UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

October 9, 2018 at 10:00 a.m.

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1. 17-26125-A-7 FIRST CAPITAL RETAIL, L.L.C. BUC-1
18-2030 FIRST DATA MERCHANT SERVICES L.L.C. V. MCA RECOVERY, L.L.C. ET AL
MOTION TO DISMISS AMENDED CROSS-CLAIMS
8-30-18 [110]

Tentative Ruling: The motion will be granted in part.

MCA Recovery, L.L.C., as agent of Yellowstone Capital West, L.L.C., seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(6), of 13th Floor Pilot, L.L.C.'s August 22, 2018 amended cross complaint seeking avoidance and recovery under 11 U.S.C. §§ 547, 548, 550, and 551 of:

— MCA's lien (restraining notice and marshal levy under New York law) against approximately $215,000 interpleaded in this proceeding (claims 5, 6, 7 in part);

— a series of pre-petition transfers, totaling $103,034.67, by the debtor in the underlying bankruptcy case to MCA (claims 3, 4, and 7 in part); and

— the entry into a secured merchant agreement between MCA and Suneet Singal on behalf of the debtor (claims 1 and 2).

Docket 108.

MCA argues that Pilot does not have standing to assert the claims and that the asset purchase agreement between the debtor and Pilot prohibits Pilot from prosecuting the claims.

The plaintiff, First Data Merchant Services, L.L.C., is a payment card processing company. It facilitates the movement of funds from the company that issued the payment card to the merchant or payee's account at a financial institution. The plaintiff was the payment processor for the retail transactions of the debtor.

On or about August 2, 2017, MCA froze approximately $215,000 the plaintiff was holding for the debtor. MCA was prosecuting a claim against First Capital in New York and the $215,000 was frozen so that it would be available to pay its claim if it prevailed in a suit against First Capital. This process did not run its course however because First Capital filed the underlying chapter 11 bankruptcy on September 14, 2017. The debtor demanded that the plaintiff pay over its money but MCA objected.

The plaintiff filed this interpleader action on March 22, 2018.

On April 6, 2018, the court approved a sale of substantially all assets of the

bankruptcy estate to Pilot. Case No. 17-26125, Dockets 372 & 378.

The APA provided for the sale of Acquired Assets that are defined in section 1.1 of the APA.

Among the assets sold were "*all Cash and Cash Equivalents [and] . . . all causes of action, lawsuits, judgments, claims, refunds, rights of recovery, rights of set-off, counterclaims, defenses, demands, warranty claims, rights to indemnification, contribution, advancement of expenses or reimbursement, or similar rights of Seller (at any time or in any manner arising or existing, whether choate or inchoate, known or unknown, now existing or hereafter acquired, contingent or noncontingent), including, without limitation, (1) any claim or cause of action relating to the Seller's interests in any lease or contract related to the Business or the Acquired Assets (including the Seller's franchise relationship with Franchisor) and (2) the Acquired Avoidance Actions.*"

Docket 108 at 22, APA §§ 1.1 Acquired Assets (l) and (v).

The assets sold included:

"*any avoidance actions under Chapter 5 of the Bankruptcy Code relating to*

"*(1) any Transferred Contract or trade vendor that Buyer will conduct business with following the Closing (the "Acquired Avoidance Actions"), and*

"*(2) any cause of action, lawsuit, judgment, claim, refund, right of recovery, right of set-off, counterclaim, defense, demand, warranty claim, right to indemnification, contribution, advancement of expenses or reimbursement, or similar rights of Seller from and against First Data Merchant Services LLC (the "First Data Claims"); provided, that in the event the Buyer (x) realizes a recovery from the prosecution and/or settlement of any First Data Claims, the proceeds realized therefrom shall be allocated and paid according to the following waterfall: first to reimburse Buyer all costs of collection incurred by Buyer; second, an amount not to exceed $100,000 in the aggregate for payment to Debtor's retained professionals for actual, reasonable and documented unpaid fees and expenses; and third, the remaining balance, if any, to Buyer for its own account; provided, further, that in the event Buyer determines, after due investigation, not to prosecute the First Data Claims, Buyer agrees that it shall provide prompt written notice of such determination to the Seller, and upon delivery of such notice the First Data Claims shall thereupon become Excluded Assets for all purposes of this Agreement.*"

Docket 108 at 22-23, APA § 1.1 Acquired Assets (w).

