **8-29-18 [563]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney's, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on August 30, 2018. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Motion Authorizing Post-Petition Junior Secured Financing and Use of Cash Collateral is denied.

Jeffery Edward Aramabel ("Debtor in Possession") seeks permission to acquire junior-lien secured financing and to use cash collateral. Debtor in Possession reached an agreement with chief creditor, SBN V Ag I, LLC ("Creditor" or "Summit"), to use collateral to fund partial dividends to its Debtor in Possession's estate's unsecured creditors . Debtor in Possession requests the use of cash collateral to pay court-approved administrative expenses, including a Real Estate Advisor.

Failure to Summarize all Material Provisions

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

The Motion provides an introductory statement, jurisdictional statement, and factual background (including general background, overview of the necessity of post-petition financing and cash collateral, and statement of the substantial and material positive developments from the use of cash collateral). Dckt. 563 at 1:20-4:23. The Motion further states grounds for authorization of post-petition financing under 11 U.S.C. § 364(d)(1) and authorization for use of cash collateral under 11 U.S.C. § 363(c)(2). *Id.* at 4:25-5:20. The Motion concludes requesting the court issue an order:

1. Authorizing the Debtor in Possession to obtain post-petition financing comprised of a non-revolving line of credit facility in the maximum aggregate principal amount of up to $2,000,000 (the "DIP Loan Facility") from Summit for the payment of court-approved administrative expenses, including the Real Estate Advisor.

2. Granting Summit a junior-priority lien on most of the Debtor's assets (except such property as is expressly excluded) to secure the Post-Petition Financing;

3. Authorizing the use of certain of Summit's cash collateral from the time of the approval of the DIP Financing Agreement and other accompanying agreements in the maximum amount of up to $3,500,000 (as set forth more fully in the DIP Financing Agreement, which funds will be earmarked for distribution to allowed non-insider general unsecured claims;

4. Granting Summit junior replacement liens in an amount equal to the extent of such use of Cash Collateral on substantially all of the Debtor's assets (except such assets are expressly excluded pursuant to the DIP Financing Agreement) (the "Replacement Liens");

5. Granting Summit a superpriority allowed administrative expense claim pursuant to §§ 503(b) and 364(c)(1) of the Bankruptcy Code, with priority over any and all administrative expense claims and general unsecured claims, without limitation, administrative expenses of the kinds specified in, arising under, or ordered pursuant to §§ 105, 326, 328, 330, 331, 503(b), 506, 507(a), 507(b), 546(c), 546(d), 726(b), 1113 or 1114 respectively, of the Bankruptcy Code;

6. Providing in the Order (I) Authorizing the Debtor in Possession to Obtain PostPetition Financing, (ii) Authorizing the Debtor in Possession to use Cash Collateral, (iii) Granting adequate Protection to Pre-Petition Secured Lender, (iv) Granting Liens and Superpriority Claims, and (v) Modifying the Automatic Stay (the "DIP Order") that Summit shall not be required to take any further steps to perfect the replacement liens granted through the DIP Financing Agreement; and

7. Granting such further relief as is just and appropriate in the circumstances of this Motion.

Id. at 5:23-6:19.

Movant has not listed or summarized within its Motion all of the material provisions. Among other deficiencies, no summary is provided of Section 3 of the agreement describing interest or charges. Further, while it is generally described Creditor would receive a lien in substantially all of Debtor's assets, no discussion is provided of the various assignments of proceeds described in Section 4. The Motion must list or summarize the material provisions of the financing agreement. FED. R. BANKR. P. 4001(c)(1)(B). Even if the court presumes the Motion's requests for relief satisfy the requirement for a list or summary of the agreement terms, the Motion still fails to provide an overview of all the material provisions.

Denial of Motion to Approve Settlement with Summit

This request is premised on the court approving the purported "Settlement" with Summit, set to be heard the same day as the hearing on this Motion. The court has tentatively denied that motion. The Civil Minutes stating the numerous grounds for denying that motion are incorporated herein by this reference.

The motion seeks to justify the borrow citing to the Debtor in Possession's high monthly administrative expenses ($59,000 a month in operating expenses and $70,000 a month in administrative expenses) as the reason to borrow more money. It appears that the Debtor in Possession's "plan" was to: (1) turn over control of the case to Summit and (2) incur more debt.

Interestingly, the Debtor in Possession testifies in his Declaration that the loan broker engaged for the bankruptcy estate "has been unable to locate a lender who will lend on terms more favorable than Summit." Declaration ¶ 6, Dckt. 566. The court questions whether the Debtor in Possession has taken into account that a term of this "loan" is that he cedes his fiduciary duties to Summit and consents to an injunction prohibiting him from exercising those fiduciary duties with respect to Summit's liquidation of property of the bankruptcy estate.

Actual Terms of the Financing

Exhibit B filed in support of the Motion is the Promissory Note to document the obligation. Dckt. 567, at 49-50. The basic terms of the Note are:

A. "FOR VALUE RECEIVED and intending to be legally bound, the undersigned, JEFFERY E. ARAMBEL, an adult individual, as a debtor and debtor-in-possession (the "Maker"), hereby promises to pay to SBN V Ag I LLC, a Delaware limited liability company, or its successors or assigns (the "Holder"), the principal sum in United States dollars equal to $2,000,000.00 or such lesser sum which represents the principal balance outstanding under the Line of Credit established pursuant to the provisions of the Agreement."

Note, p. 1.

By this note, the obligor on the Note is not only the Debtor in Possession in his fiduciary capacity for the bankruptcy estate, but the Debtor personally. This is akin to the trustee as an independent fiduciary of a trust be a co-borrower on a loan by the trustee. This creates an immediate conflict, by which the "fiduciary" now is put in a position of acting in his fiduciary capacity with property of the trust (here the bankruptcy estate) to minimize his personal liability and enhance his personal position at the expense of the trust (bankruptcy estate). It is surprising that such a conflict would be built into the Note by Summit.

B. The parties, for this California transaction, with California property, with a California bankruptcy case, with their California attorneys, once again choose New York substantive law to govern the transaction.

Id.

C. The signature block is just for "Jeffery E. Arambel, an adult individual." No signature block is set up for "Jeffery E. Arambel, Debtor in Possession for the bankruptcy estate in *In re Arambel*, E.D. Cal. Bankr. No. 18-90029. Thus, if signed, it would appear that there would be no obligation of the bankruptcy estate to repay the monies advanced.

Id. at 2.

In addition to the Note, there is a forty-three (43) page Loan Agreement. Exhibit A, Dckt. 567. The terms of the Loan Agreement include:

a. The borrower is both Jeffery Arambel individually and as Debtor in Possession.

Loan Agreement, p. 1.

b. The Loan Agreement provides for a maximum line of creditor of $2,000,000.

Id., ¶ C.

c. In addition, the Loan Agreement allows for the use of up to $3,500,000 in cash collateral.

Id. ¶ D.

d. Summit is willing to provide the line of credit and use of cash collateral ONLY IF the Debtor in Possession consents to:

i. "(I) all of the Obligations hereunder and under the other Loan Documents [which appears to include pre-petition obligations, see definition of "Loan Documents" in Loan Agreement]

(1) (a) constitute an allowed superpriority, administrative expense claim in the Chapter 11 Case pursuant to § 364(c)(1) of the Bankruptcy Code, as more particularly set forth herein and in the DIP Order and

(2) (b) are secured by valid and perfected security interests and liens on the Collateral, pursuant to § 364(c)(2), (3) of the Bankruptcy Code, to the extent set forth herein and in the DIP Order;

ii. (ii) the DIP Loan Facility, the use of the Cash Collateral, and the Loan Documents are authorized and approved by the DIP Order to be entered by the Bankruptcy Court;

iii. (iii) Pre-Petition Lender shall have received, as adequate protection for the use of any Cash Collateral, junior replacement liens on the Collateral securing the Pre-Petition Obligations in an amount equal to the extent of any use of Cash Collateral; and

iv. (iv) the DIP Order is acceptable in form and substance to Summit."

e. ""Case Milestones" means:

i. I. On or before September 14, 2018, Borrower shall have filed a Plan with the Bankruptcy Court, together with a related disclosure statement; and

ii. ii. On or before December 31, 2018, the Effective Date for the Plan shall have occurred.

Id., p. 3 of Loan Agreement.

A review of the Docket for this case on September 25, 2018, indicates that no plan and no disclosure statement have been filed. Thus, if the court were to approve this Loan Agreement, Summit has a built in default.

f. "'Event of Default' shall have the meaning specified in Section 10.01 hereof."

Id. at 5.

g. "10.01 Events of Default.

The occurrence of any one or more of the following events shall constitute an "Event of Default" by Borrower hereunder:

i. (a) Any payment required under the Loan Documents is not made when due, declared due, or demanded by Lender; or

ii. (b) The Financial Information or any representation or warranty in the Loan Documents is materially incorrect or misleading when made or provided; or

iii. (c) Borrower does not:

(1) (I) maintain (or cause to be maintained) all policies of insurance required under the Loan Documents (including, without limitation, crop insurance) and pay (or cause payment of) all premiums for that insurance on or prior to the date when due;

(2) (ii) subject to the Operating Budget, maintain the Collateral (or cause the Collateral to be maintained) in good condition and repair, all in accordance with the terms and conditions of the Loan Documents;

(3) (iii) subject to the Operating Budget, prevent waste, spoliation, or destruction from occurring with respect to any material portion of the crops;

(4) (iv) comply with the Crop Proceeds Assignment; or

(5) (v) perform when required under any covenant under this Agreement; or

iv. (d) The death of Borrower; or

If the borrower is to be the bankruptcy estate through its fiduciary, the "death" clause appears to be questionable, or possibly an acknowledgment that the obligation is owed only by the Debtor personally, and is not an obligation of the bankruptcy estate.

v. (e) [reserved]; or

vi. (f) [reserved]; or

vii. (g) [reserved]; or

viii. (h) Any "Event of Default" as that term is defined in the Loan Documents other than this agreement which is not cured within any applicable cure or grace period; or

ix. (I) [reserved]; or

x. (j) [reserved]; or

xi. (k) [reserved]; or

xii. (l) [reserved]; or

xiii. (m) Title to the Real Estate ceases to be satisfactory to Lender by reason of any defect, except defects existing as of the Closing Date and disclosed to Lender prior to the Closing Date, or the Lien created by the Loan Documents ceases to be a perfected Lien on fee title to the Real Estate vested in Borrower, except as specifically contemplated by the Real Estate Restructuring Agreement; or

This appears to be a unilateral, "declare it when Summit wants," provision to cut off the credit.

xiv. (n) Any Loan Document ceases to be in full force and effect or is declared void by a Governmental Authority or any Party thereto shall claim such unenforceability or invalidity, or any security interest in the Collateral created by the Loan Documents shall fail or cease to be, or shall be asserted in writing that it is not a valid and perfected security interest in the securities, assets or properties covered thereby; or

xv. (o) The occurrence of any of the following in the Chapter 11 Case without the prior written consent of Summit:

(1) (I) the bringing of a motion, taking of any action or the filing of any plan of reorganization or disclosure statement attendant thereto by Borrower, or the entry of an order,

(a) (a) to obtain additional financing under § 364(c) or § 364(d) of the Bankruptcy Code from any Person other than Lender not otherwise permitted by this Agreement,

(b) (b) to authorize any Person to recover from any portions of the Collateral or the Pre-Petition Collateral any costs or expenses of preserving or disposing of such Collateral or such Pre-Petition Collateral under § 506(c) of the Bankruptcy Code, or

(c) (c) except as provided in the DIP Order, to use Cash Collateral without Lender's prior written consent under § 363(c) of the Bankruptcy Code or

(d) (d) to grant any new Lien upon or affecting any Collateral or any Pre-Petition Collateral;

(2) (ii) the dismissal of the Chapter 11 Case or the conversion of the Chapter 11 Case to a case under Chapter 7 of the Bankruptcy Code;

(3) (iii) the entry of an order which has not been withdrawn, dismissed or reversed

(a) (a) appointing an interim or permanent trustee in the Chapter 11 Case,

(b) (b) granting relief from or modifying the automatic stay of § 362 of the Bankruptcy Code (except for relief in favor of American AgCredit, FLCA)

(i) (x) to allow any creditor to execute upon or enforce a Lien on any Collateral or on any other property or assets of Borrower or

(ii) (y) with respect to any Lien of, or the granting of any Lien on any Collateral or any other property or assets of Borrower to, any state or local environmental or regulatory agency or authority, or

(c) (c) amending, supplementing, staying, reversing, vacating or otherwise modifying any of this Agreement, the DIP Order, the Settlement Agreement, the Settlement Order, the Retention Agreement, the Retention Order, the Real Estate Restructuring Agreement, or any of the other Loan Documents, or Lender's rights, benefits, privileges or remedies under any of the foregoing or any Pre-Petition Loan Document;

(4) (iv) the termination or modification of Borrower's exclusivity as to the proposal of any reorganization plan;

This is an interesting default provision. It appears intended to force the court to endlessly extend the exclusivity period, otherwise Summit walks. It has nothing to do with any actual competing plans or the Debtor in Possession prosecuting a plan (to the extent that it would be the Debtor in Possession and not Summit as the real party prosecuting the *de facto* plan "Settlement Agreement").