In a hanging paragraph below section 1.1(x), the APA provides that "notwithstanding anything to the contrary set forth in this definition, the Acquired Assets shall not include any Excluded Assets."

Excluded Assets are set out in a list of definitions. As pertaining to avoidance actions and the First Data Claims, the APA provides that Excluded Assets include: "*(g) all avoidance actions under chapter 5 of the Bankruptcy Code, except for the Acquired Avoidance Actions; [and] (h) any First Data Claims (but only following delivery written notice of nonprosecution/exclusion from Buyer, if any).*"

Docket 108 at 26, APA § 1.1 Excluded Assets (g) & (h).

The debtor and Pilot entered into an amendment to the APA on May 22, 2018, deleting § 1.1 Acquire Assets (w) of the agreement and replacing it with the following paragraph:

"*(i) any avoidance actions or claims under Chapter 5 of the Bankruptcy Code or (ii) any and all claims or causes of action arising under applicable non-bankruptcy law relating to:*

"*(1) any Transferred Contract or trade vendor that Buyer will conduct business with following the Closing (the "Acquired Avoidance Actions"), and*

"*(2) any cause of action, lawsuit, judgment, claim, refund, right of recovery, right of set-off, counterclaim, defense, demand, warranty claim, right to indemnification, contribution, advancement of expenses or reimbursement, or similar rights of Seller from and against Yellowstone Capital West, LLC ("Yellowstone"), MCA Recovery, LLC ("MCA"), First Data Merchant Services LLC ("First Data"), Suneet Singal (an individual "Singal"), only as a necessary party to this complaint, and/or entity in which Singal maintains an interest, or any of them relating to transactions between and among Seller, Yellowstone, MCA and Singal (individually and collectively, the "First Data Claims"); provided, that in the event the Buyer (x) realizes a recovery from the prosecution and/or settlement of any First Data Claim(s), the proceeds realized therefrom shall be allocated and paid according to the following waterfall: first to reimburse Buyer for all costs of collection incurred by Buyer, including, without limitation, reasonable and documented attorneys' fees and costs; second, an amount not to exceed $100,000 in the aggregate for payment to Seller's retained professionals for actual, reasonable and documented unpaid fees and expenses incurred in connection with the commencement and prosecution of the Bankruptcy Case, as same may be approved by the Bankruptcy Court upon application therefor; and third, the remaining balance, if any, to Buyer for its own account; provided, further, that in the event Buyer determines, after due investigation, not to prosecute any one or more of such First Data Claims, Buyer agrees that it shall provide prompt written notice of such determination to the Seller (a "Non-Prosecution Notice"), and upon delivery of such Non-Prosecution Notice the First Data Claim(s) identified in such Non-Prosecution Notice shall thereupon become an Excluded Asset(s) for all purposes of this Agreement.*"

Docket 108 at 89, Amendment to APA § 1(a).

On August 22, Pilot filed its amended cross complaint. Docket 108. MCA filed this motion on August 30. Docket 110.

The court converted the case from chapter 11 to chapter 7 on September 4, 2018, pursuant to a motion by the U.S. Trustee. Case No. 17-26125, Docket 490.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint

in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"*To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'*"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

The Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"*First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'*

"*In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.*"

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

"*Generally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint. See Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1141 n.5 (9th Cir. 2003). A court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the*

12(b)(6) motion. See Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002); see also Warren, 328 F.3d at 1141 n.5, Chambers v. Time Warner, Inc., 282 F.3d 147, 153 n.3 (2d Cir. 2002). The court may treat such a document as 'part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).' United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)."

Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006); see also Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120 n.2 (9th Cir. 2007).

Pilot's amended cross complaint attaches and refers to the APA and the May 22, 2018 amendment. Docket 108 at 3-4. Pilot's standing to prosecute the claims is derived from these documents.

First, as to the avoidance claims involving the interpleaded funds, the cross complaint states a claim upon which relief can be granted.

Pilot's amended cross complaint alleges that the APA and its amendment "assigned all of the Debtor's right, title, and interest in the Funds and that Pilot is the proper party to pursue any avoidance actions and other claims the Debtor may have had against MCA/Yellowstone and Yellowstone." Docket 108 at 4. The cross complaint, along with the attached APA and amendment, states a plausible claim for Pilot's standing to prosecute these particular avoidance claims.

The motion does not argue that the APA amendment did not transfer these avoidance claims to Pilot. The motion's challenge to the amendment is only that it was not approved by the court and therefore is not valid.

Nevertheless, even if the APA amendment is invalid, the APA transferred both the interest in the funds and the avoidance claims associated with that interest.

The motion lumps together all chapter 5 avoidance claims of the cross complaint into one category, Acquired Avoidance Actions. The motion fails to distinguish among avoidance claims pertaining to the funds interpleaded by the plaintiff, avoidance claims pertaining to the series of pre-petition transfers between the debtor and MCA, and avoidance claims pertaining to the secured merchant agreement.

On the other hand, the APA and its amendment make a distinction between the Acquired Avoidance Actions and the avoidance claims associated with the interpleaded funds. They make it clear that the latter avoidance claims are not part of the definition of Acquired Avoidance Actions.

In both its original and amended forms, section 1.1 Acquired Assets (w) defines Acquired Avoidance Actions as "any avoidance actions under chapter 5 of the Bankruptcy Code relating to (1) any Transferred Contract or trade vendor that Buyer will conduct business with following the Closing."

The interest in the funds does not involve Transferred Contracts or trade vendors. Transferred Contracts are defined by section 2.7(b) of the APA as the contracts listed on Schedule 2.7(a) attached to the APA. Schedule 2.7(a) to the APA makes no reference to the subject funds, whatsoever. Nor is the interest in the funds based on a trade vendor transaction. It is based on a collections action by MCA against the debtor.

The structure of section 1.1 Acquire Assets (w) supports this reading of the APA as well. In its original and amended forms, section 1.1 Acquired Assets (w) has a preamble that applies to two separate subsections of the section, marked as subsections (1) and (2). The preamble applies to both subsections separately and independently. The language of the preamble is as follows: "any avoidance actions under chapter 5 of the Bankruptcy Code relating to."

Subsection 1.1(w)(2) is separate and independent from subsection 1.1(w)(1). The definition of Acquired Avoidance Actions is limited solely to the language of subsection 1.1(w)(1). It does not encompass any of the language of subsection 1.1(w)(2).

Subsection 1.1(w)(2) encompasses the transfer of the avoidance claims pertaining to the debtor's rights from or against First Data. Subsection 1.1(w)(2) is written quite broadly to encompass:

"*any avoidance actions . . . relating to . . . (2) any cause of action, lawsuit, judgment, claim, refund, right of recovery, right of set-off, counterclaim, defense, demand, warranty claim, right to indemnification, contribution, advancement of expenses or reimbursement, or similar rights of Seller from and against First Data Merchant Services.*"

Docket 108 at 22, APA § 1.1 Acquired Assets (w)(2).