(5) (v) the challenge by Borrower or any insider of Borrower to, or entry of an order adverse to, the amount of Lender's Allowed Claim with

respect to the Pre-Petition Obligations or the validity, extent, perfection, priority or characterization of any Pre-Petition Obligations incurred or Pre-Petition Liens granted under or in connection with the Pre-Petition Loan Documents;

(6) (vi)

(a) (a) any claim or challenge by Borrower to

(i) (I) disallow in whole or in part the Claim of Pre-Petition Lender in respect of the Pre-Petition Obligations or the Claim of Lender in respect of the Obligations or the validity, perfection and enforceability of any of the Pre-Petition or Post-Petition Liens in favor of Summit,

(ii) (II) equitably subordinate or recharacterize in whole or in part the Claim of Summit in respect of the Obligations or the Pre-Petition Obligations, or

(iii) (III) avoid or compel any recoupment or disgorgement of any payment made to Pre-Petition Lender under the Pre-Petition Loan Documents or

(b) (b) the entry of an order (including any order confirming any plan of reorganization) by the Bankruptcy Court granting the relief described in clause (I), (II) or (III), whether in connection with any challenge by Borrower or any challenge by any other Person;

(7) (vii) the filing of a lawsuit, adversary proceeding, contested motion, claim or counterclaim related to Borrower, the Collateral or the Pre-Petition Collateral, in each instance, against Lender by Borrower or any insider of Borrower;

This provision, while reasonable in one respect, is colored by the over-reaching of Summit, and essentially states that Summit can engage in whatever conduct it wants, immunized from being responsible to the estate.

(8) (viii) the application by Borrower for authority to make any Pre-Petition Payment unless authorized in advance by Lender;

The Loan Agreement defines "Pre-Petition Payments" as payment on pre-petition obligations of the Debtor. Thus, Summit will dictate when and what payments will be made to the other creditors in this case – otherwise the financing disappears.
\

(9) (ix) the entry of any order in the Chapter 11 Case to deny or avoid Pre-Petition Liens on the Pre-Petition Collateral that secure the Pre-Petition Obligations or to avoid or otherwise set aside or recoup payments made to Pre-Petition Lender under the Pre-Petition Loan Documents;

(10) (x) the entry of an order in the Chapter 11 Case, after the date of this agreement, authorizing procedures for interim compensation of professionals that is not in form and substance acceptable to Lender;

Summit again reaches in and dictates that the court shall draft and issue orders only as it is instructed by Summit, otherwise Summit will cut the credit line and cause other creditors to be damaged – without Summit having any responsibility for such damage. It is not for Summit to dictate how the court prepares its orders.

(11) (xi) the imposition of any requirement that Summit marshal any of the Collateral or the Pre-Petition Collateral;

This provision appears to give Summit the unilateral control to harm other creditors and avoid applicable law to its advantage and damage to others.

(12) (xii) Borrower or any insider of Borrower requesting or seeking authority for, or the entry of an order in the Chapter 11 Case that approves or provides authority to take, any other action or actions adverse to Summit or its rights and remedies under the Loan Documents or the Pre-Petition Collateral or its interest in the Collateral or the Pre-Petition Collateral;

(13) (xiii) Borrower or any insider of Borrower announcing or informing any other Person of its intention to file a plan of reorganization that does not pay the Obligations and the Pre-Petition Obligations in full in cash or is otherwise not acceptable to Summit;

Summit demonstrates that it is not providing fair, reasonable post-petition financing, but is including this as part of its scheme to circumvent the Bankruptcy Code, control the property of the Estate, and preclude the Debtor in Possession from fulfilling its fiduciary duties.

(14) (xiv) Any order is entered in the Chapter 11 Case finding, or motion is filed asserting, that Summit is subject to the "equities of the case" exception contained in § 552(b) of the Bankruptcy Code with respect to the Collateral, the Pre-Petition Collateral or the proceeds,

products, offspring or profits of any of the Collateral or the Pre-Petition Collateral; or

(15) (xv) the failure of Borrower to meet any of the Case Milestones, unless a Case Milestone is extended by mutual agreement of Lender and Borrower.

Id., at 27-30.

Separate Request for Relief: Use of Cash Collateral

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> (A) such sale or such lease is consistent with such policy; or
>
> (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
>
> (I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
>
> (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as

is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

As the Motion Authorizing Post-Petition Financing is denied, the Motion for Authorization to Use Cash Collateral is moot, as any agreement by Summit for the use of cash collateral was contingent upon the Loan Agreement being approved.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Authorizing Post Petition Junior Secured Debtor in Possession Financing And/Or Motion for Authority to Use Cash Collateral filed by Jeffery Edward Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Authorizing Post Petition Junior Secured Debtor in Possession Financing And/Or Motion to Use Cash Collateral is denied.

5. **18-90029-E-11 MF-33** **JEFFERY ARAMBEL** **Matthew Olson** **MOTION TO EMPLOY GLASSRATNER ADVISORY & CAPITAL GROUP, LLC AS REAL ESTATE ADVISOR 8-29-18 [568]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney's, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on August 30, 2018. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Motion to Employ is denied.

Jeffery Edward Arambel ("Debtor in Possession") seeks to employ George J. Demos ("Real Estate Advisor") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Real Estate Advisor to act as an independent third-party fiduciary to oversee the real estate sales by the Debtor in Possession and to advise both the Debtor in Possession and the Estate's creditors regarding the sales, and to provide an independent point-of-contact for the Estate's creditors to inquire about real property sales.

George J. Demos, a Senior Managing Director of GlassRatner Advisory & Capital Group, LLC, testifies that he has 30 years of accounting experience, will serve as Real Estate Advisor to Debtor in

Possession and will have independent standing to enter into agreements to sell the properties and to pursue this court's approval of sales believed to be in the best interest of the Estate and its creditors. George J. Demos testifies further that he and his firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys. Dckt. 570 at ¶¶ 5-8.

The terms of the Agreement employing Mr. Demos provide a $20,000.00 retainer and a billable rate of $295 per hour. Dckt. 570 at ¶ 10.

CONDITIONAL OBJECTION OF AMERICAN AGCREDIT, FLCA

American AgCredit, FLCA ("Creditor") filed a conditional objection to this Motion and other motions set to be heard the same day on September 20, 2018. Dckt. 616. With respect to this Motion, Creditor is concerned the real estate advisor is granted sole authority to act and sell real estate of Debtor, notwithstanding consent of Debtor in Possession or other secured parties. Creditor presumes the discretion granted to the real estate advisor is still subject to the bankruptcy court's approval, and only objects to the extent its presumption is not correct.

Creditor requests these issues be clarified and that creditor not be delayed in pursuing foreclosure on its collateral.

DISCUSSION

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

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

The court has denied the Motion to Approve the Compromise (DCN: MF-31) on the multiple grounds as stated in the Civil Minutes for the September 27, 2018 hearing on that Motion. The court incorporates herein those Civil Minutes as part of this decision.

As addressed in the ruling on the Motion to Approve Compromise, the "Settlement" is little more than a take-over of the bankruptcy case by SBN V Ag I, LLC ("Summit") and the appointment of George J. Demos of GlassRatner Advisory & Capital Group, LLC as the disguised liquidating receiver to operate on the instructions of Summit. Such employment went well beyond that Mr. Demos and GlassRatner Advisory & Capital Group, LLC being an "advisor" owing a fiduciary duty to the bankruptcy estate, but gave

Mr. Demos and GlassRatner Advisory & Capital Group, LLC standing and the unilateral power to administer property of the bankruptcy estate, seek court orders approving the sale, and oust the Debtor in Possession from his fiduciary duties. The "Settlement" with Summit went further, requiring that if Summit determined grounds existed, Mr. Demos and GlassRatner Advisory & Capital Group, LLC would be required to follow the instructions of Summit for the liquidation of property of the bankruptcy estate. Further, that a prohibitory injunction would prevent the Debtor in Possession, as the fiduciary of the bankruptcy estate, from challenging any such instructions unilaterally issued by Summit.

The present Motion does not seek the appointment of an advisor, but a liquidating receiver for Summit. The Debtor in Possession proceeding with this Motion may well be an indication that the appointment of a trustee is proper. However, such need must be addressed by separate motion or order to show cause, not through the appointment of a disguised liquidating receiver.

The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Jeffery Edward Arambel (" Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is denied.

6. **18-90029-E-11** **JEFFERY ARAMBEL** **MOTION TO EXTEND EXCLUSIVITY PERIOD FOR FILING A CHAPTER 11 PLAN AND DISCLOSURE STATEMENT FILED BY DEBTORS**
MF-35 **Matthew Olson** **9-13-18 [597]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on September 13, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Disclosure Statement is denied.

Jeffery Arambel ("Debtor in Possession") requests that the court extend the time period in 11 U.S.C. § 1121(b) & (c)(3) by a further 20 days pursuant to 11 U.S.C. §§ 105(a), 105(d) and 1121(d) in addition to the previous extension provided.

Debtor in Possession's main argument in support of the Motion is as follows:

1. The Debtor in Possession engaged in extensive negotiations with SBN V Ag I, LLC ("Summit"), the holder of the largest claim in this bankruptcy

case (at about $40 million), concerning the process for further sales of real property, financing of the estate's operations on a going-forward basis, and key funding components for his plan of reorganization. Those negotiations resulted in three motions which are now pending before the Court: a motion to approve a compromise with Summit (DCN: MF-31), to approve a DIP and Cash Collateral Agreement with Summit (DCN: MF-32), and to approve the employment of George Demos to implement certain aspects of the agreements with Summit (DCN: MF-33). Importantly, the relief sought in the motions create important underpinnings for the Debtor in Possession's plan of reorganization, including a fund for distributions to holders of allowed unsecured claims earlier than they would otherwise receive distributions and a structure for oversight of further sales of real property.

2. After consulting with tax professionals, the Debtor in Possession has elected to abandon the liquidating trust concept and rather pursue another structure—likely establishing a limited liability company—which avoids change-in-ownership issues concerning the estate's assets, and the tax liabilities that arise therefrom, while still maintaining the management structure necessary for the Debtor in Possession to honor his settlement with and to provide the additional protections that the estate's other secured creditors have been requesting.

3. The exclusivity period for the Debtor in Possession to file a plan and disclosure statement is September 14, 2018. Rather than file a "placeholder" plan and disclosure statement that the Debtor in Possession submits simply to meet this deadline, only to substantially amend it in the coming weeks to avoid the substantial negative tax impacts of a liquidating trust, the Debtor in Possession believes it is prudent and in the best interests of the estate and its creditors to take the time necessary to revise the plan's structure and to present a plan that the Debtor in Possession believes, in good faith, is confirmable.

APPLICABLE LAW

11 U.S.C. § 105 provides:

(a) The court may issue any order, process, or judgment that is necessary or appropriate **to carry out the provisions of this title**. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(11 U.S.C. § 105(a)(emphasis added)) and:

(d) The court, on its own motion or on the request of a party in interest–

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that–

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title–

(I) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 105(d) (emphasis added).

11 U.S.C. § 1121 creates statutory deadlines and dates when persons other than the debtor in possession may file a plan, and 11 U.S.C. § 105(d) provides a statutory basis for the court to modify those dates. Section 1121 states, in part:

> (b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.
>
> . . . .
>
> (d) (1) Subject to paragraph (2), on request of a party in interest made within the respective periods specified in subsection (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.
>
> (2) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.

11 U.S.C. § 1121(b), (d). A party moving for the period to be extended must establish that there is cause for an extension. *See In re New Meatco Provisions, LLC*, No. 2:13-bk-22155-PC, 2014 Bankr. LEXIS 914, at *7–8 (Bankr. C.D. Cal. March 10, 2014) (citing *In re Dow Corning Corp.*, 208 B.R. 661, 663 (Bankr. E.D. Mich. 1997); *In re Newark Airport/Hotel Ltd. P'ship*, 156 B.R. 444, 451 (Bankr. D.N.J. 1993), *aff'd*, 155 B.R. 93 (D.N.J. 1993)).

Determining whether cause exists depends upon the facts presented to the court. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 352 B.R. 578, 586 (Bankr. S.D.N.Y. 2006). A number of factors may indicate cause, including:

A. The size and complexity of a case;

B. The necessity of sufficient time to permit a debtor to negotiate a plan of reorganization and to prepare adequate information;

C. The existence of good faith progress toward reorganization;

D. Whether a debtor is paying bills as they become due;

E. Whether a debtor demonstrates reasonable prospects for filing a viable plan;

F. Whether a debtor has made progress in negotiating with creditors;

G. How much time as elapsed in the case;

H. Whether a debtor seeks an extension to pressure creditors into submitting to demands; and

I. Whether an unresolved contingency exists.

208 B.R. at 664–65; *see also Official Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem'l Hosp. (In re Henry Mayo Newhall Mem'l Hosp.)*, 282 B.R. 444, 452 (B.A.P. 9th Cir. 2002) (explaining that there are several factors analyzed commonly upon an extension request).

DISCUSSION

This Motion is filed in conjunction with a series of other motions which have been denied by the Court. These include the Motion to Approve Compromise (DCN: MF-31), which the Court determined was a thinly disguised scheme for the appointment of a liquidating receiver and an evisceration of the ability of the Debtor in Possession to perform his fiduciary duties. *See* the Civil Minutes from the September 27, 2018 hearing on the Motion to Approve Compromise, which are incorporated herein by this reference.

Under the terms of purported Compromise (which was actually a de facto plan, appointment of a liquidating receiver, injunction against the Debtor in Possession from fulfilling his fiduciary duties, and empowering SBN V Ag I LLC ("Summit") to instruct the liquidating receiver on how to liquidate the property of the bankruptcy estate) the Debtor in Possession must immediately proceed with the liquidation of property of the estate. If the liquidation was not completed within twelve months or if Summit determined sooner that the Debtor in Possession was not sufficiently fulfilling its duties under the "Settlement," Summit could instruct and the liquidating required to proceed with the liquidation as instructed by Summit.

This Motion to Extend states that the Debtor in Possession has abandoned the concept of liquidating property of the bankruptcy estate, but instead set up a limited liability company to somehow generate the monies to fund a plan and fulfill the liquidation sale commitments the Debtor in Possession agreed to in the now not approved "Settlement."

The Debtor in Possession has not shown grounds to extend the exclusivity period. Here, at the eleventh and one-half hour, out of one side of his mouth requesting the court approve a "Compromise" that requires the liquidation of property over the next twelve months, and out of the other side of his mouth states that he now intends to pursue some limited liability company scheme to avoid liquidating property of the bankruptcy estate.

As the court noted, based on what the Debtor in Possession agreed to in the purported "Settlement" (including the appointment of a liquidating receiver, turning over control of property of the bankruptcy estate to the liquidating receiver, agreeing to an injunction precluding him from exercising his fiduciary duties concerning the conduct of Summit, and giving Summit the unilateral control to instruct the liquidating trustee how to liquidate property of the bankruptcy estate), it appears that the Debtor is admitting that he cannot fulfill the duties of a debtor in possession. It may well be that a bankruptcy trustee is appointed.

If the Debtor in Possession has a "plan" which makes financial sense, then he can discuss it with the rational, reasonable creditors. They can advance such a "plan" in the form of a Chapter 11 Plan (not a de facto plan disguised as a "Settlement). Such a "plan" can then be part of a confirmed Chapter 11 Plan, in full compliance with the Bankruptcy Code.

Not giving a further extension of the exclusivity period (it having already been extended once; Order, Dckt. 393) will not impair the ability of the Debtor in Possession (or even the Debtor if a trustee is appointed) to in good faith ally himself with the creditors who are in good faith attempting to assert their rights (as opposed to creditors who seek to violate the Bankruptcy Code, mislead the court, or stymie sales of property in an effort to divert substantial equity into their own pockets rather than it going to the bankruptcy estate) to properly provide for creditor claims and salvage the shrinking equity in the property of the bankruptcy estate.

The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend Exclusivity Period filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to [Further] Extend Exclusivity Period is denied.

7. 18-90029-E-11 MF-22 JEFFERY ARAMBEL

CONTINUED MOTION TO APPROVE USE OF FUNDS PURSUANT TO BUDGET 6-8-18 [404]

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims], creditors, parties requesting special notice, and Office of the United States Trustee on June 11, 2018. By the court's calculation, 10 days' notice was provided. The court set the hearing for 10:30 a.m. on June 21, 2018. Dckt. 408.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor in Possession, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion for Authority to Use of monies of the Estate pursuant to the proposed budget is granted.

REVIEW OF THE MOTION

Jeffery Arambel ("Debtor in Possession") moves for an order approving the use of cash collateral. Debtor in Possession requests the use of monies of the bankruptcy estate pursuant to the stated budget. To the extent that the monies are cash collateral, the use of such cash collateral shall be pursuant to a stipulation with the creditor or further order of the court.

Debtor in Possession proposes to use monies of the bankruptcy estate for the following expenses:

Category	Monthly Expense
Irrigation, including water, power, labor, fuel, and parts	$10,000.00
Contract labor for Debtor in Possession's office	$1,120.00
Insurance, including health insurance, homeowner's insurance, general liability insurance, and automobile insurance, together with a one-time payment of $31,338 for past-due post-petition insurance premium payments	$7,091.00 Plus one-time $31,338 Post-Petition Insurance Arrearage Payment
Pharmacy expenses	$300.00
Home maintenance and homeowner's association assessments	$400.00
Adequate protection payments to Wells Fargo Bank	$6,100.00
Utilities	$1,167.00
Food, clothing, and household expenses	$1,000.00
Transportation, including gasoline	$400.00
Office supplies	$100.00
Miscellaneous	$150.00
Total	**$27,828.00** Monthly, Plus One-Time $31,338 Insurance payment

Debtor in Possession also requests permission to pay various flat fees, retainers, or interim fees for professionals of the Estate, despite noting that those requests have already been raised in prior employment applications. If Debtor in Possession wishes to pay professionals for work that has been performed, then Debtor in Possession may file a motion under the appropriate section of the Code, but the court will not authorize payment to be made outside of the strictures of the Bankruptcy Code and Ninth Circuit fee application precedent.

JUNE 21, 2018 HEARING

At the June 21, 2018, hearing the court found Debtor in Possession had shown that the proposed use of monies of the bankruptcy estate is in the best interest of the Estate. The proposed use provides for living expenses for this individual debtor, as well as maintaining business expenses to generate income. The court granted the Motion, and Debtor in Possession was authorized to use the monies of the bankruptcy estate for the period June 21, 2018, through September 21, 2018, including required adequate protection payments.

At the hearing, counsel for the Debtor in Possession clarified that the $75,000 in escrow is from a sale of property in which only Metropolitan Life has a security interest.

The court further continued the hearing on the Motion to 10:30 a.m. on September 20, 2018, for Debtor in Possession to file a Supplement to the Motion to extend authorization due by September 13, 2018.

ORDER GRANTING MOTION TO AMEND

On July 9, 2018, the court granted Debtor in Possession's *Ex Parte* Motion to Amend Order. Dckt. 495. The court issued an order amending its prior order (Dckt. 451) to authorize (1) the Debtor in Possession to use the aforesaid funds to make a $15,000.00 payment on the previously approved Underwriting and Syndication Fee to business Debt Solutions, and (2) the Debtor in Possession to use aforesaid funds to fund post-petition retainers to the following court-approved professionals:

Braun International	$7,500, and
Judith Callaway, CPA	$5,000.

Dckt. 495.

ORDER GRANTING EX PARTE MOTION TO CONTINUE HEARING

On September 16, 2018, the court granted Debtor in Possession's *Ex Parte* Motion to Continue the Hearing on Debtor in Possession's Motion to Approve Use of Funds Pursuant to Budget to September 27, 2018, at 10:30 a.m. Dckt. 607.

DEBTOR IN POSSESSION'S SUPPLEMENTAL STATEMENT

Debtor in Possession filed a Supplemental Statement on September 13, 2018. Dckt. 595. The Debtor in Possession requests continuing authority to use any unspent portions of the $375,000 in accordance with the same budget offered in support of the Summit Motion as it related to the DIP Financing Facility, to wit:

Category	**Monthly Amt.**
Fuel	$1,200.00
Parts	$600.00
Insurance	$10,091.00
Contract labor (office)	$1,120.00
Draw	$8,400.00
Utilities (includes water)	$1,100.00
Office Supplies	$100.00
Transportation/gas	$400.00
Miscellaneous	$500.00

Property Taxes	$20,000.00
Professional Fees	$77,500.00
Total	$137,011.00

Debtor in Possession asserts that with the exception of property taxes and professional fees—which will only be paid after approval of fee applications by the Court—these amounts are largely consistent with the Court's prior approval to use funds pursuant to a budget.

Debtor in Possession argues the expenses are necessary to the Estate because:

(1) the Debtor must pay basic living expenses in order to survive.

(2) the Debtor in Possession's orchards must be irrigated at least to a minimum extent. If the trees are allowed to die, this will result in pests and disease that will harm other trees, devaluing the value of the trees which are collateral for the claims of several lenders.

(3) basic business expenses for operation of the estate, including the payment of insurance, are necessary to preserve the value of the estate and to pursue the Debtor in Possession's efforts to reorganize.

(4) the estate must provide for the payment of competent professionals in order for this case to be administered effectively, but only after Court approval of fee applications. Finally, payment of property taxes is necessary for the estate to avoid penalties and interest imposed under state law.

Debtor in Possession argues these proposed expenditures are consistent under either 11 U.S.C. § 363(c)(1) as expenditures in the ordinary course of business or 11 U.S.C. § 363(b)(1) as reasonable expenditures within the Debtor in Possession's sound business judgement necessary for the preservation of the estate.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–

(I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

Debtor in Possession has shown that use of the remaining approve funds is in the best interest of the estate. The proposed use again provides for living expenses for this individual debtor, as well as maintaining business expenses to generate income.

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 Authority to Use Monies of the Bankruptcy Estate Pursuant to Budget filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, pursuant to this order, the monies of the bankruptcy estate may be used to pay the following expenses:

Category	**Monthly Amt.**
Fuel	$1,200.00
Parts	$600.00
Insurance	$10,091.00
Contract labor (office)	$1,120.00
Draw	$8,400.00
Utilities (includes water)	$1,100.00
Office Supplies	$100.00
Transportation/gas	$400.00
Miscellaneous	$500.00
Property Taxes	$20,000.00
Professional Fees	$77,500.00
Total	$137,011.00

This order does not authorize the use of cash collateral, which shall be the subject of a subsequent stipulation or order

8. **18-90030-E-11 STJ-6** | **FILBIN LAND & CATTLE CO., INC.** **Michael St. James** | **CONTINUED MOTION TO EXTEND EXCLUSIVITY PERIOD FOR FILING A CHAPTER 11 PLAN AND DISCLOSURE STATEMENT FILED BY DEBTOR 6-21-18 [185]**

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

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

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

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that a hearing will be held, and the hearing will be based upon submitted pleadings as well as argument at the hearing. Based upon language that there may submissions at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on June 21, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance at the July 12, 2018 hearing.

The Motion to Extend Exclusivity Period is denied.

Filbin Land & Cattle Company, the Debtor in Possession, ("Debtor in Possession" or "DIP") requests that the court extend the time period in 11 U.S.C. § 1121(b) & (c)(3) by 120 days pursuant to 11 U.S.C. §§ 105(a) and 1121(d). Debtor in Possession argues that this is a large case (more than $200 million in assets and $50 million in debt) that has several sales of real property either closing or pending. In particular, Debtor in Possession stresses that the non-governmental claim deadline passed recently, and

several claims were filed around it, including one claim for $40 million that Debtor in Possession has not had sufficient time to analyze.