The language of the amendment of section 1.1 Acquired Assets (w)(2) is broader but it wholly subsumes and encompasses the language of the original section 1.1 Acquired Assets (w)(2):

"*any avoidance actions or claims . . . or (ii) any and all claims or causes of action arising under applicable non-bankruptcy law relating to: . . . (2) any cause of action, lawsuit, judgment, claim, refund, right of recovery, right of set-off, counterclaim, defense, demand, warranty claim, right to indemnification, contribution, advancement of expenses or reimbursement, or similar rights of Seller from and against Yellowstone Capital West, LLC ("Yellowstone"), MCA Recovery, LLC ("MCA"), First Data Merchant Services LLC."*

Docket 108 at 89, Amendment to APA § 1(a).

The fact that the APA section 1.1 Acquired Assets (w) does not specifically reference MCA or Yellowstone is of no consequence. From the broad terminology used by that section — such as "any" and "relating to" and "right of recovery" and "cause of action" and "from or against First Data" — it is compelling that any avoidance actions relating to any recovery from First Data, which at the time of the APA was still the plaintiff in this action, were transferred to Pilot.

Further, while the APA excludes Excluded Assets from the definition of Acquired Assets, the APA also excludes the First Data Claims (*i.e.*, the avoidance claims relating to the funds) from the definition of Excluded Assets.

The preamble to the item list definition of Acquired Assets expressly excludes Excluded Assets. "[T]he Acquired Assets shall not include any Excluded Assets. Without limiting the generality of the foregoing, the Acquired Assets shall include the following (except to the extent listed or otherwise included as an Excluded Asset)." Docket 108 at 20, APA § 1.1, Preamble on Acquired Assets.

In a hanging paragraph below section 1.1 Acquired Assets (x), the last item on

the list of definitions of Acquired Assets, the APA also states that "notwithstanding anything to the contrary set forth in this definition, the Acquired Assets shall not include any Excluded Assets."

However, at the very end of section 1.1 Acquired Assets (w), the APA provides that the First Data Claims — namely, the avoidance claims relating to the funds — are not included in the definition of Excluded Assets.

"Buyer agrees that it shall provide prompt written notice of such determination to the Seller ("Non-Prosecution Notice"), and upon delivery of such notice the First Data Claims shall thereupon become Excluded Assets for all purposes of this Agreement."

Docket 108 at 22-23, APA § 1.1 Acquired Assets (w).

This reading of Excluded Assets is consistent with the definition of Excluded Assets within APA section 1.1, where "any First Data Claims" are included in the definition of Excluded Assets, "(but only following delivery [of] written notice of nonprosecution/exclusion from Buyer, if any)." Docket 108 at 26, APA § 1.1 Excluded Assets (h). In other words, until there is a nonprosecution notice, the First Data Claims are excluded from the definition of Excluded Assets.

While subsection (g) (above the foregoing subsection (h)) says that Excluded Assets are "all avoidance actions under chapter 5 of the Bankruptcy Code, except for the Acquired Avoidance Actions," subsection (g) cannot be read in a vacuum, irrespective of subsection (h), which makes it clear that the exception in subsection (g) is little broader.

Taken together, all the above provisions in the APA provide a *plausible* factual basis for excluding the First Data Claims from the definition of Excluded Assets. As such, whether or not the amendment to the APA is valid, Pilot has plausible standing to prosecute the avoidance claims relating to the funds.

Finally, APA's prohibition against Pilot's prosecution of avoidance claims is limited to the Acquired Avoidance Actions, which do not include the First Data Claims. "Buyer shall not at any time following the Closing pursue, prosecute, sell and/or transfer any of the Acquired Avoidance Actions." Docket 108 at 56, APA § 6.11.

The motion will be denied as to the avoidance claims relating to the funds (claims 5, 6, and 7 in part).

Second, as to the avoidance claims relating to the series of transfers and the secured merchant agreement, the court finds no legal or factual authority in the APA, the cross complaint, or the APA amendment for Pilot's standing to prosecute these claims.