July 12, 2018, hearing

At the July 12, 2018, hearing the court continued the hearing on th Motion to August 23, 2018 at 10:30 a.m. Dckt. 224.

OBJECTION OF CREDITORS

Creditors Dorothy Arnaud, individual and as co-trustee of the Patrick and Margaret Filbin Trust UTA, dated December 30, 1973; Helen Jacobson, individually, and as co-trustee of the Patrick and Margaret Filbin Trust UTA, dated December 30, 1973; and Deborah and Gary Dewolf ("Creditors") filed an Objection to the Motion on August 16, 2018. Dckt. 264. Creditor's object on the basis that (1) this is not a complex bankruptcy, (2) the length of time the case has already been pending, and (3) Debtor in Possession has not shown a reasonable prospect for filing a viable plan.

REPLY OF DEBTOR IN POSSESSION

DIP filed a Reply brief in support of the Motion to Extend Exclusivity on August 17, 2018. Dckt. 266. DIP argues as follows:

1. The Court should extend exclusivity for 120 days so as to permit the satisfaction of the secured debt and the negotiation of a consensual Plan of Reorganization while sparing the estate the unnecessary expense and distraction of pointless litigation over a Plan proposed by the Secured Creditors.

2. As the Court is aware, Filbin Land & Cattle Co., Inc., Debtor in Possession herein ("Filbin DIP") seeks to sell a 10-acre parcel (the "Sale Property"), which sale has been set for hearing and an auction on August 30, 2018. An Initial Overbid has been submitted for $2.75 million dollars; Dckt #258, ¶6; Dckt #259; Ex. A; within spitting distance of the amount required to satisfy all secured claims in full; $2,795,526.83 million. See, Claim No. 10. Several overbidders have qualified by presenting acceptable sale contracts and $100,000 non-refundable good faith deposits. It is overwhelmingly likely that the Auction, set for August 30, 2018, will satisfy the alleged $45,000 shortfall between the secured debt and the Initial Overbid and make it possible to pay off the Secured Creditors in full. In the event that there is no subsequent overbid, the Secured Creditors will have approximately 84 acres of collateral to secure payment of the $45,000 shortfall. That remaining property has been valued at $10.339 million dollars. Dckt #257, Ex A. The Secured Creditors are subject to no perceptible risk respecting collection of their claim.

3. The instant case involves more than $10 million in assets and more than $40 million in debts; coupled with the related case, they involve approximately $200 million in assets and more than $50 million in debts and appear to be the largest filed in this District in at least the past five years. The overlap of approximately $40 million in debt to Summit, owed directly by the related Debtor but guaranteed by the instant Debtor, increase the complexity of the case and suggests that a coordinated reorganization with the related case will prove most beneficial to creditors. Accordingly, this factor supports extension of the exclusivity periods.

4. In collaboration with the Chapter 11 professionals representing the companion estate of Jeffrey Arambel ("Arambel"), Filbin DIP has been negotiating an overall resolution with Summit. As part of that effort, Filbin DIP recently sought and obtained dismissal of its lawsuit against Summit. The negotiations with Summit have proceeded to the point of reviewing and commenting on draft documentation. Filbin DIP (and Arambel) need some additional time to attempt to formulate a consensual Plan of Reorganization. Accordingly, this factor supports extension of the exclusivity periods.

5. Filbin DIP filed an Initial Plan; Dckt #135; and thereafter a Plan and Disclosure Statement; Dckt #165, 166. Filbin DIP decided to cancel its Disclosure Statement hearing because it concluded that completing the pending sale would make its reorganization alternatives clearer. It presently appears that the sale will generate sufficient funds to pay-off the Secured Creditors, rendering the formulation of a readily confirmable Plan of Reorganization more likely. Filbin DIP is in negotiations with Summit, its other substantial creditor and is making good faith progress toward its reorganization. Accordingly, this factor supports extension of the exclusivity periods.

6. Filbin DIP has proposed an Initial Plan and a subsequent Plan of Reorganization and Disclosure Statement. Through the sale, it expects to satisfy the Secured Creditors who have opposed virtually all of Filbin DIP's efforts in this case. While it believes that it can negotiate a consensual Plan of Reorganization with its other significant creditor and is making progress toward doing so, it believes that its prior Plans were viable and it can and will prosecute a non-consensual Plan of Reorganization if the current negotiations with Summit fail. Accordingly, this factor supports extension of the exclusivity periods.

7. As noted, Filbin DIP is making tremendous progress respecting the only issue of concern to the Secured Creditors: a prompt cash-out. Filbin DIP is also making significant progress in its negotiations with Summit. While a nonconsensual reorganization is viable, there is good reason to believe that a consensual reorganization with Summit is achievable, and that such a

resolution would be substantially preferable to creditors and the estates. Accordingly, this factor supports extension of the exclusivity period.

8. The case has been pending for about eight months. The Court is now conducting the first, albeit continued, hearing on Filbin DIP's first request to extend the exclusivity periods.

9. There is no indication that Filbin DIP in Possession is seeking an extension to pressure creditors.

10. The principal contingencies at present are: (a) outcome of the pending auction of the Sale Parcel, and (b) whether a consensual resolution of the treatment of Summit can be achieved. This factor supports extension of the exclusivity periods. It has been suggested that the "the overriding factor [for the Court's consideration] is whether [extending or] terminating Filbin DIP's exclusivity would facilitate moving the case forward." COLLIER ON BANKRUPTCY ¶ 1121.06 (16th Ed. 2018), citing In re Dow Corning Corp., 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997). Here, Filbin DIP in Possession has been moving promptly toward an effective, and optimally consensual, reorganization. On the other hand, if exclusivity is allowed to expire, the prospect of a disruptive creditor Plan of Reorganization – especially from the Secured Creditors – is substantial, since the Secured Creditors are substantially over-secured and have never foregone an opportunity to oppose Filbin DIP's reorganization efforts. Terminating exclusivity would likely harm creditors and the estate, and would waste judicial resources, by requiring consideration of multiple competing plans and disclosure statements.

11. Filbin DIP seeks a 120-day extension of all of the Section 1121(c) deadlines, without prejudice to the granting of further extensions for good cause shown. Granting this relief would not violate the outside deadlines of Section 1121(d)(2).

August 23, 2018 Hearing

The court continued the hearing to September 27, 2018. At the hearing the court noted that no monthly operating reports have been filed by the Debtor in Possession since February 2018 (the January 2018, first month of filing, report). The court did not find that this delay has been caused due to the complexity of this case and the delayed hiring of accountants for the Debtor in Possession. In the months since their employment, the "simple" monthly operating reports should have been filed.

The court found further that Debtor in Possession's "concerns" that one of the creditors will engage in unnecessary, expensive prosecution of a competing plan solely to generate attorney's fees and costs to be claimed under the note and deed of trust does not rest on solid ground. Such "prevailing party" attorney's fees are subject to review by this court as part of the secured claim.

The prevailing party must establish that a contractual provision exists for attorney's fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

The court is confident that the creditors and their attorneys recognize that federal court is not one in which the billings of attorneys and expenses run up by parties just for the sake of litigation and then imposed on their opponents. The fees must be reasonable and necessary.

Conversely, the Debtor in Possession did not get to sit safely ensconced in bankruptcy, not moving forward on a plan but holding creditors at bay due to the exclusivity period. This bankruptcy case and the related Chapter 11 case of Jeffery Arambel have had their challenges, but much headway has been made due to the efforts of the respective parties and their clients. Advancement has not been made solely by the Debtor in Possessions' active prosecutions of this or the related case. The active participation by creditors has helped move the case forward and "nudge" this Debtor in Possession and the one in the related case to take financially reasonable step.

APPLICABLE LAW

Debtor in Possession does not direct the court to the provisions of 11 U.S.C. § 105(d), in which Congress provides that the district court or bankruptcy court judge before whom the bankruptcy case is pending:

> (d) The court, on its own motion or on the request of a party in interest–
>
> > (1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and
> >
> > (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems

appropriate to ensure that the case is handled expeditiously and economically, including an order that–

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title–

(I) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 105(d) (emphasis added). Though not cited to by Debtor in Possession, the court considers this basis.

11 U.S.C. § 1121 creates statutory deadlines and dates when persons other than the debtor in possession may file a plan, and 11 U.S.C. § 105(d) provides a statutory basis for the court to modify those dates.

Section 1121 states, in part:

(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

. . . .

(d) (1) Subject to paragraph (2), on request of a party in interest made within the respective periods specified in subsection (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

> (2) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.

11 U.S.C. § 1121(b), (d). A party moving for the period to be extended must establish that there is cause for an extension. *See In re New Meatco Provisions, LLC*, No. 2:13-bk-22155-PC, 2014 Bankr. LEXIS 914, at *7–8 (Bankr. C.D. Cal. March 10, 2014) (citing *In re Dow Corning Corp.*, 208 B.R. 661, 663 (Bankr. E.D. Mich. 1997); *In re Newark Airport/Hotel Ltd. P'ship*, 156 B.R. 444, 451 (Bankr. D.N.J. 1993), *aff'd*, 155 B.R. 93 (D.N.J. 1993)).

Determining whether cause exists depends upon the facts presented to the court. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 352 B.R. 578, 586 (Bankr. S.D.N.Y. 2006). A number of factors may indicate cause, including:

A. The size and complexity of a case;

B. The necessity of sufficient time to permit a debtor to negotiate a plan of reorganization and to prepare adequate information;

C. The existence of good faith progress toward reorganization;

D. Whether a debtor is paying bills as they become due;

E. Whether a debtor demonstrates reasonable prospects for filing a viable plan;

F. Whether a debtor has made progress in negotiating with creditors;

G. How much time as elapsed in the case;

H. Whether a debtor seeks an extension to pressure creditors into submitting to demands; and

I. Whether an unresolved contingency exists.

208 B.R. at 664–65; *see also Official Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem'l Hosp. (In re Henry Mayo Newhall Mem'l Hosp.)*, 282 B.R. 444, 452 (B.A.P. 9th Cir. 2002) (explaining that there are several factors analyzed commonly upon an extension request).

DISCUSSION

Since the last hearing, the court granted a Motion to Sell, permitting Filbin Land & Cattle Co., Inc., as the Debtor in Possession authorization to sell approximately ten acres of real property located at 4501, 4502, 4549, 4557, and 4561 Ingram Creek Road, Westley, California. Dckt. 304. The Property, set initially to sell at a fair market value of $2,565,000.00 received a high-bid of 8,350,000.00. *Id.*

Debtor in Possession has also filed its monthly operating reports. *See* Dckts. 276-282, and 314.

Debtor in Possession has not established that this is such a complex case that extending the exclusivity period is warranted. The Debtor in Possession is proceeding with an orderly liquidation of assets, not the running of a complex business empire. While the principal of the Debtor in Possession appears to have been challenged in several aspects in this case, they may well be challenges of his own (whether inadvertent or intentional) making. Though purportedly against the advice of counsel, the Debtor in Possession has used cash collateral without authorization (the court notes that the principal of the Debtor in Possession did obtain authorization to use cash collateral in his own related individual Chapter 11 case, showing that the concept of such authorization is not a foreign one to him).

For the Debtor in Possession and its various counsel and business professionals, the Monthly Operating Reports (which would have shown the unauthorized use of cash collateral) were not filed until eight months after this case was filed. The filing of the Monthly Operating Reports conveniently coincided with a proposed sale of property of the Bankruptcy Estate which would (if consummated by the Debtor in Possession) generate substantial monies to pay creditor claims, including fully satisfying Debtor in Possession's greatest nemesis in this case.