As noted above, with respect to avoidance claims, APA section 1.1 Excluded Assets (g) and (h) excepts from the definition of Excluded Assets only Acquired Avoidance Actions and First Data Claims (prior to the delivery of a nonprosecution notice). The court sees no other APA provisions excluding avoidance claims from the definition of Excluded Assets.

The cross complaint itself is unhelpful. It merely says that "Pilot is also the proper party to pursue any avoidance actions and other claims the Debtor may have had against MCA/Yellowstone and Yellowstone." Docket 108 at 4. This

is a legal conclusion and the court cannot accept it as true without pleaded factual basis. The complaint lacks supporting factual basis, however.

As such, Pilot's standing to prosecute these avoidance claims hinges on the APA amendment.

However, to the extent Pilot relies on the APA amendment for standing to prosecute the series of transfers and merchant agreement avoidance claims, the amendment was never approved by the court.

The court views Pilot as a creditor and not merely as a disinterested third party buyer. The APA established ongoing post sale closing obligations upon the debtor, including cooperation in the transfer of assets to Pilot. See, e.g., Docket 108 at 51-52, APA § 6.1(a), (c), (d). As such, the court is compelled to view and treat Pilot as a creditor. And as a creditor, Pilot is required to seek prior court permission to prosecute avoidance claims.

"*Section 503(b)(3)(B) carries forward the long-settled authority under former Bankruptcy Act § 64a(1) for creditors to sue in the name of the trustee to recover property for the benefit of the estate and to be compensated as administrative expenses. In re Godon, Inc., 275 B.R. 555, 561–63 (Bankr. E.D. Cal. 2002).*

"*A creditor acting under that authority with the court's prior permission has statutory standing, not some form of non-statutory standing. Id., 275 B.R. at 563–66.*"

Lieu v. Wolkowitz (In re Maximus Computers, Inc.), 278 B.R. 189, 197 (B.A.P. 9th Cir. 2002); see also 11 U.S.C. § 1107(a) (giving a debtor in possession the rights, powers, and duties (with few exceptions) of a trustee).

"*[I]n order for a creditor . . . to obtain standing to object to another creditor's claims in such a case, the objecting party must first request the trustee to object to the claim, the trustee must refuse to object to the claim, and the Bankruptcy Court may then authorize the creditor . . . to proceed.*"

In re Bakke, 243 B.R. 753, 756 (Bankr. D. Ariz. 1999).

Stated differently, for any avoidance claims not transferred by the APA, Pilot is required as a matter of law to seek prior court approval. As the APA amendment was not approved by the court, it is not enforceable in this regard and Pilot may not rely upon it for standing to prosecute the series of transfers and merchant agreement avoidance claims.

But, even if the amendment were enforceable, Pilot is relying on the order approving the sale to establish its legal validity and that order is not discussed in or attached to the cross complaint. Nor is the court willing to go beyond what is in the cross complaint to adjudicate this motion.

Further, even if the court were to consider the sale order to establish the validity of the APA amendment, the order does not give Pilot and debtor authority to amend the APA in every respect. It provides:

"*The Asset Purchase Agreement, as well as other agreements related thereto, may be modified, amended, or supplemented by the Debtor and the Buyer without further order of the Court; provided, that any such modification, amendment or supplement either is (i) not material or (ii) not less favorable to the Debtor*

than the existing applicable provisions."

Docket 113, Ex. 3 ¶ 18.

In other words, even if the court were to consider the sale order, the amended cross complaint fails to plead sufficient facts to satisfy this two prong test. The cross complaint does not allege facts indicating that amendment is immaterial or that it will not result in less favorable treatment of the estate.

Accordingly, the avoidance claims pertaining to the series of transfers and the secured merchant agreement will be dismissed without prejudice (claims 1, 2, 3, 4, and 7 in part).

2. 12-34040-A-13 JASON FERNANDEZ — MOTION TO APPROVE COMPENSATION OF PLAINTIFF'S ATTORNEY 8-27-18 [10]
18-2113 PLC-1
FERNANDEZ V. AMERICAN FIRST CREDIT UNION

Final Ruling: The hearing on this motion has been continued to November 13, 2018 at 10:00 a.m. Dockets 22 & 23. No response has been filed to the motion.

3. 10-53041-A-7 MOMOTAKA/DEBORAH SAIYO — MOTION TO APPROVE COMPENSATION OF TRUSTEE'S ATTORNEY 9-11-18 [140]
BHS-3

Tentative Ruling: The motion will be granted in part.

Law Office of Barry H. Spitzer, attorney for the trustee, has filed its first and final motion for approval of compensation. The requested compensation consists of $18,802 in fees (including $1,185 for estimated 3 additional hours of services) and $410.11 in expenses, for a total of $19,212.11. This motion covers the period from April 9, 2018 through September 11, 2018. The court approved the movant's employment as the trustee's attorney on May 8, 2018. In performing its services, the movant charged an hourly rate of $395.

The debtors filed this chapter 7 case on December 17, 2010. The trustee issued a report of no distribution on February 7, 2011. The court entered the debtors' discharge on March 28, 2011. The case was closed on April 1, 2011.

On July 28, 2016, the debtors filed a request for reopening of the case, in order for them to amend their schedules to add an asset to Schedule B and add an exemption in the new asset in Schedule C. Dockets 27 & 28. The case was reopened on July 28, 2016. Docket 30. The new asset was described as "[p]otential inheritance in Taiwan property." Docket 60, Amended Schedules B and C filed October 28, 2016. The debtors exempted $20,000 in the asset pursuant to Cal. Civ. Proc. Code § 703.140(b)(5). Id. The court appointed a chapter 7 trustee in the case on October 26, 2016. Dockets 53 & 58. The trustee issued a notice of assets on November 29, 2016. The claims bar date was set for March 2, 2017. Docket 61. Only two proofs of claim have been filed. Mr. Chang filed a proof of claim for $38 million on February 24, 2017. POC 1-1. The Golden 1 Credit Union filed a proof of claim for $14,500. POC 2-1.

The underlying dispute in Taiwan involves the following alleged facts. Ke De-sheng, the father of debtor Momotaka Saiyo, passed away in approximately

September 1999. Ke-Chen Xing-jia, the wife of Ke De-sheng and mother of some or all of debtor Momotaka Saiyo and his two siblings, a brother and sister, sold an interest in an unfinished luxury condo development in Taiwan. Starting in 2009, Ke-Chen Xing-jia entered in series of agreements with Hui-ming Chang, the buyer here, for the sale of various portions of the real property in question.

The debtor contends that false claims to the property by Ke-Chen Xing-jia did not come to light until the latter part of 2011, when the local prosecutor in Taiwan charged Ke-Chen Xing-jia with tax evasion. This happened after the debtors had already received their bankruptcy discharge and the bankruptcy case had closed. Purportedly, it was then that debtor Momotaka Saiyo and his two siblings realized that they had an inheritance interest in the real property. They then asserted interest in the property by initiating litigation in Taiwan against Mr. Chang.

Upon the passing of Ke De-sheng, the real property was to be owned in equal shares by Ke-Chen Xing-jia, debtor Momotaka Saiyo and his two siblings.

Mr. Chang disputes the foregoing, contending that he received good title to the property. He also complains that the challenges to his interest in the property surfaced only after he paid $38 million to satisfy, among others, tax liabilities on the property and a voluntary encumbrance. Most recently, Mr. Saiyo's challenge of Mr. Chang's ownership interest in the property was dismissed in a trial court in Taiwan. Mr. Saiyo is currently appealing the dismissal of his case against Mr. Chang.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses."