When the Debtor in Possession filed a motion to use cash collateral on August 23, 2018, nine months into this case, no grounds were stated for retroactive authorization, but instead Debtor in Possession merely asserted that such relief should be granted. Additionally, the Debtor in Possession did not request authorization to use cash collateral for the month of August 2018. The court findings and conclusions in connection with the motion to use cash collateral and setting a further hearing on the request for retroactive approval include the following:

> "No request is made for the use of cash collateral during the month of August 2018.
>
> A review of the Motion discloses that no grounds are stated with particularity (Fed. R. Bankr. P. 9013), or even obliquely, upon which the court is requested to grant retroactive relief. The Motion appears to "assume" that if the demand for relief is made upon the court, then the court will be obliged to sign whatever order is demanded from the Debtor in Possession and its various counsel.
>
> The Declaration of Jeffery Arambel filed in support of the Motion for Retroactive Authorization provides no testimony concerning the unauthorized use of cash collateral. Mr. Arambel provides the court with his "future plans" for the property of the bankruptcy estate.
>
> . . .
>
> This Motion is not being considered in a vacuum. Mr. Arambel has been challenged in fulfilling his duties as the responsible representative in this case and as the debtor in possession in his own case, 18-90029. Inaccurate Schedules were signed by Mr. Arambel under penalty of perjury. Mr. Arambel eschewed the hiring

> of a real estate professional to market properties of the bankruptcy estates to be sold, instead, as the fiduciary to both bankruptcy estate, electing to just do it himself.
>
> The court has repeatedly addressed with Mr. Arambel and his various attorneys these "shortcomings," repeatedly giving them all the benefit of the doubt in light of the large tracks of real estate in this case and the efforts by some creditors to stymie the bankruptcy process.
> . . .
> The Debtor in Possession, and Mr. Arambel as the responsible representative, and the attorneys he has engaged, continue to make it clear that Mr. Arambel will do what he wants, that the Bankruptcy Code (and making statements under penalty of perjury) do not limit his actions, and that since he demands retroactive authorization, the court will rubber stamp an order for him.
> . .
> When the court pressed counsel for the Debtor in Possession how such experienced general bankruptcy counsel (who joined the case in March 2018) and special bankruptcy counsel (who has been in the case since January 2018, but the court would not authorize such special counsel to serve as general bankruptcy counsel for the two debtors in possession in the two related cases) could have let the use of cash collateral inadvertently slip, no credible response was provided, with the court being told, "we didn't know."
> . . .
> The Debtor in Possession has not given the court any basis for the retroactive relief requested. The Debtor in Possession has not shown the court that grounds exist to allow the Debtor in Possession to use cash collateral prospectively. What the Debtor in Possession has shown the court is that it and its responsible representative stay true to their course, do whatever they want, say whatever they believe to be to their advantage, and expect the creditors, U.S. Trustee, and federal judicial system to bend to their demands."

Civil Minutes, Dckt. 306. The court continued the hearing on the request for retroactive approval and for the month of August 2018 (which was not requested in the original motion) to October 18, 2018.

Though early in the case, it is clear to the court that the Debtor in Possession needs to feel pressure to diligently prosecute this case. Debtor in Possession raises the phantom specter that its nemeses creditor will aggressively and needless run up legal fees, wasting the time and monies of the Debtor in Possession, other creditors, and the court. While such speculation about the good faith of the nemesis and the nemesis' counsel is not completely without merit, in light of any such fees having to be shown to this court as reasonable and necessary to be included as part of such creditor's claim (as well as the Debtor in Possession having the right to prevailing party attorney's fees in the event that such unnecessary litigation is prosecuted as a revenue generating device or abusive litigation tactic (Fed. R. Bankr. P. 9011)) , the risk to the nemesis and counsel in pursuing such abusive tactics is not worth the consequences.

The current request is little more than extending the exclusivity period for the sake of doing so. The Debtor in Possession needs to move forward in the prosecution of this case, provide for the orderly sale

of property as it states is inevitably necessary to pay creditor claims, and preserve what is asserted to be a substantial equity in the real estate.

The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend Exclusivity Period filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Extend Exclusivity Period is denied.

9. 12-93049-E-11 MARK/ANGELA GARCIA
Mark Hannon

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
11-30-12 [1]

Debtor's Atty: Mark J. Hannon

The Status Conference is XXXXXXXXXXXXXX.

Notes:
Continued from 1/11/18

Quarterly Operating Reports filed: 6/22/18 [ending Dec 2017], 6/22/18 [ending Mar 2018]

[GRF-2] First Interim Application for Compensation of Gary R. Farrar, Plan Administrator filed 4/25/18 [Dckt 973]; Order granting filed 6/3/18 [Dckt 984]

[RHS-1] Order to Show Cause Why Case Should Not be Converted to One Under Chapter 7 and Order Requiring the Personal Attendance of (No Telephonic Appearances Permitted For): Mark Anthony Garcia, Angela Marie Garcia, Mark Hannon, Esq. filed 6/29/18 [Dckt 992], set for hearing 8/2/18 at 10:30 a.m.

AUGUST 2, 2018 STATUS CONFERENCE

The court issued an Order to Show Cause why this case should not be converted to one under Chapter 7. The hearing on that is set for 10:30 a.m. on August 2, 2018. Dckt. 992.

On June 22, 2018 (prior to the issuance of the Order to Show Cause), the Replacement Plan Administrator filed a Status Report. Dckt. 990. Debtor filed a Response on July 17, 2018. Dckt. 995.

The court has continued the hearing on the Order to Show Cause to afford Debtor the opportunity to address the multiple defaults (failure to pay Replacement Plan Administrator and failure to make unsecured claim fund payment) without having to file an amended plan.

10. 12-93049-E-11 RHS-1 | **MARK/ANGELA GARCIA** Mark Hannon | **CONTINUED ORDER TO SHOW CAUSE** 6-29-18 [992]

APPEARANCE OF MARK GARCIA, ANGELA GARCIA, AND MARK HANNON REQUIRED AT THE HEARING

NO TELEPHONIC APPEARANCE PERMITTED

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Plan Administrator, and Office of the United States Trustee on July 4, 2018. By the court's calculation, 29 days' notice was provided. The court set the hearing for August 2, 2018. Dckt. 992.

The Order to Show Cause was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Plan Administrator, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Order to Show Cause is XXXXXXXXXXXX.

This Chapter 11 Case is one operating under a confirmed Plan. The road to confirmation was not smooth, with Debtor in Possession's conduct causing the court to appoint a Chapter 11 Trustee. The court's findings in determining that the appointment of a trustee was necessary include the following:

> The court in independently reviewing the Monthly Operating Reports is struck by inconsistencies between the reported income, reported expenses, and bank account balances.
>
> First, bank accounts appear and then disappear. Second, substantial amounts of monies each month are not tracked through the bank accounts of the estate. Examples include,
> . . .
>
> Cause has been shown warranting relief under 11 U.S.C. § 1112. The financial reporting and **handling of estate assets by the Debtors in Possession demonstrate a continuing loss** to the estate, **gross mismanagement** of the estate, **and failure to fill clear and accurate monthly operating reports**. . . .

Civil Minutes, Dckt. 254.

Fortunately, with the intervention of a trustee and several creditors, a Chapter 11 Plan was confirmed in this case. As discussed by the court in the Civil Minutes from the Confirmation hearing, the confirmation was not a "text book" picture of good faith prosecution. Again, Debtor and their allies muddied the waters and engaged in questionable (what some would say was bad faith) conduct. Civil Minutes, Dckt. 777. However, the court confirmed the Plan, with the two debtors taking on the fiduciary roles of Plan Administrators under the Confirmed Plan.

Under the terms of the Plan, Debtor's residence was to be sold and a portion of the sales proceeds paid into the Plan for disbursement to creditors holding general unsecured claims. The fiduciary Plan Administrator Debtor lined up a sale of the property, but then joined with their attorney in a scheme to have a sale approved that diverted the monies otherwise required to be paid to the creditors holding general unsecured claims to Debtor's attorney. In addition, as part of this scheme to divert the monies, Debtor Mark Garcia, in a declaration prepared by Mark J. Hannon, Esq., attorney for fiduciary Plan Administrator Debtor, made false statements under oath. This misconduct is addressed by the court in the Civil Minutes for the Hearing on the Motion to Sell Property, which include:

> Debtor **Mark Garcia** provides his declaration under penalty of perjury in support of the Motion. Dckt. 851. He too fails (or is unwilling) to disclose the identity of the buyer, though he **does state under penalty of perjury that neither of the two Plan Administrators/Debtors have any interest in the Buyer**. Additionally, no information is provided for the marketing of this property. It is disclosed that there is no broker's commission, **so it appears that no attempt has been made to expose this property to the market and achieve the fair market value**. Mr. Garcia's gratuitous comments that the "offer seems to be the fair market

value" does not suffice as proper marketing of the property and fulfilling the fiduciary duties of a Plan Administrator under a confirmed Chapter 11 Plan.

When the court posted the tentative ruling to deny the Motion without prejudice it stated that for all the court knows, Mark Garcia or Angela Garcia, the Debtors and fiduciary Plan Administrators, may be shareholders, partners, members, or other interest holders in Interface Investment Capital and have failed to disclose that information to the court. From the Secretary of State public records, all the court can identify is that Interface Investment Capital filed its papers with the Secretary of State on May 17, 2016, and that its agent for service of process is "LEGALZOOM.COM." http://kepler.sos.ca.gov/.

The U.S. Trustee has now provided information that a **"Mark Garcia**," the same name as one of the Plan Administrators/Debtors **is one of the two members of Interface Investment Capital, LLC, the Buyer**. The U.S. Trustee's attorney reports that this information has been obtained directly from the California Secretary of State, as well as from third-party information sources.

. . .

Additionally, that the **fiduciary Plan Administrators and their attorney** come in and **in the guise of a motion to sell attempt to** get an order of the court **giv**ing a **super-super preference to Plan Administrator's/Debtor's counsel that violates the plan** (which even if it can be read to have the 20% be used to pay administrative expenses and then general unsecured claims) allows Plan Administrator's/Debtor's counsel's administrative expense to be paid in priority to other equal-in-priority administrative expenses.

This is compounded by the fiduciary Plan Administrators/Debtors quickly abandoning not only the payment to their counsel, but any rights of the Plan estate to claim the 20% carve out and give it to the creditor who signed the Stipulation that the money go to the administrative expense of their attorney only. No reason was shown that creditor would not agree to the 20% carve out to be paid and disbursed as provided in the confirmed Chapter 11 Plan.

The conduct of the Plan Administrators/Debtors creates the appearance that they are engaging in self dealing and attempting to divert moneys and properties to their personal benefit in violation of the Chapter 11 Plan. Such may merely be an appearance and the court does not make any findings that the Plan Administrators/Debtor have engaged in such conduct. But the court does not make any findings that have not engaged in such improper conduct.

Civil Minutes, Dckt. 868 (emphasis added).

This led to the U.S. Trustee bringing a Motion to Dismiss, which was centered on the false testimony given by Mark Garcia:

Movant asserts that the case should be dismissed or converted based on the following grounds.

> A. Debtor Plan Administrator Mark Garcia falsely testified under penalty of perjury in this bankruptcy case that the sale of property proposed by the Debtor Plan Administrators was to an entity that the Plan Administrators did not have any interest.
>
> B. The statement under penalty of perjury was false in light of the records of the California Secretary of State showing that Debtor Plan Administrator was a member/owner of the proposed purchaser.
>
> C. The conduct of Debtor Plan Administrator constitutes cause to convert this case to one under Chapter 7.
>
> D. Conversion, rather than dismissal, is in the best interests of the bankruptcy estate and creditors because the estate has a right to a $25,000.00 carve out from the sale of property that the Debtor Plan Administrators (the fiduciaries) obtained authorization to sell in November 2016.

Motion, Dckt. 907.

Civil Minutes, Dckt. 937.

Rather than converting a Chapter 11 case in which there was a plan that could fully fund the Plan and pay for the costs of an actual fiduciary to serve as a Plan Administrator, the court elected to appoint a replacement plan administrator. *Id.*

Plan Administrator Fees—Source of Payment

The court ultimately authorized the sale of Debtor's residence as required by the confirmed Chapter 11 Plan. Order, Dckt. 894. From the sale proceeds, $25,000.00 was carved out free and clear of all liens and encumbrances. The Order expressly provides:

> **IT IS FURTHER ORDERED** that the $25,000.00 disbursed to the Clerk of the Bankruptcy Court is free and clear of any liens, encumbrances, and other interests. Further, **the $25,000.00 is property to be disbursed as provided in the Chapter 11 Plan to creditors holding general unsecured claims** (Confirmed Chapter 11 Plan, Class 3 "carve-out," p. 6:7-10; Dckt. 781) or as otherwise ordered by this court. **If this case is converted to one under Chapter 7** of the Bankruptcy Code, **the $25,000.00 is property of the bankruptcy estate in the Chapter 7 case**, the Plan Administrators/Debtors and creditors in attendance at the November 16, 2016 hearing so stipulating.