The movant's services included, without limitation: (1) reviewing the proof of claim of Hui-ming Chang, (2) reviewing records relating to the inheritance and litigation in Taiwan involving the debtor, his family, and Hui-ming Chang, (3) negotiating a sale of the estate's interest in the litigation and inheritance of the debtor in Taiwan to Hui-ming Chang, in conjunction with settlement of Mr. Chang's proof of claim against the estate estate, (4) preparing and prosecuting a motion for sale of that interest, (5) attending court hearings, (6) assisting the trustee with the general administration of the estate, and (7) preparing and filing employment and compensation motions.

The opposition to the motion will be overruled in part. First, while complaining about the fees sought by the movant, the opposition does not identify any specific time entries that the debtor asserts should be disallowed. The court should not have to speculate about this. The opposition also is not accompanied by any evidence, such as a declaration or affidavit establishing its factual assertions.

Second, the court rejects the debtor's contention that the trustee should not have negotiated a sale and compromise of the debtor's interest in the Taiwanese inheritance and litigation and Mr. Chang's proof of claim. Although the debtor reopened the case to schedule his new asset (the real estate inheritance and litigation interest), the trustee could not monetize that interest. The real property and litigation are in Taiwan and the estate has had no resources to fund any due diligence and/or litigation in Taiwan. Also, besides Mr. Chang's proof of claim, there is only one other proof of claim against the estate, Golden 1 Credit Union's $14,500 claim.

Hence, instead of incurring fees and expenses to object to Mr. Chang's proof of claim, when there are no funds in the estate to pay such fees and expenses, the trustee sought to sell the newly listed asset of the debtor here, in the United States, before the bankruptcy court. The trustee negotiated the sale and compromise with Mr. Chang. This sale and compromise not only ensured that the estate would pay administrative expenses and the $14,500 claim, but it also ensured that Mr. Chang's claim would be withdrawn.

The debtor, who is represented by his own bankruptcy attorney, has had the opportunity to protect his inheritance/litigation interest in Taiwan for over two years now. The debtor reopened this case in July 2016 and amended his Schedule B in October 2016 to disclose the new asset. It was not until August 17, 2018, however, that the debtor told the trustee that he wants to buy his inheritance/litigation interest from the estate. It was not until the trustee filed the motion to sell and compromise the inheritance/litigation interest with Mr. Chang and that motion was continued for one and one-half months, that the debtor finally proposed to purchase that interest from the estate. Docket 120 at 7, Debtor's August 17, 2018 Declaration (proposing for the first time to pay the claims in the estate).

There is no indication that prior to August 2018 the debtor offered to purchase his inheritance/litigation interest from the estate. The debtor either knew or should have known during this two-year period that the trustee was attempting to monetize the estate's interest in his inheritance/litigation.

The court finds no fault in the trustee's negotiating, preparing, and prosecuting the sale or compromise motion. The motion was necessary to raise funds for paying creditors of the estate.

The debtor argues that if the trustee had objected to Mr. Chang's proof of claim, there would have been "no need to negotiate a sale of any estate property[,] [c]ertainly, no need to raise $50,000.00 by selling the estate's potentially multi-million dollar Taiwan claim to Chang in exchange for Chang dropping his Proof of Claim." Docket 152 at 3.

This makes no sense. If the trustee had objected to Mr. Chang's proof of claim and not sought to sell and compromise the debtor's interest in the inheritance/litigation, how else would the trustee pay the claims in the estate, including Golden 1 Credit Union's claim? The debtor was unwilling to pay any of the claims until the second hearing on the trustee's motion to sell and compromise. Docket 120 at 7.

The court also rejects the contention that the trustee should have asked the debtor to pay the claims in the estate. The debtor is represented by counsel who knows or should know how chapter 7 estates are administered. The court does not believe that the debtor has been prepared to pay the claims in the estate, while he was merely waiting for the trustee to ask him about it. The debtor has known for over two years that the trustee is attempting to generate funds to pay creditors.

Third, by doing what he did, the trustee was not breaching his duties toward the debtor because such duties were tempered by his duties to the creditors of the estate, specifically the Golden 1 Credit Union. The court has no evidence or information in the record that the trustee has deprived or has attempted to deprive the debtor of his opportunity to purchase from the estate the inheritance/litigation interest in Taiwan, when the debtor first tendered an offer to purchase that interest.

Fourth, the court rejects the argument that the movant's work on the district court litigation and on this motion should not be compensated. No reason is given for this contention. Nor is the court persuaded that the movant should not have examined the status and course of the district court litigation, which necessarily involves the proof of claim filed by Mr. Chang. As to this motion, compensation may be approved only on a notice and hearing. The court knows of no reason for the movant not to be compensated for this motion.

Finally, the debtor complains that the fees are excessive. The opposition complains of 15.8 hours billed on "the Reply and associated Declaration," which presumably is a reference to the trustee's motion to sell and compromise. Docket 152 at 4.

The court identifies time entries pertaining to the preparation of the reply, declarations, and exhibits totaling only 13.8 hours, including five sets of time entries from July 24, 2018 through July 30, 2018. Those time entries involve the preparation of one approximately nine-page reply brief (Docket 100), one approximately ten-page amended reply brief (Docket 110), which is nearly identical to the original reply brief, one approximately one-page declaration by the trustee (Docket 102), one approximately seven-page declaration by Mr. Chang (Docket 103), which appears to have been prepared by the attorney for Mr. Chang, and four sets of exhibits (Dockets 104, 105, 106, 107), which appear to have been provided by counsel for Mr. Chang, as they are referred to only by Mr. Chang's declaration.

The court is not convinced that 13.8 hours was reasonable time required for the preparation of the reply brief (and another nearly identical reply brief) and the one declaration of the trustee. As such, the court will deduct 6.8 hours in fees for this work. The court estimates that 7 hours is a reasonable time to prepare the 11 to 12 pages of the reply brief (including the amended narrative), the one-page declaration, and prepare for filing all the paperwork for the reply, including Mr. Chang's declaration and exhibits. Accordingly, the court will decrease the requested fees by $2,686 (6.8 hours x $395 / hour).

The court concludes that the remaining compensation of $16,526.11 ($19,212.11 - $2,686) is for actual and necessary services rendered in the administration of this estate. That compensation will be approved.

To the extent applicable, the movant shall deduct from the allowed compensation any fees or costs that have been estimated but not incurred.

4. 16-20774-A-12 TIMOTHY/JILL PEDROZO — OBJECTION TO CLAIM
JPJ-2
VS. GLHEC & AFF OBO USAF — 8-17-18 [172]

Final Ruling: This objection to proof of claim has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1)(A). The failure of the claimant to file written opposition at least 14 calendar days prior to the hearing is considered as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). The claimant's default is entered and the objection will be resolved without oral argument.

The objection will be sustained.

The chapter 12 trustee objects to the general unsecured proof of claim of GLHEC & Aff obo USAF, POC 15 for $12,984.66, filed on July 31, 2018. The basis for

the objection is that the proof of claim is untimely, as it was filed after the non-governmental bar date of June 8, 2016.

The court agrees and a review of the case docket shows that there has been no request for extension of that deadline. Accordingly, the claim will be disallowed as untimely.

5.	17-25190-A-7	CARL KAUT	MOTION FOR
	17-2204	LBG-102	SUMMARY JUDGMENT
	MCKINZIE V. KAUT		8-27-18 [39]

Final Ruling: The motion will be denied because it is not supported by any evidence, such as a declaration or an affidavit to support the motion's factual assertions. This violates Local Bankruptcy Rule 9014-1(d)(3)(D), which provides: "Every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(c)(4)."

For instance, the plaintiff argues that the facts alleged in complaint have already been established in a state court proceeding in which the plaintiff prevailed. However, no certified copies of the state court record haVE been filed in support of the motion.