Id. (emphasis added). Because the court was appointing a replacement plan administrator due to Debtor Mark Garcia's false testimony under penalty of perjury and Debtor's breaches of duty in acting as the fiduciary plan administrators, the court created a safety net for the replacement plan administrator for his/her fees if Debtor failed to properly fund the Plan and if it was converted to a case under Chapter 7. The Order authorizing the sale further provides:

> **IT IS FURTHER ORDERED** that the court imposes a lien on the $25,000.00 in monies disbursed to the Clerk of the Court to secure the payment of any fees allowed by this court to any successor plan administrator(s) or receiver(s) appointed by the court to the current Plan Administrators/Debtors.

Id. In the Civil Minutes for the hearing on the Motion to sell the Debtor's residence, the court reviews, in detail, the misconduct of the fiduciary Plan Administrator Debtor in their attempts, assisted by their counsel, to improperly divert the carve-out from the sales proceeds that must be paid to creditors holding general unsecured claims under the terms of the confirmed Chapter 11 Plan to Debtor's counsel. This was to pay the personal obligations of Debtor to their counsel with monies due creditors under their confirmed Chapter 11 Plan.

Replacement Plan Administrator's Fees

On June 3, 2018, the court approved interim Replacement Plan Administrator fees of $14,160.00. In light of the substantial work required of the Replacement Plan Administrator fulfilling his fiduciary duties in light of the defaults of the Debtors (who continue to run the main business - a bail bond agency), such amount was determined to be very reasonable. The Replacement Plan Administrator has carefully tailored his duties so as not to "run up the bill."

On June 22, 2018, the Replacement Plan Administrator filed his updated Status Report. Dckt. 990. With respect to the payment of his fees, he advises the court:

> The Court approved the Plan Administrators fee application on May 31, 2018. The Order Approving was docketed June 3, 2018. At the point of agreeing to be considered for the Plan Administrator position, it was my understanding that my fee payment would be derived from the $25,000 designated sale proceeds from property escrow.
>
> I submitted the order to Linda Payne of the Clerk's Office requesting payment. I received a call from the law clerk indicating I should address this issue at the Status Conference. I have confirmed my understanding of compensation source with Mr. Hannon and Mr. Blumberg.
>
> The Plan filed does not have a provision otherwise for payment of the Plan Administrator fees. Mr . Blumberg directed me to Docket item "894" ORDER FOR AUTHORITY TO SELL REAL PROPERTY.

> The order seems to state that the $25,000 is available to pay the Plan Administrator's fees. I again request the Court authorize the disbursement of funds held per the Order approving fees June 3, 2018.

Id. The Replacement Plan Administrator interprets the $25,000.00 of monies which are to be paid creditors on their general unsecured claim is to be first used, and then lost to the creditors, to pay the Replacement Plan Administrator's fees. That is incorrect.

As the court made clear to the Debtors and their counsel when the misconduct of Debtor Mark Garcia, including the false statements in the declarations prepared by Mark Hannon, Esq., counsel for the then Plan Administrator Debtors, the cost of the Replacement Plan Administrator would not be borne by the creditors. To do so would be merely to let the Debtors accomplish what they tried to do earlier with the false testimony under penalty of perjury – divert the monies required to be paid to creditors to an administrative expense Debtors had to otherwise fund.

The order approving the sale expressly states that the $25,000.00 shall be paid to creditors holding general claims – except a lien is created on the monies to protect the Replacement Plan Administrator. If the Debtors defaulted under the Plan (such as failing to pay the Replacement Plan Administrator's fees) and the case was converted to one under Chapter 7, the Replacement Plan Administrator was protected as against the trustee and Chapter 7 administrative expenses.

DEBTOR'S RESPONSE

Debtor filed a Response on July 17, 2018. Dckt. 995. Debtor argues that there was no bad faith at plan confirmation, that confirmation took so long (and by a creditor-proposed plan) because there were two objecting creditors that Debtor could not agree with on plan terms.

Debtor does not admit whether a default has happened, instead arguing that the Estate has paid almost $100,000 in fees to the Plan Administrator and his accountant. Also instead of admitting whether or not a default has occurred, Debtor stresses that no creditor has filed anything with the court complaining about non-payment or how plan administration is proceeding.

August 2, 2018 Hearing on Order to Show Cause

At the hearing on the Order to Show Cause the Plan Administrator reported that it is anticipated that the Debtor should have sufficient funds to pay this expense in the next couple weeks. It was then, discovered, that Debtors are in default under the plan, not having funded the quarterly payments due for creditors holding general unsecured claims. No reason was given for this default, other than Debtor's were waiting for the payment on a claim made against a title insurance company for a property purported to have been sold around their lien.

At the request of the Replacement Plan Administrator, joined in by the Debtor, the court continued the hearing to September 27, 2018, at 10:30 a.m. to allow for the Debtor to try and "fix" the default without having to file an amended plan.

The court further ordered that Mark Garcia and Angela Garcia, the Debtors, and Mark Hannon, counsel for Debtor, and each of them, appear in person at the September 27, 2018 Continued Hearing, disallowing telephonic appearances permitted for said parties ordered to appear.

DISCUSSION

Terms of Confirmed Chapter 11 Plan and Sham Creditor Plan Proponent

In the Chapter 11 Plan confirmation process and then the request for fees by the purported creditor plan proponent, YP Advertising & Publishing, LLC ("YP"), the court concluded that it was actually the Debtors and Debtors' counsel who were "running the show," using the name of YP as a canard for the Debtors to prosecute this case. The court determined that the purported counsel for YP was not being paid by YP, but only if and when the Debtors could get a plan confirmed, and then only to the extent counsel could be directly paid (rather than an actual creditor reimbursed) for an administrative expense.

Terms of Confirmed Chapter 11 Plan

As Debtors advocated with the Replacement Plan Administrator, they argue that the court's order imposing a lien on the $25,000 in proceeds from the sale to secure the Replacement Plan Administrator or Chapter 7 fees constitutes a statement that the $25,000 in proceeds is the first source of payment. However, such interpretation of the creation of a lien as creating a first source of payment is inconsistent with the express terms of the confirmed Chapter 11 Plan which Debtors state they wrote and confirmed.

Additionally, in addressing the treatment of the Secured Claim of United States Fire Insurance Company ("USFI"), the confirmed Chapter 11 Plan provides (and requires):

> Class 3: Secured claim of United States Fire Insurance Company (Second Deed of Trust).
>
> Debtors will pay the non-dischargeable sum of $400,000.00 to USFI, with monthly payments of $3,000.00 for four years, with a balloon payment, if necessary, at the end of the four years. Interest shall be charged at 6%. The monthly payments due to USFI by the Debtors shall commence upon the 1st day of the month after the Effective Date of the Plan.
>
> **If the Debtors' residence is sold through this Court**, the claim of the first mortgage holder, Deutsche Bank, will be paid in full. The remaining sum, after authorized expenditures, is to be paid to USFI. In that event, USFI has agreed to a **'carve-out'** procedure, **where 20% of the proceeds payable to USFI are to be paid to unsecured creditors.**
>
> . . .
>
> In the event that the Trustee has not completed a sale of the Oakdale Property and the escrow for such sale has not closed within six (6) months of the Order approving this Stipulation, then USFI's consent to such sale shall be deemed

> withdrawn. In the event that the Debtors have defaulted on the monthly payments due to USFI, USFI may petition the Court for relief from automatic stay and/or default under the confirmed plan to obtain its remedies with respect to the Oakdale Property by judicial or non-judicial foreclosure.

Id., at 6:1–10, 7:15–20 (emphasis added). This 20% of the proceeds, which is the $25,000.00 on which the court has imposed a lien to secure payment of the fees due the Replacement Plan Administrator or Chapter 7 Trustee, is not stated to be part of the 50% dividend to be paid quarterly, but appears to be an additional amount to be disbursed to creditors holding general unsecured claims via USFI's lien.

Even if not an additional amount to be paid the creditors holding general unsecured claims, the $25,000 has to be paid to creditors holding unsecured claims for Debtor to perform and complete the confirmed Chapter 11 Plan and cannot be diverted to pay expenses of administration.

Prior Attempts of Debtor to Divert the 20% Carve Out Proceeds

As noted, the final paragraph of the above treatment addresses a situation where the Plan Administrator Debtors, not withstanding the diligent exercise of their fiduciary duties under the confirmed Chapter 11 Plan, cannot get the property sold within six months, then USFI's consent will be deemed withdrawn.

The Plan was confirmed on May 6, 2016. On September 16, 2016, a mere four months after the Plan was confirmed, the then Plan Administrator Debtors filed their Motion to sell the property securing the USFI claim. The sale was to a limited liability company for which Plan Administrator Debtor Mark Garcia was a member. However, Plan Administrator Debtors submitted false testimony that the Debtors (who were serving as the fiduciary Plan Administrator Debtors) had no interest in the purchaser.

Further, the fiduciary Plan Administrator Debtors asserted that the 20% carve out of the proceeds could be diverted to the attorney they owed as Debtors to their counsel. The fiduciary Plan Administrator Debtors asserted that this diversion of the 20% carve out could be obtained by them because the six-month sale deadline under the Plan should not be computed from the confirmation of the Plan, but from the date of the Order approving the Stipulation, July 6, 2015 - which was ten (10) months before the confirmation of the Plan. Taken on its face, the fiduciary Plan Administrator Debtors were asserting that the sale deadline had already expired when they (in the name of Creditor YP) obtained confirmation of a plan in which the creditors were told that they would receive a 20% carve out from Creditor USFI's lien.

If the arguments of Plan Administrator Debtors and the Counsel were given effect, then they would have participated in the confirmation of a plan that contained an illusory (fraudulent) term. Given that the Plan Administrator Debtors and the Counsel were clearly driving the plan confirmation process, with the creditor "proposing" the Plan clearly just along for the ride, such illusory (fraudulent) plan provision would have rested with Plan Administrator Debtors and their Counsel if the court gave such strained effect to the provision.

With respect to the nominal participation of YP as the creditor plan proponent, the court discusses this in the Memorandum Opinion and Decision on said Creditor's request for attorneys' fees. Dckt. 899. The court's findings include the following:

> In addition to Creditor YP and YP Counsel, **the main players in the prosecution of this case relevant to the current Motion are Mark Garcia and Angela Garcia, the two debtors ("Debtor"); Mark Hannon, Esq.**, who served as counsel for the two debtors when they served as the debtor in possession prior to the appointment of the Chapter 11 Trustee ("Debtor's Counsel"); John Bell, the Chapter 11 Trustee ("Chapter 11 Trustee"); Zayante P. Merrill, the first attorney for the Chapter 11 Trustee; and Estella Pino, the second attorney for the Chapter 11 Trustee (collectively "Trustee Counsel").

Id. at 2:2–8.

> In considering this Motion and the underlying facts, the court is convinced that YP Counsel, given her good nature and lack of bankruptcy law experience (though not inexperienced as a lawyer), **was actively taken advantage of by Debtor and Debtor's Counsel**, and at least passively by the Chapter 11 Trustee and Trustee Counsel. Recently, the court was presented with a declaration under penalty of perjury signed by debtor Mark Garcia, the Plan Administrator under the confirmed Chapter 11 Plan. Mr. Garcia was testifying under penalty of perjury as to facts in support of a motion to sell property under the plan to an "unrelated" third-party. **The declaration that was prepared by Debtor's Counsel, who is now serving as the attorney for the Debtor serving in the capacity of Plan Administrator, contained false information (inaccurately stating that Debtor had no interest in the "unrelated" third-party purchaser limited liability company, an entity for which debtor Mark Garcia is actually a managing member).** The court did not find persuasive debtor Mark Garcia's and Debtor's Counsel's arguments that Mr. Garcia just did not read the declaration before signing it and the court should overlook the false statement. Civil Minutes, Dckt. 896. **This misstatement exemplifies the conduct of Debtor in this case, all the while represented by the same Debtor's Counsel.**

Id. at 2:11–16, 3:1–9.

> **Additional Information Provided by YP Counsel at the October 20, 2016 Hearing**
>
> At the hearing, YP Counsel engaged in a frank, honest discussion with the court. While the court acknowledges YP Counsel's candor and professional interaction with the court and other counsel at the hearing, the information provided amplifies the court's above conclusions and concerns regarding YP Counsel's conduct, as well as the conduct of Debtor's Counsel and Trustee Counsel. At the hearing, the attorney from **YP Counsel stated** that she was not experienced in

> bankruptcy and out of her depth. She also stated that **she relied on information from Debtor's Counsel** and Trustee **Counsel as what could and could not be done under the Bankruptcy Code** in this case, in addition to her own research.
>
> At the hearing, YP Counsel further reaffirmed that she agreed to discount her fees because Debtor's Counsel and Trustee Counsel demanded payment of 100% of their fees. In addition to further demonstrating YP Counsel's bankruptcy legal naivete, it also **demonstrates the lack of professionalism and good faith conduct by Debtor and Debtor's Counsel**, and the lack of a moderating influence and demonstrating professionalism in federal court by the Trustee and Trustee Counsel.[3] . . . YP Counsel, **unadvisedly relying on the direction from Debtor's Counsel** and the apparent acquiescence of the Trustee and Trustee Counsel, **was led down a path of non-productive, non-compensable legal work**.

Id., at 6:17.5–28, 7:1–10.

Appendix A to the Memorandum Opinion and Decision is the court's review of the "Dysfunctional Conduct of the Parties" in this bankruptcy case. *Id.*, pp. 35-37. The court discusses the failure of the Debtors to fulfill their obligations as the fiduciary Debtors in Possession, which led to the appointment of a bankruptcy trustee. The Decision recounts prior findings of the court that while creditor YP was facially the plan proponent, the Debtors purported to speak for YP and Debtor's Counsel asserted that YP's counsel knew little if anything about the information put in the disclosure statement (purportedly prepared by YP's counsel). The court's findings in the Civil Minutes of the Motion to Compel production of discovery by YP include:

> D. "Finally, Debtors, on behalf of [Creditor YP], request that the court deny the Motion**. Debtors provide no basis for having standing to defend [Creditor YP]** from Mr. Macdonald's attempts to conduct discovery of the plan proponent. The Response and seeking to defend [Creditor YP] appears to **be pregnant with the implication that the Debtors are controlling, or having [Creditor YP] act merely as the Debtors agent or proxy**, in proposing the Chapter 11 plan now before the court."
>
> The court notes that as shown by the pleadings and rulings in this case, at many times it appears that Debtor's Counsel was the one actually doing the work for Creditor YP, with Creditor YP merely providing the cover of its name and YP Counsel named as the "sham party."

Id., at 36:2–8; Citing to the Civil Minutes, Dckt. 452.

One of the grossly improper terms being advanced in the Debtors/AP plan was to have Debtors' counsel paid as an administrative expense. *Id.* at 14:20–28, 15:1–4.

> This is similar to the attempt to have the 20% carve out to be paid to creditors holding general unsecured claims diverted to Debtor's counsel through the original motion to sell the residence. **This is yet another demonstration, as discussed in greater detail below, that Creditor YP, while nominally the plan proponent, was dancing to the tune of Debtor and Debtor's Counsel**. Creditor YP did not even respond to an objection to confirmation of "its" plan, but abdicated to allow Debtor's Counsel to call the shots.
>
> . . .
>
> This yet again **demonstrates that Creditor YP, as a creditor, appears to be disconnected with the Plan, allowing Debtor and Debtor's Counsel to run this bankruptcy case and the plan**. No credible explanation was provided as to how YP Counsel, as the attorney for Creditor YP, would ever propose a plan that allowed Debtor to live in their home without ever having to pay the creditors with claims secured by the property.
>
> . . .
>
> Because the Debtor does not get to vote for confirmation of a plan, there appears to be little, if any, bona fide, good faith reason for a creditor's plan to provide for a "never have to pay a claim" provision. Rather, it appears that **Debtor has prepared and proposed a Plan that "bought off" Creditor YP by providing for its claim (dropping the objection to the objection to the claim), with Creditor YP then standing as the sham plan proponent**.

Id., at 16:3–6, 11–15, 19–23 (emphasis added).

> From the evidence presented, YP Counsel has served as the "second chair" to Debtor's Counsel, acting at his direction and on his commands. The plans filed clearly were drafted, or at least the terms dictated, by Debtor's Counsel, as demonstrated by the "Debtor never has to pay on the claim secured by Debtor's home until Debtor chooses in the future" provision. As discussed above, when the "Creditor YP's Plan" was attacked, YP Counsel did not respond, but left that to Debtor's Counsel (the "first chair attorney" directing the show). This even included objecting to the deposition of YP Counsel, something that Creditor YP did not act on. Again, this demonstrated that YP Counsel was the "associate counsel" working on this matter at the direction of Debtor's Counsel.

Id., at 26:24–28, 27:1–4.

At the end of the day, the Debtors first attempted to run this case as fiduciary debtors in possession, breached their duties, and got replaced. The Debtors then tried to run the case on the sly, using the name of YP to shield their actions. After much turmoil got a plan confirmed. Once confirmed, Debtors tried to improperly divert monies from creditors to their attorney, purporting to allow him an administrative expense that was not allowed under the Bankruptcy Code. Then the Debtors, breaching their fiduciary duties as Plan Administrators Debtors, tried to improperly divert monies (the 20% proceeds of sale) from creditors holding general unsecured claims to their attorney.

Now, Debtors are failing to properly fund their Plan to pay the costs of administration of the Replacement Plan Administrator who had to be appointed due to Debtors breach of their fiduciary duties as Plan Administrators by trying to divert the 20% in proceeds that have to be distributed to the creditors with unsecured claims under the Plan to their attorney. Debtors now seek to divert the 20% from creditors to pay the costs of the Replacement Plan Administrator rather than fund it themselves.

Debtors have demonstrated that they cannot fulfill even their duties as Debtors to operate the business of the estate and pay the required monies to fund the confirmed Chapter 11 Plan, making another end around attempt to avoid paying monies they personally owe under the Plan.

The Replacement Plan Administrator's Status Report states that the Plan has not been funded to pay his fees as allowed by the court. With that nonpayment, the Replacement Plan Administrator is having to resort to the monies that otherwise must be paid to the creditors with unsecured claims. This demonstrates that the Plan is materially in default, unable to pay even this modest necessary expense of administration which arises due to the Debtors' breach of their fiduciary duties as prior plan administrators and Mark Garcia's false statements under penalty of perjury in the declaration prepared by his attorney.

Additional Information Provided for Continued Hearing

The Debtors have not provided the court with any additional information for this continued hearing. The Debtor have not provided evidence that they have properly funded the Chapter 11 Plan. At the last hearing, it was stated that in addition to the failure to fund the Replacement Plan Administrator expense, the Debtor failed to make the required payment for unsecured claims.

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

~~There being such material default, cause exists pursuant to 11 U.S.C. § 1112(b) to convert this case to one under Chapter 7.~~

~~The Chapter 11 Plan being in material default and the Debtors having demonstrated their inability (whether financially or ethically) or unwillingness (whether financially or ethically) to fund the Chapter 11 Plan, and further making a third effort to improperly divert the 20% proceeds from distribution to creditors with unsecured claims under the Plan to pay expenses which the Debtors must personally pay, and good cause appearing, the case is converted to Chapter 7.~~

~~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 Order to Show Cause 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 Order to Show Cause is sustained, and case No. 12-93049 of Mark Garcia and Angela Garcia is converted to one under Chapter 7.~~

11.	**18-90464-E-11 MJH-2** **8-22-18 [30]**	**PREMIER WEST COAST PROPERTIES LLC** **Mark Hannon**	**MOTION TO EMPLOY MARK J. HANNON AS ATTORNEY**

THE COURT HAS OPTED NOT TO POST ITS TENTATIVE RULING DENYING THE MOTION

12. 02-94454-E-7 SSA-10 | **LUANN SELECKY** **John Kyle** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH STEPHEN GOUDREAU 8-17-18 [140]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 17, 2018. By the court's calculation, 41 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice). FN.1.

FN.1. The Proof of Service supporting the Notice has not been signed. Dckt. 146. Given the documents filed, the court presumes this was merely an error, and treats the Proof of Service as being attested to under penalty of perjury by Dawn Darwin.

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

The Motion for Approval of Compromise is granted.

Michael McGranahan, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Stephen Goudreau ("Settlor"). The claims and disputes to be resolved by the proposed settlement are a Demand Note in Debtor's favor, executed on September 6, 2001 by Debtor's ex-spouse, Settlor, for $500,000.00.

This case was reopened on September 22, 2017 with the discovery of information that Debtor had intentionally omitted the Property and Demand Note from her schedules submitted in November 2002. During the pendency of this reopened case, the Trustee has successfully sold the Property for the principal amount of $270,000.00. Dckt. 132.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 145):

A. The Trustee shall pay Settlor the principal and accrued interest on Settlor's secured claim for $45,000.00.

B. This court shall retain jurisdiction over this matter.

C. Each party will bear its own fees and costs.

D. Settlor asserts no other claim against Debtor or the bankruptcy estate at issue in this case.

E. With the estate being fully solvent, the Trustee will abandon to Debtor the subject Demand Note for $500,000.00, subject to all defenses which may be entitled to that asset.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met.

Probability of Success

Movant argues that settlement is advantageous to the bankruptcy estate as Settlor has already received a final judgement in the Superior Court action, and the Debtor in this case will be left with what remains of the claim she did not file in her bankruptcy case.

The court interpret's Movant's arguments here to be a statement that Debtor's likelihood of success is slight, given a final judgement was already rendered on the issue. The court agrees, and this factor supports approval.

Difficulties in Collection

Movant asserts here that he would be required to refute arguments concerning the full faith and credit clause, and the final adjudication of a non appealable state court judicial action. Movant asserts further that litigation would generate legal expenses, and the Settlement would leave the Debtor in the same position she was in before reopening the bankruptcy case.

Movant has not raised any difficulties with collection, presuming the Trustee were successful in pursuing the claim. This factor is at best neutral.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that, if it were to continue, the litigation would be somewhat complex, both logistically and legally. Movant asserts that the interaction of federal and state law; the question as to the Demand Note's enforceability; and Settlor's residence outside California each contribute to the complexities of litigation in this matter. Additionally, with the Trustee's abandonment of the Demand Note and resolution of this case, Debtor may pursue any claims regarding the Note without the involvement of the Trustee in what is properly a two-party matter given the surplus funds generated by the bankruptcy estate.

Movant's argument's here are well-taken. Litigation here would generate expenses which are pointless here, where the estate is completely solvent. Therefore, ths factor weighs in favor of approving the compromise.

Paramount Interest of Creditors

Movant contends the Settlement Agreement reached will facilitate the closure of this estate in a timely fashion and that the Agreement is fair and equitable to the Debtor and in the best interests of the creditors.

Close of the case is in the paramount interest of creditor here where the estate is completely solvent. Therefore, this factor also supports approval.

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it resolves an issue involving potentially drawn out litigation that would unnecessarily delay close of the case where a final judgment was already reached in Superior Court and the Estate was solvent. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Michael D. McGranahan, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Stephen Goudreau ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the Motion (Dckt. 145).

13. 02-94454-E-7 SSA-9

LUANN SELECKY
John Kyle

MOTION FOR COMPENSATION FOR ATHERTON AND ASSOCIATES, LLP, ACCOUNTANT(S)
8-14-18 [134]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 14, 2018. By the court's calculation, 44 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

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

The Motion for Allowance of Professional Fees is granted.

Atherton & Associates, LLP, the Accountant ("Applicant") for Michael D. McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period February 15, 2018, through August 9, 2018. The order of the court approving employment of Applicant was entered on March 5, 2018. Dckt. 116. Applicant requests fees in the amount of $1,275.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). A professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include tax analysis and preparation of returns, fee/employment application related work, and general case administration. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Tax Analysis and Preparation of Returns: Applicant spent 4.4 hours in this category. Applicant gathered information needed to file tax returns, worked on the preparation and completion of returns, and completed a tax projection on sale of property.

Fee/Employment Application: Applicant spent 0.4 hours in this category. Applicant reviewed the bankruptcy application, performed a conflict check, and prepared time records for this fee application.

General Case Administration: Applicant spent 0.3 hours in this category. Applicant emailed the Trustee regarding tax projection.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Maria Stokman	5.1	$250.00	$1,275.00

Total Fees for Period of Application	$1,275.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $1,275.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court authorizes the Chapter 7 Trustee to pay the fees allowed by the court.

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

Fees $1,275.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Atherton & Associates, LLP ("Applicant"), Accountant for Michael D. McGranahan, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Atherton & Associates, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Atherton & Associates, LLP, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $1,275.00,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.
>
> **IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the fees by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

14. 18-90258-E-7 MF-2 | **ANDREAS ABRAMSON** **Iain Macdonald** | **CONTINUED MOTION TO DELAY DISCHARGE** **7-19-18 [86]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor , Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 20, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Motion to Delay Discharge is XXXXXXXXXX.

Andreas Abramson ("Debtor"), filed an Application to Extend Time for Entry of Order of Discharge on July 19, 2018. Dckt. 86. Debtor states he requires the extension in order to maintain the protections of automatic stay, as it affects the enforcement of liens against Debtor's residence. Debtor has filed a motion to avoid several liens under §522(f), which is set for hearing on August 23, 2018. *Id.*, ¶ 3. Debtor moves for entry of an order extending the time for entry of discharge for thirty 30 days pursuant to F.R.B.P. 4004(c)(2).

Federal Rule of Bankruptcy Procedure 4004(c)(2) provides:

> Notwithstanding Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within that period, the court may defer entry of the order to a date certain.

Debtor has requested a delay in the entry of an order granting discharge for 30 days so that he may resolve pending motions to avoid judicial liens. Without an extension, Debtor asserts the stay affecting enforcement of the judicial liens will be gone. Debtor has shown cause to delay the entry of discharge and the application is granted.

AUGUST 23, HEARING

At the August 23, Hearing, the court granted the Motion and extended the time for entry of discharge is pursuant to Federal Rule of Bankruptcy Procedure 4004(c)(2) to and including September 30, 2018, subject to further extension. Dckt. 189. The court continued the hearing to September 27, 2018, for further extension of the discharge date.

DISCUSSION

At the August 23, 2018 hearing, all but one of Debtor's motions to avoid lien were resolved. The remaining motion is set to be heard the same day as this Motion.

At the hearing, **XXXXXXXXXXXXXXXXXXXXXXX**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Application to Extend Time for Entry of Order of Discharge pursuant to Federal Rule of Bankruptcy Procedure 4004(c)(2) filed by Andreas Abramson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that **XXXXXXXXXXXXXXX**

15. 18-90258-E-7 MF-6 | **ANDREAS ABRAMSON** **Iain Macdonald** | **CONTINUED AMENDED MOTION TO AVOID LIEN OF HELEN MCABEE 8-8-18 [141]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 8, 2018. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The hearing on the Motion to Avoid Judicial Lien is xxxxxxxxxxxxxxxxx

REVIEW OF THE MOTION

This Motion requests an order avoiding the judicial lien of Helen McAbee ("Creditor") against property of Andreas Abramson ("Debtor") commonly known as 83 Sanguinetti Court, Copperopolis, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $770,000.00. An abstract of judgment was recorded with San Benito County on May 27, 2011, that encumbers the Property.

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of $1,160,027.00 as of the petition date. Dckt. 6. The unavoidable consensual liens that total $1,206,968.92 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 6. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $75,000

.00 on Amended Schedule C. Dckt. 71. These unavoidable consensual liens and homestead exemption are identified as:

Select Portfolio Servicing.....($925,557.92).....First Deed of Trust (2005)

Michael Abramson.....($265,411.00).....Deed of Trust (2009)
Goss and Goss.....($ 16,000.00).....Deed of Trust (2009)
Homestead Exemption.....($ 75,000.00)

Total consensual liens and homestead exemptions.....($1,281,968.92)

Value of Property Testified to by Debtor.....$1,160,027.00

Value/(No Value) for Judgment Liens.....($ 121,941.92)

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

AUGUST 23, 2018 HEARING - CONTINUANCE

At the August 23, 2018, hearing Helen McAbee ("Creditor") appeared through counsel and stated her opposition to the Motion. Dckt. 159. The main basis of the opposition being that Creditor asserted that the property against which she has a lien has a value of at least $1,600,000. Further, she questions the validity of the obligation and deed of trust asserted by Debtor's father.

Bernadette Cattaneo, Debtor's ex-spouse ("Ex-Spouse") also appeared asserting that she had standing to litigate creditor's rights since she also has liability on the underlying debt and the Ex-Spouse's property is also encumbered by a judicial lien. The court having Creditor, the real party in interest having the judgment lien which is the subject of this litigation, before it, Ex-Spouse's assertion of standing was not persuasive. Counsel for Ex-Spouse will consider the issue further and develop the asserted basis for Ex-Spouse having standing to litigate the rights and interests of Creditor in the context of this Motion.

Even at $1,600,000, it appears that not all of creditor's lien can be protected based on the senior liens and homestead exemption.

The parties agreed to a continuance so they could address the issues, arrange for appraisals, and propose a discovery schedule in the event that they cannot resolve the matter and an evidentiary hearing on value is required.

SEPTEMBER 6, 2018 HEARING

At the September 6, 2018, hearing Movant reported that the parties are undertaking discovery and requested additional time to present informal discovery documents. The court continued the hearing on the Motion to September 27, 2018, at 10:30. Dckt. 191.

STATUS CONFERENCE STATEMENT

On September 20, 2018, Debtor filed a Status Conference Statement. Dckt. 193. Debtor reiterates the arguments set out in its Motion, and adds:

1. McAbee contends that the lien of Debtor's father, Michael Abramson, in the amount of $265,411.00 is either inflated or fictitious. Debtor is prepared to submit evidence in support of monies advanced by his father to him to fund his divorce proceeding in the full amount claims. Moreover, by virtue of the appraised value of the property, the amount of Abramson, Sr.'s lien may be irrelevant to determine whether there is equity to support McAbee's lien.

2. Participation by Bernadette Cattaneo, as has been discussed with the court previously, Debtor disputes that Bernadette Cattaneo has an interest in the lien avoidance motion. It is noteworthy that Bankruptcy Rule 7024, allows intervention either as a matter of right or permissively, does not apply in a contested matter and thus intervention is not allowed. Bankruptcy Rule 9014(c). Intervention is permissive only following noticed motion. Bankruptcy Rule 2018(a). No motion has been made and this contested matter is too advanced to allow for such a motion.

3. Relief From Stay Order in companion contested matter. The holder of the first lien on the property has moved for relief from stay and that motion has been continued pending resolution of this dispute, on condition that Debtor make adequate protection payments, which he is doing, without assistance from either McAbee or Bernadette Cattaneo.

Dckt. 193 at ¶¶ 6. a-c. Debtor concludes that this matter should either be decided on the evidence presented or set for trial at the earliest possible opportunity.

DISCUSSION

Real Party in Interest

If the matter is not resolved by the time of the continued hearing, the court shall issue a discovery scheduling order for this Contested Matter. Additionally, the court shall issue an Order to Show Cause why Bernadette Cattaneo, Debtor's ex-spouse, should not be excluded from this contested matter as not being a

real party in interest having standing to adjudicate the rights and interests of Debtor and Creditor. Ms. Cattaneo is also liable for the obligation of Debtor (Debtor having primary responsibility under the terms of the Marital Settlement Agreement).

At the hearing, **XXXXXXXXXXXXXXXXXXXXXX**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Andreas Abramson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Avoid Judicial Lien is **XXXXXXXXXXXXXXXXXX**.

16. 18-90556-E-7 TPH-1 | **MADEANA CARRIZALES** **Thomas Hogan** | **MOTION TO AVOID LIEN OF REGENCY CENTERS, LP** **8-23-18 [15]**

Final Ruling: No appearance at the September 27, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 23, 2018. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted pursuant to the Stipulation of the Parties.

This Motion requests an order avoiding the judicial lien of Regency Centers LP ("Creditor") against property of Madeana Carrizales ("Debtor") commonly known as 1629 Dutch Corner Drive, Newman, California ("Property").

On September 17, 2018, the Parties filed a Stipulation on Debtor's Motion to Avoid Judicial Lien of Regency Centers LP. Dckt. 32. The Parties seek to reduce the lien of Creditor to $2,500.00.

Pursuant to the Stipulation of the Parties, the court grants the Motion and avoids Creditor's lien in amounts in excess of $2,500.00.

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Madeana Carrizales ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Regency Centers LP, California Superior Court for Contra Costa County Case No. WS 08-0040, recorded on July 31. 2017, Document No. 2017-0056347-00, with the Stanislaus County Recorder, against the real property commonly known as 1629 Dutch Corner Drive, Newman, California, is avoided in its entirety for all amounts in excess of $2,500.00 pursuant to 11 U.S.C. § 522(f)(1) and the Stipulation of the Parties, subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

17. 18-90524-E-7 CHARLES/PENELOPE BUSH MOTION TO REDEEM
PBG-1 Patrick Greenwell 8-27-18 [12]

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

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

Below is the court's tentative ruling.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditor, and Office of the United States Trustee on August 27, 2018. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Redeem is granted.

Charles and Penelope Bush ("Debtor") seeks to redeem personal property identified as a 2011 Nissan Sentra VIN ending in 5348 (the "Property") from the claim of CarMax Business Services, LLC dba CarMax Auto Finance ("Creditor") pursuant to 11 U.S.C. § 722. Under that provision of the Bankruptcy Code, Debtor is permitted to redeem tangible personal property intended primarily for personal, family, or

household use from a lien securing a dischargeable consumer debt, so long as the property is exempted under 11 U.S.C. § 522 or has been abandoned under 11 U.S.C. § 554. 11 U.S.C. § 722. The right to redeem extends to the whole of the Property, not just to Debtor's exempt interest in it. *See* H.R. Rep. No. 95-595, at 381 (1977).

To redeem the Property, Debtor must pay the lien holder "the amount of the allowed secured claim of [the lien] holder that is secured by such lien in full at the time of redemption." 11 U.S.C. § 722. Payment must be made by a lump sum cash payment, not installment payments. *In re Carroll*, 11 B.R. 725 (B.A.P. 9th Cir. 1981). The court looks to 11 U.S.C. § 506 to determine the amount of the secured claim.

Possible (Mis)Identification of Creditor

The Motion seeks to value and redeem property secured by the claim of "CarMax Auto Finance." A review of the California Secretary of State's online Business Search website shows this company does not exist. From a simple search, the court determined that the identity of the Creditor in this case is CarMax Business Services, LLC dba CarMax Auto Finance [FN.1]. The California Secretary of State does not identify any corporation or limited liability company authorized to do business in the State of California with the name "CarMax Auto Finance."

FN.1. *See* https://actonline.saccounty.net/CitizenAccess/SACCO_FBNSearch.aspx, *and* https://businesssearch.sos.ca.gov/CBS/SearchResults?SearchType=LPLLC&SearchCriteria=carmax+auto+finance&SearchSubType=Keyword.

However, the court notes from reviewing other files, proofs of claim are being filed both in the name "CarMax Business Services, LLC" and "CarMax Auto Finance." It may well be the latter is a dba for the former.

Evidence in Support of Motion

The Motion is accompanied by the declaration of Penelope Bush. Debtor seeks to value the Property at a replacement value of $4,854.00. Debtor's opinion seems to be in significant part based on Edmunds.com valuations. Exhibits 1 and 2, Dckt. 16. As the owner, Debtor's opinion of value is evidence of the Property's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The Motion is also supported by the Declaration of Je' Schneider, a former general manager at Sonora Subaru. Dckt. 14. Schneider states he has 12 years' experience and is familiar with the 2011 Nissan Sentra. Schneider does not indicate in detail his method of review, how he became familiar with the Property and its condition, and whether he regularly worked with Nissan vehicles in his experience at Sonora *Subaru*. His declaration provides little assistance to the court in determining the value.

Debtor's Schedules A/B and D list the Property at a fair market value of $5,500.00. Schedule A/B, Dckt. 1.

The lien perfected on the Property secures Creditor's claim with a balance of approximately $6,354.49. Schedule D, Dckt. 1. Debtor has claimed an exemption in the amount of $145.51 in the Property pursuant to California Code of Civil Procedure § 703.140(b)(5). Debtor has secured a good-faith estimate of a loan covering the amount Debtor alleges is Creditor's secured claim ($4,854.00). Exhibit 3, Dckt. 16.

The Motion to Redeem pursuant to 11 U.S.C. § 722 and Federal Rule of Bankruptcy Procedure 6008 is granted.

RULING

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Redeem filed by Charles and Penelope Bush ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor is authorized and allowed pursuant to 11 U.S.C. § 722 to redeem the 2011 Nissan Sentra VIN ending in 5348 ("Property") by paying CarMax Business Services, LLC dba CarMax Auto Finance, the creditor holding the claim secured by the Property, the total amount of $4,854.00, in full at the time of redemption, which must be paid on or before October 27, 2018.